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REPORT OF THE COMMISSION TO THE GENERAL ASSEMBLY

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Report of the International Law Commission on the work of its twenty-third session,
26 April–30 July 1971

CONTENTS

	<i>Page</i>
<i>Abbreviations</i>	276
<i>Chapter</i>	<i>Paragraphs</i>
I. ORGANIZATION OF THE SESSION	1-8 277
A. Membership and attendance	2-3 277
B. Officers	4 277
C. Drafting Committee	5 277
D. Secretariat	6 277
E. Agenda	7-8 278
II. RELATIONS BETWEEN STATES AND INTERNATIONAL ORGANIZATIONS	9-60 278
A. Introduction	9-56 278
1. Summary of the Commission's proceedings	9-39 278
2. Form and structure of the draft articles	40-50 281
3. Scope of the draft articles	51-56 283
B. Recommendation of the Commission to convene an international conference on the representation of States in their relations with international organizations	57-59 284
C. Resolution adopted by the Commission	60 284
D. Draft articles on the representation of States in their relations with international organizations	284
Part I. Introduction	284
Part II. Missions to international organizations	288
Part III. Delegations to organs and to conferences	311
Part IV. General provisions	324
<i>Annex.</i> — Observer delegations to organs and to conferences	335
General comments	335
Draft articles	336
III. PROGRESS OF WORK ON TOPICS CURRENTLY UNDER DISCUSSION	61-113 339
A. Succession of States: succession in respect of treaties	62-70 339
B. Succession of States: succession in respect of matters other than treaties	71-98 340
C. State responsibility	99-105 344
D. The most-favoured-nation clause	106-113 346
IV. QUESTION OF TREATIES CONCLUDED BETWEEN STATES AND INTERNATIONAL ORGANIZATIONS OR BETWEEN TWO OR MORE INTERNATIONAL ORGANIZATIONS	114-118 347
<i>Annex.</i> — Report of the Sub-Committee on treaties concluded between States and international organizations or between two or more international organizations	348
V. OTHER DECISIONS AND CONCLUSIONS OF THE COMMISSION	119-176 350
A. Progressive development and codification of the rules of international law relating to international watercourses	119-122 350

<i>Chapter</i>	<i>Paragraphs</i>	<i>Page</i>
B. Review of the Commission's long-term programme of work	123-128	350
C. Organization of future work	129-132	351
D. The problem of the protection and inviolability of diplomatic agents and other persons entitled to special protection under international law	133-134	352
E. Co-operation with other bodies	135-161	352
1. Asian-African Legal Consultative Committee	135-141	352
2. European Committee on Legal Co-operation	142-153	352
3. Inter-American Juridical Committee	154-161	353
F. Date and place of the twenty-fourth session	162	354
G. Representation at the twenty-sixth session of the General Assembly	163	354
H. Gilberto Amado Memorial Lecture	164-169	354
I. Seminar on International Law	170-176	355

ANNEXES

<i>Annex I.*</i> — Observations of Member States, Switzerland and the secretariats of the United Nations, the specialized agencies and the International Atomic Energy Agency on the draft articles on representatives of States to international organizations, adopted by the International Law Commission at its twentieth, twenty-first and twenty-second sessions	356
<i>Annex II.**</i> — Comparative tables of the numbering of the articles of the provisional draft (draft articles on the representatives of States to international organizations) and of the final draft (draft articles on the representation of States in their relations with international organizations) adopted by the Commission	429

* Same as mimeographed documents A/8410/Add. 1 and A/8410/Add. 2.

** Originally issued as document A/C.6/L.821.

ABBREVIATIONS

BIRPI	United International Bureaux for the Protection of Intellectual Property	IMF	International Monetary Fund
CMEA	Council for Mutual Economic Assistance	ITU	International Telecommunication Union
ECA	Economic Commission for Africa	OAS	Organization of American States
EEC	European Economic Community	OECD	Organisation for Economic Co-operation and Development
FAO	Food and Agriculture Organization of the United Nations	OEEC	Organization for European Economic Co-operation
IAEA	International Atomic Energy Agency	UNCITRAL	United Nations Commission on International Trade Law
IBRD	International Bank for Reconstruction and Development	UNDP	United Nations Development Programme
ICAO	International Civil Aviation Organization	UNESCO	United Nations Educational, Scientific and Cultural Organization
I.C.J.	International Court of Justice	UNIDO	United Nations Industrial Development Organization
ICSID	International Centre for Settlement of Investment Disputes	UNITAR	United Nations Institute for Training and Research
IDA	International Development Association	UPU	Universal Postal Union
IFC	International Finance Corporation	WHO	World Health Organization
ILO	International Labour Organisation	WIPO	World Intellectual Property Organization
		WMO	World Meteorological Organization

Chapter I

ORGANIZATION OF THE SESSION

1. The International Law Commission, established in pursuance of General Assembly resolution 174 (II) of 21 November 1947, in accordance with its Statute annexed thereto, as subsequently amended, held its twenty-third session at the United Nations Office at Geneva from 26 April to 30 July 1971. The work of the Commission during this session is described in the present report. Chapter II of the report, on relations between States and international organizations, contains a description of the Commission's work on that topic, together with 82 draft articles and commentaries thereon and an annex, as finally approved by the Commission. Chapter III contains a description of the Commission's progress of work on the following topics, currently under consideration by the Commission: (1) succession of States: (a) succession in respect of treaties; (b) succession in respect of matters other than treaties; (2) State responsibility; (3) the most-favoured-nation clause. Chapter IV is devoted to the question of treaties concluded between States and international organizations or between two or more international organizations. Chapter V deals with the organization of the Commission's future work and a number of administrative and other questions.

A. Membership and attendance

2. The commission consists of the following members:

Mr. Roberto AGO (Italy);
 Mr. Fernando ALBÓNICO (Chile);
 Mr. Gonzalo ALCÍVAR (Ecuador);
 Mr. Milan BARTOŠ (Yugoslavia);
 Mr. Mohammed BEDJAOUI (Algeria);
 Mr. Jorge CASTAÑEDA (Mexico);
 Mr. Erik CASTRÉN (Finland);
 Mr. Abdullah EL-ERIAN (United Arab Republic);
 Mr. Taslim O. ELIAS (Nigeria);
 Mr. Constantin Th. EUSTATHIADES (Greece);
 Mr. Richard D. KEARNEY (United States of America);
 Mr. NAGENDRA SINGH (India);
 Mr. Alfred RAMANGASOAVINA (Madagascar);
 Mr. Paul REUTER (France);
 Mr. Shabtai ROSENNE (Israel);
 Mr. José María RUDA (Argentina);
 Mr. José SETTE CÁMARA (Brazil);
 Mr. Abdul Hakim TABIBI (Afghanistan);
 Mr. Arnold J. P. TAMMES (Netherlands);
 Mr. Doudou THIAM (Senegal);
 Mr. Senjin TSURUOKA (Japan);

Mr. Nikolai USHAKOV (Union of Soviet Socialist Republics);
 Mr. Endre USTOR (Hungary);
 Sir Humphrey WALDOCK (United Kingdom of Great Britain and Northern Ireland);
 Mr. Mustafa Kamil YASSEEN (Iraq).

3. All members attended meetings of the twenty-third session of the Commission.

B. Officers

4. At its 1087th meeting, held on 26 April 1971, the Commission elected the following officers:

Chairman: Mr. Senjin Tsuruoka;
First Vice-Chairman: Mr. Roberto Ago;
Second Vice-Chairman: Mr. Milan Bartoš;
Rapporteur: Mr. José Sette Cámara.

C. Drafting Committee

5. At its 1092nd meeting, held on 4 May 1971, the Commission appointed a Drafting Committee composed as follows:

Chairman: Mr. Roberto Ago;
Members: Mr. Gonzalo Alcívar, Mr. Erik Castrén, Mr. Taslim O. Elias, Mr. Richard D. Kearney, Mr. Nagendra Singh, Mr. Alfred Ramangasoavina, Mr. Paul Reuter, Mr. Nikolai Ushakov, Mr. Endre Ustor and Sir Humphrey Waldock.

Mr. Abdullah El-Erian took part in the Committee's work on relations between States and international organizations in his capacity as Special Rapporteur for that topic. Mr. José Sette Cámara also took part in the Committee's work in his capacity as Rapporteur of the Commission.

D. Secretariat

6. Mr. Constantin A. Stravropoulos, Legal Counsel, attended the 1138th to 1148th meetings held from 16 to 30 July 1971, and represented the Secretary-General on those occasions. Mr. Anatoly P. Movchan, Director of the Codification Division of the Office of Legal Affairs, represented the Secretary-General at the other meetings

of the session, and acted as Secretary to the Commission. Mr. Nicolas Teslenko acted as Deputy Secretary to the Commission. Mr. Santiago Torres-Bernárdez, Mr. Eduardo Valencia-Ospina and Miss Jacqueline Dauchy served as assistant secretaries.

E. Agenda

7. The Commission adopted an agenda for the twenty-third session, consisting of the following items:

1. Relations between States and international organizations.
2. Succession of States:
 - (a) Succession in respect of treaties;
 - (b) Succession in respect of matters other than treaties.
3. State responsibility.
4. Most-favoured-nation clause.
5. Question of treaties concluded between States and international organizations or between two or more international organizations.
6. General Assembly resolution 2669 (XXV) on progressive development and codification of the rules of international law relating to international watercourses.

7. Review of the Commission's long-term programme of work.
8. Organization of future work.
9. Co-operation with other bodies.
10. Date and place of the twenty-fourth session.
11. Other business.

8. In the course of the session, the Commission held 62 public meetings (1087th to 1148th meetings). In addition, the Drafting Committee held 14 meetings, the Working Group on Relations between States and International Organizations (see para. 39 below) held 18 meetings, and the Sub-Committee on treaties concluded between States and international organizations or between two or more international organizations (see para. 114 below) held two meetings. The Commission considered all the items on its agenda with the exception of items 2 (Succession of States: (a) succession in respect of treaties; (b) succession in respect of matters other than treaties), 3 (State responsibility) and 4 (Most-favoured-nation clause), owing to the lack of time. However, in view of the fact that at this session further reports were submitted by Special Rapporteurs on some of the above-mentioned topics, the Commission decided to include in chapter III of the present report an account of the progress of work thereon resulting from the submission of those reports.

Chapter II

RELATIONS BETWEEN STATES AND INTERNATIONAL ORGANIZATIONS

A. Introduction

1. SUMMARY OF THE COMMISSION'S PROCEEDINGS

9. At its tenth session, in 1958, the Commission submitted to the General Assembly forty-five draft articles on diplomatic intercourse and immunities. The report covering the work of that session specified that the draft articles dealt only with permanent diplomatic missions.¹ It noted, however, in paragraph 52, that:

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

10. By resolution 1289 (XIII), of 5 December 1958, the General Assembly invited the Commission

to give further consideration to the question of relations between States and inter-governmental international organizations at the appropriate time, after study of diplomatic intercourse and immunities, consular intercourse and immunities and *ad hoc* diplomacy has been completed by the United Nations and in the light of the results of that study and of the discussion in the General Assembly.

11. At its eleventh session, in 1959, the Commission took note of the above-mentioned resolution and decided to consider the question in due course.²

12. At its fourteenth session, in 1962, the Commission decided to place the question on the agenda of its next session. It appointed Mr. Abdullah El-Erian as Special Rapporteur, and requested him to submit a report on the subject to the next session of the Commission.³

13. At the fifteenth session of the Commission, in 1963, the Special Rapporteur presented a first report on "relations between States and inter-governmental organizations"⁴ in which he made a preliminary study of the subject with a view to defining its scope and the order of the Commission's future work on it. At its 717th and 718th meetings, the Commission had a first general discussion of that report and asked the Special Rapporteur to continue his work with a view to further consideration of the question at a later stage.⁵

² *Ibid.*, 1959, vol. II, p. 123, document A/4169, p. 48.

³ *Ibid.*, 1962, vol. II, p. 192, document A/5209, para. 75.

⁴ *Ibid.*, 1963, vol. II, p. 159, document A/CN.4/161 and Add.1.

⁵ *Ibid.*, p. 225, document A/5509, para. 66.

¹ *Yearbook of the International Law Commission, 1958*, vol. II, p. 89, document A/3859, para. 51.

14. At the sixteenth session of the Commission, in 1964, the Special Rapporteur submitted a working paper⁶ on the definition of the scope and method of treatment of the subject. That working paper contained a list of questions which related to:

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

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

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

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

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

15. The Special Rapporteur informed the Commission that he had begun consultations with the legal advisers of several international organizations.⁷ As a result of these consultations, two questionnaires were prepared by the Legal Counsel of the United Nations and addressed by him to the legal advisers of the specialized agencies and IAEA. The first questionnaire related to the "status, privileges and immunities of representatives of Member States to specialized agencies and IAEA", and the second to the "status, privileges and immunities of the specialized agencies and of IAEA, other than those relating to representatives". After receiving replies from the organizations concerned, the Secretariat of the United Nations issued in 1967 a study entitled "The practice of the United Nations, the specialized agencies and the International Atomic Energy Agency concerning their status, privileges and immunities".⁸ That document is referred to hereafter as the "Study of the Secretariat".

16. The conclusion reached by the Commission on the scope and method of treatment of the topic was recorded in paragraph 42 of the report on the work of its sixteenth session, in the following terms:

At its 755th to 757th meetings, the Commission discussed these questions, and certain other related questions that arose in connexion therewith. The majority of the Commission, while agreeing in principle that the topic had a broad scope, expressed the view that for the purpose of its immediate study the question of diplomatic law in its application to relations between States and inter-governmental organizations should receive priority.⁹

⁶ A/CN.4/L.104.

⁷ *Yearbook of the International Law Commission, 1964*, vol. I, 757th meeting, para. 20.

⁸ *Ibid.*, 1967, vol. II, p. 154, document A/CN.4/L.118 and Add.1 and 2.

⁹ *Ibid.*, 1964, vol. II, p. 227, document A/5809, para. 42.

17. Also at its sixteenth session, in 1964, the Commission adopted its programme of work for 1965 to 1966, in which it decided to complete the study of the law of treaties and of special missions during those two years. That decision was taken having regard, in particular, to the fact that the term of office of the members of the Commission was to expire at the end of 1966 and that it was desirable to concentrate in the meantime on the study of both subjects. The topic of special missions was chosen in preference to that of relations between States and intergovernmental organizations in the light of General Assembly resolution 1289 (XIII), of 5 December 1958.¹⁰

18. At the nineteenth session of the Commission, in 1967, the Special Rapporteur submitted a second report on relations between States and inter-governmental organizations.¹¹ The report contained: (a) a summary of the Commission's discussions at its fifteenth and sixteenth sessions; (b) a discussion of general problems relating to the diplomatic law of international organizations; (c) a survey of the evolution of the institution of permanent missions to international organizations; (d) a brief account of the preliminary questions which should be discussed by the Commission before it considered draft articles; and (e) three draft articles relating to general provisions, of an introductory nature. The Commission, however, devoted that session almost entirely to the conclusion of its work on the subject of special missions, and was thus unable to discuss the Special Rapporteur's second report.

19. At the twentieth session of the Commission, in 1968, the Special Rapporteur submitted a third report¹² containing a full set of draft articles, with commentaries, on the legal position of representatives of States to international organizations. Those draft articles were divided into the following four parts:

Part I: General provisions;

Part II: Permanent missions to international organizations;

Part III: Delegations to organs of international organizations and to conferences convened by international organizations;

Part IV: Permanent observers from non-member States to international organizations.

20. The third report also included a summary of the discussion which had taken place in the Sixth Committee during the twenty-second session of the General Assembly on the "Question of diplomatic privileges and immunities" (agenda item 98), since that discussion had touched on a number of the general problems and preliminary questions raised in the second report in relation to the diplomatic law of international organizations in general, and the legal position of representatives of States to international organizations in particular.

21. At its 986th meeting, on 31 July 1968, the Commission adopted a provisional draft of twenty-one articles with the Commission's commentary on each article. The first

¹⁰ *Ibid.*, p. 226, paras. 36-37.

¹¹ *Ibid.*, p. 133, document A/CN.4/195 and Add.1.

¹² *Ibid.*, 1968, vol. II, p. 119, document A/CN.4/203 and Add.1-5.

five articles formed part I (General provisions). The remaining articles made up the first section of part II (Permanent missions to international organizations). That section was entitled "Permanent missions in general".

22. In the course of the discussion, some members of the Commission expressed the view that the scope of the draft articles should be confined to permanent missions to international organizations. The Commission was of the opinion that no decision should be taken on that question until it had had an opportunity to consider the articles (included in the Special Rapporteur's third report) on delegations to organs of international organizations and to conferences convened by international organizations and permanent observers of non-Member States to international organizations.

23. In accordance with articles 16 and 21 of its Statute, the Commission decided to transmit the provisional draft of those twenty-one articles, through the Secretary-General, to Governments for their observations.¹³

24. By resolution 2400 (XXIII), of 11 December 1968, the General Assembly *inter alia* recommended that the Commission should

continue its work [...] on relations between States and international organizations, taking into account the views and considerations referred to in General Assembly resolutions 1765 (XVII) and 1902 (XVIII).

25. At the twenty-first session of the Commission, in 1969, the Special Rapporteur submitted a fourth report¹⁴ containing a revised set of draft articles with commentaries, on representatives of States to international organizations. Those draft articles covered the following subjects: facilities, privileges and immunities of permanent missions to international organizations; conduct of the permanent mission and its members; and end of the functions of the permanent representative (sections 2, 3 and 4 of part II). The Special Rapporteur also submitted a working paper¹⁵ containing draft articles on permanent observers of non-members to international organizations.

26. The fourth report also included a summary of the discussion which had taken place in the Sixth Committee during the twenty-third session of the General Assembly on the "Report of the International Law Commission on the work of its twentieth session" (agenda item 84)¹⁶ and on the "Draft Convention on Special Missions" (agenda item 85),¹⁷ since those discussions had touched on certain questions which might present some interest as regards representatives of States to international organizations and conferences.

27. The Commission adopted a provisional draft of twenty-nine articles constituting sections 2 (Facilities,

¹³ *Ibid.*, p. 195, document A/7209/Rev.1, para. 22.

¹⁴ *Ibid.*, 1969, vol. II, p. 1, document A/CN.4/218 and Add.1.

¹⁵ A/CN.4/L.136.

¹⁶ *Official Records of the General Assembly, Twenty-third Session, Sixth Committee*, 1029th to 1039th meetings.

¹⁷ *Ibid.*, 1039th to 1059th, 1061st to 1072nd and 1087th to 1090th meetings.

privileges and immunities), 3 (Conduct of the permanent mission and its members) and 4 (End of functions) of part II (Permanent missions to international organizations).

28. In accordance with articles 16 and 21 of its Statute, the Commission decided to transmit that group of draft articles, through the Secretary-General, to Governments for their observations. It also decided to transmit it, together with the previous group, to the Secretariats of the United Nations, the specialized agencies and IAEA 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 both groups of draft articles to that Government for its observations.

29. At the same session, the Commission again considered the question referred to in paragraph 22 above. 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. It expressed the intention 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.

30. The Commission also 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. In view of the delicate and complex nature of those questions, the Commission decided to resume their examination at a future session and to postpone any decision on them at that stage.

31. By resolution 2501 (XXIV), of 12 November 1969, the General Assembly *inter alia* recommended that the Commission should

continue its work on relations between States and international organizations, with a view to completing in 1971 its draft articles on representatives of States to international organizations.

32. At the twenty-second session of the Commission, in 1970, the Special Rapporteur submitted a fifth report¹⁸ containing draft articles, with commentaries, on permanent observers of non-member States to international organizations (part III) and delegations to organs of international organizations and to conferences convened by international organizations (part IV). The Special

¹⁸ *Yearbook of the International Law Commission, 1970, vol. II, p. 1, document A/CN.4/227 and Add.1 and 2.*

Rapporteur also submitted a working paper on temporary observer delegations and conferences not convened by international organizations¹⁹ but the Commission did not consider that it should take up the matter at that time.

33. The fifth report also contained a summary of that part of the discussion in the Sixth Committee during the twenty-fourth session of the General Assembly on the agenda items entitled "Report of the International Law Commission on the work of its twenty-first session" (item 86)²⁰ and "Draft Convention on Special Missions" (item 87)²¹ which touched on certain questions presenting some interest concerning representatives of States to international organizations and conferences.

34. The Commission adopted provisionally draft articles constituting 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). It expressed the intention to determine during the second reading of the whole draft whether it would be possible to reduce the number of articles by combining provisions susceptible of uniform treatment.

35. In view of the decision taken at the twenty-first session (see para. 30 above), the Commission also decided 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 at that stage any decision on this point in the context of Parts III and IV.

36. In accordance with articles 16 and 21 of its Statute, the Commission decided to transmit parts III and IV of the draft articles, through the Secretary-General, to Governments of Member States for their observations. It further decided to transmit them to the secretariats of the United Nations, the specialized agencies and IAEA for their observations and also to Switzerland as the host State in relation to the Office of the United Nations at Geneva and to a number of specialized agencies (see para. 28 above).

37. By resolution 2634 (XXV), of 12 November 1970, the General Assembly *inter alia* recommended that the Commission should

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.

38. At its present session the Commission re-examined the draft articles in the light of the comments of Governments and the secretariats of the United Nations, specialized agencies and IAEA (see annex I below). It had before

it the Sixth Report of the Special Rapporteur (A/CN.4/241 and Add.1-6)²² which summarized the written comments of Governments and the secretariats of the United Nations, specialized agencies and IAEA and also those made orally by delegations in the General Assembly, and contained proposals for the revision of the articles. The Special Rapporteur further submitted to the Commission three working papers: the first paper (A/CN.4/L.166)²³ examined the question of the possible effects of exceptional situations such as absence of recognition, absence or severance of diplomatic and consular relations, effects of armed conflict on the representation of States in international organizations; the second paper (A/CN.4/L.171)²⁴ examined the question of the inclusion in the draft articles of a provision on the settlement of disputes; the third paper (A/CN.4/L.173)²⁵ contained draft articles on observer delegations of States to organs and to conferences. The Commission also had before it editorial observations and suggestions submitted by the Secretariat concerning the various language versions of the draft articles (A/CN.4/L.162/Rev.1 and Corr.1, A/CN.4/L.163, A/CN.4/L.164, A/CN.4/L.165, A/CN.4/L.167).

39. At its 1088th to 1110th, 1121st and 1122nd meetings the Commission considered the Sixth report of the Special Rapporteur and the above-mentioned working papers. At its 1110th to 1127th meetings it considered the reports of the Drafting Committee. The Commission established a small Working Group to assist in revising, co-ordinating and consolidating the different parts of the draft articles. The Working Group held 18 meetings and submitted a series of papers (documents A/CN.4/L.174 and Add.1-6;²⁶ A/CN.4/L.177 and Add.1-3) that proposed a new organization of the draft articles and a substantial reduction in their number. The Commission considered those papers at its 1130th to 1140th, 1142nd and 1146th meetings. It adopted certain new articles, revised the title of the draft and certain earlier articles, and decided upon the order and structure of all the articles. At its 1147th meeting, the Commission adopted the final text of its draft articles on the representation of States in their relations with international organizations and the annex thereto. In accordance with its statute, it submits them herewith to the General Assembly, together with the recommendation contained in paragraphs 57 to 59 below.

2. FORM AND STRUCTURE OF THE DRAFT ARTICLES

40. In its report on the work of its twentieth session (1968), the Commission stated:

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.²⁷

²² See p. 1 above.

²³ To be printed in *Yearbook*, 1971, vol. II, part two.

²⁴ *Idem.*

²⁵ *Idem.*

²⁶ *Idem.*

²⁷ *Yearbook of the International Law Commission*, 1968, vol. II, p. 195, document A/7209/Rev.1, para. 24.

¹⁹ A/CN.4/L.151.

²⁰ *Official Records of the General Assembly, Twenty-fourth Session, Sixth Committee*, 1103rd to 1111th meetings.

²¹ *Ibid.*, 1142nd, 1143rd and 1148th meetings.

41. At its present session, the Commission re-examined the question in the light of the comments of certain governments and international organizations on the question of the form ultimately to be given to the draft articles, and of the view of one government and one specialized agency that the form should be that of a code rather than a convention. Doubts were expressed by the government concerned 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. The Commission wishes to recall that in paragraph 5 of the commentary on articles 4 and 5 as they were provisionally adopted at the twentieth session of the Commission, (article 5 related to future agreements which may contain provisions in conflict with some of the rules laid down in the draft articles) it stated:

The Commission believes, however, 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.²⁸

42. Furthermore, the Commission continues to believe that the reasons given by it in favour of the preparation of a convention in the case of the law of treaties²⁹ are equally applicable in the present context, namely: an expository code, however well formulated, cannot in the nature of things be so effective as a convention for consolidating the law; and the codification through a multilateral convention would give all the new States the opportunity to participate directly in the formulation of the law if they so wished. It should also be noted that the consolidation of the diplomatic law of relations between States and international organizations is of particular importance at the present time when the forms and activities of institutionalized international co-operation are multiplying and many developments are taking place in the field of international organizations. Accordingly, the Commission reaffirms its decision of 1968 to prepare draft articles “intended to serve as a basis for a draft convention”.

43. In submitting the final text of the draft articles on the representation of States in their relations with international organizations, the Commission maintains the view which it accepted at the outset of its work on the topic of relations between States and international organizations and which it has expressed in its report of 1968. A corresponding recommendation is made in paragraph 57 below.

44. In formulating the draft articles at its twenty-second session (1970), the Commission gave careful consideration to the method of drafting the articles on facilities, privileges and immunities for both part III (Permanent observer missions to international organizations) and part IV (Delegations of States to organs and to conferences). Some members of the Commission were in favour of the preparation of general articles which would extend, *mutatis mutandis*, to permanent observer missions and to dele-

gations of States to organs and to conferences the relevant provisions of part II relating to permanent missions. Other members preferred for the purposes of the first reading the preparation of only those articles which were essential to permanent observer missions and to delegations of States to organs and to conferences, and to refer to the applicable provisions of part II in an explanatory passage in the Commission's report. At that session, the Commission adopted a provisional solution which falls in between the two positions outlined above.

45. Also at its twenty-second session, the Commission developed, in the course of the preparation of the articles on facilities, privileges and immunities, a set of draft articles for part III (Permanent observer missions) based largely on the provisions concerning permanent missions and a set of draft articles for part IV (Delegations of States to organs and to conferences) taking into account certain provisions of the Convention on Special Missions³⁰ and of part II of the draft articles (Permanent missions). In doing so, it examined each individual facility, privilege and immunity with reference to both permanent observer missions and delegations to organs of international organizations or to conferences convened by international organizations. In its review, the Commission was particularly concerned with determining what distinctions should be drawn, in specific cases, between special missions, permanent missions, permanent observer missions and delegations of States to organs and to conferences. It satisfied itself, in several instances, that such distinctions need not be drawn and accordingly concluded that it was not necessary to repeat in both parts III and IV the substance of the analogous articles on permanent missions. Consequently, in parts III and IV, there were both specific articles (in those cases where changes were required to take into account the differences existing between permanent missions and permanent observer missions or delegations of States to organs and to conferences) and articles which employed the technique of “drafting by reference”.

46. At its present session the Commission considered the consolidation of the provisions concerning missions of a permanent character to international organizations (Permanent missions [part II] and Permanent observer missions [part III]). This was achieved by including in article 1 two new terms. The terms “mission” and “head of mission” were made generic terms covering, respectively, both “permanent mission” and “permanent observer mission”, and both “permanent representative” and “permanent observer”. In all cases where the only difference between part II and part III was the use in the latter of the word “observer”, generic terms have been used—thus facilitating the merger of the two parts. In the few cases where the substantive differences between the corresponding provisions of parts II and III did not allow for such consolidation, a single article has been established, including in separate paragraphs, under a common heading, the provisions particular to each kind of mission. In these instances, the specific terminology “permanent mission”, “permanent observer mission”, “permanent representative”, “permanent observer” has been maintained. Only

²⁸ *Ibid.*, p. 199.

²⁹ *Ibid.*, 1962, vol. II, p. 160, document A/5209, para. 17.

³⁰ General Assembly resolution 2530 (XXIV), annex.

in the case of the functions of each kind of mission has the Commission preserved the format of the original provisions in two separate, though consecutive, articles.

47. The Commission also at its present session established the texts of introductory provisions intended to apply to the draft articles as a whole and of further provisions generally applicable to missions to international organizations and to delegations to organs and to conferences. This was achieved by applying to the general provisions included mainly in part I of the Commission's draft of 1968 and to the provisions contained in part IV of the Commission's draft of 1970 (Delegations of States to organs and to conferences), techniques similar to those described in the preceding paragraph.

48. The present set of consolidated draft articles is divided into four parts: part I ("Introduction") concerns the introductory provisions which are intended to apply to the draft articles as a whole; part IV ("General provisions") contains those further provisions which are generally applicable to missions to international organizations and to delegations to organs and to conferences; part II ("Missions to international organizations") contains provisions dealing specifically with missions as they emerged from the process of consolidating the rules on permanent missions with those on permanent observer missions, explained in paragraph 46 above; part III ("Delegations to organs and to conferences") contains provisions dealing specifically with delegations to organs and to conferences.

49. The draft articles contain also a set of provisions on observer delegations to organs and conferences. In view of the fact that these provisions were not included in the provisional draft³¹ and therefore Governments and international organizations did not have opportunity to comment on them, the Commission deemed it appropriate to present this set of provisions in the form of an annex. Should any international conference which might be convened to consider the draft articles decide in favour of including provisions on observer delegations, this set of provisions could conveniently be integrated into the set of draft articles.

50. The Commission's work on the representation of States in their relations with international organizations constitutes both codification and progressive development of international law in the sense in which those concepts are defined in article 15 of the Commission's Statute and, as in the case of several previous drafts, it is not practicable to determine into which category each provision falls. Some of the commentaries, however, indicate that certain new rules are being proposed for the consideration of the General Assembly and of Governments.

³¹ The texts of the articles of the "provisional draft", together with the commentaries, have been published as follows:

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

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

Articles 51-116: *Ibid.*, 1970, document A/8010/Rev.1, chap. II, section B.

3. SCOPE OF THE DRAFT ARTICLES

51. The draft articles deal with the representation of States in their relations with international organizations. In the course of the consideration of these draft articles some members of the Commission stated that they would have preferred to see the draft articles combined with those on the representation 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 representation of States in their relations with international organizations and that of representation 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 representation of States in their relations with international organizations.

52. To make it clear that the draft articles relate only to that specific aspect of the topic, the Commission decided that they should be entitled "Draft articles on the representation of States in their relations with international organizations".

53. In the course of the consideration of these articles, some members of the Commission referred to the status of the host State as a sending State. The Commission noted that the case when the host State is a member of the organization gives rise to the question of the application to it of the draft articles in its capacity as a sending State also. In such a case a considerable part of the rules relating to the sending State apply also, as appropriate, to the host State. However, as regards privileges and immunities of the members of the mission or delegation of the host State, this question is to be decided in accordance with the internal law of the State.

54. The draft articles do not contain provisions concerning representatives of entities other than States (e.g. representatives of national liberation movements, petitioners and representatives of non-governmental organizations) who might participate in the work of organs of international organizations or conferences convened by or under the auspices of international organizations. The Commission considers that such categories can be more appropriately dealt with under the subject of representatives of international organizations and their officials and in conjunction with experts and other persons who may be engaged in the official service of international organizations.

55. Moreover, and as in the case of previous topics, the Commission did not think it advisable to deal with the possible effects of armed conflict on representation of States in their relations with international organizations. The reasons for this are stated in the commentary on

article 79 which relates to non-recognition of States or Governments or absence of diplomatic or consular relations.

56. Members of the Commission had differing opinions on whether the work of the Commission on the topic should extend to regional organizations. In the conclusion to his first report, 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.³² 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 UPU, the 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 adopted an intermediary solution which is contained in paragraphs 2 and 4 of article 2 of the draft articles.

B. Recommendation of the Commission to convene an international conference on the representation of States in their relations with international organizations

57. At its 1146th meeting, on 28 July 1971, the Commission decided, in conformity with article 23, paragraph 1 (d), of its Statute, to recommend that the General Assembly should convene an international conference of

plenipotentiaries to study the Commission's draft articles on the representation of States in their relations with international organizations and to conclude a convention on the subject.

58. The Commission expresses the hope that appropriate arrangements will be made by the General Assembly for associating the United Nations, the specialized agencies and IAEA in the stage of the adoption of the convention envisaged. Reference has been made in the previous paragraphs to the contribution of these organizations in the Commission's work on this topic. The Commission wishes to express its appreciation for the valuable contribution made by these organizations.

59. The Commission wishes to refer to the titles given to parts and articles of its draft, which it considers helpful for an understanding of the structure of the draft and for promoting ease of reference. It expresses the hope, as it did concerning its draft articles on consular relations, law of treaties and special missions, that these titles, subject to any appropriate changes, will be retained in any convention which may be concluded in the future on the basis of the Commission's draft articles.

C. Resolution adopted by the Commission

60. The Commission, at its 1148th meeting on 30 July 1971, unanimously adopted the following resolution:

The International Law Commission,

Having adopted the draft articles on the representation of States in their relations with international organizations,

Desires to express to the Special Rapporteur, Mr. Abdullah El-Erian, its deep appreciation of the outstanding contribution he has made to the treatment of the topic during the past years by his tireless devotion and scholarly research, thus enabling the Commission to bring to a successful conclusion the important task of completing, with this draft, the work on codification already carried out in connexion with diplomatic and consular relations and special missions.

D. Draft articles on the representation of States in their relations with international organizations

PART I. INTRODUCTION

Article 1.³³ Use of terms

1. For the purposes of the present articles:

- (1) "international organization" means an intergovernmental organization;
- (2) "international organization of universal character" means an organization whose membership and responsibilities are on a world-wide scale;
- (3) "Organization" means the international organization in question;
- (4) "organ" means:
 - (a) any principal or subsidiary organ of an international organization, or

³² *Yearbook of the International Law Commission, 1963*, vol. II, p. 185, document A/CN.4/161 and Add.1, para. 179.

³³ Articles 1, 51 and 78 of the provisional draft (for the reference to the articles of the provisional draft, see foot-note 31 above).

- (b) any commission, committee or sub-group of any such organ,
in which States are members;
- (5) "conference" means a conference of States convened by or under the auspices of an international organization;
- (6) "permanent mission" means a mission of permanent character, representing the State, sent by a State member of an international organization to the Organization;
- (7) "permanent observer mission" means a mission of permanent character, representing the State, sent to an international organization by a State not member of the Organization;
- (8) "mission" means, as the case may be, the permanent mission or the permanent observer mission;
- (9) "delegation to an organ" means the delegation sent by a State to participate on its behalf in the proceedings of the organ;
- (10) "delegation to a conference" means the delegation sent by a State to participate on its behalf in the conference;
- (11) "delegation" means, as the case may be, the delegation to an organ or the delegation to a conference;
- (12) "host State" means the State in whose territory:
- (a) the Organization has its seat or an office, or
 - (b) a meeting of an organ or a conference is held;
- (13) "sending State" means the State which sends:
- (a) a mission to the Organization at its seat or to an office of the Organization, or
 - (b) a delegation to an organ or a delegation to a conference;
- (14) "permanent representative" means the person charged by the sending State with the duty of acting as the head of the permanent mission;
- (15) "permanent observer" means the person charged by the sending State with the duty of acting as the head of the permanent observer mission;
- (16) "head of mission" means, as the case may be, the permanent representative or the permanent observer;
- (17) "members of the mission" means the head of mission and the members of the staff;
- (18) "head of delegation" means the delegate charged by the sending State with the duty of acting in that capacity;
- (19) "delegate" means any person designated by a State to participate as its representative in the proceedings of an organ or in a conference;
- (20) "members of the delegation" means the delegates and the members of the staff;
- (21) "members of the staff" means the members of the diplomatic staff, the administrative and technical staff and the service staff of the mission or the delegation;
- (22) "members of the diplomatic staff" means the members of the staff of the mission or the delegation who enjoy diplomatic status for the purpose of the mission or the delegation;
- (23) "members of the administrative and technical staff" means the members of the staff employed in the admini-

strative and technical service of the mission or the delegation;

(24) "members of the service staff" means the members of the staff employed by the mission or the delegation as household workers or for similar tasks;

(25) "private staff" means persons employed exclusively in the private service of the members of the mission or the delegation;

(26) "premises of the mission" means the buildings or parts of buildings and the land ancillary thereto, irrespective of ownership, used for the purpose of the mission, including the residence of the head of mission;

(27) "premises of the delegation" means the buildings or parts of buildings and the land ancillary thereto, irrespective of ownership, used for the purpose of the delegation, including the accommodation of the head of delegation.

2. The provisions of paragraph 1 regarding the use of terms in the present articles are without prejudice to the use of those terms or to the meanings which may be given to them in other international instruments or the internal law of any State.

Commentary

(1) Following the example of many conventions concluded under the auspices of the United Nations, the Commission has specified in article 1 of the draft the meaning of the expressions most frequently used in it.

(2) As the introductory words of the article indicate, the meanings given to the terms therein are limited to the draft articles. They state only the manner in which the expressions listed in the article should be understood for the purposes of the draft articles.

(3) The meaning of the term "international organization" in sub-paragraph 1 of paragraph 1 is based on paragraph 1 (i) of article 2 of the Vienna Convention on the Law of Treaties.³⁴ The Commission has deemed this sufficient for the purposes of the present articles, which do not deal generally with international organizations but only with the representation of States in their relations with such organizations.

(4) The meaning of the term "international organization of universal character" in sub-paragraph 2 of paragraph 1 derives from Article 57 of the United Nations Charter which refers to the "various specialized agencies, established by intergovernmental agreement and having wide international responsibilities". The question whether an international organization is of universal character depends not only on the actual character of its membership but also on the potential scope of its membership and responsibilities.

(5) The term "organ" (sub-paragraph 4) applies only to bodies in which States are members. The Commission has divided the sub-paragraph into two sub-sections concerning respectively "any principal or subsidiary organ of an international organization" and "any commission, com-

³⁴ *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.

mittee or sub-group of any such organ", in order to make it clear that the expression "in which States are members" applies to both sets of bodies. That expression excludes from the scope of the draft articles bodies composed of individual experts who serve in a personal capacity. This was necessary in order to limit the expression to the aspects dealt with in the present subject. The term, as used, would not exclude the somewhat exceptional case when an organ has both States and individuals as members. The draft articles however deal only with the aspects of State participation.

(6) Sub-paragraph 5 uses the phrase "conference of States convened by or under the auspices of an international organization". This formulation would include all conferences convened by an international organization whether the invitations are issued by the international organization or by the host State. The Commission noted that in practice some meetings convened by organs were referred to as conferences. Such meetings do not come under the meaning of the term "conference" as used in the present draft. The phrase "conferences convened by or under the auspices of an international organization" covers all conferences convened by or under the auspices of organizations of universal character regardless of the number of participants or any regional limitation on participation.

(7) The meaning given to the terms "permanent mission" and "permanent observer mission" in sub-paragraphs 6 and 7 emphasizes the two main characteristics of such missions, namely their permanence and the fact that they represent the State. The phrase "representing the State" is also used in article 1 (a) of the Convention on Special Missions.³⁵

(8) The meanings given to the terms "delegation to an organ" and "delegation to a conference" in sub-paragraphs 9 and 10 are based upon participation, which is the aspect that characterizes delegations of all kinds. They bring out clearly the distinction between participating States and other States. The Commission wishes to make it clear that the notion of participating in the proceedings of an organ covers three possible categories of delegations, namely, delegations (normally of member States) which participate in the proceedings with the right to vote, delegations which participate in the discussions without the right to vote and delegations which are allowed to express their views without taking part in the discussions. In the case of conferences on the other hand, the notion of participation is clear-cut; hence the absence in sub-paragraph 10 of any reference to the "proceedings" of the conference.

(9) The meaning given to the term "host State" in sub-paragraph 12 is linked to and limited by articles 5 and 42.

(10) The term "permanent representative" in sub-paragraph 14 is used in general at the present time to designate the heads of permanent missions to international organizations. It is true that article V of the Headquarters Agreement between the United Nations and the United States³⁶ refers to "resident representatives". However,

since the adoption in 1948 of General Assembly resolution 257 A (III) on permanent missions, the term "permanent representative" has become the prevailing term in the law and practice of international organizations, both universal and regional. There are some exceptions to this general pattern. The Headquarters Agreement of IAEA with Austria³⁷ uses (section 1, sub-paragraph j) the term "resident representative". So does the Headquarters Agreement of ECA with Ethiopia,³⁸ which is the only Headquarters agreement for an economic commission which expressly envisages (in section 10, b) resident representatives. The term "resident representative" is also used in section 24 of the Headquarters Agreement of FAO with Italy.³⁹ The wording of sub-paragraph 14 is modelled on that used in article 1 (a) of the Vienna Convention on Diplomatic Relations⁴⁰ and article 1 (d) of the Convention on Special Missions. The Commission points out that according to article 16 a *chargé d'affaires ad interim* acts as head of mission if the post of head of mission is vacant or if the head of mission is unable to perform his functions. The provisions of sub-paragraphs 14, 15 and 16 are therefore subject to those of article 16.

(11) Sub-paragraphs 21 to 25 are modelled with a few changes in terminology on the corresponding provisions of article 1 of the Convention on Diplomatic Relations and article 1 of the Convention on Special Missions.

(12) Sub-paragraphs 26 and 27 correspond to article 1 (i) of the Convention on Diplomatic Relations.

(13) The other sub-paragraphs of paragraph 1 of article 1 are self-explanatory in the light of the relevant draft articles and call for no particular comment on the part of the Commission.

(14) Paragraph 2 is similar in its purpose to paragraph 2 of article 2 of the Convention on the Law of Treaties.

Article 2.⁴¹ Scope of the present articles

1. The present articles apply to the representation of States in their relations with international organizations of universal character and to their representation at conferences convened by or under the auspices of such organizations.

2. The fact that the present articles do not relate to other international organizations is without prejudice to the application to the representation of States in their relations with such other organizations of any of the rules set forth in the present articles which would be applicable under international law independently of these articles.

3. The fact that the present articles do not relate to other conferences is without prejudice to the application to the representation of States at such other conferences of any of

³⁷ *Ibid.*, vol. 339, p. 152.

³⁸ *Ibid.*, vol. 317, p. 101.

³⁹ United Nations, *Legislative texts and treaty provisions concerning the legal status, privileges and immunities of international organizations*, vol. II (United Nations publication, Sales No.: 61.V.3), p. 187.

⁴⁰ United Nations, *Treaty Series*, vol. 500, p. 95.

⁴¹ Article 2 of the provisional draft.

³⁵ General Assembly resolution 2530 (XXIV), annex.

³⁶ United Nations, *Treaty Series*, vol. 11, p. 11.

the rules set forth in the present articles which would be applicable under international law independently of these articles.

4. Nothing in the present articles shall preclude States from agreeing that the present articles apply in respect of:

(a) international organizations other than those of universal character, or

(b) conferences other than those convened by or under the auspices of such organizations.

Commentary

(1) Article 2 embodies the decision of the Commission to make the draft articles applicable both to the representation of States in their relations with international organizations of universal character and to their representation at conferences convened by or under the auspices of such organizations.

(2) One method of determining the international organizations which, in addition to the United Nations, come within the scope of the draft articles might be the method adopted by the Convention on the Privileges and Immunities of the Specialized Agencies.⁴² That Convention lists in article 1 a certain number of specialized agencies and adds that the expression "specialized agencies" also applies to "any other agency in relationship with the United Nations in accordance with Articles 57 and 63 of the Charter". That method of determining the scope of the Convention leaves aside such organizations as IAEA which is not considered, strictly speaking, a specialized agency as defined in the Convention in view of the circumstances of its creation and the nature of its relationship with the United Nations. It also leaves aside 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 for the Unification of Private Law, the International Wheat Council and the Central Office for International Railway Transport.⁴³ The wording of paragraph 1 of article 2 is designed to be comprehensive, embracing all international organizations of universal character.

(3) Paragraph 2 lays down a reservation to the effect that the limitation of the scope of the draft articles to the representation of States in their relations with international organizations of universal character does not affect the application to the relations of States with other organizations of any of the rules set forth in the draft articles which would be applicable under international law independently of these articles. The purpose of that reservation is to give due recognition to the fact that certain provisions in the draft articles are or are likely to become customary international law.

⁴² United Nations, *Treaty Series*, vol. 33, p. 261.

⁴³ For a list of such organizations see *Repertory of Practice of United Nations Organs*, vol. III (United Nations publication, Sales No.: 1955.V2), p. 125. See also Amos J. Peaslee, *International Governmental Organizations, Constitutional Documents*, 2nd ed. rev. (The Hague, Nijhoff, 1961).

(4) Paragraph 3 lays down a similar reservation with respect to conferences. The words "other conferences" cover not only conferences convened by international organizations other than those of universal character but also conferences convened by States. In their written comments certain governments suggested the widening of the scope of the draft articles so as to include conferences convened by States. This view was also shared by some members of the Commission. The Commission noted, however, that such conferences do not fall within the purview of relations between States and international organizations. The treatment of the subject of conferences convened by or under the auspices of international organizations rests on the assumption that such conferences are associated with the organization and as such should be regulated in conjunction with organs of international organizations. It is to be noted that this approach is followed by the Convention on the Privileges and Immunities of the United Nations⁴⁴ and the Convention on the Privileges and Immunities of the Specialized Agencies. Section 11 of the former speaks of "representatives of Members to the [...] organs of the United Nations and to conferences convened by the United Nations", while section 13 of the latter speaks of "representatives of members at meetings convened by a specialized agency". On the other hand, international conferences, whether convened by international organizations or by one or more States, are conferences of States and therefore governed to a great extent by the same rules of international law. It may be expected that the adoption of an international convention on the basis of the present draft articles would promote the application of the rules contained therein to conferences convened by States through *ad hoc* decisions or other appropriate arrangements.

(5) Lastly, paragraph 4 is intended to leave it open for States to decide to apply the provisions of the draft articles in respect of international organizations other than those of universal character and to conferences convened by or under the auspices of such organizations.

Article 3.⁴⁵ Relationship between the present articles and the relevant rules of international organizations or conferences

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

Commentary

(1) Article 3 reproduces the corresponding provisions of the provisional draft with the addition of the words "or to any relevant rules of procedure of the conference".

(2) The purpose of this article is twofold. First, given the diversity of international organizations and their heterogeneous character, in contradistinction to that of States, the draft articles are designed to establish a common

⁴⁴ United Nations, *Treaty Series*, vol. 1, p. 15.

⁴⁵ Article 3 of the provisional draft.

denominator and to provide general rules to regulate the diplomatic law of relations between States and international organizations in the absence of regulations on any particular point by an individual international organization.

(3) Secondly, article 3 seeks to safeguard the particular rules which may be applied by a given international organization. An example of the particular rules which may prevail in an organization concerns membership. Although membership in international organizations is, generally speaking, limited to States, there are some exceptions. A number of specialized agencies provide for "associate membership", thus permitting the participation of entities which enjoy internal self-government but have not yet achieved full sovereignty.

(4) In order to avoid having to include a specific reservation in each article in respect of which it was necessary to safeguard the particular rules prevailing in an organization or a conference, the Commission decided to formulate a general reservation in part I of the draft articles.

(5) The expression "relevant rules of the Organization" is broad enough to include all relevant rules whatever their nature: constituent instruments, certain decisions and resolutions of the organization concerned or a well-established practice prevailing in that organization.

(6) The Commission has taken the view that the rules of procedure adopted by a conference should be given, for the purpose of the draft articles, the same status as the rules of an organization with respect to matters falling within the scope of rules of procedure. A conference could not, however, completely replace the draft articles if they were in force as a treaty between the States concerned, as this would touch upon matters such as privileges and immunities that would be outside the scope of rules of procedure.

Article 4.⁴⁶ Relationship between the present articles and other international agreements

The provisions of the present articles

(a) are without prejudice to other international agreements in force between States or between States and international organizations of universal character, and

(b) shall not preclude the conclusion of other international agreements regarding the representation of States in their relations with international organizations of universal character or their representation at conferences convened by or under the auspices of such organizations.

Commentary

(1) Article 4 regulates the relationship between the draft articles and other international agreements. While recognizing that headquarters agreements and general conventions on privileges and immunities might be considered as forming part of the rules of the organizations within the meaning of article 3, the Commission took the view that

it was preferable to include a specific provision on the point.

(2) The purpose of the provision in sub-paragraph *a* is to reserve the position of existing international agreements regulating the same subject matter as the draft articles and in particular headquarters agreements and conventions on privileges and immunities. The draft articles, while intended to provide a uniform régime, are without prejudice to different rules which may be laid down in such agreements and conventions.

(3) Sub-paragraph *a* refers to international agreements "in force between States or between States and international organizations of universal character". Headquarters agreements are usually concluded between the host State and the Organization.

(4) Certain governments expressed the view that the fact that existing agreements would remain in force might deprive the draft articles of much of their practical effect. The draft articles, however, contain many provisions on questions which have not been regulated by existing treaties; these provisions will have their binding effect but at the same time the new régime will not prejudice certain rules which prevail within certain organizations and which reflect the particular needs of an organization. Certain governments also referred to the situation which might arise if one or several sending States ratified the future convention and the host State did not. The Commission wishes to point out that such a situation of treaties having different parties or having conflicting provisions involves problems governed by the general law of treaties and in particular article 30 of the Convention on the Law of Treaties.

(5) Sub-paragraph *b* relates to future agreements which may contain provisions diverging from some of the rules laid down in the draft articles. The Commission recognizes 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. The draft articles are not intended in any way to preclude any further development of the law in this area.

PART II. MISSIONS TO INTERNATIONAL ORGANIZATIONS

Article 5.⁴⁷ Establishment of missions

1. Member States may, if the rules of the Organization so admit, establish permanent missions for the performance of the functions mentioned in article 6.

2. Non-member States may, if the rules of the Organization so admit, establish permanent observer missions for the performance of the functions mentioned in article 7.

3. The Organization shall notify to the host State the institution of a mission, if possible prior to its establishment.

⁴⁶ Articles 4, 5 and 79 of the provisional draft.

⁴⁷ Articles 6 and 52 of the provisional draft.

Commentary

(1) Article 5 lays down a general rule according to which States may establish missions to international organizations of universal character. These missions are normally established at the seat of the Organization. However, the United Nations has an Office at Geneva where a large number of States maintain missions as liaison with that Office as well as with a number of specialized agencies which have established their seats at Geneva (ILO, ITU, WHO and WMO). Missions have also been established by States at the headquarters of United Nations regional economic commissions.⁴⁸

(2) Permanent representation of States to an international organization presents two main characteristics, both of which are reflected in the wording of paragraphs 1 and 2 of article 5. First, the institution is of a non-obligatory character. States are under no obligation to establish missions at the seat or an office of the Organization. Secondly, the establishment of missions by States is subject to the relevant rules of the Organization. Only when those rules allow the establishment of missions, may States proceed to do so.

(3) Since the creation of the United Nations, the practice of establishing permanent missions of Member States at the seat or an office of international organizations of universal character has developed considerably. The institution of permanent missions, endorsed by General Assembly resolution 257 A (III) of 3 December 1948 has been generalized. Doubts that were expressed in the Sixth Committee during the first part of the General Assembly's third session concerning the advisability of recommending that Member States establish permanent missions to the United Nations have been dispelled by events.⁴⁹ Permanent missions as an institution are today widely accepted and used by States in their relations with international organizations. Such development and generalization were already foreseen by resolution 257 A (III) whose second preambular paragraph stated that:

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

(4) The legal basis of permanent missions is considered as deriving from constituent instruments of international organizations—particularly in the provisions relating to functions—as supplemented by resolutions adopted by their organs and by the general conventions on the privileges and immunities of the organizations and relevant headquarters agreements. To this must be added the practice that has accumulated in respect of permanent

⁴⁸ The Headquarters Agreement of ECA with Ethiopia (see footnote 38 above) is, however, the only headquarters agreement concerning a United Nations regional economic commission which expressly envisages resident representatives.

⁴⁹ See *Official Records of the General Assembly, Part I of the Third Session, Plenary Meetings of the General Assembly, Annexes to the Summary Records of Meetings*, document A/609. See also paragraph 2 of the commentary to article 6 of the provisional draft. (For the reference to the articles of the provisional draft, see footnote 31 above.)

missions in the United Nations and agencies of the United Nations family.

(5) Given the central position which organizations of universal character occupy in the present day international order and the world-wide character of their activities and responsibilities, non-member States have also felt it necessary to establish permanent observer missions to those organizations. Frequently, it is of great interest to non-member States to be able to follow the work of international organizations of universal character. The association of non-member States with such international organizations is also of benefit to the organizations themselves and conducive to the fulfilment of their principles and purposes.

(6) Accordingly, paragraph 1 of article 5 regulates the establishment of "permanent missions" by "member States" and paragraph 2 of "permanent observer missions" by "non-member States". As stated in paragraph 1, member States may, if the rules of the Organization so admit, establish permanent missions for the performance of the functions mentioned in article 6 of the present draft articles. Paragraph 2, in turn, provides that non-member States may, if the rules of the Organization so admit, establish permanent observer missions for the performance of the functions mentioned in article 7 of the present draft articles.

(7) The words "may establish" used in paragraphs 1 and 2 underline the non-obligatory character—mentioned above—of the institution of permanent missions of States to international organizations. The phrase "if the rules of the Organization so admit" has been inserted in both paragraphs in order to make provision for the consent of the Organization, namely to cover expressly the second main characteristic of permanent representation to international organizations referred to above. The Commission employed the expression "rules of the Organization" as including any established practice of the Organization. In this connexion, it may be recalled that article 3 of the present draft states that "The application of the present articles is without prejudice to any relevant rules of the Organization" and that article 4 sets forth another general reservation concerning existing and future international agreements regarding the representation of States in their relations with international organizations.

(8) Paragraph 3 has been included because the Commission considered that the host State should be notified of the institution of a mission even before its physical establishment, to facilitate any necessary action.

Article 6.⁵⁰ Functions of the permanent mission

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

(a) ensuring the representation of the sending State to the Organization;

(b) maintaining the necessary liaison between the sending State and the Organization;

⁵⁰ Article 7 of the provisional draft.

- (c) negotiating with or in the Organization;
- (d) ascertaining activities 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.

Commentary

(1) Since the functions of permanent missions are numerous and varied, article 6 merely lists the usual functions under broad headings. The words "*inter alia*" in the opening sentence serve to underline that the enumeration of functions made by the article is not intended to be exhaustive.

(2) Sub-paragraph *a* is devoted to the representational function of the permanent mission. In order to make it clear that the representation of a State to an international organization may take different forms, of which the permanent mission, while important, is only one, the Commission replaced the words "representing the sending State" used in the provisional draft by the words "ensuring the representation of the sending State".

(3) Sub-paragraph *b* relates to the function which characterizes a main activity of permanent missions, namely maintaining the necessary liaison between the sending State and the organization. The permanent mission, and in particular the permanent representative as head of mission, is responsible for the maintenance of official relationships between the Government of the sending State and the organization. A permanent mission maintains contact with the organization on a continuous basis and acts as a channel of communication between its Government and the organization.

(4) Sub-paragraphs *c* and *d* set out two classic diplomatic functions, *viz.*, negotiating and reporting to the Government of the sending State on activities. In a memorandum submitted to the Secretary-General of the United Nations in 1958 the Legal Counsel stated:

The development of the institution of the permanent missions since the adoption of that resolution [General Assembly resolution 257 A (III)] shows that the permanent missions also have functions of a diplomatic character [. . .]. The permanent missions perform these various functions through methods and in a manner similar to those employed by diplomatic missions, and their establishment and organization are also similar to those of diplomatic missions which States accredit to each other.⁵¹

(5) The role of permanent missions in negotiations is assuming increasing importance with the steady growth of the activities of international organizations, especially in technical assistance and in the economic and social fields. Negotiations carried out by permanent missions are not necessarily confined to negotiations "with" the organization itself. The reference in sub-paragraph *c* to negotiations "in" the organization recognizes the practice

⁵¹ "The practice of the United Nations, the specialized agencies and the International Atomic Energy Agency concerning their status, privileges and immunities: study prepared by the Secretariat" ("hereinafter referred to as "Study of the Secretariat"), *Yearbook of the International Law Commission, 1967*, vol. II, p. 165, document A/CN.4/L.118 and Add.1 and 2, part one, A, para. 17.

of consultations and exchanges of views between States through their permanent missions. This latter type of negotiation, which includes what has come to be known as multilateral diplomacy, is generally recognized to be one of the significant features of contemporary international organizations. In the Introduction to his Annual Report on the work of the United Nations from 16 June 1958 to 15 June 1959, the Secretary-General observed that

The permanent representation at Headquarters of all Member nations, and the growing diplomatic contribution of the permanent delegations outside the public meetings [. . .] may well come to be regarded as the most important "common law" development which has taken place so far within the constitutional framework of the Charter.⁵²

(6) It should be noted, however, that certain functions of diplomatic missions are not usually performed by permanent missions to international organizations. This applies in particular to the function of diplomatic protection, which belongs to the diplomatic mission of the sending State accredited to the host State. It was also pointed out during the discussion that permanent missions may in certain circumstances perform functions in relation to the host State, with the latter's consent.

(7) Sub-paragraph *e* states that one of the functions of permanent missions consists in promoting co-operation for the realization of purposes and principles of the Organization. Article 1 of the Charter of the United Nations refers to international co-operation as one of the purposes of the United Nations and to the Organization itself as "a centre for harmonizing the actions of nations". The duty of States to co-operate with one another is also one of the principles included in the "Declaration of 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. The promotion of international co-operation through the realization of the purposes and principles of international organizations of universal character has become a common undertaking at the present stage of development of international relations.

Article 7.⁵³ Functions of the permanent observer mission

The functions of the permanent observer mission consist *inter alia* in:

- (a) ensuring, in relations with the Organization, the representation of the sending State and maintaining liaison with the Organisation;
- (b) ascertaining activities in the Organization and reporting thereon to the Government of the sending State;
- (c) promoting co-operation with the Organization and, when required, negotiating with it.

⁵² *Official Records of the General Assembly, Fourteenth Session, Supplement No. 1A (A/4132/Add.1)*, p. 2.

⁵³ Article 53 of the provisional draft.

Commentary

(1) Permanent observer missions, being missions established by States non-members of the organization, perform different functions from those of permanent missions of member States as mentioned in article 6. Article 7, like article 6, merely enumerates the usual functions of permanent observer missions.

(2) The representational function of permanent observer missions is limited to certain specific purposes; hence the inclusion in sub-paragraph *a* of the phrase "in relations with the Organization" which delimits the scope of the representation of a sending State by a permanent observer mission. Their liaison function likewise differs from that of permanent missions inasmuch as there is no formal link between the Organization and a non-member State; sub-paragraph *a*, therefore, refers to "maintaining liaison with the Organization" instead of "maintaining the necessary liaison between the sending State and the Organization" as in the case of permanent missions (article 6).

(3) The wording of sub-paragraph *b* follows that of the corresponding provision of article 6 (sub-paragraph *d*). In paragraph 168 of the Introduction to his Annual Report on the work of the Organization covering the period 16 June 1966–15 June 1967, the Secretary-General of the United Nations stated:

In my introduction to last year's annual report as well as in previous years, I have already expressed my strong feeling that all countries should be encouraged and enabled, if they wish to do so, to follow the work of the Organization more closely by maintaining observers at the Headquarters of the United Nations, at Geneva and in the regional economic commissions. They will thus be exposed to the impact of the work of the Organization and the currents and cross-currents of opinion that prevail within it, besides gaining opportunities to contribute to that exchange.⁵⁴

(4) The function of "promoting co-operation with the Organization" referred to in sub-paragraph *c* differs substantially from the corresponding function of permanent missions which is, under sub-paragraph *e* of article 6, to promote co-operation "for the realization of the purposes and principles of the Organization".

(5) Lastly, the function of negotiation may be exercised by permanent observer missions when an agreement "with" the Organization is under consideration, while permanent missions may perform negotiating functions "with or in" the Organization. On the other hand, negotiations not being a regularly recurrent part of a permanent observer mission's activity, the Commission added in sub-paragraph *c* the words "when required" before the words "negotiating with it" [the Organization].

Article 8⁵⁵ Multiple accreditation or appointment

1. The sending State may accredit the same person as head of mission to two or more international organizations or

⁵⁴ *Official Records of the General Assembly, Twenty-second Session, Supplement No. 1A (A/6701/Add.1).*

⁵⁵ Articles 8 and 54 of the provisional draft.

appoint a head of mission as a member of the diplomatic staff of another of its missions.

2. The sending State may accredit a member of the diplomatic staff of the mission as head of mission to other international organizations or appoint a member of the staff of the mission as a member of the staff of another of its missions.

Commentary

(1) There have been a number of cases where a head of mission, permanent representative or permanent observer, has been accredited or appointed by the sending State to more than one international organization; at the Office of the United Nations at Geneva the practice has been developed of accrediting the same person as head of mission both to the various specialized agencies having their headquarters in Geneva and to the Office itself. Other members of a mission to an international organization are likewise sometimes called upon to exercise functions on behalf of their respective States at another organization; for instance members of missions at United Nations Headquarters have exercised functions on behalf of their respective States at specialized agencies in Washington.⁵⁶ The practice of accrediting or appointing the same person, head of mission or member of the staff of the mission, to two or more organizations is not limited to organizations of universal character. Representatives have on occasion simultaneously represented their country both at the United Nations and at regional organizations (e.g. at the OAS).⁵⁷ Permanent representatives of certain European countries to the Council of Europe have been simultaneously accredited to EEC. The provisions set forth in article 8 are, therefore, based on a well established and generalized practice.

(2) The first part of paragraph 1 provides that the same person may be accredited by a sending State as "head of mission" to two or more international organizations; and the second part of that paragraph that a sending State may appoint a "head of mission" to an international organization as a "member of the diplomatic staff" of another of its missions. Paragraph 2, in turn, states that a sending State may accredit "a member of the diplomatic staff" of a mission to an international organization a "head of mission" to other international organizations or to appoint "a member of the staff" of a mission as "a member of the staff" of another of its missions. The Commission used the verb "to appoint" in connexion with designations as a member of the diplomatic staff of a mission or as a member of the staff of a mission, because only the designation as "head of mission" requires accreditation.

(3) Both paragraph 1 of article 5 of the Vienna Convention on Diplomatic Relations, which regulates the case of the accreditation of a head of mission or the assignment of a member of the diplomatic staff to more than one State, and article 4 of the Convention on Special Missions which deals with the sending of the same special mission

⁵⁶ Study of the Secretariat [see foot-note 51 above], op.cit., p. 169, para. 38.

⁵⁷ *Ibid.*, para. 39.

to two or more States, require that none of the receiving States objects. That requirement is designed to avoid the undesirable conflict and difficulties that may arise in certain instances of accreditation or assignment of the same diplomatic agent to more than one State or the sending of the same mission to two or more States. Given the different character of missions to international organizations, the considerations underlying the requirement contained in paragraph 1 of article 5 of the Convention on Diplomatic Relations and in article 4 of the Convention on Special Missions do not apply to missions to international organizations. Moreover, such a requirement is not supported by practice. Article 8 therefore does not make the accreditation or appointment of the same head of mission or member of the diplomatic staff of a mission to two or more international organizations conditional upon the lack of objection of the organizations concerned.

(4) Article 6 of the Convention on Diplomatic Relations provides that two or more States may accredit the same person as head of mission to another State, and article 5 of the Convention on Special Missions authorizes the sending of a joint special mission by two or more States. In the cases where a similar situation has arisen within the framework of representation to international organizations, what has been involved in fact has been representation to one of the organs of the organization or to a conference convened by it, and not the institution of missions as such.

Article 9.⁵⁸ Appointment of the members of the mission

Subject to the provisions of articles 14 and 72, the sending State may freely appoint the members of the mission.

Commentary

(1) The freedom of choice by the sending State of the members of the mission is a principle basic to the effective performance of the functions of the mission. Article 9 expressly provides for two exceptions to that principle. The first relates to the size of the mission; that question is regulated by article 14. The second exception is embodied in article 72 which requires the consent of the host State for the appointment of one of its nationals as head of mission or as a member of the diplomatic staff of the mission of another State.

(2) Unlike the relevant articles of the Convention on Diplomatic Relations and of the Convention on Special Missions, article 9 does not make the freedom of choice by the sending State of the members of its mission to an international organization subject to the *agrément* of either the Organization or the host State as regards the appointment of the head of mission.

(3) The members of the mission are not accredited to the host State in whose territory the seat of the organization is situated. They do not enter into direct relationship with the host State, unlike the case of bilateral diplomacy. In

the latter case, the diplomatic agent is accredited to the receiving State in order to perform certain functions of representation and negotiation between the receiving State and his own. That legal situation is the basis of the institution of *agrément* for the appointment of the head of the diplomatic mission. As regards the United Nations, the Legal Counsel made, at the 1016th meeting of the Sixth Committee on 6 December 1967 the following statement which, though referring to representatives to United Nations organs and conferences, is likewise of relevance to missions:

The Secretary-General, in interpreting diplomatic privileges and immunities, would look to provisions of the Vienna Convention [on Diplomatic Relations] so far as they would appear relevant *mutatis mutandis* to representatives to United Nations organs and conferences. It should of course be noted that some provisions—such as those relating to *agrément*, nationality or reciprocity—have no relevancy in the situation of representatives to the United Nations.⁵⁹

Article 10.⁶⁰ Credentials of the head of mission

The credentials of the head of mission shall be issued either by the Head of State or by the Head of Government or by the Minister for Foreign Affairs or, if the rules of the Organization so admit, by another competent authority of the sending State and shall be transmitted to the Organization.

Commentary

(1) Article 10 is based on paragraph 1 of General Assembly resolution 257 A (III) on permanent missions, adopted on 3 December 1958. This paragraph reads:

[The General Assembly]

Recommends

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

(2) During the debates in the Sixth Committee which led to the adoption of the resolution the use of the word "credentials" in the draft resolution under consideration⁶¹ was criticized by some representatives. It was argued that the word "credentials" was out of place because it tended to give the impression that the United Nations was a State. As matters stood, certain permanent representatives had full powers and not "credentials" (*lettres de créance*).⁶² A number of representatives, however, did not share that point of view. They preferred the use of the word "credentials", pointing out that it had been intentionally included in the draft resolution and that it was unnecessary for permanent representatives to receive full powers to carry out their functions.⁶³

⁵⁹ *Official Records of the General Assembly, Twenty-second Session, Annexes, agenda item 98, document A/C.6/385, para. 4.*

⁶⁰ Articles 12 and 57 of the provisional draft.

⁶¹ *Official Records of the General Assembly, Part I of the Third Session, Plenary Meetings of the General Assembly, Annexes to the Summary Records of Meetings, document A/609.*

⁶² *Official Records of the General Assembly, Third Session, Part I, Sixth Committee, 125th meeting, pp. 624 and 625.*

⁶³ *Ibid.*, pp. 626, 628 and 630.

⁵⁸ Articles 10 and 55 of the provisional draft.

(3) The general practice regarding issuance of credentials in respect of permanent representatives to international organizations is that these credentials are issued by the Head of State or by the Head of Government or by the Minister for Foreign Affairs. In the case of some specialized agencies the credentials of permanent representatives may also be issued by the member of government responsible for the department which corresponds to the field of competence of the organization concerned. For instance, credentials for representatives to ICAO are usually signed by the Minister for Foreign Affairs or the Minister of Communications or Transport.

(4) While the credentials of permanent representatives are usually transmitted to the chief administrative officer of the Organization, whether designated "Secretary-General", "Director-General" or otherwise, there is no consistent practice as to which organ that officer should report on the matter. The last operative paragraph of General Assembly resolution 257 A (III) instructs the Secretary-General to submit, at each regular session of the General Assembly, a report on the credentials of the permanent representatives accredited to the United Nations. In the case of some other organizations, the credentials are submitted to the Director-General who reports thereon to the appropriate organ (e.g. the Board of Governors of IAEA). There are also some organizations which have no procedure of this kind in relation to credentials.

(5) The Study of the Secretariat refers only indirectly to the question of credentials of permanent observers, in the context of facilities accorded to them. In that respect, the study quotes a memorandum, dated 22 August 1962, sent by the Legal Counsel to the then Acting Secretary-General, paragraph 4 of which states *inter alia* :

[. . .] Communications informing the Secretary-General of their [the permanent observers] appointment are merely acknowledged by the Secretary-General or on his behalf and they are not received by the Secretary-General for the purpose of presentation of credentials as is the case for Permanent Representatives of States Members of the Organization.⁶⁴

(6) During the discussion of this question in the Commission some members were in favour of adhering to the present United Nations informal practice in accordance with which permanent observers do not present credentials. However, the Commission considered that given the limited extent of that practice and in the interest of uniformity, it would be preferable to provide for the submission of credentials of permanent observers in substantially the same form as permanent representatives.

(7) Article 10 is therefore designed to consolidate the practice in the matter where such practice exists, and to set up a general pattern for the submission of the credentials of the head of mission, whether permanent representative or permanent observer, to the Organization. The article provides that the credentials of the head of mission shall be issued either by the Head of State or by the Head of Government or by the Minister for Foreign Affairs or, if the rules of the Organization so admit, by another competent authority of the sending State. The latter words, namely "or, if the rules of the Organization so

admit, by another competent authority" have been inserted in order to cover situations such as those discussed in paragraph 3 of the present commentary. The Commission has chosen the expression "competent authority" rather than the more restricted expression "competent minister" because a reasonable degree of latitude appeared desirable in view of the widely varying nature of international organizations and State practice. Thus, in some States credentials are issued by authorities which although equivalent, cannot be termed ministers. For reasons already indicated in connexion with other articles, the Commission replaced the words "if that is allowed by the practice followed in the Organization" which appeared in the provisional draft by the words "if the rules of the Organization so admit".

(8) Lastly, article 10 provides that the credentials of the head of mission "shall be transmitted to the Organization." The Commission deleted the words "the competent organ of" from the corresponding provisions of the provisional draft in view of the definition of the term "organ" given in article 1, paragraph 1 (4), according to which "organ" means a body in which States are members. In making that change, the Commission did not therefore intend to depart from practices such as those referred to in paragraph 4 of the present commentary.

Article 11.⁶⁵ Accreditation to organs of the Organization

1. A member State may specify in the credentials issued to its permanent representative that he is authorized to act as a delegate to one or more organs of the Organization.

2. Unless a member State provides otherwise its permanent representative may act as a delegate to organs of the Organization for which there are no special requirements as regards representation.

3. A non-member State may specify in the credentials issued to its permanent observer that he is authorized to act as an observer delegate to one or more organs of the Organization when this is admitted.

Commentary

(1) Paragraph 1 of this article—which is derived from paragraph 4 of General Assembly resolution 257 A (III)—provides that a member State may specify in the credentials of its permanent representative that he is authorized to act as its delegate in one or more organs of the Organization.

(2) According to the information supplied by the legal advisers of international organizations, the position as to whether a permanent representative accredited to a particular organization is entitled to represent his State before all organs of the organization varies to some extent from organization to organization. It would seem, however, to be a general practice that accreditation as a permanent representative does not by itself entitle the representative to participate in the proceedings of any organ to which he is not specifically accredited.

⁶⁴ Study of the Secretariat, *op. cit.*, p. 190, para. 169.

⁶⁵ Articles 13 and 57, para. 2, of the provisional draft.

(3) The competence of a permanent representative to represent his State on the Interim Committee of the General Assembly was discussed by that Committee in 1948. The summary of the discussion in the Committee's report contains, *inter alia*, the following passages:

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

It was pointed out that the matter of credentials was properly one for the Governments concerned to decide for themselves. For example, in accrediting the head of a permanent delegation, it might be specified that, in the absence of notification to the contrary, he might act as representative on all organs or committees of the United Nations. The representative of the Dominican Republic made it clear, however, that the proposal submitted by his Government was intended to apply exclusively to the Interim Committee.⁶⁸

(4) While paragraph 1 of article 11 embodies the practice described in paragraphs 2 and 3 of this commentary, paragraph 2 establishes a principle in favour of granting in general to the permanent representative competence to represent his country in the different organs of the organization because this simplifies the operations of international organizations.

(5) As the reservation stated in the first phrase of paragraph 2 makes clear, the competence of the permanent representative to act as a delegate of his State in the organs of the organization is necessarily subject to the relevant rules of the organization which may prescribe special requirements as regards representation to organs. Special credentials, for instance, are required for the representative of a Member State in the Security Council. The same applies in a considerable number of other organizations, for instance in the case of government delegates in the General Conference and the Governing Body of ILO, and of the Executive Board of UNESCO.

(6) It should also be noted that the rule stated in paragraph 2 of the present article is without prejudice to the functions of credentials committees or to other similar procedures which may be set up by the different organs to examine the credentials of delegates.

(7) Paragraph 3 concerning permanent observers is parallel to paragraph 1. The provisions embodied in those paragraphs are, however, substantially different. First, paragraph 3 provides that a non-member State may specify in the credentials issued to its permanent observer that he is authorized to act as "an observer delegate", and not as "a delegate", in one or more organs. Secondly, the

provision in paragraph 3 is subject to the proviso "when this is admitted". The Commission has added that proviso to paragraph 3 because there is no generally accepted practice under which a non-member State may be represented by an observer delegate in an organ of that organization. Lastly, no provision parallel to paragraph 2 of article 11 was included with regard to permanent observers, since there was no general rule in international practice that non-member States could be represented by permanent observers at meetings of organs of international organizations for which there were no special requirements as regards representation by observers.

Article 12.⁶⁷ Full powers in the conclusion of a treaty with the Organization

1. The head of mission 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 Organization.
2. The head of mission 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 Organization unless it appears from the practice of the Organization, or from other circumstances, that the intention of the parties was to dispense with full powers.

Commentary

(1) The Commission decided to limit the scope of article 12, as indicated by its title, to treaties between States and the Organization. The article does not cover treaties concluded within organs of international organizations or in conferences convened under the auspices of international organizations.

(2) This article concerns the authority of heads of mission, whether permanent representatives or permanent observers. As one of the functions of permanent observer missions is negotiating "when required" with the organization (article 7, sub-paragraph *c*), the Commission considered that the provisions of this article should apply to permanent observers.

(3) Paragraph 1 of article 12 complements the relevant provisions of paragraph 2 *b* of article 7 of the Convention on the Law of Treaties⁶⁸ by establishing for heads of

⁶⁷ Articles 14 and 58 of the provisional draft.

⁶⁸ The provisions in question read:

Article 7: Full powers

2. In virtue of their functions and without having to produce full powers, the following are considered as representing their State:

...
(*b*) heads of diplomatic missions, for the purpose of adopting the text of a treaty between the accrediting State and the State to which they are accredited;

The term "full powers" is defined in article 2, paragraph 1 (*c*), of the same Convention as meaning

a document emanating from the competent authority of a State designating a person or persons to represent the State for negotiating, adopting or authenticating the text of a treaty, for expressing the consent of the State to be bound by a treaty, or for accomplishing any other act with respect to a treaty.

⁶⁸ *Official Records of the General Assembly, Third Session, Supplement No. 10* (document A/606), paras. 67 and 68.

missions accredited to an international organization, with regard to treaties concluded by their respective States "with" the organization, a presumption similar to that contained in paragraph 2 *b* of article 7, of that Convention.

(4) Paragraph 2 of article 12 is based on the practice of international organizations. The requirement of United Nations practice that permanent representatives need full powers to sign international agreements was described as follows by the Legal Counsel in response to an inquiry made by a permanent representative in 1953:

As far as permanent representatives are concerned, their designation as such has not been considered sufficient to enable them to sign international agreements without special full powers. Resolution 257 (III) of the General Assembly of 3 December 1948 on permanent missions does not contain any provision to this effect and no reference was made to such powers during the discussions which preceded the adoption of this resolution in the Sixth Committee of the General Assembly.⁶⁹

(5) In the case of treaties in simplified form, the production of an instrument of full powers is not usually insisted upon in the practice of States. Since treaties between States and international organizations are sometimes concluded by exchanges of notes or in other simplified forms, the Commission has included in paragraph 2 of article 12 a clause which dispenses with the production of full powers for the purpose of signing a treaty if "it appears from the practice of the Organization, or from other circumstances, that the intention of the parties was to dispense with full powers".

Article 13.⁷⁰ Composition of the mission

In addition to the head of mission, the mission may include diplomatic staff, administrative and technical staff and service staff.

Commentary

(1) Article 13 is modelled on article 9, paragraph 1, of the Convention on Special Missions.

(2) The terms used in article 13 are defined in article 1 of the draft. Where appropriate, the extent of their meaning has been explained in the commentary to that article.

(3) Every mission must include a head since the host State and the organization must at any given moment know who is responsible for the mission. As for the further composition of missions, it may be very similar to that of diplomatic missions which States accredit to each other. In paragraphs 7 and 8 of its commentary on articles 13 to 16 of the 1958 draft articles on diplomatic intercourse and immunities,⁷¹ the Commission set out the normal composition of diplomatic missions.

(4) Missions often include experts and advisers as members of the diplomatic staff, who play an important role,

especially as regards international organizations of a technical character.

Article 14.⁷² Size of the mission

The size of the 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.

Commentary

(1) Article 14 is modelled on article 11, paragraph 1 of the Convention on Diplomatic Relations. There is, however, one essential difference between the two texts. According to the provision of the Vienna Convention, the receiving State "may require"⁷³ that the size of a mission be kept within limits considered by it to be reasonable and normal [. . .]. Article 14 of the present draft articles states the problem differently. It creates an obligation for the sending State, when establishing the composition of its mission, to keep its size within "reasonable and normal" limits.

(2) In their replies to the questionnaire addressed to them by the Legal Counsel, the specialized agencies and IAEA stated that they had encountered no difficulties in relation to the size of permanent missions accredited to them, and that host States had imposed no restrictions on the size of those missions. The practice of the United Nations itself, as summed up in the Study of the Secretariat, indicates that although no provision appears to exist specifically delimiting the size of permanent missions it has been generally assumed that some upper limit does exist.⁷⁴

(3) When negotiations were held with the United States of America authorities concerning the Agreement regarding the Headquarters of the United Nations,⁷⁵ the United States representative, while accepting the principle of the proposed article V dealing with permanent representatives "felt that there should be some safeguard against too extensive an application". The text thereupon suggested—which, with slight modifications, was finally adopted as article V—was considered by the Secretary-General and the Negotiating Committee to be a possible compromise. This compromise is reflected in section 15, paragraph 2 (article V), which grants privileges and immunities to:

such resident members of [the] staffs [of the resident representatives] as may be agreed upon between the Secretary-General, the Government of the United States and the Government of the Member concerned.

(4) The main difference between article 14 and the corresponding provision of the Convention on Diplomatic Relations has already been indicated in paragraph 1 of this commentary. In this respect, the Commission wishes to observe that, unlike the case of bilateral diplomacy, the

⁶⁹ Study of the Secretariat, op. cit., p. 169, para. 35.

⁷⁰ Articles 15 and 59 of the provisional draft.

⁷¹ *Yearbook of the International Law Commission, 1958*, vol. II, p. 94, document A/3859, para. 53.

⁷² Articles 16 and 60 of the provisional draft.

⁷³ Emphasis supplied.

⁷⁴ Study of the Secretariat, op. cit., p. 166, para. 18.

⁷⁵ For the reference to the text of the Agreement, see foot-note 36 above.

members of missions to international organizations are not accredited to the host State. Nor are they accredited to the international organization in the proper sense of the word. As will be seen in different parts of the draft articles, remedy for the grievances which the host State or the organization may have against the permanent mission or one of its members cannot be sought in the prerogatives which derive from the fact that diplomatic envoys are accredited to the receiving State and from the latter's inherent right, in the final analysis, to refuse to maintain relations with the sending State. In the case of missions to international organizations, the principle of the freedom of the sending State in the composition of its mission and the choice of its members must be recognized in order to ensure the effective functioning of multilateral diplomacy. Remedies against any misuse of that freedom must be sought in the consultation and conciliation procedure provided for in articles 81 and 82 of the present draft articles.

(5) Like paragraph 1 of article 11 of the Convention on Diplomatic Relations, article 14 lays down as objective factors in determining the size of the mission "the needs of the particular mission" and "the circumstances and conditions in the host State." To these article 14 adds the "functions of the Organization". Indeed, the Commission observed that a number of specialized agencies drew attention to the fact that, owing to the technical and operational nature of their functions, they corresponded directly with ministries or other authorities of member States; the role of missions to those agencies tended to be of a formal and occasional nature rather than of day-to-day importance.

Article 15.⁷⁶ Notifications

1. The sending State shall notify the Organization of:

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

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

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

(d) the beginning and the termination of the employment of persons resident in the host State as members of the staff of the mission or as persons employed on the private staff;

(e) the location of the premises of the mission and of the private residences enjoying inviolability under articles 23 and 29, as well as any other information that may be necessary to identify such premises and residences.

2. Where 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.

4. The Sending State may also transmit to the host State the notifications referred to in paragraphs 1 and 2.

Commentary

(1) With the exception of paragraph 1 *e* which is modelled on paragraph 1 *f* of article 11 of the Convention on Special Missions, the provisions of article 15 are modelled on those of article 10 of the Convention on Diplomatic Relations, with the changes required by the particular nature of missions to international organizations.

(2) It is essential that the organization and the host State be informed of the persons who are entitled to privileges and immunities. Consequently sending States are obliged to give notification as regards missions to international organizations, just as they are with regard to diplomatic and special missions.

(3) The question of the notification of the appointment of members of permanent missions to the United Nations was regulated by General Assembly resolution 257 A (III), paragraph 2 of which provides that

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

On the basis of the practice established in 1947 and 1948, the normal procedure at present is for permanent missions to notify the Protocol and Liaison Section of the Secretariat of the names and ranks of persons on their staff who are entitled to privileges and immunities under sub-sections 1 and 2 of section 15 of the Headquarters Agreement. These particulars are then forwarded by the Secretariat to the United States Department of State through the United States Mission.

(4) The question of notifications is also dealt with in the "Decision of the Swiss Federal Council concerning the legal status of permanent delegations to the European Office of the United Nations and to other international organizations having their headquarters in Switzerland" of 31 March 1948.⁷⁷ Paragraph 4 of the decision provides that:

The establishment of a permanent delegation and the arrivals and departures of members of permanent delegations are notified to the Political Department by the diplomatic mission of the State concerned at Berne. The Political Department issues to members of delegations an identity card (*carte de légitimation*) stating the privileges and immunities to which they are entitled in Switzerland.

(5) While the United Nations has a system of notification of the appointment of members of permanent missions and of their departures and arrivals, the arrangements applied within other international organizations of universal character regarding notifications appear to be fragmentary and far from systematized. The Commission took the view that it was desirable to establish a uniform regulation and article 15 seeks to do this.

⁷⁷ United Nations Legislative Series, *Legislative texts and treaty provisions concerning the legal status, privileges and immunities of international organizations* (United Nations publication, Sales No.: 60.V.2), p. 92. [Text in French].

⁷⁶ Articles 17 and 61 of the provisional draft.

(6) The rule formulated in article 15 is based on considerations of principle as well as practical considerations. Its rationale 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 (para. 1). Those notifications are transmitted to the host State by the organization (para. 3). Paragraph 4 of the article makes it optional for the sending State to address notifications directly to the host State. Paragraph 4 provides a supplement to and not an alternative for the pattern prescribed in paragraphs 1 and 3 of the article.

(7) Sub-paragraph *a* of paragraph 1 departs from the corresponding provision of the Convention on Diplomatic Relations in that it specifies an obligation for the sending State to notify changes in the status of the members of the mission.

(8) With respect to sub-paragraph *d* of paragraph 1, the Commission considered that the expression "engagement and discharge" which appeared in the corresponding sub-paragraph of its earlier draft and derives from article 10, paragraph 1 *d* of the Convention on Diplomatic Relations was too narrow; for instance it did not cover the case of the death of one of the persons referred to. The Commission therefore replaced it by the words "the beginning and the termination of the employment".

(9) The Commission included paragraph 1 *e* at its twenty-third session because of the need of the host State to be aware of the exact location of the premises and private residences whose inviolability it is called upon to ensure.

Article 16.⁷⁸ *Chargé d'affaires ad interim*

If the post of head of mission is vacant, or if the head of mission is unable to perform his functions, a *chargé d'affaires ad interim* shall act as head of mission. The name of the *chargé d'affaires ad interim* shall be notified to the Organization.

Commentary

(1) Article 16, which is modelled on paragraph 1 of article 19 of the Convention on Diplomatic Relations, provides for situations when the post of head of mission falls vacant, or the head of mission is unable to perform his functions. As indicated by the use of the expression "head of mission", it covers both permanent representatives and permanent observers. The provision which the Commission had adopted at its twenty-second session concerning the designation of a *chargé d'affaires ad interim* in the case of a prolonged absence of the permanent observer differed from the corresponding provision on permanent representatives inasmuch as it provided a faculty instead of imposing an obligation on the sending State. At its present session, however, the Commission has eliminated that difference: it considers that once a mission is established, it is necessary in the interest both of the organization and of the host State that there should be at any given moment a person responsible for the mission.

⁷⁸ Articles 18 and 62 of the provisional draft.

(2) In the case of permanent missions, General Assembly resolution 257 A (III) envisages the possibility that the duties of head of mission may be performed temporarily by someone other than the permanent representative. Paragraph 3 of the resolution provides that:

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

As regards permanent observer missions, it is the practice of a number of them, in particular in Geneva, to appoint members of their staff to be *chargé d'affaires ad interim* in the case of a prolonged absence of the permanent observer.

(3) Article 16 does not retain the word "provisionally" which appears in paragraph 1 of article 19 of the Convention on Diplomatic Relations; the Commission deemed the word unnecessary since the concept it expresses is already covered by the words "*ad interim*", and misleading since it may give the impression that acts performed by a *chargé d'affaires* are subject to confirmation. Also, the Commission has deleted the reference to the authority responsible for notifying the name of the *chargé d'affaires ad interim* to the organization which appeared in the corresponding provisions of its earlier draft. In its view the important point is that notification should be given to the organization and it is not necessary to specify by what authority it should be given. As regards permanent missions, the term "*chargé d'affaires*" should be distinguished from the terms "alternate representative" or "deputy permanent representative". The latter are frequently used by member States to designate the person ranking immediately after the permanent representative.

Article 17.⁷⁹ *Precedence*

1. Precedence among permanent representatives shall be determined by the alphabetical order of the names of the States used in the Organization.

2. Precedence among permanent observers shall be determined by the alphabetical order of the names of the States used in the Organization.

Commentary

(1) Article 17 adopts the rule of alphabetical order to govern precedence. That rule is intended to apply in the case of permanent representatives as well as in the case of permanent observers. However, the Commission has deemed it appropriate to provide in separate paragraphs for each case to make it clear that only two orders of precedence are covered by the article: precedence of permanent representatives as among themselves and precedence of permanent observers as among themselves.

(2) At its twenty-second session, the Commission had not included a provision on precedence for permanent observers. At the present session, however, the Commission took the view that the regulation which the draft articles try to achieve should be as complete as possible, and it therefore included such a provision in paragraph 2.

⁷⁹ Article 19 of the provisional draft.

(3) The articles on precedence among permanent representatives contained in the Commission's provisional draft laid down a dual criterion for determining precedence: alphabetical order or the time and the date of the submission of credentials. At its present session, the Commission decided that affording a choice between two solutions in accordance with usage in the organization did not offer a definite solution. It therefore retained only the rule of alphabetical order since it is generally followed in international organizations. For clarity, and since there are several alphabetical orders, the article specifies that the alphabetical order is that of the names of the States concerned used in the Organization.

Article 18.⁸⁰ Office of the mission

The sending State may not, without the prior consent of the host State, establish an office of the mission in a locality within the host State other than that in which the seat or an office of the Organization is established.

Commentary

(1) Article 18 starts from the presumption that the sending State has a right to establish an office in the locality where the seat or an office of the organization is established. Its purpose is to ensure that an office of the mission is established in a locality other than that in which the seat or an office of the organization is established, only with the consent of the host State.

(2) The article is confined to the establishment of an office of the mission in the territory of the host State as is expressly indicated by the words "within the host State" which are inserted after the word "locality". The Commission deleted a provision contained in a separate paragraph of the corresponding article of its provisional draft which allowed for the establishment of offices in the territory of a State other than the host State only with the prior consent of such a State. The Commission considered that this provision related to a wholly exceptional situation with which it was unnecessary to deal in the draft articles.

(3) The words "office" and "locality" appear in the singular, since the article is concerned with the establishment of a specific office of the mission.

Article 19.⁸¹ 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. The permanent observer mission shall have the right to use the flag and emblem of the sending State on its premises.

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

Commentary

(1) The right to the use of the flag and emblem of the sending State was recognized for diplomatic missions in article 20 of the Convention on Diplomatic Relations. The present article is modelled on that text as far as recognizing a similar right for missions to international organizations is concerned. However, the difference in functions between permanent missions and permanent observer missions led the Commission to establish some distinction as regards the extent of the right accorded to each kind of mission. Consequently, it decided to provide in separate paragraphs for each case.

(2) Paragraph 1 of the article concerns permanent missions. Unlike the corresponding article of the Vienna Convention on Diplomatic Relations, it is divided in two sentences to make clearer the distinction between the right granted to the permanent mission as such and the right granted to the permanent representative.

(3) Paragraph 2 covers permanent observer missions. The omission in this paragraph of a sentence corresponding to the second sentence of paragraph 1 reflects the Commission's opinion that some reduction in the visible signs of the presence of permanent observers was justified in view of the functional difference between permanent missions and permanent observer missions.

(4) Paragraph 3 of the article concerning the exercise of the right accorded under paragraphs 1 and 2 is common to both kinds of missions. It is modelled on paragraph 3 of article 29 of the Convention on Consular Relations⁸² and on paragraph 2 of article 19 of the Convention on Special Missions.

Article 20.⁸³ General facilities

1. The host State shall accord:

(a) to the permanent mission all facilities for the performance of its functions;

(b) to the permanent observer mission the facilities required for the performance of its functions.

2. The Organization shall assist the mission in obtaining those facilities and shall accord to the mission such facilities as lie within its own competence.

Commentary

(1) Paragraph 1 of article 20 is modelled on article 25 of the Convention on Diplomatic Relations. Sub-paragraph *a* provides that the host State shall accord to the permanent mission "all facilities" for the performance of its functions. The Commission replaced in the English version the expression "full facilities" of the provisional

⁸⁰ Articles 20 and 63 of the provisional draft.

⁸¹ Articles 21 and 64 of the provisional draft.

⁸² United Nations, *Treaty Series*, vol. 596, p. 261.

⁸³ Articles 22 and 65 of the provisional draft.

draft by the expression "all facilities". It considered that such a departure from the corresponding provision of the Convention on Diplomatic Relations was justified, the expression "all facilities" rendering better the idea expressed in the French ("*toutes facilités*") and Spanish ("*toda clase de facilidades*") versions. Sub-paragraph *b* states that the host State shall accord to the permanent observer mission "the facilities required" for the performance of its functions. The Commission considered it advisable to retain the intentional difference in wording between subparagraphs *a* and *b*. The different wording of subparagraph *a* and subparagraph *b* reflects a certain distinction between the functions, obligations and needs of "permanent missions" on the one hand, and those of "permanent observer missions" on the other, which makes it unnecessary for the latter to be given the same facilities as the former.

(2) Paragraph 2 establishes the obligation of the organization "to assist" the mission in obtaining the facilities to which permanent missions and permanent observer missions are entitled under paragraph 1. It provides also that the Organization "shall accord to the mission such facilities as lie within its own competence". The latter words are designed to recognize both that the facilities which an organization is able to supply are limited and that the according of facilities to a mission by an organization has to be carried on in light of the relevant rules of the organization.

Article 21.⁸⁴ Premises and accommodation

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 the mission or assist the sending State in obtaining accommodation in some other way.

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

Commentary

(1) Article 21 is modelled on article 21 of the Convention on Diplomatic Relations.

(2) As indicated by the Commission in the commentary on the relevant provision (article 19) of its draft articles on diplomatic intercourse and immunities which served as the basis for the Convention,

the laws and regulations of a given country may make it impossible for a mission to acquire the premises necessary for it. For that reason the Commission inserted in the draft an article which makes it obligatory for the receiving State to ensure the provision of accommodation for the mission if the latter is not permitted to acquire it.⁸⁵

These considerations equally underlie paragraph 1 of the present article.

⁸⁴ Articles 23 and 66 of the provisional draft.

⁸⁵ *Yearbook of the International Law Commission, 1958*, vol. II, p. 95, document A/3859, para. 53.

(3) Certain members of the Commission pointed out during the discussion of the article that in some cases property rights over the premises of a mission to an international organization could not be obtained by acquisition under the applicable municipal law and that in other cases the premises were acquired not by the sending State but, on its behalf, by the head of mission. They believed therefore that the expressions "acquisition" and "by the sending State" unduly restricted the scope of article 21. It was, however, observed that all such cases would come under the clause of article 21 obliging the host State to assist the sending State "in obtaining accommodation in some other way". The Commission decided, therefore, to retain in the article the expressions in question.

(4) The assistance which the organization may give to the members of the mission under paragraph 2 in obtaining suitable accommodation would be very useful, among other reasons, because the organization itself would as a rule have experience of conditions in the host State. In light of the concern expressed in comments submitted by some secretariats of international organizations regarding the burdens resulting from the requirement of paragraph 2 of the article, the Commission wishes to stress that the organization's obligation under that paragraph is *to assist in obtaining*, not *to provide*. On the other hand, the statement of the organization's obligation does not exclude the use of arrangements such as those existing at the Headquarters of the United Nations in New York or at its Office in Geneva for joint activities of international organizations in this area.

Article 22.⁸⁶ Assistance by the Organization in respect of privileges and immunities

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

Commentary

(1) One of the characteristics of representation to international organizations is that the observance of juridical rules governing privileges and immunities is not solely the concern of the sending and the receiving (host) State as it is the case in bilateral diplomacy. In the discussion of the "Question of diplomatic privileges and immunities" (agenda item 98) which took place in the Sixth Committee during the twenty-second session of the General Assembly (1967) it was generally agreed that the United Nations itself had an interest in the enjoyment by the representatives of Member States of the privileges and immunities necessary to enable them to carry out their functions. It was also recognized that the Secretary-General should maintain his efforts to ensure that the privileges and immunities concerned were respected.⁸⁷

⁸⁶ Articles 24 and 66 of the provisional draft.

⁸⁷ *Official Records of the General Assembly, Twenty-second Session, Annexes*, agenda, item 98, document A/6965, para. 14.

(2) In his statement at the 1016th meeting of the Sixth Committee (1967), the Legal Counsel, speaking as the representative of the Secretary-General, stated that:

It therefore seems elementary that the rights of representatives should properly be protected by the Organization and not left entirely to bilateral action of the States immediately involved. The Secretary-General would therefore continue to feel obligated in the future, as he has done in the past, to assert the rights and interests of the Organization on behalf of representatives of Members as the occasion may arise. I would not understand from the discussion in this Committee that the Members of the Organization would wish him to act in any way different from that which I have just indicated. Likewise, since the Organization itself has an interest in protecting the rights of representatives, a difference with respect to such rights may arise between the United Nations and a Member and consequently be the subject of a request for an advisory opinion under section 30 of the Convention [on the Privileges and Immunities of the United Nations]. It is thus clear that the United Nations may be one of the "parties", as that term is used in section 30.⁸⁸

(3) The Commission was unable to agree with a governmental comment that even where there was 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 22. In this regard, it should be recalled that the obligation imposed by article 22 on the organization is subject to the proviso "where necessary". The obligation of the organization to assist the sending State, the mission and the members of the mission relates to the articles of the draft providing for privileges and immunities. The scope of the organization's obligation to assist relates only to these privileges and immunities as formulated in the present draft.

Article 23.⁸⁹ Inviolability of the premises

1. The premises of the mission shall be inviolable. The agents of the host State may not enter them, except with the consent of the head of mission. 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 mission.

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

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

Commentary

(1) The first and second sentences of paragraph 1 and paragraphs 2 and 3 of article 23 are modelled on article 22 of the Convention on Diplomatic Relations. The third sentence of paragraph 1 is modelled on the third sentence

of paragraph 1 of article 25 of the Convention on Special Missions. The General Assembly introduced that sentence in article 25 of the Convention on Special Missions, following the adoption by the Sixth Committee of an amendment submitted by Argentina to article 25 of the International Law Commission's draft articles on special missions.⁹⁰

(2) The requirement that the host State should ensure the inviolability of the missions' premises, archives and documents has been generally recognized. In a letter sent to the Legal Adviser of one of the specialized agencies in 1964, the Legal Counsel of the United Nations stated that:

There is no specific reference to mission premises in the Headquarters Agreement and the diplomatic status of these premises therefore arises from the diplomatic status of a resident representative and his staff.⁹¹

(3) The headquarters agreements of some of the specialized agencies contain provisions relating to the inviolability of the premises of permanent missions. An example of such provision may be found in article XI (section 24) of the Headquarters Agreement of FAO.

(4) The inviolability of the premises of the United Nations and the specialized agencies is provided in article II (section 3) of the Convention on the Privileges and Immunities of the United Nations and article III (section 5) of the Convention on the Privileges and Immunities of the Specialized Agencies respectively. These provisions state that the property and assets of the United Nations and the specialized agencies, wherever located and by whomsoever held, shall be immune from search, requisition, confiscation, expropriation and any other form of interference, whether by executive, administrative, judicial or legislative action.

(5) The Commission unanimously agreed on the principle of the inviolability of the premises of missions to international organizations. The Commission was divided only on the question raised by the third sentence of paragraph 1.⁹² Some members were in favour of formulating the inviolability of the premises without exceptions, while others considered that such inviolability should not prevail over the fundamental obligation of the host State to guard against loss of life and personal injuries in serious cases of fire or other disaster. In adopting such a formulation, the Commission felt entitled to assume that both sending and host States would apply the provision embodied therein in good faith. The Commission wished to make it clear also that, in the context of paragraph 1 of article 23 of the draft, the words "head of mission" ("permanent representative" or "permanent observer") were to be understood to mean any person authorized to act on his behalf.

⁹⁰ Amendment adopted at the 1088th meeting of the Sixth Committee during the consideration of the item entitled "Draft Convention on Special Missions" at the twenty-third session (1968) of the General Assembly (See *Official Records of the General Assembly, Twenty-third Session. Annexes*, agenda item 85, document A/7375, paras. 190, 192, 194 and 195).

⁹¹ Study of the Secretariat, op. cit., p. 187, para. 154.

⁹² cf. article 22 of the Convention on Diplomatic Relations and article 25 of the Convention on Special Missions.

⁸⁸ *Ibid.*, document A/C.6/385, para. 8.

⁸⁹ Articles 25 and 67 of the provisional draft.

(6) The inviolability of premises granted by this article applies to the "premises of the mission" as defined in article 1, paragraph 1 (26), of the draft.

Article 24.⁹³ Exemption of the premises from taxation

1. The premises of the mission of which the sending State or any person acting on its behalf is the owner or the lessee shall be exempt from all national, regional or municipal dues and taxes 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 any person acting on its behalf.

Commentary

(1) Article 24 is modelled on article 23 of the Convention on Diplomatic Relations.

(2) The replies of the United Nations and the specialized agencies indicate that the exemption provided for in this article is generally recognized. Examples of provisions of headquarters agreements for such exemption are to be found in article XI of the Headquarters Agreement of FAO and in articles XII and XIII of the Headquarters Agreement of IAEA.

(3) The Commission changed the beginning of paragraph 1 to correspond to that of article 32, paragraph 1, of the Convention on Consular Relations. It might be argued that the wording of paragraph 1, as provisionally adopted in 1969, covered only taxes levied against persons holding title to or possession of real property and did not include taxes made a direct charge on the property itself. As modified, the beginning of the paragraph reads: "The premises of the mission of which the sending State or any person acting on its behalf is the owner or the lessee . . .". A consequential change has been made at the end of paragraph 2 ("by persons contracting with the sending State or any person acting on its behalf").

(4) The Commission, bearing in mind the provisions of article 33 of the draft—especially sub-paragraph *a*—was of the opinion that article 24 should be interpreted as covering also "indirect taxes". It considered that the exemption provided for in article 24 covered likewise shares in housing corporations in respect of mission premises.

Article 25.⁹⁴ Inviolability of archives and documents

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

⁹³ Articles 26 and 67 of the provisional draft.

⁹⁴ Articles 27 and 67 of the provisional draft.

Commentary

(1) Article 25 is modelled on article 24 of the Convention on Diplomatic Relations.

(2) In paragraph 3 of its commentary on that article (article 22: Inviolability of the archives) of its 1958 draft on diplomatic intercourse and immunities, the Commission commented:

Although the inviolability of the mission's archives and documents is at least partly covered by the inviolability of the mission's premises and property, a special provision is desirable because of the importance of this inviolability to the functions of the mission. This inviolability is connected with the protection accorded by article 25 to the correspondence and communications of the mission.⁹⁵

Article 26.⁹⁶ 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 freedom of movement and travel in its territory to all members of the mission and members of their families forming part of their respective households.

Commentary

(1) Article 26 is modelled on article 26 of the Convention on Diplomatic Relations.

(2) The only difference of substance between article 26 of the Convention and article 26 of the present draft is the addition of the phrase "and members of their families forming part of their respective households". The Commission considered that the families of members of the mission should have the right to move freely in the host State. The Commission decided that it was desirable to include a specific provision to that effect in the present draft.

(3) Replies of the specialized agencies indicate that no restrictions have been imposed by the host State on the movement of members of missions to international organizations.

(4) Some members of the Commission referred to governmental comments which raised the question whether the proper functioning of missions to international organizations required that their members enjoy the same freedom of movement that was granted to members of diplomatic missions. They suggested that the freedom of movement guaranteed in article 26 should be qualified in the same manner as in the corresponding article (article 27) of the Convention on Special Missions. In their view it would be appropriate to restrict freedom of movement to what was necessary for the purpose of the functions of the mission. The majority of the members of the Commission considered that the only grounds on which the host State could validly restrict freedom of movement were those of national security, and the article already covered that

⁹⁵ *Yearbook of the International Law Commission, 1958*, vol. II, p. 96, document A/3859, para. 53.

⁹⁶ Articles 28 and 68 of the provisional draft.

point. They thought that any attempt to introduce a limitation based on the functional element would unduly restrict the freedom of movement of members of missions. The view of those members was that it would be preferable not to add the reservation which had been provided for in the case of special missions and which was justified by the particular character of those missions.

Article 27.⁹⁷ Freedom of communication

1. The host State shall permit and protect free communication on the part of the mission for all official purposes. In communicating with the Government of the sending State, its permanent diplomatic missions, consular posts, permanent missions, permanent observer missions, special missions and delegations, wherever situated, the mission may employ all appropriate means, including couriers and messages in code or cipher. However, the mission may install and use a wireless transmitter only with the consent of the host State.

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

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

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

5. The courier of the 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 mission may designate couriers *ad hoc* of the mission. In such cases the provisions of paragraph 5 shall also apply, except that the immunities therein mentioned shall cease to apply when the courier *ad hoc* has delivered to the consignee the mission's bag in his charge.

7. The bag of the 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 mission. By arrangement with the appropriate authorities of the host State, the mission may send one of its members to take possession of the bag directly and freely from the captain of the ship or of the aircraft.

Commentary

(1) Article 27 is modelled on article 27 of the Convention on Diplomatic Relations.

(2) Missions to the United Nations, the specialized agencies and other international organizations enjoy in practice freedom of communication on the same terms as the diplomatic missions accredited to the host State.

⁹⁷ Articles 29 and 67 of the provisional draft.

(3) Replies of the United Nations and specialized agencies indicate also that the inviolability of correspondence, which is provided for in section 11 *b* (article IV), of the Convention on the Privileges and Immunities of the United Nations and section 13 *b* (article V), of the Convention on the Privileges and Immunities of the Specialized Agencies, has been fully accorded.

(4) One difference between this article and article 27 of the Convention on Diplomatic Relations is the addition in paragraph 1 of the words "permanent missions", "permanent observer missions", "special missions" and "delegations" in order to co-ordinate the article with other provisions of the present draft and article 28, paragraph 1, of the Convention on Special Missions and to enable those missions and delegations to communicate with each other. The reference to "permanent observer missions" and "delegations" has been added at the second reading. When the draft article was provisionally formulated in 1969, the Commission had not yet undertaken the study of permanent observer missions and delegations to organs or to conferences.

(5) A further difference is that paragraph 7 of article 27 provides that the bag of the mission may be entrusted not only to the captain of a commercial aircraft, as provided for the diplomatic bag in article 27 of the Convention on Diplomatic Relations, but also to the captain of a merchant ship. A similar provision is found in article 35 of the Convention on Consular Relations and article 28 of the Convention on Special Missions.

(6) On the basis of article 28 of the Convention on Special Missions, the article uses the expressions "the bag of the mission" and the "courier of the mission". The expressions "diplomatic bag" and "diplomatic courier" were not used in order to prevent any possibility of confusion with the bag and courier of the diplomatic mission.

(7) Finally, the Commission reversed its decision of 1969 and included the phrase "By arrangement with the appropriate authorities of the host State" at the beginning of the last sentence of paragraph 7. In paragraph 7 of the commentary to article 29 of the provisional draft, the Commission had already expressed the view that "the omission of the phrase was not, however, to be taken as implying that a member of the permanent mission could, for example, proceed to an aircraft without observing the applicable regulations".⁹⁸ The phrase in question is based on the corresponding provision of article 28, paragraph 8, of the Convention on Special Missions.

Article 28.⁹⁹ Personal inviolability

The persons of the head of mission and of the members of the diplomatic staff of the mission shall be inviolable. They shall not be liable to any form of arrest or detention. The

⁹⁸ *Yearbook of the International Law Commission, 1969*, vol. II, p. 211, document A/7610/Rev.1, chap. II, B.

⁹⁹ Articles 30 and 69 of the provisional draft.

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 29.¹⁰⁰ Inviolability of residence and property

1. The private residence of the head of mission and of the members of the diplomatic staff of the mission shall enjoy the same inviolability and protection as the premises of the mission.

2. Their papers, correspondence and, except as provided in paragraph 3 of article 30, their property, shall likewise enjoy inviolability.

Commentary

(1) Articles 28 and 29 are modelled on articles 29 and 30 of the Convention on Diplomatic Relations.

(2) Articles 28 and 29 deal with two generally recognized immunities which are essential for the performance of the functions of the head of mission and of the members of the diplomatic staff of the mission.

(3) The principle of the personal inviolability of the head of mission and of the members of the diplomatic staff, which article 28 confirms, implies the obligation for the host State to respect, and to ensure respect for, the person of the individuals concerned. The host State must take all necessary measures to that end, which may include the provision of a special guard if circumstances so require.

(4) Inviolability of all papers and documents of representatives of States to the organs of the organizations concerned is consistently provided for in the conventions on the privileges and immunities of the United Nations and the specialized agencies and in the agreements relating to other international organizations.

(5) In paragraph 1 of its commentary on article 28 (Inviolability of residence and property) of its 1958 draft articles on diplomatic intercourse and immunities, the Commission stated:

This article concerns the inviolability accorded to the diplomatic agent's residence and property. Because this inviolability arises from that attaching to the person of the diplomatic agent, the expression "the private residence of a diplomatic agent" necessarily includes even a temporary residence of the diplomatic agent.¹⁰¹

(6) The wording of the consolidated provisions of articles 28 and 29 follows that of the provisional draft articles except for a minor drafting change introduced at the beginning of the second sentence of article 28 in the French and Spanish versions. In the French version the word "ils" has been replaced by the word "ceux-ci" and in the Spanish the words "*Ni el jefe de la misión ni esos miembros*" have been inserted before "*podrán ser*". The Commission made those drafting changes in the French and Spanish versions in order to make it clearer

that the "head of mission" and the "members of the diplomatic staff of the mission" are not liable to any form of arrest or detention.

(7) Lastly, it should be pointed out that, as provided for in article 29, the inviolability of the private residence of the head of mission and of the members of the diplomatic staff of the mission is "the same" as the inviolability of the "premises of the mission" regulated by article 23 of the draft. Therefore, the observations made on the terms in which the inviolability of the premises of the mission is formulated in article 23 also apply to article 29 (see commentary to article 23).

Article 30.¹⁰² Immunity from jurisdiction

1. The head of mission and the members of the diplomatic staff of the 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 sending State for the purposes of the mission;

(b) 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 by the person in question outside the exercise of the functions of the mission where those damages are not recoverable from insurance.

2. The head of mission and the members of the diplomatic staff of the mission are not obliged to give evidence as witnesses.

3. No measures of execution may be taken in respect of the head of mission or a member of the diplomatic staff of the mission except in cases coming under sub-paragraphs *a*, *b*, *c* and *d* of paragraph 1, 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 head of mission or of a member of the diplomatic staff of the mission from the jurisdiction of the host State does not exempt him from the jurisdiction of the sending State.

Commentary

(1) Article 30 is modelled on article 31 of the Convention on Diplomatic Relations. Paragraph 1 of article 30 grants complete immunity from criminal jurisdiction. Subject to the exceptions stated in that paragraph, immunity from civil and administrative jurisdiction is also recognized.

(2) The Commission agreed that the phrase "civil and administrative jurisdiction" in paragraph 1 of article 30 is

¹⁰⁰ Articles 31 and 69 of the provisional draft.

¹⁰¹ *Yearbook of the International Law Commission*, vol. II, p. 98, document A/3859, para. 53.

¹⁰² Articles 32 and 69 of the provisional draft.

used in a general sense, in contradistinction to "criminal jurisdiction", and includes, for instance, commercial and labour jurisdiction.

(3) Paragraph 4 of the Commission's commentary to article 32 (Immunity from jurisdiction) of the provisional draft stated:

After a lengthy discussion, the Commission was unable owing to a wide divergence of views, to reach any decision on the substance of the provision in sub-paragraph 1 (*d*). It decided to place the provision in brackets and to bring it to the attention of Governments. Those favouring the proposal, which was based on sub-paragraph (2) (*d*) of article 31 of the draft articles on special missions, argued that it would meet a real and growing problem which had, it was said, been inadequately recognized at the 1961 Vienna Conference on Diplomatic Intercourse and Immunities. Further, there were problems in some countries concerning the application and effect of insurance laws and practices as well as the adequacy of the insurance coverage. On the other hand, it was argued that the Vienna precedent should be followed, since it provided the closer analogy. In addition, considerable emphasis was placed on articles 34 and 45 of the present draft [articles 31, paragraph 5, and 75 of the present draft articles]; the former provision, which goes beyond the corresponding resolution of the 1961 Vienna Conference, requires the sending State to waive immunity 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 immunity is not waived the sending State "shall use its best endeavours to bring about a just settlement of such claims".¹⁰³ The latter provision requires all persons enjoying privileges and immunities to respect the laws and regulations of the host State. Those opposing the proposal in sub-paragraph 1 (*d*) also argued that one particular kind of claim should not be singled out in this way and that the functional line drawn in it would be difficult to apply.¹⁰⁴

(4) At its present session, the Commission examined again the question of the advisability of including sub-paragraph *d* of paragraph 1 in the text of the article as well as its formulation. Several Governments had submitted comments on the matter but, as the Special Rapporteur had pointed out, those comments were "not sufficient in themselves to give to the Commission any clear directive as to the manner in which the question should be finally resolved". (A/CN.4/241 and Add.1-6,¹⁰⁵ chap. II, observations on article 32, para. 21.) Most members were in favour of including sub-paragraph *d* of paragraph 1 in the text of the article, as the General Assembly did in article 31 of the Convention on Special Missions, with a slightly different wording to reflect the frequently expressed desire that the vehicles of members of missions to international organizations should be insured against third-party risks.

(5) Accordingly, the Commission decided to include sub-paragraph *d* of paragraph 1 in the text of article 30 and to make therein an express reference to the question of the insurance coverage. In doing so, the Commission made two changes in the wording of that sub-paragraph. It replaced the words "outside the official functions of the

person in question", of which there was no definition, by the words "by the person in question outside the exercise of the functions of the mission". The "functions of the mission" are defined in articles 6 and 7 of the present draft. Secondly, the Commission added at the end of the sub-paragraph the phrase "where those damages are not recoverable from insurance". The Commission used that phrase instead of other alternatives, like for instance "and only if those damages are not covered by insurance," to avoid any possibility that, under the applicable law in force in the host State, recovery on a claim might be defeated if an insurance company were able to invoke immunity from jurisdiction of a person causing an accident in order to avoid compensating the victim.

Article 31.¹⁰⁶ Waiver of immunity

1. The immunity from jurisdiction of the head of mission and members of the diplomatic staff of the mission and of persons enjoying immunity under article 36 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 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.

5. If the sending State does not waive the immunity of any of the persons mentioned in paragraph 1 in respect of a civil action, it shall use its best endeavours to bring about a just settlement of the case.

Commentary

(1) Paragraphs 1 to 4 of article 31 are modelled on article 32 of the Convention on Diplomatic Relations. Paragraph 5 is based on resolution II adopted by the United Nations Conference on Diplomatic Intercourse and Immunities on 14 April 1961¹⁰⁷ and on the recommendation contained in General Assembly resolution 2531 (XXIV) of 8 December 1969 adopted in connexion with the Convention on Special Missions. Paragraph 5 replaces the articles on "settlement of civil claims" included in the Commission's provisional draft.

(2) The basic principle of the waiver of immunity is contained in article IV (section 14) of the Convention on the Privileges and Immunities of the United Nations which states:

Privileges and immunities are accorded to the representatives of Members not for the personal benefit of the individuals themselves, but in order to safeguard the independent exercise of their functions in connexion with the United Nations. Consequently a Member not only has the right but is under a duty to waive the immunity of its representative in any case where in the opinion of the Member

¹⁰³ The formulation of provisional draft article 34 has been substantially modified by the Commission at the second reading (see commentary to article 31 of the present draft).

¹⁰⁴ *Yearbook of the International Law Commission, 1969*, vol. II, pp. 212-213, document A/7610/Rev.1, chap. II, B.

¹⁰⁵ See p. 1 above.

¹⁰⁶ Articles 33, 34 and 71 of the provisional draft.

¹⁰⁷ *Official Records of the United Nations Conference on Diplomatic Intercourse and Immunities*, vol. II (United Nations publication Sales No.: 62.XL1), p. 90.

the immunity would impede the course of justice, and it can be waived without prejudice to the purpose for which the immunity is accorded.

(3) This provision was reproduced *mutatis mutandis* in article V (section 16) of the Convention on the Privileges and Immunities of the Specialized Agencies and in a number of the corresponding instruments of regional organizations.

(4) At the second reading, the Commission has made only some minor drafting changes in the wording of paragraphs 1 to 4 of article 31. The text of paragraph 5 is different from that of the corresponding provision of the provisional draft (article 34). The text proposed in former article 34 stated that:

The sending State shall waive the immunity of any of the persons mentioned in paragraph 1 of article 33 [paragraph 1 of the present article] 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.

This text was similar to that of article 42 of the Commission's draft articles on special missions adopted in 1967.¹⁰⁸ Since then, however, the General Assembly deleted such a provision from the 1969 Convention on Special Missions and made it the subject-matter of the separate recommendation contained in resolution 2531 (XXIV) mentioned above. This recommendation follows the language of resolution II adopted by the United Nations Conference on Diplomatic Intercourse and Immunities.

(5) At the present session, the Commission considered whether the best course would be to follow the solution adopted in connexion with the Convention on Special Missions, namely to delete altogether former article 34 and to append to the draft articles a recommendation along the lines of General Assembly resolution 2531 (XXIV). Many members, however, considered it desirable to retain some ideas of the General Assembly's recommendation in the text of the draft articles. The Commission, therefore, decided to replace former article 34 by a new paragraph 5 to be added to article 31 on waiver of immunity. This paragraph 5 does not strictly speaking lay down an obligation to waive immunity, but it does impose upon a sending State the duty to "use its best endeavours to bring about a just settlement of the case" if it is unwilling to waive immunity. The Commission was of the opinion that, so formulated, the provision should be acceptable to States in general and, therefore, retained in the convention they might adopt in the future on the basis of the present draft.

Article 32.¹⁰⁹ Exemption from social security legislation

1. Subject to the provisions of paragraph 3, the head of mission and the members of the diplomatic staff of the

mission shall with respect to services rendered for the sending State be exempt from social security provisions which may be in force in the host State.

2. The exemption provided for in paragraph 1 shall also apply to persons who are in the sole private employ of the head of mission or of a member of the diplomatic staff of the 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 which may be in force in the sending State or a third State.

3. The head of mission and the members of the diplomatic staff of the mission who employ persons to whom the exemption provided for in paragraph 2 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 paragraph 1 and 2 shall not preclude voluntary participation in the social security system of the host State provided that such participation is permitted by that State.

5. The provisions of this article shall not affect bilateral or multilateral agreements concerning social security concluded previously and shall not prevent the conclusion of such agreements in the future.

Commentary

(1) Article 32 is modelled on article 33 of the Convention on Diplomatic Relations.

(2) As has been pointed out in some written comments of Governments, there is no express provision in paragraph 1 of this article exempting the sending State itself, in its capacity as employer, from social security legislation. The Commission considered any such clause unnecessary in view of the rule of general international law concerning the immunity enjoyed by the State in diplomatic relations. The reference to the sending State is, therefore, implicit in paragraphs 1 and 3 of this article.

(3) Like paragraph 2 of article 32 of the Convention on Special Missions, paragraph 2 of this article substitutes the expression "persons who are in the sole private employ" for the expression "private servants who are in the sole employ", which is used in article 33 of the Convention on Diplomatic Relations. Referring to this change in terminology, the Commission stated in paragraph 2 of its commentary on article 32 of its draft articles on special missions:

Article 32 of the draft applies not only to servants in the strict sense of the term, but also to other persons in the private employ of members of the special mission such as children's tutors and nurses.¹¹⁰

(4) Owing to the special character of agreements on social security, the Commission considered it desirable to maintain paragraph 5 of article 32 rather than to leave the matter to be covered by article 4.

¹⁰⁸ *Yearbook of the International Law Commission, 1967*, vol. II, p. 365, document A/6709/Rev.1, chap. II, D.

¹⁰⁹ Articles 35 and 69 of the provisional draft.

¹¹⁰ *Yearbook of the International Law Commission, 1967*, vol. II, p. 362, document A/6709/Rev.1, chap. II, D.

(5) As stated in paragraph 2 of article 37 of the present draft, members of the staff of the mission, other than members of the diplomatic staff, who are nationals of or permanently resident in the host State, enjoy privileges and immunities "only to the extent admitted by the host State". The case could therefore occur that a person, national of or permanently resident in the host State, employed by the sending State for instance as a member of the technical and administrative staff of the mission, might be obliged to participate in the social security system of the host State and make the appropriate contributions. The Commission noted that in such case the practice of several countries was that the mission voluntarily undertook to pay the employer's contribution.

Article 33.¹¹¹ Exemption from dues and taxes

The head of mission and the members of the diplomatic staff of the 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 mission;

(c) estate, succession or inheritance duties levied by the host State, subject to the provisions of paragraph 4 of article 38;

(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 24.

Commentary

(1) Article 33 is modelled on article 34 of the Convention on Diplomatic Relations.

(2) The immunity of representatives from taxation is dealt with indirectly in article IV (section 13) of the Convention on the Privileges and Immunities of the United Nations which provides that:

Where the incidence of any form of taxation depends upon residence, periods during which the representatives of Members to the principal and subsidiary organs of the United Nations and to conferences convened by the United Nations are present in a State for the discharge of their duties shall not be considered as periods of residence.

(3) This provision was reproduced *mutatis mutandis* in article V (section 15) of the Convention on the Privileges and Immunities of the Specialized Agencies and in a number of the corresponding instruments of regional organizations.

(4) Except in the case of nationals of the host State, representatives enjoy extensive exemption from taxation.

¹¹¹ Articles 36 and 69 of the provisional draft.

In ICAO and UNESCO all representatives, and in FAO and IAEA, resident representatives, are granted the same exemptions in respect of taxation as diplomats of the same rank accredited to the host State concerned. In the case of IAEA, no taxes are imposed by the host State on the premises used by missions or delegates including rented premises and parts of buildings. The taxation system applied to permanent delegations to UNESCO is in principle the same as that enjoyed by embassies. Permanent delegations to UNESCO pay only taxes for services rendered (scavenging, sewage, etc.) and real property tax ("*contribution foncière*") when the permanent delegate is the owner of the building. Permanent delegates are exempt from tax on movable property ("*contribution mobilière*"), a tax imposed on residents in France according to the residential premises they rent or occupy, in respect of their principal residence but not in respect of any secondary residence.¹¹²

(5) In the light of the comments submitted by Governments and secretariats of international organizations, the Commission wishes to make it clear that in the opening sentence of the article the words "personal or real, national, regional or municipal" apply to "dues" as well as to "taxes". The provision in sub-paragraph *b* is general in character and covers every relevant concrete situation, like, for instance, shares in housing corporations in respect of mission premises. The Governments which referred to the question having indicated the existence of no practical difficulties in interpreting and applying the provision of sub-paragraph *f* of article 34 of the Convention on Diplomatic Relations, the Commission decided to maintain the final phrase of sub-paragraph *f* of this article ("subject to the provisions of article 24").

(6) In sub-paragraph *f*, the Commission retained words "with respect to immovable property". Taking into consideration that those words, which appeared both in article 34 of the Convention on Diplomatic Relations and article 33 of the 1967 draft articles on special missions, had been deleted from the Convention on Special Missions by the General Assembly following the adoption of an oral amendment in the Sixth Committee, the Commission did not include them in the corresponding provision (sub-paragraph *f* of article 102) of part IV of the provisional draft relating to delegations. However, at its present session the Commission decided to include the words in question in article 64 (in the part of the draft dealing with delegations), because if they were omitted from article 64 and retained in article 33, the result would be that missions of a permanent character would have to pay registration, court or records fees, mortgage dues and stamp duty only with respect to movable property whereas delegations would have to pay them on all property, movable and immovable.

Article 34.¹¹³ Exemption from personal services

The host State shall exempt the head of mission and the members of the diplomatic staff of the mission from all

¹¹² Study of the Secretariat, op. cit., p. 201, document A/CN.4/L.118 and Add.1 and 2, part one, B. para. 45.

¹¹³ Articles 37 and 69 of the provisional draft.

personal services, from all public service of any kind whatsoever, and from military obligations such as those connected with requisitioning, military contributions and billeting.

Commentary

(1) Article 34 is modelled on article 35 of the Convention on Diplomatic Relations.

(2) The Commission's commentary on the provision on which article 35 of the Convention was based (article 33 of the draft articles on diplomatic intercourse and immunities), stated that it dealt

with the case where certain categories of persons are obliged, as part of their general civic duties or in cases of emergency, to render personal services or to make personal contributions.¹¹⁴

(3) The immunity in respect of national service obligations provided in article IV (section 11 *d*), of the Convention on the Privileges and Immunities of the United Nations and article V (section 13 *d*), of the Convention on the Privileges and Immunities of the Specialized Agencies has been widely acknowledged. That immunity does not normally apply when the head of mission or a member of the diplomatic staff of the mission is a national of the host State.¹¹⁵ The phrase "military obligations" is comprehensive; the enumeration in article 34 is by way of example only.

Article 35.¹¹⁶ 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 mission;

(b) articles for personal use of the head of mission or a member of the diplomatic staff of the mission, including articles intended for his establishment.

2. The personal baggage of the head of mission or a member of the diplomatic staff of the 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, 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.

Commentary

(1) Article 35 is modelled on article 36 of the Convention on Diplomatic Relations.

(2) While in general, heads of missions and members of the diplomatic staff of missions enjoy exemption from

¹¹⁴ *Yearbook of the International Law Commission, 1958*, vol. II, p. 100, document A/3859, para. 53.

¹¹⁵ Study of the Secretariat, op. cit., p. 200, para. 37.

¹¹⁶ Articles 38, 67 and 69 of the provisional draft.

customs and excise duties, the detailed application of this exemption in practice varies from one host State to another according to the headquarters agreements and to the system of taxation in force.

(3) As regards the United Nations Headquarters, the "United States Code of Federal Regulations, Title 19—Customs Duties (Revised 1964)" provides in section 10.30 b, paragraph *b*, that resident representatives and members of their staffs may import ". . . without entry and free of duty and internal-revenue tax articles for their personal or family use".¹¹⁷

(4) At the United Nations Office at Geneva the matter is dealt with largely in the Swiss Customs Regulation of 23 April 1952. Briefly, permanent missions may import all articles for official use and belonging to the Government they represent (art. 15). In accordance with the declaration of the Swiss Federal Council of 20 May 1958,¹¹⁸ the heads of permanent delegations may import free of duty all articles destined for their own use or that of their family (art. 16, para. 1). Other members of permanent delegations have a similar privilege except that the importation of furniture may be made only once (art. 16, para. 2).¹¹⁹

(5) The position in respect of missions to specialized agencies having their headquarters in Switzerland is identical with that of missions to the United Nations Office at Geneva. In the case of FAO, the extent of the exemption of resident representatives depends on their diplomatic status and is granted in accordance with the general rules relating to diplomatic envoys. Permanent delegates to UNESCO, with rank of ambassador or minister plenipotentiary, are assimilated to heads of diplomatic missions (article 18 of the Headquarters Agreement)¹²⁰ and can import goods for their official use and for that of the delegation free of duty. Other delegates or members of delegations may import their household goods and effects free of duty at the time of taking up their appointment. They may also temporarily import motor cars free of duty, under customs certificates without deposit (article 22, sub-paragraphs *g* and *h* of the Headquarters Agreement).

(6) Apart from minor drafting changes in some language versions, the Commission made only one change in the wording of the corresponding provisions of the provisional draft. It had deleted from paragraph 1, sub-paragraph *b*, the phrase "or members of his family forming part of his household". That phrase was unnecessary because the provisions of article 35 concerning the members of the family of the head of mission and the members of the family of a member of the diplomatic staff of the mission were incorporated in article 36, paragraph 1.

¹¹⁷ Study of the Secretariat, op. cit., document A/CN.4/L.118 and Add.1 and 2, part one, A, p. 183, para. 134. For details of the position in respect of the various federal and State taxes in New York, see *ibid.*, pp. 183–186, paras. 132–148.

¹¹⁸ *Ibid.*, p. 173, para. 62.

¹¹⁹ *Ibid.*, p. 183, para. 136.

¹²⁰ For the text of the Agreement, see United Nations, *Treaty Series*, vol. 357, p. 3.

Article 36.¹²¹ Privileges and immunities of other persons

1. The members of the family of the head of mission forming part of his household and the members of the family of a member of the diplomatic staff of the mission forming part of his household shall, if they are not nationals of the host State, enjoy the privileges and immunities specified in articles 28, 29, 30, 32, 33, 34 and in paragraphs 1 *b* and 2 of article 35.

2. Members of the administrative and technical staff of the mission, together with members of their families forming part of their respective households who are not nationals of or permanently resident in the host State, shall enjoy the privileges and immunities specified in articles 28, 29, 30, 32, 33 and 34, except that the immunity from civil and administrative jurisdiction of the host State specified in paragraph 1 of article 30 shall not extend to acts performed outside the course of their duties. They shall also enjoy the privileges specified in paragraph 1 *b* of article 35 in respect of articles imported at the time of first installation.

3. Members of the service staff of the mission 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 32.

4. Private staff of members of the mission shall 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 mission.

Commentary

(1) Article 36 is modelled on article 37 of the Convention on Diplomatic Relations.

(2) The Study of the Secretariat does not include data on privileges and immunities which host States accord to the members of the families of permanent representatives and to the members of the administrative and technical staff and of the service staff of permanent missions. The Commission understands that the practice relating to the status of these persons conforms to the corresponding rules established within the framework of inter-State diplomatic relations as codified and developed in the Convention on Diplomatic Relations. This understanding is corroborated by the identity of the legal bases of the status of these persons inasmuch as their status attaches to and derives from that of the diplomatic agents or permanent representatives, who are accorded analogous diplomatic privileges and immunities.

(3) The article grants to the administrative and technical staff, to the members of service staff and to the private staff, dealt with in paragraphs 2, 3 and 4 of the article, full immunity from the criminal jurisdiction of the host State. However, paragraph 2 expressly states that the

immunity of the administrative and technical staff from 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". The criteria of privileges and immunities necessary for the performance of the duties does not concern the members of the family dealt with in paragraphs 1 and 2.

(4) The Commission did not include a reference to article 31 in paragraph 1 of article 36. Article 31 does not specify a privilege or an immunity, but concerns waiver of immunity and settlement of claims. On the other hand, paragraph 1 of article 31 already provides that the rules stated in that article apply to "persons enjoying immunity under article 36". In addition, the Commission noted that article 35, paragraph 1 *a*, was concerned with a custom exemption granted to the permanent mission itself and not to members of the family of the head of mission or a member of the diplomatic staff. It replaced, therefore, the reference to the whole article by a more specific reference to "paragraphs 1 *b* and 2 of article 35".

(5) In paragraphs 3 and 4 the Commission deleted the reference to persons not nationals of or permanently resident in the host State as being unnecessary in the light of the provisions contained in paragraph 2 of article 37 (Nationals of the host State and persons permanently resident in the host State).

Article 37.¹²² 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 head of mission and any member of the diplomatic staff of the 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 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.

Commentary

(1) Article 37 is modelled on article 38 of the Convention on Diplomatic Relations.

(2) A number of the existing conventions on the privileges and immunities of international organizations, whether universal or regional, stipulate that the provisions which define the privileges and immunities of the representatives

¹²¹ Articles 40 and 69 of the provisional draft.

¹²² Articles 41 and 70 of the provisional draft.

of States are not applicable as between a representative and the authorities of the State of which he is a national, or of which he is or has been the representative. A well-known example of such a provision is section 15 of the Convention on the Privileges and Immunities of the United Nations. A similar provision appears in section 17 of the Convention on the Privileges and Immunities of the Specialized Agencies as well as in the following: article 11 of Supplementary Protocol No. 1 to the Convention for European Economic Co-operation on the Legal Capacity, Privileges and Immunities of OEEC,¹²³ article 12 *a* of the General Agreement on Privileges and Immunities of the Council of Europe,¹²⁴ article 15 of the Convention of the Privileges and Immunities of the League of Arab States,¹²⁵ and article V, paragraph 5, of the General Convention on the Privileges and Immunities of the Organization of African Unity.¹²⁶ Examples of similar provisions in national legislation may be found in paragraph 9 of the Diplomatic Privileges (United Nations and International Court of Justice) Order in Council 1947 (United Kingdom)¹²⁷ and paragraph 6 of the Order in Council PC 1791 relating to the Privileges and Immunities of ICAO (Canada).¹²⁸

(3) The Commission took the view that nationals of the host State and persons permanently resident in the host State once appointed as members of a mission or a delegation of the sending State, in accordance with the rule stated in article 72 of the draft, are entitled only to privileges and immunities as provided for in this article.

(4) Paragraph 1 of the article regulates the question of the privileges and immunities of the head of mission and any member of the diplomatic staff of the mission who are nationals of or permanently resident in the host State. The wording follows the corresponding provision of the Convention on Diplomatic Relations.

(5) Paragraph 2 concerns any member of the administrative and technical staff and of the service staff of the mission and any person on the private staff who are nationals of or permanently resident in the host State. It follows the corresponding provision of the Convention on Diplomatic Relations.

Article 38.¹²⁹ Duration of privileges and immunities

1. Every person entitled to privileges and immunities shall enjoy them from the moment he enters the territory of the

¹²³ United Nations, *Legislative texts and treaty provisions concerning the legal status, privileges and immunities of international organizations*, vol. II (United Nations publication, Sales No.: 61.V.3), p. 369.

¹²⁴ *Ibid.*, p. 390.

¹²⁵ *Ibid.*, p. 414.

¹²⁶ Text published by the Secretariat of the Organization of African Unity, Addis Ababa.

¹²⁷ United Nations, *Legislative text and treaty provisions concerning the legal status, privileges and immunities of international organizations*, vol. I (United Nations publication, Sales No.: 60.V.2), p. 113.

¹²⁸ *Ibid.*, vol. II (United Nations publication, Sales No.: 61.V.3), p. 20.

¹²⁹ Articles 42 and 73 of the provisional draft.

host State on proceeding to take up his post or, if 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. When the functions of a person enjoying privileges and immunities have come to an end, such privileges and immunities shall normally cease at the moment when he leaves the country, or on expiry of a reasonable period in which to do so. However, with respect to acts performed by such a person in the exercise of his functions as a member of the mission, immunity shall continue to subsist.

3. In case of the death of a member of the 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 country.

4. In the event of the death of a member of the 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 the country 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 is in the host State solely because of the presence there of the deceased as a member of the mission or of the family of a member of the mission.

Commentary

(1) Article 38 is modelled on article 39 of the Convention on Diplomatic Relations.

(2) Paragraph 1 deals with the commencement of privileges and immunities for persons who enjoy them under these articles. Its formulation follows the corresponding paragraph of article 39 of the Convention on Diplomatic Relations, except that the phrase "from the moment when his appointment is notified to the Ministry for Foreign Affairs or such other ministry as may be agreed" has been replaced by the phrase "from the moment when his appointment is notified to the host State by the Organization or by the sending State". This change is in conformity with the provisions of paragraphs 3 and 4 of article 15 of the draft articles.

(3) Paragraph 2 dealing with the time of termination of the enjoyment of privileges and immunities follows also the corresponding provision of article 39 of the Convention. Having regard to the decision set out in paragraph 55 of the Introduction to the draft, the Commission has not, however, included the reference to the case of armed conflict which appears in paragraph 2 of article 39 of the Convention.

(4) Paragraphs 1 and 2 are both drafted in terms of persons who enjoy privileges and immunities in their official capacity. The Commission considered the advisability of including in the article a specific provision concerning commencement and termination in regard to persons who do *not* enjoy privileges and immunities in their official capacity (members of the family of a member of the mission forming part of his household; persons employed in the private staff of the members of the mission) as has been done in article 53, paragraph 2 and 3

of the Convention on Consular Relations. The Commission arrived at the conclusion that it was not necessary to add such a specific provision. The application *mutatis mutandis* to those persons of the provisions stated in paragraphs 1 and 2 of this article, bearing in mind the provisions on notifications set forth in article 15, paragraphs 1 *b*, *c* and *d*, seemed to the Commission the best practical solution of the matter.

(5) Paragraphs 3 and 4 also reproduce the corresponding provisions of the Convention on Diplomatic Relations. For drafting reasons, the Commission replaced in paragraph 4 the expression "the presence of which in the receiving State [host State] was due solely to the presence there of the deceased" by the expression "which is in the host State solely because of the presence there of the deceased", as did the General Assembly in paragraph 2 of article 44 of the Convention on Special Missions.

(6) Lastly, the Commission recalls that article IV (section 11) of the Convention on the Privileges and Immunities of the United Nations and article V (section 13) of the Convention on the Privileges and Immunities of Specialized Agencies provide that representatives shall enjoy the privileges and immunities listed therein while exercising their functions and during their journey to and from the place of meeting. In 1961 the Legal Counsel of the United Nations replied to an inquiry made by one of the specialized agencies as to the interpretation to be given to the first part of this phrase. The reply contained the following:

You inquire whether the words "while exercising their functions" should be given a narrow or broad interpretation [...] I have no hesitation in believing that it was the broad interpretation that was intended by the authors of the Convention.¹³⁰

In addition, article IV (section 12) of the Convention on the Privileges and Immunities of the United Nations, which is reproduced *mutatis mutandis* in article V (section 14) of the Convention on the Privileges and Immunities of the Specialized Agencies, provides that:

In order to secure, for the representatives of Members to the principal and subsidiary organs of the United Nations and to conferences convened by the United Nations, complete freedom of speech and independence in the discharge of their duties, the immunity from legal process in respect of words spoken or written and all acts done by them in discharging their duties shall continue to be accorded, notwithstanding that the persons concerned are no longer the representatives of Members.

Article 39.¹³¹ Professional or commercial activity

The head of mission and members of the diplomatic staff of the mission shall not practise for personal profit any professional or commercial activity in the host State.

Commentary

(1) Article 39 is modelled on article 42 of the Convention on Diplomatic Relations.

¹³⁰ Study of the Secretariat, op. cit., p. 176, para. 87.

¹³¹ Articles 46, 76 and 113 of the provisional draft. Article 113 was deleted at the present session.

(2) The Commission took the view that the right of the host State to grant permission to persons referred to in the article to practise a professional or commercial activity on its territory was self-evident.¹³²

Article 40.¹³³ End of the functions of the head of mission or of a member of the diplomatic staff

The functions of the head of mission or of a member of the diplomatic staff of the mission shall come to an end, *inter alia*:

(a) on notification of their termination by the sending State to the Organization;

(b) if the mission is finally or temporarily recalled.

Commentary

(1) Sub-paragraph *a* of article 42 is modelled on sub-paragraph *a* of article 43 of the Convention on Diplomatic Relations. For the sake of precision, the Commission replaced the words "to this effect" which appeared in the provisional draft by the words "of their termination".

(2) Sub-paragraph *b* refers to the case where the sending State recalls the mission temporarily or finally.

Article 41.¹³⁴ Protection of premises, property and archives

1. When the mission is temporarily or finally recalled, the host State must respect and protect the premises as well as the property and archives of the mission. The sending State must take all appropriate measures to terminate this special duty of the host State within a reasonable time. It may entrust custody of the premises, property and archives of the mission to a third State acceptable to the host State.

2. The host State, if requested by the sending State, shall grant the latter facilities for removing the property and the archives of the mission from the territory of the host State.

Commentary

(1) Although there is a degree of similarity between article 41 and article 45 of the Convention on Diplomatic Relations, they regulate situations that are substantially different. Bilateral relationships between States and relationships between States and international organizations are of an essentially different nature. Withdrawal of a mission to an international organization may be due to a wide variety of causes and may be final. The host State is

¹³² A similar position was adopted by the Commission in connexion with its draft articles on special missions in paragraph 2 of the commentary on article 49 of that draft. See *Yearbook of the International Law Commission, 1967*, vol. II, p. 367, document A/6709/Rev.1, chap. II, D. Draft article 49 was adopted without change by the General Assembly; it became article 48 of the Convention on Special Missions.

¹³³ Articles 47 and 77 of the provisional draft.

¹³⁴ Articles 49 and 77 of the provisional draft.

not ordinarily involved in the factors which may determine such a withdrawal or its duration. It would, therefore, mean imposing an unjustified burden on that State to require it to provide, for an unlimited period, special guarantees concerning the premises, archives and property of a mission which has been recalled even on a temporary basis. It was therefore decided that, in case of the recall of its mission, the sending State must terminate this special duty of the host State within a reasonable time. Where the sending State has failed to discharge its obligation within a reasonable period, the host State ceases to be bound by the special duty imposed by article 41, but, with respect to the property, archives and premises, remains bound by any obligations which may be imposed upon it by its municipal law, by general international law or by special agreements for the protection of the property of foreign States in general.

(2) The sending State is free to discharge the obligation imposed on it by the second sentence of paragraph 1 of this article in various ways, for instance, by removing its property and archives from the territory of the host State. The premises similarly cease to enjoy special protection from the time the property and archives situated in them have been withdrawn or, after the expiry of a reasonable period, have ceased to enjoy special protection. The second sentence of paragraph 1 has been drafted in the most general terms in order to cover all these possibilities. The Commission considered, however, that one of the possibilities open to the sending State should be mentioned in the text of the paragraph itself, namely entrusting the premises, property and archives of the mission to the custody of a third State.

(3) Paragraph 2 concerning facilities for removing the property and the archives of the mission from the territory of the host State is based on article 45, paragraph 2, of the Convention on Special Missions. The obligation of the host State under paragraph 2 of the present article is subject to the proviso "if requested by the sending State."¹³⁵

PART III. DELEGATIONS TO ORGANS AND TO CONFERENCES

Article 42.¹³⁶ Sending of delegations

A State may send a delegation to an organ or to a conference in accordance with the rules and decisions of the Organization.

Commentary

(1) This article parallels article 5 relating to the establishment of missions. It provides that a State may send a delegation to an organ or to a conference in accordance with the rules and decisions of the organization.

¹³⁵ See paragraph 3 of the commentary to article 77 (Facilities for departure).

¹³⁶ New article.

(2) It is to be noted that, as stated by the Commission in paragraph 5 of its commentary on article 3, the expression "rules of the Organization" included all relevant rules whatever their nature. Constituent instruments of international organizations usually contain provisions regarding the membership of their organs and regulating the conditions under which States not members of such organs may participate therein (examples: Article 32 of the Charter of the United Nations and Article 14 of the provisional rules of procedure of the Security Council). The specific reference to "decisions of the Organization" is designed to cover the cases where a State is invited to participate in an organ or in a conference by an *ad hoc* decision. Thus the General Assembly of the United Nations decides, upon the recommendation of the Security Council, on the participation in the elections to the International Court of Justice of States parties to the Statute of the Court but not members of the United Nations. The decisions taken by international organizations to convoke conferences usually lay down the criterion in accordance with which invitations to States for participation in such conferences are issued.

(3) At its twenty-second session, the Commission included in its provisional draft articles on delegations to organs and conferences a provision that a delegation to an organ or to a conference may represent only one State (article 83 of the provisional draft). In paragraph 1 of its commentary on that article, the Commission stated that some of the members of the Commission expressed reservations concerning the article and that the Commission would review the matter at the second reading of the draft articles in the light of the observations which it received from governments and international organizations. In their written comments a number of Governments and international organizations suggested that the article on the principle of single representation should be redrafted so as not to exclude double representation in certain cases or that the article be deleted altogether. Reference was made to a number of international conventions and constituent instruments of international organizations where representation of two or more States by a single delegation is envisaged.¹³⁷ The Commission concluded that this

¹³⁷ The following international conventions were cited [see below annex I, section A, Netherlands, part c, para. 23]:

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 UPU General Regulations pertaining to the Convention 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: 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 No. 640-642, of the General Regulations annexed to the Convention 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 (1955 Paris Convention: article XVII provides for the possibility of transferring votes in the International Committee of Legal Metrology up to a maximum of two extra votes).

The European Economic Community (Treaty of Rome 1957: article 150 provides for the possibility of a member of the Council of

aspect of representation concerns a matter which is governed by the internal law of international organizations and decided therefore not to deal with it in the present articles.

Article 43.¹³⁸ Appointment of the members of the delegation

Subject to the provisions of articles 46 and 72, the sending State may freely appoint the members of the delegation.

Commentary

- (1) Article 43 parallels article 9.
- (2) The freedom of choice by the sending State of the members of the delegation is a principle basic to the effective performance of the tasks of the delegation. Article 43 expressly provides for two exceptions to that principle. The first relates to the size of the delegation; that question is regulated by article 46. The second exception is embodied in article 72, which requires the consent of the host State for the appointment of one of its nationals as a delegate or as a member of the diplomatic staff of the delegation.
- (3) Like article 9 relating to permanent missions, article 43 does not make the freedom of choice by the sending State of the members of its delegation to an organ or a conference subject to the *agrément* of either the organization or the host State as regards the appointment of the head of the delegation. The reasons why the *agrément* of the host State does not operate within the framework of representation of State in their relations with international organizations have been stated by the Commission in its commentary on article 9.
- (4) In their written comments on the provisional draft, two Governments indicated that they would like to see the position of the host State invested with further guarantees. They suggested that the host State should be

the Community acting as proxy for not more than one other member in case of a vote).

In addition ITU pointed out [see below annex I, sect C, 11] that the terms of article 83 conflict with chapter 5, paragraphs 6, 7 and 8 of the General Regulations annexed to the 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.

Finally, UPU pointed out [see below annex I, section C, 10] 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 UPU). It therefore shared the reservations expressed by certain members of the Commission about article 83 and agreed with the reasoning advanced by them.

¹³⁸ Article 84 of the provisional draft.

empowered to reject the entering into the State of a given individual as a member of a delegation. The Commission decided not to depart from the principle of freedom of appointment in the framework of the representation of States in their relations with international organizations. Meanwhile, it has endeavoured to provide adequate guarantees to the States concerned through the procedures envisaged in articles 81 and 82.

Article 44.¹³⁹ Credentials of delegates

The credentials of the head of delegation and of other delegates shall be issued either by the Head of State or by the Head of Government or by the Minister for Foreign Affairs or, if the rules of the Organization or the rules of procedure of the conference so admit, by another competent authority of the sending State. They shall be transmitted, as the case may be, to the Organization or to the Conference.

Commentary

- (1) Article 44 parallels article 10. It is to be noted, however, that in the case of delegates to a conference, the question of credentials is usually regulated by the rules of procedure of the conference; hence the inclusion in the text of article 44 of the phrase "it [. . .] the rules of procedure of the conference so admit".
- (2) As indicated in the commentary to article 10, the phrase "by another competent authority" is designed to cover the practice whereby credentials of delegates to organs or to conferences dealing with technical matters are issued by the authority in the sending State directly responsible for those matters. This phrase also covers a practice whereby credentials of delegates to organs are sometimes issued by the head of the permanent mission.
- (3) In its written comments on the provisional draft,¹⁴⁰ ITU states that while persons appointed by a member country to serve on the Administrative Council are accredited in the two organs of the Administrative Council, namely the International Radio Consultative Committee and the International Telegraph and Telephone Consultative Committee, no system of formal accreditation for representatives of States is used, since they do not have the power to draw up treaties or regulations, but merely make recommendations. In formulating article 44, the Commission is seeking to lay down a residual requirement which does not preclude the application of a different rule as authorized under article 3 which might be appropriate to the particular needs of certain organs.
- (4) At its twenty-second session, the Commission had included in its provisional draft articles on delegations to organs and conferences a provision regarding full powers to represent the State in the conclusion of treaties (article 88 of the provisional draft).¹⁴¹ In their written com-

¹³⁹ Article 87 of the provisional draft.

¹⁴⁰ See below annex I, section C, 11.

¹⁴¹ That article read:

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

ments, certain Governments questioned the advisability of the repetition in the present articles of what is already laid down in the Convention on the Law of Treaties. The Commission, at its present session, reexamined this question in the light of these comments. It concluded that the matter of full powers of delegations to represent the State in the conclusion of treaties should be left to be governed by the general law of treaties or to be covered by the topic of treaties concluded between States and international organizations or between two or more international organizations.

Article 45.¹⁴² Composition of the delegation

In addition to the head of delegation, the delegation may include other delegates, diplomatic staff, administrative and technical staff and service staff.

Commentary

- (1) Article 45 parallels article 13.
- (2) Every delegation includes at least one person to whom the sending State has entrusted the task of representing it. Otherwise the delegation would be without a member who could speak on behalf of the State or cast its vote. Article 45 is also formulated on the assumption that each delegation will have a head to whom the host State, the organization or the conference, as the case may be, and the other participating delegations can turn at any time as the person responsible for the delegation.
- (3) In its written comments on the provisional draft,¹⁴³ the ILO noted 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 equal footing. It further pointed out that the delegates representing employers and workers are not subject to the authority of any head of delegation. The Commission notes that the particular situation prevailing in the Conference of the International Labour Organisation is covered by article 3 of the draft articles.
- (4) While each delegation must have at least one representative, the appointment of other members is permitted under article 45.

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.

¹⁴² Article 81 of the provisional draft.

¹⁴³ See below annex I, section C, 2.

Article 46.¹⁴⁴ Size of the delegation

The size of the delegation shall not exceed what is reasonable and normal, having regard, as the case may be, to the functions of the organ or the object, as well as the needs of the particular delegation and the circumstances and conditions in the host State.

Commentary

(1) Article 46 parallels article 14. The Commission wishes to point out one difference between these two articles. Article 14 refers to the "functions" of the organization. Article 46 does use that term as regards organs, but it uses the word "object" in referring to conferences, which in the opinion of the Commission is more appropriate in relation to conferences.

(2) In their written comments on the provisional draft, some Governments criticized the formulation of the provision on the size of the delegation, in that, unlike article 11, paragraph 1 of the Convention on Diplomatic Relations, it does not apportion to the host State the right to determine "what is reasonable and normal". It is to be noted that article 46 is based on article 14 which relates to missions to international organizations. In its commentary on this latter article, the Commission explained the reasons why a different rule is required for relations between States and international organizations than that for bilateral diplomatic relations. The Commission wishes also to underline the procedures available to the host State under articles 81 and 82 of the draft.

(3) In their written comments on the provisional draft certain international organizations referred to provisions contained in their constituent instruments relating to the composition of delegations or defining the number of delegates and alternates. They expressed fears of what they called contradiction between such provisions and the rule stated in article 46. The Commission is of the opinion that no such contradiction exists. Article 46 seeks to regulate the size of the delegation as a whole, and does not purport to pose limitations on the specific category of delegates. Moreover, the constituent instruments would necessarily prevail under articles 3 and 4 of the draft.

Article 47.¹⁴⁵ Notifications

1. The sending State shall notify the Organization or, as the case may be, the conference of:

(a) the composition of the delegation, including the position, title and order of precedence of the members of the delegation, and any subsequent changes therein;

(b) the arrival and final departure of members of the delegation and the termination of their functions with the delegation;

(c) the arrival and final departure of any person accompanying a member of the delegation;

¹⁴⁴ Article 82 of the provisional draft.

¹⁴⁵ Article 89 of the provisional draft.

(d) the beginning and the termination of the employment of persons resident in the host State as members of the staff of the delegation or as persons employed on the private staff;

(e) the location of the premises of the delegation and of the private accommodation enjoying inviolability under articles 54 and 60 as well as any other information that may be necessary to identify such premises and accommodation.

2. Where 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.

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

Commentary

(1) Article 47 is modelled partly on article 15 of the draft and partly on article 11 of the Convention on Special Missions. The Commission has taken the position that, owing to the temporary character of delegations to organs and conferences, the provisions concerning notifications with regard to such delegations should follow the Special Missions precedent more closely than did the corresponding provisions adopted in 1970 for the provisional draft.

(2) As a result of that position, article 47 differs in several respects from the corresponding provisions of the 1970 text. Firstly sub-paragraph *a* of paragraph 1 of the original provision has been divided into two sub-paragraphs, the first of which refers not to the "appointment [. . .] of the members of this delegation", as did the previous text, but to the "composition of the delegation". In practice, notifying the composition of the delegation is simpler and speedier than giving separate notifications for each appointment. Also in paragraph 1 *a*, the Commission has added the words "and any subsequent changes therein", which are borrowed from paragraph 1 *a* of article 11 of the Convention on Special Missions. Lastly, the Commission has merged paragraphs 1 *b* and 1 *c* of the 1970 text into one single provision (sub-paragraph 1 *c*) which reproduces with the necessary drafting changes paragraph 1 *c* of article 11 of the Convention on Special Missions.

(3) In its written comments on the provisional draft, one Government suggested that, as it is the host State which grants privileges and immunities, it is to the host State that the notifications should be sent first. As previously stated by the Commission in its commentary on article 15 (which article 47 parallels) the rationale of the rule formulated in the provision on notifications 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.

(4) One international organization, while conceding that it would indeed be desirable if organizations could be told of the dates of arrival and departure of the persons referred to in the article on notifications and so inform

the government of the country in which the conference meets of the period in which those persons will enjoy rights and privileges provided for in the draft convention, pointed out that the provision might face insurmountable difficulties when it came to be implemented. It cited as an example the case when some delegates fail to inform the organization of their arrival and departure. In seeking to lay down a general requirement in article 47, the Commission is conscious that total implementation cannot always be expected in practice. It trusts however that the formulation of a rule on notification will lead to the organization and the host State being provided with all the necessary information.

Article 48.¹⁴⁶ *Acting head of the delegation*

1. If the head of delegation is absent or unable to perform his functions, an acting head shall be designated from among the other delegates by the head of delegation or, in case he is unable to do so, by a competent authority of the sending State. The name of the acting head shall be notified, as the case may be, to the Organization or to the conference.

2. If a delegation does not have another delegate available to serve as acting head, another person may be designated for that purpose. In such case credentials must be issued and transmitted in accordance with article 44.

Commentary

(1) Paragraph 1 of article 48 parallels article 16. There are, however, two main differences between that paragraph and article 16. In the first place, the expression "*chargé d'affaires ad interim*" (article 16) has been replaced by "acting head" in order to conform to the terminology normally used in delegations. In the second place, since meetings of conferences and organs are sometimes of a very short duration, the first sentence of the article provides for a speedy and flexible mode of designation of the acting head.

(2) Paragraph 2 deals with the case in which no delegate is available to replace the head of delegation. It provides that in such a case "another person may be designated for that purpose". However, because a delegation cannot function as a delegation in the absence of a representative empowered to act on behalf of the sending State, paragraph 2 of article 48 contains a requirement that such person must be designated as a delegate through the issuance and transmittal of credentials in accordance with article 44.

(3) In its written comments, one Government pointed out that it would be preferable for the acting head of the delegation to be designated in advance, before any case of unavoidable absence, which may be sudden, can occur. The Commission is not sure that such a requirement would be practicable and fears that its adoption might result in unnecessary rigidity.

¹⁴⁶ Article 86 of the provisional draft.

Article 49.¹⁴⁷ Precedence

Precedence among delegations shall be determined by the alphabetical order of the names of the States used in the Organization.

Commentary

- (1) Article 49 parallels article 17.
- (2) The text of article 90 of the provisional draft provided that precedence among delegations was determined by the alphabetical order used in the host State. In its written comment on that text, one Government observed 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. To meet this point and taking into account the practice of international organizations as indicated in the written comments of some of these organizations,¹⁴⁸ according to which it is the alphabetical order used in the organization rather than that used in the host State which is generally followed to determine precedence among delegations to organs and conferences, the Commission redrafted the article accordingly.
- (3) During the discussion of article 49 some members of the Commission criticized the use of the word "precedence" which in their view raised questions regarding the principle of sovereign equality of States. The Commission decided, however, to retain that word, as it had been used in the Conventions on Diplomatic Relations and on Consular Relations and in the Convention on Special Missions. The word has thus acquired a special connotation in convention of this character, with respect to matters of etiquette and protocol.

Article 50.¹⁴⁹ Status of the Head of State and persons of high rank

- 1. The Head of the sending State, when he leads the delegation, shall enjoy in the host State or in a third State, in addition to what is granted by the present articles, the facilities, privileges and immunities accorded by international law to Heads of State.**
- 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, shall enjoy in the host State or in a third State, in addition to what is granted by the present articles, the facilities, privileges and immunities accorded by international law to such persons.**

Commentary

- (1) Article 50 is modelled on article 21 of the Convention on Special Missions. It provides that Heads of State and

¹⁴⁷ Article 90 of the provisional draft.

¹⁴⁸ See annex I, section C below. In WHO, for example, precedence among delegations is determined by using English or French alphabetical order in alternate years, in accordance with the rules of procedure.

¹⁴⁹ Article 91 of the provisional draft.

other persons of high rank who become delegates retain the facilities, privileges and immunities accorded to them by international law.

(2) Apart from the necessary drafting changes, article 50 differs from article 21 of the Convention on Special Missions and from article 91 of the provisional draft in two respects: firstly the words "in addition to what is granted by the present articles" have been inserted in paragraph 1. Secondly, the last part of paragraph 1 reads "privileges and immunities accorded by international law to Heads of States" instead of "privileges and immunities accorded by international law to Heads of State on an official visit". In this connexion, the Commission wishes to point out that when a head of State leads a delegation to an organ or to a conference, he is not on an official visit to the host State and that it would not be appropriate to impose upon the host State the whole range of special duties which such a visit might entail.

(3) The Commission wishes to point out that article 50 relates only to privileges and immunities of a legal character and not to ceremonial privileges and honours.

(4) In their written comments, certain Governments expressed the view that article 50 was unnecessary in view of the fact that the persons concerned would enjoy the facilities, privileges and immunities accorded to them by international law whether the article was included or not in the draft. The Commission, however, considered that since it was specified in another article (article 74) that a member of a diplomatic mission retained the benefit of diplomatic privileges and immunities when he became a member of a delegation, it would be consistent to do the same for a head of State, head of Government or other person of high rank. It was also pointed out that those persons did in fact enjoy special status so that the article reflected a well-established practice.

(5) The Commission noted in that connexion that on numerous occasions a delegation to an organ or to a conference is headed by or includes among its members a head of State, a head of Government, a Minister for Foreign Affairs or "other persons of high rank". For instance, such high level representation is quite common in delegations to the General Assembly of the United Nations and corresponding general representative organs of the specialized agencies. Also, article 28, paragraph 2, of the Charter provides as follows:

The Security Council shall hold periodic meetings at which each of its members may, if it so desires, be represented by a member of the government or by some other specially designated representative.

The Security Council approved recently a statement expressing the consensus of the Council:

that the holding of periodic meetings, at which each member of the Council would be represented by a member of the Government or by some other specially designated representative, could enhance the authority of the Security Council and make it a more effective instrument for the maintenance of international peace and security.¹⁵⁰

¹⁵⁰ Statement approved in connexion with the question of initiating periodic meetings of the Security Council in accordance with article 28, paragraph 2, of the Charter. See *Official Records of the Security Council, Twenty-fifth Year, 1544th meeting.*

(6) The question was raised whether the provisions in paragraph 2 of article 50 should not be made more general so as to cover also the case of members, and in particular heads of missions, who were holding a rank higher than that of ambassador. The Commission, however, took the view that the persons of high rank referred to in paragraph 2 were entitled to special privileges and immunities by virtue of the functions which they performed in their countries and would not be performing those functions as a head of mission. The expression "person of high rank" therefore refers not to persons who because of the functions they perform in a mission are given by their State a particularly high rank, but to persons who hold high positions in their home States and are temporarily called upon to take part in a delegation to an organ or to a conference.

Article 51.¹⁵¹ General facilities

The host State shall accord to the delegation all facilities for the performance of its tasks. The Organization or, as the case may be, the conference shall assist the delegation in obtaining those facilities and shall accord to the delegation such facilities as lie within their own competence.

Commentary

(1) Article 51 parallels paragraphs 1 *a* and 2 of article 20. Although the language is similar, the general facilities granted to delegations by this article necessarily reflect the special character and tasks of delegations.

(2) The first sentence of article 51 refers to "all facilities for the performance of [the] tasks" of the delegation. This change results from the Commission's decision to use all through part III of the draft articles the expression "tasks of the delegation" instead of "functions of the delegation" employed in the provisional draft. In the Commission's view the term "tasks" is more appropriate than the term "functions" in the light of the temporary nature of delegations and their different purposes. No article has been included in part III of the draft defining the tasks of the delegation because of the great variety in the nature and activities of delegations.

(3) In the second sentence the words "the Organization or, as the case may be, the conference" recognize that in some cases the conference may be in a better position than the organization to take up a question with the host State, particularly if the conference is held in a place other than that of the headquarters of the organization. On the other hand, it is for the conference to accord the facilities which lie within its own competence.

(4) The observations made in paragraph 2 of the commentary to article 20 apply *mutatis mutandis* to the provisions of this article. It should be added that the *ad hoc* agreements usually concluded between the organization and the host State in whose territory the meeting of the organ or the conference is convened often include provisions not only on privileges and immunities but also on facilities to be granted to delegations in the host State.

Article 52.¹⁵² Premises and accommodation

The host State shall assist the delegation, if it so requests, in procuring the necessary premises and obtaining suitable accommodation for its members. The Organization or, as the case may be, the conference shall, where necessary, assist the delegation in this regard.

Commentary

(1) Article 52 parallels article 21 and is modelled on article 23 of the Convention on Special Missions.

(2) The Commission modelled the first sentence of the article on the corresponding provision of the Convention on Special Missions because the temporary nature of a delegation raises somewhat similar considerations with regard to premises and accommodation as in the case of a special mission. The Commission considered that it is not necessary to grant the sending State, as paragraph 1 of article 21 does in the case of missions, the right to acquire the premises necessary for the delegation. It is sufficient for the host State "to assist" the delegation "in procuring the necessary premises" by means other than acquisition. On the other hand, the host State should also assist the delegation "in obtaining suitable accommodation for its members" as in the case of missions (paragraph 2 of article 21). The obligations of the host State provided for in the first sentence of article 52 are subject to the proviso "if it so requests".

(3) The second sentence of article 52 concerns the obligation of the organization or the conference to assist delegations "where necessary" in procuring and obtaining premises and accommodation as provided for in the first sentence. This obligation of the organization or the conference is not intended, therefore, to replace the obligation of the host State laid down in the first sentence. Only the territorial State has the ability to make arrangements for the provision of premises and accommodation for a delegation and its members. To the extent of its ability and means, the organization or the conference must, however, co-operate with the host State in facilitating the availability of premises necessary for the performance of the delegation's tasks as well as suitable accommodation for its members.

(4) Thus, for instance, a delegation requesting assistance under the first sentence of article 52 may address its request to the host State directly or indirectly through the secretariat of the organization or the conference, the latter being normally constituted by members of the staff of the convening organization itself. On the other hand, the Commission noted that when the meeting of an organ or a conference was held in a place other than that in which the seat or an office of the organization which convened the conference, or to which the organ belonged, was established, it was a frequent practice for secretariats of international organizations, acting in accord with the host State which had invited the organ or the conference, to request sending States in advance to send particulars of the accommodation needed by their delegations to that host State.

¹⁵¹ Article 92 of the provisional draft.

¹⁵² Article 93 of the provisional draft.

Article 53.¹⁵³ Assistance in respect of privileges and immunities

The Organization or, as the case may be, the Organization and the conference shall, where necessary, assist the sending State, its delegation and the members of the delegation in securing the enjoyment of the privileges and immunities provided for by the present articles.

Commentary

Article 53 parallels article 22, except that the words "the Organization" have been replaced by the words "The Organization or, as the case may be, the Organization and the conference". With regard to conferences, the Commission considers that in some cases the assistance might be given by the international organization convening the conference, in other cases by the conference itself and in some circumstances by both together. The observations contained in paragraphs 2 and 3 of the commentary to article 22 apply, *mutatis mutandis*, to the provisions set forth in this article.

Article 54.¹⁵⁴ Inviolability of the premises

1. The premises of the delegation shall be inviolable. The agents of the host State may not enter them, except with the consent of the head of delegation. 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 delegation.
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 and other property thereon and the means of transport of the delegation shall be immune from search, requisition, attachment or execution.

Commentary

- (1) Article 54 parallels article 23.
- (2) In the provisional draft, the Commission had made provision in cases of emergency for seeking the permission to enter the premises either of the head of delegation or, if appropriate, of the head of the permanent diplomatic mission of the sending State accredited to the host State. On reflection, the reference to the latter has been deleted; to request the consent of the head of the permanent diplomatic mission would complicate matters unnecessarily, particularly when the organs or conferences to which delegations are sent meet, as is quite often the case, in a city which is not the capital of the host State.
- (3) If, as is often the case, offices of the delegation are established in premises which already enjoy the privileges

of inviolability—for instance in the premises of the permanent diplomatic mission of the sending State or in the premises of a mission of that State to an international organization—the fact that delegation offices are established therein will not affect the inviolability enjoyed by such premises and the rules concerning such inviolability will continue to apply. If the delegation occupies premises of its own, these premises will enjoy inviolability as provided for in this article.

(4) The observations in paragraphs 2 to 5 of the commentary to article 23 apply *mutatis mutandis*, to the provisions set forth in this article. For the same reasons as those advanced in connexion with article 23, some members of the Commission were opposed to the third sentence of paragraph 1 of article 54, while others considered that the provision contained in this sentence was the more justified in the case of delegations because delegation premises are often established in hotel rooms or buildings to which the public has access.

Article 55.¹⁵⁵ Exemption of the premises from taxation

1. The sending State and the members of the delegation acting on behalf of the delegation shall be exempt from all national, regional or municipal dues and taxes in respect of the premises of 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.

Commentary

- (1) Article 55 parallels article 24 and is modelled on article 24 of the Convention on Special Missions. At the second reading, however, on the basis of governmental comments, the Commission decided to delete at the beginning of paragraph 1 the phrase "To the extent compatible with the nature and duration of the functions performed by a delegation to an organ or to a conference" which had been included in the provisional draft following the wording of the above-mentioned article of the convention on Special Missions. Paragraph 2 reproduces unchanged the text of the corresponding provision of the provisional draft.
- (2) In their observations, Governments were concerned about the meaning of the phrase at the beginning of paragraph 1, which they considered could be interpreted in either a liberal or a narrow sense. Its deletion is intended to simplify the application of the provision set forth in paragraph 1 of article 55.
- (3) The wording of paragraph 1 of this article has not, however, been brought into line with the corresponding provision of part II (paragraph 1 of article 24). The Commission considered that, as its duration was relatively

¹⁵³ Article 92 of the provisional draft.

¹⁵⁴ Article 94 of the provisional draft.

¹⁵⁵ Article 95 of the provisional draft.

short, the delegation would probably not buy or lease premises but would in general make use of hotels. Consequently, it would not be appropriate to refer in article 55 to premises owned or leased by the delegation, as did article 24 for missions having a permanent character. In most cases, therefore, the practical result of the application of the provision embodied in paragraph 1 of article 55 will be to exempt delegation premises from taxes based on occupancy of hotel rooms.

Article 56.¹⁵⁶ *Inviolability of archives and documents*

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

Commentary

Article 56 parallels article 25, the commentary of which applies equally here.

Article 57.¹⁵⁷ *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 the delegation such freedom of movement and travel in its territory as is necessary for the performance of the tasks of the delegation.

Commentary

Article 57 parallels article 26 of the draft and is modelled on article 27 of the Convention on Special Missions. Freedom of movement for members of the delegation is granted for travel necessary for the performance of the delegation's tasks. As delegations are temporary, it is not necessary to accord to their members the same freedom of movement and travel as that granted to missions of a permanent character by article 26. Another difference is that article 57 does not mention the members of the family of a member of the delegation accompanying him. It was generally understood in the Commission that the provisions of this article should not be interpreted in an unduly strict manner in light of the general practice of host States to allow members of delegations and their families to travel freely in their territory.

Article 58.¹⁵⁸ *Freedom of communication*

1. The host State shall permit and protect free communication on the part of the delegation for all official purposes. In communicating with the Government of the sending State, its permanent diplomatic missions, consular posts,

permanent missions, permanent observer missions, special missions and other 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 tasks.

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 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 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 delegation. By arrangement with the appropriate authorities of the host State, 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.

Commentary

(1) Article 58 parallels article 27 of the draft and is modelled on article 28 of the Convention on Special Missions.

(2) In view of the needs of a delegation, the Commission considered it advisable to insert, as paragraph 3, a provision similar to paragraph 3 of article 28 of the Convention on Special Missions. One difference between this article and article 28 of that Convention is the addition in paragraphs 1 and 3 of the words "permanent mission(s)" and "permanent observer mission(s)" in order to coordinate the article with the corresponding provisions of part II of the draft. Another difference is the addition in paragraph 1 of the words "other delegations", in order to enable the delegations of the sending State to communicate with each other. Finally, as to terminology, the article uses the expressions "bag of the delegation" and "courier of the delegation" for reasons similar to those set forth in paragraph 6 of the commentary to article 27.

¹⁵⁶ Article 92 of the provisional draft.

¹⁵⁷ Article 96 of the provisional draft.

¹⁵⁸ Article 97 of the provisional draft.

Article 59.¹⁵⁹ Personal inviolability

The persons of the head of delegation and of other delegates and members of the diplomatic staff of the delegation 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 60.¹⁶⁰ Inviolability of private accommodation and property

1. The private accommodation of the head of delegation and of other delegates and members of the diplomatic staff of the delegation shall enjoy the same inviolability and protection as the premises of the delegation.

2. Their papers, correspondence and, except as provided in paragraph 3 of article 61, their property shall likewise enjoy inviolability.

Commentary

(1) Article 59 parallels article 28 of the draft and is modelled on article 29 of the Convention on Special Missions. Article 60 parallels article 29 of the draft and is modelled on article 30 of the Convention on Special Missions. The observations set forth in paragraphs 2 to 7 of the commentary to articles 28 and 29 of the draft apply also, *mutatis mutandis*, to the provisions of articles 59 and 60.

(2) At the second reading, only minor drafting adjustments and consequential terminological changes have been made by the Commission in the texts of the provisional draft (articles 98 and 99). Thus, the terms "of the representatives in a delegation to an organ or to a conference and of the members of its diplomatic staff" have been replaced by the terms "of the head of delegation and of other delegates and members of the diplomatic staff of the delegation". The Commission retained, however, in article 60 the expression "private accommodation" used in the Special Missions Convention, instead of "private residence" as in article 30 of the Convention on Diplomatic Relations and article 29 of the present draft, in view of the temporary character of delegations. Finally, the Commission added to the title of article 60 the words "and property".

(3) It is to be noted that the inviolability of private accommodation of the head of delegation and of other delegates and members of the diplomatic staff of the delegation, as provided for in article 60, applies regardless of the nature of the private accommodation—whether in hotel rooms, rented apartments, etc.

Article 61.¹⁶¹ Immunity from jurisdiction

1. The head of delegation and other delegates and members of the diplomatic staff of the delegation shall enjoy immu-

nity 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 delegation;

(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 by the person in question outside the performance of the tasks of the delegation where those damages are not recoverable from insurance.

2. The head of delegation and other delegates and members of the diplomatic staff of the delegation are not obliged to give evidence as witnesses.

3. No measures of execution may be taken in respect of the head of delegation or any other delegate or member of the diplomatic staff of the delegation except in cases coming under sub-paragraphs *a*, *b*, *c* and *d* of paragraph 1, and provided that the measures concerned can be taken without infringing the inviolability of his person or of his accommodation.

4. The immunity of the head of delegation and of other delegates and members of the diplomatic staff of the delegation from the jurisdiction of the host States does not exempt them from jurisdiction of the sending State.

Commentary

(1) The present article replaces article 100 of the provisional draft, which was presented in the form of two alternatives.¹⁶²

¹⁶² *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.

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.

(Continued overleaf)

¹⁵⁹ Article 98 of the provisional draft.

¹⁶⁰ Article 99 of the provisional draft.

¹⁶¹ Article 100 of the provisional draft.

(2) In bringing to the attention of Governments the two alternatives for article 100 of its provisional draft, the Commission stated in paragraph 1 of the commentary on that article that:

Alternative A is modelled directly on article 31 of the Convention on Special Missions. Alternative B is based on article IV, section 11, of the General Convention [on the Privileges and Immunities of the United Nations]; it follows that section in limiting immunity from the civil and administrative jurisdiction to acts performed in the exercise of official functions but goes beyond it in providing, as in alternative A, for full immunity from the criminal jurisdiction of the host State.¹⁶³

Article 61 reproduces the substance of alternative A of article 100 of the provisional draft.

(3) In their comments some Governments expressed preference for alternative A as affording greater protection to delegations and being based directly on the corresponding article of the Convention on Special Missions. One international organization observed that alternative A is based on the Convention on Diplomatic Relations and the Convention on Special Missions, which it assumed to reflect more closely the current thinking on the subject than the earlier Convention on the Privileges and Immunities of the United Nations. Other Governments expressed preference for alternative B, because they considered that it set out all the safeguards that were needed for the proper functioning of delegations. Two Governments did not regard either alternative A or B as satisfactory. They observed that alternative A is based on the Convention on Special Missions which they did not consider to be the appropriate precedent. They further pointed out that alternative B would confer immunity from criminal jurisdiction in respect of the non-official acts of a representative and that under the United Nations and the Specialized Agencies Conventions, the immunity is only from arrest and detention in connexion with such matters and not immunity from jurisdiction as such.

(4) The Commission re-examined the question at its present session in the light of these comments. Certain members expressed preference for alternative B, since in their opinion alternative A departed from existing practice and such departure was not justifiable. The majority of the members expressed, however, preference for alternative A.

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 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.

¹⁶³ Yearbook of the International Law Commission, 1970, vol. II, document A/8010/Rev.1, chap. II, B.

In deciding to draft article 61 in its present form, the Commission takes the position that the privileges and immunities of members of delegations to organs of international organizations and to conferences convened by or under the auspices of international organizations should be based upon a selective merger of the pertinent provisions of the Convention on Special Missions and the provisions regarding missions to international organizations provided for in part II of the present draft. This position is derived from a number of recent developments 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 those of permanent diplomatic missions; (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.

Article 62.¹⁶⁴ Waiver of immunity

1. The immunity from jurisdiction of the head of delegation and of other delegates and members of the diplomatic staff of the delegation and of persons enjoying immunity under article 67 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 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 judgment, for which a separate waiver shall be necessary.
5. If the sending State does not waive the immunity of any of the persons mentioned in paragraph 1 in respect of a civil action, it shall use its best endeavours to bring about a just settlement of the case.

Commentary

(1) Article 62 parallels article 31. Paragraphs 1 to 4 are therefore modelled on article 32 of the Convention on Diplomatic Relations and article 41 of the Convention on

¹⁶⁴ Article 101 of the provisional draft.

Special Missions. Paragraph 5, like paragraph 5 of article 31, is based on resolution II adopted by the United Nations Conference on Diplomatic Intercourse and Immunities and General Assembly resolution 2531 (XXIV) relating to the settlement of civil claims in connexion with the Convention on Special Missions.

(2) As indicated in paragraph 5 of the commentary to article 31, the provision set forth in paragraph 5 places the sending State, in respect of a civil action, under the obligation of using its best endeavours to bring about a just settlement of the case if it is unwilling to waive the immunity of the person concerned. If, on the one hand, the provision of paragraph 5 leaves the decision to waive immunity to the discretion of the sending State which is not obliged to explain its decision, on the other, it imposes on that State an objective obligation which may give to the host State grounds for complaint if the sending State fails to comply with it. The legal obligation of the sending State to seek a just settlement of the case might lead, in the case of delegations as well as of missions, to the initiation of the consultation and conciliation procedures provided for in articles 81 and 82, to which the host State can resort if the sending State does not find a means of settlement.

(3) As in the case of missions (articles 30 and 31), the provisions of articles 61 and 62, taken together, will therefore guarantee the solution of disputes in civil matters.

Article 63.¹⁶⁵ Exemption from social security legislation

1. Subject to the provisions of paragraph 3, the head of delegation and other delegates and members of the diplomatic staff of the delegation shall with respect to services rendered for the sending State be exempt from social security provisions which may be in force in the host State.

2. The exemption provided for in paragraph 1 shall also apply to persons who are in the sole private employ of the head of delegation or of any other delegate or member of the diplomatic staff of the delegation, 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 which may be in force in the sending State or a third State.

3. The head of delegation and other delegates and members of the diplomatic staff of the delegation who employ persons to whom the exemption provided for in paragraph 2 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 shall not preclude voluntary participation in the social security system of the host State provided that such participation is permitted by that State.

5. The provisions of this article shall not affect bilateral or multilateral agreements concerning social security concluded

previously and shall not prevent the conclusion of such agreements in the future.

Commentary

Article 63 parallels article 32. The Convention on Diplomatic Relations (article 33) and the Convention on Special Missions (article 32) dealt with the subject-matter of this article in the same manner. The observations set forth in paragraphs 2 to 5 of the commentary to article 32 of the draft apply *mutatis mutandis* to article 63.

Article 64.¹⁶⁶ Exemption from dues and taxes

The head of delegation and other delegates and members of the diplomatic staff of the delegation shall be exempt from all dues and taxes, personal or real, national 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 paragraph 4 of article 69;

(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 55.

Commentary

(1) Article 64 parallels article 33 of the draft and is modelled on article 34 of the Convention on Diplomatic Relations and article 33 of the Convention on Special Missions. The observations in paragraphs 2 to 6 of the commentary to article 33 of the draft apply *mutatis mutandis* to the provisions embodied in article 64.

(2) At the first reading, the Commission considered whether to insert a sub-paragraph which would add "excise duties or sales tax" to the list of exclusions from exemption.¹⁶⁷ Some members considered that such an addition would be desirable because it would accord with the existing provisions in the United Nations Convention on Privileges and Immunities and would reduce administrative difficulties in the host States. Other members considered that the nature and level of "sales tax" varied according to the country concerned. Some members were of the opinion that "excise duties or sales tax" were, at least to some extent, covered by sub-paragraph *a* of the article.

¹⁶⁶ Article 102 of the provisional draft.

¹⁶⁷ *Yearbook of the International Law Commission, 1970*, vol. I, p. 201, 1077th meeting, paras. 134 *et seq.*

¹⁶⁵ Article 104 of the provisional draft.

A similar division of views was reflected in discussions in the Sixth Committee and comments received from Governments. The Commission decided then that it was desirable to adhere to the pattern originally laid down in the Convention on Diplomatic Relations. At the second reading, the Commission decided to maintain that decision.

Article 65.¹⁶⁸ Exemption from personal services

The host State shall exempt the head of delegation and other delegates and members of the diplomatic staff of the delegation from all personal services, from all public service of any kind whatsoever, and from military obligations such as those connected with requisitioning, military contributions and billeting.

Commentary

Article 65 parallels article 34 of the draft, and is modelled on article 35 of the Convention on Diplomatic Relations and article 34 of the Convention on Special Missions. The observations set forth in paragraph 3 of the commentary to article 34 of the draft apply *mutatis mutandis* to the provisions of article 65.

Article 66.¹⁶⁹ 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 delegation;

(b) articles for the personal use of the head of delegation or of any other delegate or member of the diplomatic staff of the delegation.

2. The personal baggage of the head of delegation or of any other delegate or member of the diplomatic staff of the delegation 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, or articles the import or export of which is prohibited by the law or controlled by the 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.

Commentary

(1) Article 66 parallels article 35. It is modelled on article 36 of the Convention on Diplomatic Relations and article 35 of the Convention on Special Missions.

(2) The Commission replaced in paragraph 1 the phrase "within the limits of such laws and regulations as it may adopt" which appears in article 35 of the Convention on

Special Missions by the phrase "in accordance with such laws and regulations as it [the host State] may adopt" used in article 36 of the Convention on Diplomatic Relations and article 35 of the present draft.

(3) The Commission did not include in paragraph 1b of this article the words "including articles intended for his establishment", which appear in the corresponding subparagraph of article 35, because the tasks of delegations are generally of short duration.

Article 67.¹⁷⁰ Privileges and immunities of other persons

1. The members of the family of the head of delegation who accompany him, and the members of the family of any other delegate or member of the diplomatic staff of the delegation who accompany him shall, if they are not nationals of or permanently resident in the host State, enjoy the privileges and immunities specified in articles 59, 60, 61, 63, 64, 65 and paragraphs 1 (b) and 2 of article 66.

2. Members of the administrative and technical staff of the delegation, together with members of their families who accompany them and who are not nationals of or permanently resident in the host State, shall enjoy the privileges and immunities specified in articles 59, 60, 61, 63, 64 and 65, except that the immunity from civil and administrative jurisdiction of the host State specified in paragraph 1 of article 61 shall not extend to acts performed outside the course of their duties. They shall also enjoy the privileges specified in paragraph 1 (b) of article 66 in respect of articles imported at the time of their first entry into the territory of the host State for the purpose of attending the meeting of the organ or conference.

3. Members of the service staff of the delegation 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 63.

4. Private staff of members of the delegation shall 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 tasks of the delegation.

Commentary

(1) Article 67 parallels article 36 of the draft and is modelled on article 37 of the Convention on Diplomatic Relations and articles 36 to 39 of the Convention on Special Missions. Having adopted alternative A of the provisional draft for article 61 dealing with immunity from jurisdiction, the Commission, at the second reading, formulated article 67 along the lines of the corresponding article of part II of the draft (article 36).

(2) More particularly, the Commission found it necessary to retain the distinction between the members of the family

¹⁶⁸ Article 104 of the provisional draft.

¹⁶⁹ Article 103 of the provisional draft.

¹⁷⁰ Article 105 of the provisional draft.

“accompanying” members of delegations, as described in paragraphs 1 and 2 of article 67, and the members of the family “forming part of the household” of members of missions, as described in paragraphs 1 and 2 of article 36. The Commission considered that the word “accompany” was appropriate in article 67, having regard to the temporary character of delegations.

(3) Another difference between articles 36 and 67 is the retention of the words “or permanently resident in the host State” in paragraph 1 of article 67. This is in accord with the corresponding provision in article 39 of the Convention on Special Missions.

(4) The observations contained in paragraphs 2, 3 and 4 of the commentary to article 36 apply, *mutatis mutandis*, to the provisions of this article.

Article 68.¹⁷¹ 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 head of delegation and any other delegate or member of the diplomatic staff of the delegation 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 delegation 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 tasks of the delegation.

Commentary

Article 68 parallels article 37 of the draft and is modelled on article 38 of the Convention on Diplomatic Relations and article 40 of the Convention on Special Missions. The observations in paragraphs 2 to 5 of the commentary to article 37 of the draft apply, *mutatis mutandis*, to the provisions of article 68.

Article 69.¹⁷² Duration of privileges and immunities

1. Every person entitled to privileges and immunities shall enjoy them from the moment he enters the territory of the host State for the purpose of attending the meeting of an organ or conference or, if 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 enjoying privileges and immunities have come to an end, such privileges and immunities shall normally cease at the moment when he leaves the country, or on expiry of a reasonable period in which to do

so. However, with respect to acts performed by such a person in the exercise of his functions as a member of the delegation, immunity shall continue to subsist.

3. In case of the death of a member of the 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 country.

4. In the event of the death of a member of the delegation not a national of or permanently resident in the host State or of a member of his family accompanying him, 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. 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 delegation or of the family of a member of the delegation.

Commentary

(1) Article 69 parallels article 38 of the draft and is modelled on article 39 of the Convention on Diplomatic Relations and articles 43 and 44 of the Convention on Special Missions.

(2) In 1970, the Commission, following the Convention on Special Missions, provisionally formulated the provisions of this article in two separate articles. At the second reading, the Commission adopted the arrangement and language found in the Convention on Diplomatic Relations as being better designed for the present purposes.

(3) Articles 38 and 69 have, however, some differences in wording, due mainly to the temporary nature of delegations. In paragraph 1 the phrase “on proceeding to take up his post or, if already in its territory, from the moment when his appointment is notified to the host State by the Organization or by the sending State” has been replaced by the phrase “for the purpose of attending the meeting of an organ or conference or, if 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.” The words “by the conference” have been inserted in order to cover the case when notification is made by the conference itself and not by the organization responsible for convening it, or directly by the sending State. The expression “forming part of his household” has been replaced by the expression “accompanying him” in paragraph 4.

(4) The observations in paragraphs 2 to 6 of the commentary to article 38 apply, *mutatis mutandis*, to the provisions of article 69.

Article 70.¹⁷³ End of the functions of the head of delegation or any other delegate or member of the diplomatic staff

The functions of the head of delegation or of any other delegate or member of the diplomatic staff of the delegation shall come to an end, *inter alia*:

¹⁷¹ Article 106 of the provisional draft.

¹⁷² Articles 108 and 109 of the provisional draft.

¹⁷³ Article 114 of the provisional draft.

(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.

Commentary

(1) Article 70 parallels article 40.

(2) The English word "meeting" is used in this article in its broad sense (like "réunion" and "reunión" used in the French and Spanish versions), and not in the narrower meaning in which it is sometimes used in the context of the rules, procedures and practice of organs and conferences.

(3) The observations in paragraph 1 of the commentary to article 40 apply, *mutatis mutandis*, to the provisions of this article. It should also be pointed out that both article 40 and article 70 regulate the "end of functions" and not the question of the "duration of the privileges and immunities", which is dealt with in articles 38 and 69.

Article 71.¹⁷⁴ Protection of premises, property and archives

1. When the meeting of an organ or a conference comes to an end, the host State must respect and protect the premises of the delegation so long as they are assigned to it, as well as the property and archives of the delegation. The sending State must take all appropriate measures to terminate this special duty of the host State within a reasonable time.

2. The host State, if requested by the sending State, shall grant the latter facilities for removing the property and the archives of the delegation from the territory of the host State.

Commentary

(1) Article 71 parallels article 41.

(2) One difference between article 41 and article 71 is that the protection of the premises of the delegation, provided for in the first sentence of paragraph 1 of article 71, is qualified by the words "so long as they are assigned to it", taken from article 46 of the Convention on Special Missions. The Commission considered that difference justified because, unlike the premises of missions, those of delegations are in most cases occupied only for a short time. Under the circumstances, the host State could not be required to protect them when they are no longer assigned to the delegation.

(3) In view also of the short duration of most delegations, the Commission felt it unnecessary to include in article 71 a provision on entrusting custody of the premises, property and archives of the delegation to a third State, as provided for in the case of missions in the third sentence of paragraph 1 of article 41.

(4) Lastly, the opening words of article 41 "When the mission is temporarily or finally recalled" have been

replaced by the words "When the meeting of an organ or a conference comes to an end", in view of the fact that it is normally when the meeting of the organ or the conference has come to an end, that the question of the protection of the premises, property and archives of the delegation arises.

(5) As appropriate, the observations of the commentary to article 41 apply also to the provisions of article 71.

PART IV. GENERAL PROVISIONS

Article 72.¹⁷⁵ Nationality of the members of the mission or the delegation

The head of mission and members of the diplomatic staff of the mission, the head of delegation, other delegates and members of the diplomatic staff of the delegation 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 State which may be withdrawn at any time.

Commentary

(1) Article 72 is modelled on paragraphs 1 and 2 of article 8 of the Convention on Diplomatic Relations and paragraphs 1 and 2 of article 10 of the Convention on Special Missions.

(2) The rule the article lays down applies to both the head of mission and members of the diplomatic staff of the mission and to the head of delegation, other delegates and members of the diplomatic staff of the delegation. Persons belonging to these categories of members of the mission or the delegation should in principle be of the nationality of the sending State and may not be appointed from among persons having the nationality of the host State, except with the consent of that State. With respect to members of delegations, however, the Commission assumed that, given the temporary nature of delegations, the host State would withdraw its consent to the appointment of one of its nationals to a delegation only in serious cases and that every effort would be made not to disrupt the work of the delegation.

(3) The Commission decided to limit the scope of the article to nationals of the host State and not to extend it to nationals of a third State. It therefore did not include in article 72 the rule contained in paragraph 3 of article 8 of the Convention on Diplomatic Relations and in paragraph 3 of article 10 of the Convention on Special Missions. The highly technical character of some international organizations makes it desirable not to restrict unduly the free selection of members of missions and delegations since the sending State may find it necessary to appoint, as members of its missions and delegations,

¹⁷⁴ Article 116 of the provisional draft.

¹⁷⁵ Articles 11, 56 and 85 of the provisional draft.

nationals of a third State who possess the required training and experience.

(4) To the considerations stated in the preceding paragraph, the objection might be raised that, in some States, nationals have to seek the consent of their own Government before entering into the service of a foreign Government. Such a requirement, however, applies only to the relationship between a national and his own Government; it does not affect relations between States and is therefore not a rule of international law.

(5) The Commission also considered the question of the appointment of stateless persons or persons with dual nationality. It concluded that, like the cases falling under the Conventions on Diplomatic Relations and on Consular Relations and the Convention on Special Missions, the matter should be settled according to the relevant rules of international law.

Article 73.¹⁷⁶ Laws concerning acquisition of nationality

Members of the mission or the delegation not being nationals of the host State, and members of their families forming part of their household or, as the case may be, accompanying them, shall not, solely by the operation of the law of the host State, acquire the nationality of that State.

Commentary

(1) Article 73 is based on the rule stated in article II of the Optional Protocol concerning Acquisition of Nationality, adopted on 18 April 1961 by the United Nations Conference on Diplomatic Intercourse and Immunities.¹⁷⁷ A similar Optional Protocol was adopted on 24 April 1963 by the United Nations Conference on Consular Relations.¹⁷⁸

(2) The origin of the rule stated in the 1961 Optional Protocol is to be found in article 35 of the draft articles on diplomatic intercourse and immunities adopted by the Commission at its tenth session (1958). At the time, the Commission gave the following explanation on the matter in its commentary on article 35:

This article is based on the generally received view that a person enjoying diplomatic privileges and immunities should not acquire the nationality of the receiving State solely by the operation of the law of that State, and without his consent. In the first place the article is intended to cover the case of a child born on the territory of the receiving State of parents who are members of a foreign diplomatic mission and who also are not nationals of the receiving State. The child should not automatically acquire the nationality of the receiving State solely by virtue of the fact that the law of that State would normally confer local nationality in the circumstances. Such a child may, however, opt for that nationality later if the

legislation of the receiving State provides for such an option. The article covers, secondly, the acquisition of the receiving State's nationality by a woman member of the mission in consequence of her marriage to a local national. Similar considerations apply in this case also and the article accordingly operates to prevent the automatic acquisition of local nationality in such a case. On the other hand, when the daughter of a member of the mission who is not a national of the receiving State marries a national of that State, the rule contained in this article would not prevent her from acquiring the nationality of that State, because, by marrying, she would cease to be part of the household of the member of the mission.¹⁷⁹

(3) In support of the Commission's recommendation that the provision should form an integral part of the draft articles on missions to international organizations and delegations to organs and to conferences, the Commission wishes to point out a significant difference between bilateral diplomatic relations and situations covered by the present draft with regard to the scope of application of the rule of acquisition of nationality. The Optional Protocol concerning Acquisition of Nationality (1961) was intended to apply to the bilateral relationships among the great number of States members of the community of nations. On the other hand, in the case of missions to international organizations and delegations to their organs and to conference convened by or under their auspices, the persons whose nationality is in question are on the territory of the host State in virtue of the relationship of their State with the international organization or of its participation in the conference and not of any purely bilateral relation between the sending State and the host State; indeed, bilateral diplomatic relations may in some cases not even exist between the host State and the sending State. Similarly, the element of reciprocity which exists in the case of diplomatic relations does not exist in the present context. Accordingly, the Commission considered that in the present draft there was a reasonable case for making the matter one of express provision rather than relegating it to an optional protocol.

(4) It is also worthwhile noting that even in bilateral diplomacy many States under whose internal law citizenship is automatically conferred by the fact of birth within their territory recognize that there is an exemption in the case of children of diplomats.

(5) As formulated, the article does not exclude the acquisition of the nationality of the host State by consent but only automatic acquisition by the operation of the law of the host State. It applies to: (a) members of the mission (head of mission and members of the diplomatic staff, the administrative and technical staff and the service staff of the mission) who are not nationals of the host State; (b) members of the delegation (head of delegation, delegates and members of the diplomatic staff, the administrative and technical staff and the service staff of the delegation) who are not nationals of the host State; (c) members of the family forming part of the household of a member of the mission who is not a national of the host State; (d) members of the family accompanying a member of the delegation who is not a national of the host State.

¹⁷⁶ Articles 39, 72 and 104 of the provisional draft.

¹⁷⁷ *Official Records of the United Nations Conference on Diplomatic Intercourse and Immunities*, vol. II (United Nations publication, Sales No.: 62.X.I.), p. 88.

¹⁷⁸ *Official Records of the United Nations Conference on Consular Relations*, vol. II (United Nations publication, Sales No.: 64.X.I.), p. 189.

¹⁷⁹ *Yearbook of the International Law Commission, 1958*, vol. II, p. 101, document A/3859, para. 53.

Article 74.¹⁸⁰ Privileges and immunities in case of multiple functions

When members of the permanent diplomatic mission or of a consular post in the host State are included in a mission or delegation, they shall retain their privileges and immunities as members of their permanent diplomatic mission or consular post in addition to the privileges and immunities accorded by the present articles.

Commentary

(1) Article 74 is modelled on paragraph 2 of article 9 of the Convention on Special Missions. It deals with a situation which frequently arises in practice. Sending States have often appointed members of their permanent diplomatic mission or consular posts in the host State as members of their permanent mission or permanent observer mission to an international organization as well as members of their delegation to an organ or to a conference.

(2) These functions are not incompatible. The performance by diplomatic agents and consular officers of representative functions to or in an international organization has already been regulated by the Convention on Diplomatic Relations and the Convention on Consular Relations. Paragraph 3 of article 5 of the Convention on Diplomatic Relations provides that:

A head of [diplomatic] mission or any member of the diplomatic staff of the [diplomatic] mission may act as representative of the sending State to any international organization.

and the first sentence of paragraph 2 of article 17 of the Convention on Consular Relations states:

A consular officer may, after notification addressed to the receiving State, act as representative of the sending State to any inter-governmental organization.

The accreditation or appointment to a diplomatic mission or a consular post of members of a mission to an international organization or of members of a delegation to an organ or to a conference, is, of course, governed by the rules of international law concerning diplomatic and consular relations. Having come to the conclusion that the compatibility of these functions is well established and regulated by the two Conventions referred to above, the Commission decided to limit article 74 to the question of the privileges and immunities in case of multiple functions and deleted from the present articles the provision contained in article 9 (Accreditation, assignment or appointment of a member of a permanent mission to other functions) of the provisional draft.

(3) Article 74 provides that when a member of the permanent diplomatic mission or a consular post in the host State is included in a mission to an international organization or in a delegation to an organ or to a conference, he will retain his privileges and immunities as a member of the permanent diplomatic mission or of the consular post in addition to the privileges and immunities accorded by the present articles. In other words, he will not lose either his diplomatic or consular privileges and immunities by reason of the fact that he is during the same period performing functions in the mission to an international organ-

¹⁸⁰ Article 59, paragraph 2, and article 107 of the provisional draft.

ization or in the delegation to an organ or to a conference. In this connexion it is worth noting that the second sentence of paragraph 2 of article 17 of the Convention on Consular Relations states that when a consular officer acts as a representative of a State to an inter-governmental organization

he shall be entitled to enjoy any privileges and immunities accorded to such a representative by customary international law or by international agreements; however, in respect of the performance by him of any consular function, he shall not be entitled to any greater immunity from jurisdiction than that to which a consular officer is entitled under the present Convention.

(4) Finally, the Commission did not consider it necessary to regulate expressly in the article the question of the privileges and immunities of members of a special mission included in a mission to an international organization or in a delegation to an organ or to a conference. Owing to the temporary nature of special missions, situations such as those envisaged in article 74 do not occur so frequently with regard to special missions as in the case of permanent diplomatic missions and consular posts. It would be natural that by analogy the general principle embodied in the article should apply, *mutatis mutandis*, to members of a special mission included in a mission to an international organization or in a delegation to an organ or to a conference in the particular instances in which such a situation may occur in practice.

Article 75.¹⁸¹ 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 jurisdiction, the sending State shall, unless it waives the immunity of the person concerned, recall him, terminate his functions with the mission or the delegation or secure his departure, as appropriate. The sending State shall take the same action in case of grave and manifest interference in the internal affairs of the host State. The provisions of this paragraph shall not apply in the case of any act that the person concerned performed in carrying out the functions of the mission or the tasks of the delegation.

3. The premises of the mission and the premises of the delegation shall not be used in any manner incompatible with the exercise of the functions of the mission or the performance of the tasks of the delegation.

Commentary

(1) Paragraphs 1 and 3 of article 75 are modelled on the provisions of article 41, paragraphs 1 and 3, of the Convention on Diplomatic Relations, and article 47 of the Convention on Special Missions. The absence of the *persona non grata* procedure in the context of relations

¹⁸¹ Articles 45, 76 and 112 of the provisional draft.

between States and international organizations is the basis for the requirement of withdrawal in the circumstances provided for in paragraph 2. The formulation of the article as a whole reflects the need for safeguarding all the interests involved, namely the interests of the host State, of the sending State and of the international organization in question.

(2) Paragraph 2 regulates the obligations of the sending State in the particular circumstances specified therein. In order to clarify the meaning of the paragraph, the Commission has made the following major changes in the text of the corresponding paragraph of the provisional draft articles: (a) the first sentence has been retained, but the word "criminal" before the word "jurisdiction" has been deleted as unnecessary; (b) the words "The sending State shall take the same action in case of grave and manifest interference in the internal affairs of the host State" have been inserted as a new second sentence; (c) in the third sentence, formerly second sentence, the specification of place has been deleted ("within either the Organization or the premises of a [mission]"; "in the premises where the organ or conference is meeting or the premises of the delegation"). Accordingly, paragraph 2 establishes the obligations of the sending State in the event of a grave and manifest breach of the criminal law of the host State by a person enjoying immunity from jurisdiction and of a grave and manifest interference in its internal affairs by any such persons. In this connexion, the Commission is of the opinion that repeated minor violations of the criminal law could lead to a "grave and manifest violation" thereof within the meaning of paragraph 2.

(3) Three alternatives are offered to the sending State for the discharge of the obligations imposed on it by paragraph 2: (a) to waive the immunity of the person concerned; (b) to terminate his functions in the mission or the delegation; (c) to secure his departure from the host State. The paragraph, therefore, imposes on the sending State an obligation to recall a member from his mission or delegation in cases of grave and manifest violation of the criminal law of the host State and in cases of grave and manifest interference in its internal affairs. Where the gravity of certain offences or acts would be evident, the sending State clearly has the obligation to recall the person concerned. If a dispute should arise between the sending State and the host State on the matter, consultations can be held, in accordance with the procedure provided for in articles 81 and 82, which will either convince the sending State that the person concerned ought to be recalled, or convince the host State that the act was not such as to require his recall. The expression "unless it waives the immunity" has been included in order to emphasize that the provisions of the paragraph are not intended to derogate from those of articles 30 and 61.

(4) The last sentence of paragraph 2 contains a saving clause intended *inter alia* to safeguard the independent exercise of the functions of the members of the mission or the delegation. The reservation, which concerns grave and manifest offences committed in carrying out the functions of the mission or the tasks of the delegation, is designed to deal with extreme cases. The Commission has used the expression "act [. . .] performed in carrying out

the functions of the mission or the tasks of the delegation" instead of the expression "official acts", with the view of keeping within the rules provided for in the first and second sentences of the paragraph any act belonging to one of the two categories referred to in those sentences which does not fall within the scope of acts performed in carrying out the functions of the mission or the tasks of the delegation. For instance, if a grave and manifest interference in the internal affairs of the host State took the form of publishing material aimed at encouraging disaffection in the host State, such interference will not fall within the scope of acts performed in carrying out the functions of the mission or the tasks of the delegation.

(5) Paragraph 2 is not a limitation upon the obligations embodied in paragraph 1. The obligations of the sending State under paragraph 2 do not modify with respect to the person concerned either the general obligation to respect the laws and regulations of the host State or the general duty not to interfere in the internal affairs of that State. Although the obligation to recall imposed on the sending State by paragraph 2 relates only to "grave and manifest violation of criminal law" and to "grave and manifest interference in the internal affairs", grounds for recall may also arise from failure to comply with the duties established in paragraph 1, even if the failure relates to violations of non-criminal law or to violations or interferences not necessarily grave and manifest. In other words, paragraph 2 defines the obligations of the sending State in specified circumstances, including the obligation to recall under these circumstances, but it is not intended to limit the cases in which the host State can ask the sending State to recall a person enjoying privileges and immunities.

(6) Finally, paragraph 3, which remains unchanged, stipulates that the premises of the mission or the delegation shall not be used in any manner incompatible with the exercise of the functions of the mission or the performance of the tasks of the delegation. Failure to fulfil the obligation laid down in this paragraph does not render the inviolability of the premises, as established in the draft articles, inoperative but, on the other hand, that inviolability does not authorize a use of the premises which is incompatible with the functions of the mission or the tasks of the delegation. Unlike paragraph 3 of article 41 of the Convention on Diplomatic Relations and paragraph 2 of article 47 of the Convention on Special Missions, paragraph 3 of this article does not include the expression "as laid down (envisaged) in the present Convention or by (in) other rules of general international law", or a phrase similar to that referring to "any special agreements in force between the sending and the receiving State". These were deemed unnecessary, particularly in the light of articles 2 and 4 of the draft.

Article 76.¹⁸² Entry into the territory of the host State

1. The host State shall permit entry into its territory of:

(a) members of the mission and members of their families forming part of their respective households, and

¹⁸² New article.

(b) members of the delegation and members of their families accompanying them.

2. Visas, when required, shall be granted as promptly as possible to any person referred to in paragraph 1.

Commentary

(1) As stated in the commentaries to articles 48 (permanent missions) and 115 (delegations) of the provisional draft articles, the Commission had considered at its twenty-first¹⁸³ and twenty-second¹⁸⁴ sessions the possibility of including in the draft, as a counterpart to the articles relating to "facilities for departure", a general provision on the obligation of the host State to allow members of missions or delegations to enter its territory to take up their posts, but had postponed its decision until the second reading of the draft.

(2) In the light of the comments made by several Governments and the Secretariats of the United Nations and IAEA, the Special Rapporteur submitted to the Commission, as a basis for discussion at its present session, the text of a new article entitled "Entry into the host State" in the part of the draft dealing with permanent missions (A/CN.4/241 and Add.1-6,¹⁸⁵ chap. II, article 27 *bis*). The Special Rapporteur made identical proposals for the parts concerning permanent observer missions and delegations to organs and to conferences (*ibid.*, article 67, and chap. V, article Z).

(3) The Secretariat of the United Nations expressed its views on the question in the following manner:

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 articles.

Entry into the territory of the host State 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

¹⁸³ Paragraph 2 of the commentary to article 48. See *Yearbook of the International Law Commission, 1969*, vol. II, p. 221, document A/7620/Rev.1.

¹⁸⁴ Commentary to article 115. See *Yearbook of the International Law Commission, 1970*, vol. II, p. 299, document A/8010/Rev.1.

¹⁸⁵ See p. 1 above.

article 45, paragraph 2, on "recall" (of the person concerned by the sending State). 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 the relevant provisions 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 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.¹⁸⁶

(4) 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 of a permanent mission 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 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.¹⁸⁷

¹⁸⁶ See below annex I, section C, 1.

¹⁸⁷ *Ibid.*, section C, 13.

(5) The Commission considered that the inclusion in the present draft of an article on the obligation of the host State to allow members of missions or delegations to enter its territory to take up their post would serve a useful purpose and decided to insert such an article in the draft among the general provisions applicable to the whole draft articles.

(6) Accordingly, paragraph 1 of article 76 states that the host State shall permit entry into its territory of members of the mission and of the delegation. This obligation of the host State applies also in the case of members of the families of members of the mission "forming part of their respective households" and of members of the families of members of the delegation "accompanying them". Paragraph 2 provides for the prompt issuance of visas, when required, to the persons referred to above.

(7) The Commission thought it unnecessary to make an explicit reference in this article to the freedom of "transit" or "access" to and from the premises of the organization, the facilitation of the "sojourn" in the host State, the exemption from the laws and regulations of the host State tending to restrict the entry or sojourn of aliens and the granting of visas free of charge. The Commission considered that the freedom of "transit" or "access" to and from the premises of the organization was already granted by the provisions contained in articles 26 and 57 (Freedom of movement) and that the obligation of the host State to facilitate the "sojourn" was inherent in several provisions of the draft articles. The Commission was further of the view that a general statement of the obligation of the host State concerning entry into its territory, as stated in this article 76, implied the inapplicability to the persons concerned of any restrictive laws and regulations on entry or sojourn of aliens.

Article 77.¹⁸⁸ Facilities for departure

The host State shall, if 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.

Commentary

(1) Article 77 is modelled on article 44 of the Convention on Diplomatic Relations and paragraph 1 of article 45 of the Convention on Special Missions.

(2) In the Convention on Diplomatic Relations and the Convention on Special Missions, both of which deal with bilateral relations, the article was drafted for extreme situations between the receiving State and the sending State—for instance, a rupture of diplomatic relations or an armed conflict between those States. This was considered inappropriate for a draft concerning relations between States and international organizations.

(3) Under the present article, the obligation of the host State to facilitate departure is subject to a request made to it by the sending State. In normal circumstances there

would be no question of facilities being requested by the sending State. On the other hand, the host State should comply with such a request in the event of a real difficulty. It is, of course, understood that the difficulties mentioned may result, in actual fact, from emergencies such as a case of *force majeure* or even the outbreak of hostilities affecting the situation at the headquarters of the organization or at the place of the meeting of an organ or a conference. The obligation of the host State to facilitate departure, if it is so requested by the sending State, applies therefore whatever the cause of the difficulty may be, including situations created by emergencies of the kind described.

Article 78.¹⁸⁹ Transit through the territory of a third State

1. If a head of mission or a member of the diplomatic staff of the mission, a head of delegation, other delegate or member of the diplomatic staff of the delegation 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 resume his functions, 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.

2. The provisions of paragraph 1 shall also apply in the case of:

(a) members of the family of the head of mission or of a member of the diplomatic staff of the mission forming part of his household and enjoying privileges and immunities, whether travelling with him or travelling separately to join him or to return to their country;

(b) members of the family of the head of delegation, of any other delegate or member of the diplomatic staff of the delegation who are accompanying him and enjoy privileges and immunities, whether travelling with him or travelling separately to join him or to return to their country.

3. In circumstances similar to those specified in paragraphs 1 and 2, third States shall not hinder the passage of members of the administrative and technical or service staff, and of members of their families, through their territories.

4. 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 articles. They shall accord to the couriers of the mission or of the delegation, who have been granted a passport visa if such visa was necessary, and to the bags of the mission or of the delegation in transit the same inviolability and protection as the host State is bound to accord under the present articles.

5. The obligations of third States under paragraphs 1, 2, 3 and 4 shall also apply to the persons mentioned respectively in those paragraphs, and to the official communications and bags of the mission or of the delegation when they are present in the territory of the third State owing to *force majeure*.

¹⁸⁸ Articles 48, 77 and 115 of the provisional draft.

¹⁸⁹ Articles 43, 74 and 110 of the provisional draft.

Commentary

(1) Article 78 is modelled on article 40 of the Convention on Diplomatic Relations and article 42 of the Convention on Special Missions.

(2) Reference has been made in paragraph 3 of the commentary on article 9 of the draft to the broad interpretation given by the Legal Counsel of the United Nations to the provision of article IV (section 11) of the Convention on the Privileges and Immunities of the United Nations and of article V (section 13) of the Convention on the Privileges and Immunities of the Specialized Agencies which stipulates that representatives shall enjoy the privileges and immunities listed in those Conventions while exercising their functions and during their journeys to and from the place of meeting.

(3) The Study of the Secretariat mentions the special problem which may arise when access to the country in which a United Nations meeting is to be held is only possible through another State. It states that:

While there is little practice, the Secretariat takes the position that such States are obliged to grant access and transit to the representatives of Member States for the purpose in question.¹⁹⁰

(4) During the discussion in the Commission it was noted that when the Commission had drafted the corresponding articles of the draft on diplomatic intercourse and immunities and of the draft on special missions, it had not intended to lay down an obligation for third States to grant transit, but merely wished to regulate the status of diplomatic agents in transit.¹⁹¹ Doubts were expressed as to whether such an obligation would be a positive rule at present and as to whether States would be prepared to accept it as *lex ferenda*. Reference was made to the difficulties which the obligation of granting transit would give rise to and in particular to the difficulties that would be encountered in the case in which the request for transit was made on behalf of a person who might be objectionable to the third State. Particular attention was given to the situation when a member of a mission or a delegation, being a national of a land-locked State, finds himself obliged to pass through the territory of the third State. In such an exceptional situation there is perhaps a case for asserting the existence of an obligation on the part of the third State, at least when it is a member of the organization concerned, by virtue of Articles 104 and 105 of the United Nations Charter and similar provisions in the constitutions of specialized agencies and regional organizations.

(5) In the present article the Commission decided to follow, with some adjustments and drafting changes in some language versions, the wording of article 40 of the

¹⁹⁰ Study of the Secretariat, op. cit., p. 190, para. 168.

¹⁹¹ Paragraph 2 of the commentary to article 39 of the draft articles on diplomatic intercourse and immunities [see *Yearbook of the International Law Commission, 1958*, vol. II, p. 103, document A/3859, para. 53] and paragraph 2 of the commentary to article 43 of the draft articles on special missions [*ibid.*, 1967, vol. II, p. 365, document A/6709/Rev. 1, chap. II, D].

Convention on Diplomatic Relations rather than the wording of article 42 of the Convention on Special Missions.

(6) Consequently, the phrases "which has granted him a passport visa if such visa was necessary" and "who have been granted a passport visa if such a visa was necessary" have been maintained in paragraphs 1 and 4 of the present article instead of being replaced by a separate paragraph along the lines of paragraph 4 of article 42 of the Convention on Special Missions. The Commission considers that a provision like paragraph 4 of article 42 of the Convention on Special Missions was not necessary with regard to delegations to organs or to conferences. It believes that in the framework of multilateral diplomacy the visa requirement, as provided for in this article and in the Convention on Diplomatic Relations, offers adequate protection to the third State.

(7) Paragraph 2 of the present article corresponds to the last sentence of paragraph 1 of article 40 of the Convention on Diplomatic Relations and the last sentence of paragraph 1 of article 42 of the Convention on Special Missions. It concerns the transit through the territory of a third State of members of the family of the head of mission, of a member of the diplomatic staff of the mission, of the head of delegation, of any other delegate or of a member of the diplomatic staff of the delegation. The different position of members of the family enjoying privileges and immunities in the context of permanent or of temporary diplomacy explains the need of a separate formulation. So far as missions are concerned, the members of the family referred to are those "forming part of the household" of the person concerned, while in the case of delegations the members of the family dealt with are those "accompanying" the member of the delegation in question.

(8) Finally, "third State" means in this article any State party to the convention which will be adopted on the basis of the present draft articles, other than the sending State or the host State. For third States not parties to the future convention, the subject-matter of the article will be governed by particular conventions or agreements, where applicable, or by customary international law.

Article 79.¹⁹² *Non-recognition of States or governments or absence of diplomatic or consular relations*

1. The rights and obligations of the host State and of the sending State under the present articles shall be affected neither by the non-recognition by one of those States of the other State or of its governments nor by the non-existence or the severance of diplomatic or consular relations between them.

2. The establishment or maintenance of a mission, the sending or attendance of a delegation or any act in application of the present articles shall not by itself imply recognition by the sending State of the host State or its government or by the host State of the sending State or its government.

¹⁹² New article.

Commentary

(1) This article has been added to the draft after the discussion of a working paper entitled "Consideration by the International Law Commission of the question of the possible effects of exceptional situations such as absence of recognition, absence or severance of diplomatic and consular relations, or armed conflict on the representation of States in international organizations" (A/CN.4/L.166).¹⁹³ submitted by the Special Rapporteur at the present session of the Commission. The working paper was submitted by the Special Rapporteur in the light of the Commission's decision, recorded in the reports on its twenty-first¹⁹⁴ and twenty-second sessions,¹⁹⁵ to examine at the second reading the question of the possible effects of exceptional situations on the representation of States in international organizations. The Commission kept in mind the interest expressed, during the twenty-fourth¹⁹⁶ and twenty-fifth¹⁹⁷ sessions of the General Assembly, in the fact that the Commission was to examine that question.

(2) As indicated in paragraphs 30 and 55 of the Introduction to this chapter, the Commission decided to limit the scope of this new article to non-recognition of States or governments or absence of diplomatic or consular relations.

(3) The question of the non-existence or the severance of diplomatic or consular relations has been dealt with explicitly or by implication in several provisions of the Convention on Diplomatic Relations, the Convention on Consular Relations and the Convention on Special Missions. In particular, paragraph 3 of article 2 of the Convention on Consular Relations states that

The severance of diplomatic relations shall not *ipso facto* involve the severance of consular relations;

and article 7 of the Convention on Special Missions that The existence of diplomatic or consular relations is not necessary for the sending or reception of a special mission.

Articles 63 and 74 of the Convention on the Law of Treaties dealt also with the question of the severance or absence of diplomatic or consular relations in the law of treaties.

(4) These Conventions, however, do not contain provisions concerning situations deriving from the recognition or non-recognition of States or governments. Paragraph 2 of article 7 of the draft articles on special missions, adopted by the Commission in 1967, did provide that

¹⁹³ To be printed in *Yearbook of the International Law Commission, 1971*, vol. II, part II.

¹⁹⁴ *Yearbook of the International Law Commission, 1969*, vol. II, p. 206, document A/7610/Rev.1, para. 18.

¹⁹⁵ *Ibid.*, 1970, vol. II, p. 276, document A/8010/Rev.1, para. 22.

¹⁹⁶ *Official Records of the General Assembly, Twenty-fourth Session, Annexes*, agenda items 86 and 94 b, document A/7746, para. 22.

¹⁹⁷ *Ibid.*, *Twenty-fifth Session, Annexes*, agenda item 84, document A/8147, para. 17.

A State may send a special mission to a State, or receive one from a State, which it does not recognize,¹⁹⁸

but the paragraph was deleted by the Sixth Committee and it did not appear in the Convention on Special Missions adopted by the General Assembly in 1969. In the context of the law of treaties, paragraph 1 of the commentary to article 60 of the final draft articles on the subject, adopted by the Commission in 1966, states

any problems that may arise in the sphere of treaties from the absence of recognition of a Government do not appear to be such as should be covered in a statement of the general law of treaties.¹⁹⁹

(5) Once decided that it was advisable to include an article on non-recognition of States or governments or absence of diplomatic or consular relations in the present draft, the Commission examined thoroughly the possible effects of such exceptional situations on the relations between States and international organizations and arrived at the conclusion that the formulation of the corresponding provision should not follow that of the relevant provisions of the Conventions referred to above. The Conventions on Diplomatic and Consular Relations and the Convention on Special Missions govern bilateral relations between a receiving State and a sending State, while the present draft articles are concerned with relations between States and international organizations and with the relations between the sending State and the host State only within the framework of the organization. The element of consent is not, of course, absent from relations between States and international organizations, but it appears in a somewhat different perspective. The consent of the host State to act as such and the consent of a sending State to establish a relationship with the organization or to participate in a meeting of an organ or a conference are both directed to the organization. In the framework of the relations between States and international organizations, the consent and the legal nexus derived therefrom is established (a) between the host State and the organization and (b) between each sending State and the organization. The non-recognition or the absence of diplomatic or consular relations between a host State and a sending State cannot therefore have the same effects as it would have in their mutual relations.

(6) As formulated, article 79 regulates the question of the effects on the relations between States and international organizations of (a) the non-recognition of States and governments (paragraphs 1 and 2) and (b) the non-existence or the severance of diplomatic or consular relations (paragraph 1).

(7) Paragraph 1 ensures that the non-recognition by the host State or the sending State of the other State or of its government or the non-existence or severance of diplomatic or consular relations between them does not affect their *respective* "rights and obligations" under the present articles. In other words, the rights and obligations of the

¹⁹⁸ *Yearbook of the International Law Commission, 1967*, vol. II, p. 350, document A/6709/Rev.1, chap. II, D.

¹⁹⁹ *Ibid.*, 1966, vol. II, p. 260, document A/6309/Rev.1, part II, chap. II.

host State and the sending State under the present articles are not dependent upon recognition or upon the existence of diplomatic or consular relations at the bilateral level. The paragraph refers both to "non-recognition" and to "the non-existence or the severance of diplomatic or consular relations" because recognition does not necessarily imply the establishment of diplomatic or consular relations. When appropriate, the principle embodied in the paragraph applies also to the relations between two sending States—for instance, if a sending State participates, in accordance with the rules and practice of the organization, together with another sending State in the consultations mentioned in article 81.

(8) The provision in paragraph 2, which reflects existing law and practice, may appear to be self-evident. The Commission considered none the less a useful safeguard, particularly for host States, to state it in express terms. As indicated by the words "by itself", the establishment or maintenance of a mission, the sending or attendance of a delegation or any act in application of the present articles do not imply automatic recognition by the sending State of the host State or its government or by the host State of the sending State or its government. The provision, however, does not preclude that the host State and the sending State, if that is their will, consider that such measures constitute evidence of recognition. The phrase "or any act in application of the present articles" has been inserted because certain measures taken in application of the present articles, other than the establishment and maintenance of a mission or the sending or attendance of a delegation, might be interpreted as implying recognition—for instance, participation in consultations in accordance with article 81. The acts of application referred to in this paragraph being unilateral, there is no need to refer therein to diplomatic or consular relations. These relations, as provided for in article 2 of the Convention on Diplomatic Relations and article 2 of the Convention on Consular Relations, can only be established by "mutual consent".

Article 80.²⁰⁰ Non-discrimination

In the application of the provisions of the present articles no discrimination shall be made as between States.

Commentary

(1) Article 80 is modelled on paragraph 1 of article 47 of the Convention on Diplomatic Relations, on paragraph 1 of article 49 of the Convention on Special Missions and on paragraph 1 of article 72 of the Convention on Consular Relations.

(2) A difference of substance between article 80 and the corresponding articles of the Convention on Diplomatic Relations, the Convention on Special Missions and the Convention on Consular Relations is the non-inclusion in article 80 of paragraph 2 of the relevant articles of the above-mentioned Conventions. These paragraphs refer to

cases in which, although an inequality of treatment is implied, no discrimination occurs, since the inequality of treatment in question is justified by the rule of reciprocity. In this connexion, it should be noted that, inspired by paragraph 1 *b* of article 41 of the Convention on the Law of Treaties, the Convention on Special Missions, adopted in 1969, has qualified the *inter se* modifications of the extent of the facilities, privileges and immunities regarded as non-discrimination by the addition of the words

provided that it is not incompatible with the object and purpose of the present Convention and does not affect the enjoyment of the rights or the performance of the obligations of third States.

(3) The Study of the Secretariat states that it has been the understanding of the Secretariat of the United Nations that the privileges and immunities granted should generally be those afforded to the diplomatic corps as a whole, and should not be subject to particular conditions imposed, on a basis of reciprocity, upon the diplomatic missions of particular States.²⁰¹ In his statement at the 1016th meeting of the Sixth Committee of the General Assembly, the Legal Counsel of the United Nations stated that:

The Secretary-General, in interpreting diplomatic privileges and immunities, would look to provisions of the Vienna Convention so far as they would appear relevant *mutatis mutandis* to representatives to United Nations organs and conferences. It should of course be noted that some provisions such as those relating to *agrément*, nationality or reciprocity have no relevancy in the situation of representatives to the United Nations.²⁰²

(4) In deciding not to include a second paragraph on the model of paragraph 2 of article 47 of the Convention on Diplomatic Relations, of article 49 of the Convention on Special Missions and of article 72 of the Convention on Consular Relations, the Commission took into account the fact that the extension or restriction of privileges and immunities applies as a consequence of the operation of reciprocity within the framework of bilateral diplomatic relations between the sending State and the receiving State. In the case of multilateral diplomacy, however, it is a matter of relations among States and international organizations and not a matter which belongs exclusively to the relations between the host State and the sending State.

(5) The inclusion of the article as a general provision should not be misinterpreted as suggesting that the various types of missions and delegations dealt with in the draft articles should be treated in the same manner. The rule on non-discrimination, as expressly stated in the opening words "In the application of the provisions of the present articles", is purely concerned with the application of the provisions contained in the various draft articles and such provisions establish a number of differences between those various types of missions or delegations.

(6) Article 80 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 sending State, the organization or third States.

²⁰¹ Study of the Secretariat, *op. cit.*, p. 178, para. 96.

²⁰² *Official Records of the General Assembly, Twenty-second Session, Annexes*, agenda item 98, document A/C.6/385, para. 4.

²⁰⁰ Articles 44, 75 and 111 of the provisional draft.

(7) Finally, it should be pointed out that a non-discriminatory application of a particular rule implies that all States concerned are entitled to the same treatment under that rule. It should not be confused with the question of the means necessary for the implementation of the rule vis-à-vis each of those States. Such means may require to be different according to the various circumstances of each particular case.

Article 81.²⁰³ Consultations between the sending State, the host State and the Organization

If any dispute between one or more sending States and the host State arises out of the application or interpretation of the present articles, consultations between (a) the host State, (b) the sending State or States concerned, and (c) the Organization or, as the case may be, the Organization and the conference, shall be held upon the request of any such State or of the Organization itself with a view to disposing of the dispute.

Article 82.²⁰⁴ Conciliation

1. If the dispute is not disposed of as a result of the consultations referred to in article 81 within three months from the date of their inception, it may be submitted by any State party to the dispute to such procedure applicable to the settlement of the dispute as may be established in the Organization. In the absence of any such procedure, any State party to the dispute may bring it before a conciliation commission to be constituted in accordance with the provisions of this article by giving written notice to the Organization and to the other States participating in the consultations.

2. A conciliation commission will be composed of three members, of whom one shall be appointed by the host State, and one by the sending State. Two or more sending States may agree to act together, in which case they shall jointly appoint the member of the conciliation commission. These two appointments shall be made within two months of the written notice referred to in paragraph 1. The third member, the chairman, shall be chosen by the other two members.

3. If either side has failed to appoint its member within the time limit referred to in paragraph 2, the chief administrative officer of the Organization shall appoint such member within a further period of one month. If no agreement is reached on the choice of the chairman within four months of the written notice referred to in paragraph 1, either side may request the chief administrative officer of the Organization to appoint the chairman. The appointment shall be made within a period of one month. The chief administrative officer of the Organization shall appoint as the chairman a qualified jurist who is neither an official of the Organization nor a national of any State party to the dispute.

4. Any vacancy shall be filled in the same manner as the original appointment was made.

5. The Commission shall establish its own rules of procedure and shall reach its decisions and recommendations by a majority vote. If so authorized in accordance with the Charter of the United Nations the Commission may request an advisory opinion from the International Court of Justice regarding the interpretation or application of these articles.

6. If the Commission is unable to obtain an agreement among the parties on a settlement of the dispute within six months of its initial meeting, it shall prepare as soon as possible a report of its proceedings and transmit it to the parties and to the Organization. The report shall include the Commission's conclusions upon the facts and questions of law and the recommendations it has submitted to the parties in order to facilitate a settlement of the dispute. The six months time limit may be extended by decision of the Commission.

7. Nothing in the preceding paragraphs shall preclude the establishment of another appropriate procedure for the settlement of disputes arising in connexion with the conference.

8. This article is without prejudice to provisions concerning the settlement of disputes contained in international agreements in force between States or between States and international organizations.

Commentary

(1) In the course of the consideration of the draft articles, the Commission recognized the need for adopting a general provision on the question of consultations between the sending State, the host State and the organization. The purpose of the consultations in question would be to seek solutions for any difficulties between the host State and the sending State in connexion with the interpretation or application of the present articles.

(2) Article 81 is intended to be sufficiently flexible to envisage the holding of consultations between the host State, the sending State or States concerned and the organization or, as the case may be, the conference. Moreover, the article provides that those consultations shall be held not only upon the request of the States concerned, but also upon the request of the organization itself. It applies, in particular, to the case where a dispute arises between the host State on the one hand, and several sending States, on the other. In such a case, the sending States concerned may join together in the consultations with the host State and the organization.

(3) As regards the duty of the organization to ensure the application of the provisions of the present draft, the Commission refers to article 22.

(4) The provision for consultations is not uncommon in international agreements. It may be found for example in article IV (section 14) of the Agreement of 26 June 1947 between the United Nations and the United States of America regarding the Headquarters of the United Nations and in article 2 of the Inter-American Treaty of Reciprocal Assistance, of 2 September 1947.²⁰⁵

²⁰³ Article 50 of the provisional draft.

²⁰⁴ New article.

²⁰⁵ United Nations, *Treaty Series*, vol. 21, p. 93. For other examples, see P. Guggenheim, *Traité de droit international public* (Geneva, Librairie de l'Université, 1954), t. II, pp. 198-200.

(5) In their comments on the article on consultations in the provisional draft (article 50), some governments expressed the view that the provision on consultations was inadequate and a more effective procedure should be found to reconcile differences between sending and host States. In this connexion, one Government stated that the Commission's views on the possibility of inserting at the end of the draft articles provisions concerning the settlement of disputes arising out of the application of the articles deserved particular attention. Another Government suggested that the article on conciliation should be incorporated in a more detailed provision or in a protocol on the settlement of disputes, as might be appropriate. A third Government observed that the special nature of the relations between the sending State and the host State required the establishment of a tripartite body capable of coming to a decision in a very short time. It presented to this effect an elaborate suggestion embodying a conciliation machinery.

(6) The Commission re-examined the question of the inclusion in the draft articles of a provision on the settlement of disputes at its present session in the light of these comments and decided to adopt the settlement procedure laid down in article 82. This procedure envisages the utilization of any settlement procedure which may be established in the organization and, in the absence of any such procedure, the reference of the dispute to conciliation. The Commission further took into account evidence of recent State practice including article 66 of the Convention on the Law of Treaties and the annex thereto and the Claims Commission provided for in the draft convention on international liability for damage caused by space objects, adopted on 29 June 1971 by the Legal Subcommittee of the United Nations Committee on the Peaceful Uses of Outer Space.²⁰⁶ The International Law Commission concluded that the conciliation procedure, as embodied in article 82, represents the largest measure of common ground that could be found at present among governments as well as in the Commission on this question.

(7) Paragraph 1 of article 82 provides that if the dispute is not disposed of as a result of the consultations referred to in article 81 within three months from the date of their inception, it may be submitted by any State party to the dispute to such procedure applicable to the settlement of the dispute as may have been established in the organization. The Commission considers that the logical steps following the consultations in case they prove unsatisfactory should be the utilization of any settlement procedure which may be available in the organization. The Commission presumes that the adoption of these articles may encourage the development of such process. If an international organization has not provided for a dispute settlement procedure to deal with problems of this character, then any State party to such a dispute having participated in the consultations may have recourse to the conciliation procedure provided in article 82.

(8) By paragraph 1 of article 82, the right to bring a dispute before a conciliation commission is limited to the

States parties to the dispute which have participated in the consultations; the organization and the conference itself are not entitled to do so, unlike the case of consultations which may be held upon their request. Paragraph 1, however, provides that written notice of the submission of the dispute to conciliation must also be given to the organization. This requirement is thought to be desirable in view of the general interest of the organization and its members in the settlement of a dispute on which consultations had been held with its participation and in view of the role that the organization may eventually play in the process of establishing the conciliation commission. Moreover, paragraph 1 sets up the time pattern which is essential for setting in motion the conciliation procedure.

(9) Paragraphs 2, 3 and 4 regulate the composition of the conciliation commission. The provisions of paragraph 2 reflect the standard practice followed in setting up conciliation panels. Furthermore, as it is likely that more than one sending State might be involved in a dispute, the paragraph provides for a procedure whereby two or more such States may agree to act together, in which case they shall jointly appoint the member of the conciliation commission. This provision leaves it open to the sending State to decide whether to act separately or jointly.

(10) Paragraph 3 is a safeguarding clause according to which the chief administrative officer of the organization is to appoint the member of the conciliation commission for the side which has failed to do so or, at the request of either side, the chairman of the commission in case no agreement is reached on his choice between the two members of the conciliation commission. The expression "chief administrative officer" is used in Article 97 of the Charter of the United Nations and in the constituent instruments of a number of international organizations, for example in the Constitution of UNESCO²⁰⁷ (Article VI, para. 2) and in the Statute of IAEA²⁰⁸ (Article VII, para. A). For the purposes of the present articles, that expression covers the chief administrative officer of the organization, whether designated Secretary-General, Director-General or otherwise. In order to ensure against a possible fear of bias as regards the appointment of a member or the chairman of the conciliation commission, given the organization's involvement as the prior stage of consultations, the last sentence of paragraph 3 sets forth three requirements for such an appointment.

(11) The word "decisions" used in the first sentence of paragraph 5 refers to such interlocutory decisions to be taken by the conciliation commission as those connected with the extension of time limits or with the request for an advisory opinion from the International Court of Justice provided for in the second sentence of paragraph 5. The conciliation commission is empowered to request such an opinion regarding the interpretation or application of the present articles, if so authorized in accordance with the Charter of the United Nations. In view of the time element involved, a general authorization might be convenient but the whole question of how the request for an

²⁰⁶ *Official Records of the General Assembly, Twenty-sixth Session, Supplement No. 20 (A/8420)*, para. 31.

²⁰⁷ United Nations, *Treaty Series*, vol. 4, p. 275.

²⁰⁸ IAEA, *Statute (as amended up to 31 January 1963)*, March 1967.

advisory opinion is to be made must be left to the decision of the General Assembly of the United Nations. Finally, unlike section 30 (article VIII) of the Convention on the Privileges and Immunities of the United Nations, the present article does not provide that such an advisory opinion shall be binding.

(12) The provision of paragraph 7 is included in the article in view of the time factor, which would make a conciliation procedure impracticable within the relatively short existence of a conference.

(13) Paragraph 8 is intended to safeguard the procedures on the settlement of disputes established by any other existing bilateral or multilateral agreements between the parties. Those agreements may provide for other means of settlement such as arbitration or the compulsory jurisdiction of the International Court of Justice or the referral of the dispute to the competent organ of the organization. The Commission decided to include an express provision in paragraph 8 in order to leave no possible doubt on this point.

ANNEX

OBSERVER DELEGATIONS TO ORGANS AND TO CONFERENCES

General comments

(1) At the twenty-second session of the Commission, the Special Rapporteur submitted a working paper on temporary observer delegations and conferences not convened by international organizations²⁰⁹ but the Commission did not consider that it should take up the matter at that time.²¹⁰ In the course of the consideration of the Commission's report by the Sixth Committee at the twenty-fifth session of the General Assembly, some delegations expressed themselves in favour of supplementing the draft articles with provisions regulating the status of observer delegations to organs and conferences. The matter was also raised by a number of Governments in their written comments. At its present session the Commission examined this question and instructed the Special Rapporteur to prepare for its consideration a set of draft articles. Accordingly, the Special Rapporteur submitted a working paper (A/CN.4/L.173).²¹¹

(2) The Study of the Secretariat does not include detailed information on temporary observers. According to the information provided to the Special Rapporteur by the Legal Advisers of some specialized agencies, the practice relating to the privileges and immunities of temporary observers is fragmentary and varied.

One specialized agency indicated in its reply that temporary observers are invited to observe in accordance with the relevant rules of procedure, but are normally sent from a diplomatic mission accredited to the host State; diplomatic privileges and immunities are granted, to the Secretariat's knowledge, only to the extent that such persons are members of the diplomatic corps and otherwise entitled to privileges and immunities in the host State. Another specialized agency stated in its reply that the headquarters agreement is silent on the question of privileges and immunities of temporary observers of non-member States. The host State grants such representatives visas as a matter of courtesy and without the intervention of the organization.

Under the rules of procedure of the Assembly of WHO,²¹² when a State applies for admission to membership of the Organization,

²⁰⁹ A/CN.4/L.151.

²¹⁰ *Yearbook of the International Law Commission, 1970*, vol. II, p. 274, document A/8010/Rev.1, para. 14.

²¹¹ To be printed in *Yearbook of the International Law Commission, 1971*, vol. II, part II.

²¹² See WHO, *Basic Documents*, 22nd ed. (Geneva, April 1971), p. 97.

under article 6 of the Constitution of WHO,²¹³ it may, in accordance with rule 46 of the rules of procedure of the World Health Assembly, appoint an observer, who may attend any open meeting of the World Health Assembly or of its main committees and who may, upon the invitation of the President and with the consent of the Assembly or committee, make a statement on the subject under discussion. As a matter of practice, these observers have been treated in the same manner as other representatives.

The Conference of FAO has adopted certain principles relating to the granting of observer status to representatives of non-member nations. Annex C to the report of the ninth session of the FAO Conference reads as follows:

"Observers from nations admitted to meetings of the Organization may be permitted:

- "1. to make only formal statements in Conference and Council plenaries and in Commissions of the Whole, subject to the approval of the General Committee of the Conference, or of the Council;
- "2. to participate in the discussions of the session commissions and committees of the Conference and Council and in the discussions of technical meetings, subject to the approval of the chairman of the particular meeting and without the right to vote;
- "3. to receive the documents, other than those of a restricted nature, and the report of the particular meeting;
- "4. to submit written statements on particular items of the agenda.

" . . ." ²¹⁴

The Rules of Procedure of the General Conference of IAEA contain a provision relating to temporary observers on behalf of non-member States (Rule 30). Section 27 a, viii (Article XI), of the Headquarters Agreement between IAEA and Austria stipulates that, with respect to representatives of States not members of IAEA who are sent as observers, in accordance with rules adopted by IAEA, to meetings convened by IAEA, the host Government shall take all necessary measures to facilitate their entry into and sojourn in Austrian territory, place no impediment in the way of their departure from Austrian territory, ensure that no impediment is placed in the way of their transit to or from the headquarters seat, and shall afford them all necessary protection in transit.

²¹³ *Ibid.*, p. 1.

²¹⁴ See FAO, *Report of the Ninth Session of the Conference (2-23 November 1957)*, Rome, 1958, pp. 221-222.

As for the ILO, observers on behalf of non-member States may, following an invitation issued by the Governing Body of the ILO, be designated temporarily to the International Labour Conference or to Regional Conferences (see article 2, paragraph 3 *e* of the Standing Orders of the Conference²¹⁵ and article 1, paragraph 7, of the *Rules concerning the Powers, Functions and Procedure of Regional Conferences convened by the International Labour Organisation*.²¹⁶

(3) On request of the Commission at its present session, the Secretariat of the Commission provided information on the practice both at the United Nations Headquarters in New York and at its European Office in Geneva regarding the question whether observer representatives submit credentials or letters of appointment and by what authorities of the sending State those documents are issued.

(4) After considerable examination, both in the Working Group and in the Commission, on the basis of the reports of the group (A/CN.4/L.174/Add.4-6),²¹⁷ the Commission decided to include in the draft articles provisions regarding observer delegations to organs and conferences. Some members of the Commission expressed doubts concerning the advisability of the final inclusion in the draft articles of provisions which did not pass through the usual process of submission to governments in a provisional form and subsequent re-examination in the light of those comments. The Commission concluded, however, that it would serve a useful purpose to present provisions which would enable any conference which might be convoked for considering the present draft to adopt a convention dealing as comprehensively as possible with the question of the representation of States in their relations with international organizations. The Commission considers that the presentation of draft articles on observer delegations to organs and to conferences would provide governments with a concrete basis for their consideration of this subject and thus facilitate the eventual adoption of an appropriate regulation, the absence of which may result in a lacuna in the draft articles. However, in view of the above-mentioned particular circumstances of the preparation by the Commission of the provisions on observer delegations to organs and to conferences, the Commission deemed it appropriate to attach them as an annex to the draft articles.

(5) In submitting this group of draft articles on observer delegations to organs and to conferences, the Commission wishes to draw particular attention to the following four points:

(a) The term "observer delegation to an organ" in paragraph *a* of article A is so formulated as to be confined to delegations which are sent by a State to observe on its behalf the proceedings of the organ. Its meaning becomes clear when it is taken in comparison with the broad meaning given to the use of the term "delegation to an organ" in sub-paragraph 9 of paragraph 1 of article 1. This latter term covers delegations sent by States to participate on their behalf in the proceedings of an organ, whether they are members of the organ or not. Participation would comprise any form of activity in the meeting, such as the right to speak without voting, as contrasted with the passive task of observing. The Commission has drafted article A on the use of terms so that it is capable of being integrated in article 1 of the draft in case any conference which might be convoked to consider this draft decide in favour of adopting provisions on observer delegations to organs and conferences.

(b) Article D provides simply for the issuance of letters of appointment of the observer delegates. Given their limited function, such observer delegates do not need, in the opinion of the Commission (which was based on the information provided by the Secretariat), letters of credentials.

(c) In formulating article E on the composition of the observer delegation, the Commission has based itself on the assumption that, given its limited function of observing, such a delegation is usually composed of one or more observer delegates. Therefore the Commission adopted for article E a formulation different from the corresponding provisions relating to missions to international organizations and delegations to organs and to conferences respectively.

(d) In view of the restrictive manner in which article E is formulated, it has not been thought necessary to include a specific provision on the size of the observer delegation.

Draft articles

Article A. Use of terms

[For the purposes of the present articles:]

- (a) "observer delegation to an organ" means the delegation sent by a State to observe on its behalf the proceedings of the organ;
- (b) "observer delegation to a conference" means the delegation sent by a State to observe on its behalf the proceedings of the conference;
- (c) "observer delegation" means, as the case may be, the observer delegation to an organ or the observer delegation to a conference;
- (d) "sending State" means the State which sends:
 - ...
 - (iii) an observer delegation to an organ or an observer delegation to a conference;
- (e) "observer delegate" means any person designated by a State to attend as an observer the proceedings of an organ or of a conference;
- (f) "members of the observer delegation" means the observer delegates and the members of the administrative and technical staff of the observer delegation;
- (g) "members of the administrative and technical staff" means the persons employed in the administrative and technical service of the observer delegation.

Article B. Sending of observer delegations

A State may send an observer delegation to an organ or to a conference in accordance with the rules and decisions of the Organization.

Article C. Appointment of the members of the observer delegation

Subject to the provisions of article 72,²¹⁸ the sending State may freely appoint the members of the observer delegation.

Article D. Letter of appointment of the observer delegate

The letter of appointment of the observer delegate shall be issued either by the Head of State or by the Head of Government or by the Minister for Foreign Affairs or, if the rules of the Organization or the rules of procedure of the conference so admit, by another competent authority of the sending State. It shall be transmitted, as the case may be, to the Organization or to the conference.

Article E. Composition of the observer delegation

1. The observer delegation may consist of one or more observer delegates.

²¹⁵ International Labour Office, *Constitution of the International Labour Organisation and Standing Orders of the International Labour Conference* (Geneva, 1968), p. 31.

²¹⁶ ILO, Geneva, 1966.

²¹⁷ To be printed in *Yearbook of the International Law Commission*, 1971, vol. II, part II.

²¹⁸ Article 72 (Nationality of the members of the mission or the delegation) is one of the general provisions of the consolidated draft.

2. It may also, if necessary, include some administrative and technical staff.

Article F. Notifications

1. The sending State shall notify the Organization or, as the case may be, the conference of:

(a) the composition of the observer delegation and any subsequent changes therein;

(b) the arrival and final departure of members of the observer delegation and the termination of their functions with the observer delegation;

(c) the arrival and final departure of any person accompanying a member of the observer delegation;

(d) the beginning and the termination of the employment of persons resident in the host State as members of the administrative and technical staff of the observer delegation;

(e) the location of the accommodation enjoying inviolability under article N as well as any other information that may be necessary to identify such accommodation.

2. Where 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.

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

Article G. Precedence

Precedence among observer delegations shall be determined by the alphabetical order of the names of the States used in the Organization.

Article H. General facilities

The host State shall accord to the observer delegation the facilities required for the performance of its task. The Organization or, as the case may be, the conference shall assist the observer delegation in obtaining those facilities and shall accord to the observer delegation such facilities as lie within their own competence.

Article I. Assistance in respect of privileges and immunities

The Organization or, as the case may be, the Organization and the conference shall, where necessary, assist the sending State, its observer delegation and the members of the observer delegation in securing the enjoyment of the privileges and immunities provided for in the present articles.

Article J. Inviolability of archives and documents

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

Article K. 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 the observer delegation such freedom of movement and travel as is necessary for the performance of the task of the observer delegation.

Article L. Freedom of communication

1. The host State shall permit and protect free communication on the part of the observer delegation for all official purposes. In communicating with the Government of the sending State, its permanent diplomatic missions, permanent missions and permanent observer

missions wherever situated, the observer delegation may employ all appropriate means, including couriers and messages in code or cipher.

2. The official correspondence of the observer delegation shall be inviolable. Official correspondence means all correspondence relating to the observer delegation and its tasks.

3. Where practicable, the observer 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 observer delegation shall not be opened or detained.

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

6. The courier of the observer 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.

Article M. Personal inviolability

The person of the observer delegate shall be inviolable. He shall not be liable to any form of arrest or detention. The host State shall treat him with due respect and shall take all appropriate steps to prevent any attack on his person, freedom or dignity.

Article N. Inviolability of accommodation and property

1. The accommodation of an observer delegate shall be inviolable. The agents of the host State may not enter it except with the consent of the observer delegate. 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 observer delegate.

2. The host State is under a special duty to take all appropriate steps to protect the accommodation of the observer delegate against any intrusion or damage.

3. The accommodation of the observer delegate, its furnishings and other property thereon and the means of transport of the observer delegate shall be immune from search, requisition, attachment or execution.

4. The papers, correspondence and, except as provided in paragraph 3 of article O, the property of the observer delegate shall likewise enjoy inviolability.

Article O. Immunity from jurisdiction

1. The observer delegate shall enjoy immunity from the criminal jurisdiction of the host State.

2. The observer delegate shall enjoy immunity from the civil and administrative jurisdiction of the host State in respect of all acts performed in the exercise of his official functions.

3. No measures of execution may be taken in respect of the observer delegate except in cases which do not fall under paragraph 2 and provided that the measures concerned can be taken without infringing the inviolability of his person or accommodation.

4. The observer delegate is not obliged to give evidence as a witness.

5. The immunity from jurisdiction of the observer delegate does not exempt him from the jurisdiction of the sending State.

Article P. Waiver of immunity

1. The immunity from jurisdiction of the observer delegate and of persons enjoying immunity under article U 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 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.
5. If the sending State does not waive the immunity of any of the persons referred to in paragraph 1 in respect of a civil action, it shall use its best endeavours to bring about a just settlement of the case.

Article Q. Exemption from social security legislation

1. The observer delegate shall, with respect to services rendered for the sending State, be exempt from social security provisions which may be in force in the host State.
2. The provisions of this article shall not affect bilateral or multilateral agreements concerning social security concluded previously and shall not prevent the conclusion of such agreements in the future.

Article R. Exemption from dues and taxes

The observer delegate 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;
- (d) dues and taxes on private immovable property situated in the territory of the host State, unless he holds it on behalf of the sending State for the purpose of the observer delegation;
- (c) estate, succession or inheritance duties levied by the host State, subject to the provisions of paragraph 4 of article W;
- (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.

Article S. Exemption from personal services

The host State shall exempt the observer delegate from all personal services, from all public service of any kind whatsoever and from military obligations such as those connected with requisitioning, military contributions and billeting.

Article T. 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 observer delegation;
 - (b) articles for the personal use of the observer delegate.
2. The personal baggage of the observer delegate shall be exempt from inspection, unless there are serious grounds for presuming that it contains articles not covered by the exemption mentioned in paragraph 1, 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 observer delegate or of his authorized representative.

Article U. Privileges and immunities of other persons

1. Members of the family of an observer delegate shall, if they accompany him, enjoy the privileges and immunities specified in articles M, N, O, Q, R, S and T provided that they are not nationals of or permanently resident in the host State.
2. Members of the administrative and technical staff of the observer delegation, together with members of their families who accompany them and who are not nationals of or permanently resident in the host State, shall enjoy the privileges specified in articles M, N, O, Q and S. They shall also enjoy the privileges specified in paragraph 1 b of article T in respect of articles imported at the time of their first entry into the territory of the host State for the purpose of attending the meeting of the organ or conference and exemption from dues and taxes on the emoluments they receive by reason of their employment.

Article V. 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, an observer delegate who is a national 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 his functions.
2. Members of the administrative and technical staff of the observer delegation 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 in such a manner as not to interfere unduly with the performance of the task of the observer delegation.

Article W. Duration of privileges and immunities

1. Every person entitled to privileges and immunities shall enjoy them from the moment he enters the territory of the host State for the purpose of attending the meeting of an organ or conference or, if 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 enjoying privileges and immunities have come to an end, such privileges and immunities shall normally cease at the moment when he leaves the country, or on expiry of a reasonable period in which to do so. However, with respect to acts performed by such a person in the exercise of his functions as a member of the observer delegation, immunity shall continue to subsist.
3. In case of the death of a member of the observer 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 country.
4. In the event of the death of a member of the observer delegation not a national of or permanently resident in the host State or of a member of his family accompanying him 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. 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 observer delegation or of the family of a member of the observer delegation.

Article X. End of the functions of the observer delegate

The functions of the observer delegate 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.

Chapter III

PROGRESS OF WORK ON TOPICS CURRENTLY UNDER DISCUSSION

61. As indicated in paragraph 8 above, the Commission, owing to the lack of time, did not consider agenda items 2 (Succession of States: (a) succession in respect of treaties, and (b) succession in respect of matters other than treaties), 3 (State responsibility) and 4 (Most-favoured-nation clause). It decided however to include in the present chapter an account of the progress of work on the above-mentioned topics. This chapter therefore consists of four sections dealing respectively with succession in respect of treaties, succession in respect of matters other than treaties, State responsibility and most-favoured-nation clause; each section has been prepared by the Special Rapporteur for the topic.

A. Succession of States: succession in respect of treaties

62. Sir Humphrey Waldock, the Special Rapporteur, has submitted four reports on this topic. The first report,²¹⁹ submitted in 1968, was considered by the Commission at its twentieth session. At its twenty-second session, the Commission considered together, in a preliminary manner, certain draft articles contained in the second²²⁰ and third²²¹ reports, submitted in 1969 and 1970.

63. At the present session the Special Rapporteur submitted a fourth report (A/CN.4/249)²²² dealing with the general rule regarding succession in respect of bilateral treaties. In preparing this report he made use, *inter alia*, of a series of Secretariat studies entitled "Succession of States in respect of bilateral treaties" and covering respectively (I) "Extradition treaties",²²³ (II) "Air transport agreements" (A/CN.4/243),²²⁴ and (III) "Trade agreements" (A/CN.4/243/Add.1). The first of these studies was circulated to the Commission at its twenty-second session and the other two have been added at the present session.

64. The Special Rapporteur's first report was of a preliminary character. However, the second, third and fourth reports contain, in all, seventeen articles on succession in respect of treaties together with introductions and commentaries. These articles deal with: (a) the use of certain

terms in the draft (article 1); (b) the area of territory passing from one State to another, that is the so-called principle of "moving treaty-frontiers" (article 2); (c) devolution agreements and unilateral declarations by successor States (articles 3 and 4); (d) treaties providing for the participation of "new States" (article 5); (e) the general rules governing the position of "new States" in regard to multilateral treaties (articles 6-12); and (f) the general rules governing the position of "new States" in regard to bilateral treaties (articles 13-17).

65. In presenting his fourth report the Special Rapporteur explained that he had also prepared a very substantial commentary on the subject of so-called "dispositive", "localized" or "territorial" treaties. He recognized the importance attached to this subject by many members of the Commission and by representatives in the Sixth Committee, and that his proposals concerning the position of new States in regard to multilateral and bilateral treaties could not be fully appreciated until his draft concerning this category of treaties had been completed. Since, however, he had found the subject extremely complex as well as controversial and the Commission was finding it impossible to take up the topic of succession of States at the present session, he had decided to give the subject further study and to defer his proposals regarding this category of treaties until his fifth report.

66. The Special Rapporteur recalled the meaning attributed in his third report to the expression "new State" found in articles 5-17 and the explanations given in that report of his use of that expression as a term of art for the purposes of the draft.²²⁵ The term was used in the draft as meaning a succession where a territory which previously formed part of an existing State has itself become an independent State. It was designed to cover succession in its simplest and purest form of the separation of part of the metropolitan territory of an existing State or of the emergence of an associated territory to independence but to exclude other cases such as unions of States, federations, or the emergence of protected States, mandates and trusteeships to independence. Both for purposes of study and drafting he thought it convenient, and indeed essential, first to identify the basic principles applicable to "new States" in their purest form before considering the possible effect of special factors in particular cases of succession. It followed that articles 5-17 as drafted related only to "new States" as defined in the way he had mentioned. The same would be true of any provisions he might propose in his fifth

²¹⁹ *Yearbook of the International Law Commission, 1968*, vol. II, p. 87, document A/CN.4/202.

²²⁰ *Ibid.*, 1969, vol. II, p. 45, document A/CN.4/214 and Add.1 and 2.

²²¹ *Ibid.*, 1970, vol. II, p. 25, document A/CN.4/224 and Add.1.

²²² See p. 143 above.

²²³ *Yearbook of the International Law Commission, 1970*, vol. II, document A/CN.4/229.

²²⁴ Documents A/CN.4/243 and Add. 1 are to be printed in *ibid.*, 1971, vol. II, part II.

²²⁵ *Ibid.*, 1970, vol. II, pp. 27-28, document A/CN.4/224 and Add. 1, para. 9 (cf. *ibid.*, article I (additional provisions), para. 1 (e) and the commentary to that article).

report in regard to so-called "dispositive", "localized" or "territorial" treaties, which would also form part of the series of articles dealing with the position of "new States" as so defined.

67. The Special Rapporteur further explained that his fifth report would contain an examination of the various special categories of succession and include such further articles concerning these special categories as that examination might show to be required. It seemed clear that, at the very least, some special provisions would be needed for the cases of unions of States and federations and of the dissolution of unions and federations; and certain other cases required careful consideration. At the same time, it was conceivable that the outcome of the examination of some of the special categories of succession might be to render some adjustment of the definition of "new State" or even of the provisions of articles 5-17 themselves desirable.

68. The Special Rapporteur drew attention to the opinion expressed by him in previous reports concerning the need, in the interests of uniformity, to co-ordinate the scope, the language and the provisions of the present draft with those of the Vienna Convention on the Law of Treaties, adopted in 1969.²²⁶ In his first preliminary report he had made concrete proposals to this end by suggesting certain general provisions regarding the use of terms, the scope of the draft and the application of relevant rules of international organizations (articles 1 (1), 2 and 3). He said that in due course he would have to revert to these proposals. On the last mentioned point, a representative of the ILO had in fact intimated to him during the present session its anxiety lest an established practice of the organisation regarding succession to treaties adopted within it might be prejudiced by the rule proposed in article 6 (no general obligation on a new State to consider itself bound by its predecessor's treaties). The point was clearly a valid one and the practice in question had been expressly mentioned in the Special Rapporteur's first report as an illustration of the need to include such a safeguarding provision in the present draft. He thought there would also be some other general provisions to be inserted in the introductory part of the draft articles such as the one referred to in the Commission's report on the work of its twenty-second session.²²⁷ This would be a provision, modelled on article 43 of the Vienna Convention on the Law of Treaties, which would underline that the cessation of the application of a treaty under article 6 of the present draft would not release any State from its duty "to fulfil any obligation embodied in the treaty to which it would be subject under international law independently of the treaty".

69. As to his fourth report submitted at the present session, the Special Rapporteur explained that further study of the position of new States in regard to bilateral

treaties had confirmed the provisional view which he had expressed at the twenty-second session.²²⁸ In contrast with multilateral treaties, a new State did not appear to have an actual right to the continuance in force of a bilateral treaty applicable in respect of its territory at the date of the succession. The legal nexus arising from the treaty having been in force in respect of the new State's territory prior to the succession seemed rather to sanction a legally recognized process for bringing about the entry into force of the treaty between the successor State and the other State party by novation. It created a faculty to renew the treaty in respect of the territory by mutual consent but no more. That consent might on one side or the other be tacit and merely inferred from conduct. But the continuance in force of the treaty still depended on the consent of both the new State and the other State party. This was the general rule proposed in article 13 of the draft; but it was, of course, without prejudice to any particular rules for so-called "dispositive", "localized" or "territorial" treaties that might be proposed in the Special Rapporteur's fifth report. Further articles contained in the fourth report dealt with the duration of a bilateral treaty that is considered as continuing in force after the succession (article 14); the non-application of the treaty as between the predecessor and successor State (article 15); cases of the bilateral application of a multilateral treaty between a successor State and a party to the treaty (article 16), and the effect of the termination or amendment of the original treaty on the treaty-relation between the successor State and the other State party (article 17).

70. The Special Rapporteur also referred to the valuable discussion of his second and third reports which had taken place at the Commission's twenty-second session and to the extensive summary of it contained in its report for that session.²²⁹ The comments of members of the Commission in that debate, and subsequently of representatives in the Sixth Committee, would be of considerable assistance to him in completing the draft articles in his fifth report. The intention of the Commission, as he understood it, was to carry out its first reading of the whole of the topic of state succession in respect of treaties at its twenty-fourth session; and it would therefore be essential for the Commission then to have a comprehensive draft covering all the main elements of the topic. Although he had been obliged for various reasons to present his draft articles in sections in successive reports, he recognized that for ease of work it might be desirable for the Commission to have at its twenty-fourth session a consolidated text at least of the articles as a whole.

B. Succession of States: succession in respect of matters other than treaties

71. Mr. Mohammed Bedjaoui, the Special Rapporteur, has prepared four reports on this topic. The first two

²²⁶ *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.

²²⁷ *Yearbook of the International Law Commission, 1970*, vol. II, p. 304, document A/8010/Rev.1, para. 58.

²²⁸ *Ibid.*, p. 303, para. 47.

²²⁹ *Ibid.*, pp. 303 *et seq.*, paras. 49-63.

reports²³⁰ were examined by the Commission at its twentieth²³¹ and twenty-first²³² sessions. The third report²³³ and fourth report (A/CN.4/247 and Add.1)²³⁴ submitted at the twenty-second and twenty-third sessions respectively, have not yet been examined by the Commission. Their subject was succession to public property.

72. In taking up the topic of succession to public property the Special Rapporteur did not base his approach on theory, but simply tried to state some pragmatic rules drawn from the practice of States. He therefore deliberately refrained from going into the preliminary question whether the transfer of public property was in fact part of the international law of State succession. It might well be argued that, since the effect of State succession was to replace one sovereignty over a territory by another, this meant that the previous sovereignty automatically lost its material support, and that the right of the predecessor State to public property therefore passed *ipso jure* to the successor State. The right to public property would thus be seen as an effect of the coming into existence, or of the existence, of a subject of international law in the territory concerned, and not as a consequence of State succession *per se*.

73. The Special Rapporteur observed that, viewed in this light, the theory of State succession would not apply to the rights and obligations of the State in relation to public property. Once international law recognized the validity of the new juridical order, this entailed for the successor State a right to all State-owned public property. More precisely, international law would simply recognize the validity of the new juridical order of the State expressed by and through the municipal legislation under which the automatic transfer of the right to public property took place.

74. This approach reduced sovereignty to something that would be inconceivable without a set of operational and material attributes such as, for example, the public property which the State used to meet certain essential requirements of the inhabitants of its territory. However, this approach was open to one rather serious objection. If the successor State automatically acquired public property by the mere fact of its own sovereignty and its own power, how did it come about that property situated outside the territory affected by the change—i.e. outside the successor State's sphere of territorial jurisdiction—might fall within its patrimony?

75. The Special Rapporteur accordingly abstained from any purely theoretical study of this problem and of other

²³⁰ *Ibid.*, 1968, vol. II, p. 94, document A/CN.4/204, and *ibid.*, 1969, vol. II, p. 69, document A/CN.4/216/Rev.1.

²³¹ *Ibid.*, 1968, vol. II, p. 216, document A/7209/Rev.1, paras. 45–79.

²³² *Ibid.*, 1969, vol. II, p. 225, document A/7610/Rev.1, paras. 35–63.

²³³ *Ibid.*, 1970, vol. II, p. 131, document A/CN.4/226.

²³⁴ See p. 157 above.

problems which may arise from State succession to public property, and confined himself to preparing draft articles in terms as specific as possible. Throughout his work he tried to keep in mind a concern which may be expressed in the form of three questions:

(a) What is *public property*? (problems of defining and determining such property);

(b) What is *transmissible* public property? (Is it all public property, or property of public authorities, or State property alone? Is it all State property or only the property appertaining to sovereignty?);

(c) Is the ownership of the property transmitted (this is a question of succession to property *stricto sensu*) or is the property merely placed under the control of the new juridical order (this brings in succession to legislation as well)?

76. With these questions in mind, the Special Rapporteur began in his third report and continued in his fourth report a study, presented in the form of draft articles, on State succession to public property.

1. *The third report by the Special Rapporteur*²³⁵

77. The third report by the Special Rapporteur contained four draft articles with commentaries. Article 1 gave a *definition*, and also suggested methods for the *determination*, of public property. Such property was said to be “public” in character by virtue of its *belonging* to the State, to a territorial authority thereof or to a public body. The Special Rapporteur's commentaries stressed three points:

(a) That a purely internationalist approach to the notion of public property was impracticable, since there was in international law no independent criterion for determining what constituted public property;

(b) That determination of public property by treaty or by the decisions of international tribunals had its limitations and did not solve all problems; and

(c) That whatever the circumstances, recourse to municipal law for such determination seemed inevitable, the essential question being which legislation—that of the predecessor State, that of the successor State or that of the territory affected by the change of sovereignty—should be applied for that purpose.

78. The Special Rapporteur, finding practice and judicial decisions somewhat contradictory, proposed in article 1 that the determination of what constituted public property should be made by reference to the municipal law which governed the territory concerned, “save in the event of serious conflict with the public policy of the successor State”. He explained his reasons for this in paragraphs 9 to 13 of the commentaries on article 1. In his view however, it stood to reason that, as soon as the municipal law of the predecessor State or of the territory affected by the change of sovereignty had performed its function of determining what constituted public property, it gave way to the juridical order of the successor State. Once the property had been classified for purposes of

²³⁵ *Yearbook of the International Law Commission, 1970*, vol. II, document A/CN.4/226.

devolution, the successor State resumed its sovereign power to change the legal status of the property transmitted to it, if it so desired. In the drafting of article 1, however, the Special Rapporteur had left the problem open to discussion by proposing provisionally a solution which made it possible to waive the application of the law of the predecessor State in favour of the legislation of the successor State if there would otherwise be a risk of serious conflict with public policy.

79. Be that as it may, the Special Rapporteur's only ambition in the draft definition was to define "public property", whether it belonged to the State, to a territorial authority or to a public body. A further problem was whether all this public property was *transmissible* to the successor State. This, indeed, was the whole problem to be settled by the succeeding draft articles. Thus the definition and determination of public property were to open the way to the distinction between the actual transmittal of State property and the mere placing of public property under the control of the juridical order of the successor State (A/CN.4/247 and Add.1,²³⁶ paras. 2-5 of the commentary to article 5).

80. Bearing in mind that neither the writers nor judicial decisions had exhausted discussion on the question whether property in the *private domain* of the State is transmissible *ipso jure* on the same grounds as property in its *public domain*, the Special Rapporteur sought to avoid this distinction—which, indeed, was unknown to some national systems of law—and proposed for discussion by the Commission, in his third report, an article 2 under which the general principle of immediate transmittal without compensation can apply only to "property appertaining to sovereignty". By that expression, the Special Rapporteur meant property which, in accordance with the legislation of the predecessor State, helps to serve the general interest and through which the State expresses its sovereignty over the territory. The composition of such property varied from State to State and from one political system to another. That was inevitable. All property which closely followed the legal destiny of the territory and which was necessary to *public* activity or to the expression of the State's sovereignty was transmissible. It was, as Bluntschli puts it, "an inseparable attribute of sovereignty, which moves with it, no special stipulation being required in order to transfer the attendant benefit and responsibility".

81. In article 2 the Special Rapporteur brought out the difference between State property appertaining to sovereignty, which is transmissible, and property of the territory ceded, which remains in that territory's patrimony. While it seemed evident that this property should not devolve to the successor State and that it remained the territory's property (except where the predecessor State was absorbed in its entirety—in other words, when there was, *ex hypothesi*, no property of the territory itself distinct from the property of the State which had ceased to exist, the ceded territory being co-extensive with the former territory) it was no less evident that this did not amount to maintenance of the *status quo ante*. The Special Rapporteur explained that public property owned by the ceded territory continued to belong to it, but must

of course follow the legal and political destiny of the territory which passed under another sovereignty. It was therefore governed henceforth by the legislation of the successor State. In brief, it was not affected by the change of sovereignty so far as ownership was concerned, but passed within the juridical order of the successor State.

82. Another article (article 7) dealt with the fate of *public archives*, works of art, museums and public libraries. The Special Rapporteur noted that this matter had been regulated by treaty—at any rate in cases of what may be called traditional succession—in quite considerable detail. In his opinion, the principle of the transmittal of archives to the successor State seemed to be accepted, irrespective of the nature of the items concerned. The link between archives and territory had not been overlooked, since the proposed text stated the principle that the handing over applies to archives "relating directly or belonging to the territory". The Special Rapporteur held that practice authorized the transmittal to the successor State of archives situated outside the territory because they had been either removed thither or established there. However, this did not occur without a *quid pro quo* and the imposition of responsibilities on the successor State: in particular, the obligation to supply the predecessor State and any third State concerned with copies of these items, save where they affected the security or sovereignty of their new owner.

83. The distribution of public documents among more than one successor State raised more complex but, in view of the advances made in methods of reproduction, by no means insoluble problems. In so far as the archives were divisible, each of the successor State received such part of the archives as was situated in the territory over which it was henceforth exercising its sovereignty. If the central archives were indivisible they were placed in the charge of the State which they concerned most directly, and that State was then responsible for making copies of them for the other States. The Special Rapporteur had also described the practice followed with regard to the transmittal of archives and libraries free of cost and with regard to time-limits for handing over the archives.

84. A fourth article (article 8) dealt with the fate of *public property of the ceded territory which is situated outside it*. Subject to the application of the rules relating to recognition, such public property passed not into the patrimony, but within the juridical order, of the successor State. The actual ownership of this property devolved to the successor State only in cases of total absorption or of decolonization: i.e. where the territory affected by the change of sovereignty no longer possessed a separate personality or legal status (absorption) or had acquired a new one (decolonization). The Special Rapporteur considered separately the case of property of a ceded territory situated in a predecessor State which had not ceased to exist, and the case of property situated in a third State.

2. The fourth report by the Special Rapporteur

85. In his fourth report (A/CN.4/247 and Add.1),²³⁷ submitted at the Commission's twenty-third session, the Special Rapporteur supplemented the four articles which

²³⁶ See p. 157 above.

²³⁷ *Idem*.

he had prepared for the twenty-second session with further provisions, beginning with the articles listed in his previous report for formulation later. These related to:

(a) *Intangible property and rights* (currency and the privilege of issue, Treasury and public funds, public debt-claims and rights in respect of the authority to grant concessions);

(b) *Property of the State in public enterprises or public corporations* (public enterprises, establishments and corporations; provincial and municipal property); and

(c) *Treatment of foundations.*

86. Article 7 dealt with currency and the privilege of issue. The complex technical problem of currency concerned both *succession to public property* and *succession to public debts*. In theory, paper money constituted a debt owed by the institution of issue to the bearer of the fiduciary currency. As to the privilege of issue, the predecessor State lost this privilege in the territory transmitted, and its place was taken by the privilege of issue which the successor State exercised in its own right. The proposed article specified that this privilege "shall belong" to the new sovereign, signifying that it was not inherited (see A/CN.4/247 and Add.1, para. 4 of the commentary to article 7). All monetary tokens proper to the territory transmitted (where there had previously been monetary autonomy, as in the case of former colonies) passed into the control of the successor State. Cases of dismemberment and cases where there was more than one successor State were also contemplated, in paragraph 3 of article 7. At that stage of his study of the question, however, the Special Rapporteur did not consider it possible to propose a general rule for the apportionment of currency that would take into account all the quantitative factors involved (the numerical size of the various populations, the level of wealth of the territory, its past contribution to the formation of central monetary reserves, the proportion of paper money in circulation in the territory, and so on).

87. Article 8 dealt with the problems of the *Treasury and public funds*. Where public funds were the property of the territory transmitted (*ibid.*, para. 1 of the commentary to article 8), they passed under the control of the new juridical order. So far as the remainder—i.e. the State Treasury—was concerned, the successor State, upon closure of the public accounts, received the assets and assumed responsibility for costs relating thereto and for budgetary and Treasury deficits. It also assumed the liabilities, on such terms and in accordance with such rules as applied to succession to the public debt, which would be examined at a later stage. The Special Rapporteur pointed out in his fourth report that the proposed article did not contain a specific provision for cases where more than one successor State was involved (*ibid.*, para. 3). Practice showed that, in such cases, the public funds were divided "equitably"; but a careful scrutiny of such practice revealed the extreme technical complexity and variety of the arrangements that had been adopted. This made it impossible, at that stage, to go any further towards laying down a comprehensive and detailed rule.

88. The question of *public debt-claims*, with which the Special Rapporteur dealt in article 9, was presented first of all in terms of a distinction between *State debt-claims*

and *territorial debt-claims*. The Special Rapporteur drew attention to the difficulty of formulating a uniform general rule on the subject of public debt-claims which would apply to all types of succession. Leaving aside the eminently clear case of total absorption, in which the predecessor State ceases to exist and its successor may properly take over all its debt-claims as well as all its rights, the Special Rapporteur felt able to affirm that claims properly belonging to the territory transmitted, in respect of which the debtor, title or pledge (if any) might be situated either within or outside the territory, remained in the patrimony of that territory irrespective of the type of succession and were not affected by the change of sovereignty. If there was any change in the beneficiary or in the status of the claims, it occurred not as a result of State succession but by the will of the new State, acting not as successor, but as the new sovereign in the territory. Where State debt-claims, irrespective of their motive, were *receivable* by the predecessor State by virtue of its activity or its sovereignty in the territory transmitted, the successor State became the beneficiary. The Special Rapporteur stressed in his commentary the magnitude and variety of such claims, which included tax debt-claims (*ibid.*, paras. 8–23 of the commentary to article 9). Cases where there was more than one successor State were always complex and were usually resolved by specific agreements dealing in detail, mainly through expert commissions, with the technical and financial problems involved.

89. In article 10 the Special Rapporteur dealt with *rights in respect of the authority to grant concessions*. The successor State was subrogated to the property rights which belonged to the predecessor State in its capacity as the conceding authority in respect of natural resources in the territory transmitted, and generally in respect of all public property covered by concessions. This provision expressed the concern, approved by the United Nations, to secure recognition for the right of nations to their natural resources. It implied the extinction, as soon as the transmittal of territory had taken place, of the competence and prerogatives of the former conceding authority and their replacement by the prerogatives of the new conceding authority, henceforth embodied in the successor State. Article 10 did not approach the problem from the standpoint of *mineral rights* held by private individuals or companies, but was concerned rather with the rights exercised by the conceding authority.

90. The purpose of the four paragraphs of article 11 was to determine the treatment of State property in *public enterprises, establishments and corporations*. Here again a distinction had been drawn between the property of the predecessor State (in its enterprises, establishments and so forth) and property which belonged to the territory transmitted. The former passed to the successor State, which was subrogated to the rights, and also to the costs and obligations, pertaining thereto; the latter was not affected by the fact of the change of sovereignty. Where the property of enterprises or establishments belonging to the territory or to the State was situated in parts of the territory falling within the jurisdiction of different sovereigns, the Special Rapporteur proposed that it should be apportioned equitably between the said parts, due regard being had to the viability of the parts and to the geogra-

phical location and origin of the property, and subject, where necessary, to equalization payments and offset.

91. *Provincial and municipal property* formed the subject of article 12, which consisted of the following four proposals:

(a) The change of sovereignty should, as a rule, leave intact the patrimonial property, rights and interests of the provinces and municipalities transmitted. Strictly speaking, this was not a question of State succession, but it became one by virtue of the fact that the property, rights and interests in question were henceforth to be governed by the juridical order of the successor State in the same way as the communities which owned them;

(b) Where the change of sovereignty had the effect of dividing a province or a municipality by attaching its several parts to two or more successor States, the property, rights and interests of the former territorial authority were to be apportioned equitably between the new territorial authorities according to criteria of viability, with due regard to the geographical location and origin of the property, and subject, where necessary, to equalization payments and offset;

(c) The successor State was subrogated to the rights and obligations of its predecessor in respect of the latter's share in the property, rights and interests of provinces and municipalities;

(d) Where there were two or more successor States, the aforementioned share of the predecessor State was to be apportioned equitably between them in accordance with criteria of equity, viability, etc.

92. Article 13 dealt with the treatment of religious, charitable or cultural foundations, whose legal status was not affected by the territorial change unless it seriously conflicted with public policy in the successor State.

93. After completing the first draft of these articles, the Special Rapporteur deemed it useful to precede them by various *preliminary provisions* which appear in his fourth report. He drew up four such provisions: i.e., articles 1-4.

94. Article 1 raised the preliminary problem of the treatment of property in the event of *irregular acquisition of territory*. In article 2 the Special Rapporteur had attempted to state a rule on the *transfer of territory and of public property as they exist*, firstly by placing the successor State under a duty to assume the responsibilities and obligations corresponding to its rights of succession to public property and secondly by placing on the predecessor State the obligation to maintain the public property in good faith until the date of actual transmittal, the whole being determined in accordance with the municipal law applied in the transmitted territory hitherto. Article 3 was concerned with the *date of transfer* of the property, which in practice was not always the same as the date of transmittal of the territory itself. Article 4 dealt with the *limitations by treaty* on the general principle of the transmittal of State-owned public property.

95. These draft rules presented as *preliminary provisions* were not, of course, concerned solely with the succession of States in respect of matters other than treaties or, *a fortiori*, solely with succession to public property. The Special Rapporteur had made a point of emphasizing this

in his fourth report (A/CN.4/247 and Add.2), in particular in paragraph 3 and in the commentary to article 2 (para. 2) and to article 3 (para. 1). He had accordingly submitted the draft rules with that reservation, since they were provisions common to several aspects of State succession, some of which fell within the competence of other Special Rapporteurs. It was for the Commission to decide whether, in the last analysis, it seemed wiser to plan to examine these and perhaps other articles at a later stage of its work, when sufficient progress had been made in exploring the various aspects of State succession.

96. The same observations could be made with regard, in particular, to the preliminary provision on the problem of irregular acquisition of territory, with the difference that while deferred examination would be appropriate from the methodological standpoint, logically this provision nevertheless represented a problem preliminary to all or any succession. It was true that, in the study of State succession as in any other study, it was necessary to take a number of rules for granted, and to assume that certain conditions in other sectors of general international law were satisfied, from the outset. The Special Rapporteur nevertheless thought it appropriate that a provision in the form of an "exception of non-succession" in case of irregular transfer of territory should be included in that preliminary setting even if the consideration of that provision had to be postponed or the drafting modified to take account of subsequent work.

97. A similar problem arose, for example, in connexion with the law of treaties when the Special Rapporteur on that subject, wishing to study the effect of the law of war on the law of treaties, thought of devoting a provision to the effect of hostilities on a treaty. It was to be noted however that he had had to abandon that idea.

98. In view of the present state of progress in the Special Rapporteur's work, there were probably two more operations to be carried out in the immediate future:

- (i) *To complete the draft articles on succession to public property*, in particular by considering, in the next phase, how far the articles already proposed, which constituted common provisions, could be supplemented by more specific articles relating to the various types of succession (merger, division, decolonization, partial transmittal of territory, restoration of States). The Special Rapporteur could not, at that stage, say how much work this would entail. However, in the light of that work once it was done, it might prove necessary to reorganize the draft somewhat so as to begin exclusively with general rules common to all types of succession and continue with as many special chapters as there were specific types of State succession;
- (ii) *To begin the study of succession to public debts* and to submit a first set of draft articles on that subject.

C. State responsibility

99. In 1969, Mr. Roberto Ago, the Special Rapporteur, submitted his first report on the responsibility of States.²³⁶

²³⁶ *Ibid.*, 1969, vol. II, p. 125, document A/CN.4/217 and Add.1. This report has been supplemented by document A/CN.4/217/Add.2, reproduced above, p. 193.

This report contained a review of previous work on the codification of the topic and reproduced, as annexes, the most important texts prepared in the course of the earlier codification work. At the conclusion of its examination of that report, the Commission established criteria as a guide for its future work.²³⁹ These criteria were on the whole favourably received by the Sixth Committee of the General Assembly which also expressed its approval of the plan adopted for the study, in successive stages, of the exceedingly complex topic of international responsibility.²⁴⁰

100. In 1970, the Special Rapporteur submitted a second report entitled "The origin of international responsibility",²⁴¹ comprising an introduction and a first chapter devoted to the general fundamental rules governing the topic as a whole. Owing to lack of time, the Commission was unable to do more than discuss the report generally. The conclusions reached at that discussion, both on questions of method and on points of substance and problems of terminology, were of particular importance for the continuation of the work on responsibility and were accordingly summarized in the Commission's report on its twenty-second session.²⁴² At the close of the discussion on his report, the Commission invited the Special Rapporteur to continue his study of the topic and the preparation of the draft articles. It was agreed that the Special Rapporteur should include in a third and more extensive report the part which had been examined at the twenty-second session, revised in the light of the discussion. The Commission hoped to be able to embark on a detailed examination of that report at its twenty-third session.²⁴³

101. At the present session, the Special Rapporteur submitted his third report entitled "The internationally wrongful act of the State, source of international responsibility" (A/CN.4/246 and Add.1-3).²⁴⁴ This report began with an introduction describing the progress achieved in the work on State responsibility and setting out in detail the various conclusions reached by the Commission following its examination of the second report; these were to serve as a guide for the preparation of the draft as a whole. It was followed by a first chapter ("General principles"), divided into four sections, each ending with a draft article (articles 1-4). In this the Special Rapporteur reproduced the material included in chapter I of his second report, revised and supplemented in the light of the discussion in the Commission of its twenty-second session. Thus the first section of chapter I of his third

report dealt with the definition of the principle attaching responsibility to any internationally wrongful act of the State; the second was devoted to the determination of the conditions for the existence of a wrongful act under international law; and the third established the principle that any State is capable at the international level of being considered as the author of a wrongful act, a source of international responsibility. To these three sections, which appeared in a different form in the previous report, the Special Rapporteur added a fourth section dealing with the principle that the municipal law of a State cannot be invoked to prevent an act of that State from being characterized as wrongful in international law.

102. The basic general principles having thus been identified and defined, the Special Rapporteur's third report also presented six sections of chapter II of his draft ("The 'act of the State' according to international law"). These examined successively and in detail the conditions in which the actual conduct of a specific individual or group of individuals should be considered as an "act of the State" from the point of view of international law. The first section contained preliminary considerations designed to clear away certain difficulties, caused basically by false premises, and to assert the autonomy of international law in the matter. The rest of the chapter was devoted first to establishing the individuals or groups of individuals whose conduct may be considered to constitute conduct attributable to the State at the international level. The Special Rapporteur indicated that the next step would be to determine which of the various types of conduct engaged in by those individuals or groups should be specifically attributed to the State. The analysis would then conclude a negative approach, showing the categories of individuals or groups whose conduct cannot be regarded as conduct of the State, and at the same time considering the possible international situation of the State in relation to such conduct.

103. In the context of the first group of questions, chapter II, section 2, defined the rule which represented the starting-point in this field, namely, that an act or omission may be taken into consideration for attribution to the State as an internationally wrongful act if it was committed by an individual or group of individuals recognized as an organ of the State under the legal system of the State concerned which acted in that capacity in the case in point (acts of organs of the State). The third section posed the question whether, in the light of the rule thus defined, a distinction should be drawn according to whether the organ in question belonged to one of the main branches of the State machinery or whether its functions related to international relations or were concerned solely with domestic matters, or whether its functions fell into a higher or lower category. The fourth section was devoted to an examination of the question whether these should be taken into account, for the purpose of attributing to the State as a subject of international law, acts or omissions by individuals or groups who, under the internal legal system of the State, were not regarded properly speaking as organs of the State but as organs of separate public institutions such as autonomous national public institutions or local public collectivities (States members of a federal State, cantons, regions, departments, municipali-

²³⁹ See *Yearbook of the International Law Commission, 1969*, vol. II, p. 233, document A/7610/Rev.1, paras. 79-84.

²⁴⁰ See *Official Records of the General Assembly, Twenty-fourth Session, Annexes*, agenda items 86 and 94 (b), document A/7746, para. 87.

²⁴¹ *Yearbook of the International Law Commission, 1970*, vol. II, p. 177, document A/CN.4/233.

²⁴² *Ibid.*, pp. 307 *et seq.*, document A/8010/Rev.1, paras. 70-82.

²⁴³ *Ibid.*, para. 83.

²⁴⁴ See p. 199 above.

ties, autonomous administrations of territories or dependent territories, and so on). The fifth section dealt with the possibility of considering as imputable to the State—again for the purpose of establishing the international responsibility of the State—the conduct of individuals or groups which although not formally possessing the capacity of organs had in fact acted in that capacity (*de facto* organs, government auxiliaries, individuals occasionally performing public functions, and so on). Lastly, a sixth section discussed the specific question of the possibility of attributing to a State an act or omission by an organ placed at the disposal of that State by another State or by an international organization. Except for the first section, which was introductory in character, all the sections of chapter II presented in the third report concluded with a draft article (articles 5 to 9).

104. As has already been mentioned, the Special Rapporteur indicated that chapter II would be completed later by new sections dealing with the other two groups of questions arising in connexion with the determination of what is an “act of State” in international law. He expressed the intention of examining these other groups of questions in his fourth report. First he proposed to examine in a seventh section the controversial question whether the conduct of an organ which has exceeded its competence or disregarded its instructions can be imputed to the State, and the possible limitations of such imputation. An effort would also be made to clarify the situation which may arise when an individual has continued to act as an organ despite having lost that capacity, in fact if not in form. The third group of questions would be dealt with in the eighth and ninth sections of chapter II. The first of these would be devoted to an examination of the reasons for excluding in principle the possibility of imputing to the State, at the international level, the acts of individuals who have acted as such. It would then examine the circumstances in which the existence of an internationally wrongful act of State could legitimately be envisaged in connexion with the conduct of individuals. The next section would deal with the exclusion, in principle, of the possibility of imputing to the State acts or omissions by individuals acting as organs of insurrectional movements against that State and the limitations on such exclusion. The possibility of linking the conduct of such individuals to the insurrectional movement itself, as a separate subject of international law, would also be examined. Three further draft articles would thus complete the series proposed in chapter II.

105. At that point, the examination of the conditions in which specific conduct may be regarded as an “act of the State” could be considered as having been completed. The next step would be to deal, in another chapter devoted to “the violation” in international law (chapter III), with an examination of the various aspects of what has been called the objective element of the internationally wrongful act: the failure to fulfil an international obligation. First, it would be made clear that the source of the international legal obligation which had been violated (customary, treaty or other) did not affect in any way the determination as to whether the violation was an internationally wrongful act. The Special Rapporteur would then

endeavour to define the aspects of the violation of an obligation regarding conduct and the distinction to be drawn between cases where the specific purpose of the obligation was to ensure some particular conduct as such, and cases where the obligee was only required to ensure that a certain event did not occur. He would next deal with the characteristics of the violation when the obligation violated was one of those which required, in a general way, an assurance of the occurrence of a certain result, without specifying the means by which the result was to be obtained. In that connexion he would also examine the force of the condition of the exhaustion of local remedies before the violation of an obligation regarding the treatment of individuals could be established. Finally, he would examine the problem of determining the *tempus commissi delicti* in cases where failure to fulfil an international obligation lead to an apparently permanent situation or was the result of separate and successive types of conduct. Once all these points had been settled, a number of special problems would still remain to be considered, such as the possibility of simultaneous imputation of an internationally wrongful act to more than one State in connexion with a single specific situation, and the possibility of making a State responsible, in certain circumstances, for an act committed by another State. After that, detailed consideration of the various circumstances excluding wrongful action would complete the first part of the Special Rapporteur’s study of State responsibility for internationally wrongful acts.

D. The most-favoured-nation clause

106. At its nineteenth session, in 1967, the Commission decided to place on its programme the topic of most-favoured-nation clauses in the law of treaties and appointed Mr. Endre Ustor as Special Rapporteur thereon.²⁴⁵

107. At the Commission’s twentieth session the Special Rapporteur submitted a working paper²⁴⁶ giving an account of the preparatory work undertaken by him on the topic and outlining the possible contents of a report to be presented at a later stage. The Special Rapporteur also submitted a questionnaire listing points on which he specifically asked the members of the Commission to express their opinion. The Commission, while recognizing fundamental importance of the role of the most-favoured-nation clause in the domain of international trade, instructed the Special Rapporteur not to confine his studies to that area but to explore the major fields of application of the clause. The Commission considered that it should focus on the legal character of the clause and the legal conditions governing its application and that it should clarify the scope and effect of the clause as a legal institution in the context of all aspects of its practical application. It wished to base its studies on the broadest possible foundations without, however, entering

²⁴⁵ *Yearbook of the International Law Commission, 1967, vol. II, p. 369, document A/6709/Rev.1, para. 48.*

²⁴⁶ *Ibid.*, 1968, vol. II, p. 165, document A/CN.4/L.127.

into fields outside its functions. In the light of these considerations, the Commission instructed the Special Rapporteur to consult, through the Secretariat, all organizations and interested agencies which might have particular experience in the application of the most-favoured-nation clause.²⁴⁷

108. By resolution 2400 (XXIII) of 11 December 1968, the General Assembly recommended that the Commission, *inter alia*, continue its study of the most-favoured-nation clause.

109. At the twenty-first session of the Commission in 1969, the Special Rapporteur submitted his first report,²⁴⁸ containing a history of the most-favoured-nation clause up to the time of the Second World War, with particular emphasis on the work on the clause undertaken in the League of Nations or under its aegis. The Commission considered the report at its 1036th meeting and, accepting the suggestion of the Special Rapporteur, instructed him to prepare next a study based mainly on the replies from organizations and interested agencies consulted by the Secretary-General and having regard also to three cases dealt with by the International Court of Justice relevant to the clause.²⁴⁹

110. Following the instructions of the Commission, the Special Rapporteur submitted his second report²⁵⁰ at the twenty-second session of the Commission in 1970. Part I of this report attempted to present an analytical survey of the views held by the parties and the judges on the nature and function of the clause in the three cases dealt with by the International Court of Justice pertaining to the clause: the *Anglo-Iranian Oil Company Case (Jurisdic-*

tion) [1952],²⁵¹ the *Case concerning the Rights of Nationals of the United States of America in Morocco (Judgment)* [1952]²⁵² and the *Ambatielos Case (Merits : obligation to arbitrate)* [1953].²⁵³ The Award handed down on 6 March 1956 by the Commission of Arbitration established by the Agreement of 24 February 1955 between the Governments of Greece and the United Kingdom for the arbitration of the Ambatielos claim was also dealt with in the first part of the report.²⁵⁴

111. Part II of the second report was intended to present in a systematic manner the replies of international organizations and interested agencies to the circular letter of the Secretary-General dated 23 January 1969. In this letter the organizations concerned were requested to submit for transmittal to the Special Rapporteur, all the information derived from the experience of the organization concerned which might assist him and the Commission in the work of codification and progressive development of the rules of international law concerning the most-favoured-nation clause. They were particularly requested to draw attention to any relevant bilateral or multilateral treaty, statement, practice or fact and to give their views as to the existing rules which could be discerned in respect of the clause. A number of international organizations gave a detailed answer to the circular letter and those answers served as a basis for the part II of the report.

112. Although the General Assembly by its resolution 2501 (XXIV) of 12 November 1969 and 2634 (XXV) of 12 November 1970 recommended that the Commission continue its study of the most-favoured-nation clause, the Commission found itself obliged to postpone the consideration of the topic owing to the lack of time.

113. At the present session, however, on the suggestion of the Special Rapporteur, the Commission requested the Secretariat to prepare on the basis of the collections of law reports available to it and of the information to be requested from governments a "Digest of decisions of national courts relating to most-favoured-nation clauses".

²⁴⁷ *Ibid.*, p. 223, document A/7209/Rev.1, paras. 92-94.

²⁴⁸ *Ibid.*, 1969, vol. II, p. 157, document A/CN.4/213.

²⁴⁹ *Ibid.*, p. 234, document A/7610/Rev.1, para. 89.

²⁵⁰ *Ibid.*, 1970, vol. II, p. 199, document A/CN.4/228 and Add.1.

²⁵¹ *I.C.J. Reports 1952*, p. 93.

²⁵² *Ibid.*, p. 176.

²⁵³ *I.C.J. Reports 1953*, p. 10.

²⁵⁴ United Nations, *Reports of International Arbitral Awards*, vol. XII (United Nations publication, Sales No.: 63.V.3), p. 91.

Chapter IV

THE QUESTION OF TREATIES CONCLUDED BETWEEN STATES AND INTERNATIONAL ORGANIZATIONS OR BETWEEN TWO OR MORE INTERNATIONAL ORGANIZATIONS

114. At its twenty-second session, the Commission, following the recommendation contained in General Assembly resolution 2501 (XXIV) of 12 November 1969, decided to include in its general programme of work the question of treaties concluded between States and international organizations or between two or more international

organizations. It set up a Sub-Committee composed of the following thirteen members: Mr. Reuter (Chairman), Mr. Alcívar, Mr. Castrén, Mr. El-Erian, Mr. Nagendra Singh, Mr. Ramangasoavina, Mr. Rosenne, Mr. Sette Câmara, M. Tabibi, Mr. Thiam, Mr. Tsuruoka, Mr. Ustor and Sir Humphrey Waldock and entrusted it with

the task of considering preliminary problems involved in the study of this new topic.²⁵⁵ The Sub-Committee submitted to the Commission a report which contained various proposals and was adopted by the Commission.²⁵⁶ In accordance with those proposals, the Secretary-General was requested to prepare a number of documents for the use of members of the Commission; in addition, the Chairman of the Sub-Committee was asked to submit to members of the Sub-Committee a questionnaire regarding the method of treating the topic and its scope and the members were requested to send their replies to this questionnaire, together with any other comments they might wish to make.

115. At the twenty-third session, in accordance with the proposals of the Sub-Committee as adopted by the Commission, the Secretary-General submitted to the Commission a working paper containing a short bibliography, a historical survey of the question and a preliminary list of the relevant treaties published in the United Nations *Treaty Series* (A/CN.4/L.161 and Add.1 and 2).

116. During the twenty-third session, the Sub-Committee held two meetings and submitted to the Commission a report (A/CN.4/250) which is reproduced in annex to this chapter. That report contained a summary of the views expressed by members of the Sub-Committee in reply to

²⁵⁵ *Yearbook of the International Law Commission, 1970*, vol. I, 1069th meeting, paras. 82-85.

²⁵⁶ *Ibid.*, vol. II, p. 310, document A/8010/Rev.1, para. 89.

the questionnaire prepared by its Chairman; the questionnaire and the full text of the replies received from members appeared in annex I and II, respectively, to that report.²⁵⁷

117. The Commission considered the report of the Sub-Committee at its 1129th meeting on 5 July 1971 and adopted it without change.

118. On the basis of the recommendations contained in paragraph 15 of the report, the Commission took the following decisions:

(a) It unanimously appointed Mr. Paul Reuter Special Rapporteur for the question of treaties concluded between States and international organizations or between two or more international organizations;

(b) It confirmed the request it had addressed to the Secretary-General at its twenty-second session concerning the preparation of documentation for the use of members of the Commission, it being understood that the Secretary-General will, in consultation with the Special Rapporteur, phase and select the studies required for the preparation of that documentation which will include, in addition to as full a bibliography as possible, an account of the relevant practice of the United Nations and the principal international organizations;

(c) It decided that the historical survey contained in document A/CN.4/L.161 and Add.1 and 2, for which it expressed its appreciation to the Secretariat, should be included in the relevant Yearbook of the International Law Commission.

²⁵⁷ The annexes to the report will be printed in *Yearbook of the International Law Commission*, vol. II, part II.

ANNEX

REPORT OF THE SUB-COMMITTEE ON TREATIES CONCLUDED BETWEEN STATES AND INTERNATIONAL ORGANIZATIONS OR BETWEEN TWO OR MORE INTERNATIONAL ORGANIZATIONS ²⁵⁸

I. INTRODUCTION

1. The Sub-Committee on treaties concluded between States and international organizations or between two or more international organizations was set up by the International Law Commission at its 1069th meeting on 12 June 1970. Its members are: Mr. Reuter (Chairman), Mr. Alcivar, Mr. Castrén, Mr. El-Erian, Mr. Nagendra Singh, Mr. Ramangasoavina, Mr. Rosenne, Mr. Sette Câmara, Mr. Tabibi, Mr. Thiam, Mr. Tsuruoka, Mr. Ustor and Sir Humphrey Waldock.

2. The Sub-Committee's task is to consider preliminary problems involved in the study of the question of treaties concluded between States and international organizations or between two or more international organizations, a question included by the Commission in its general programme of work.

3. During the Commission's twenty-third session, the Sub-Committee held two meetings, on 16 June and 1 July 1971.

4. In accordance with the decisions taken by the Commission at its twenty-second session on the recommendation of the Sub-Committee,²⁵⁹ the Sub-Committee had before it the following documents:

(a) A working paper by the Secretariat containing a short bibliography, a historical survey of the question and a preliminary list of the relevant treaties published in the United Nations *Treaty Series* (A/CN.4/L.161 and Add.1 and 2);

(b) A questionnaire prepared by the Chairman of the Sub-Committee regarding the method of treating the topic and its scope (A/CN.4/250, annex I), a working paper containing the replies of members to this questionnaire (A/CN.4/250, annex II), and an introduction prepared by the Chairman of the Sub-Committee.

²⁵⁸ Document A/CN.4/250.

²⁵⁹ See foot-note 256 above.

II. SUMMARY OF THE VIEWS EXPRESSED ON THE BASIS OF THE QUESTIONNAIRE PREPARED BY THE CHAIRMAN OF THE SUB-COMMITTEE

5. The questionnaire sent to the members of the Sub-Committee and their replies were, in the nature of things, of an exploratory character. Even so, consideration of those documents showed that there were a number of important points on which the Sub-Committee is in agreement.

6. In the first place, the subject certainly requires very extensive study; not only is the practice less well known than in the case of treaties between States and the information difficult to obtain, but the full range of specific problems raised by these treaties is only now beginning to emerge. The historical survey contained in the working paper prepared by the Secretariat (A/CN.4/L.161 and Add.1), which gives an objective account of the Commission's work on the subject, clearly shows that the Commission, and its special rapporteurs, following a distinct pattern, on several occasions decided to include in the study of international treaties those concluded by international organizations only to defer consideration of the latter treaties until a later occasion. Apart from the drafting problems which the Commission has been anxious to avoid, the Commission's decisions to defer consideration of the topic seem to have been due also to doubts as to the extent of the problem to be solved. The same hesitations manifested themselves at the Vienna Conference on the Law of Treaties.

7. As to the scope of the research to be undertaken, there was also broad agreement in the Sub-Committee that the study should be confined to treaties in written form. Although unwritten agreements have their importance, it seems wiser to confine the work to written agreements for the same reasons as led the Commission and the Vienna Conference to do so in regard to treaties between States. This would not of course exclude appropriate treatment of the element of tacit consent as part of the general law of treaties.

8. On the question to what international organizations the Commission's proposals will apply, there was agreement in the Sub-Committee that it is highly desirable that the rules proposed by the Commission should in principle be applicable to all international organizations. In the particular cases in which the 1969 Vienna Convention on the Law of Treaties²⁶⁰ deals with matters relating to intergovernmental international organizations, it refers to all such organizations without exception, and it would not be very satisfactory if the topic as a whole were governed by multiple sets of different rules over and above that Convention, when the subject itself is naturally homogeneous. Against this, it is to be noted that the Commission's proposals on the status of representatives of States to international organizations are confined to international organizations of universal character.²⁶¹ The future special rapporteur for the present topic will have to take into account the availability of information in regard to the practice of international organizations. In the light of that information, he should be requested to make appropriate recommendations to the Commission as to the scope of the draft to be prepared.

9. The Sub-Committee also dealt with questions of method. While thinking it necessary to leave the future special rapporteur the

widest discretion, there was general agreement in the Sub-Committee on certain fundamental points.

10. In the first place, the articles of the Vienna Convention on the Law of Treaties provide a firm basis for research. Not only must nothing be done which could directly or indirectly weaken their effect in their own field of application, a point which is self-evident; but these articles show the broad outline of a very detailed picture of what may be called treaty problems, and this will greatly facilitate the research to be done on the treaties of international organizations.

11. The replies of the members of the Sub-Committee, either by taking examples or by examining the articles of the Vienna Convention as a whole, have shown how much can be gained from recourse to the provisions of the Vienna Convention. In general, for example, they have taken the view that questions which the Vienna Convention had left aside in regard to treaties between States should also remain in abeyance in regard to treaties concluded by international organizations. Since the Vienna Convention had avoided a comprehensive classification of treaties concluded by States, the members of the Sub-Committee felt that it would be desirable that the rules now to be prepared should be drafted also without preparing a comprehensive classification of treaties concluded by international organizations.

12. It was at the same time pointed out that this does not mean that the Commission's task is limited to adapting the articles of the Vienna Convention to the particular case of international organizations. The special rapporteur will have to look for the relevant broad questions of principle governing the particular subject which the Vienna Convention did not have to take into account.

13. Lastly, the Sub-Committee agreed that consultation with the organizations concerned can only be arranged at a later stage, after the special rapporteur has himself made specific proposals to the Commission.

14. In general, the Sub-Committee felt that the Commission should include this topic in the list of items under active consideration. The Vienna Conference on the Law of Treaties showed that there is a genuine and profound need to clarify a number of questions which are still pending. In its current work, the Commission has frequently found it necessary to refer to problems arising out of the treaties concluded by international organizations, and other United Nations organs are in the same position.

III. RECOMMENDATIONS TO THE COMMISSION

15. The Sub-Committee therefore recommends that the Commission should decide:

(a) To appoint a special rapporteur for this topic;

(b) To confirm the request addressed to the Secretary-General concerning the preparation of documents for the use of members of the Commission, on the understanding that if the Commission appoints a special rapporteur in accordance with the recommendation addressed to it, the Secretary-General would, in consultation with him, phase and select the studies within the general framework laid down for him by the Commission in 1970;

(c) To request that the historical survey prepared by the Secretariat on the question of treaties concluded between States and international organizations or between two or more international organizations (A/CN.4/L.161 and Add.1), for which the Commission will doubtless wish to express its appreciation to the Secretariat, should be included among the publications of the Commission.

²⁶⁰ For the text of the Convention, 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.

²⁶¹ Article 1, paragraph 1 (2) and article 2 of the draft articles on the representation of States in their relations with international organizations, reproduced in chapter II, section D above.

Chapter V

OTHER DECISIONS AND CONCLUSIONS OF THE COMMISSION

A. Progressive development and codification of the rules of international law relating to international watercourses

119. By paragraph 1 of resolution 2669 (XXV) of 8 December 1970, the General Assembly recommended

that the International Law Commission should, as a first step, take up the study of the law of the non-navigational uses of international watercourses with a view to its progressive development and codification and, in the light of its scheduled programme of work, should consider the practicability of taking the necessary action as soon as the Commission deems it appropriate.

120. In the light of the General Assembly's recommendation quoted above, the Commission, at its 1128th meeting, decided to include a question entitled "Non-navigational uses of international watercourses" in its general programme of work without prejudging the priority to be given in the future to its study. It would be for the Commission in its new composition to decide what priority the topic should be given and what other concrete actions should be taken, bearing in mind the current programme of work of the Commission as well as its revised long-term programme.

121. The Commission agreed that for undertaking the substantive study of the rules of international law relating to non-navigational uses of international water courses with a view to its progressive development and codification on a world-wide basis, all relevant materials on States' practice should be appropriately analyzed and compiled. The Commission noted that a considerable amount of such substantive materials had already been published in the Secretary-General's report on "Legal problems relating to the utilization and use of international rivers"²⁶² prepared pursuant to General Assembly resolution 1401 (XIV) of 21 November 1959, as well as in the United Nations Legislative Series.²⁶³ On the other hand, paragraph 2 of General Assembly resolution 2669 (XXV) requested the Secretary-General to continue the study initiated in accordance with General Assembly resolution 1401 (XIV) in order to prepare a "supplementary report" on the legal problems relating to the question, taking into account the recent application in State practice and international adjudication of the law of international watercourses

²⁶² A/5409 (mimeographed document, 15 April 1963).

²⁶³ United Nations, *Legislative Texts and Treaty Provisions Concerning the Utilization of International Rivers for Other Purposes than Navigation* (United Nations publication, Sales No.: 63.V.4).

and also intergovernmental and non-governmental studies of this matter.

It is the understanding of the Commission that in preparing that supplementary report, the Secretary-General will certainly invite Governments of Member States to provide him with additional materials regarding legislative texts and treaty provisions, as well as any other relevant information which may be useful as evidence of their practice.

122. Finally, the Commission decided to print, as appropriate, in its *Yearbook* the Secretary-General's report (A/5409) prepared in accordance with General Assembly resolution 1401 (XIV). This report has never been printed before and it is, at present, out of stock. The Commission considered it necessary to print that report in its *Yearbook* because the new report requested by General Assembly resolution 2669 (XXV) will be of a supplementary nature and, therefore, intended to be used together with the former one.

B. Review of the Commission's long-term programme of work

123. Confirming its intention of bringing up to date its long-term programme of work, taking into account recommendations of the General Assembly and the international community's current needs, and discarding those topics on the 1949 list²⁶⁴ which were no longer suitable for treatment, the Commission, at its twenty-second session, asked the Secretary-General to submit at its twenty-third session a working paper as a basis for the Commission to select a list of topics which may be included in its long-term programme of work.²⁶⁵

124. At the present session, the Commission had before it a working paper entitled "Survey of International Law" (A/CN.4/245),²⁶⁶ prepared by the Secretary-General in the light of the Commission's decision mentioned

²⁶⁴ The 1949 list was prepared by the Commission on the basis of a Memorandum submitted by the Secretary-General entitled *Survey of International Law in Relation to the Work of Codification of the International Law Commission* (United Nations publication, Sales No.: 1948.V.1(1)).

²⁶⁵ *Yearbook of the International Law Commission, 1970*, vol. II, p. 309, document A/8010/Rev.1, para. 87.

²⁶⁶ To be printed in *Yearbook of the International Law Commission, 1971*, vol. II, part two.

above. At the 1141st meeting, Mr. Constantin A. Stavropoulos, Legal Counsel of the United Nations, introduced the "Survey" in the Commission on behalf of the Secretary-General. The "Survey" contains a preface, an introduction and seventeen chapters, sub-divided in some cases into sections. The chapters are entitled: I. The position of States in international law; II. The law relating to international peace and security; III. The law relating to economic development; IV. State responsibility; V. Succession of States and Governments; VI. Diplomatic and Consular Law; VII. The law of treaties; VIII. Unilateral acts; IX. The law relating to international watercourses; X. The law of the sea; XI. The law of the air; XII. The law of outer space; XIII. The law relating to the environment; XIV. The law relating to international organizations; XV. International law relating to individuals; XVI. The law relating to armed conflicts; XVII. International criminal law.

125. A preliminary discussion on the review of the Commission's long-term programme of work took place at the 1141st, 1143rd and 1144th meetings held on 21, 22 and 26 July 1971. During the discussion, several members of the Commission advanced general observations on the "Survey" as well as more detailed comments on particular points or subjects referred to therein. The Commission as a whole agreed that the "Survey" was a comprehensive and, at the same time, concise and realistic document based on a thorough analysis of the achievements, trends and needs in the field of the codification and progressive development of international law as they appeared at the present time. As such it constituted not only an excellent basis for the review by the Commission of its long-term programme of work, but also a document of high interest for Governments, the Sixth Committee of the General Assembly and other bodies engaged in the codification process as well as for professional and academic circles. The Commission, unanimously, expressed its great appreciation to the Codification Division for the outstanding work done in producing the "Survey", which was a milestone in the history of the Commission.

126. Reference was made by some members to specific subjects which they considered particularly suitable for inclusion in a revised list of topics selected for codification and to a certain number of general questions involved in any review of the Commission's long-term programme of work, such as, for instance, the criteria to be taken into consideration for the selection, the kind of topics to be selected, the relationship between the current programme of work of the Commission and the long-term programme, the number of topics which it would be advisable to select, the possible priorities among the selected topics, the need to choose the most appropriate codification method for the study of a particular topic and the period of time required for its study and codification.

127. Conscious of the need for further reflection on a question which may influence the codification and progressive development of international law in the years to come, and in view of the fact that the present members of the Commission were at the end of their term of office, the Commission concluded that the definitive task of reviewing its long-term programme of work should be

left to the Commission in its new composition. The records of the preliminary exchange of views at the present session would, it was thought, be helpful to the new membership in undertaking that task on the basis of the "Survey" prepared by the Secretary-General.

128. In the light of the foregoing, the Commission took the following decisions:

(a) To place on the provisional agenda of its twenty-fourth session an item entitled "Review of the Commission's long-term programme of work: 'Survey of International Law' prepared by the Secretary-General (A/CN.4/245)";

(b) To invite members of the Commission to submit written statements on the review of the Commission's long-term programme of work to be circulated at the beginning of the twenty-fourth session of the Commission;

(c) To request the Secretariat to give, as appropriate, to the "Survey of International Law" (A/CN.4/245) a circulation and distribution as wide as possible by issuing it as a separate publication, in addition to its printing in the Commission's *Yearbook*, 1971.

C. Organization of future work

129. As a permanent body, and without wishing to prejudice the freedom of action of its membership in 1972, the Commission made the arrangements indicated below to ensure the continuation of the work on the topics for codification and progressive development currently under consideration.²⁶⁷ In making these arrangements the Commission took into account recommendations of the General Assembly [resolution 2634 (XXV) of 12 November 1970], conclusions reached on the matter by the Commission at its twenty-second session and the fact that, at its present session, its draft articles on the representation of States in their relations with international organizations had been completed together with an annex on observer delegations to organs and to conferences.

130. The Commission agreed that the provisional agenda of its twenty-fourth session in 1972 should include items on succession of States in respect of treaties, succession of States in respect of matters other than treaties, State responsibility, the most-favoured-nation clause and the question of treaties concluded between States and international organizations or between two or more international organizations.

131. At its twenty-fourth session, the Commission intends to complete the first reading of the entire draft of articles on succession of States in respect of treaties. It also intends to make substantial progress in the study of State responsibility. In addition, the Commission wishes to devote some time to the consideration of succession of States in respect of matters other than treaties and the most-favoured-nation clause and, if time permits, to have a preliminary discussion on the question of treaties concluded between States and international organizations or between two or more international organizations.

²⁶⁷ See chap. III and IV above.

132. The Commission reaffirmed its decisions recorded in its reports of 1953²⁶⁸ and 1966²⁶⁹ that a Special Rapporteur who is re-elected as a member should continue his work on his topic if this had not yet been finally disposed of by the Commission, unless and until the Commission as newly constituted decided otherwise. Even if the Special Rapporteur on a topic should not be re-elected, inclusion of the above mentioned items in the provisional agenda would give the newly reconstituted Commission the opportunity of reviewing with respect to each of those items the directions and guidelines previously given to the Special Rapporteurs.

D. The problem of the protection and inviolability of diplomatic agents and other persons entitled to special protection under international law

133. In connexion with the adoption of the Commission's agenda at the 1087th meeting, the suggestion was made that the Commission should consider whether it would be possible to produce draft articles regarding such crimes as the murder, kidnapping and assaults upon diplomats and other persons entitled to special protection under international law. The Commission recognized both the importance and the urgency of the matter, but deferred its decision in view of the priority that had to be given to completion of the draft articles on the representation of States in their relations with international organizations. In the course of the session it became apparent that there would not be sufficient time to deal with any additional subject.

134. In considering its programme of work for 1972, however, the Commission reached the decision that, if the General Assembly requested it to do so, it would prepare at its 1972 session a set of draft articles on this important subject with the view to submitting such articles to the twenty-seventh session of the General Assembly.

E. Co-operation with other bodies

1. ASIAN-AFRICAN LEGAL CONSULTATIVE COMMITTEE

135. Mr. Elias submitted a report (A/CN.4/248)²⁷⁰ on the twelfth session of the Asian-African Legal Consultative Committee held in Colombo from 18 to 28 January 1971, which he had attended as an observer for the Commission.

136. The Asian-African Legal Consultative Committee was represented in the Commission by Mr. Fernando and by its Secretary, Mr. Sen. Mr. Fernando addressed the Commission at its 1136th meeting.

²⁶⁸ *Yearbook of the International Law Commission, 1953*, vol. II, p. 231, document A/2456, para. 172.

²⁶⁹ *Ibid.*, 1966, vol. II, p. 277, document A/6309/Rev.1, part II, para. 73.

²⁷⁰ To be printed in *Yearbook of the International Law Commission, 1971*, vol. II, part two.

137. He first stressed that the usefulness of the work accomplished by the Committee had been recognized by the Governments of Asia and Africa which had renewed the mandate of the Committee for successive five-year periods; a new period of five years was due to commence in November 1971. As far as membership was concerned, he indicated that many countries had been attracted to the Committee, which now had 21 members (16 from Asia and 5 from Africa) and that the number was expected to increase. After describing the measures being taken to introduce French, in addition to English, as a working language of the Committee and to increase the staff of the Committee's secretariat, he emphasized that the development of public international law was a means of fostering international co-operation and was therefore necessary for the furtherance of peace. The patient research by the International Law Commission on the subject of the law of treaties had made possible the success of the Vienna Convention on the Law of Treaties (1969). The Committee had itself devoted two of its sessions to the law of treaties, thereby greatly assisting the representatives of the Asian and African countries in shaping their own contributions to the Vienna Conference on the Law of Treaties.

138. He pointed out that international organizations were playing an increasing role in the life of the world community and the Commission's current discussions were evidence of its importance.

139. As far as the future work of the Commission was concerned, the Committee considered its role as that of taking note of the more important subjects to be codified by the Commission, undertaking research work and thereafter submitting to governments a generally agreed view.

140. He concluded by paying tribute to the objective approach displayed by the members of the Commission and to their self-restraint.

141. The Commission was informed that the thirteenth session of the Committee, to which it had a standing invitation to send an observer, would open at Lagos (Nigeria) in 1972. The Commission requested its Chairman, Mr. Senjin Tsuruoka, to attend the session or, if he was unable to do so, to appoint another member of the Commission for the purpose.

2. EUROPEAN COMMITTEE ON LEGAL CO-OPERATION

142. Sir Humphrey Waldock attended the fifteenth session of the European Committee on Legal Co-operation held at Strasbourg from 14 to 18 June 1971 as an observer for the Commission; he made a statement before the Committee.

143. The European Committee on Legal Co-operation was represented by Mr. H. Golsong, Director of Legal Affairs of the Council of Europe, who addressed the Commission at the 1144th meeting.

144. He began by saying that the points at which the interests of the Commission converged with those of the European Committee on Legal Co-operation as well as

other legal bodies of the Council of Europe became more numerous as their work progressed. That was clear from the Commission's documents, from the report submitted to the Committee at its fifteenth session by Sir Humphrey Waldock as observer for the International Law Commission, and from the "Survey of International Law" (A/CN.4/245)²⁷¹ prepared by the Secretary-General of the United Nations.

145. Mr. Golsong mentioned as being among the questions of mutual interest the European draft Convention on State Immunity, to which he had referred the previous year.²⁷² He drew particular attention to its provision on compliance with judgements and said that the draft, now in the final stages of preparation, would probably be opened for signature at the next Conference of European Ministers of Justice, to be held in May 1972.

146. With regard to the draft convention on the prevention of pollution of the major international waterways of western Europe, on which he had commented in 1970,²⁷³ he said that the draft now contained a clause on inter-State responsibility, though its scope was comparatively limited. There were wide differences in the legislation and practice of the member States of the Council of Europe with regard to civil liability for acts of pollution, and Mr. Golsong said that the Committee would accordingly consider the question in 1972 on the basis of a study of comparative law.

147. He referred to the interest shown by the Consultative Assembly and the Governments of the member States of the Council of Europe in the work of the Committee on the Peaceful Uses of the Sea-Bed and the Ocean Floor beyond the Limits of National Jurisdiction. On the question of the protection of diplomats, he said that the European Committee on Legal Co-operation was aware that the problem was arising even in Europe. It considered that member States should first review and supplement their penal legislation as a move towards combating the new phenomenon.

148. He also commented on the problem resulting from the simultaneous existence of instruments dealing with the same subject from a different angle, such as the conventions on extradition and judicial assistance in criminal matters and the conventions providing for the recognition and enforcement of foreign criminal judgments. The Committee had, in addition, undertaken studies on assistance between States in matters of administrative law.

149. With regard to the application of international conventions, he said that a highly instructive meeting of government representatives and legal practitioners had taken place at which the subject of discussion had been the problems encountered in the application of international agreements relating to criminal law. It had been found that some difficulties could be solved by bringing into harmony the positions adopted unilaterally by each of the contracting States.

²⁷¹ *Idem.*

²⁷² *Yearbook of the International Law Commission, 1970, vol. I, p. 147, 1069th meeting, para. 92.*

²⁷³ *Ibid.*, para. 91.

150. On the question of patents, the diplomatic conference for the preparation of a universal version of the European Convention on the International Classification of Patents for Invention had made it possible for non-member States of the Council of Europe to participate in the work of classification. Apart from having thrown light on the process involved in transforming a regional convention into a universal convention, the conference had testified to the political will of the member States of the Council of Europe to go beyond the regional framework when such a course was justified by the common interests of the members of the international community.

151. He announced that on 1 January 1972, as a contribution to the implementation of General Assembly resolution 2099 (XX), a fellowship system would be introduced to enable jurists from developing countries to familiarize themselves with the work of the European Committee on Legal Co-operation.

152. In conclusion, he said that although the Committee itself had adopted a different approach to the question, it was following with the closest attention the Commission's work on relations between States and international organizations of universal character. He hoped that the Committee, as an observer to any diplomatic conference that might be convened for the adoption of a convention on the subject, would be able to assist it in arriving at the necessary compromises.

153. The Commission was informed that the sixteenth session of the Committee, to which it had a standing invitation to send an observer, would be held at Strasbourg (France) in November 1971. The Commission requested its Chairman, Mr. Senjin Tsuruoka to attend the session or, if he was unable to do so, to appoint another member of the Commission for the purpose.

3. INTER-AMERICAN JURIDICAL COMMITTEE

154. The Inter-American Juridical Committee was represented by Mr. Aja Espil and Mr. Caicedo Castilla. Mr. Aja Espil addressed the Commission at its 1124th meeting.

155. He stressed that the Committee, with its new structure as one of the main organs of OAS and its expanded membership of eleven, had held in the second half of 1970 its first extraordinary session to examine, at the express request of the OAS General Assembly, the question of the formulation of one or more draft inter-American instruments on the subject of kidnappings and other attacks against individuals, when those acts affected international relations. The Committee had taken as its starting point a resolution of the OAS General Assembly condemning all acts of terrorism, in particular kidnappings and related acts of extortion, and characterizing them as grave ordinary crimes. It had had to consider a number of preliminary questions such as whether such acts constituted crimes against municipal law and whether, in the case of the kidnapping of diplomats, the crime was primarily a matter for the international community or for the national community. In that connexion, the Committee had had to consider the problem of international wrong-

ful acts, a subject on which it had taken into account the views expressed on the subject by certain members of the Commission. The Committee had noted that the essence of the problem rested in its international aspects: in the case of the kidnapping of diplomats, for example, the offenders created an international conflict of interests by inducing the sending State to bring pressure to bear on the receiving State.

156. He commented that the Committee had taken the view that the two categories of offences dealt with in the draft convention under consideration—namely acts of terrorism and the perpetration of those offences against the representatives of foreign States—affected mainly the international community and therefore fell within the scope of international law. The Committee had therefore described them as ordinary crimes having international repercussions but had not gone so far as to regard them as international crimes proper. The central idea of the Committee's draft was the prevention and punishment of acts of terrorism in so far as those acts constituted attacks against the international community and violations of human rights.

157. He recalled in that connexion that subsequently the member States of OAS had adopted a convention on the subject, though it dealt only with attacks against the life and physical integrity of persons to whom the State had a duty to extend special protection in accordance with international law.

158. With regard to the work of the Committee in 1971, he drew attention to the problem which had arisen in connexion with the Committee's consideration of its own draft statute. Article 2 of the draft statute stated that the members of the Committee served in a personal capacity and specified that they enjoyed the privileges and immunities laid down in article 104 of the Charter of OAS. Since that article referred to the representatives of member States in the organs of OAS the view had been put forward that the members of the Committee did not enjoy those privileges and immunities. The majority however had upheld a constructive interpretation of the rule in question and had held that the members of the Committee represented the member States of OAS as a whole and should therefore enjoy such privileges and immunities.

159. He mentioned that the Committee had also dealt with the review and evaluation of the inter-American conventions on intellectual property. In view of the fact that the Latin American countries lagged behind the more industrialized countries with regard to technology and were essentially importers of products and techniques invented abroad, it was necessary to devise some system for the protection of industrial property which would prevent the creation of certain situations detrimental to the public interest, while promoting the active transfer of technology that was vital to the accelerated development of Latin America. Also, the Committee had examined the question of bills of exchange and cheques, a subject on which it was keeping in close touch with the work of UNCITRAL.

160. Lastly he mentioned that the Committee had commenced the study of the law of the sea. The first problem

it had faced was that of determining whether there existed a Latin American position on the law of the sea. A number of principles and rules had been formulated between 1950 and 1956 but the new economic and social approach to the problem in the Declarations of Montevideo (May 1970) and Lima (August 1970) made it necessary to re-examine the whole question. Work had been initiated on the formulation of a new concept of special sea areas beyond the territorial sea, areas over which jurisdiction would be exercised for certain purposes by the coastal State. The existence of such areas now constituted a reality which was accepted by international law and confirmed by the general practice of States.

161. The Commission was informed that the next session of the Committee, to which it had a standing invitation to send an observer, would open at Rio de Janeiro (Brazil) on 9 August 1971. The Commission requested its Chairman, Mr. Senjin Tsuruoka, to attend the session or, if he was unable to do so, to appoint another member of the Commission for the purpose.

F. DATE AND PLACE OF THE TWENTY-FOURTH SESSION

162. The Commission decided to hold its next session at the United Nations Office at Geneva from 2 May 1972 to 7 July 1972.

G. REPRESENTATION AT THE TWENTY-SIXTH SESSION OF THE GENERAL ASSEMBLY

163. The Commission decided that it would be represented at the twenty-sixth session of the General Assembly by its Chairman, Mr. Senjin Tsuruoka.

H. GILBERTO AMADO MEMORIAL LECTURE

164. During the consideration of the Report of the Commission at the twenty-fifth session of the General Assembly it was suggested in the Sixth Committee, in connexion with the discussion on the point concerning the International Law Seminar,²⁷⁴ that with a view to honouring the memory of Gilberto Amado, the illustrious Brazilian jurist and former member of the International Law Commission, the possibility should be considered of naming a series of sessions after him or of establishing a permanent conference in his name within the Seminar.

165. The Government of Brazil, consulted by Mr. T. O. Elias, Chairman of the twenty-second session of the Commission, through Mr. Sette Câmara, responded favourably to the idea and offered financial assistance, to begin with the sum of US \$3,000 for the next year because budgetary procedure did not allow them to make long-term commitments.

166. The question was considered at the 1146th meeting and the Commission accepted a proposal by Mr. Elias that the memorial lecture should take the form of an annual commemoration to which the members of the

²⁷⁴ See *Official Records of the General Assembly, Twenty-fifth Session, Annexes*, agenda item 84, document A/8147, para. 121.

Commission, the participants in the session of the International Law Seminar and about twenty-five other experts on international law, including the members of the Secretariat of the Commission, would be invited. The first lecture would be given by a past or present member of the Commission.

167. The money offered by the Brazilian Government would be held in the trust fund established for the fellowships given to the Seminar and would be used to defray the cost of the implementation of the programme including the publication in English, French and Spanish of the annual lecture. Travel expenses and a small honorarium would be paid to the lecturer.

168. An advisory committee composed of Mr. Ago, Mr. Elias, Mr. Kearney, Mr. Sette Câmara, Mr. Tabibi, Mr. Ushakov, Sir Humphrey Waldock and Mr. Yasseen was established to consider questions arising out of the organization of the annual lecture.

169. The view was also expressed that at the time of the publication of the first lecture it would be appropriate to recall the contribution of Gilberto Amado in the sphere of codification of international law, *inter alia* in United Nations organs such as the Committee on the Progressive Development of International Law and its Codification, the Sixth Committee and the International Law Commission.

I. SEMINAR ON INTERNATIONAL LAW

170. In pursuance of General Assembly resolution 2634 (XXV) of 12 November 1970, the United Nations Office at Geneva organized during the twenty-third session of the Commission a seventh session of the Seminar on International Law intended for advanced students of that discipline and young government officials whose functions habitually include a consideration of questions of international law.

171. Between 10 and 28 May 1971, the Seminar held twelve meetings devoted to lectures followed by discussion, the last meeting being set aside for the evaluation of the Seminar by the participants.

172. Twenty-three students from different countries participated; they also attended meetings of the Commission during that period and had access to the facilities provided by the Library in the Palais des Nations.

173. Nine members of the Commission (Mr. Ago, Mr. Bartoš, Mr. Bedjaoui, Mr. Castañeda, Mr. Elias,

Mr. Kearney, Mr. Reuter, Mr. Ustor and Mr. Yasseen), the Legal Adviser of the International Labour Office (Mr. Wolf) and a member of the Secretariat (Mr. Raton, Senior Officer, Office of the Director-General of the United Nations Office at Geneva) generously gave their services as lecturers. The lectures were given on various subjects connected with the past and present work of the International Law Commission, including the questions of State responsibility, special missions, the succession of States, agreements between States and international organizations, and recent legal aspects of the law of the sea. Other lectures dealt with the question of Namibia before the International Court of Justice and with the problem of revision of the Charter before the General Assembly. Lastly, international trade law formed the subject of two lectures, one on the work of UNCITRAL and the other on CMEA. The Legal Adviser of the International Labour Office spoke about the ILO and International Labour Conventions.

174. The Seminar was held without cost to the United Nations, which assumed no responsibility for the travel or living expenses of the participants. As at previous sessions, the Governments of Denmark, the Federal Republic of Germany, Finland, Israel, the Netherlands, Norway and Sweden and, for the first time, Switzerland offered scholarships for participants from developing countries. Ten candidates were chosen to be beneficiaries of the scholarships, and three students holding scholarships granted by UNITAR were also admitted to the Seminar. The grant of scholarships is making it possible to achieve a much better geographical distribution of participants and to bring deserving candidates from distant countries who would otherwise be unable to attend the session solely for pecuniary reasons. It is therefore desirable to be able to rely on the continuing generosity of the above-mentioned Governments.

175. In application of General Assembly resolution 2634 (XXV), Spanish was used as a working language during the session. In accordance with the wishes expressed during the debates of the Sixth Committee, three young diplomats who had participated in the work of the Committee were admitted to this session of the Seminar.

176. The Commission expressed appreciation, in particular to Mr. Raton, for the manner in which the Seminar was organized, the high level of discussion and the results achieved. The Commission recommended that seminars should continue to be held in conjunction with its sessions.

ANNEXES

ANNEX I

Observations of Member States, Switzerland and the secretariats of the United Nations, the specialized agencies and the International Atomic Energy Agency on the draft articles on representatives of States to international organizations, adopted by the International Law Commission at its twentieth, twenty-first and twenty-second sessions *

CONTENTS

	<i>Page</i>		<i>Page</i>
A. OBSERVATIONS OF MEMBER STATES		B. OBSERVATIONS OF SWITZERLAND	406
Australia	356	C. OBSERVATIONS OF THE SECRETARIATS OF THE UNITED NATIONS, THE SPECIALIZED AGENCIES AND THE INTERNATIONAL ATOMIC ENERGY AGENCY	
Austria	358	1. United Nations	412
Belgium	358	2. International Labour Organisation	413
Canada	361	3. Food and Agriculture Organization of the United Nations	415
Cyprus	365	4. United Nations Educational, Scientific and Cultural Organization	415
Denmark	365	5. World Health Organization	418
Ecuador	365	6. International Bank for Reconstruction and Development	421
Finland	367	7. International Development Association	422
France	368	8. International Finance Corporation	423
Hungary	372	9. International Monetary Fund	423
Israel	372	10. Universal Postal Union	423
Japan	376	11. International Telecommunication Union	424
Madagascar	379	12. World Meteorological Organization	427
Mauritius	380	13. International Atomic Energy Agency	428
Netherlands	380		
New Zealand	387		
Pakistan	387		
Poland	388		
Spain	388		
Sweden	392		
Turkey	396		
Union of Soviet Socialist Republics	397		
United Kingdom of Great Britain and Northern Ireland	398		
United States of America	401		
Yugoslavia	404		

A. OBSERVATIONS OF MEMBER STATES

Australia

OBSERVATIONS COMMUNICATED BY LETTER DATED 19 JANUARY 1971
FROM THE PERMANENT REPRESENTATIVE TO THE UNITED NATIONS

[Original text: English]

1. The Australian Government expresses its appreciation of the work of the International Law Commission in drawing up the draft articles on relations between States and international organizations.¹

* The observations contained in this annex were originally distributed in documents A/CN.4/221 and Corr.1 and Add.1, A/CN.4/238 and Add.1 and 2, A/CN.4/239 and Add.1-3 and A/CN.4/240 and Add.1-7.

¹ The texts of the draft articles on representatives of States to international organizations, together with the commentaries, have been published as follows:

It has studied the draft articles with interest and wishes at this stage to make the following comments.

General comments

2. The Australian Government considers that the draft is too long and in places unnecessarily repetitive: perhaps greater use could be

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

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

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

made of drafting by reference. Further study might also be given by the Commission to the definition in articles 1, 51 and 78 with the object of consolidating them where possible.

3. A considerable body of practice already exists, including a large number of international agreements, dealing with relations between States and international organizations: the two Conventions on Privileges and Immunities of the United Nations and of the Specialized Agencies² are of considerable significance as precedents in the matter because of their wide and long-standing acceptance as appropriate standards for international organizations. Due regard should be had to this body of practice. The Australian Government is pleased to note that articles 3 and 5 preserve this and acknowledge the possible need to conclude future agreements on the subject in relation to particular organizations. The varied character of international organizations had led to a diversity of rules regarding their functions and status: nevertheless these rules have been generally founded on the principle of functional necessity, a principle which is embodied in Article 105 of the Charter of the United Nations. The Australian Government has always regarded this important principle as fundamental to a consideration of the levels of privileges and immunities in the international field and emphasizes that, in its view, the present draft articles should not attempt to depart from it. If they do, the possibility of wide acceptance of the articles will be greatly prejudiced. There is already in many countries both a public and a parliamentary resistance to the proliferation of organizations and individuals who are entitled to special privileges, even on the more modest scale accepted hitherto.

4. The Australian Government notes with approval that the articles are confined to international organizations of universal character, although, as mentioned subsequently in relation to delegations of States to international organizations and conferences, even this restriction does not prevent the articles having application to a very large number of international conferences.

5. Paragraph 2 of the Commission's commentary on *article 22* states that the question of international organizations becoming parties to the draft articles is a separate one to be considered at a later stage. It seems to the Australian Government that this is 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.

***Permanent missions to international organizations:
Articles 6-50***

6. Bearing in mind the principle of functional necessity referred to earlier in these comments, the Australian Government considers that, in general, these articles are satisfactory. They broadly equate permanent missions to international organizations with permanent diplomatic missions: this seems a reasonable approach.

7. One important difference, however, between permanent missions to international organizations and permanent diplomatic missions is 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). The present draft tends to underestimate the difficult position of the host State and the Australian Government suggests that this aspect might be considered further by the Commission. An example arises in *article 45*. Under that article, persons enjoying privileges and immunities under the articles have a duty to respect the laws and regulations of the host State and a duty not to interfere in the

internal affairs of that State. The draft articles contain no provision for the declaration by the host State of an unwelcome representative to the international organizations as *persona non grata*. 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 organizational 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.

8. In relation to the position of the host State, the Australian Government refers to the difficulty felt by members of the Commission in relation to accidents arising out of the use of motor cars. This difficulty appears, *inter alia*, in the Commission's commentary on *article 32* where it is indicated that some members of the Commission took the view that members of the permanent mission should not enjoy immunity from the civil jurisdiction of the host State in the case of an action for damages arising out of an accident caused by a vehicle used outside the official functions of the person in question. 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.

Permanent observer missions: Articles 51-77

9. The comments of the Commission and of other States indicate that *article 52* has already been construed as conferring on a non-member State the right to send an observer mission to an international organization. In the view of the Australian Government, international practice has established no such right: on the contrary the members of an organization maintain control over the establishment of observer missions. How this should be codified is a matter which should be given further consideration by the Commission; but it is essential that the Commission should examine from this standpoint both the efficacy of, and indeed the need for, *article 52*.

10. The provisions regarding permanent observer missions have evidently been based on the premise that these missions perform functions virtually identical to the functions performed by permanent missions. They have therefore been accorded similar status, privileges and immunities. The Australian Government is of the view that this premise is not valid and that the description of a

² For the Convention on the Privileges and Immunities of the United Nations, see United Nations, *Treaty Series*, vol. 1, p. 15. For the Convention on the privileges and Immunities of the Specialized Agencies, *ibid.*, vol. 33, p. 261.

permanent observer mission in *articles 51 and 53* does not accurately reflect the role of a permanent observer mission. The phrase "representative [. . .] character" in article 51 is accurate to the extent that a permanent observer mission is "representative" of the sending State, but in the Australian Government's view it is not accurate to the extent that the mission "represents" the sending State in the organization itself. The function of an observer mission is to observe and maintain liaison with the organization: it does not, in the active sense, "represent" the sending State.

11. The draft articles virtually equate permanent observer missions with permanent missions for the purposes of determining the facilities, privileges and immunities to be accorded to them. In the Australian Government's view, 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 in the following paragraphs of these comments for delegations to organs and conferences.

**Delegations of States to organs and to conferences:
Articles 78-116**

12. The Australian Government agrees 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. 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 interest. 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 Australian Government finds 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. 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 is of 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.

Austria

PART I AND SECTION I OF PART II OF THE PROVISIONAL DRAFT

OBSERVATIONS COMMUNICATED BY "NOTE VERBALE" DATED
30 AUGUST 1969 FROM THE PERMANENT REPRESENTATIVE TO
THE UNITED NATIONS

[Original text: English]

It can be said that the present twenty-one draft articles on representatives of States to international organizations achieve the aim—as expressed in paragraph 1 of the International Law Commission's commentary to article 3—of detecting the common denominator and laying down the general pattern which regulates the diplomatic law of relations between States and international organizations. Apart from that, it is to be noted favourably that the articles, especially *articles 11, 16 and 17, paragraph 3*, correspond to the interests of the host State, and it may be hoped that the Commission will continue to pay due attention to these interests when drafting the remaining articles.

With respect to *article 4* the following may be pointed out: if the status of permanent missions to an international organization is defined bilaterally by a headquarters agreement between the host State and the organization concerned, the entry into force of the envisaged convention on representatives of States to international organizations between the host State and the sending State of a permanent mission, would establish treaty relations between these two States on a subject already covered by the headquarters agreement in force between the host State and the organization. For the sake of clarity, it would seem advisable to mention that the status of the permanent missions concerned (as defined in the headquarters agreement) would in such a case not be altered by the convention.

Article 17 requires the organization to transmit to the host State certain notifications received from the sending States. In this context, the question arises whether the possibility should not be provided, for the organizations concerned, to become parties to the convention.

Apart from that, it would seem advisable to have a somewhat more precise definition of the expression "international organization of universal character" [*article 1 (b)*].

Belgium

PARTS I AND II OF THE PROVISIONAL DRAFT

OBSERVATIONS COMMUNICATED BY LETTER DATED
13 NOVEMBER 1970 FROM THE PERMANENT REPRESENTATIVE
TO THE UNITED NATIONS

[Original text: French]

General observations

The part of the draft articles dealing with permanent missions to international organizations proceed from two somewhat debatable starting-points, in that, firstly, such missions are divorced from the at once more general and more diversified context of international organizations, and, secondly, it is assumed that because they are

accredited to international organizations, their establishment and status are not subject to the *agrément* of the host country.

In a way, this abstract approach runs counter to actual international practice with respect to the establishment of permanent missions. An international organization is a functional whole, its purpose being to institutionalize collaboration among a larger or smaller group of States in a broader or narrower field. The main instruments of this institutionalization are one or more decision-making organs, in which representatives of the States deliberate together, and an executive organ composed of international officials; in some cases there is, in addition to these basic institutions, a parliamentary-type assembly and a judicial body.

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 required to enable them and their staffs to attend sessions of deliberative bodies at the most varied levels.

There is a considerable lack of uniformity with regard to these facilities. For instance, article IV of the Convention on the Privileges and Immunities of the United Nations of 13 February 1946 and article V of the Convention on the Privileges and Immunities of the Specialized Agencies of 21 November 1947 grant representatives of States immunity from legal process only in respect of words spoken or written by them in their official capacity. Other instruments go further and refer to the privileges and immunities enjoyed by diplomatic envoys of comparable rank (part IV, article 9, of Supplementary Protocol No. 1 to the Convention for European Economic Co-operation of 16 April 1948);¹ others again simply speak of the customary privileges and immunities (cf. the Protocol on the Privileges and Immunities of the European Communities, of 8 April 1965).²

Furthermore, in the case of organizations having a particularly important role in various spheres (political, economic, technical, etc.), representatives of States may have such extensive duties to perform that travelling to attend meetings from time to time no longer suffices.

Although this does not mean that travelling delegations are eliminated, it does as a matter of practical necessity call for the establishment of a permanent unit to provide representation. However, since this situation is *sui generis* and is not covered by most statutory protocols, it is essential to make provision for it, and this is done through supplementary protocols, through headquarters agreements between the organization concerned and the host State—especially if the latter is not a member of the organization—or through the application of customary rules or even of regulations laid down unilaterally by the host State. Another factor which emerges at this stage is 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.

Inasmuch as a permanent mission is part and parcel of the over-all functioning of an international organization, it would have been conceivable that its status and the status of its staff should be determined in accordance with objective criteria peculiar to the organization concerned. 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 1961.³

It therefore seems 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 (e.g., article V of the Agreement between the United Nations and the United States of America of 26 June 1947⁴ and article 11 of the Agreement on the status of Western European Union, National Representatives and International Staff, 11 May 1955).⁵ 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 described above 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.

It should be noted that such status is often accorded to the executive head of an international organization but that, in this case, the host State has an opportunity to express its views through institutional procedures as regards both his appointment and the waiver of his immunity.

In view of the diversity of the statutes of international organizations, the ideal course would be to try to synthesize them in a model statute which, besides dealing with questions relating to observers for the missions of third States, representatives to sessions and conferences, and so forth, would lay down procedures for the establishment of permanent missions that would preclude any automaticity.

The draft articles will be reviewed below in the light of the foregoing.

Observations on the draft articles

Title and scope

“Representatives of States” is a general term—a fact which, incidentally, shows clearly that permanent missions are functionally part of a broader framework and that an approach extrinsic to their status is unjustified.

PART I.—General Provisions

Article 1

Subparagraphs (g) and (h). The use of the term “diplomatic staff” 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. In effect, this is an explicit cross reference to the Convention on Diplomatic Relations of 18 April 1961.

Assuming that it does not simply follow from this that the régime laid down in the Vienna 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.

Article 2

1. The draft articles would apply only to “international organizations of universal character”, which, according to article 1 (b),

³ United Nations, *Treaty Series*, vol. 500, p. 95.

⁴ *Ibid.*, vol. 11, p. 11.

⁵ United Nations, *Legislative texts and treaty provisions concerning the legal status, privileges and immunities of international organizations*, vol. II (United Nations publication, Sales No.: 61.V.3), p. 421.

¹ *British and Foreign State Papers*, vol. 151, p. 289.

² *Traités instituant les Communautés européennes: Traités portant révision de ces traités, Documents annexes* (Office des publications officielles des Communautés européennes, 1971), p. 769.

would mean organizations whose membership and responsibilities are on a world-wide scale. This is both too restrictive and too vague.

It may very well be that a world organization does not necessitate permanent representation, whereas a regional organization may render it indispensable. Thus, universality of character is totally irrelevant, and the only decisive factors should be the functional criterion and a consensus among the States concerned.

Furthermore, 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.

2. Once the scope of the draft articles is restricted to world organizations, it is quite obvious that they do not cover regional organizations at all. Paragraph 1 of article 2 is therefore unnecessary and merely points up the difficulty, as demonstrated by articles 3, 4 and 5, of reconciling the draft with the actual state of international relations in this field.

Article 3

Every international organization is governed by its constituent instrument or by protocols annexed thereto. The diversity of their statutes makes it difficult to formulate rules in the abstract, without any functional criteria. Another significant point is that, as mentioned in paragraph 5 of the commentary on this article, the "relevant rules of the Organization" include not only constituent instruments but also resolutions of the organization or the practice prevailing in it.

The question of "association membership" or of delegates who are not representatives of States (e.g., employers and workers) appears somewhat irrelevant to the establishment of a permanent mission.

Articles 4 and 5

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.

PART II.—Section 1: Permanent missions in general

Article 6

As drafted, this article on the establishment of permanent missions subjects the host State to automaticity. Also implicit in it is a rule that such missions will proliferate far beyond the actual need. The establishment of permanent missions should derive from the statutes of the organization or a decision taken in accordance with a functional procedure that enables the host State to express its views, or from an agreement with the host State. This is borne out by a statement quoted in paragraph 4 of the commentary, to the effect that the status of permanent delegations derives from internal legislative texts, international treaties such as headquarters agreements, and from customary rules.

It should also be noted that the article makes no reference to permanent missions of third States.

Article 7

Although the functions listed 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.

Articles 8 and 9

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 seems compatible with the rules governing precedence and rank.

Article 10

In diplomacy, the receiving State is entitled to refuse its *agrément* to the appointment of a head of mission and to declare certain persons unacceptable. 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 should be clear that 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.

Article 11

Once it is accepted that diplomatic status should be granted to permanent missions, there is no compelling reason to diverge from the provisions of the Convention on Diplomatic Relations of 18 April 1961.

Articles 12, 13 and 14

The question of credentials is by no means confined to permanent missions. Moreover, the reference to the practice followed in the organization makes it clear that this is a matter which depends essentially on the statute of the organization concerned. It also seems too restrictive to cover only treaties between member States and the organization; treaties concluded under the auspices of the organization may constitute a much more far-reaching and important category.

Article 15

Since the composition of a permanent mission is the same as that of a diplomatic mission, it might surely have been more expedient to annex a few specific articles on permanent missions to the Convention on Diplomatic Relations.

Article 16

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.

Articles 17 and 18

These articles correspond *mutatis mutandis* to the equivalent articles of the Convention on Diplomatic Relations.

Article 19

With regard to the reference to the practice established in the organization, see the observations on articles 12, 13 and 14 above.

Article 20

This article is unnecessary and might give rise to difficulties. Obviously, a permanent mission should normally be established only in the vicinity of the seat of the organization. Cases in which the functions of representation to the organization concerned devolve upon a diplomatic mission, or upon a permanent mission to another organization in the host country or in a third country, are covered by draft articles 8 and 9.

Article 21

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

Article 22

It seems 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.

Articles 23 and 24

As stated above, 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.

Articles 25 to 33

These articles merely repeat the substance of the corresponding articles of the Convention on Diplomatic Relations. As noted above, 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, as it in fact was in the Vienna Convention on Consular Relations of 24 April 1963.⁶

Furthermore, the wording of article 31, paragraph 2, of the latter Convention is preferable by far to that proposed in the present draft, inasmuch as the term "public safety" can be very broadly interpreted.

A similar comment applies to draft article 32, paragraph 1 (*d*), which provides that there shall be no immunity from jurisdiction in the case of damages arising out of a traffic accident. Such a clause is certainly very much to the point, but here again the question is whether it 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. Moreover, the term "official functions" can be broadly interpreted and ought to be clarified.

Article 34

This article, which reproduces the operative part of resolution II (Consideration of civil claims) annexed to the Convention on Diplomatic Relations,⁷ adds nothing more than the recommendation itself, since in the final analysis it rests on the discretion and goodwill of the sending State.

Articles 35 to 43

These articles are simply copied from the corresponding provisions of the Convention on Diplomatic Relations, or, in the case of article 39, the Optional Protocol concerning Acquisition of Nationality.

Article 41, paragraph 1, perpetuates a drafting error which occurred in the French text of that Convention but which was cor-

rected 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 . . .".

Article 44

This article on non-discrimination is unacceptable, unless provision is made for the principle of reciprocity. It is 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.

Article 45

Paragraph 2 of this article, relating to recall by the sending State of a person enjoying privileges in case of a grave violation, does not go far enough. The host State should be able to declare him *persona non grata*.

The last sentence of paragraph 2 reintroduces the principle of extritoriality, although this had been dropped in the Convention on Diplomatic Relations.

Articles 46 to 49

These articles add nothing to the analogous provisions of the Convention on Diplomatic Relations.

Article 50

This article, which provides only for consultations with a view to the solution of questions in dispute, is imperfect and should be incorporated in a more detailed provision or in a protocol on the settlement of disputes, as may be appropriate.

Canada*(a) PART I AND SECTION I OF PART II OF THE PROVISIONAL DRAFT*

OBSERVATIONS COMMUNICATED BY LETTER DATED 15 JANUARY 1970 FROM THE PERMANENT REPRESENTATIVE TO THE UNITED NATIONS

[Original text: English]

It is noted that the Commission has sought, in these articles, to lay down certain general principles, while ensuring that appropriate recognition is given to both existing and future agreements concluded between States and international organizations. In the Canadian view, the provisional draft articles appear to be generally satisfactory. However, there are certain articles, dealing mainly with the position of the host State, on which we wish to make a few specific comments.

We have studied with particular interest *articles 10 and 11* which relate to the appointment of members of the permanent mission. Article 11 requires a sending State to obtain the consent of the host State before appointing as a permanent representative or member of the diplomatic staff of the permanent mission a person who is a national of the host State. It is suggested that further study might be given to the adoption of a provision whereby the sending State's freedom to appoint nationals of the host State, as members of the permanent mission, would be recognized; however, the host country would have the right to decide which privileges and immunities it should grant to its own nationals. In this connexion, it might also be useful to give some consideration to the position of landed

⁶ United Nations, *Treaty Series*, vol. 596, p. 261.

⁷ *Official Records of the United Nations Conference on Diplomatic Intercourse and Immunities*, vol. II (United Nations publication, Sales No.: 62.XI.1), p. 90.

immigrants or permanent residents of the host State whose position might be assimilated to that of nationals.

The present draft articles do not provide a formula whereby the host State can require a member of the permanent mission to leave its territory. In our opinion, consideration should be given to the desirability of introducing a provision similar to the one contained in article IV, section 13 (b) (1)-(3), of the Agreement signed between the United Nations and the United States of America on 26 June 1947.

In its present form, *article 15* does not specifically recognize the practice which has been adopted by an increasing number of States of appointing Deputy Permanent Representatives or Associate Permanent Representatives. We would suggest that a provision, to the effect that the "Deputy or Associate Permanent Representative" shall enjoy the status of Permanent Representative when the latter is absent, be included.

Article 16, which is concerned with the size of the permanent mission, seeks to take into account the interests of the mission, of the international organization and of the host State. Canada fully endorses the suggestion that consideration be given to the inclusion of a provision for consultation between the host State, the sending State and the international organization concerning the application of this and other articles. Canada notes and welcomes the indication by the Commission that it will consider a general article relating to the settlement of disputes.

Finally, we would recommend that *article 19* be revised so as to specify the language of the alphabetical order to which the article refers. This would remove the possibility of confusion which might otherwise result from the present wording.

(b) SECTION 2 OF PART II AND PARTS III AND IV OF THE PROVISIONAL DRAFT

OBSERVATIONS COMMUNICATED BY A LETTER DATED 20 JANUARY 1971 FROM THE PERMANENT REPRESENTATIVE TO THE UNITED NATIONS

[Original text: English]

PART II.—Facilities, privileges and immunities of permanent missions

General remarks

Draft articles 22 to 50 generally provide for permanent missions a status approximating that of diplomatic missions. This appears generally satisfactory to Canada. However, there are certain articles dealing mainly with the position of the host State on which Canada would like to comment on the basis of its experience as host State to one of the United Nations specialized agencies.

Observations on particular articles in the draft

Article 25

Article 25, paragraph 1, sanctions the inviolability of the premises of the mission, and provides that agents of the host State are permitted to enter the mission only after obtaining the consent of the permanent representative.

Such consent may be assumed in case of fire or other disaster that seriously endangers public safety "only in the event that it has not been possible to obtain the express consent of the permanent representative". 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.

Article 26

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

The inclusion of paragraph 2 of the article continues to be important. It is believed that 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.

Article 30

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".

Article 35

This article would seem to be satisfactory. However, 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 subparagraph (a) of article 36 which permits the receiving State to impose indirect taxes.

Article 36

It is 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".

Subparagraph (a) is acceptable, although it is 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.

In subparagraph (b), it is considered that the phrase "unless the person concerned holds it on behalf of the sending State for the purposes of the permanent mission" could, to avoid any undesirable extension of the exemption, be deleted and replaced by the words "subject to the provisions of article 26".

In subparagraph (d), it is 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 subparagraph (d) of article 34 of the Convention on Diplomatic Relations, is less satisfactory than the wording of subparagraph (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;"

Subparagraph (f) contains the phrase "with respect to immovable property" which Canada would prefer to have deleted.

Article 38

In paragraph 1, subparagraph (b), it is presumed that the word "his" refers both to the permanent representative and to any member of the diplomatic staff.

¹ *Yearbook of the International Law Commission, 1969*, vol. II, p. 206, document A/7610/Rev.1, para. 14.

Article 40

It is noted that in paragraph 1 of article 40 the phrase "or permanently resident in the host State" does not appear. It is recommended that the words "or permanently resident in" be inserted after the words "if they are not nationals of".

Article 42

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.

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".

Article 48

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. The last sentence of article 48 should, therefore, be replaced by the following provision: "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."

Article 50

The first part of this article should be amended to read: "If any question arises among a sending State, the host State and the Organization. . .". 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.

PART III.—Permanent observer missions

General remarks

Canada appreciates 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, it is the opinion of Canada that a permanent observer mission should not be placed on the same footing as that of a permanent mission. Reference made in draft articles 65 to 77 to the draft articles on permanent missions should be more restrictive. Privileges and immunities granted to permanent observer missions should only be those which are essential to the execution of their functions.

*Observations on particular articles in the draft**Article 51*

Canada considers that the contents of article 51 are generally acceptable. It is, however, suggested that the elimination of the overlapping of article 51 with article 1 should receive careful attention.

As to subparagraph (a) of article 51, Canada is of 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", and therefore the role of the "permanent observer" referred to in subparagraph (b) of the same article would clearly be to "observe" not "represent".

Article 52

Article 52 is generally acceptable to Canada. However, it is understood that this article does not give an automatic right to establish a permanent observer mission. In cases where there is no generally recognized practice regarding establishment of observer missions, it would be a matter for arrangement between the sending State, the organization and the host State.

Article 53

In conformity with the comments made on subparagraphs (a) and (b) of article 51, Canada is of the view that the phrase "negotiating with the Organization when required and representing the sending State at the Organization" be rephrased or deleted in order to make it clear that an observer mission does not represent.

Article 56

It is 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."

Article 57

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 . . .".

In paragraph 2 of the same article, 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".

Article 58

In the context of the role of an observer mission, it is suggested that in paragraph 1 of this article the word "representing" be deleted and replaced by the words "being authorized by".

The title of this article should read: "Full powers with respect to the conclusion of treaties".

Article 59

Article 59 should include in paragraph 1 a provision to the effect that the "deputy or associate permanent observer" shall enjoy the status of permanent observer when the latter is absent.

As to paragraph 2, Canada is satisfied as to the recognition of the differences in privileges and immunities enjoyed by different types of delegates.

Article 60

Canada 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.

Article 62

In view of the fact that "*Chargé d'affaires ad interim*" is a well established title, its use here might be somewhat confusing. Accordingly, Canada would prefer the use of the words "Acting permanent observer" rather than "*Chargé d'affaires ad interim*" for the replacement of permanent observers.

Article 64

Canada is of the general opinion that the words "Use of emblem" would be sufficient.

Article 65

Canada 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".² The comments of Canada on articles 66 to 75 are therefore of a tentative nature, taking into account the possibility of a redraft of these articles which would give further emphasis to the difference between a permanent mission and a permanent observer mission.

Article 67

Canada believes 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 is therefore 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.

Article 68

It is suggested that article 68 should follow article 34 of the Vienna Convention on Consular Relations instead of article 28 of this draft convention.

Article 69

Along the line of the comments made on article 68, it is 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, in our view, 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.

Article 71

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.

Article 73

This article should follow article 53 of the Convention on Consular Relations; only notification by the organization to the host State should be relevant.

Article 75

In article 75, reference could be made to article 72 of the Convention on Consular Relations.

² See *Official Records of the General Assembly, Twenty-fifth Session, Sixth Committee, 1193rd meeting.*

Article 76

It is suggested that article 76 should follow in substance articles 55, 56 and 57 of the Convention on Consular Relations.

Article 77

Article 77 should follow articles 25, 26 and 27 of the Convention on Consular Relations.

PART IV. Delegations of States to organs
and to conferences

General remarks

It is the opinion of Canada that in the drafting of articles 78 to 116 a functional approach should be taken. 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. It is therefore 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.

Comments on specific articles

Set out below are some comments on specific articles. However, in view of the likelihood (which Canada deems desirable) that part IV will be completely redrafted, Canada reserves the right to present further comments in the future.

Article 83

Article 83 could be redrafted so as not to exclude double representation when permitted by the organ or the organization concerned.

Article 85

It is suggested 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".

Article 94

Article 94 should be redrafted keeping in mind that delegations are often located in commercial buildings.

Articles 95, 98, 99 and 102

Articles 95, 98, 99 and 102 offer other examples, in Canada's opinion, of practical administrative problems that would arise for a country subscribing to the text of these articles as they now stand. The redrafting should be guided by the functional approach.

Article 100

Canada would prefer alternative B.

Article 103

Article 103 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."

Article 104

Instead of referring to articles 35, 37 and 33, article 104 could simply state that members of delegations shall be exempted from social security legislation, personal services and laws concerning acquisition of nationality.

Cyprus**(a) PART I AND SECTION 1 OF PART II OF THE PROVISIONAL DRAFT**

OBSERVATIONS COMMUNICATED BY LETTER DATED 22 OCTOBER 1969
FROM THE MINISTRY OF FOREIGN AFFAIRS

[Original text: English]

The Cyprus Government heartily welcomes the set of twenty-one draft articles on representatives of States to international organizations, and wishes to record once again its appreciation for the work of the Special Rapporteur, Ambassador El-Erian. The draft articles on permanent missions to international organizations are of particular interest to the Cyprus Government. While the Cyprus Government will carefully study the implications arising therefrom in detail, it simply wishes, at this stage, to say that the draft articles in question seem to achieve a proper balance between the legitimate interests of the three parties concerned, i.e., the sending State, the receiving State and the organization itself.

(b) SECTION 2 OF PART II OF THE PROVISIONAL DRAFT

OBSERVATIONS COMMUNICATED BY LETTER DATED 14 NOVEMBER 1969
FROM THE MINISTRY OF FOREIGN AFFAIRS

[Original text: English]

The following general observations of the [Cyprus] Government are a reiteration of the views expressed by its representative [at the 1109th meeting of the Sixth Committee, on 30 September 1969].¹

The Cyprus Government welcomes the twenty-nine new draft articles on the subject, which, together with the twenty-one draft articles adopted in 1968, were the work of Mr. El-Erian. While the Cyprus Government leaves detailed comments to be submitted at a later stage, it wishes to express its general approval of these articles, which are 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.

On the substance of the draft articles, the Cyprus Government would like to offer a few comments at this stage.

While agreeing with the substance of *article 25*, it should be stressed 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.

Again, with regard to *article 26* on exemption of the premises of the permanent mission from taxation, the Cyprus Government would like to see a formulation exempting such premises from taxation, not only in cases where the premises are owned by the mission, but also when such property is leased or rented. While

¹ *Official Records of the General Assembly, Twenty-fourth Session, Sixth Committee, 1109th meeting, paras. 23-27.*

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.

The Cyprus Government would likewise wish to stress the significance it attaches to such other topics, as the assistance to be furnished by the Organization in respect of privileges and immunities (*article 24*), the inviolability of the archives and documents of the mission (*article 27*), freedom of communication (*article 29*), personal inviolability (*article 30*), inviolability of residence and property (*article 31*) and immunity from jurisdiction (*article 32*).

The Cyprus Government 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. Once this piece of work is ripe for codification, and in relation to the Convention on Special Missions, this will have completed the codification and progressive development of the whole field of diplomatic law, and it will finally be a source of particular satisfaction to all concerned with the codification and development of this important branch of law.

Denmark**PART I AND SECTION 1 OF PART II OF THE PROVISIONAL DRAFT**

OBSERVATIONS COMMUNICATED BY LETTER DATED 9 JANUARY 1970
FROM THE PERMANENT REPRESENTATIVE TO THE UNITED NATIONS

[Original text: English]

The Danish Government has studied with interest the International Law Commission's report on the work of its twentieth session containing a provisional draft of twenty-one articles on representatives of States to international organizations. The Danish Government has no comments on the proposed articles. It is suggested, however, that the Commission reconsider whether the interests of the host State are adequately safeguarded by the provisions of *article 11* on the nationality of the members of the permanent mission, and *article 16* on the size of the permanent mission.

Ecuador**PART I AND SECTION 1 OF PART II OF THE PROVISIONAL DRAFT**

OBSERVATIONS COMMUNICATED BY LETTER DATED 6 JUNE 1969
FROM THE MINISTRY OF FOREIGN AFFAIRS

[Original text: Spanish]

Article 1

The Government of Ecuador fully subscribes to the view expressed by the Sixth Committee of the General Assembly with regard to article 1 (Use of Terms), namely, that the definition of "an international organization" is inadequate in that the statement that it means any intergovernmental organization does little to improve it. The definition suggested by the Special Rapporteur in his third report¹ would obviously have been preferable. Nevertheless, given the fact that the Vienna Convention on the Law of Treaties² contains a definition identical to that proposed in draft article 1 (a)

¹ *Yearbook of the International Law Commission, 1968, vol. II, p. 124, document A/CN.4/203 and Add.1-5, chap. II, part I, article 1.*

² For the text of this Convention, 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.

and as the terms used in treaties sponsored by the United Nations should be consistent, this definition is acceptable.

It would be advisable to expand the definition of "an international organization of universal character" in subparagraph (b) of the same article by stating that such an organization should be open to all States which accept the rights and obligations established in its constitutive document, as was suggested in the Sixth Committee.³

In the definition of a "permanent mission" in subparagraph (d), the word "permanent" is repeated and this does not clarify the term as it ought to be clarified in a definition. The same comment applies to the definition of "organ" in subparagraph (m).

The remaining definitions are based on corresponding definitions in the Vienna Convention on Diplomatic Relations and are acceptable. They are consonant with the provisions of the *Ley Orgánica del Servicio Exterior Ecuatoriano* (Organic Law of the Ecuadorian Foreign Service).

Article 2

The draft articles should logically be applicable only to international organizations of universal character because their obvious connexion, in the context of the United Nations system, with the provisions of Articles 57 and 63 of the United Nations Charter is thereby preserved and because a convention of this kind cannot seek to standardize existing or future rules applicable in a regional context. It must be borne in mind that, even in the case of international organizations, these rules are supplementary, as is clear from draft article 3 which states that: "The application of the present articles is without prejudice to any relevant rules of the Organization". The approach of the International Law Commission to the drafting of article 2, namely, that the present text, which excludes regional organizations, should be retained, is preferable to that suggested in the Sixth Committee's commentary on this article⁴ whereby these provisions would be applicable even to regional organizations, which could adopt other rules for themselves only by mutual agreement. This latter approach is diametrically opposed to that taken in the draft.

Articles 3 and 4

Article 3 regulates the application of the draft provisions and is, by any standard, a necessary rule. The same may be said of article 4, which safeguards provisions already in force as the result of other international agreements between States and an international organization.

Article 5

The provision in this article makes the draft articles considerably more flexible because it does not preclude the possible conclusion of other international agreements "having different provisions concerning the representatives of States to an international organization".

Article 6

This provision would allow Member States to establish permanent missions to the Organization for the performance of the functions set forth in article 7 of the draft articles.

This article would be of doubtful value if the International Law Commission had not made clear that it was to be interpreted subject to the general reservations laid down in draft articles 3, 4 and 5. Otherwise, this rule would oblige international organizations to agree to accept permanent missions established by States, even in violation of their own rules. The present wording taken by itself, therefore, does not make matters clear and to understand the rule properly it would always be necessary to have the interpretation based on the clarification given by the International Law Commission.

³ *Official Records of the General Assembly, Twenty-third Session, Annexes, agenda item 84, document A/7370, para. 23.*

⁴ *Ibid.*, para. 25.

sion. The article should be so drafted as to make its meaning clear. In addition, the commentary on article 13 is relevant to this rule.

Article 7

The enumeration in this article of the functions of a permanent mission is perfectly clear.

The Sixth Committee's suggestion for the addition 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, could be adopted.⁵

Articles 8 and 9

Despite the fact that, in a regional context, Ecuador has 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 has its headquarters—articles 8 and 9, being designed to meet needs at the global as opposed to the regional level, are 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.

Articles 10 to 12

The various relevant provisions are rather descriptive and refer, respectively, to the appointment of the members of a permanent mission, to the nationality of its members and the manner in which the credentials of permanent representatives should be issued. These articles occasion no difficulty whatsoever. They follow current practice and would make it a rule of international law that, as stated in article 11, the diplomatic staff of permanent missions 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. This provision is appropriate, in view primarily of the problems which a citizen would create for his own country in respect of privileges and immunities.

Article 13

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.

⁵ *Ibid.*, para. 29.

Article 14

While the subject-matter of this article belongs rather in the Vienna Convention on the Law of Treaties, it is acceptable as part of these draft articles although, as the Sixth Committee has pointed out,⁶ it would be wiser here again to take the rules of the said Vienna Convention as the model.

Article 15

This article presents no problem; its text reflects current practice.

Article 16

The size of the permanent mission as laid down in this article is acceptable.

Article 17

This article presents no problem whatsoever; it is right and proper to state that the members of the permanent mission are not accredited to the organization in question but are simply appointed by the sending State to assume such functions.

Article 18

This article calls for no comment. It merely confirms customary diplomatic practice by stipulating that a *Chargé d'affaires ad interim* shall be appointed in the absence of the head of the mission.

Article 19

This rule is acceptable in that it establishes the order of precedence among permanent representatives and thereby ratifies the principle of the sovereign equality of States.

Articles 20 and 21

The Government of Ecuador has no comment to make on these rules, which are fully acceptable.

Finland*(a) SECTION 2 OF PART II OF THE PROVISIONAL DRAFT*

OBSERVATIONS COMMUNICATED BY "NOTE VERBALE" DATED 16 FEBRUARY 1971 FROM THE PERMANENT REPRESENTATIVE TO THE UNITED NATIONS

[Original text: English]

It is noted that the provisions contained in the draft articles 22 to 50 are closely related to the Vienna Convention on Diplomatic Relations and the Vienna Convention on Consular Relations and to the Convention on Special Missions¹ and are often variants of these, adapted to the special circumstances related to international organizations.

The Government of Finland has no special observations to make about the main principles as embodied in the draft articles, provided there are no inconsistencies between the draft articles and the aforementioned Conventions. *Draft articles 26 and 36* deal with exemption from taxation of the premises of the permanent mission of (a) the sending State, (b) the permanent representative and (c) another member of the permanent mission acting on behalf of the mission. Article 26 seems to refer to direct taxes but leaves room for the interpretation that also indirect taxes (sales tax and other similar taxes) are covered. According to the view of the Finnish Government 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.

Similarly there have been difficulties in interpretation with regard to taxation of apartments of diplomatic missions in Finland, 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. Article 36 (b) should also provide that its provision shall apply to the aforementioned shares which cannot be considered as real property.

Article 32 deals with the immunity of the diplomatic staff of the permanent mission from the jurisdiction of the host State. This immunity is complete as to criminal jurisdiction, but there are exceptions as to civil and administrative jurisdiction. Different opinions were expressed in the Commission, whether traffic accidents having occurred outside official functions were to be expressly mentioned among the exceptions as has been done in the Convention on Special Missions, or whether they should be left without special mentioning, as in the Convention on Diplomatic Relations. Although valid reasons have been given in favour of both alternatives the former one seems to be more pertinent for the sake of clarity.

With regard to *article 42* 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.

The Government of Finland considers that part II of the draft articles on representatives of States to international organizations submitted by the International Law Commission are suited as a basis for the final draft.

(b) PARTS III AND IV OF THE PROVISIONAL DRAFT

OBSERVATIONS COMMUNICATED BY "NOTE VERBALE" DATED 23 FEBRUARY 1971 FROM THE ACTING PERMANENT REPRESENTATIVE TO THE UNITED NATIONS

[Original text: English]

The Government of Finland has noted with satisfaction articles 51-116 concerning permanent observer missions and delegations to organs and to conferences and consider them to be a valuable basis for the preparation of a convention on the subject.

With respect to individual articles the Government of Finland makes the following observations:

Article 52

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.

Article 53

It is not necessary 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.

Articles 54 and 56

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

⁶ *Ibid.*, para. 33.

¹ See resolution 2530 (XXIV) of the General Assembly, annex.

States including so-called micro-States. Consequently, States should have the right to appoint a joint permanent observer and to be represented at two or more organizations or organs by the same representative. The provisions should therefore be flexible enough in this respect.

Article 57

In this article and in the commentary thereto, the presentation of credentials is described in varying terms. Terminology should be harmonized. (Reference is made to article 87).

Article 58

The wording of paragraph 1 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.

Article 64

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.

Articles 65-75

In principle the permanent observer missions should have the same status as the permanent missions.

Article 82

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.

Articles 83 and 85

A delegation should be entitled to represent two or more States if necessary and 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. Even a conference of short duration can cause great costs which could be shared by appointing a joint delegation and thus a greater participation could also be obtained. In this way the representation at, and dissemination of information from the meetings of organs having limited membership on grounds of equitable geographical distribution, such as UNCITRAL, could be more easily arranged.

Article 90

It remains to some extent unclear by what alphabetical order the precedence among delegations shall be determined in countries which have several official languages.

Article 91

The status of the persons of high rank 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.

Article 98

The provisions of this article have gained additional significance as a result of the recent kidnappings of diplomats.

Article 100

Because delegations are usually composed of various categories of persons and because 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

Finland is in favour of alternative B. The acceptance of this alternative will entail consequential changes at least in article 105.

Article 103

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.

Article 113

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.

Article 114

In the view of the Government of Finland, 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.

France

OBSERVATIONS COMMUNICATED BY "NOTE VERBALE" DATED 8 APRIL 1971 FROM THE PERMANENT MISSION TO THE UNITED NATIONS

[Original text: French]

The Government of the French Republic has studied the draft articles on relations between States and international organizations adopted on first reading by the International Law Commission at its twentieth, twenty-first and twenty-second sessions.

The French Government would like first to pay tribute to the work already accomplished by the Commission. Undertaken as it has been with great meticulousness and care, this work will certainly represent a positive contribution to the development of international law and States will usefully be able to refer to it in defining their relations with the international organizations they have created or may decide to create.

The French Government wishes, however, to make some general observations and some specific comments on the articles provisionally adopted, in the hope that the International Law Commission may take them into consideration during its second reading of the draft.

General observations

1. As the French delegation has stated at recent sessions of the General Assembly, the draft prepared by the International Law Commission should be applicable only to major universal organizations.

It must be remembered that international organizations, even those which are similar in their geographical scope, differ widely in character. However, since the International Law Commission has wisely adopted the criterion of "functional necessity" for determining the privileges and immunities provided for in its draft, it is essential that the organizations to which the draft relates should, by the very nature of their activities, present a certain similarity.

The definition given in article 1, paragraph (b) ("an 'international organization of universal character' means an organization whose membership and responsibilities are on a world-wide scale") does not seem to be sufficiently specific on this point.

The French Government believes that the Commission should try to find a formulation which would make it clear that the draft will apply only in the case of organisations of universal character

whose activities are of major importance to the world community and are such that the functions of representatives of States to the organizations justify the status proposed.

In this connexion, the French Government still believes that it would have been easier to consider, first, what status should be accorded to organizations of the type under consideration, and then to determine what privileges and immunities should be accorded to persons taking part in their activities.

2. The French Government considers that, in its further work, the Commission should take due account of existing agreements on the subject and should use them as a basis for its work of codification. It should examine very carefully the practice of States, as it appears from these agreements, and should not adopt too doctrinal an approach. It should, accordingly, refrain from applying the solutions of the 1961 Vienna Convention on Diplomatic Relations systematically to different situations for which States have already found solutions of their own.

3. In the French Government's view, it is equally essential that the convention should not be applied in the face of an established practice. Article 4, which states that "the provisions of the present articles are without prejudice to other international agreements in force between States or between States and international organizations" is particularly important in this connexion. Organizations which are the subject of an agreement already concluded should continue to be governed by this agreement, and by it alone.

The French Government also strongly supports the principle expressed in article 5, which preserves the freedom of negotiation of States which become parties to the proposed convention.

Observations on the various parts of the draft articles

PART I.—General provisions

and

PART II.—Permanent missions to international organisations

Article 1 and article 15

(this observation applies to all the draft articles)

The French Government has already had occasion to state that it regrets the use of the words "diplomatic staff" in a context other than that of diplomatic relations, which are the subject of the Conventions on Diplomatic Relations.

Article 6

It would be better for the Commission to include, in the actual text of this provision, the principles to which it refers in paragraphs (4) and (5) of its commentary—namely, that:

- the legal basis of permanent missions is to be found in the constituent instruments of international organizations, in the conventions on the privileges and immunities of the organizations, in headquarters agreements or, possibly, in recognized practice;
- the establishment of permanent missions is subject to certain reservations.

Articles 10, 34 and 45

The French Government notes that the International Law Commission's draft does not contain any provision similar to that expressed in article 9 of the 1961 Vienna Convention, to the effect that a member of the staff of a mission may be declared *persona non grata*.

It believes that the International Law Commission should try to find formulations which would enable the host State to take measures necessary for its security and maintenance of public order, without prejudice to the independence of the organization.

It is true that in two articles—articles 34 and 45 which are referred to in articles 71, 76 and 112—the Commission has provided that the sending State should, in certain cases, waive the immunity from jurisdiction of its representative.

However, these provisions seem to be more limited in their scope than article IV, section 14 of the Convention on the Privileges and Immunities of the United Nations which is quoted in the commentary to article 33 and states that:

"Privileges and immunities are accorded to the representatives of Members not for the personal benefit of the individuals themselves, but in order to safeguard the independent exercise of their functions in connexion with the United Nations. Consequently a Member not only has the right but is under a duty to waive the immunity of its representative in any case where in the opinion of the Member the immunity would impede the course of justice, and it can be waived without prejudice to the purpose for which the immunity is accorded."

Moreover, article 45 provides that, in case of grave and manifest violation of the criminal law of the host State, the sending State must waive the immunity of its representative or recall him, unless the act in question was performed by the person in carrying out the functions of the permanent mission within either the organization or the premises of a permanent mission.

These exceptions seem to be difficult to explain in law, since they are apparently based on a principle of extritoriality which is no longer recognized; an offence committed on the premises of an organization or of a permanent mission is committed on the territory of the host State and, subject to the privileges and immunities applicable, falls within the jurisdiction of the host State. Article 45, as it is at present drafted, could have the effect that, if a crime were committed in a permanent mission, for instance, by a person enjoying immunity from jurisdiction, the host State would not be able even to request his recall; and this would obviously be unacceptable. The same remarks apply to similar provisions in the Commission's draft.

For the foregoing reasons, the French Government wishes to express the hope that the International Law Commission will reconsider the matter, and to point out once again that there is one serious omission in the draft as it now stands: it does not contain any provision concerning the possible expulsion of the persons whose immunities it defines. Yet a provision to this effect is essential in order to strike a fair balance between the interest of the host State and those of the sending State.

Article 14

The French Government is not convinced that provisions concerning powers to represent a State in the conclusion of treaties between that State and an international organization should be included in the draft now being prepared.

Article 17

The French Government considers that prior notification of the arrival and final departure of members of a permanent mission should be given in every case.

Articles 24 and 50

The attention of the French Government has been drawn to articles 24 and 50.

Article 24 provides that: "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."

Articles 50 provides that: "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."

The French Government does not dispute the fact that an international organization has an interest in the fulfilment by the host State of the obligations assumed by the host State in regard to sending States. However, it does not consider that the precise forms which this interest may take are reflected altogether satisfactorily in the above-mentioned provisions.

Article 24 might induce the organization to intervene in relations between sending States and the host State in cases where no genuine problems concerning the enjoyment of privileges and immunities had arisen.

Article 50—notwithstanding the observations to the contrary which appear in the commentary—might well prejudge a solution of the problem of the settlement of disputes. Like article 24, it might also prejudge the answer to the question which organ of the organization would be entitled to concern itself with respect for the privileges and immunities accorded to missions of member States. It would in all probability be difficult in practice to get the political organs of the organization to intervene on problems which arise in the day-to-day life of a permanent mission. The secretariat of the organization concerned might, as a result of the approach adopted in this provision, find itself invested with powers which it should be accorded only by the constituent instruments of the organization.

The French Government takes this opportunity to state that it does not subscribe to the principle expressed by the Legal Counsel of the United Nations in a statement made to the Sixth Committee at the twenty-second session of the General Assembly, and reproduced in the commentary to article 24, to the effect that the Organization itself is a party to the Convention on the Privileges and Immunities of the United Nations. In this connexion, a distinction should be made between multilateral conventions, to which only States are parties, and headquarters agreements to which organizations as such may become parties.

Article 25

Though the French Government is not formally opposed to the wording of paragraph 1 of this provision, it would prefer the wording of article 31, paragraph 2 of the Vienna Convention on Consular Relations to be used in the last sentence.

It also expresses the hope that the reference to means of transport in paragraph 3 of this provision will for practical reasons be deleted.

Article 26

The French Government considers that exemption from taxation, in respect of the mission premises, of a member of the permanent mission other than the permanent representative might be a source of confusion. A provision of this kind which might be required in the case of special missions, is unnecessary in the case of missions of a permanent character.

The French Government could not, moreover, agree to any extension of the privileges provided for by this article.

Article 28

The French Government takes the view that the principle on which this provision is based does not satisfy the criterion of functional necessity which the Commission has adopted. Representatives to an international organization do not require, for the performance of their functions, as great a freedom of movement as diplomats. *A fortiori*, there is no reason to go beyond the Convention on Diplomatic Relations with regard to the families of the persons concerned.

The French Government suggests, therefore, that the Commission might adopt the rule expressed in article 27 of the Convention on Special Missions, to the effect that freedom of movement and travel should be ensured to the extent necessary for the performance of the functions of the mission.

Article 29

The French Government feels that it would be desirable to insert in this article a provision similar to that of article 28, paragraph 3 of the Convention on Special Missions, to the effect that communications between the permanent mission and its Government or other missions should, as far as possible, be conducted through the permanent diplomatic mission of the sending State.

Article 32

If the principle that diplomatic status should be accorded to certain members of permanent missions is accepted, the idea that such persons should enjoy immunity from civil jurisdiction for road accidents caused by a vehicle used outside their official functions is also acceptable. If it is so decided and if subparagraph (d) of paragraph 1 is accordingly omitted, the French Government would like to see it expressly stated that persons benefiting from the provisions of the article should at all times be covered by a motor vehicle accident insurance policy taken out under the laws of the host State.

Article 35

The French Government has no objection to this provision. It notes, however, that it relates to social security legislation only. The French Government believes that the Commission should include in its draft a provision relating to labour law in connexion with contracts concluded by permanent missions with locally recruited staff.

Article 36

The French Government expresses the hope that paragraph (f) of this article will be brought into line with the corresponding provisions of the Convention on Consular Relations and the Convention on Special Missions, by deleting the words "with respect to immovable property".

Article 38

It would seem to be unnecessary to refer to members of the family in this provision, since article 38 is mentioned in article 40, paragraph 1. It would also seem to be preferable to have the entire status of these persons defined in one single provision.

Article 39

The French Government believes that this provision might be incompatible with legislations which enable persons, by an act of personal choice (option or repudiation), to avoid the application of the law concerning acquisition of nationality. It would therefore be better to make this provision optional, as in the case of the Vienna Conventions of 1961 and 1963.

Article 41

Paragraph 1 of this provision contains a drafting error which appeared in the French text of the 1961 Vienna Convention and which was corrected in the Vienna Convention of 1963 and in the Convention on Special Missions. In the French text, the last part of the paragraph should read: ". . . ne bénéficient que de l'immunité de juridiction et de l'inviolabilité pour les actes officiels accomplis dans l'exercice de leurs fonctions."

Articles 42 and 43

The French Government hopes that the International Law Commission will be able to find some way of making these articles more specific.

The French Government made this point in connexion with the corresponding provisions in the Convention on Special Missions.

It would seem that some attempt to make these articles more explicit is essential, in order to avoid possible disputes on the interpretation of the provisions.

In this connexion, the French Government wishes to state that—differing, perhaps, from the opinion of Legal Counsel of the United Nations which is reproduced in paragraph 3 of the commentary on article 42—it does not consider that the provisions of a convention relating to the granting of privileges and immunities should be given a broad interpretation, save in exceptional cases.

In any case, with regard to paragraph 1 of article 42, it would be better to find a formulation which would rule out any possibility that the appointment as a member of a permanent mission of a person already in the territory of the host State may be invoked as grounds for granting privileges and immunities even in cases when the appointment is made some time before the person actually takes up his post.

Similarly, with respect to article 43, the State of transit should not be obliged to grant the privileges and immunities provided for unless it has been notified of the transit and status of the person concerned, and has given its consent. This principle should be applied to all categories of representative covered by the convention.

Article 44

It is stated in this draft article that: "In the application of the provisions of the present articles, no discrimination shall be made as between States". In its commentary, the Commission states that this article is placed provisionally. If at its next session the Commission should decide to consider certain exceptional circumstances, such as participation in the organization by non-recognized States, it will find, on examining existing agreements, that some variations have from time to time been introduced into the rule which it states in this article. At present, too, by omitting the reference to the concept of reciprocity, the Commission has made the rule more absolute than the principle established by the Vienna Convention of 1961.

PART III.—Permanent observer missions to international organizations

On this part of the draft, the French Government will confine itself to making some fairly general remarks, since it believes that the Commission should reconsider the very principles underlying the articles which it has provisionally adopted.

The French Government wishes to state, first, that it shares the views of those members of the Commission who believe—as stated in paragraph 3 of the commentary on article 52—that no State is entitled to send an observer mission to an organization when the rules or practice of the organization do not provide for such a possibility.

The International Law Commission has, in its draft, created an entirely new international status of "permanent observer" and even of a permanent observer mission patterned exactly on the status of diplomatic missions.

The French Government cannot fail to note that the Commission itself states in its commentary (part III, section 1, paragraph 2 of the "General comments") that:

"There are no provisions relating to permanent observer missions of non-member States in the United Nations Charter or the Headquarters Agreements or in General Assembly resolution 257 (III) of 3 December 1948 which deals with permanent missions of Member States".

The Commission goes on to say that, as regards the United Nations, the problem has been determined—satisfactorily, it would seem—by practice. The French Government is therefore by no means

convinced that it is necessary or advisable to establish a rigid and comprehensive body of legal rules such as that contained in the Commission's draft. It considers that, if the presence of observers and the régime applicable to them are not based on the constituent instruments of an organization, or on its practice or on decisions taken by the competent organs, then observers should not be admitted and should not in any case enjoy a particular legal status unless such a status is expressly provided for either by the multi-lateral conventions applicable to the organization itself or by a special agreement between the organization and the host State. In the French Government's view, such an agreement should define a uniform status for all observer missions to the same organization. However, the Commission should reconsider the question whether there is any justification for giving "observer missions" the same status as the permanent missions of States to international organizations, having regard both to the role played by observer missions and to the fact that the States which appoint them are not members of the organization and are therefore not subject to its rules. The French Government has some very serious doubts on this point.

PART IV.—Delegations of States to organs and to conferences

With regard to this part of the draft, the French Government must again urge the Commission to take account of established practice.

As the Commission itself has noted (part IV, section 2, paragraph 1 of the "General comments"):

"A substantial body of rules has developed in relation to privileges and immunities of representatives to organs of international organizations and to conferences convened by international organizations".

After analysing these rules, however, 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 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 which, as the Commission itself has noted (*ibid.*, para. 12), stated that it had

"seen fit to avoid the term 'diplomatic' in describing the nature of the privileges and immunities conferred under Article 105" of the Charter and that it had "preferred to substitute a more appropriate standard, based . . . in the case of . . . representatives . . . on providing for the independent exercise of their functions".

The French Government is of the opinion that the Commission should reconsider the question in the light of that comment.

It is not 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.

The French Government believes, as has already been stated, that privileges and immunities should be granted only to the extent that they satisfy the criterion of functional necessity. The agreements at present in force, based on this principle, seem in fact to have proved satisfactory.

Due account also must be taken of the temporary character of delegations. 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.

From this point of view also, it is impossible to extend diplomatic law, as it stands, to temporary delegations to international organizations.

The Commission must in fact have realized this since, for article 100 on immunity from jurisdiction, it has proposed two alternatives. The French Government believes that in the light of current practice in the matter, and having regard to the proper sphere of application of the draft, alternative B would be preferable. However, it does not regard this alternative 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 French Government must emphasize once again that it is highly desirable for the Commission to give due consideration to the provisions of that text and of similar texts which strike the necessary balance between the various interests involved in the life of an international organization. Such consideration will undoubtedly lead it to the conclusion that provisions such as those relating to the premises of delegations, private accommodation and customs or tax exemptions are not in keeping with the solutions which have generally been adopted both for reasons of principle and for practical considerations.

The French Government would also express the hope that the Commission will consider the practical aspects of applying the provisions it adopts. It would observe, for example, that if a person is to be accorded full diplomatic status, it is essential that he should be immediately identifiable by the authorities concerned, and that the authorities should receive prior notification of his presence on the territory of the host State.

In short, the French Government believes that 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.

In general, the French Government believes 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.

The French Government intends to offer some further observations when the Commission has completed its second reading of the draft.

Hungary

PARTS III AND IV OF THE PROVISIONAL DRAFT

OBSERVATIONS COMMUNICATED BY "NOTE VERBALE" DATED 22 FEBRUARY 1971 FROM THE PERMANENT REPRESENTATIVE TO THE UNITED NATIONS

[Original text: English]

Article 52

This article ought to lay down that all non-member States may establish permanent observer missions to the international organiza-

tions of universal character. The present wording of the provision, more specifically, the expression "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.

Furthermore there is 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.¹

Article 94

The last sentence of paragraph 1 of this article ought to be deleted. 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.

Article 100

Alternative A would seem to be the more acceptable because alternative B narrows down, with no reason, the immunity from civil and administrative jurisdiction of the representatives of States members of an international organization.

Israel

(a) PART I AND SECTION 1 OF PART II OF THE PROVISIONAL DRAFT

OBSERVATIONS COMMUNICATED BY *note verbale* DATED 8 APRIL 1969 FROM THE PERMANENT REPRESENTATIVE TO THE UNITED NATIONS

[Original text: English]

Article 1

The Government of Israel believes 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 proposes that subparagraph (b) be omitted, having regard to its observations on article 2.

It suggests that in subparagraph (1), the words "are established" be replaced by "may be established".

Article 2

The Government of Israel does not consider that a valid or workable distinction can be drawn between international organizations of a universal character and others, for the purpose of these articles. It points out that in so far as the provisions of these articles conflict with the relevant rules or 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. It therefore proposes that this article be omitted.

¹ *Yearbook of the International Law Commission, 1970, vol. II, p. 7, document A/CN.4/227 and Add.1 and 2.*

Articles 4 and 5

The Government of Israel makes the following comments:

(1) The formulation of article 4 should correspond more closely with the terms of paragraph 2 of article 26 of the draft articles on the law of treaties (in the final form which will be given to it at the Vienna Conference).¹

(2) It is noted that 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. The Government of Israel doubts if it is appropriate to restrict article 4 only to agreements in force when the draft articles themselves enter into force.

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

(4) In the light of the foregoing, a more succinct formulation should be considered, such as an amalgamation of articles 4 and 5 along the following lines: "Nothing in the present articles shall prejudice other international agreements in force concerning the representatives of States to an international organization".

Article 7

The Government of Israel suggests that subparagraph (c) be inserted immediately after subparagraph (a), in view of its generality and importance.

Article 8

The Government of Israel considers that this article is superfluous, and believes that it could well be omitted. In view of the fact that the appointment of members of a permanent mission is not subject to the *agrément* of the host State or the organization concerned, it points out that even in the absence of this article there would be nothing to prevent a sending State from appointing the same persons as members of two or more permanent missions. By contrast, it points out, 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.³ The hypothesis of the present article, however, is not analogous to that with which those other provisions deal.

It is also considered that if this article is retained, then, as a matter of drafting, 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". This, it seems, would more accurately express the intended meaning, in view of the definitions of each of these phrases contained in paragraphs (f) and (g) or article 1.

Article 9

The Government of Israel suggests that the phrase "as head of a diplomatic mission", which occurs in paragraph 1 and paragraph 2, should in each case be replaced by "as head of a diplomatic or special mission".

Article 10

The Government of Israel recognizes that this article gives expression to the well-established practice with regard to permanent

missions, namely that their members may be appointed freely and without requiring the consent of the host State or of the organization. It nevertheless considers that in the following two cases, the host State should have the right to refuse its consent, namely:

(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*.

In order to give effect to this, it proposes the addition of a new provision either as a new paragraph to article 10 or as a new article 10 (*bis*), along the following lines:

"The host State may withhold or at any time withdraw its consent to the appointment as a member of a permanent mission of any person whom it has previously declared *persona non grata* or who has previously been convicted in any of its courts of a criminal offence involving ignominy."

The phrase "a criminal offence involving ignominy" is based upon the authorized English translation of subsection (1) of section 44 of the Chamber of Advocates Law, 5721-1961.³ The use of this phrase is suggested here, in order to exclude from the scope of the proposed article trivial contraventions such as parking offences.

Article 11

The Government of Israel draws attention in this context to the necessity of making special provision, in those sections dealing with privileges and immunities, for the privileges and immunities of members of a permanent mission who are nationals or permanent residents of the host State. Such a provision could be based on paragraph 2 of article 38 of the Vienna Convention on Diplomatic Relations.

Article 12

The Government of Israel proposes the following two amendments:

(1) To replace the words "or by another competent minister" by "or by any other authority competent to do so under the laws of the sending State". It considers that "authority" is preferable to "minister", since credentials are in fact sometimes issued by authorities other than ministers, and because the word "minister", unlike "Minister for Foreign Affairs", has no clearly defined meaning in international law. As regards the word "competent", it feels that the proposed phrase should be substituted, in order to eliminate the possible ambiguity arising from the fact that the word occurs twice in this article, the first time with the meaning "competent by the law of the sending State", and the second time with the meaning "competent by the rules of the organization".

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

Article 13

The Government of Israel considers that the text of this article should be replaced by that suggested in paragraph 7 of the commentary. The meaning of the latter is far clearer, and it is free from the ambiguities of the present text, which leaves it uncertain (a) whether in the event of organs being specified, the permanent representative has or has not the right to appear before the unspecified organs, (b) whether in the event of organs not being specified, the permanent representative has a right to appear before any organs at all, and (c) whether paragraph 2 related to a situation in which organs have been specified, or in which they have not been specified. The Government of Israel suggests, however, that in paragraph 2

¹ In the Vienna Convention on the Law of Treaties as adopted by the United Nations Conference on the Law of Treaties on 23 May 1969, article 26 of the International Law Commission's draft articles on the law of treaties has become article 30.

² See *Yearbook of the International Law Commission, 1967*, vol. II, p. 349, document A/6709/Rev.1, chap. II, D.

³ Israel, Ministry of Justice, *Laws of the State of Israel*, vol. 15, 5721—1960/61, Authorized translation from the Hebrew (Published by the Government Printer [n.d.]), p. 203.

of the alternative text contained in paragraph 7 of the commentary, the words "unless there are special requirements as regards representation in any particular organ" be omitted, since this point is already expressed by article 3.

Article 14

The Government of Israel, while not disagreeing with the provisions of this article as they stand, feels that the topic of treaties between States and international organizations would be more appropriately dealt with in the context of the codification of the law of treaties. While noting that the draft adopted in 1968 by the Committee of the Whole at the first session of the Vienna Conference is limited by article 1 to treaties concluded between States,⁴ it draws attention to the resolution passed at the same session of that conference recommending the General Assembly to refer the study of the question of treaties concluded between States and international organizations or between two or more international organizations to the International Law Commission.⁵ In view of this, the Government of Israel suggests that the question of the retention of article 14 should be examined only after the General Assembly has finally pronounced itself on the future study of the topic.

Article 15

The Government of Israel suggests that article 15 be merged with article 6, so as to form the second paragraph of that article.

Article 17

The Government of Israel proposes that in subparagraph (a) of paragraph 1, the words "of the members" be replaced by "of members" and the words "their arrival and final departure" by "their arrival and their final departure"; this would bring the text of the article into line with that of article 10 of the Vienna Convention on Diplomatic Relations. It also proposes that at the end of the subparagraph, the semicolon be replaced by a comma and the following words added: "and, in the case of temporary absences, their departure and return".

In subparagraph (b), it considers that the words "where appropriate" are redundant and should be deleted.

It suggests that paragraph 2 be drafted along the same lines as paragraph 2 of article 11 of the draft articles on special missions.

Article 18

The Government of Israel suggests that the following sentence be added to the end of article 18, along the lines of paragraph 4 of article 17: "The Organization shall transmit the notification to the host State".

It notes that no provision has been made for the accreditation of *chargés d'affaires ad interim*. It considers that this may be needed, in view of the fact that the post of permanent representative is sometimes vacant for a considerable time. It suggests that the International Law Commission obtain information as to the practice of international organizations on this point, with a view to the inclusion of an appropriate provision.

Article 20

The Government of Israel makes the following suggestions:

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

⁴ *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. 110.

⁵ *Ibid.*, p. 285.

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

Article 21

The Government of Israel proposes 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) SECTION 2 OF PART II OF THE PROVISIONAL DRAFT

OBSERVATIONS COMMUNICATED BY "NOTE VERBALE" DATED 1 JUNE 1970 FROM THE PERMANENT REPRESENTATIVE TO THE UNITED NATIONS

[Original text: English]

General observations

See the statement of the representative of Israel at the 1106th meeting of the Sixth Committee on 29 September 1969.⁶

Observations on particular articles

Article 26

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. See in this context, the observations of the Government of Israel on article 18 (see section (a) above).

Article 32

Paragraph 4 of the commentary has been noted. The Government of Israel recognizes the interconnexion between paragraph 1 (d) of article 32 and article 34 of the draft articles. Expressing the hope that article 34 will be retained in the final text, the Government of Israel would wish to reserve its position on article 32, paragraph 1 (d) for the time being.

Article 33

The Government of Israel suggests that in paragraph 1, in 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".

Article 35

The Government of Israel takes the view that paragraph 5 adds nothing to the provisions of articles 4 and 5, and that it could with advantage be omitted.

Article 38

The Government of Israel suggests that in paragraph 1 (b) "their families" be substituted for "his family", "their households" for "his household" and "their establishments" for "his establishment".

⁶ *Official Records of the General Assembly, Twenty-fourth Session, Sixth Committee, 1106th meeting.*

Article 39

See the remarks of the representative of Israel at the 1106th meeting of the Sixth Committee.⁷

Article 42

The Government of Israel notes that article 39, paragraph 1 of the Vienna Convention on Diplomatic Relations 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 the Government of Israel feels that the earlier text is preferable as being more precise. In this connexion it seems that article 17 could be made more precise as well as article 18, if the suggestion of the Government of Israel regarding that article (see above) is incorporated into the final text of the draft article.

Article 43

The Government of Israel suggests that the last sentence of paragraph 1 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."

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.

Article 44

The Government of Israel notes that this article 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 of Israel 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."

*Article 45**Paragraph 2*

The Government of Israel wishes to make the following observations:

(1) The phrase "grave and manifest violation of the criminal law" appears to have no recognized legal meaning.

(2) The provisions of the paragraph apparently leave it to the sending State itself to determine whether, in the hypothesis with which the article deals, a case has arisen to recall the person concerned.

The problems with which the International Law Commission is endeavouring to grapple are appreciated, and it is 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. On that basis a more satisfactory formation 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."

The phrase "a criminal offence involving ignominy" has been explained in the observations of the Government of Israel on article 10 (reproduced above); and should the suggestions made for that article find expression in the Commission's final text, it is believed that article 45 should be co-ordinated with it.

Paragraph 3

The words "the exercise of", which do not appear in the corresponding provision of the Vienna Convention on Diplomatic Relations (article 41), seem superfluous.

Article 48

1. The Government of Israel notes that the words "to leave its territory" at the end of the first 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 Relations (article 44). It sees no reason for this change, and therefore suggests reverting to the earlier text.

2. With reference to paragraph 2 of the commentary, the Government of Israel considers 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.

Article 49

1. The Government of Israel proposes that the word "must", wherever it appears in paragraph 1, be replaced by "shall".

2. The Government of Israel notes that, 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 difference between the "special" protection and protection of property, archives and premises under international law is not altogether clear.

(c) PARTS III AND IV OF THE PROVISIONAL DRAFT

OBSERVATIONS COMMUNICATED BY "NOTE VERBALE" DATED 5 JANUARY 1971 FROM THE PERMANENT REPRESENTATIVE TO THE UNITED NATIONS

[Original text: English]

General observations

See the statement of the representative of Israel at the 1193rd meeting of the Sixth Committee on 8 October 1970.⁸

Subject to the comments set out below, Israel expresses its general agreement with the proposed draft articles.

The observations of the Government of Israel on the first and second groups of draft articles apply generally and in principle to Parts III and IV.

⁷ *Ibid.*

⁸ *Ibid.*, Twenty-fifth Session, Sixth Committee, 1193rd meeting.

As the four parts of the draft articles will form an integral part of the diplomatic law, it is considered that 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. The Government of Israel is inclined 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. At all events it is considered that 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.

It is also considered desirable for the question of observer delegations to organs and conferences to be regulated in the present group of draft articles.

Observations on particular articles

Article 51

The introductory words to this article dealing with the use of terms indicate that those terms would specifically apply to part III of the draft articles.

Subparagraph (a) of this draft article defines the term "permanent observer mission" as a mission sent to an "international organization". Paragraph 1 of the commentary of this draft article explains that the latter term is used in the same sense as in draft article 1.

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.

Article 52

The Government of Israel considers 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 relatively generalized concepts such as "principles of sovereign equality of States and of universality" (paragraph 3 of the commentary) could prevail over the rules and practice of the organization in question.

Article 58

Since the Vienna Convention on the Law of Treaties does not deal adequately with this aspect, the Government of Israel agrees 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.

Article 76

The Government of Israel suggests 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).

Article 88

See observations on article 58.

Article 112

See observations on article 76.

Japan

OBSERVATIONS COMMUNICATED BY LETTER DATED 16 MARCH 1971 FROM THE CHARGÉ D'AFFAIRES "AD INTERIM" OF THE PERMANENT MISSION TO THE UNITED NATIONS

[Original text: English]

PART I.—General provisions

Articles 4 and 5

In view of the great variety of functions and characteristics of agreements relating to international organizations, articles 4 and 5 have rightly been included.

PART II.—Permanent missions to international organizations

General comments

1. In the view of the Japanese Government, draft articles on the diplomatic law on the relationship between States and international organizations should be based of the functional necessity, due regard being paid to the existing rules and practice. Owing to the approach taken by the Commission that the provisions on privileges and immunities of permanent missions and their members should closely follow the corresponding provisions of the Vienna Convention on Diplomatic Relations, the element of diversity of functions and needs of international organizations is not sufficiently taken into consideration. Thus the draft articles substantially depart from the prevailing practices and principles of international organizations regarding privileges and immunities.

2. 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.

3. While the draft articles grant permanent missions privileges and immunities virtually identical with those accorded to permanent diplomatic missions, they do not adequately ensure 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, namely, consultations among the States concerned and the organization, 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).

Observations on particular articles

Article 13

The formulation of paragraph 2 does not appear to be sufficiently clear in its meaning. The Japanese Government would favour the formulation which appears in paragraph 7 of the Commission's commentary.

Article 19

The end of the sentence from the words "in accordance with . . ." should be deleted in the light of the provision of article 3. If these words are retained, the article will not provide an effective residual rule where established practice or rules do not exist in the organization on the matter.

Article 22

The Japanese Government is not convinced of the necessity of the second sentence of article 22 on the obligation of an international organization to assist permanent missions in obtaining facilities for the performance of their functions. 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.

Article 24

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.

Article 25

The provision of article 25 is considered reasonable. The third sentence of paragraph 1 should be retained.

Article 28

This 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. 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 rule. It is 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.

Article 32

The provision in paragraph 1 (d) of article 32 on action for damages arising out of a motor accident is reasonable and necessary and should be retained. The Japanese Government is also of the view that provisions be included requiring members of permanent missions to be insured against liability for accident caused by vehicles used by them.

Article 34

The Japanese Government believes that this article should be retained.

Article 48

The insertion of the words "whenever requested" is likely to be interpreted as placing a greater responsibility on the host State than the provision of article 44 of the Vienna Convention on Diplomatic Relations does on the receiving State. The expression "whenever requested" might be replaced by the expression "in case of need".

The wording "in case of emergency" is ambiguous with respect to multilateral relations. Since the bilateral relationship between a sending State and the host State is not directly connected with the

withdrawal of a permanent mission to an international organization, it is not clear what other cases of "emergency" exist.

It is considered 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.

Article 49

The second sentence of paragraph 1 is reasonable and should be retained.

Article 50

For the reason mentioned in the general comments, the Japanese Government is 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. A more effective procedure might be provided for in order to protect the interests both of the sending State and the host State in cases where consultations of the type envisaged do not bring about satisfactory solutions.

PART III.—Permanent observer missions to international organizations

General comments

It is considered that the draft articles adopted by the Commission are based too closely on those of permanent diplomatic missions and permanent missions to international organizations.

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 Japanese Government would suggest that the draft articles on privileges and immunities of permanent observer missions be based on the Vienna Convention on Consular Relations.

*Observations on particular articles**Article 52*

The Commission has rightly made the right of non-member States to establish permanent observer missions conditional on the

relevant rules or practice of the organization. When such rules or practice do not provide for the establishment of permanent observer missions, a non-member State should be allowed to send an observer mission to an organization only if the host State and the organization agree to receive such a mission.

Article 53

It is noted that the Commission has included among the functions of permanent observer missions "negotiating with the Organization when required and representing the sending State at the Organization". 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.

It is therefore suggested that the end of the sentence from the words "negotiating with" be deleted. The deletion will in no way preclude a permanent observer mission from performing such functions.

Article 57

It is doubted that the inclusion in the draft articles of a provision on the submission of credentials of a permanent observer is necessary. Since a permanent observer does not represent the sending State in the organization, there is no need for submission of credentials. The requirement of notification under article 61 will suffice for the purpose of a permanent observer. Additional formality adds nothing to the status of a permanent observer. The practice of the United Nations in this regard should be followed.

Article 58

This 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.

Article 64

The Japanese Government would favour the deletion of the reference to the use of flag.

Articles 65 and 66

The comments made on articles 22 and 24 also apply to articles 65 and 66.

Article 68

It is not considered 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.

Article 69

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.

PART IV.—Delegations of States to organs and to conferences

General comments

1. The Japanese Government is 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.

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.

2. 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.

3. The Japanese Government 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.

Observations on particular articles

Article 80

According to the commentary, the Commission is of the view that 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 is therefore suggested 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.

Article 83

This article does not appear to be necessary. 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.

Article 85

The Japanese Government would favour 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. 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.

Article 99

This 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.

Article 100

The Japanese Government supports alternative B.

Article 103

Paragraph 1 (b) should be deleted. 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.

Article 105

It is deemed 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).

Madagascar

PARTS II, III AND IV OF THE PROVISIONAL DRAFT

OBSERVATIONS COMMUNICATED BY "NOTE VERBALE" DATED 2 FEBRUARY 1971 FROM THE PERMANENT REPRESENTATIVE TO THE UNITED NATIONS

[Original text: French]

PART II.—Permanent missions to international organizations

Article 32

The attention of Governments is drawn to a novel provision of article 32, paragraph 1 (d), under which immunity from civil and administrative jurisdiction is not extended to any "action for damages arising out of an accident caused by a vehicle used outside the official functions of the person in question".

In support of this provision, some delegations argued that it met a real need because of the greater frequency of such accidents and the difficulties which had arisen in some countries from the application of insurance laws.

Other delegations, however, opposed this provision, citing as a precedent the 1961 Vienna Convention, which does not deal with the question, pointing out that draft article 34 calls upon the sending States to waive civil immunity whenever possible or to use their "best endeavours to bring about a just settlement", and emphasizing the difficulties of applying the functional line that was being drawn. One other argument, based on article 45, in accordance with which it is the duty of persons enjoying immunity to respect the laws and regulations of the host State, does not appear to be valid in connexion with a liability resulting from clumsiness or carelessness.

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, the Malagasy Government believes that it would be advisable to concentrate on eliminating the difficulties encountered by victims of traffic accidents in obtaining compensation.

However, the provision in question does not, in its opinion, 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.

Article 42

The expression "a reasonable period" in paragraphs 2 and 3 of this article seems very vague and needs to be further clarified.

In addition, it is rightly noted in paragraph 2 of the commentary that there is no provision regulating the duration of privileges and immunities for persons who do not enjoy them in their official capacity. A provision on this point, based on article 53 of the Vienna Convention on Consular Relations, might therefore profitably be added to article 42.

PART III.—Permanent observer missions to international organizations

Article 63

As a drafting change, needed in order to eliminate any ambiguity, the word "localities" should be replaced by the words "a locality". 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).

Article 64

The right to use the flag is expressly recognized. If diplomatic relations do not exist or are severed, however, use of the flag should be the subject of arrangements to be concluded between the sending State and the receiving State.

PART IV.—Delegations of States to organs and to conferences

Article 83

Article 6 of the Vienna Convention on Diplomatic Relations specifies that two or more States may accredit the same person as head of mission to another State. The article under consideration raises a similar issue and 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. For example, 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.

Article 100

Two alternative versions are given:

Alternative A lists the four categories of civil actions for which there is no entitlement to immunity from civil and administrative jurisdiction;

Alternative B, which seems broader in scope, excludes from the sphere of immunity acts which are not "performed in the exercise of [. . .] official functions".

In both cases, measures of execution are dealt with in the same way as the categories of actions to which they relate.

In the opinion of the Malagasy Government, 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.

For this reason, the Malagasy Government prefers alternative A, which is clearer and more specific.

In addition, the comments already made on the subject of the provision concerning actions arising out of a traffic accident are also applicable to article 100 (alternative A), paragraph 2 (d).

Mauritius

PARTS I AND II OF THE PROVISIONAL DRAFT

OBSERVATIONS COMMUNICATED BY "NOTE VERBALE" DATED 25 AUGUST 1970 FROM THE PERMANENT MISSION TO THE UNITED NATIONS

[Original text: English]

. . . Mauritius is fully appreciative of the efforts of the International Law Commission to codify international law on the topic of representatives of States to international organizations and is in general in agreement with the draft articles proposed.

Netherlands

(a) PART I AND SECTION I OF PART II OF THE PROVISIONAL DRAFT

OBSERVATIONS COMMUNICATED BY LETTER DATED 25 SEPTEMBER 1969 FROM THE DEPUTY PERMANENT REPRESENTATIVE TO THE UNITED NATIONS

[Original text: English]

General remarks

1. The draft articles are intended to be rules of a non-obligatory nature, open to exceptions in the cases provided for in articles 3-5. The Netherlands Government agrees with this modest scope of the draft. Nevertheless, the draft articles must be regarded as reflecting the actual state of international law as regards relations between States and international organizations. In fact, in paragraph 1 of the commentary on article 3 the International Law Commission itself describes the draft articles as a "common denominator" and a "general pattern which regulates the diplomatic law of relations between States and international organizations", their purpose being "the unification of that law to the extent feasible in the present stage of development".

2. It is for this reason that the Netherlands Government objects to the present wording of article 6, which in principle grants States the right to establish permanent missions to the organizations of which they are members. When exercising this right, they are of course subject to the relevant rules of the organization concerned. But what if the organization's rules are silent in regard to the possibility of establishing special missions? Must it then be assumed that member States are automatically entitled to establish permanent missions, pursuant to article 6?

3. The Netherlands Government considers this interpretation undesirable, for the following reasons. Firstly, a provision of this

kind would make no allowance for the great differences between the aims of the various organizations and between their membership. With respect to many organizations, there will be a need for permanent missions. However, to several organizations (e.g., IMF and IBRD) the institution of permanent missions is unknown. Secondly, the institution of permanent missions is liable to put smaller States at a disadvantage. Through its permanent mission, a State is able to exert a certain influence, and it is easier for some States to keep large diplomatic missions than it is for others. Thirdly, if member States were automatically entitled to establish permanent missions, countries might be less inclined to make themselves available as host States in the future, and the ratification of the present rules by the existing host States might be held up.

4. For these three reasons, it would be better to word article 6 in such a way that member States are only entitled to establish permanent missions in so far as this is provided for in the rules of the organization in question. Accordingly, a different wording for article 6 will be suggested below in the comments on each separate article.

5. The Netherlands Government notes with satisfaction that the International Law Commission agrees to consider the inclusion of an article of general scope on the remedies available to host States for safeguarding their rights (paragraph 8 of the commentary on article 16). Pending the inclusion of such an article, the Government will abstain from expressing an opinion on the position of the host States as resulting from the present draft articles. However, the Netherlands Government wishes to point out that it is the host State that will have to accept the privileges and immunity provided for in this Convention. In that Government's opinion, this means that there does exist a legal relationship between the sending State and the host State (cf. paragraph 3 of the commentary on article 10).

6. The Netherlands Government is aware that guarantees for host States can also be included in headquarters agreements.

Comments on particular articles*Article 1, sub-paragraph (b) in conjunction with article 2, paragraph 1*

7. In the opinion of the Netherlands Government the proposal that the present rules be restricted to "organizations of universal character" is inopportune, since this criterion is irrelevant in this connexion. 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. The Council of Europe is a good example. If the addition to article 6 suggested below is accepted, there would appear to be no objection to allowing the existing rules to apply in principle to all international organizations. In that case, article 2 could be omitted altogether.

Article 2, paragraph 2

8. If article 2 is retained, the Netherlands Government recommends deleting the last sentence of paragraph 2, 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.

Article 6

9. For the reasons stated in the general remarks, the Netherlands Government suggests that article 6 be reworded as follows:

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

Article 7

10. This article rightly emphasizes the diplomatic, representational function of permanent representatives. It should be kept in mind that the draft articles are intended to supplement the codifications of the law on the position of State representatives so far completed, viz., the Vienna Conventions on Diplomatic Relations and on Consular Relations, and the Convention on Special Missions.

Article 9

11. The Netherlands Government wonders why in paragraphs 1 and 2, the permanent representative and the members of the staff of a permanent mission are named separately, whereas in paragraph 3 they are mentioned together, which is in accordance with article 1 (f). It is recommended that paragraphs 1 and 2 be combined.

Article 10

12. As stated in the general remarks, further guarantees will have to be given with regard to the position of the host State. It therefore is right that in article 10, reference be made to articles 11 and 16, which grant to the host State some influence as regards the nationality of the members of a mission and its size.

Article 13

13. The Netherlands Government prefers the wording of this article suggested by some members of the International Law Commission (paragraph 7 of the commentary), as expressing more clearly the purpose of the article.

Article 14

14. The title of this article is too wide; actually the article refers to only one category of conventions, namely, those between sending States and international organizations. It is therefore suggested that the title be redrafted as follows:

“Representation of States in the conclusion of treaties with international organizations.”

Article 15

15. The Netherlands Government fails to see why paragraph 4 of the commentary on this article refers, without further explanation, to a number of definitions of the word “representatives”, which term is deemed to include delegations, i.e., temporary representatives at international organizations. According to paragraph 19 of the report of the International Law Commission on the work of its twentieth session, the position of delegations to organs of international organizations and to conferences convened by international organizations will be determined in a later section of the draft articles. Quite rightly, therefore, the only term defined in article 1 (e) is “permanent representative”. It is recommended that paragraph 4 of the commentary to article 15 be deleted.

(b) SECTION 2 OF PART II OF THE PROVISIONAL DRAFT

OBSERVATIONS COMMUNICATED BY LETTER DATED 13 OCTOBER 1970
FROM THE DEPUTY PERMANENT REPRESENTATIVE TO THE UNITED
NATIONS

[Original text: English]

General observations

1. In its comments on the draft articles on special missions,¹ the Netherlands Government recommended to restrict the privileges

¹ *Yearbook of the International Law Commission, 1967*, vol. II, pp. 388 *et seq.*, document A/6709/Rev.1, annex I, sect. 18.

and immunities to be accorded to diplomats *ad hoc*, in view of the differences in their position and responsibilities vis-à-vis permanent diplomatic representatives. Such a minimum regulation could, if needed, be supplemented by additional agreements between the sending and the host State.

2. The present draft deals with permanent diplomatic representatives of States accredited not to other States but to international organizations. 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.

3. 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 1961 Vienna Convention on Diplomatic Relations.

4. The Netherlands Government agrees to this in principle and will not, therefore, make proposals designed to restrict privileges and immunities, as it deemed appropriate to make with regard to diplomats *ad hoc*. It does not, for instance, intend to propose that personal inviolability be restricted to acts performed in the discharge of official duties, nor that the rule of no immunity in the event of damage due to road accidents be extended to official journeys.

5. From the point of view of *host States* however, 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.

6. 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.

7. In view of these considerations, the Netherlands Government is of the opinion 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.

The role of the Organization

8. 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. The Netherlands Government fully supports 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.

9. The Netherlands Government is, however, of 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.

10. The Netherlands Government fears that the present wording of articles 22 and 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.

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. The Netherlands Government agrees with this view, but thinks it desirable that this should be clearly stated in the article. It has formulated an amended text to that effect in paragraph 16 of these comments.

Position of the host State

11. The Netherlands Government is of the opinion that this position is *insufficiently guaranteed* in the present draft. In its comments on articles 1–21 (see section (a) above), it stated that it would postpone expressing a final opinion on the matter until the guarantees the Commission intended to provide for host States had been formulated. This has now been done in articles 45 and 50. In the Netherlands Government's view, these guarantees are insufficient; the host States' position should be made clearer.

12. For instance, the provision of paragraph 2 of article 45, in virtue of which a member of a permanent mission is required to leave the host State in case of certain conduct, would in the Netherlands Government's view 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.

13. Should a dispute arise between the sending and host States on this matter, the consultations provided for in *article 50*, in which the Organization may also participate, may well offer a solution. The Netherlands Government, however, considers a provision for the settlement of disputes concerning the interpretation and application of the Convention essential, in addition to the conciliation procedure of article 50. Paragraph 5 of the commentary on article 50 shows that the Commission reserves the possibility of including a provision to that effect.

Comments on particular articles

Articles 22 and 24

14. As pointed out in paragraph 10 above, the wording of these articles could create the impression that the Organization should be concerned solely with the interests of the sending State. It must be admitted, however, that in article 24 the words "where necessary" guarantee to some extent that the Organization will try to strike a balance between the interests of sending and host States.

15. The term "full facilities" in article 22 seems to suggest facilities of too wide a scope, also in the light of what has been stated in the preceding paragraph. 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.

16. With reference to the points raised in paragraphs 10 and 14, it is proposed that the phrase "take steps to ensure the application of the present articles, and assist . . ." etc. be inserted in article 24 after the words "where necessary". The Netherlands Government is aware that this proposal 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. It will postpone giving its views on this question until it has studied the draft articles, referred to by the Commission in paragraph 17 of its report on its twenty-first session,² on permanent observers from non-member States, delegations to sessions of organs of international organizations and conferences convened by such organizations.

² *Ibid.*, 1969, p. 206, document A/7610/Rev.1.

Article 25

17. Regarding paragraph 3, there seems 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.

Article 26

18. In paragraph 3 of the commentary, the Commission requests Governments to supply information on the practice in their respective countries. The practice in the Netherlands is 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, the Netherlands Government is of the opinion that for the situation in the Netherlands, special regulations are not called for in respect of leased premises.

Article 30

19. For the reasons stated in paragraphs 2 and 4 above, the Netherlands Government will 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. It seems appropriate to regulate the position of permanent representatives to international organizations in this point in conformity with the Convention on Diplomatic Relations.

Article 31

20. In paragraph 4 of the commentary on article 25, the Commission proposes a new paragraph (*k bis*) to be added to article 1, reading "The 'premises of the 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.*" It is recommended that the last phrase, from "including the residence . . .", be deleted, since this idea is covered by article 31, paragraph 1.

Article 32

21. In the exceptions to immunity from jurisdiction listed in paragraph 1, the Commission has, tentatively, included in subparagraph (*d*) actions for damages arising out of accidents caused by vehicles used outside the official functions of the persons involved.

The Netherlands Government welcomes the inclusion of this provision and might refer to the fact that the Netherlands delegation to the United Nations Conference on Diplomatic Intercourse and Immunities (1961) already advocated the inclusion of such a provision.³ It was not adopted until 1969, however, namely in the Convention on Special Missions [article 31, paragraph 2, subparagraph (*d*)].

If the proposed provision is adopted, the question of including in the present draft a provision requiring from diplomats entitled to immunity a third party liability-insurance loses much of its relevance. Moreover, many States already impose an obligation of this kind.

³ *Official Records of the United Nations Conference on Diplomatic Intercourse and Immunities*, vol. II (United Nations publication, Sales No.: 62.XI.1), p. 27, document A/CONF.20/C.1/L.186/Rev.1.

22. It is recommended that *aircraft and ships* be included in *subparagraph* (d), since these too may cause considerable damage.

23. In paragraph 30 of its comments on the draft articles on special missions,⁴ the Netherlands Government 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. The Netherlands Government has considered whether it would be appropriate to make such a proposal in the case of the present draft. It is of the opinion, however, that the similarity between *permanent* missions to States and *permanent* missions to international organizations, to which attention has been drawn in paragraphs 2 to 4 above 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.

Article 35

24. In paragraph 3 of the commentary on this article, the Commission raises the question whether the reference to bilateral and multilateral agreements concerning social security in paragraph 5 of this article is necessary, in view of the provisions of articles 4 and 5. The Netherlands Government answers this question in the negative.

Article 36

25. As regards the provision in subparagraph (f) concerning certain fees, dues and taxes with respect to immovable property, the Commission states in paragraph 5 of its commentary that it would be interested to learn whether Governments have found any practical difficulties in applying the corresponding provision appearing in article 34 of the Vienna Convention on Diplomatic Relations. In the Netherlands, registration fees, paid on the transfer to the sending State of immovable property intended for official use, are refunded. Documents signed solely by members of foreign diplomatic missions are exempt from stamp duty. This practice does not give rise to difficulties.

Article 42

26. As regards this article, the Commission invites the views of Governments on the desirability of including a provision similar to article 53 of the Vienna Convention on Consular Relations, concerning the dates of commencement and termination of entitlements for persons who do not enjoy privileges and immunities in their official capacity.

The Netherlands Government is of the opinion that such a provision should indeed be included.

Article 44

27. It was proposed in the Sixth Committee at the twenty-fourth session of the United Nations General Assembly, during the debate on the report of the International Law Commission on the work of its twenty-first session, that the article on non-discrimination be worded as follows: "In the application of the provisions of the present articles, there shall be no discrimination against any State".⁵

The Netherlands Government prefers this wording of article 44 to that proposed by the Commission.

Article 45

Paragraph 2

28. The Netherlands Government refers to its comments in paragraph 12 above and proposes that paragraph 2 be extended to

⁴ See foot-note 1 above, this section.

⁵ *Official Records of the General Assembly, Twenty-fourth Session, Annexes*, agenda items 86 and 94 (b), document A/7746, para. 53.

include all "grave and manifest violations" of the obligations laid down in paragraph 1.

Paragraph 3

29. As regards this provision, the Netherlands Government recommends that the *means of transport* of the mission be explicitly included. It is proposed to insert the words "and means of transport" after the word "premises".

(c) PARTS III AND IV OF THE PROVISIONAL DRAFT

OBSERVATIONS COMMUNICATED BY LETTER DATED 9 MARCH 1971 FROM THE ACTING PERMANENT REPRESENTATIVE TO THE UNITED NATIONS

[Original text: English]

General observations

1. Now that the third series of articles, completing the Commission's draft, is at hand, the Netherlands Government would first of all like to express its admiration for this extensive piece of work designed to add a new, complete chapter to the codification and progressive development of international law concerning diplomatic and other missions through which States maintain mutual relations.

Reading through the complete draft, one is obliged to consider to what extent the draft body of rules satisfies the needs of the international community. The draft is remarkably detailed and treats some points very fully—an understandable and perhaps inevitable consequence of any attempt at codification. The various parts of the draft are based in part on the existing regulations for permanent and *ad hoc* diplomatic missions—with the inherent risk that dissimilar matters may be treated as similar. It may be thought that in some cases the present rules follow too closely the rules of classical bilateral diplomacy, instead of being adapted to the changed needs of modern international relations.

In international practice, a number of organizations already have rules for the functioning of and facilities for permanent missions or permanent observer missions of States and almost all organizations have such rules for delegations of States to their organs or conferences. These rules display considerable variety, as is clearly shown by the extensive research undertaken by the Commission and notably by its very capable Special Rapporteur. The Commission quite rightly takes this variety into account in articles 3, 4, 5, 79 and 80.

At the same time it is to be expected that the regulations for the individual organizations will, under the influence of the present codification, tend towards standardization. Assuming that uniformity ought never to be an aim in itself, the question should be considered whether the international community is in fact in need of highly detailed standardization for the legal relationships under review, always bearing in mind the evident multifariousness of international organizations. This line of thought might well prompt the conclusion that the final text should confine itself more to basic principles.

At the present stage of international exchange of views on the Commission's draft, the Netherlands Government would restrict itself to putting forward the above views for further comment. It reserves the right to return to these questions after considering the comments of other Governments and the final draft.

PART III.—Permanent observer missions

The observer mission as an institution

2. 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. This is the consideration underlying the following comments on the individual articles.

Multiple representation

3. Neither part II, which deals with permanent missions, nor the present part III make any provision for the possibility of one representative or observer being accredited to an organization on behalf of two States. This is in contrast to article 6 of the Vienna Convention on Diplomatic Relations, article 8 of the Vienna Convention on Consular Relations, article 5 of the 1969 Convention on Special Missions and article 83 of the present draft.

The Special Rapporteur considers this point in his third report in a “Note on appointment of a joint permanent mission by two or more States”⁶ and, basing his observations exclusively on the practice followed within the United Nations, he concludes that joint representation is a rare phenomenon, to be found only in connexion with the assembly of an organ or with a conference; this was the reason for the drafting of article 83.

The Netherlands Government readily accepts the fact that, until now, joint permanent missions or joint permanent observer missions have seldom occurred—if at all. On the other hand it would like to point out that the absence of any reference to such a possibility in parts II and III leaves that possibility open. The Netherlands Government considers it right that the possibility should be kept open, especially in part III, in view of the fact that in the case of observer missions there is not the added complication of the exercise of voting rights. Moreover, this possibility could be in the interests of the micro-States. There is no need for such an arrangement to be regulated in the draft under review, provided that articles 6 and 52 state that no permanent missions or observer missions may be admitted, save where rules governing such admission have been laid down by the organization concerned (see the Netherlands comments on draft article 6 reproduced above, and also para. 4 below).

Observations on particular articles

Article 52

4. As regards the various points of view existing within the Commission, as reflected in paragraph 3 of its commentary, the Government of the Netherlands subscribes to the view that no State may derive from this 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. From this point of view article 52 is too broadly formulated; a more precise formulation is recommended on the lines suggested earlier for article 6 (see the Netherlands comments on the first series of articles, reproduced above).

⁶ *Yearbook of the International Law Commission, 1968*, vol. II, p. 135, document A/CN.4/203 and Add.1-5, paras. 31-34.

Article 54

5. 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 the fifth report, the Special Rapporteur did make a proposal for the latter.⁷

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.

The Netherlands Government too considers any provision analogous to article 9 superfluous, but it is of the opinion that, for reasons of balance, article 9 could and should be deleted.

Article 55

6. As previously observed in its comments on the first series of draft articles (see section (a) above general remarks and comments on article 10) and in paragraphs 11 *et seq.* of its comments on the second series (see section (b) above), the Netherlands Government 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.

Article 57

7. The Netherlands Government sees no reason why credentials should be introduced for permanent observers. This formality is not met with in practice and a written communication to the organization as provided for in article 61, paragraph 1, seems sufficient for all conceivable purposes. Article 57 can be entirely omitted.

8. As regards the wording of paragraph 2, 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”.

Article 58

9. The observation made in the Netherlands’ comments on the title of article 14 (see section (a) above) also applies to the title of this article.

Article 59

10. The provision in 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.

11. 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. There seems to be no difference in intent, so it is recommended that the same wording be adopted.

Article 61

12. A new provision should be inserted between subparagraphs (a) and (b) in the first paragraph (see para. 13 below).

⁷ *Ibid.*, 1970, vol. II, p. 8, document A/CN.4/227 and Add.1 and 2, “Note on assignment to two or more international organizations or to functions unrelated to permanent missions”.

Article 62

13. The Netherlands Government agrees 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. If article 62 were deleted, it would suffice to add to article 61, paragraph 1, a subparagraph (b) reading as follows:

"the name of the person who will act as *chargé d'affaires ad interim*, if the post of permanent observer is vacant or the permanent observer is unable to perform his functions, and if the sending States wishes to fill this vacancy".

Article 63

14. Replacement of the word "localities" by "a locality" (see paragraph 2 of the Commission's commentary) would indeed seem to clarify the text.

Article 64

15. If this article is considered necessary, it seems preferable to refer to the "flag and emblem" (see para. 2 of the Commission's commentary).

Article 65

16. In accordance with the Netherlands' suggestion on article 22 (section (b), para. 15, above), article 65 should also mention:

". . . such facilities as are required for the performance . . .".

Article 66

17. Please refer to the comments in paragraph 27 below relating to article 93.

Article 74

18. Please refer to the comments in paragraphs 35 and 36 below relating to article 110.

Article 75

19. The observation of the Netherlands Government concerning a different wording of article 44 (see section (b), para. 27) is equally applicable to article 75.

20. It 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. The Netherlands Government considers the answer to be in the negative.

PART IV.— Delegations of States to organs and to conferences

*Section I.— Delegations in general**Other conferences*

21. With references to the definition in subparagraph (b) of article 78, the Netherlands Government points out that, besides conferences convened by or under the auspices of organizations (and even including in that category conferences convened by States on behalf of organizations [see paragraph 3 of the Commission's commentary]), 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), the European Fisheries Conference of 1963/1964 in London. The status of delegations to these and similar conferences is not covered in the

draft articles under review; nor would it seem to be covered by the 1969 Convention on Special Missions, unless article 6 of that Convention is to be interpreted as covering delegations to international conferences as well.

Article 81

22. The Netherlands Government shares the view of the majority of the Commission that a delegation must include at least one person empowered to represent the sending State.

Article 83

23. 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 report⁸ 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 Union⁹ 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).¹⁰ 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 Treaty¹¹ 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).¹² Article XVII provides for the possibility of transferring votes in the International Committee of Legal Metrology up to a maximum of two extra votes.

The European Economic Community (Treaty of Rome, 1957).¹³ 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.

⁸ *Ibid.*, p. 1, document A/CN.4/227 and Add.1 and 2.

⁹ United Nations, *Treaty Series*, vol. 611, p. 86.

¹⁰ WIPO, *Paris Convention for the Protection of Industrial Property* (Geneva, 1970) [201(E)].

¹¹ United States of America, Department of State, *United States Treaties and other International Agreements* (Washington D.C., U.S. Government Printing Office, 1968), vol. 18, part 1, 1967, p. 685.

¹² United Nations, *Treaty Series*, vol. 560, p. 3.

¹³ *Ibid.*, vol. 294, p. 17.

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.

Article 84

24. Please refer to the comments in paragraph 6 above in relation to article 55.

Article 88

25. Together with "some members" of the Commission whose opinion is reflected in paragraph 2 of the commentary, the Netherlands Government is of the opinion that paragraph 3 of the proposed article is redundant. It fears that the inclusion of this article may tend to confuse rather than clarify.

Moreover, with reference to the article as a whole, it is questionable whether in this case the repetition of what is already laid down in the Vienna Convention on the Law of Treaties is to be recommended.

Section 2.—Facilities, privileges and immunities of delegations

26. The third and last category of representatives of States to international organizations 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. For this reason it seems more appropriate to approach the question of the facilities, privileges and immunities to be accorded to them from a purely functional point of view.

In this connexion, the Netherlands Government would recall the rules in existence for delegations to organs and conferences, which are laid down, for instance, in the Conventions on the Privileges and Immunities of the United Nations and of the Specialized Agencies, also mentioned by the Commission in its general comments on section 2. It is questionable whether it is desirable to deviate from these existing rules to any considerable extent.

Article 93

27. The Netherlands Government does not see 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.

What has been stated above in respect of article 93 is also applicable to the accommodation of permanent missions and permanent observer missions (articles 23 and 66), 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 articles 23 and 66 too might not be reversed.

Article 94

28. Please refer to the comments on article 25 (see section (b), para. 17).

The analogy drawn by the Commission with the special missions has already been disputed in paragraph 27 above.

Articles 98, 99 and 100

29. In accordance with the views expressed in paragraph 26 above, the Netherlands Government prefers provisions limiting the immunity to acts carried out during the performance of the duties of the delegation. With reference to draft article 100, this implies the rejection of alternative A.

30. With reference to article 100, the Netherlands Government offers for consideration 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.

31. 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.

Article 107

32. Please refer to the comments contained in paragraph 11 above in relation to article 59.

Article 108

33. Please refer to the Netherlands' comments on article 42 (see section (b), para. 26).

34. The Netherlands Government 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.

Article 110

35. 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?

36. 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 criterion, and this should be laid down in the article under review. If no objective criterion can be formulated for refusing transit, there seems to be little point in retaining the article.

Article 111

37. Please refer to the Netherlands comments on article 44 (see section (b), para. 27) and article 75 (paras. 19 and 20) above.

Article 112

38. With reference to paragraph 2, the same remark is applicable as that made above by the Netherlands Government with reference to article 45, paragraph 2 (see section (b), para. 28).

For paragraph 3, please refer to the observations made on article 45, paragraph 3 (see section (b), para. 29).

Article 115

39. 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.

New Zealand

PARTS III AND IV OF THE PROVISIONAL DRAFT

OBSERVATIONS COMMUNICATED BY "NOTE VERBALE" DATED 20 JANUARY 1971 FROM THE PERMANENT MISSION TO THE UNITED NATIONS

[*Original text: English*]

The Government of New Zealand wishes to reiterate the views expressed by its representative in the Sixth Committee on 8 October 1970¹ 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 1962² 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 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.

¹ *Official Records of the General Assembly, Twenty-fifth Session, Sixth Committee, 1193rd meeting.*

² United Nations, *Treaty Series*, vol. 453, p. 3.

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.

Pakistan

PARTS III AND IV OF THE PROVISIONAL DRAFT

OBSERVATIONS COMMUNICATED BY "NOTE VERBALE" DATED 15 JANUARY 1971 FROM THE PERMANENT REPRESENTATIVE TO THE UNITED NATIONS

[*Original text: English*]

The Government of Pakistan is pleased to note the progress achieved by the International Law Commission in the formulation of draft articles on representatives of States to international organizations. In general, the practical approach which has been adopted seems to be adequate to present needs. Particular satisfaction is felt at the consideration given by the International Law Commission on the legal status, privileges and immunities of permanent observers of non-member States to international organizations. It is noted that the progress on the subject is the consequence of the conscientious preparatory work which has been undertaken by the present Special Rapporteur on the topic and the Government of Pakistan is happy to express its appreciation of his work.

The following specific observations are put forward:

1. The Government of Pakistan feels that it is necessary to provide a legal basis for permanent observer missions hitherto regulated by practice. The questions dealt with in this set of draft articles are of particular interest to newly independent States which still lack an extensive network of embassies.
2. The Government of Pakistan is of the opinion 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. In view of this, the Government of Pakistan endorses the approach taken by the Special Rapporteur that permanent observers may simply address a letter to the Secretary-General in conformity with the current United Nations practice instead of presenting credentials.
3. The Government of Pakistan is of 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.
4. The Government of Pakistan fears that the provision in draft *article 63*, paragraph 2, under which the sending State may not establish offices of the permanent observer mission in the territory of a State other than the host State, may cause hardship to newly independent States.
5. The Government of Pakistan is of the opinion that the International Law Commission rightly recognized the correct position in draft *article 83*. This article is based on the general practice at conferences convened under the auspices of the United Nations.
6. The Government of Pakistan would like to point 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 expresses its concern in respect of the last sentence of paragraph 1 of draft *article 94* where it is provided that in case of fire or other disaster, the agent of the host State may enter the said premises. The Government believes that the inviolability should be strictly maintained and no relaxation should be allowed without express consent.

7. The Government of Pakistan is in favour of alternative B of draft *article 100* which deals with immunity from jurisdiction.

Poland

PARTS III AND IV OF THE PROVISIONAL DRAFT

OBSERVATIONS TRANSMITTED BY "NOTE VERBALE" DATED 9 JANUARY 1971 FROM THE PERMANENT MISSION TO THE UNITED NATIONS

[Original text: English]

The Government of the Polish People's Republic welcomes with satisfaction the progress made by the International Law Commission in the elaboration of the draft articles on relations between States and international organizations. The codification of this branch of international law will certainly contribute to the creation of better conditions for the fulfilment by the representatives of States of their functions related to the activities of international organizations and thus it will contribute to the attainment of goals of the organizations concerned.

Part III of the draft pertaining to permanent observer missions to international organizations 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.

All States should be enabled, if they wish to do so, to co-operate with the universal international organizations, and in particular with the United Nations. This will be of benefit both to the States concerned and to the organizations themselves. It is worth mentioning that numerous provisions of the Charter of the United Nations, as well as many resolutions of the United Nations organs are addressed to States in general, and not only to Member States. The attainment of the purposes of the United Nations requires, therefore, that all States willing to co-operate with the Organization should be permitted to contribute to the efforts undertaken by the United Nations. Unjustified and inadmissible is the practice under which only certain States have been allowed to establish permanent observer missions to the United Nations, while some other States, which are able and willing to co-operate with the United Nations (e.g. the German Democratic Republic) are prevented from establishing such missions.

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. 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. Such a discrimination would be incompatible with the principle of sovereign equality of States and the principle contained in *article 75* of the draft.

It is to be hoped that the articles on permanent observer missions will serve in the future as a solid ground for the establishment of permanent observer missions to the United Nations and, as appropriate, to other international organizations of universal character by those States which are not willing, because of the scarcity of their human or material resources, to assume the burden of responsibilities arising out of a full membership. Permanent observer missions would enable those States to benefit from co-operation with the universal international organizations and to contribute to the attainment of the aims of those organizations.

As to part IV of the draft articles concerning delegations of States to organs and to conferences, the Government of the Polish People's Republic is of the opinion that the codification of these matters should primarily aim at systematizing the existing rules and filling the existing gaps. The Government of the Polish People's Republic

will 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.

Spain

OBSERVATIONS COMMUNICATED BY LETTER DATED 23 JUNE 1971 FROM THE PERMANENT MISSION TO THE UNITED NATIONS

[Original text: Spanish]

General observations

(a) The draft articles set out to regulate the relations between States and international organizations in their entirety: that is to say, not only the relations arising between the States members of the organization and the organization itself, but also the relations arising, though not always in a direct form, between those States and the organization's host State.

From this point of view it is doubtful whether the draft articles, in their present form, afford an adequate guarantee of the interests at stake in the diplomacy carried on in international organizations. That is the position if we bear in mind the characteristics which distinguish this form of diplomacy from traditional bilateral diplomacy.

The law which regulates bilateral diplomatic relations seeks to protect the two mutually complementary interests at stake: the sending State's interest in the unfettered performance of a series of functions in relation to the receiving State, and the receiving State's interest that there should be no abuse or over-stepping of authority in the performance of those functions in relation to itself.

With these two complementary aims in view, international law has prescribed a set of advantages which the receiving State grant to the sending State and a set of safeguards against any abuse is the performance of functions. These safeguards are applied by then receiving State directly and immediately in relation to and against the sending State; they are the declaration of *persona non grata*, refusal to permit the performance of functions not sanctioned by general international law, and reciprocity.

In contrast, the diplomacy carried on in international organizations involves a number of interests which are neither complementary nor related to one another. On one side is the sending State's interest in freely performing a series of functions within the organization together with its member States. The free performance of those functions has to be guaranteed by the host State, although the functions are not performed in relation to it and it may not maintain bilateral relations with the sending State, or even recognize the latter as a State or acknowledge its Government. The safeguards which are available to the sending State and to the host State are not of direct or immediate application.

In the draft articles under discussion, the guarantees which exist in bilateral diplomacy by virtue of its very nature have not been included because they are inoperative. The guarantees laid down in articles 44, 45 and 50 seem on the whole to have less force than can be ascribed to those embodied in the international law of traditional diplomacy.

(b) The approach made in the draft articles—that of following the 1961 Vienna Convention on Diplomatic Relations as closely as possible in defining the advantages of permanent missions and their members—is an acceptable one. In principle, agents who perform a diplomatic function permanently should not differ substantially in status according to whether they perform that function in bilateral diplomacy or in an international organization.

It is therefore considered that the draft articles should indeed keep as closely as possible to the 1961 Vienna Convention in enumerating the diplomatic advantages of missions and their members.

There is no doubt that the 1961 Convention has already begun to show its flaws and omissions. However, no attempt should be made in the draft articles to remedy those defects unless they are fundamental and obvious; in this way it will be possible to avoid creating any basic difference between the status conferred on permanent missions and that of traditional diplomatic missions.

Any differences that may appear in the draft articles in the matter of advantages should be dictated solely by the *sui generis* position of the host State in granting those advantages—a position which is radically different from that of the receiving State in bilateral diplomacy.

Specific observations

Article 1

It is assumed that the words "For the purposes of the present articles" will be amended to read "For the purposes of the present Convention" if the Commission's draft articles take shape as a convention. That was the case with the 1961 Vienna Convention on Diplomatic Relations and the 1969 Convention on Special Missions.

Subparagraph (a)

Since the draft is intended for a convention on representatives of States to international organizations, a more precise definition of the term "international organization" would be desirable. Merely to define it as an "intergovernmental organization" may have been adequate in the context of the 1969 Vienna Convention on the Law of Treaties, whose scope excludes treaties concluded with international organizations, but it is insufficient in the present draft. For this purpose the definition proposed by the Special Rapporteur in his third report—"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"¹—seems more satisfactory, possibly with the words "a legal personality" expanded to read "an international legal personality".

Subparagraph (b)

The definition of an "international organization of universal character" which is given raises a series of difficult political problems. If the draft articles did not deal with the legal status of international organizations, those problems could be avoided or minimized; if, on the other hand, the articles were made into a comprehensive instrument which dealt with that subject along with the rest, the political problems involved might become acute, making this subparagraph one of those most likely to complicate the progress of discussion on the draft. In addition the question arises whether it is really sound to confine the scope of the convention to international organizations of universal character.

Subparagraph (d)

It is a generally accepted principle that the word defined should not appear in the definition. A more satisfactory definition should therefore be sought.

Subparagraph (h)

The wording of this subparagraph exhibits a defect which was present in the 1961 Vienna Convention, but which is more serious in the present draft articles: namely, the lack of a definition of "diplomatic status".

In bilateral diplomacy, the international legal status of diplomat is acquired as a result of two wills: the will of the sending State that a person shall have that status, and the will of the receiving

State to accept the person in that status. It is the meeting of these two wills which determines the attribution of the international status of diplomat to a particular person.

In the diplomacy carried on in international organizations, on the other hand, the international legal status of diplomat is acquired solely through the will of the sending State to attribute that status to the person concerned. In diplomatic practice, the organization does not make any expression of will to accept that status; consequently the status is not the result of a meeting of wills but the consequence of a single will.

The use in the 1961 Convention and in the draft articles of the same wording² to indicate those persons who acquire diplomatic status may give the impression that the diplomatic status is the same in both cases. It would therefore be useful to insert some indication of the particular nature of the acquisition of diplomatic status by the persons to whom the draft articles are to apply.

Such an explanation of what is meant by the word "diplomatic" is more of a necessity in the draft articles than in the 1961 Convention; that Convention did no more than codify the practice of centuries, whereas the draft articles in preparation will of necessity break new ground in many of their provisions.

Furthermore it would be desirable to include the head of the permanent mission among the members of the diplomatic staff, as was done in the 1961 Convention. This would make it possible to simplify considerably the wording of the articles concerning privileges and immunities, which apply equally to the permanent representative and to the other members of the diplomatic staff of the mission. The subparagraph would then read as follows:

"The 'members of the diplomatic staff' are the permanent representative and the members of the staff of the permanent mission, including experts and advisers, who have diplomatic status."

Subparagraph (j)

No reason is given for the change in the wording of this subparagraph from that of the corresponding provision of the 1961 Convention. Although the present text is consistent with that of the Convention on Special Missions, the definition given in the Convention on Diplomatic Relations seems more appropriate.

Article 2

The wording of paragraph 2 is somewhat inapt; either a simpler and more intelligible text should be found, or the paragraph should be deleted as redundant. Non-universal organizations can make use of the provisions of the Convention without it being necessary to say as much in the text. In a sense this paragraph tacitly acknowledges that it may have been a mistake to exclude non-universal international organizations from the scope of the draft articles.

Article 5

After perusal of this article it is not clear what purpose the draft is intended to serve. Under this article it would be possible to conclude a treaty laying down less favourable provisions than those of the draft articles. This implies the admission that the provisions of the draft may not be strictly necessary for the satisfactory conduct of relations between States and international organizations: in other words, that those provisions are not dictated by functional requirements as in the case of the existing conventions on diplomatic matters. It would therefore seem more appropriate to word the article along the lines of article 73, paragraph 2, of the 1963 Vienna Convention on Consular Relations.

² n.b. the expression "diplomatic rank" in article 1, subparagraph (d), of the 1961 Vienna Convention on Diplomatic Relations and the expression "diplomatic status" in article 1, subparagraph (h), of the draft articles on representatives of States to international organizations are alike rendered by "la calidad de diplomático" in the Spanish text.

¹ *Yearbook of the International Law Commission, 1968*, vol. II, p. 124, document A/CN.4/203 and Add.1-5, chap. II, article 1 (a).

Article 6

The inference from the present wording of this article is that the establishment of permanent missions is a discretionary right of the States members of the organization which could be exercised even against the organization's express wishes. Moreover the reference to article 7, which contains a non-exhaustive list of the functions of a permanent mission ("consist *inter alia* in . . ."), might imply that the permanent mission could perform no functions other than those enumerated in that list.

It would therefore seem more appropriate to use a form of words on the following lines:

"To the extent prescribed by the relevant rules or the practice of the Organization, member States may establish permanent missions to the Organization for the performance of their functions."

Article 7

This article represents perhaps the fundamental point of the draft articles, for it must be remembered that all diplomatic law centres on the performance of a function. Its wording probably presents greater difficulties than did that of the corresponding article of the 1961 Vienna Convention. Whereas for the latter the International Law Commission was able to draw on an ample supply of learned commentaries and the diplomatic practice of centuries, both of these are lacking in the case of diplomatic functions performed in international organizations.

Subparagraph (a)

There is a contradiction between the wording of this subparagraph ("Representing the sending State *in* the Organization") and the definition of a permanent mission given in article 1, subparagraph (d) ("a mission of representative and permanent character sent by a State member of an international organization *to* the Organization"). It would seem more correct to use the preposition "to", as more in keeping with the notion of the international legal personality of international organizations (with its concomitant right to send and receive legations) and with the terminology of the draft articles.

Subparagraph (b)

The function of liaison referred to in this subparagraph is not a separate function in itself. Liaison activities are merely a consequence of the function of representation. The subparagraph should therefore be deleted.

Subparagraph (c)

In order to maintain consistency with the corresponding provision of the 1961 Vienna Convention, the word "Negotiating" should be used instead of the words "Carrying on negotiations".

Subparagraph (d)

"Ascertaining activities" is not, strictly speaking, a function but a means of duly performing the function of reporting, since it would clearly be difficult to make a report without ascertaining the facts. This inaccuracy, which originates from the Convention on Diplomatic Relations and reappeared in the Convention on Consular Relations, may be difficult to correct.

Furthermore the permanent mission also has certain reporting duties to the organization in connexion with the latter's aims and programmes.

Subparagraph (e)

The inclusion in the 1961 Vienna Convention of a function of promoting international co-operation does not seem sound, for no such diplomatic function exists. What does exist in the present state of organization of the international community is the principle that it is necessary to co-operate in promoting international peace, a principle which should inspire the performance of diplomatic

functions in both bilateral and multilateral relations. Thus the existence of a function of promoting co-operation, as specified in this subparagraph, is open to question. It is more a matter of a principle which should guide the performance of the diplomatic functions of a State in an international organization.

On the other hand there does appear to be one separate function which is not mentioned in the draft article. This consists in the performance of particular activities in pursuit of the aims of the organization: in other words, the functions which are performed by the members of a permanent mission as members of committees or other organs of the organization, and which are not a direct expression of the interests of the State that those persons represent. Thus there seems to be a function of realizing the aims and purposes of the Organization. The International Law Commission should consider how best to describe the activities mentioned.

Lastly, there seems to be no justification for departing from the list given in article 3 of the 1961 Vienna Convention by excluding all reference to the function of protection. Admittedly the function of diplomatic protection, in the strict technical sense of procedural action governed by international law to protect the interest of the State or of its nationals, is not fully operative in international organizations. However, although—as the International Court of Justice has acknowledged—an international organization may, as a subject of international law, perform a protective function and claim that a State is internationally liable for damage caused to the organization's officials, the organization itself may also cause damage to States or private individuals and be the defendant in an international claim. Accordingly a permanent mission can and should also perform a function of protection against the organization in respect of any damage which the organization may cause to the sending State or to its nationals. The International Law Commission should give its attention to this point as well.

Article 9

Paragraphs 1 and 2 might be combined into a single paragraph reading: "A member of the permanent mission of a State may . . .", since, under the definition given in article 1, subparagraph (f), the "members of the permanent mission" include the permanent representative.

Moreover this article does not correspond fully to article 5, paragraph 3, of the 1961 Vienna Convention; the latter requires that the person with double accreditation should be a member of the diplomatic staff, whereas under the draft articles a member of the administrative and technical staff or even of the service staff [see the definition given in article 1, subparagraph (g)] may be doubly accredited. In order to preserve the parallelism between the provisions of the two Conventions, it might perhaps be appropriate to amend the words "A member of the staff of a permanent mission" to read "A member of the diplomatic staff of a permanent mission". In this case too, the paragraphs 1 and 2 of the present article could be combined into a single paragraph provided that the definition proposed for article 1, subparagraph (h), was accepted. The paragraph would then begin as follows: "A member of the diplomatic staff of a permanent mission of a State may . . .".

Article 12

The decision who is to issue the credentials of the permanent representative of a State lies within the competence of that State; the present text could be taken as interference in its domestic affairs, particularly since there are no similar provisions in the 1961 Vienna Convention.

It would therefore seem more appropriate to word the article as follows:

"The credentials of the permanent representative shall be issued in accordance with the internal rules of each State and the practice of the Organization and shall be transmitted to the competent organ of the Organization."

Furthermore the question may be asked whether the credentials should not be "submitted" instead of being "transmitted".

Article 13

As indicated in paragraph 7 of the International Law Commission's commentary, there is room for doubt as to the interpretation which might be placed upon the present wording of the article with regard to its scope. The wording given in that paragraph seems clearer and sounder. In any case the terminology should be made consistent, since the title speaks of "accreditation to" and the text speaks of *representation in*.

Article 14

It is open to question whether this article is really necessary and whether it would not be better to leave it for inclusion in the draft convention on treaties with international organizations.

Article 16

It would be desirable to establish some kind of safeguard, however limited, for the host State in the event of non-compliance by the sending State with the provisions of this article. In this connexion, attention is drawn to the opinion expressed in paragraph 8 of the commentary. In any event it is doubtful whether the system of consultations provided for in article 50 is in itself a sufficient guarantee.

Article 19

In establishing an order of precedence, the article speaks only of permanent representatives and does not mention *chargés d'affaires*. For the latter, either of the following two rules might be adopted: that they should take the position which falls to the permanent representative whom they are replacing, or that they should be placed after permanent representatives. The second alternative seems the more appropriate. It might be desirable to deal with this point in the article, although there is no parallel rule in the 1961 Vienna Convention.

Article 23

In the first line of paragraph 1, the word "either" should be deleted.

Article 25

Paragraph 5 of the commentary undoubtedly makes some valid points.

The third sentence in paragraph 1 of the article does not appear in the corresponding article of the 1961 Vienna Convention, although it does in the 1969 Convention on Special Missions.

The omission of that sentence from the 1961 Vienna Convention—which has been criticized by a considerable body of juristic opinion—means that there would be an important difference between bilateral diplomacy and diplomacy in international organizations. This difference would give rise to difficult problems where the premises of the permanent mission were located within the premises of a diplomatic mission.

In any case, the words "or, in his absence, of another member of the diplomatic staff of the permanent mission" should be added at the end of paragraph 1.

Article 26

Paragraph 3 of the commentary states an undoubted fact. However, any attempt to correct the inequality in question would create a fundamental difference between the 1961 Vienna Convention and the draft articles. At all events, if the Commission does manage to incorporate in the article the element of progressive

development referred to in the commentary and in due course the text is approved, it would be desirable to add a parallel rule to the 1961 Convention.

Article 28

The phrase which has been added to the wording taken from the 1961 Vienna Convention should be retained for the reasons given in paragraph 2 of the commentary.

Article 29

Those phrases of this article which, as pointed out in paragraph 4 of the commentary, have been added to the wording taken from the corresponding article of the 1961 Convention should be deleted. In point of fact the additions are unnecessary, since the expression "diplomatic mission" can have a general meaning in addition to the specific meaning it has in the context of traditional bilateral diplomacy. The added words introduce an unwarranted difference between the draft articles and the 1961 Vienna Convention. Furthermore, if the text of article 27, paragraph 1, of the 1961 Convention is to be followed verbatim, there is no clear reason for replacing the word *radiquen* by the words *se encuentran* in the Spanish text.

Again it is not clear why the expression "diplomatic bag" should not be used when in fact the bag has diplomatic status. The confusion referred to in paragraph 6 of the commentary could be avoided by speaking of the "diplomatic bag of the permanent mission". Moreover it should be remembered that article 1 does not hesitate to describe persons who have diplomatic status as "members of the diplomatic staff", in the same terms as are used in the 1961 Convention, even though they differ from the diplomatic agents of traditional missions.

The same may be said of the deletion of the adjective "diplomatic" to describe couriers.

Article 30 et seq.

If the proposed definition of "members of the diplomatic staff" as including the permanent representative is accepted, the formulation of these articles can be simplified.

Article 32

Paragraph 1, subparagraph (d), of this article does not appear in the corresponding article of the 1961 Vienna Convention. In the general terms in which it is expressed, it embodies an extremely dangerous principle. An exception to immunity for traffic accidents should be allowed solely where a diplomat who is under a duty to be covered by adequate insurance is not so covered through his own fault or negligence. Where this is not the case the immunity should be maintained, particularly if approval is given to article 34 of the draft, which prescribes a waiver of immunity in certain circumstances.

To make an exception to immunity in the case mentioned means laying down a principle which could be dangerous. An accident can easily be engineered or even simulated, particularly where, as in the subparagraph in question, the damage referred to is not confined to personal injury but also includes material damage. This could be an easy means of attacking the independence and inviolability of the diplomat through civil claims for damages for which there might be no basis in reality. This is a matter to which the International Law Commission should give more attention, considering that various countries are gradually increasing the penalties for causing traffic accidents.

Article 34

Neither the 1961 Vienna Convention nor the 1969 Convention on Special Missions contains a rule similar to the one laid down in this article. Such a rule was expressly excluded from both Conventions, having met with strong opposition from various States. Although the opposition probably still exists, there seem to be stronger reasons

why the rule laid down in this article should be included in the present draft; a particular reason is the special situation of the host State. Article 34 could be an important guarantee and safeguard for the host State in its peculiar situation in relation to States members of the organization.

Article 35

Paragraph 3 of the commentary appears to refer only to paragraph 5 of the article. If so, consideration might be given to the deletion of paragraph 5. A case could nevertheless be made for keeping that paragraph in the interests of closer consistency with the 1961 Convention.

Article 38

If this article is intended to reproduce article 36 of the 1961 Convention verbatim, there seems to be no reason to alter the Spanish text of paragraph 1 by replacing the word *de* by the words *por lo que respecta a*.

Article 43

In view of paragraph 4 of the commentary, it seems advisable to leave the wording of the article as it now stands in the draft.

Article 44

The use of the phrase "of the present articles" might suggest that the article refers solely to section 2 of the draft. Consequently, if the draft articles become a convention, this phrase will have to be amended to read "of the present Convention". The statements made in paragraphs 6 and 7 of the commentary do not suffice to dispel the ambiguity.

Article 45

Paragraph 2 of this article is not carried to its logical conclusion, since no provision is made for action by the host State in the event that the sending State refuses to waive the immunity of or to recall the official who has gravely violated the criminal law of the host State. The consultation procedure laid down in article 50 may not be sufficient.

Article 47

This article does not seem very aptly worded in that it lumps together the end of the functions of the diplomatic staff of a permanent mission with the final or temporary end of the mission's own existence. No such confusion arises in article 43 of the 1961 Convention.

Article 48

The introduction of the phrase "in case of emergency", which does not appear in article 44 of the 1961 Convention, would seem to be justified but there seems to be less justification for the requirement of a prior request, which could give rise to prevarication or excuses. The host State should always be prepared to grant facilities to members of permanent missions, whether requested to do so or not.

Article 50

The International Law Commission should carefully consider whether the consultations provided for in this article afford a proper safeguard for the interests of the sending States and of the host State respectively: that is to say, the interest of the sending States that the permanent missions should be able to perform their functions with sufficient independence and freedom, and the interest of the host State that there should be no abuses either in the performance of those functions or in the enjoyment of diplomatic privileges.

Sweden

(a) PART I AND SECTION 1 OF PART II OF THE PROVISIONAL DRAFT
OBSERVATIONS COMMUNICATED BY LETTER DATED 1 SEPTEMBER 1969
FROM THE ROYAL MINISTRY OF FOREIGN AFFAIRS

[Original text: English]

General remarks

1. 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.

2. The establishment of permanent missions by members of an international organization is, in principle, a matter for arrangement between the organization concerned, or its members, and the host State. Only on the basis of a special agreement between these parties can a State member of an organization claim a right to establish a permanent mission to the organization. Article 6, which provides that "member States may establish permanent missions to the Organization . . .", is, of course, quite in order if the ultimate form of the draft articles is to be a code, but does not seem acceptable as a general provision to be included in a convention which would apply to any organization falling within the definitions in article 1, subject only to the reservations contained in articles 3-5.

3. With regard to the privileges and immunities of permanent representatives of States to international organizations, a large measure of uniformity has already been achieved in practice, since such representatives have generally been accorded the same treatment as diplomatic agents in the host State, in most cases by headquarters agreements or other special arrangements. Without wishing to propose any change in the present status of permanent representatives, the Swedish Government is of the opinion that it is not axiomatic that full diplomatic privileges and immunities should be granted in every future case. It should be regarded as the maximum that can be asked for, rather than as the standard required. In its view, the general rules to be adopted in this field could be limited to granting mainly functional immunities, leaving it to the member States and the host State of any international organization to extend full diplomatic immunities to permanent missions by special agreement, if they choose to do so.

4. The following observations are submitted on individual draft articles, viewed as being intended for a code and not a convention.

Observations on particular articles

Article 1

The purpose and meaning of the expression "representative . . . character" as used in the definition of a "permanent mission" in article 1 (a) are not clear. 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, 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.

Although the status of a permanent mission representing the host State in an international organization may, in some respects, be different from that of other permanent missions, it is nevertheless believed that such a mission should be included in the term "permanent mission" as used in the draft articles. Since the expression "sent . . . to the Organization" in article 1 (*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 is suggested that those words should be replaced by "representing in the organization".

The definition in article 1 (*h*) of the term "members of the diplomatic staff" should be more precise. As appears from paragraph 6 of the commentary, this term is intended to include not only staff members having diplomatic titles but also experts and advisers assimilated to them. However, the definition lays down as a condition for such assimilation that the persons concerned should have "diplomatic status". It is believed that this condition, the meaning of which is not clear, can be dispensed with, and that article 1 (*h*) might be changed to read:

"(*h*) 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."

Article 9

The functions specifically mentioned in article 9—diplomatic and consular functions and special missions to a State—should presumably be regarded as examples rather than as an exhaustive enumeration of the functions which may be performed by a permanent representative and any other member of a permanent mission outside the field of his activities in that capacity. It can hardly be intended, for instance, that a permanent representative should be prevented from acting either as head of a permanent mission to an international organization of which the sending State is not a member [this case does not seem to be covered by article 8, since such a mission does not fall within the definition of a permanent mission in article 1 (*d*)] or as a delegate to an international conference (this case is presumably not covered by the expression "special mission of that State to the host State or to another State" in paragraph 1 of article 9).

It would seem, however, that article 9 should preferably deal only with the performance of diplomatic and consular functions, leaving out all questions regarding temporary assignments to other functions, such as special missions. If the scope of the article is thus limited, there would be less reason for uncertainty as to the purpose and indirect implications of the article. It is accordingly proposed that the words "or special" should be deleted after "member of a diplomatic" in paragraphs 1 and 2 of the article and that the title of the article should be changed to read: "Performance of diplomatic and consular functions by a member of a permanent mission".

Article 14

There is no objection to the principle underlying article 14 that permanent representatives should be regarded as being invested with powers similar to those of heads of diplomatic missions as regards the negotiation or conclusion of treaties.

The first paragraph of the article contains provisions similar to those of article 7, paragraph 2 (*b*), of the Vienna Convention on the Law of Treaties. However, the expression "adopting the text of a treaty" is not ordinarily used in connexion with bilateral treaties, and in the absence of any definition in the present draft articles, may lend itself to an interpretation different from that intended in the Vienna Convention. To avoid any misunderstandings it would seem that the word "negotiating" should be substituted for the words "adopting the text" in paragraph 1 of article 14.

Because of the differing opinions on the nature of agreements between international organizations and member States and on the legal personality of international organizations, it is suggested that the word "treaty" in article 14 should be replaced by the more neutral expression "agreement".

The Swedish Government is not convinced of the wisdom of the formula adopted in article 7 paragraph 1 (*b*) of the Vienna Convention on the Law of Treaties, and it has similar views on the clause "unless it appears from the circumstances that the intention of the Parties was to dispense with full powers" in paragraph 2 of article 14. It would be in favour of deleting this clause.

Article 18

It is 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. It seems desirable that the latter designation should, as a rule, be reserved for the temporary head of a diplomatic mission, and not be unnecessarily extended to other missions.

(b) SECTION 2 OF PART II OF THE PROVISIONAL DRAFT

PRELIMINARY OBSERVATIONS COMMUNICATED BY LETTER DATED 17 DECEMBER 1970 FROM THE ACTING HEAD OF THE LEGAL DEPARTMENT OF THE ROYAL MINISTRY FOR FOREIGN AFFAIRS

[Original text: English]

Article 22

Some of the draft articles purport to impose obligations on the organization concerned. In paragraph 2 of the commentary to article 22, the question is raised whether it is desirable that the obligations of international organizations should be stated in the draft articles. The question apparently needs further consideration. According to article 3,

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

Paragraph 5 of the commentary to article 3 states that

"the expression 'relevant rules [. . .]' is broad enough to include all relevant rules whatever their source: constituent instruments, resolutions of the organization concerned or the practice prevailing in that organization".

In such circumstances it becomes somewhat questionable to speak of "obligations". It seems that they could be invalidated simply by unilateral action—resolutions, practice—taken by the organization.

Article 26

In paragraph 3 of the commentary to this article attention is drawn to

"the inequality resulting from the provisions of paragraph 2 as between a State that was able to buy property to house its mission, or the mission staff, and a State which found itself obliged to lease premises for the same purpose".

The Commission would like to receive the views of Governments on the matter.

Paragraph 2 of this article provides that exemption from taxation in respect of mission premises does not apply to dues and taxes payable by persons contracting with the sending State. The inequality mentioned would, therefore, 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.

Article 32

In paragraph 4 of the commentary, the views of Government are requested on paragraph 1 (*d*) which is placed within brackets because agreement on this provision could not be reached by the Commission.

Paragraph 1 (*d*) provides, in its context, that the immunity from civil and administrative jurisdiction does not cover "An action for damages arising out of an accident caused by a vehicle used outside the official functions of the person in question".

The Swedish Government is in favour of a provision along these lines. There is 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.¹ It is true that a corresponding provision was not included in the 1961 Vienna Convention on Diplomatic Relations, but this can hardly be a decisive argument. The Convention and the draft articles are not quite comparable in this respect. The Convention deals with immunities accorded by a receiving State, the draft articles with immunities accorded by a host State, and the problems caused by immunities may well be much greater in the latter than in the former State. Furthermore, as pointed out, opinions have developed since 1961 in the direction of restricting immunity from jurisdiction, particularly in traffic cases. In the words of paragraph 3 of the Commission's commentary on article 26 "an element of progressive development" should also, according to the Swedish view, be incorporated in article 32.

Article 35

The Commission states in paragraph 3 of its commentary 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".

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.

Article 36

The Commission wishes to learn whether Governments have met practical difficulties in applying paragraph (*f*) because "it states an exception to a rule which is itself an exception" (paragraph 5 of the commentary).

The Swedish Government is not aware of any such difficulty.

Article 42

The Commission invites the views of Governments as to whether it is desirable to include a provision regarding the commencement and termination of entitlement for persons who do not enjoy privileges and immunities in their official capacity. It is noted by the Commission that the 1961 Vienna Convention on Diplomatic

Relations does not contain any specific provision on the question, whereas the 1963 Vienna Convention on Consular Relations does so in its article 53.

Prima facie it would seem preferable to have a special provision on the matter. The fact that the more recent of the two Conventions contains such a provision might perhaps also be taken as an indication that experience has shown it to be desirable.

Article 43

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.

Article 45

According to paragraph 3 of the commentary, paragraph 2 of the article is intended

"to ensure the protection of the host State in the event of a grave and manifest breach of its criminal law by a person enjoying immunity from criminal jurisdiction in the absence of the *persona non grata* procedure in the context of relations between States and international organizations".

It is open to doubt whether paragraph 2 would fulfil that expectation. Several questions may 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 those provisions without a sanction? Furthermore, is it really desirable that the recall provisions should 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"? It is one thing that he should not be prosecuted, but it is 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.

(c) PARTS III AND IV OF THE PROVISIONAL DRAFT

PRELIMINARY OBSERVATIONS COMMUNICATED BY LETTER DATED 23 MARCH 1971 FROM THE ROYAL MINISTRY FOR FOREIGN AFFAIRS

[Original text: English]

PART III.— Permanent observer missions to international organizations

Article 51

Three of the articles drafted so far deal with the "use of terms", namely articles 1, 51 and 78. As stated in its commentaries to articles

¹ 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).

51 and 78, the Commission will at the second reading review all these articles together with article 2 on the "scope of the articles" in order to co-ordinate them and make such adjustments as may be necessary.

It may be useful in that connexion to point out that, while according to article 1 subparagraph (a), an "international organization" means "an intergovernmental organization", it seems obvious, in view of article 2 which limits the scope of the articles to "international organizations of universal character", that when the term "international organization" is used in the substantive articles of the draft, it is in fact intended to mean not only that the organization should be intergovernmental as indicated in the definition in article 1, but also universal in character, as indicated in article 2. It is suggested that this point should be made clearer.

Besides this problem of drafting, the question might perhaps be further examined whether the universal—in contradistinction to regional—character of an organization should be the criterion for the applicability of the draft articles to that organization. The elaborate provisions drafted by the Commission and the substantial privileges and immunities accorded in the draft seem to presuppose that the draft articles are intended to apply only in the case of organizations of considerable importance. It is doubtful whether the importance of an organization can be measured simply by the geographical extension of its membership or responsibilities. Indeed, regional organizations may be found which are far more important than some organizations of "universal character". From that point of view it might be prudent not to take a final decision regarding the scope of the articles until the Commission has taken up and studied in depth the status of the organizations themselves.

In any case, the present definition of an international organization of universal character as an "organization whose membership and responsibilities are on a world-wide scale" is hardly precise enough and should be given further consideration.

Finally, attention is drawn to the observations previously made by Sweden regarding article 1 on the use of terms (see section (a) above).

Article 52

In the Swedish general remarks on the first twenty-one articles of the draft it is stated:

"The establishment of permanent mission by members of an international organization is, in principle, a matter for arrangement between the organization concerned, or its members, and the host State. Only on the basis of a special agreement between these parties can a State member of an organization claim a right to establish a permanent mission to the organization."

This principle applies, *a fortiori*, to the establishment of a permanent observer mission by a non-member State. Article 52 therefore seems unacceptable. There is no valid reason why the articles alone should create a right, even if residuary, for non-member States to be represented at the organization. The article ought to be omitted or replaced by an article to the effect that the establishment of a permanent observer mission is left to agreement between the interested parties. Such an agreement would not necessarily have to be explicit but could also result from practice between the parties.

Article 53

If the establishment of permanent observer missions were left to agreement between the interested parties, this article, too, could be omitted or could be revised so as to make reference to the agreements between the parties. The functions of a mission would be specified in each case by the agreement, whether explicit or developed by practice.

Articles 54-77 (in general)

Sweden would prefer that these articles also be omitted and the substance of them left to be settled by explicit agreement or by practice. If it is felt that the articles should contain some reference to

permanent observer missions, it seems sufficient to draft an article stating generally that in case there exist permanent observer missions at an organization, these missions should enjoy such facilities, privileges and immunities as are necessary for the fulfilment of their functions.

Regarding some of the articles in particular, the following observations are submitted.

Articles 55, 56 and 60

These articles confer upon the sending State wide discretionary powers regarding the appointment of members of a permanent observer mission. The International Law Commission has in fact applied to observer missions the substance of the corresponding rules concerning permanent missions of members States. This is hardly justified. There is a considerable difference between a State having the rights and duties of membership and taking part in the activity of the organization and an outside State, however great its interest may be in following the work of the organization. If a non-member State wishes to have a permanent mission at an organization, it would seem reasonable that the size and composition of such a mission should be matters to be agreed upon by the sending State, the organization and the host State. This view is strengthened by the fact that in this field there exists no *persona non grata* procedure.

Article 62

The Swedish observations on article 18 (reproduced above) apply.

Article 65-75

In the Commission's commentary to article 65 it is stated:

"Article 65 reproduces the provisions of article 22 except as regards the words 'full facilities', which have been replaced by the words 'facilities required' in the first sentence. In introducing this change, the Commission has sought to reflect the difference, both in nature and scope, between the functions, obligations and needs of permanent missions, on the one hand, and those of permanent observer missions, on the other, which makes it unnecessary for the latter to be given the same facilities as the former."

In view of this emphatic pronouncement on the difference between the functions and needs of permanent missions and those of permanent observer missions, it is surprising that in the following articles of this section, the Commission has chosen without stating the reasons for such a decision to apply to permanent observer missions the corresponding articles on permanent missions.

It is hoped that the Commission, if it considers that the section on facilities, privileges and immunities of permanent observer missions should be retained, will at the second reading re-examine the section in the light of the passage quoted above.

Article 76

The Swedish observations on article 45 (reproduced above) apply *a fortiori* with respect to observer missions.

PART IV.—Delegations of States to organs and to conferences

General remarks

The subject-matter of part IV would be better indicated if, in the title, the word "organs" were replaced by the words "meetings of organs" or "sessions of organs". Part IV is in fact concerned with delegations to meetings, sessions or conferences of limited duration in contradistinction to the permanent missions dealt with in parts II and III.

However, it is far from evident that meetings of organs of an international organization and conferences convened by or under the auspices of an international organization should be dealt with on the same level and be subject to the same rules. Although generalization may be dangerous, it may perhaps be said that meetings of organs are part of the regular activities of the organization, while conferences are convened now and then, when it is considered useful. Furthermore, if general rules are to be drafted for international conferences, it does not seem particularly relevant whether or not the conference is convened by an organization of universal character. The functional needs of a conference convened by a regional organization or by one or more States would hardly differ from those of a conference called by an organization of universal character. It would therefore seem more practical to deal with international conferences as a separate matter. This question which in itself is comprehensive would then be treated in its proper context. At the same time part IV, if it were limited to meetings of organs of international organizations, could be greatly simplified.

In the present draft, part IV is to a large extent based upon the Convention on Special Missions. It is doubtful whether that approach to the matter is justified. A special mission is a mission sent by one State to another to deal with specific questions. It is not apparent why the functional needs of such a mission should be substantially the same as those of delegations to international conferences or to meetings of organs of international organizations. One would have thought that a safer method would have been to study the practice of these organs and of international conferences and build on the experience to be found in such practice. Without such a study of practice the doubt will persist whether all the privileges and immunities accorded in the draft are necessary for the proper functioning of the organs or the conferences.

Observations on particular articles

Article 78

See the observations on article 51 above.

Article 79

The content of the article seems to belong in part I (General provisions) and should be included in article 5.

Article 83

When advanced as a general residuary rule, the contents of this article, 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. It is hard to see why, in principle, several States should not be considered free to send one (joint) delegation to represent them all. 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.

As a residuary rule referred to above need not be expressly stated, the article could be omitted and the matter left to rules of procedure.

Article 86

The article should be omitted. It is unnecessary and in any case too rigid.

Article 89

These provisions seem unduly detailed.

Article 91

The article is superfluous. In substance it provides only that the rules of international law regarding the status of heads of State and persons of high rank should be respected.

Article 94

It is doubtful if 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. It is common that delegations are housed in hotels in different parts of a conference site. In the case of a fairly big conference, the task imposed upon the authorities of the host State by these articles might well be impossible to fulfil. Much depends of course on what precise meaning is given to the term "all appropriate steps".

It would be advisable to reconsider the articles in order to formulate the obligations imposed by them with more precision and, at the same time, limit them to what it is possible to fulfil.

Article 99

See the observations on article 94 above.

Article 100

Sweden would prefer alternative B of this article.

Article 105

See the observations on article 94 above.

Article 112

See the observations on article 45 (see section (b) above).

Turkey

PARTS III AND IV OF THE PROVISIONAL DRAFT

OBSERVATIONS COMMUNICATED BY "NOTE VERBALE" DATED 13 APRIL 1971 FROM THE PERMANENT REPRESENTATIVE TO THE UNITED NATIONS

[*Original text: French*]

The Turkish Government congratulates the International Law Commission on the results of its work on the draft articles on relations between States and international organizations. It has examined the draft with great interest and submits herewith its observations on the articles adopted in 1970.

PART III.—Permanent observer missions to international organizations

Section 1.—Permanent observer missions in general

Article 51

The term "international organization" in subparagraph (a) is broad and not very clear. For greater precision, the words "of universal and political character" should be added after "international organization".

Article 52

The words "in accordance with the rules or practice of the Organization" may give rise to differing interpretations. To improve the wording it is suggested that they be replaced by the words "in accordance with the rules applicable to the Organization".

Article 53

The functions of a permanent observer mission, as listed in the article, have not yet been clearly defined in practice. A list of functions of this kind may have adverse effects on current developments in this field. Hence it is Turkey's view that there is no point in retaining the article. Moreover some of these functions do not concern an observer mission. Either the article or its title needs to be reworded in order to bring them into harmony. As for "reporting . . . to the Government of the sending State", it is for the permanent observer mission itself to choose the most suitable method of informing its Government. The words "and reporting . . ." are therefore superfluous, assuming that article 53 is to be retained.

Article 54

The term "accreditation", which is used for diplomatic missions, is not appropriate for permanent observer missions. Turkey would prefer the term "sending" to "accreditation" so as to cover the situation of permanent observer missions.

Article 58

The deletion of the article is suggested on the same grounds as those adduced in the case of article 53.

Article 62

Turkey suggests that the expression "*Chargé d'affaires ad interim*" used for diplomatic missions be replaced by the expression "acting head of the permanent observer mission" in order to bring out clearly the difference between the two kinds of mission.

Article 64

Turkey would like to see the words in square brackets retained both in the title and in the text of article 64.

*Section 2.—Facilities, privileges and immunities of permanent observer missions**Article 68*

In general, Turkey supports the view that the privileges and immunities accorded to permanent observer missions should be confined to the facilities necessary for the performance of their functions and is accordingly inclined to favour the deletion of article 68. It is, of course, always open to the host State to grant this freedom to permanent observer missions. If the article is retained, it would be desirable to add the words "to the extent necessary for the performance of their functions".

Article 76

Turkey cannot accept the reference to the provisions of article 45 unless the word "manifest", in paragraph 2 of that article, is deleted and a provision concerning the *persona non grata* procedure is included.

PART IV.—Delegations of States to organs and to conferences

Article 78

Turkey 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. Acceptance of the text as it stands would represent a considerable departure from the principle that privileges and immunities should

be accorded to the extent necessary for the performance of the respective functions.

Apart from this general observation, it considers that the term "international organization" in article 78 (a) should be amplified in the light of its comments on article 51 (a), and that in view of the temporary character of the functions of the delegations concerned, subparagraphs (g), (h), (i), (j), and (k) should be deleted.

Article 88

In view of the subject-matter of article 88, there is no justification for retaining it in the draft convention and Turkey accordingly suggests that it be deleted.

Article 89

Paragraph 4 of article 89, on notifications, seems inadequate from the practical standpoint. Since it is the host State which grants privileges and immunities it is to the host State that the notifications should be sent first.

Article 91

Turkey considers that article 91 is out of place in the convention. This matter should be left to international law to be dealt with in accordance with custom.

Article 94

Paragraphs 1 and 2 would be very difficult to apply, although in appearance they may be worth retaining. They would seem to relate mainly to hotels. The provisions relating to the premises occupied by the mission cannot be applied to commercial buildings. To avoid any possible dispute, Turkey would suggest that the two paragraphs be either deleted or at least redrafted so as to diminish the obligation therein laid down.

Article 100

Turkey prefers alternative B of draft article 100 on immunity from jurisdiction.

Article 101

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.

Union of Soviet Socialist Republics

PART I AND SECTION I OF PART II OF THE PROVISIONAL DRAFT
OBSERVATIONS COMMUNICATED BY "NOTE VERBALE" DATED 19 DECEMBER 1969 FROM THE PERMANENT MISSION TO THE UNITED NATIONS
[Original text: Russian]

The Permanent Mission of the Union of Soviet Socialist Republics to the United Nations has the honour to state that the draft articles on representatives of States to international organizations (articles 1-21) do in general reflect existing practice and do not give rise to any objections of principle.

The Permanent Mission believes that in view of the representative nature of permanent missions to international organizations established by sovereign States, and also in order to ensure the normal and uninterrupted functioning of such missions, the principle of according them all the privileges and immunities which are accorded to diplomatic missions should be consistently followed throughout the draft articles, and the status of members of the staff of such missions should be analogous to the status of staff of the corresponding category in diplomatic missions.

United Kingdom of Great Britain and Northern Ireland

(a) PARTS I AND II OF THE PROVISIONAL DRAFT

OBSERVATIONS COMMUNICATED BY LETTER DATED 27 NOVEMBER 1970
FROM THE PERMANENT REPRESENTATIVE TO THE UNITED NATIONS

[Original text: English]

General

1. The project as envisaged by the International Law Commission is to study "the question of diplomatic law in its application to relations between States and intergovernmental organizations".¹ The Government of the United Kingdom have some reservations about the method which the Commission has chosen to adopt in carrying out this purpose. The Commission's approach seems to consist in treating the representatives of States to international organizations as if they were diplomatic personnel on a permanent or temporary mission, then determining what modifications of the Vienna Convention on Diplomatic Relations and of the Convention on Special Missions are called for and, finally, drafting articles apparently for inclusion in a general convention on the subject.

2. This approach gives rise to two basic difficulties. The first is as to its relationship to the considerable body of treaty provisions already covering the same ground in various ways. The second, which is connected with the first, is that the approach adopted assumes that all organizations can be treated in the same way notwithstanding the differences between them which have been reflected in the differences admittedly sometimes slight but also sometimes important, in the privileges and immunities provisions at present applying to them. These difficulties are to some extent met by draft articles 2, 3, 4 and 5 prepared by the Commission. It is true that, in accordance with these articles, the draft articles as a whole at present only relate to "organizations of universal character"; that they would not prejudice the "relevant rules" of organizations; that they would not affect existing international agreements in the matter; and that they would not preclude the conclusion of international agreements containing different provisions. But the commentary to article 3 says in its paragraph 1 that the draft articles

"seek to detect the common denominator and lay down the general pattern which regulates the diplomatic law of relations between States and international organizations. Their purpose is the unification of that law to the extent feasible in the present stage of development".

Thus, if and when a convention on the basis of the draft articles were concluded, its impact in the field would be likely to be greater than its strict legal effect. That is to say, although it did not legally affect the existing situation or prevent the conclusion of agreements with different provisions, it might tend to become the norm—if it did not simply become a dead letter.

3. The Government of the United Kingdom continue 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".

The Council of Europe has 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 adopted the report prepared by the European Committee on Legal Co-operation. This report has been printed² and it is understood that copies have been made available to the Commission. The report considered the practice and the principles relating to the privileges and immunities of organizations and among its conclusions was the following:

"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 organisation for the accomplishment of its aims and the exercise of its functions."³

The United Kingdom Government fully supports that conclusion.

4. With regard to draft articles 22 to 50 on which the comments of Governments have been invited, it is true that, broadly speaking, permanent representatives to international organizations have, under existing international agreements, a status generally similar to that of members of permanent diplomatic missions. In commenting on the draft articles 22 to 50 therefore, the Government of the United Kingdom are merely recognizing this fact and do not wish to imply that they regard 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 or the Convention on Special Missions will be acceptable to them or that they would not welcome reconsideration by the Commission of its general approach to the topic and of the assumptions on which it is based.

Observations on particular articles

Article 22

This and other articles involve the placing of obligations on organizations. The Government of the United Kingdom note that the Commission will consider at a later stage the question whether international organizations would be parties to any convention which would embody the draft articles. The Government of the United Kingdom are not in principle opposed to the participation of organizations in such a convention.

Articles 25, 30, 31 and 32

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.

Article 28

The Government of the United Kingdom are 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.

¹ Yearbook of the International Law Commission, 1968, vol. II, p. 194, document A/7209/Rev.1, para. 16.

² 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).

³ *Ibid.*, p. 71, para. 188(3).

Article 29

The Government of the United Kingdom would favour the inclusion of a provision on the lines of article 28 paragraph 3 of the Convention on Special Missions.

Article 32

The Government of the United Kingdom support the inclusion of a provision on the lines of paragraph 1 (d) relating to actions for damages arising out of accidents caused by vehicles used outside the official functions of the person in question. It is to be noted that this exception is now contained in article 31, paragraph 2 (d) of the Convention on Special Missions adopted by the General Assembly of the United Nations on 8 December 1969.

Article 34

The Government of the United Kingdom support 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.

Article 39

The United Kingdom and certain other States 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.

Article 40

The Government of the United Kingdom are not convinced of the justification for the privileges and immunities conferred by paragraph 2. They also remain of the view that the private staff referred to in paragraph 4 should not be accorded tax exemption.

Article 41

In paragraph 1, the word "only" should be placed 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).

Articles 45 and 50

These two articles do not appear to give adequate protection to the interests of the host State. It is true that the concept of *persona non grata* is not appropriate in relation to representatives to international organizations. However, 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. The Government of the United Kingdom consider that, when possible, Governments should be encouraged to waive immunity rather than simply recall the person concerned. They do not at the present stage have any alternative drafts to suggest. They will be interested to see the results of further consideration of this matter by the Commission in the light of comments by Governments.

(b) PARTS III AND IV OF THE PROVISIONAL DRAFT

OBSERVATIONS COMMUNICATED BY LETTER DATED 19 MARCH 1971 FROM THE PERMANENT REPRESENTATIVE TO THE UNITED NATIONS

[Original text: English]

PART III.—Permanent observer missions

The Commission has rightly drawn attention in paragraph 2 of its general comments⁴ to the fact that there is at present no clear

⁴ *Yearbook of the International Law Commission, 1970, vol. II, p. 276, document A/8010/Rev.1.*

treaty basis for the status, privileges and immunities of permanent observer missions sent by non-member States to certain international organizations. But 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 no constitutional provision for observer missions and no settled practice, 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.

The Government of the United Kingdom are therefore 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.

*Section 1.—Permanent observer missions in general**Article 52*

The drafting of this article might suggest that a non-member State has in some way a right to establish a permanent observer mission if it considers that it can do so in accordance with the rules or practice of the organization. This 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 is, by definition, not a party to the constitution of the organization in question and it is only by agreement or decision of the members that a non-member State can become entitled to send an observer mission. 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.

If it is felt that any provision is 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 is 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 illustrate the general difficulty of trying to lay down uniform rules relating to observer missions given that the cases which arise in practice are naturally so heterogeneous.

Article 53

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.

Articles 54, 57 and 58

These articles also deal 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.

Article 61

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.

Article 62

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.

Section 2.—Facilities, privileges and immunities of permanent observer missions

The Government of the United Kingdom note that privileges and immunities are at present accorded to certain observer missions on a scale similar to that accorded to missions of Member States. The Government of the United Kingdom do not consider 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.

PART IV.—Delegations of States to organs and to conferences

General remarks

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 and in the Convention on the Privileges and Immunities of the Specialized Agencies. 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. Underlying these agreements and this practice is the principle, embodied in paragraph 2 of Article 105 of the United Nations Charter, of functional need.

It is the view of the Government of the United Kingdom that 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 as follows:

"Given the diversity of international organizations and their heterogeneous character, in contradistinction to that of States, the draft articles merely seek to detect the common denominator and lay down the general pattern which regulates the diplomatic law of relations between States and international organizations. Their purpose is the unification of that law to the extent feasible in the present stage of development."

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.

However, 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 see 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 that:

"[...] 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."

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.

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. The Government of the United Kingdom do 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.

It follows from the above that the Government of the United Kingdom are not able to accept the principles underlying Part IV of the Commission's draft articles and they very much hope that the Commission will revise Part IV with the above considerations in mind. The following comments on particular articles are without prejudice to that position.

Observations on particular articles

Article 91

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),⁵ the Government of the United Kingdom 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.

Articles 94 and 99

The obligations which would be imposed by these articles 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.

Article 98

The corresponding provision in the United Nations and Specialized Agencies Conventions does not confer such a general personal inviolability. The Government of the United Kingdom do not see any justification for the change.

Article 100

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.

Article 101

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.

Articles 102 and 103

These draft articles are substantially different from the provisions in the United Nations and Specialized Agencies Conventions. The Government of the United Kingdom do not accept that the proposed departure from the provisions of those Conventions is justified.

⁵ *Official Records of the General Assembly, Twenty-fourth Session, Annexes, agenda item 87, document A/7799, paras. 177 and 178.*

United States of America

(a) PART I AND SECTION 1 OF PART II OF THE PROVISIONAL DRAFT

OBSERVATIONS COMMUNICATED BY "NOTE VERBALE" DATED 23 MARCH 1970 FROM THE PERMANENT REPRESENTATIVE TO THE UNITED NATIONS

[*Original text: English*]

The United States has reviewed the draft articles on representatives of States to international organizations contained in the report of the International Law Commission on the work of its twentieth session. 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.

There are a number of articles as to which explicit comment is considered desirable.

Article 1

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. 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. The same problem arises in connexion with the concept of responsibilities. 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. The parties to the Commodity Agreements, for example, may not meet a requirement of practically universal membership but, 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. The same conclusion could be reached regarding the responsibilities of the organizations established under those Agreements.

Another example is the Asian Development Bank. Although ostensibly a regional organization, the membership is very widely distributed and the responsibilities, if considered on a reciprocal basis, are the same.

It may be queried 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.

Article 2

In the light of the comments regarding article 1 (b), it is suggested the Commission reconsider whether paragraph 1 of article 2 should not be revised.

Articles 3, 4 and 5

These articles are reasonable and necessary provisions. They recognize that the diversity of international organizations, the varying character of existing agreements with host States and the unforeseeable variances in headquarters agreements that may be necessary to accommodate future relationships of international organizations with host States require the maintenance of flexibility and the preservation of wide degrees of tolerance.

Article 7

It is doubted that clause (b) relating to liaison is necessary. It would appear to be subsumed under clauses (a) and (c).

Article 9

It is clearly the intention of the International Law Commission not to modify in any way the requirements of the Vienna Conventions on Diplomatic and Consular Relations as a result of the coming into force of the present articles. Accordingly, the proposal contained in paragraph 7 of the commentary to add a provision along the lines of paragraph 2 of article 17 of the Convention on Consular Relations appears essential.

Article 14

Article 14 will have to be reviewed in light of the text of article 7 of the Vienna Convention on the Law of Treaties.

Article 16

Article 16 is a well-balanced solution of a difficult problem that takes into account all the competing requirements relating to the size of a permanent mission.

Article 19

It is doubtful that an alternative proposal for determining precedence is desirable. The purpose of the article is to lay down a residual rule if an organization does not have a rule relating to precedence. Consequently, affording a choice between two solutions in accordance with established practice does not offer a definite solution. The United States considers that it would be desirable to adopt the rule of alphabetical order since that procedure is generally followed in international organizations.

Article 20

Paragraph 1 is a helpful clarification of the established rule but contains a slight ambiguity as a result of the word "localities". 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? 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.

(b) SECTION 2 OF PART II AND PARTS III AND IV
OF THE PROVISIONAL DRAFT

OBSERVATIONS COMMUNICATED BY "NOTE VERBALE" DATED 30 MARCH 1971 FROM THE PERMANENT REPRESENTATIVE TO THE UNITED NATIONS

[Original text: English]

PART II.—Permanent missions to international organizations

Section 2.—Facilities, privileges and immunities

Article 25

With regard to the second sentence of paragraph 1, the United States suggests that it would be preferable to follow more closely the language used in paragraph 2 of article 31 of the Vienna Convention on Consular Relations. We believe that in cases causing serious danger to public safety it is not practical to insist on exhaustive efforts to contact those in authority at the mission involved before taking protective action.

Regarding paragraph 3, the United States is of the view that the immunity accorded means of transport should only apply for official journeys.

Regarding paragraph 4 of the commentary on article 25, the United States has no problems with the suggested definition to be inserted in article 1 as paragraph (k bis).

Article 26

The United States suggests revising paragraph 1 of this article to read:

"The premises of the permanent mission, or the sending State or any person acting on its behalf who is the owner or lessee of such premises, 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."

This language is intended to have the same effect as that of the corresponding articles in the Vienna Conventions on Diplomatic and Consular Relations, but is slightly expanded to be more complete. By specifically exempting the premises themselves from taxes, the provision on the face of it bars *in rem* actions against such premises. Article 23 of the Vienna Convention on Diplomatic Relations refers only to the persons exempted in regard to taxes on the premises, while article 32 of the Vienna Convention on Consular Relations exempts the premises themselves in addition to these persons.

Article 28

The United States would prefer the language of article 96 to that contained in article 28. Under section 11 of the Headquarters Agreement between the United States and the United Nations, the United States already guarantees free transit to the Headquarters District of the United Nations. We thus accept the principle that free transit should be assured to those travelling to the Headquarters District of an international organization. In addition, the United States considers it appropriate that freedom of movement be assured within the territory of a country to representatives of members of an international organization when their official functions require such additional travel, provided that this entails no serious threat to the host State's national security. While the United States is, in principle, in favour of the broadest possible freedom of movement within its territory, we see no compelling reason why essentially private freedom of movement outside a headquarters district should be guaranteed by a convention if such movement bears no relationship to the functioning of the organization or mission involved.

Article 30

Section 15 of the Headquarters Agreement between the United States and the United Nations and section 11 of the Convention on the Privileges and Immunities of the United Nations grant privileges and immunities similar to those provided in draft article 30. The United States finds draft article 30 acceptable, provided that adequate provision is made to protect the host State against abuse of privileges and immunities which are accorded. Section 13 (b) of the Headquarters Agreement provides such protection, and it would be essential to include this provision in draft article 45 (section 13 (b) of the Headquarters Agreement is applicable as well to persons granted privileges and immunities under the Convention on the Privileges and Immunities of the United Nations by virtue of section 26 of the Headquarters Agreement, and this was restated for the sake of clarity in the United States reservation to the Convention). If draft article 45 is not improved, the United States would have to reconsider its view on draft article 30. In this regard, see the United States comments on draft article 45 below.

Article 32

In regard to subparagraph (d) of draft article 32, the United States suggests that the same treatment be accorded this subject as is by article 43 of the Vienna Convention on Consular Relations.

Article 35

In regard to paragraph 3 of the commentary, the United States believes paragraph 5 is not necessary.

Article 40

The United States believes the privileges and immunities accorded members of the mission should only be accorded to the class of people defined in section 16 of the Convention on Privileges and Immunities of the United Nations. We think it excessive to accord "the administrative and technical staff [. . .] together with members of their families forming part of their respective households" all the same privileges and immunities. Nor is this necessary for the effective functioning of the mission. If immunities are to be granted, they should only relate to members of the administrative and technical staff, not to members of their families, and immunities granted should only be in respect of acts performed in the course of their official duties. Indeed, we believe the assumption in paragraph 2 of the commentary is unwarranted.

Article 44

While the United States agrees completely with the provision of draft article 44 that no discrimination be made as between States, we understand that this of course does not in any way prohibit distinctions based on rational grounds, which are in certain instances warranted. The draft articles themselves implicitly recognize this fact. For example, article 25, paragraph 2, provides that the host State is under a special duty to take all appropriate steps to protect the premises of the permanent mission; the application of this provision may require that reasonable distinctions be made in the treatment accorded different States—for example, three policemen may be required for one mission but only one for another because of the size and location of the mission and its particular political problems.

Article 45

In regard to paragraph 2 of draft article 45, the United States believes it essential to substitute for this paragraph language along the lines of section 13 (b) of the Headquarters Agreement between the United States and the United Nations. Similar language is contained in section 25 of the Convention on the Privileges and Immunities of the Specialized Agencies. If privileges and immunities as broad as those provided for in the draft articles are to be accorded, a means must be provided by which the host State can protect itself against any serious abuse of the privilege of residence, whether or not it constitutes a grave and manifest violation of the criminal law. The Secretariat of the United Nations recognized this fact in its observations on this draft article.¹ Examples of activities from which a host State is entitled to protection are given in paragraph 11 of the United Nations Secretariat observations. In such cases, provided that there are such clear procedural safeguards as in section 13 (b) of the Headquarters Agreement, the host State must retain the ability to require that a person that has seriously abused his privilege of residence leave the country (this is of course the case with regard to diplomats who are accredited to States and who may be declared *persona non grata*).

Article 49

Regarding paragraph 1, the United States agrees with the Government of Israel that the word "must", which appears twice, should be replaced by the word "shall".² This would make the first paragraph consistent with the second paragraph of the draft article and, indeed, with the entire draft convention.

Article 50

It might be desirable to formalize the conduct of the consultations to a greater extent than is provided in article 50. Provision for some type of conciliation may be appropriate.

¹ See below, section C, 1, paras. 9–11.

² See the observations of Israel above.

In addition, the United States strongly believes a new article should be added along the lines of section 30 of the Convention on the Privileges and Immunities of the United Nations.

PART III.—Permanent observer missions to international organizations

The draft articles in part III create new and extensive privileges and immunities for permanent observer missions to international organizations. The United States believes that it is worthwhile to codify the existing privileges and immunities of observers, and in some limited cases to agree on their expansion. But we believe that the status given such missions in this part of the draft articles is not warranted. When a country undertakes to be host to an international organization, it is appropriate that the country provide the necessary privileges and immunities to the organization and to its members. It is implicit that the legitimate functioning of the organization must in no way be hindered. But observers are not formally participants in the work of the organization. In most cases they are not provided for in the charter or constitution of the organization, and it is difficult to imply an undertaking on the part of the host State with regard to them. To the extent that a practice has been established whereby observer missions exist, the United States believes it appropriate only to accord to such missions the limited privileges and immunities necessary for the functioning of the mission in its capacity as an observer. We believe that any further privileges and immunities must await action by the concerned international organizations to give observers formal, official status.

Article 52

The United States believes that, unless the international organization concerned has given formal consent to the establishment of the particular observer mission concerned, the consent of the host State should be required for the establishment of a permanent observer mission.

Article 53

The draft article seeks to elevate the status of observer missions from that of "observers" for the sending States to that of "representatives" of the sending States in the international organization. The United States believes that giving observers representative status is not warranted. Of course, "observers" do represent their States abroad in the sense that anyone who goes abroad represents his State. But this does not make them diplomatic representatives in the full sense, and they are not "representatives" in the international organization. Thus, in the view of the United States the words "and representing the sending State at the Organization" should be deleted from the end of draft article 53.

To take into account this change, consequential changes will be required in draft articles 51 (a) (deletion of the words "representative and"), 51 (d) and (e) (deletion of the reference to "diplomatic staff"), and 59 (deletion of the reference to "diplomatic staff").

Article 56

If the function of the permanent observer mission is to observe on behalf of the sending State rather than to represent that State, the United States has no objection to the observer being a national of the host State.

Article 59

In regard to paragraph 1, the United States is concerned that the listing of members of permanent observer missions may presage or even instigate the institutionalization of large observer missions. It is doubtful that an observer mission requires, in addition to the permanent observer, substantial diplomatic, administrative, technical and service staffs.

Article 62

The United States believes it is inappropriate to use the term "*chargé d'affaires ad interim*". This term has become standard usage with regard to diplomatic missions and therefore carries with it too many implications relating to such missions. We suggest that the term "Acting permanent observer" be used.

Article 64

The United States supports the deletion of the words in brackets. Indeed, the United States is of the view that the permanent observer mission should not have the right to use either the flag or the emblem of the sending State. Even use of the emblem is symbolic of a representative function at the international organization since members use such emblems. It would therefore not be proper for observers to have their use.

Articles 65 to 77 (in general)

As noted in the introductory remarks to part III, the United States is of the view that the privileges and immunities of permanent observer missions should strictly be limited to those required for the effective fulfilment of the function of the mission, i.e., observing. In regard to the specific draft articles, the United States refers to its previous comments regarding draft articles 25, 26, 28, 40, 44, 45 and 49. We should however like to make the following additional comments:

Article 69

The United States does not believe it is appropriate to guarantee to observer missions such broad privileges and immunities as are covered by draft articles 30 and 32. In the view of the United States, the privileges and immunities regarding arrest and immunity from jurisdiction should be no broader than those provided officials of the United Nations under section 18 (a) of the Convention on the Privileges and Immunities of the United Nations. Moreover, it should be made clear that the "official capacity" referred to is merely that of an observer. We also question whether the exemption of personal baggage from inspection, as provided in paragraph 2 of article 38, is necessary to ensure the effective fulfilment of the functions of an observer mission.

Article 76

The restriction on professional activities contained in article 46 may not be warranted with regard to members of an observer mission who have no formal duty to represent their sending State in the organization.

PART IV.—Delegations of States to organs and to conferences

Article 91

The United States believes 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.

Article 94

The United States questions the wisdom of paragraph 1 of article 94. Most members of delegations will be quartered in hotel rooms often for short periods of time. Is this what is meant by "premises where a delegation [. . .] is established"? As suggested in the commentary, the United States believes 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 United States comments on draft article 25 should also be referred to.

Article 95

The United States believes that this article needs clarification.

Article 99

The United States believes that paragraph 1 raises difficulties similar to those expressed in our comment on draft article 94.

Article 100

The United States believes alternative B is the better article. Regarding the immunity from criminal jurisdiction provided for in paragraph 1, the United States wishes to refer to its comments on draft articles 30, 32 and 45.

Article 102

The United States is of 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.

Article 103

The United States believes it is important that the language of articles 38 and 103 be uniform.

Article 105

As pointed out in the foot-note to article 105, if the preferable alternative B of article 100 is adopted, paragraph 2 of article 105 will require revision. In any case, the United States wishes to refer to its comments on draft article 40 in connexion with draft article 105.

Article 111

The United States wishes to refer to its comment on draft article 44.

Article 112

In regard to draft article 112, the United States wishes to refer to its comments on draft article 45.

Article 116

The United States questions whether it is reasonable to require protection of the premises of a delegation after the end of a conference. As noted in previous comments on other draft articles in part IV, the premises of a delegation will normally be a hotel room and the archives, one would assume, would consist of a brief case full of documents.

Yugoslavia

(a) PARTS I AND II OF THE PROVISIONAL DRAFT

OBSERVATIONS COMMUNICATED BY "NOTE VERBALE" DATED 18 AUGUST 1970 FROM THE PERMANENT MISSION TO THE UNITED NATIONS

[Original text: French]

General

The Yugoslav Government has studied the draft articles on representatives of States to international organizations adopted by the International Law Commission at its twentieth and twenty-first

sessions, and regards them as an important contribution to the codification and progressive development of rules on representatives of States to international organizations which are destined to play a special role in the promotion of peaceful international co-operation.

Furthermore, the stress placed on the optional nature of the draft (articles 2, 3 and 4) should make it easy for this international instrument to be adopted by a large number of interested parties (host States, international organizations and sending States).

The draft articles rightly cover the main functions of permanent missions. Bearing in mind that permanent missions also exercise other functions important for the development of international relations (e.g. *ad hoc* representation in an international organization, quasi-diplomatic relations between States through their good offices, etc.), the question arises whether it would not be desirable to give these functions a specific place in the text of the draft.

One very important point is 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. Noteworthy too is the important decision taken by the Commission to round off the draft articles with legal rules concerning permanent observers for non-member States and representatives attending sessions of organs of international organizations; without these provisions the draft would be incomplete.

Observations on particular articles

Article 1

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. The definition should emphasize his function as representative of a State to an international organization; this would be in keeping with subparagraph (d) of the article.

Article 12

The Yugoslav Government considers 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.

Article 26

In principle, the provisions of paragraph 2 of article 26 should not go further than those of the Convention on Diplomatic Relations.

Article 28

The Yugoslav Government regards 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.

Article 29

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, the Yugoslav Government considers it justifiable to allow permanent missions to send messages in code or to use a wireless transmitter, as provided in the Vienna Conventions system.

Article 32

Since the provisions of draft article 34 satisfactorily safeguard the interests of the host State and the exercise of the functions of the permanent representative, the Yugoslav Government does 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.

Article 42

As regards the duration of privileges and immunities, the incorporation in their entirety of the basic provisions of article 39 of the 1961 Vienna 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.

Article 44

The Yugoslav Government regards 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. The Yugoslav Government would point out in this connexion 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.

Article 48

The Commission's idea, expressed in paragraph 2 of the commentary to this article, concerning the obligation of the host State to allow members of permanent missions to enter its territory to take up their posts, warrants separate examination.

Article 50

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.

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.

(b) PARTS III AND IV OF THE PROVISIONAL DRAFT

OBSERVATIONS COMMUNICATED BY A "NOTE VERBALE" DATED 1 JUNE 1971 FROM THE DEPUTY PERMANENT REPRESENTATIVE TO THE UNITED NATIONS

[Original text: French]

The Government of the Socialist Federal Republic of Yugoslavia has studied parts III and IV of the draft articles on representatives of States to international organizations—dealing respectively with permanent observer missions to international organizations and with delegations of States to organs and to conferences—and wishes to make the following preliminary observations concerning the present stage of the work on this question.

PART III.—Permanent observer missions

General observations

For practical reasons it would be highly desirable to reduce part III of the draft, on permanent observer missions, to the essential provisions and to provide in transitional articles that the corresponding articles of the preceding parts shall also apply *mutatis mutandis* to the institutions whose status, privileges and immunities are governed by part III of the draft.

*Observations on specific articles**Article 51*

In this article, which defines the terms to be used in part III of the draft, it would also be useful to specify the meaning given to the expression "family of a member of the permanent observer mission" (article 61). In the other texts this concept is defined separately. Since the present article 51 defines in detail the terms used in part III, it might also cover this category of terms for the purposes of this part of the draft.

Article 53

An addition might be made to the text of this article, to the effect that the functions of the permanent observer mission also include maintaining relations with the permanent missions of member States.

PART IV.—Delegations of States to organs and to conferences

Article 83

For practical reasons, this article should provide for an exception to the effect that one State may represent another State to an organ or to a conference if the statutory provisions of the Organization so allow.

Article 100

Alternative A is drafted in greater detail and, from this point of view, offers better safeguards. However, in the Yugoslav Government's opinion, there is no need to include in this article the exception stated in paragraph 2, subparagraph (d), of the draft, particularly since the application of the "official functions" criterion is a very complex matter.

Conclusion

The Yugoslav Government considers that the text in question should be adopted as an international convention, i.e., as a fourth part of the code of diplomatic and consular law.

B. OBSERVATIONS OF SWITZERLAND

(a) PARTS I AND II OF THE PROVISIONAL DRAFT

OBSERVATIONS COMMUNICATED BY "NOTE VERBALE" DATED 22 JUNE 1970 FROM THE PERMANENT OBSERVER TO THE UNITED NATIONS

[Original text: French]

The Swiss Government has followed with interest the work of the International Law Commission in the field of relations between States and international organizations. Not only has Switzerland long been a member of many international organizations, in the establishment and administration of which it has sometimes played

a prominent part, but it now has many such organizations within its territory. It welcomes the efforts undertaken by the Commission, at the request of the General Assembly of the United Nations, with a view to codifying as far as possible this new aspect of international relations, which has become particularly important as a result of the development of multilateral international co-operation following the Second World War. In that connexion, the Swiss Government submits the following observations.

General remarks

The status and legal relations of international organizations are a field pre-eminently suited to contractual regulation. The existence, capacity and activity of each organization is based on its constitution, the application and, generally speaking, the interpretation of which are the responsibility of its organs. At first sight it might seem that the subject, regulated as it is by conventional instruments, does not lend itself to codification. However, the relevant constitutions and multilateral conventions often fail to cover all eventualities; although the procedure and functioning of organs can be treated on the basis of general principles, the situation is much more difficult when, for example, the status of certain persons connected with international organizations has to be defined in detail. Similarly, the constitution can only regulate relations between the organization and third parties within certain limits. It can impose rules on the organization itself, but not on its partners.

The Swiss Government therefore considers that there is justification for seeking to codify the rules on relations between States and international organizations, in so far as those rules cannot be codified by the constitutions of the organizations themselves, or where it seems desirable to establish common rules for a particular category of organizations.

For example, the rules concerning the conclusion of treaties between States and international organizations or between international organizations, a field in which the prevailing practice is complex and sometimes unclear, seem to require codification. In view of the rapid development of international organizations it may also be considered desirable 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.

The Swiss Government understands that the question of treaties concluded by international organizations will be taken up later. With regard to immunities and privileges, it would seem preferable to deal first—as indeed the International Law Commission has done—with the status of permanent representatives of member States to the organizations. It will be noted that this is 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.

However, the Swiss Government wishes to observe that no conclusions can be drawn from the status of such permanent representatives—hitherto assimilated in international practice to diplomatic agents—as to the status of other representatives or of the organizations and their personnel. Those are fields in which there exist in addition a number of important multilateral and bilateral treaties, all based on more or less the same principles, which are completely distinct from those applicable to bilateral diplomacy.

The Swiss Government can also 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 diplo-

matic 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. The Swiss Government hopes that, in pursuing its codification work, the International Law Commission will take due account—particularly in connexion with non-permanent representatives—of the current situation, which has proved to be fully satisfactory.

Text of the articles

Article 1

Subparagraph b

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 may nevertheless still seem somewhat too wide. 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 would be advisable to replace the word “responsibilities” by an expression suggesting that there are special additional conditions which must be fulfilled. 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.

Subparagraph 1

The commentary seems to imply that the International Law 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. The term “seat” and for that matter the term “office”, should probably be defined in subparagraph 1. 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 . . .”.

Articles 4 and 5

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 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.

Article 6

This article creates a right in favour of the members of an organization covered by the article, by virtue of which they may establish a permanent mission to the seat or at an office of the organization. In view of the extent of the privileges granted to such missions in later draft articles, it may be wondered whether this provision does not exceed its goal, which is to ensure that any member State, on terms of perfect equality, may exercise its rights as a member and assert its interests within the organization.

It is true that article 6 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. For example, by virtue of consistent practice—mentioned, it may be noted, by the Commission (article 1, paragraph 7 of the commentary)—the permanent missions of member States to the specialized agencies with seats in Geneva are accredited to the Office of the United Nations. Thus, a single mission represents a member State both to the Office and to the specialized agencies. The results of this practice have been completely satisfactory, and it would be desirable for that fact to be taken into account in the text of article 6. To that end, two amendments could be made in the draft: the first the insertion after “Organization” of the words “in accordance with the latter’s practice”, and the second the addition of a paragraph 2, reading as follows:

“They may establish a single permanent mission to several organizations”.

The Swiss Government feels that such a provision 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.

Article 8

As noted in the commentary, the provisions of paragraph 1 conform to the practice followed in Geneva with regard to the specialized agencies. The provisions of paragraph 2 seem acceptable, provided that the representative so designated does not have the status of head of mission.

Practice has shown that difficulties may arise in the case of multiple accreditations if the accreditation is not officially notified to the host State. Special provision should be made for this in article 17, for it may happen that such notifications are not given in the case of persons who already enjoy the immunities involved.

Article 9

There may be some justification for this article in so far as it signifies that the assignment of a diplomatic agent to a permanent mission is not in itself an obstacle to his being simultaneously assigned to a diplomatic mission or a consular post. It may, however, remain a dead letter as regards heads of mission and heads of consular posts, who may be refused the *agrément* or the *exequatur* without any reason being given.

The notification of such dual assignments should also be mentioned in article 17.

Article 10

Subject to the provisions of article 11, this article empowers any State which is a member of an organization covered by article 2 to send any person as a representative or agent to the territory of the host State, with extensive privileges, the host State having absolutely no say in the matter. Such a regulation may in practice lead to situations which the host State is not obliged to accept.

The *agrément* procedure is not in keeping with the nature of the relations between the host State and the sending State. On the other hand, in view of the position which the agent is 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. These objections could be examined by the conciliation commission whose establishment is suggested below.¹

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.

¹ See observations on article 50.

Article 11

In its commentary, the Commission mentions the question of stateless representatives. In that connexion, it should be specified that the host State should not be obliged to accept the presence of stateless representatives unless the sending State takes them under its protection and is prepared to admit them to its territory at the end of their mission.

Article 14

In the Swiss Government's view, this article relates to the conclusion of treaties between States and international organizations, a field which will perhaps eventually be codified. The corresponding provision concerning heads of mission in relations between States is contained in article 7 of the Convention on the Law of Treaties of 23 May 1969. It is therefore suggested that this article should be deleted.

Article 16

Unlike article 11 of the Convention on Diplomatic Relations, and for easily understandable reasons, this article does not give the host State the right to limit the size of the permanent mission. Unless what is intended is merely a moral exhortation addressed to the sending State, however, 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 a conciliation procedure described below.

Article 17

It was noted above (articles 8 and 9) that it would be highly desirable for multiple accreditations and the assignment of a member of a permanent mission to a diplomatic mission or a consular post to be expressly notified.

The provisions of article 17 deal simultaneously with two completely separate questions: notification of the organization, and notification of the host State. It may be wondered whether, in order to make the text clearer, it would not be preferable to have two separate articles, especially since the two types of notification have very different consequences.

Notification of the host State is particularly important, for it constitutes a condition *sine qua non* of the granting of privileges and immunities. It is therefore essential that the host State should be informed as soon as possible of any changes which take place. In that connexion, the Swiss Government would point out that paragraph 4 of its decision of 31 March 1948, quoted in paragraph 4 of the Commission's commentary, was amended by a decision of 3 November 1967 reading as follows:

"The establishment of a permanent delegation is notified to the Political Department by the diplomatic mission of the State concerned at Berne, or, in the absence of such mission, through the competent Swiss diplomatic representation. Arrivals and departures of members of delegations are notified to the Political Department by the diplomatic mission at Berne or by the delegation. The Department issues to members of delegations an identity card (*carte de légitimation*) stating the privileges and immunities to which they are entitled in Switzerland.

The Swiss Government considers that it is the permanent mission, not the organization, which should give notification to the host State. This procedure is simpler and safer and makes for prompt issue of the cards.

Article 22

This article, like article 24, creates obligations for the organization; other articles deal with the relations between the organization and the sending State. Article 50 provides for consultations between the organizations, the sending State and the host State. This struc-

ture, 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.

Article 25

The Swiss Government ventures to draw the Commission's attention to the last sentence of article 31, paragraph 4, of the Convention on Consular Relations, which provides for the case of expropriation. The Swiss Government considers that this provision could usefully be added to article 25.

Subparagraph *k bis*, which it is proposed should be inserted in article 1 (paragraph 4 of the commentary on article 25), includes the residence of the permanent representative in the premises of the mission. The Swiss Government considers 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 would be sufficiently protected by article 31.

Article 28

While stressing that it has never taken and does not intend to take any restrictive measures with regard to members of permanent missions, the Swiss Government would observe 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, reference may be made to article 27 of the Convention on Special Missions.

Article 32

The Swiss Government favours the retention of paragraph 1 *d* of this article.

Articles 33 and 34

The Swiss Government regards it as an important advance that the principle stated in 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. It nevertheless regrets 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 will be commented on below and which is not fully satisfactory.

In that connexion, it may be noted 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 much 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.

Article 35

It seems 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 Convention on Diplomatic Relations.

Article 36

Although the Convention on Diplomatic Relations rule corresponding to subparagraph *f* is formulated as an exception to an exception, its application has caused no difficulty in Switzerland.

Article 39

The Swiss Government 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 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.

Article 40

With regard to the "private staff" of members of the mission, see the comment on article 35.

Article 41

Same comment as for the preceding article.

Article 45

The Swiss Government appreciates the intention of the Commission in inserting in article 45 a paragraph on the recall of members of the permanent mission. However, this provision has several drawbacks and on the whole must be considered inadequate. In the first place, it excludes offences committed within the premises of the mission, which implies that such offences do not fall within the jurisdiction of the host State. Furthermore, the obligation laid upon the sending State depends upon its good will 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.

The Swiss Government suggests two possible ways of replacing paragraph 2 of article 45 by a more satisfactory provision:

(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) A provision on the procedure to be followed in the event of expulsion, such as that contained in section 13 of the Agreement regarding the Headquarters of the United Nations.

Article 49

According to the commentary, the second sentence of paragraph 1 also covers 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 is done in article 45, subparagraph *b*, of the Convention on Diplomatic Relations.

Article 50

The Swiss Government has already indicated that it considers article 50 inadequate. In its view, the inadequacy is twofold.

First, the consultations provided for are insufficient for the application of a codification convention. The Swiss Government maintains 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 will make a proposal in that sense in due course.

Secondly, 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 body 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).

The conciliation machinery could operate in accordance with the text suggested below:

"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."

(b) PARTS III AND IV OF THE PROVISIONAL DRAFT

OBSERVATIONS COMMUNICATED BY "NOTE VERBALE" DATED 22 JANUARY 1971 FROM THE PERMANENT OBSERVER TO THE UNITED NATIONS

[Original text: French]

Introduction

The Swiss Government has been greatly interested in the results of the work of the International Law Commission on permanent observer missions to international organizations and on delegations of States to organs and to conferences. Switzerland attaches the greatest importance to these matters, 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. The Swiss Government is happy to be able to collaborate in the codification work undertaken by the Commission at the request of the General Assembly, and its observations on the Commission's draft articles are given below.

As a preliminary comment, it is 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.

Article 52

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.

Article 53

The Swiss Government has 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".

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.

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 1962,² part of which is cited in the Commission's report on its twenty-second session.³ 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.

² 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.

³ *Ibid.*, 1970, vol. II, p. 277, document A/8010/Rev.1, chap. II, B.

In addition, it is 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.

Article 54

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, here again, 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, mentions both these functions.

However, the present wording of the article is 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*".

Article 55

Please see the Swiss Government's comment on article 10. 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, it should be empowered to refuse to grant all or some of the immunities to the person concerned.

Article 57

The Swiss Government supports the idea of issuing permanent observers with credentials. This results in a welcome clarification of their status.

Article 58

In its earlier comments, the Swiss Government 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.

Secondly, it is suggested that the word "adopting" in paragraph 1 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.

Article 60

The Swiss Government reiterates its earlier comment on article 16, concerning the limiting of the size of the mission.

Article 61

The Swiss Government reiterates its earlier comment on article 17, concerning notification of the host State by the observer and not by the organization, as an indispensable requirement for the granting of privileges.

With regard to notification of double assignments (article 59, para. 2), please see the earlier comments on articles 9 and 17.

Article 63

The Swiss Government endorses the principle set out in this article. In addition, it shares the view expressed by some members

of the Commission that the words "in localities" should be replaced by "in a locality".

Article 64

In view of the observations on the similarity between observer missions and diplomatic missions (see comment on article 53), it seems natural to grant the 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.

Article 67 et seq.

The Swiss Government supports 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.

Article 68

Please see the earlier comment on article 28.

Article 79

It might be desirable to amend this article so as to cover agreements already concluded, as well as those to be concluded in the future.

Moreover, the purpose of this provision, 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 indeed 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.

Article 82

The subject of this article is a rather delicate one. 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. 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, i.e., in our case, those resulting from the headquarters agreement concluded with the organization. For the host State, such special norms will commonly involve the obligation to allow delegations to enter, with some opportunity to formulate objections in cases where they are of an exaggerated size. 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. This does not seem to be the case with the present wording of the draft and such an approach appears to be acceptable.

The Swiss Government wishes to reaffirm in this connexion its intention to pursue a most liberal policy in his matter.

Article 83

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.

Article 84

Please see the comment on article 55.

Article 86

It would be preferable for the acting head to be designated in advance, before any case of unavoidable absence, which may be sudden, can occur.

Article 95

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 . . .".

Article 100

In view of the fairly loose ties delegates have in the host State—where their stay is only temporary—alternative B seems better. In the circumstances, this wording of the text ensures adequate protection.

Article 101

See the observations on articles 33 and 34.

Article 102

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 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 subparagraph *a* or those referred to in subparagraph *e*), and the taxes to which they are liable regardless of their presence in the territory of the country (subparagraphs *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.

Article 108

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 for the beginning of the paragraph:

"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 after the functions have come to an end".

Article 114

It would be desirable for the notification referred to in subparagraph *a* to be sent to the host State as well.

C. OBSERVATIONS OF THE SECRETARIATS OF THE UNITED NATIONS, THE SPECIALIZED AGENCIES AND THE INTERNATIONAL ATOMIC ENERGY AGENCY

1. United Nations

(a) PARTS I AND II OF THE PROVISIONAL DRAFT

[Original text: English]

1. In pursuance of the request of the International Law Commission made at its twenty-first session, 1969, the Secretariat of the United Nations submits the following observations on parts I and II of the draft articles on representatives of States to international organizations, adopted by the Commission at its twentieth and twenty-first sessions.

Right of entry and sojourn

2. 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 articles.

3. 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 II, 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.

4. 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" (of the person concerned by the sending State). 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 representa-

tives 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.

5. 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.

6. 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 the relevant provisions 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 entry or sojourn of aliens should not apply to any person referred to in 1 above.

7. With reference to the privilege of sojourn in the host State, it is noted that article 45 of the draft 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.

8. Should the Commission decide to add a new article in the sense suggested above, the text might be inserted so as to precede existing articles 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."

Abuse of privilege of residence

9. Article 45, paragraph 2, provides an obligation of the sending State, if it does not waive the immunity of a member of a permanent mission, to recall or otherwise remove him only "in case of grave and manifest violation of the criminal law of the host State". It is suggested that this obligation should be broadened to bring it into line with the corresponding provision of the Headquarters Agreement of the United Nations. It would then 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.

10. The language of the Headquarters Agreement of the United Nations (section 13, para. b) is "in case of abuse of such privileges of residence by any such person in activities in the United States outside his official capacity", and this has been followed in other headquarters agreements and conference agreements. Thus the practice in the wording of agreements supports a broader formulation than that in the present draft; and 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.

11. Under the present formulations of the draft articles, if there is 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.

(b) PARTS III AND IV OF THE PROVISIONAL DRAFT

[Original text: English]

1. The Secretariat of the United Nations submits to the International Law Commission two points concerning the Commission's draft articles on permanent observer missions to international organizations (part III) and those on delegations of State to organs and to conferences (part IV). These comments are parallel to its observations on part II of the draft articles dealing with permanent missions to international organizations and are motivated by the same considerations.

2. The Secretariat believes, in the first place, that express provision should be made, in parts III and IV of the draft articles, to ensure to members of permanent observer missions and 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.

3. The Secretariat is of the opinion, secondly, that the obligation of the sending State, envisaged by reference in articles 76 and 112,

to recall or otherwise to remove a member of its permanent observer mission or 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 residence.

4. 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 and delegations to organs and conferences.

2. International Labour Organisation

(a) PARTS I AND II OF THE PROVISIONAL DRAFT

OBSERVATIONS COMMUNICATED BY LETTER DATED 21 AUGUST 1970
FROM THE LEGAL ADVISER

[Original text: French]

Before offering the comments which certain of the draft articles seem to us to call for, 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, 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.

Turning to our specific comments, we should like to stress the following points.

Article 3

The full significance of this article does not seem to us very clear, even in the light of the explanation given by the International Law Commission itself. Judging strictly from the explanation and the text, 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. 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.

Articles 4 and 5

These texts, the purpose of which is to safeguard existing agreements and permit the conclusion of special agreements in the future, also seem to us to justify some doubts. 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 (such is the case, for example, in Switzerland). Would these arrangements, which may even have acquired the character of customary law, be maintained under the new system, or would the convention have to be regarded as displacing them?

Moreover, a particularly delicate situation might arise if one or more of the sending States ratified the new convention and the host State did not. In such a case, 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 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. Such a situation would naturally be unsatisfactory, and perhaps some clarification of the problems which would arise could be included in the convention itself.

Article 7

This article, which describes the functions of a permanent mission, should of course be expanded, as far as the ILO is concerned, to take into account the fact that the ILO's relations with member States are primarily of a technical nature. For that reason, relations with member States are for the most part, under article 11 of the Constitution,¹ 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. Of course, draft article 7 is subject to the reservations set forth in article 3 and could thus, in the case of the ILO, at least to some extent be disregarded; but the impression given by article 7 is 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 might be useful to specify what the situation would be, at least in an appropriate commentary of the draft convention.

Article 7 also provides that one of the functions of the permanent mission is that of "carrying on negotiations with or in the Organization". This provision does not seem to be applicable to the ILO, since no negotiations are carried on in the organization, at least as regards the adoption of the most important ILO instruments, namely conventions and recommendations, which takes place in the Conference.

Article 16

This provision, which deals with the size of the mission, and in particular the limits which the size of the mission should not exceed, gives no indication of who would decide what is reasonable and normal. It could place the organization in a very difficult situation, considering that article 50 of the draft provides that any question arising between a sending State and the host State concerning the application of the convention shall be the subject of tripartite negotiations between the sending State, the host State and the organization. The organization would thus be obliged to take a position on a problem which had very little to do with it.

Article 17

This article would completely disrupt the ILO's present practice. Until now the ILO has limited itself to receiving and taking note of notification regarding accreditation to the organization. The informa-

tion received concerns only members of permanent missions representing their countries in the ILO. 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. At Geneva, moreover, the members of permanent missions are in the great majority of cases assigned to several organizations at the same time. 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. 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.

Article 19

The order of precedence provided for in this article would be determined by the alphabetical order. Perhaps the article should specify which alphabetical order is meant, as it would vary according to the language used.

Articles 22, 23 and 24

These articles provide that the organization shall assist the permanent mission in various matters. They raise the same problems as article 50. 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.

Article 50

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) PARTS III AND IV OF THE PROVISIONAL DRAFT

OBSERVATIONS COMMUNICATED BY LETTER DATED 2 DECEMBER 1970
FROM THE LEGAL ADVISER

[Original text: French]

... I should like to point out that my general comments concerning parts I and II [of the provisional draft] also apply to [parts III and IV].

Turning to particular points, I feel that the following observations could be made.

Article 51

Paragraph *a* of this article 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 host State has ratified it.

¹ International Labour Office, *Constitution of the International Labour Organisation and Standing Orders of the International Labour Conference* (Geneva, 1968).

Probably both States have to be parties to the convention, but it might be preferable to say so specifically.

The term "office" in paragraph *i* of the same article does not seem very clear. It may 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. I am not sure that this was the intention of the authors of the draft. 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.

Article 78

Quite obviously, article 78 refers solely to delegations consisting of government representatives and not to non-government delegations such as those representing employers and workers as we know them in the International Labour Office. For example, the status of the employers' and workers' members of the Governing Body of the International Labour Office or of the persons invited by the Governing Body to take part in advisory committees or regional conferences or meetings of experts does not fall within the scope of the draft. Similarly, there is no provision covering non-permanent observer delegations to an organ of the organization or to a conference. This seems to us to be an omission in the draft which might be of some importance, particularly as regards rights of entry, sojourn and departure in the country where the conference or the meeting is held, and also as regards the principal immunities.

Lastly, concerning the relation between the fourth part of the draft and article 13, which deals with the accreditation of permanent representatives to organs, 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.

Article 79

This article, which basically reproduces the text of article 5, might create some ambiguity, particularly with regard to the scope of articles 3 and 4, which are not reproduced. Accordingly, it is felt that it would be preferable either not to reproduce the substance of article 5, or to reproduce the whole of articles 3 to 5.

Article 81

It should be noted in this connexion 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. The delegates representing employers and workers are not subject to the authority of any head of delegation.

Articles 84 and 86

The comments concerning article 81 apply equally to these two articles.

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 cease on the closing date of the conference?

Article 90

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.

Lastly, I note that the question of the status of observer missions which are not composed of national officials, such as the representatives at Geneva of the large employers' and workers' organizations, is not taken up in the draft convention.

3. Food and Agriculture Organization of the United Nations

PARTS I AND II OF THE PROVISIONAL DRAFT

OBSERVATIONS COMMUNICATED BY A LETTER DATED
5 JANUARY 1971 FROM THE LEGAL COUNSEL

[Original text: English]

Article 12

In the third sentence of paragraph 5 of the commentary, the words "the Conference (FAO), or" should be deleted. In FAO the Director-General does *not* report to the Conference on credentials or appointment of permanent representatives; the Conference and its Credentials Committee may have to examine such credentials in cases in which the permanent representative is to represent his country at a session of the Conference by virtue of his general credentials.

Article 13

The first sentence of paragraph 4 of the commentary should be accompanied by a foot-note reading as follows:

"In 1969, FAO amended Rule III.2 of its General Rules in this sense; the relevant provision now reads: 'A Permanent Representative to the Organization does not require special credentials if his letter of accreditation to the Organization specifies that he is authorized to represent his Government at sessions of the Conference, it being understood that this would not preclude that Government from accrediting another delegate by means of special credentials'."²

The previous practice has been modified by this amendment which has been drawn up in the light of the draft articles.

4. United Nations Educational, Scientific and Cultural Organization

(a) PARTS I AND II OF THE PROVISIONAL DRAFT

OBSERVATIONS COMMUNICATED BY LETTER DATED 2 SEPTEMBER 1970
FROM THE ASSISTANT DIRECTOR-GENERAL FOR INTERNATIONAL
STANDARDS AND LEGAL AFFAIRS

[Original text: French]

The observations of the UNESCO Secretariat refer to the draft articles and the commentaries on them, and also to the interpreta-

² FAO, *Basic Texts of the Food and Agriculture Organization of the United Nations, 1970 Edition*, pp. 24-25.

tion given to the information provided by UNESCO in its letters dated 2 March and 3 September 1965, 15 September 1966 and 2 August 1968.

1. In *article 11*, the provision that the permanent representative and the members of the diplomatic staff "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 to me too restrictive. Nationality should not be of any concern in the choice of a permanent representative and of the diplomatic staff of the mission, and the host State should not be given a right of veto in the matter. I note that

"some members of the Commission considered that in principle there should be no restrictions on the appointment by the sending State of non-nationals to its permanent mission" (commentary, para. 2).

The only restriction with regard to nationals of the host State which seems to me to be justified is that concerning privileges and immunities, and I appreciate that the host State should not be obliged to grant such persons all the privileges and immunities; those restrictions are explicitly laid down in articles 40 and 41, and it would be advisable to leave it at that.

2. In *article 14*, it does not seem to me very apt to speak of "adopting the text of a treaty" in the case of a bilateral instrument. It would seem to me more accurate and more in accordance with the facts to say that a permanent representative 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 . . .".

3. The commentary on *article 15* seems to me to call for two comments:

(a) Paragraph 3 of the commentary draws attention to the practice of certain States of appointing to their permanent missions "deputy permanent representatives" or "alternate permanent representatives" and to the increasing importance of the functions performed by these officials, and observes that this practice is often followed at United Nations Headquarters in New York but is not a common occurrence "at headquarters of other international organizations". This is not correct in the case of UNESCO, where the practice in this matter is the same as in New York. There are many deputy permanent delegates at UNESCO Headquarters in Paris, and the functions performed by them are increasingly important. Moreover, the Headquarters Agreement³ makes mention of such deputy permanent delegates (article 9, para. 2, c, and article 18, para. 1).

(b) In paragraph 4 of the commentary, the reference should no longer be to the "Interim Arrangements on Privileges and Immunities of the United Nations concluded between the Secretary-General and the Swiss Federal Council" but to the "Agreement on Privileges and Immunities of the United Nations concluded between the Swiss Federal Council and the Secretary-General of the United Nations on 19 April 1946". The original title was amended by an "exchange of letters constituting an additional agreement" of 5 and 11 April 1963, which entered into force on 11 April 1963.⁴

4. Article 17, paragraph 1, a, should speak of the "*cessation de leurs fonctions*" and not the "*cession de leurs fonctions*". This mistake occurs in the French text only.

5. In the French text of paragraph 4 of the commentary on article 20, it would be better to say *Conseiller juridique*, rather than *Conseil juridique*.

6. The last part of the commentary on *article 21* described the practice with regard to permanent delegates to UNESCO in terms which

do not accurately reflect what was set forth in the reply that I addressed to you under cover of my letter of 2 March 1965.⁵ I can only refer to that letter.

7. With regard to *article 22*, it is open to question whether a clause providing that the organization shall assist the permanent mission in obtaining the facilities necessary for the performance of its functions and shall accord it such facilities as lie within its own competence would not be out of place in such a convention. I understand that this question arose in the Commission (commentary, para. 2).

8. *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, namely, whether a provision of this kind is not out of place in a convention of this kind.

9. In *article 32*, I consider that paragraph 1 d, which 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), the importance of which should not be underestimated, should be adhered to.

10. With regard to *article 33*, there seems to me 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, I think that 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.

[For a further observation on article 33, see section b, para. 7, below.]

⁵ The relevant paragraph of the letter reads as follows:

"21. The permanent delegations with offices in the UNESCO Headquarters do not display their national emblems. The flags of member States (and that of the United Nations) are flown at the entrance to the Headquarters on the occasion of national holidays and visits of the respective Heads of State.

"With regard to the right of permanent representatives to fly their national flag from their private residence, the Protocol Department of the Ministry of Foreign Affairs was consulted on the matter and stated that there were no official rules on the point.

"Permanent representatives who are holders of a 'Head of diplomatic mission' card and who have a CMD plate on their car are entitled to fly a pennon in their national colours on their car (in the exercise of their official functions)."

³ United Nations, *Treaty Series*, vol. 357, p. 3.

⁴ *Ibid.*, vol. 509, p. 309.

11. 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 1965.⁶

12. 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).⁷

13. I note that in *article 40*, paragraphs 2 and 3, and in *article 41*, 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. Article 41 is most significant in this respect.

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.

14. With regard to *article 45*, 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 is 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.

⁶ 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."

⁷ 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, subparagraphs *g* and *h*, of the Headquarters Agreement)."

15. *Article 49* does not seem to me to have settled the question in an entirely satisfactory and comprehensive manner. It should have been based more on article 45 of the Vienna Convention, 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.

(b) PARTS III AND IV OF THE PROVISIONAL DRAFT

OBSERVATIONS COMMUNICATED BY LETTER DATED 25 FEBRUARY 1971
FROM THE ACTING DIRECTOR, OFFICE OF INTERNATIONAL STANDARDS AND LEGAL AFFAIRS

[Original text: French]

1. In section I of part III of the draft, under the heading "General comments", it is stated in paragraph I 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 . . .".

2. In *article 56*, 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. This draft article calls for the same observations as we have formulated concerning article II. 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. I think that 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 me to be justified is that concerning privileges and immunities, and I appreciate that 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.

3. In *article 58* it does not seem to me very apt to speak of "adopting the text of a treaty" in the case of a bilateral instrument. It would seem to me 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 . . .". We had made a similar remark concerning article 14.

4. With regard to *article 65*, it is open to question whether a clause providing that the organization shall assist the permanent observer mission in obtaining the facilities necessary for the performance of its functions and shall accord it such facilities as lie within its own

competence would not be out of place in such a convention. I refer here to the observation made by the UNESCO secretariat regarding article 22.

5. *Article 66*, which states that article 23 shall apply in the case of permanent observer missions, calls for the same observations as we made concerning article 23, paragraph 2.

6. Similarly, *article 69*, which states that article 32 shall apply in the case of permanent observer missions, calls for the same observations as we made concerning article 32.

7. I note 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. I think that 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). In my view 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. Article 69 again states that article 40, paragraphs 1, 2, 3 and 4, shall apply in the case of permanent observer missions, and the same is true of article 70 with regard to the application of article 41. In this connexion I can only refer to the observations which the UNESCO secretariat made concerning articles 40 and 41 and reiterate that we regret the assimilation of persons having their permanent residence in the host State to nationals of that State.

9. *Article 76* states that article 45 shall apply in the case of permanent observer missions. Here again I refer to the remarks we made concerning article 45.

10. Finally, *article 77* states that article 49 shall apply in the case of permanent observer missions, and I can only refer to the observations we made concerning article 49.

5. World Health Organization

(a) PARTS I AND II OF THE PROVISIONAL DRAFT

OBSERVATIONS COMMUNICATED BY LETTER DATED 18 AUGUST 1970
FROM THE DIRECTOR OF THE LEGAL OFFICE

[*Original text: English*]

As regards part I and section 1 of part II of the draft articles, I have noted that in the commentary to *article 6* it is stated that "The legal basis of permanent missions is to be found in the constituent instruments of international organizations—particularly in the provisions relating to functions [. . .]" (para. 4), with a further provision that "the Commission wishes to make it clear 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 [. . .]" (para. 5).

It may be relevant to note that in so far as the World Health Organization is concerned, the functions of permanent missions as outlined in *article 7* of the draft articles need to be considered in the light of the provisions of articles 10, 1, 24 and 25 of the WHO Constitution,⁹ relating to participation at constitutional meetings, and of article 33 relating to the direct access of the Director-General to the departments of members, including health administrations and national health organizations.

⁹ United Nations, *Treaty Series*, vol. 14, p. 185 and *ibid.*, vol. 377, p. 380.

For delegates to the World Health Assembly and persons designated to serve on the Executive Board, the Constitution contains a recommendation that they should be technically qualified or competent in the field of health and permanent representatives have not been seated as such in constitutional meetings. The rules of procedure of the World Health Assembly⁹ (rule 22) require formal credentials for representatives of members and associate members, irrespective of whether permanent representation exists, while in the case of the Executive Board, the persons serving thereon are not representatives of the members who have designated them.

It may be noted that one permanent mission in Geneva has for some years included a medical officer on its staff for the purposes of liaison with WHO.

With regard to communications, article 33 of the Constitution leaves it to members to decide to what government departments the Director-General may have access, and in the comment by the Technical Preparatory Committee on the draft constitution for WHO,¹⁰ it was stated that the original provision in the draft was intended only to invest the Director-General and the Secretariat with the right to communicate with national health administrations in such manner as might be agreed upon with the competent authority of each country. Direct communication with other branches of government should be through such channels as might be approved by the above-mentioned health authority.

The notion of direct access to national health administrations is not new; it flows from similar arrangements under the Pan American Sanitary Code (article 57) and the Statutes of the International Public Health Office in Paris. The reason for these provisions was that experience had shown that it was not satisfactory to have communications on urgent international public health matters passing through traditional diplomatic channels, owing to the delays and misunderstandings that resulted and that these delays and misunderstandings could represent either a danger to public health or entirely unwarranted interference in international commerce and the free movement of persons and means of transport.

I should like to take this occasion to draw attention to paragraph 4 of the commentary on *article 12*. The wording suggests that in the case of WHO the authorities mentioned (Head of State, the Minister for Foreign Affairs, or the Minister of Health or any other appropriate authority) are empowered to issue credentials to permanent representatives. It should be pointed out that the reference to WHO practice is to a rule of procedure of the World Health Assembly relating to credentials of delegates to the Assembly (rule 22). This rule has no application to permanent representatives and the report of the Commission is erroneous in this regard.

As regards *article 14*, permanent representatives have occasionally signed agreements between WHO and the member concerned. However, the bulk of agreements between WHO and its members are related to the execution of operational programmes which are dealt with at the regional level and as there are no permanent representatives at any of WHO's regional offices, these agreements are signed on behalf of the members in the ministries concerned.

In Geneva, since permanent representatives are usually accredited to the United Nations and to the international organizations in Geneva, it is presumed that the notifications referred to in *article 17* would be made to the United Nations. Lists of permanent missions are prepared by the United Nations and circulated to the other organizations. However, I query the value of the inclusion of subparagraphs *c* and *d* in this article as these would seem to be of marginal interest only.

⁹ See WHO, *Basic Documents*, 22nd ed. (Geneva, April 1971), p. 97.

¹⁰ See WHO, *Official Records of the World Health Organization*, No. 1, p. 72.

On precedence (article 19), WHO practice has already been indicated in my letter of 5 August 1968, and there has been no change in this practice to date.¹¹

With respect to section 2 of part I, my only comments relate to the provisions placing various responsibilities on the organization with respect to the securing of the enjoyment of privileges and immunities, etc. (articles 22, 23 and 24). Apart from the specific question of housing under article 23, where 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, I have some reservations on the more general obligations contained in articles 22 and 24. 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. As regard 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

¹¹ The relevant paragraphs of the letter read as follows:

"In so far as the precedence accorded to Permanent Representatives is concerned, I should point out that in Geneva, Permanent Representatives are accredited to the United Nations Office in Geneva and to the Specialized Agencies and that questions of precedence and liaison have been principally dealt with by the United Nations itself. WHO has never established any official list of precedence but for internal purposes official invitations, etc.) we usually establish precedence amongst permanent delegates on the basis of the date of deposit of the credentials.

"In so far as delegates of members attending the World Health Assembly are concerned our practice is to list these in alphabetical order in the language in which the list is drawn up. Within the lists themselves, Chief Delegates and Deputy Chief Delegates are given precedence over other delegates and alternates; Ministers of Public Health when serving on delegations normally are designated as chief delegates and enjoy precedence for that reason. However, persons of ambassadorial rank will not necessarily enjoy, in the list, any precedence over other delegates within the same delegation.

"In practice in the Health Assembly, Ministers of Health are often called upon to speak early in the general discussion but this practice is based not so much on precedence but on the fact that often Ministers attend only the first days of the session and are very anxious to be given an early opportunity to speak before returning to their country. The practice on matters of precedence is otherwise similar to that followed in the General Assembly and the members of the General Committee of the Health Assembly enjoy precedence over other delegates.

"There is however one point of difference which may be of interest. Under rule 72 of the rules of procedure of the Health Assembly, votes by roll-call are taken in the English or French alphabetical order of the names of the members in alternate years. Our practice is consequently to make the seating arrangements in the Assembly hall in alternate years in English or French as the case may be, the cards bearing the names of the countries being in whatever language is being used in a particular year. Roll-call sheets and lists for making the call of the delegates for secret ballots are similarly prepared in one or the other language in alternate years."

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) PARTS III AND IV OF THE PROVISIONAL DRAFT

OBSERVATIONS COMMUNICATED BY LETTER DATED 8 JANUARY 1971
FROM THE DIRECTOR OF THE LEGAL OFFICE

[Original text: French]

Observations concerning permanent observer missions to international organizations (part III of the draft)

1. 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 Assembly were changed later, after the adoption of appropriate resolutions by the Executive Board and Health Assembly.¹²

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.

2. 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.¹³ The reservation was not accepted by the Assembly.¹⁴

¹² 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).

¹³ *Official Records of the World Health Organization*, No. 21, p. 312.

¹⁴ Resolution WHA2.98 (*ibid.*, p. 54).

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.

3. 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 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.

The privileges and immunities which may be accorded such observers, regardless of privileges they may enjoy in other respects, are governed by the relevant provisions of the Headquarters Agreement¹⁵ 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. As a general rule, these 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.

Observations concerning delegations of States to organs or to conferences (part IV of the draft)

WHO would like first to comment on points relating to some of the draft articles. It will then offer observations concerning the facilities and privileges accorded to delegations of States.

1. The first comment concerns *article 78*. Subparagraph *e* says that a "representative" means any person designated by a State to represent it in an organ or at a conference. WHO uses a different term. Under *article 11* of its Constitution, the persons who re-

present States are called "delegates". Under *article 47* of the Constitution, the term "representative" is used in the case of WHO Regional Committees. The draft articles should therefore take account of the special system laid down in WHO's constituent instruments.

Article 82 states that the size of a delegation shall not exceed what is reasonable or normal. *Article 11* of WHO's 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. 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.

The principle of single representation embodied in *article 83* of the draft also 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.

Article 85 of the draft states that the members of a delegation should in principle be of the nationality of the sending State. WHO has no rule in this connexion, although the principle always seems to have been observed, at least so far as delegations to the Assembly are concerned. It will be noted, 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 (*article 24* of the Constitution), a State has sometimes chosen a person who was not one of its nationals—for example, the members of the Benelux union.

In the case of credentials, referred to in *article 87* of the draft, rule 22 of the rules of procedure of the Health Assembly states that they 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. 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.

Article 89 relates to notifications concerning delegations. WHO is notified of the members of the delegation, as already stated, 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.).

Article 90 establishes that precedence among delegations shall be determined by the alphabetical order used in the host State. In WHO, precedence is determined by using English or French alphabetical order in alternate years, in accordance with the rules of procedure.

2. The facilities, privileges and immunities of delegations participating in WHO conferences are established in a number of texts. *Article 67 (b)* of the Constitution 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. 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 which 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. It will, however, be noted that some of the obligations imposed in some articles of the draft do not apply to WHO. For example, *article 93* states that, where necessary, the organization shall assist a delegation in securing premises or accom-

¹⁵ United Nations, *Treaty Series*, vol. 26, p. 331.

modation for its members. To date, WHO has not followed this practice.

It will be noted in connexion with *article 96*, concerning freedom of movement, 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.

The other articles of the draft required no special comment on the part of WHO.

6. International Bank for Reconstruction and Development

OBSERVATIONS COMMUNICATED BY LETTER DATED 14 JANUARY 1971
FROM THE GENERAL COUNSEL

[Original text: English]

Introduction

1. The International Bank for Reconstruction and Development (IBRD) has reviewed with interest, on its own account and on behalf of the organizations affiliated with it (IFC, IDA, ICSID), the draft articles on representatives of States to international organizations circulated on behalf of the International Law Commission during the past several years. IBRD recognizes that the instrument that is thus being formulated is likely to be merely the first in a series that will give general definition and structure to the still relatively fluid law of international organizations.¹⁶ Indeed, for the reasons indicated below, the most important of the following comments are addressed not to the substance of the draft articles but to the procedure by which they are to become part of international law (see paras. 4 and 5 below).

2. IBRD recognizes that an instrument on the subjects dealt with in the draft articles will have at most a minor direct effect on either the Bank itself or on its affiliates. This is due primarily to the particular structure and in part to the activities and methods of operation of these organizations.¹⁷ As a consequence of this special structure and other features, neither member nor non-member States have established any permanent missions to the organization of the IBRD Group, nor is it likely that they will do so. Members and a few non-member States send delegations to the annual meetings of the Boards of Governors of the Bank, IFC and IDA (and of the Administrative Council of ICSID), but these sessions are relatively brief (traditionally some five days) so that many of the questions dealt with in

¹⁶ The International Law Commission has already started the consideration of treaties concluded between States and international organizations or between two or more international organizations, and has identified the topic of the succession of States in respect of membership in international organizations.

¹⁷ The special nature of the representative organs of IBRD, IFC and IDA was described in replies made by the Bank to questionnaires distributed by the United Nations Secretariat at the beginning of the International Law Commission study of this subject, which are summarized in an annex to part I of the study prepared by the United Nations Secretariat on the practice of the United Nations, its specialized agencies and IAEA concerning their status, privileges and immunities (hereafter referred to as the "Study by the Secretariat").^a Though the Bank's replies did not refer to ICSID, and its structure differs substantially from that of the financial organizations in the IBRD Group, most of the following remarks also apply to ICSID.

^a Study by the Secretariat, *Yearbook of the International Law Commission, 1967*, vol. II, p. 204, document A/CN.4/L.118 and Add.1 and 2, part one, annex.

part IV of the draft articles are unlikely to arise. With the exception of several groups of legal experts convened to assist in the formulation of the Convention on the Settlement of Investment Disputes between States and Nationals of Other States [hereafter referred to as the SID Convention],¹⁸ the members of the IBRD Group have established no special organs and have convened no conferences to which the draft articles would apply—though of course it is always possible that they will do so in the future. Finally, as the Bank has explained, the variety of posts held from time to time by its executive directors and the different ways in which individual directors perform their duties makes it inappropriate to treat them as being exclusively either "representatives" or "officials".¹⁹

3. Moreover, 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,²⁰ IFC,²¹ and IDA²² (and the SID Convention in relation to ICSID), the Convention on the Privileges and Immunities of the Specialized Agencies and the United Nations Headquarters Agreement—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.

Procedural observations

4. 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.

5. 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

¹⁸ United Nations, *Treaty Series*, vol. 575, p. 159. The groups referred to are the four regional Consultative Meetings of Legal Experts and the Legal Committee on Settlement of Investment Disputes (see ICSID, *History of the Convention on the Settlement of Investment Disputes between States and Nationals of Other States—Analysis of Documents Concerning the Origin and the Formulation of the Convention* (Washington, 1970), vol. I, pp. 6 *et seq.*).

¹⁹ Study by the Secretariat, *op. cit.*, p. 205, para. 71.

²⁰ United Nations, *Treaty Series*, vol. 2, p. 134.

²¹ *Ibid.*, vol. 264, p. 117.

²² *Ibid.*, vol. 439, p. 249.

provisions of the Convention on the Privileges and Immunities of the Specialized Agencies present the most useful 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 subparagraph *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 subparagraph *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 (subparagraph *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 affected could object thereto and prevent the application to it of the altered instrument.²³

(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 (subparagraph *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 (subparagraph *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.²⁴

Observations relating to particular provisions

6. Article 2, paragraph 1, would restrict the application of the Convention to "international organizations of universal character", which are defined by article 1 (*b*) as those "whose membership and responsibilities are on a world-wide scale". Since, in effect, none of the existing international organizations is truly universal in character as all have some provisions for accepting (and thus implicitly for excluding) and sometimes for expelling or permitting the resignation of member States, it may be preferable to refer in article 2, paragraph 1, to organizations having a "world-wide scope".

7. Because of the considerable variations in the legal instruments relating to, and the practices of, international organizations (even if only the specialized agencies are considered), IBRD attributes considerable importance to the maintenance of article 3 of the present draft, with an interpretation at least as broad as indicated in paragraph 5 of the related commentary.²⁵

²³ By analogy to article 20, paragraph 4, of the Vienna Convention on the Law of Treaties.

²⁴ These definitions are now contained in draft articles 1, subparagraphs *a* and *b*, and 2, paragraph 1.

²⁵ See also para. 12 below.

8. Similarly, IBRD attributes considerable importance to the maintenance of draft articles 4, 5 and 79 (the last two of which might conveniently be consolidated), since it is highly desirable that States be permitted to make, with each other and with organizations, arrangements especially suitable to the requirements of particular organizations. It is of course recognized that international agreements formulated subsequent to the promulgation of the instrument here under consideration are likely to be, and indeed should be, influenced by it.

9. The proposed rule in 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.

10. Paragraph 1 of the commentary to article 33 quotes section 14 (article IV) of the Convention on the Privileges and Immunities of the United Nations, including the provision that

"a Member not only has the right but is under a duty to waive the immunity of its representative in any case where in the opinion of the Member the immunity would impede the course of justice, and it can be waived without prejudice to the purpose for which the immunity is accorded".

Though paragraph 2 of the commentary indicates that this commendable provision also appears in a number of other instruments, it is regrettable that it only appears in weakened form in article 34 (and therefore also article 71) and has tentatively been omitted from part IV of the draft articles.

11. 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. 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 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.

12. Though part IV of the draft covers delegations to both organs and conferences, article 80 refers only to the rules of procedure of conferences. In the light of the commentary, 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. International Development Association

See paragraph 1 of the observation submitted by the International Bank for Reconstruction and Development, reproduced above.

8. International Finance Corporation

See paragraph 1 of the observations submitted by the International Bank for Reconstruction and Development, reproduced above.

9. International Monetary Fund

(a) PARTS I AND II OF THE PROVISIONAL DRAFT

OBSERVATIONS COMMUNICATED BY LETTER DATED 26 NOVEMBER 1969 FROM THE GENERAL COUNSEL AND DIRECTOR, LEGAL DEPARTMENT
[Original text: English]

In the Study by the Secretariat²⁶ it was recognized that questions relating to permanent representatives or member delegations to international organizations are not applicable to IMF in the light of the Fund's organizational structure. It would appear that the draft articles are not intended to apply to IMF by virtue of the specific subject-matter of their coverage. Moreover, draft articles 3 and 4 may also be taken to lead to the same conclusion of non-applicability to IMF. The Special Rapporteur may wish to consider the desirability of explicitly stating that the draft articles are not applicable to IMF.

(b) PARTS III AND IV OF THE PROVISIONAL DRAFT

OBSERVATIONS COMMUNICATED BY A LETTER DATED 28 JANUARY 1971 FROM THE GENERAL COUNSEL AND DIRECTOR, LEGAL DEPARTMENT
[Original text: English]

Our observations on parts III and IV of the draft articles would not be very different from what we said in our letter dated 26 November 1969, concerning parts I and II. As mentioned in the Study by the Secretariat, 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 IMF.

10. Universal Postal Union

(a) PARTS I AND II OF THE PROVISIONAL DRAFT

OBSERVATIONS COMMUNICATED BY LETTER DATED 18 SEPTEMBER 1970 FROM THE DEPUTY DIRECTOR-GENERAL OF THE INTERNATIONAL BUREAU
[Original text: French]

1. My remarks refer, first and foremost, to the question of the application to the Universal Postal Union of the parts of the draft submitted for our consideration.

2. Up to now relations between UPU and the member countries have been conducted in principle, and in accordance with the Acts of UPU through the Postal Administrations. There is no written provision concerning permanent missions. Relations between the permanent missions and UPU have developed *de facto* and on the fringe, as it were, of the relations that the permanent missions maintain with the specialized agencies that have their headquarters at Geneva. This is due to the essentially technical nature of the activities of our organization. We have therefore deemed it necessary to explain the *de jure* situation of UPU, our practice and the reasons for it, in order that the problems to which the full application of the draft to UPU would give rise may be better understood.

3. The role of the various organs is at present as follows:

(a) The International Bureau

Article 20 of the Constitution of UPU reads as follows:²⁷

"A central office operating at the seat of the Union under the title of the International Bureau of the Universal Postal Union, directed by a Director-General under the general supervision of the Government of the Swiss Confederation, serves as an organ of liaison, information and consultation for Postal Administration."

This article therefore places the International Bureau at the disposal of the Postal Administrations which are the State bodies directly authorized by the Acts of UPU to ensure the execution of the international postal service.

In fact, one important task of the Bureau is to produce, with the help of information provided by the Postal Administrations, numerous publications concerning the various branches of the postal service. Another important part of the work of the International Bureau is its co-operation in the many studies undertaken in the small collective organs, namely the Executive Council and the Consultative Council for Postal Studies. These organs, which are composed of representatives of the Postal Administrations, require direct and continuous contact with those Administrations.

To complete the picture, it should be pointed out that the International Bureau does not assume the function of depositary of the Acts of the Union and has no part in the procedure for admission or accession to the Union. That is the function of the Swiss Government. Consequently, the International Bureau, unlike the secretariats of the other specialized agencies, has nothing to do with the diplomatic procedure required for the procedure of admission or accession.

(b) Congress

The Congress, which is the supreme organ of UPU and which meets every five years in a different member country, deals mainly with the revision of the Acts of the Union. Although it is composed of plenipotentiaries authorized to sign the treaties thus revised, the members are for the most part representatives of Postal Administrations who are given *ad hoc* powers, for the discussions are essentially concerned with postal problems and require the participation and commitment of those who are responsible for postal services, especially as the proposals submitted to the Congress are drawn up and submitted on behalf of the Postal Administrations.

(c) Executive Council and Consultative Council for Postal Studies

In the small collective organs, namely the Executive Council (EC) and the Consultative Council for Postal Studies (CCPS), the representative of each of the member countries must be appointed by the Postal Administration of his country and be a qualified official (General Regulations,²⁸ article 102, para. 3, and article 104, para. 2). The members of diplomatic missions or permanent missions may form part of the delegation, but if they are alone the Council has in the past granted them the capacity and rights of an observer, i.e. the possibility of participating without the right to vote.

4. We shall have occasion to revert to the organs referred to in subparagraphs *b* and *c* above when submitting our observations concerning part IV of the draft articles.

5. Despite what we have just said, we cannot fail to recognize that the intervention of permanent missions has developed and has been justified mainly in relation to the problems of technical assistance and to UNDP. Thus UPU, which is taking an increasing part in

²⁷ United Nations, *Juridical Yearbook, 1964* (United Nations publication, Sales No.: 66.V.4), p. 195.

²⁸ UPU, *Constitution of Règlement général de l'Union* (Berne, Bureau de l'Union, 1965).

²⁶ Study by the Secretariat, *op. cit.*, p. 206, paras. 76-78.

these programmes, cannot escape this general practice, since it has to do with questions in which State authorities other than Postal Administrations may be concerned. For that reason there must be a certain flexibility in the development of the relations between permanent missions and UPU.

6. In view of the above consideration, it is clear that the full application to UPU of the provisions drawn up by the International Law Commission would present a large number of legal and practical problems. We therefore consider that it would be useful, and indeed necessary, to refer more explicitly to the particular practice of international organizations than is done in certain articles in part I, especially in *article 3* (Relationship between the present articles and the relevant rules of international organizations). It is rightly stated in the commentary on this article that its first purpose is to detect the common denominator and lay down the general pattern which regulates the diplomatic law of relations between States and international organizations. The second purpose is to safeguard the particular rules which may be applicable in a given international organization. Consequently this is a matter not simply of the *structural* peculiarities of international organizations but also of the *peculiarities* in the *current practice* of one or another given organization. In our opinion, article 3 does not seem to provide a full guarantee of the autonomous development of relations between permanent missions and UPU, of a kind which would serve the interests of both parties, in accordance with the purpose of this international organization. Draft article 3 uses the same terminology as article 5 of the Convention on the Law of Treaties. We interpret this terminology as indicating respect for the *de jure* and *de facto* situation in regard to the subject-matter of part II of the draft articles. In our opinion, it would be desirable to expand the commentary on the article in question.

7. *Article 2* deals with the scope of the draft articles. 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*.

8. Lastly—although this is a secondary question—we think that the notification procedure laid down in *article 17*, paragraph 3, is somewhat cumbersome in cases where several organizations have their headquarters in the same host country. The host State is supposed to receive the same notification from each organization. This point is all the more valid in that, according to the commentary (para. 7), paragraph 4 of article 17 provides a supplement to, and not an alternative or substitute for, the procedure prescribed for international organizations.

(b) PARTS III AND IV OF THE PROVISIONAL DRAFT

OBSERVATIONS TRANSMITTED BY LETTER DATED 27 JANUARY 1971
FROM THE DEPUTY DIRECTOR-GENERAL

[*Original text: French*]

PART III.—Permanent observer missions to international organizations

Article 52

This article leaves the way open for the establishment of permanent observer missions to international organizations by non-member States. The practice of UPU does not correspond to the general scope of this provision, because there is certain reticence towards non-member countries. Admittedly the right is not un-

conditional but is dependent on the rules or practice of the organization. For these reasons, we wish to reiterate the need to settle the question of the establishment of the legal relationship between the proposed convention and international organizations (see paragraph 7 of the observations by UPU on the first two parts of the draft articles and paragraph 20 *in fine* of the report of the Sixth Committee to the General Assembly).²⁹

Article 53

As we have already explained, 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).

PART IV.—Delegations of States to organs and to conferences

Article 83

In connexion with this article, it should be pointed out that the regulations in force in UPU allow a delegation to represent only one member country other than its own (article 101, para. 2, of the General Regulations of UPU). For this reason, we share the reservations expressed by certain members of the Commission about this article and agree with the reasoning advanced by them.

Lastly, 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 Nations³⁰ (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.

11. International Telecommunication Union

(a) PARTS I AND II OF THE PROVISIONAL DRAFT

OBSERVATIONS COMMUNICATED BY LETTER DATED 14 MAY 1970
FROM THE LEGAL ADVISER

[*Original text: English/French*]

... Our practice is not entirely reflected in some of the draft articles, e.g. draft *articles 7, 12, 13 and 17*. For example: it is the United Nations which receives the credentials of permanent representatives accredited to the United Nations and ITU, and ITU addresses its official communications directly to the Telecommunication Administrations and not through the Permanent Missions. In so far, however, as any divergencies between the draft articles and our practice can be attributed to our rules, the situation would appear to be regulated by draft *article 3*. But, unless the phrase "relevant rules" can be interpreted to include "practice", we feel that there may be some differences that *article 3* does not cover.

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

²⁹ *Official Records of the General Assembly, Twenty-fifth Session, Annexes*, agenda item 84, document A/8147.

³⁰ United Nations, *Treaty Series*, vol. 1, p. 163, and *ibid.*, vol. 509, p. 309.

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.”

(b) PARTS III AND IV OF THE PROVISIONAL DRAFT

OBSERVATIONS COMMUNICATED BY LETTER DATED 21 DECEMBER 1970
FROM THE LEGAL ADVISER

[Original text: English]

PART III.—Permanent observer missions to international organizations

1. 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),³¹ 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.³² The Secretary-General of the ITU is given no power to accept the accreditation of a permanent observer mission, nor the credentials of its permanent observer.

PART IV.—Delegations of States to organs and to conferences

2. The provisions of part IV of the draft articles are not entirely applicable to the pattern of work of the ITU, as is explained below.

3. 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 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 the ITU to plenipotentiary and administrative conferences of the Union. These definitions do not entirely correspond to those in the Convention.³³

4. It may be remarked, however, 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 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.

5. In addition to its Administrative Council, the Union has two organs (hereinafter called the CCI’s 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).

6. Persons appointed by a member country to serve on the Council are accredited and would, according to the interpretation mentioned in paragraph 3 above, be included in the category of “members of the diplomatic staff” for the purposes of the draft treaty.

7. The CCI’s, however, do not seem to fit into the pattern envisaged in article 78 of the International Law Commission’s draft. 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.

8. In addition to persons representing Governments, certain representatives of entities—usually non-governmental—attend CCI plenary assemblies and meetings of their study groups.

As will be seen from annex 2, the term “representative” as used in the Montreux Convention 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 CCI’s (Montreux Convention, No. 769) and, under certain circumstances, they may vote in Plenary Assemblies (*idem*, No. 789).

³¹ United Nations, *Juridical Yearbook*, 1965 (United Nations publication, Sales No.: 67.V.3), p. 173.

³² See annex 1 below.

³³ See annex 2 below.

Furthermore, scientific and industrial organizations engaged in telecommunication work may participate in an advisory capacity in meetings of the study groups of the CCI's (*idem*, No. 773).

These agencies and organizations contribute towards defraying the expenses of the CCI's (*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 CCI's.

9. Non-governmental representatives make a major contribution to the work of the CCI's. These persons need to enjoy most the privileges and immunities granted to representatives of States in order to perform their tasks. In practice, host Governments have always accorded them the necessary facilities but the situation is anomalous.

10. As article 79 and article 5 of the draft make allowance for the existence of different practices, we assume that nothing in the draft will affect the ITU. We wonder, however, whether the International Law Commission might not wish to consider making some treaty provisions for a special status for persons authorized by the basic instruments of international organizations to attend conferences or meetings of their organs but not sent by States, since this category of participant plays an important part in the work of many technical organizations.

11. The terms of *article 82* conflict with the definition of "delegations" in the Montreux Convention³⁴ in which it is stated: "Each Member and Associate Member shall be free to make up its delegation as it wishes."

12. The terms of *article 83* conflict with chapter 5, paragraphs 6, 7 and 8, of the General Regulations³⁵ annexed to the 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. With reference to *article 85*, it is observed 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.

14. With reference to *article 86*, 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.

15. ITU does not follow, as regards representatives to CCI meetings, the practice laid down in paragraph 1 of *article 87*.³⁶

16. We consider that paragraph 3 of *article 88* is a useful clarification.

17. 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.

18. *Article 90* is not in accordance with ITU practice, which is always to seat delegations in the alphabetical order of the French names of the countries represented (Montreux Convention, No. 658). 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.

19. ITU accepts no responsibility for finding premises and accommodation for delegations. The last sentence of *article 93* would therefore be inapplicable to ITU conferences.

I have 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.

Annex 1

Administrative Council resolution No. 88 (amended)³⁷

RELATIONS OF THE GENERAL SECRETARIAT OF THE UNION WITH STATES OR ADMINISTRATIONS WHICH ARE NOT MEMBERS OR ASSOCIATE MEMBERS OF THE UNION

The Administrative Council

Considering that it is advisable to give precise instructions to the Secretary-General in regard to the attitude he must adopt in the event of receiving communications from States or administrations which are not Members or Associate Members of the Union, and also in regard to the dispatch of documents of the Union that such States or administrations might request.

Resolves that

1. With the exceptions specified below, the Secretary-General may correspond with or forward documents to the Members and Associate Members listed in annexes 1 and 2 of the Convention (Geneva, 1959)³⁸ and those that have become or will become Members or Associate Members in accordance with the procedures laid down in the Convention;

2. The Secretary-General is authorized to correspond with States or administrations not mentioned in paragraph 1 above, with a view to informing them on accession to the Union and the implementation of the Convention or Regulations, or in the case of formal requests to accede, transmitted in accordance with the procedure laid down in the Convention;

3. In respect of any other communication he may receive from a State or administration which is not a Member or Associate Member, the Secretary-General shall take the following steps:

(a) If the communication concerns a matter of policy that the Council should normally consider and resolve, or in the case of doubt, he shall restrict himself to acknowledging it, informing the sender that it will be referred to the Administrative Council;

(b) If the communication is clearly of a factual nature, connected with the telecommunication services, the Secretary-General shall acknowledge it, informing the sender that a copy will be sent to the Members and Associate Members of the Union for their information, and shall take action accordingly in each case;

³⁴ See annex 2 to these observations.

³⁵ ITU, *International Telecommunication Convention (Montreux, 1965)*, Geneva, General Secretariat of ITU, annex 4, p. 99.

³⁶ See para. 7 above.

³⁷ ITU, Supplement No. 2 (August 1967) to the *Volume of Resolutions and Decisions of the Administrative Council of ITU*.

³⁸ United States of America, Department of State, *United States Treaties and other International Agreements* (Washington, U.S. Government Printing Office, 1962), vol. 12, part 2 (1961), p. 1761.

4. (1) In cases referred to in paragraph 3 (b) above, the Secretary-General shall publish the communication received under the heading: "Information received from sources outside the Union", followed by a note to the effect that the publication of the information in question does not imply recognition of the status of the sender in relation to the Union;

(2) However, if the nature of the information received is such as to warrant its inclusion in official documents, it shall not be published separately but shall be incorporated in the appropriate documents, under the title and with the explanatory note referred to in paragraph 4 (1);

5. (1) Requests for documents, public sale of which is authorized, may be complied with in return for payment;

(2) All notifications, communications and circular letters distributed gratis by the Secretary-General to Members and Associate Members of the Union shall be furnished by him to any private individual or to any organization on request in return for payment at a price to be fixed by the Secretary-General;

6. Until Germany becomes a Member once again, the Secretary-General is authorized to correspond with the Allied Control Commission in Germany; he shall, as a practical measure, be provisionally authorized to correspond with the occupation zones of Germany, bearing in mind the practice at present in force.

Ref.: Doc. 265/CA3—October 1948; Doc. 535, 542, 546 and 549/CA4—September 1949; Doc. 803/CA5—October 1950; and Doc. 1606/CA9—May 1954.

Annex 2

*Definition of certain terms used in the International Telecommunication Convention and its annexes*³⁹

...

Delegate: A person sent by the Government of a Member or Associate Member of the Union to a plenipotentiary conference, or a person representing a Government or an administration of a Member or Associate Member of the Union at an administrative conference, or at a meeting of an international consultative committee.

Representative: A person sent by a recognized private operating agency to an administrative conference, or to a meeting of an international consultative committee.

Expert: A person sent by a national scientific or industrial organization which is authorized by the Government or the administration of its country to attend meetings of study groups of an international consultative committee.

Observer: A person sent by:

- The United Nations in accordance with article 29 of the Convention;
- One of the international organizations invited or admitted in accordance with the provisions of the General Regulations to participate in the work of a conference;
- The Government of a Member or Associate Member of the Union participating in a non-voting capacity in a regional administrative conference held under the terms of article 7 of the Convention.

Delegation: The totality of the delegates and, should the case arise, any representatives, advisers, attachés or interpreters sent by the same country.

Each Member and Associate Member shall be free to make up its delegation as it wishes. In particular, it may include in its delegation in the capacity of delegates, advisers or attachés, persons belonging to private operating agencies which it recognizes or persons belonging to other private enterprises interested in telecommunications.

12. World Meteorological Organization

OBSERVATIONS COMMUNICATED BY LETTER DATED 30 OCTOBER 1970
FROM THE DEPUTY SECRETARY-GENERAL

[Original text: English]

I have no comments of substance to submit concerning the texts of the draft articles adopted by the International Law Commission on "Relations between States and international organizations". I should like however to submit for the attention of the Commission some specific features governing the relations between WMO and its Members (States and territories). These observations are contained in a note attached to the present letter.

Note on some aspects of the relations between the World Meteorological Organization and its Members as regards representation of Members in the Organization

(a) Permanent representatives

The basis for the nomination of permanent representatives with WMO by Member States and member Territories of WMO is stipulated in Regulation 6 of the WMO General Regulations⁴⁰ which contains a definition of the functions of the permanent representative. Regulation 6 reads as follows:

"Each Member shall designate by written notification to the Secretary-General a Permanent Representative who should be the Director of the Meteorological Service to act on technical matters for the Member between sessions of Congress. Subject to approval of their respective governments, Permanent Representatives should be the normal channel of communications between the Organization and their respective countries and shall maintain contact with the competent authorities, governmental or non-governmental, of their own countries on matters concerning the work of the Organization."

It should be noted that the main purpose for which these representatives were instituted was to provide a means of conveying to the Organization the position of its Members on technical matters falling within the sphere of competence of the Organization. In addition, Regulation 6 provides that, "subject to the approval of their respective governments", the functions of these permanent representatives could be extended so that they could represent their government before the Organization. In fact, about half of the WMO permanent representatives have been granted the right by the Minister of Foreign Affairs of their country to communicate with the Organization on behalf of their government on all matters. There are other cases, however, where the functions of the WMO permanent representative have been restricted to technical matters only. In such cases, the communications on non-technical matters are addressed to WMO by the government of the Member, either directly from the Minister of Foreign Affairs or through the permanent mission of the Member in Geneva.

In those cases where both a WMO permanent representative has been designated to act on behalf of his government on all matters concerning WMO and a permanent mission of a member in Geneva has been accredited to WMO, some difficulties have been experienced. In most of these cases, a *modus vivendi* has been found and, in general, communications of a non-technical nature are accepted from both sources.

³⁹ Annex 2 to the International Telecommunication Convention (Montreux, 1965) [for the reference to the Convention, see footnote 31 above].

⁴⁰ WMO, *General Regulations*, Offprint of *Basic Documents—Edition 1971* (WMO—No. 15), p. 32.

To complete the picture, it should be stressed that, with very few exceptions, the WMO permanent representatives are not entitled to designate and issue credentials for representatives of their country at sessions of the WMO Congress, regional associations and technical commissions of the Organization, and WMO technical conferences.

It should also be noted that the WMO permanent representatives exercise their functions at the seat of the government of their country and not, like the permanent mission, near the headquarters of the Organization. Therefore, if a word other than "permanent representative" could be used to designate the head of the permanent mission, it would, in the case of WMO, avoid a certain amount of confusion. It may perhaps be useful to mention in this connexion that some Governments when accrediting the head of a permanent mission in Geneva to WMO have designated him as the resident representative of their country in Geneva.

(b) *Permanent missions accredited to several organizations*

Most of the permanent missions established in Geneva are accredited to the Office of the United Nations and other international organizations in Geneva. In a few cases, a separate letter accrediting the permanent mission to WMO is addressed to the Organization. In other cases, a single letter of accreditation is addressed to the Office of the United Nations in Geneva indicating that the head of the permanent mission is accredited to the Office of the United Nations and "other international organizations in Geneva". It is not clear in this latter case whether WMO is included or not. Such difficulties could be avoided if the State accrediting the head of a permanent mission could notify separately each of the organizations to which he is accredited.

(c) *Representation of members by the permanent representative of another member*

Draft *article 83* (Principle of single representation) states that a delegation to an organ or to a conference may represent only one State. This provision is contrary to the present practice of WMO. The principle of multiple representation in WMO can be based on the fact that a few Members of the Organization operate joint meteorological services with other Members. There have been several instances of one delegation representing two or three WMO Members at sessions of the WMO Congress, regional associations and technical commissions. In case one delegate represents more than one Member at such a session, he has all the rights of the delegate of each Member he represents with one exception, i.e., he can only vote for one Member in accordance with the provision of regulation 55 of the General Regulations of the Organization which reads: "... No person shall have more than one vote in sessions of constituent bodies". However, when a delegation which represents several Members has a total of delegates equal to or greater than the number of Members represented by the delegation, different delegates of this delegation have the right to vote each for one of the Members represented by the delegation.

13. International Atomic Energy Agency

(a) PARTS I AND II OF THE PROVISIONAL DRAFT

OBSERVATIONS COMMUNICATED BY LETTER DATED 16 SEPTEMBER 1970
FROM THE DIRECTOR OF THE LEGAL DIVISION

[Original text: English]

1. *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". This distinction implies that the two concepts are different from each other. Thus, 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 International Law Commission, we wonder whether in article 6, where a principle is being established, a similar provision could not be introduced for permanent representatives. Such a provision may help avoid any ambiguity and possible derogation from the rights, privileges and immunities of permanent representatives, which, in fact, to our mind, are as important as the privileges and immunities of permanent missions, it not more so. (We would like to add that there have been some difficulties because of the provision in the IAEA Headquarters Agreement⁴¹ [section 29, article XII] which provides that permanent missions to the IAEA of Member States shall enjoy the same privileges and immunities as are accorded to diplomatic missions in the Republic of Austria. This provision is separate and distinct from those relating to Governors and resident representatives, namely sections 30 to 32 (article XIII). At least in one instance, where the host Government refused to accept the accreditation of a resident representative on the grounds of incompatible professional activity or nationality, an attempt was made, and indeed succeeded, to obtain duty-free import privileges in the name of the "permanent mission".) If this proposal proved acceptable, consequential amendment may have to be made in other articles referred to above wherever it appears necessary.

2. We believe that in *article 14* a third paragraph similar to paragraph 2 *a* of article 7 of the Vienna Convention on the Law of Treaties could be added, since Heads of State, Heads of Governments and Ministers for Foreign Affairs should also be able to conclude treaties with international organizations without having to produce full powers.

3. 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, subparagraph 1, 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.

4. 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.

5. *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

⁴¹ United Nations, *Treaty Series*, vol. 339, p. 152.

have particular merits if a "permanent mission" is established in a "third State".

6. We also think that the following minor comments on details of drafting may be of some use to the drafters of the text:

(a) Paragraph 5 of the commentary to *article 12* gives the impression that in the IAEA's practice the Director-General reports to the Board of Governors on the credentials of all permanent representatives. The fact is that such reporting concerns only the credentials of Governors. There is no reporting on the credentials of permanent representatives.

(b) *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.

(c) In subparagraphs *b*, *c* and *d* of *article 36*, the exemptions are specifically those from dues and taxes of the "host State". Does the omission of such specification in subparagraphs *a*, *e* and *f* mean that those particular exemptions are from dues and taxes of any State?

(d) *Article 14* casually mentions, and *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".

(b) PARTS III AND IV OF THE PROVISIONAL DRAFT

OBSERVATIONS COMMUNICATED BY LETTER DATED 2 MARCH 1971
FROM THE DIRECTOR OF THE LEGAL DIVISION

[Original text: English]

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.

1. With respect to *article 52*, we note 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".

2. As concerns *article 53*, 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".

3. With regard to *article 58*, 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."

4. Finally, with respect to *article 100*, we have a preference for alternative A since it 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.

ANNEX II

Comparative tables of the numbering of the articles of the provisional draft (draft articles on the representatives of States to international organizations) and of the final draft (draft articles on the representation of States in their relations with international organizations) adopted by the Commission

NOTE BY THE SECRETARIAT¹

In connexion with the topic "Relations between States and international organizations", the International Law Commission prepared a provisional set of draft articles and a final set of draft articles. The provisional set, entitled "Draft articles on representatives of States to international organizations", was adopted by the Commission at its twentieth, twenty-first and twenty-second sessions.² The final set, entitled "Draft articles on the representation

of States in their relations with international organizations", was adopted by the Commission at its twenty-third session.³

For the convenience of the Sixth Committee, the Secretariat has compiled the following two tables indicating the correspondence between the two sets of draft articles. It should be noted that in both tables where an article in one set has no corresponding article in the other set the relevant column is marked "-".

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

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

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

³ For the text of the "final draft", see above, pp. 284 *et seq.*

¹ Originally distributed as mimeographed document A/C.6/L.821 (of 8 October 1971) of the twenty-sixth session of the United Nations General Assembly, under agenda item 88 (Report of the International Law Commission on the work of its twenty-third session).

² For the text of the articles of the "provisional draft", see the following documents:

TABLE I

Articles of the provisional draft in numerical order
and the corresponding articles of the final draft

<i>Number of article in the provisional draft</i>	<i>Number of article in the final draft</i>
1	1
2	2
3	3
4	4
5	4
6	5
7	6
8	8
9	—
10	9
11	72
12	10
13	11
14	12
15	13
16	14
17	15
18	16
19	17
20	18
21	19
22	20
23	21
24	22
25	23
26	24
27	25
28	26
29	27
30	28
31	29
32	30
33	31
34	31
35	32
36	33
37	34
38	35
39	73
40	36
41	37
42	38
43	78
44	80
45	75
46	39
47	40
48	77
49	41
50	81
51	1
52	5
53	7
54	8
55	9
56	72
57	10 and 11
58	12
59	13 and 74
60	14
61	15
62	16

TABLE II

Articles of the final draft in numerical order
and the corresponding articles of the provisional draft

<i>Number of article in the final draft</i>	<i>Number of article in the provisional draft</i>
1	1, 51 and 78
2	2
3	3
4	4, 5 and 79
5	6 and 52
6	7
7	53
8	8 and 54
9	10 and 55
10	12 and 57
11	13 and 57
12	14 and 58
13	15 and 59
14	16 and 60
15	17 and 61
16	18 and 62
17	19
18	20 and 63
19	21 and 64
20	22 and 65
21	23 and 66
22	24 and 66
23	25 and 67
24	26 and 67
25	27 and 67
26	28 and 68
27	29 and 67
28	30 and 69
29	31 and 69
30	32 and 69
31	33, 34 and 71
32	35 and 69
33	36 and 69
34	37 and 69
35	38, 67 and 69
36	40 and 69
37	41 and 70
38	42 and 73
39	46, 76 and 113
40	47 and 77
41	49 and 77
42	—
43	84
44	87
45	81
46	82
47	89
48	86
49	90
50	91
51	92
52	93
53	92
54	94
55	95
56	92
57	96
58	97
59	98
60	99
61	100
62	101

TABLE I (concluded)

Articles of the provisional draft in numerical order
and the corresponding articles of the final draft

<i>Number of article in the provisional draft</i>	<i>Number of article in the final draft</i>
63	18
64	19
65	20
66	21 and 22
67	23, 24, 25, 27 and 35
68	26
69	28, 29, 30, 32, 33, 34, 35 and 36
70	37
71	31
72	73
73	38
74	78
75	80
76	39 and 75
77	40, 41 and 77
78	1
79	4
80	—
81	45
82	46
83	—
84	43
85	72
86	48
87	44
88	—
89	47
90	49
91	50
92	51, 53 and 56
93	52
94	54
95	55
96	57
97	58
98	59
99	60
100	61
101	62
102	64
103	66
104	63, 65 and 73
105	67
106	68
107	74
108	69
109	69
110	78
111	80
112	75
113	39
114	70
115	77
116	71

TABLE II (concluded)

Articles of the final draft in numerical order
and the corresponding articles of the provisional draft

<i>Number of article in the final draft</i>	<i>Number of article in the provisional draft</i>
63	104
64	102
65	104
66	103
67	105
68	106
69	108 and 109
70	114
71	116
72	11, 56 and 85
73	39, 72 and 104
74	59 and 107
75	45, 76 and 112
76	—
77	48, 77 and 115
78	43, 74 and 110
79	—
80	44, 75 and 111
81	50
82	—