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# REPORT OF THE COMMISSION TO THE GENERAL ASSEMBLY

## DOCUMENT A/7209/REV.1

### Report of the International Law Commission on the work of its twentieth session, 27 May-2 August 1968

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#### CHAPTER I

##### Organization of the session

1. The International Law Commission, established in pursuance of General Assembly resolution 174 (II) of 21 November 1947 and in accordance with its Statute annexed thereto, as subsequently amended, held its twentieth session at the United Nations Office at Geneva from 27 May to 2 August 1968. 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 twenty-one draft articles on representatives of States to international organizations and commentaries thereon. Chapter III, on the Succession of States and Governments, contains a description of the Commission's work on that topic. Chapter IV relates to the progress of the Commission's work on the topic of the most-favoured-nation clause. Chapter V deals with the Commission's review of its programme and methods of 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. Gilberto AMADO (Brazil)  
 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. Louis IGNACIO-PINTO (Dahomey)

Mr. Eduardo JIMÉNEZ DE ARÉCHAGA (Uruguay)  
 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. Abdul Hakim TABIBI (Afghanistan)  
 Mr. Arnold J. P. TAMMES (Netherlands)  
 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. With the exception of Mr. Taslim O. Elias, all members attended meetings of the twentieth session of the Commission.

##### B. OFFICERS

4. At its 942nd meeting, held on 27 May 1968, the Commission elected the following officers:  
*Chairman:* Mr. José María Ruda  
*First Vice-Chairman:* Mr. Erik Castrén  
*Second Vice-Chairman:* Mr. Nikolai Ushakov  
*Rapporteur:* Mr. Abdul Hakim Tabibi

##### C. DRAFTING COMMITTEE

5. At its 962nd meeting, held on 26 June 1968, the Commission appointed a Drafting Committee composed as follows:

*Chairman:* Mr. Erik Castrén  
*Members:* Mr. Roberto Ago; Mr. Fernando Albónico; Mr. Milan Bartoš; Mr. Jorge Castañeda; Mr. Richard D. Kearney; Mr. Nagendra Singh; Mr. Alfred Ramangasoavina; Mr. Paul Reuter; Mr. Nikolai Ushakov;

and Mr. Endre Ustor. 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. Abdul Hakim Tabibi also took part in the Committee's work in his capacity as Rapporteur of the Commission.

#### D. SECRETARIAT

6. Mr. Constantin A. Stavropoulos, Legal Counsel, attended the 957th to 959th, 977th and 978th meetings, held on 19, 20 and 21 June, 17 and 18 July 1968, respectively, and two private meetings held on 18 and 19 July 1968, 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, Mr. Santiago Torres-Bernárdez, Mr. Vladimir Prusa and Mr. Eduardo Valencia-Ospina served as assistant secretaries.

#### E. AGENDA

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

1. Succession of States and Governments:
  - (a) Succession in respect of treaties;
  - (b) Succession in respect of rights and duties resulting from sources other than treaties.
2. Relations between States and inter-governmental organizations.
3. Most-favoured-nation clause.
4. Review of the Commission's programme and methods of work.
5. Co-operation with other bodies.
6. Organization of future work.
7. Date and place of the twenty-first session.
8. Other business.

8. In the course of the session, the Commission held forty-eight public meetings and two private meetings. In addition, the Drafting Committee held ten meetings. The Commission considered all the items on its agenda.

### CHAPTER II

#### Relations between States and international organizations

##### A. HISTORICAL BACKGROUND AND SCOPE OF THE TOPIC

9. At its tenth session, in 1958, the International Law 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.<sup>1</sup> 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 organization, governed by special conventions."

10. By resolution 1289 (XIII) of 5 December 1958, the General Assembly invited the International Law 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 International Law Commission took note of the above-mentioned resolution and decided to consider the question in due course.<sup>2</sup>

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.<sup>3</sup>

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"<sup>4</sup> 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.<sup>5</sup>

14. At the sixteenth session of the Commission, in 1964, the Special Rapporteur submitted a working paper<sup>6</sup> as a basis for discussion of 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);

<sup>2</sup> *Yearbook of the International Law Commission, 1959*, vol. II, document A/4169, p. 123, para. 48.

<sup>3</sup> *Yearbook of the International Law Commission, 1962*, vol. II, document A/5209, p. 192, para. 75.

<sup>4</sup> Document A/CN.4/161 and Add.1. *Yearbook of the International Law Commission, 1963*, vol. II, p. 159.

<sup>5</sup> *Yearbook of the International Law Commission, 1963*, vol. II, document A/5509, p. 225, para. 66.

<sup>6</sup> Document A/CN.4/L.104.

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

(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.<sup>7</sup> 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 the International Atomic Energy Agency (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 provisional edition of a study entitled "The Practice of the United Nations, the Specialized Agencies and the International Atomic Energy Agency concerning their Status, Privileges and Immunities".<sup>8</sup> 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, after its discussion of the working paper and the questions referred to above, was recorded in paragraph 42 of its 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."<sup>9</sup>

17. Also at its sixteenth session, in 1964, the Commission adopted its programme of work for 1965 and 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 complete the study of both

subjects before that date. The topic of special missions was chosen in preference to that of relations between States and inter-governmental organizations in the light of General Assembly resolution 1289 (XIII) of 5 December 1958.<sup>10</sup>

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. 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 organization; (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.<sup>11</sup> 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 present session of the Commission the Special Rapporteur submitted a third report<sup>12</sup> 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 which are reproduced in section E below, with the Commission's commentary on each article. The first five articles form part I (General provisions). The remaining articles make up the first section of part II (Permanent missions to international organizations). That section is entitled "Permanent missions in general".

<sup>7</sup> *Yearbook of the International Law Commission, 1964*, vol. I, 757th meeting, pp. 221 and 222, para. 20.

<sup>8</sup> Document A/CN.4/L.118 and Add.1 and 2. This study, with minor changes, is published in the *Yearbook of the International Law Commission, 1967*, vol. II, p. 154.

<sup>9</sup> *Yearbook of the International Law Commission, 1964*, vol. II, document A/5809, p. 227.

<sup>10</sup> *Ibid.*, p. 226, paras. 36 and 37.

<sup>11</sup> Document A/CN.4/195 and Add.1. *Yearbook of the International Law Commission, 1967*, vol. II, p. 133.

<sup>12</sup> See p. 119 above (A/CN.4/203 and Add.1-5).

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

#### B. TITLE OF THE TOPIC

23. The Commission noted that in its original form the draft resolution which was subsequently adopted by the General Assembly as resolution 1289 (XIII)<sup>13</sup> used the expression "international organizations". The adjective "inter-governmental" was added as a result of an oral suggestion made by a representative at the Sixth Committee shortly before the voting took place. The reason given for that suggestion was that the resolution should make it clear that it applied only to inter-governmental organizations.<sup>14</sup> The Commission observed, however, that the expression "international organizations" without the adjective "inter-governmental" is used in the Vienna Convention on Diplomatic Relations<sup>15</sup> and the draft articles on the law of treaties.<sup>16</sup> It decided therefore to substitute that expression in the title of the topic for "inter-governmental organizations". To avoid any misunderstanding the Commission included in article 1 of the draft articles a sub-paragraph stating that "an international organization" means an inter-governmental organization.

#### C. FORM AND TITLE OF THE DRAFT ARTICLES

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

25. To make it clear that the draft articles prepared at this stage of its work related only to that specific

aspect of the topic, the Commission decided that they should be entitled "Draft articles on representatives of States to international organizations".

#### D. SCOPE OF THE DRAFT ARTICLES

26. Members of the Commission had differing opinions on whether the work of the Commission on the topic should extend to regional organizations. In paragraph 179 of his first report,<sup>17</sup> the Special Rapporteur had suggested that the Commission should concentrate its work on this topic first on international organizations of a universal character and prepare its draft articles with reference to these organizations only, and should examine later whether the draft articles could be applied to regional organizations as they stood, or whether they required modification. In explaining his suggestion he stated that the study of regional organizations raised a number of problems, which would require the formulation of particular rules for those organizations. Some members of the Commission took issue with that suggestion. They thought that regional organizations should be included in the study, pointing out that relations between States and organizations of a universal character might not differ appreciably from relations between States and similar regional organizations. Indeed, they considered that there were at least as great differences between some of the universal organizations—for example, between the Universal Postal Union (UPU), the International Labour Organisation 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.

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

28. Some members of the Commission were of the opinion that the scope of the draft articles should be confined to permanent missions to international organizations. In his third report the Special Rapporteur had

<sup>13</sup> See para. 10 above.

<sup>14</sup> *Official Records of the General Assembly, Thirteenth Session, Annexes*, agenda item 56, document A/4007, para. 21.

<sup>15</sup> United Nations, *Treaty Series*, vol. 500, p. 96.

<sup>16</sup> *Yearbook of the International Law Commission, 1966*, vol. II, document A/6309/Rev.1, part II, para. 177, para. 38.

<sup>17</sup> See foot-note 4.

included a number of articles on delegations to organs of international organizations and to conferences convened by international organizations and on permanent observers of non-member States to international organizations (parts III and IV). The Commission was of the opinion that no decision should be taken on that question until it had had an opportunity to consider those articles. If the Commission were to decide to cover those two subjects in the draft articles, the title of the draft articles would have to be changed.

E. DRAFT ARTICLES ON REPRESENTATIVES OF STATES  
TO INTERNATIONAL ORGANIZATIONS

*Part 1. General provisions*

*Article 1. Use of terms*

**For the purposes of the present articles:**

- (a) An “international organization” means an inter-governmental organization;
- (b) An “international organization of universal character” means an organization whose membership and responsibilities are on a world-wide scale;
- (c) The “Organization” means the international organization in question;
- (d) A “permanent mission” is a mission of representative and permanent character sent by a State member of an international organization to the Organization;
- (e) The “permanent representative” is the person charged by the sending State with the duty of acting as the head of a permanent mission;
- (f) The “members of the permanent mission” are the permanent representative and the members of the staff of the permanent mission;
- (g) The “members of the staff of the permanent mission” are the members of the diplomatic staff, the administrative and technical staff and the service staff of the permanent mission;
- (h) The “members of the diplomatic staff” are the members of the staff of the permanent mission, including experts and advisers, who have diplomatic status;
- (i) The “members of the administrative and technical staff” are the members of the staff of the permanent mission employed in the administrative and technical service of the permanent mission;
- (j) The “members of the service staff” are the members of the staff of the permanent mission employed by it as household workers or for similar tasks;
- (k) The “private staff” are persons employed exclusively in the private service of the members of the permanent mission;
- (l) The “host State” is the State in whose territory the Organization has its seat, or an office, at which permanent missions are established;
- (m) An “organ of an international organization” means a principal or subsidiary organ, and any commission, committee or sub-group of any of those bodies.

*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 definitions contained therein are limited to the draft articles. They only state the meaning in which the expressions listed in the article should be understood for the purposes of the draft articles.

(3) The definition of the term “international organization” in sub-paragraph (a) is based on sub-paragraph (i) of paragraph 1 of article 2 of the draft articles on the law of treaties. In his third report, the Special Rapporteur had proposed the following definition: “an international organization is an association of States established by treaty, possessing a constitution and common organs, and having a legal personality distinct from that of the Member States”.<sup>18</sup> The Commission thought, however, that such an elaborate definition was not necessary for the time being since it was not dealing at the present stage of its work with the status of the international organizations themselves, but only with the legal position of representatives of States to the organizations. The Commission intends to harmonize, if necessary, the definition contained in sub-paragraph (a) with the corresponding provision of the Convention on the Law of Treaties which will be adopted by the Vienna Conference.

(4) The definition of the term “international organization of universal character” in sub-paragraph (b) flows from Article 57 of the Charter which refers to the “various specialized agencies, established by inter-governmental agreement and having wide international responsibilities”.

(5) The term “permanent representative”—defined in sub-paragraph (e)—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 States<sup>19</sup> refers to “resident representatives”. However, since the adoption in 1948 of General Assembly resolution 257 A (III) on permanent missions, the use of the term “permanent representative” has become the prevailing pattern 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 Austria uses the term “resident representative”.<sup>20</sup> So does the Headquarters Agreement of the United Nations Economic Commission for Africa with Ethiopia,<sup>21</sup>—which is the only Headquarters agreement for an economic commission which expressly envisages resident representatives.

<sup>18</sup> A/CN.4/203, chapter II, article 1, sub-paragraph (a).

<sup>19</sup> United Nations, *Treaty Series*, vol. II, p. 26.

<sup>20</sup> Section 1 (j) of the Agreement, United Nations, *Treaty Series*, vol. 339, p. 153.

<sup>21</sup> Section 10 (b) of the Agreement, United Nations, *Treaty Series*, vol. 317, p. 108.

The term "resident representative" is also used in the Headquarters Agreement of the Food and Agriculture Organization of the United Nations (FAO) with Italy.<sup>22</sup>

(6) The definition of the term "members of the diplomatic staff" in sub-paragraph (h) differs in two respects from the corresponding definition in sub-paragraph (d) of article 1 of the Vienna Convention on Diplomatic Relations. In the first place, sub-paragraph (h) refers expressly to experts and advisers in view of the prominent role played by these officials and the important services rendered by them as members of permanent missions, especially as regards international organizations of a technical character. In the second place, in the English text, the term "diplomatic status" has been substituted for "diplomatic rank". The Commission has already used the term "diplomatic status" in the English text of the corresponding provision of the draft articles on special missions.<sup>23</sup> It has a broader connotation than "diplomatic rank" and covers not only persons having diplomatic titles but also experts and advisers assimilated to them.

(7) As regards sub-paragraphs (l), which defines the term "host State", the Commission observed that international organizations usually have one seat. The United Nations, however, has, in addition to its Headquarters in New York, an Office in Geneva, where a great number of Member States maintain permanent missions as liaison with the Office as well as with the following specialized agencies established in Geneva: the International Labour Organisation (ILO), International Telecommunication Union (ITU), World Health Organisation (WHO) and World Meteorological Organisation (WMO).

(8) Sub-paragraphs (f), (g), (i), (j) and (k) are based, with a few changes in terminology, on the corresponding provisions of article 1 of the Vienna Convention on Diplomatic Relations and of article 1 of the draft articles on special missions.

(9) The other sub-paragraphs 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.

### *Article 2. Scope of the present articles*

**1. The present articles apply to representatives of States to international organizations of universal character.**

**2. The fact that the present articles do not refer to representatives of States to other international organizations is without prejudice to the application to those representatives of any of the rules set forth in the present articles to which they would be subject independently of these articles. Likewise, it shall not preclude States**

<sup>22</sup> *Legislative texts and treaty provisions concerning the legal status, privileges and immunities of international organizations (United Nations Legislative Series)*, vol. II (ST/LEG/SER.B/11), section 24, p. 195.

<sup>23</sup> Sub-paragraph (h) of article 1. See *Yearbook of the International Law Commission, 1967*, vol. II, document A/6709/Rev.1 and Rev.1/Corr.1, p. 348.

**members of those other organizations from agreeing that the present articles apply to their representatives to such organizations.**

### *Commentary*

(1) One method of determining the international organizations which, in addition to the United Nations, come within the scope of the draft articles could be the method adopted by the Convention on the Privileges and Immunities of the Specialized Agencies.<sup>24</sup> That Convention lists in article 1 a certain number of specialized agencies and adds that the term "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 out 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 out other organizations of universal character which are outside what has become known as the United Nations "system" or "family" or the United Nations and its "related" or "kindred" agencies. Examples of such organizations are the Bank for International Settlements, the International Institute for the Unification of Private Law, the International Wheat Council, and the Central Office of International Transport by Rail.<sup>25</sup> The wording of paragraph 1 of article 2 of the draft articles is designed to fill that gap by using the method of a general definition covering all international organizations of universal character.

(2) Paragraph 2 of the article lays down a reservation to the effect that the limitation of the scope of the draft articles to international organizations of universal character does not affect the application to representatives of States to other organizations of any of the rules set forth in the draft articles to which they would be subject independently of the articles. The purpose of that reservation is to give adequate expression to the view stated by some members of the Commission that relations between States and international organizations often follow similar patterns whether the organizations are of a universal or a regional character.

(3) Paragraph 2 of the article also leaves it open for States members of the organizations not covered in paragraph 1 to decide to apply the provisions of the draft articles to their representatives to such organizations by adopting such instruments as they may find appropriate.

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

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

<sup>24</sup> United Nations, *Treaty Series*, vol. 33, p. 262.

<sup>25</sup> For a list of such organizations see *Repertory of Practice of United Nations Organs*, vol. III, article 57, annex; see also Amos J. Peaslee, *International Governmental Organizations, Constitutional Documents*, The Hague, 1961.

### Commentary

(1) The purpose of this article is twofold. First, it seeks to state the general nature of the draft articles. 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.

(2) Secondly, article 3 seeks to safeguard the particular rules which may be applicable in 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. The members of UPU, for example, include a certain number of territories for whose international relations a member Country is responsible and which possess an independent postal administration.<sup>26</sup> A number of specialized agencies provide for "associate membership", thus enabling participation of entities which enjoy internal self-government but have not yet achieved full sovereignty. In WHO, for instance, "territories or groups of territories which are not responsible for the conduct of their international relations" may be admitted as associate members upon application by the State or authority having responsibility for those relations.<sup>27</sup>

(3) Another illustration of the particular rules which may prevail in a given international organizations relates to the character of representatives to international organizations as representatives of States. An exception to this general pattern is to be found in the tripartite system of representation in the ILO. The employers' and workers' members of the Governing Body do not represent the countries of which they are nationals, but are elected by employers' and workers' delegates to the Conference. By virtue of paragraph 1 of the ILO annex to the Specialized Agencies Convention, employers' and workers' members of the Governing Body are assimilated to representatives of member States, except that the waiver of the immunity of any such person may be made only but the Governing Body.<sup>28</sup>

(4) The Commission did not consider it appropriate to include a specific reservation in each article in respect of which it was necessary to safeguard the particular rules prevailing in one or more international organizations. It therefore decided to formulate a general reservation and to place it in part I so as to cover the draft articles as a whole. This enabled the Commission to simplify the drafting of the articles.

(5) The expression "relevant rules of the Organization" used in article 3 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.

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

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

### *Article 5. Derogation from the present articles*

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

### Commentary

(1) Articles 4 and 5 regulate the relationship between the draft articles and other international agreements. Some members of the Commission considered that these two articles were not necessary since the expression "relevant rules of the Organization" used in article 3 could be interpreted to cover international agreements relating to representatives of States to international organizations. They pointed out that headquarters agreements and general conventions on privileges and immunities are concluded with or approved by the organizations concerned. Their provisions could therefore be considered as forming part of the rules of the organizations. The majority of the members of the Commission, however, was of the opinion that, given the great variety of agreements relating to international organizations and of the situations envisaged therein, it would be more appropriate to devote to them a specific provision of the draft articles.

(2) The purpose of article 4 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 serve as a general pattern and a uniform rule, are without prejudice to different rules which may be laid down in such agreements and conventions.

(3) Article 4 refers to international agreements "in force between States or between States and international organizations". Headquarters agreements are usually concluded between the host State and the Organization. As regards the Convention on the Privileges and Immunities of the United Nations,<sup>29</sup> the determination of the parties to that Convention has given rise to difficulties of interpretation. Section 31 of the Convention provides that "This convention is submitted to every Member

<sup>26</sup> Article 4 of the Universal Postal Convention of 1957, United Nations, *Treaty Series*, vol. 364, p. 166.

<sup>27</sup> Article 8 of the Constitution of WHO, *ibid.*, vol. 14, p. 189.

<sup>28</sup> Study of the Secretariat. See *Yearbook of the International Law Commission, 1967*, vol. II, document A/CN.4/L.118 and Add.1 and 2, p. 199, para. 34.

<sup>29</sup> United Nations, *Treaty Series*, vol. 1, p. 16.

of the United Nations for accession". It has been asserted by the United Nations Secretariat—an assertion supported by some writers—that the Convention is of a very special character, being in fact a convention *sui generis*, and that the United Nations could be considered in a sense to be a party to it.<sup>30</sup>

(4) Some members of the Commission also suggested that reference should be made in article 4 to agreements between international organizations. The Commission, however, thought that such a reference was not necessary since agreements between international organizations are rare and, when they do exist, probably do not concern representatives to international organizations. The Commission therefore decided to cover in article 4 the principal cases only.

(5) Article 5 relates to future agreements which may contain provisions in conflict with some of the rules laid down in the draft articles. Some members of the Commission stated that this article was not necessary since the relationship between the draft articles and future international agreements is governed by the rules of the general law of treaties. The majority of the members of the Commission thought, however, that an article providing for the possibility of the future adoption by States of different provisions relating to representatives to international organizations would serve a useful purpose. The Commission hopes that the draft articles will provide a basis for conventions on representatives of States to particular international organizations which their members may see fit to conclude. 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.

## *Part II. Permanent missions to international organizations*

### *Section 1. Permanent missions in general*

#### *Article 6. Establishment of permanent missions*

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

#### *Commentary*

(1) Article 6 makes it clear that the institution of permanent representation to an international organization is of a non-obligatory character. Member States are under no obligation to establish permanent missions at the seat of the Organization.

<sup>30</sup> See the statement by the Legal Counsel at the 1016th meeting of the Sixth Committee, *Official Records of the General Assembly, Twenty-second Session, Annexes*, agenda item 98, document A/C.6/385.

(2) When the question of permanent missions was discussed in the Sixth Committee during the first part of the General Assembly's third session, a number of representatives expressed doubts concerning the advisability of including in a draft resolution submitted by Bolivia<sup>31</sup> a provision which would have recommended that Member States should establish permanent missions to the United Nations. They stated that while they considered that it would be desirable for all Member States to have a permanent mission attached to the United Nations, they did not think it appropriate to make a special recommendation to that effect in view of the fact that for internal reasons certain Member States might not be able to establish permanent missions. One representative considered that the recommendation was "unprofitable, as it constituted interference in the internal administration of Member States". He pointed out that a number of Member States were deterred from maintaining permanent missions by the "special budgetary and administrative expenses" involved.<sup>32</sup>

(3) Since permanent missions represent the sending State in the Organization and since they keep the necessary liaison, they are established at the seat of the Organization. International organizations usually have one seat. However, the United Nations has an Office at Geneva, where a large number of Member States maintain permanent missions as liaison with that Office as well as with a number of specialized agencies which have established their seats at Geneva (the International Labour Organisation, ITU, WHO and WMO). As mentioned previously the Headquarters Agreement of the Economic Commission for Africa with Ethiopia is the only headquarters agreement of a United Nations economic commission which expressly envisages resident representatives.<sup>33</sup>

(4) The legal basis of permanent missions is to be found in the constituent instruments of international organizations—particularly in the provisions relating to functions—as supplemented by the general conventions on the privileges and immunities of the organizations and by headquarters agreements. To this must be added the practice that has accumulated in respect of permanent missions in the United Nations. According to one writer, "the status of permanent delegations derives from a number of texts: internal legislative texts, international treaties such as headquarters agreements, and from customary rules".<sup>34</sup>

<sup>31</sup> A/609; for the final text adopted by the General Assembly see resolution 257 (III).

<sup>32</sup> *Official Records of the General Assembly, Third Session, Part I, Sixth Committee*, 125th meeting, p. 626. Another representative observed: "Only the members of the Security Council were obliged to maintain permanent representatives, as laid down in Article 28 of the Charter . . . If the appointment of permanent missions was made obligatory, it might impose a heavy burden on certain States". He therefore suggested that "the appointment of permanent missions should be optional". *Ibid.*, 126th meeting, p. 637.

<sup>33</sup> See above paragraph (5) of the commentary to article 1.

<sup>34</sup> Philippe Cahier, *Le droit diplomatique contemporain*, Genève et Paris, 1962, p. 411.

(5) 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, the existing international agreements, and derogation from the draft articles. Special reference should also be made to article 16, which concerns the size of the permanent mission.

(6) It is to be noted that the institution of permanent missions of member States has not been developed so far within the Organization of African Unity. During meetings held at Addis Ababa from 6 to 9 December 1965, the Institutional Committee of that Organization considered the "question of the relations between the General-Secretariat and the African Diplomatic Missions accredited to Addis Ababa" and adopted the following recommendation:

"The Institutional Committee recommends that the diplomatic missions of African States in Addis Ababa maintain the excellent relations they have established with the General Secretariat of the Organization of African Unity and continue to serve as liaison between the Secretariat and their respective Governments."<sup>35</sup>

The report of the Institutional Committee was approved by the Council of Ministers of the Organization on 28 February 1966 at its sixth ordinary session, held in Addis Ababa.

#### *Article 7. Functions of a permanent mission*

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

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

#### *Commentary*

(1) Since the functions of permanent missions are numerous and varied, article 7 merely lists the most important functions under broad headings.

(2) Sub-paragraph (a) is devoted to the representational function of the permanent mission. It provides that the mission represents the sending State in the Organization. The mission, and in particular the permanent representative as head of the mission, is responsible for the maintenance of official relationship between the Government of the sending State and the Organization.

(3) Sub-paragraph (b) relates to the function which characterizes a principal activity of the permanent mission. That function has been described by two writers who have served on the permanent missions of two Member States of the United Nations as follows:

"They [the permanent missions] maintain contact with the United Nations Secretariat on a continuous basis, report on previous meetings, anticipate coming meetings and act as a channel of communication and centre of information for the relationships of their country with the United Nations."<sup>36</sup>

(4) Sub-paragraphs (c) and (d) state two classic diplomatic functions, *viz.*, negotiating and reporting to the Government of the sending State on activities and developments. 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."<sup>37</sup>

(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 confined to negotiations "with" the organizations. The reference in sub-paragraph (c) to negotiations "in" the organizations is intended to underline the importance of consultations and exchanges of views between 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 achievements 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."<sup>38</sup>

(6) It should be noted, however, that certain functions of diplomatic missions are not usually performed

<sup>36</sup> John G. Hadwen and Johan Kaufmann, *How United Nations decisions are made*, Leyden and New York, 1962, p. 26.

<sup>37</sup> Study of the Secretariat. See *Yearbook of the International Law Commission, 1967*, vol. II, document A/CN.4/L.118 and Add.1 and 2, p. 165, para. 17.

<sup>38</sup> *Official Records of the General Assembly, Fourteenth Session, Supplement No. 1 A (A/4132/Add.1)*, p. 2.

<sup>35</sup> Document INST/Rpt.1/Rev.1 of the Organization of African Unity.

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. However, during the discussion of article 7 in the Commission, reference was made to some exceptional cases in which the function of diplomatic protection could be performed by the permanent mission. But since such cases are rare and the enumeration of the functions in the article is not exhaustive, the Commission did not feel it necessary to include therein the function of diplomatic protection. It was also pointed out during the discussion that permanent missions may perform functions in relation to the host State. It should be noted, however, that the functions enumerated in article 7 concern mainly relations with or within the Organization.

(7) Sub-paragraph (e) is intended to reflect the hope that permanent missions will not only serve the interests of their respective countries in the narrow sense, but will seek to promote the cause of international co-operation and will contribute to the realization of the purpose expressed in Article 1, paragraph 4, of the Charter that the United Nations "be a center for harmonizing the actions of nations in the attainment of [the] common ends".

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

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

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

*Commentary*

(1) There have been a number of cases where a permanent representative has been appointed to represent his State in more than one international organization. At the United Nations Office at Geneva the practice has developed of appointing the same person as permanent representative both to the various specialized agencies having their headquarters in Geneva and to the Office itself.

(2) Article 8 is drafted in general terms. It covers the practice of designating a permanent representative or another member of a permanent mission to represent his country in two or more organizations during the same period. At United Nations Headquarters, for instance, members of permanent missions have also exercised functions on behalf of their respective States at specialized agencies in Washington.<sup>39</sup>

<sup>39</sup> Study of the Secretariat. See *Yearbook of the International Law Commission, 1967*, vol. II, document A/CN.4/L.118 and Add.1 and 2, p. 169, para. 38.

(3) The practice of appointing the same mission or permanent representative 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 Organization of American States).<sup>40</sup> Permanent representatives of Sweden and Norway to the Council of Europe have been simultaneously accredited to the European Economic Community.

(4) 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 draft articles on special missions, which deals with the sending of the same special mission 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 of the same diplomatic agent to more than one State. Given the different character of permanent missions to international organizations, which serve primarily as liaison between the sending State and the organization concerned, the considerations underlying the requirement contained in paragraph 1 of article 5 of the Vienna Convention and in article 4 of the draft articles on special missions do not apply to permanent missions to international organizations. Moreover, such a requirement is not supported by the practice of international organizations. Article 8 therefore does not condition the appointment of the same permanent representative or another member of the permanent mission to two or more international organizations on the lack of objection of the organizations concerned.

(5) Article 6 of the Vienna 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 draft articles on special missions deals with the sending of a joint special mission by two or more States. In the infrequent 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 permanent missions as such. The practice of the United Nations in the matter is summed up as follows in the study of the Secretariat:

"The question of representation of more than one Government or State by a single delegate has been raised on several occasions in United Nations bodies. It has been the consistent position of the Secretariat and of the organs concerned that such representation is not permissible unless clearly envisaged in the rules of procedure of the particular body. The practice, which has sometimes been followed, of accrediting the official of one Government as the representative of another, has not been considered legally objectionable,

<sup>40</sup> *Ibid.*, para. 39.

provided the official concerned was not simultaneously acting as the representative of two countries...."<sup>41</sup>

(6) For the reasons stated above, the Commission has decided not to include an article on this matter in part II of the draft articles, devoted to permanent missions, but to deal with it if and when it considers the question of delegates to organs of international organizations and to conferences convened by those organizations.

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

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

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

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

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

*Commentary*

(1) Paragraph 1 of article 9 deals with the situation envisaged in paragraph 3 of article 5 of the Vienna Convention on Diplomatic Relations, which provides that:

"3: A head of mission or any member of the diplomatic staff of the mission may act as representative of the sending State to any international organization." There is, however, a difference of substance between the two provisions in that paragraph 1 of article 9 refers to the assignment of the permanent representative to a special mission as well as to a diplomatic mission.

(2) Paragraph 2 of article 9 extends the scope of the rule laid down in paragraph 1 to other members of the permanent mission. In practice, a number of permanent representatives or members of permanent missions have served as ambassadors of the sending State to the host State or to a neighbouring State, or as members of diplomatic missions.

(3) Paragraph 3 of article 9 deals with the situation envisaged in the first sentence of paragraph 2 of article 17 of the Vienna Convention on Consular Relations, which provides that: "A consular officer may, after notification addressed to the receiving State, act as representative of the sending State to any inter-governmental organization."

(4) During the discussion of article 9 some members of the Commission maintained that the article was unnecessary since the performance of diplomatic and consular functions by representatives to international organizations was already regulated by the two Vienna Conventions. The majority of the Commission, however, was in favour of retaining it since the parties to the draft articles and the two Vienna Conventions may not be the same and in order to make the draft articles an autonomous and self-contained unit.

(5) Adopting the principle laid down in paragraph 3 of article 5 of the Vienna Convention on Diplomatic Relations, article 9 does not provide that the Organization or the host State may object to the accreditation or assignment dealt with in the article. The reasons why paragraph 1 of article 5 of that Convention grants the receiving States the right to object when the same person is accredited as head of mission or assigned as member of the diplomatic staff to more than one State do not apply to the case dealt with in article 9 of the draft articles.

(6) Paragraph 4 of article 9 reserves *inter alia* the rules of international law governing the granting of the *agrément* to the heads of diplomatic missions and of the *exequatur* to consular officers.

(7) When the Commission discusses at its next session the section of the draft articles relating to the privileges and immunities of permanent missions, it will consider the inclusion in that section of a provision analogous to the one contained in the second sentence of paragraph 2 of article 17 of the Vienna Convention on Consular Relations. That sentence 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".

**Article 10. Appointment of the members of the permanent mission**

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

*Commentary*

(1) The freedom of choice by the sending State of the members of the permanent mission is a principle basic to the effective performance of the functions of the mission. Article 10 expressly provides for two exceptions to that principle. The first is embodied in article 11, which requires the consent of the host State for the appointment of one of its nationals as a permanent representative or as a member of the diplomatic staff of the permanent mission of another State. The

<sup>41</sup> *Ibid.*, para. 40. See also United Nations, *Juridical Yearbook*, 1962 (provisional edition), ST/LEG/8, fascicle 2, p. 258.

second exception relates to the size of the mission; that question is regulated by article 16.

(2) Unlike the relevant articles of the Vienna Convention on Diplomatic Relations and the draft articles on special missions, article 10 does not make the freedom of choice by the sending State of the members of its permanent mission to an international organization subject to the *agrément* of either the organization or the host State as regards the appointment of the permanent representative, the head of the permanent mission.

(3) The members of the permanent 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 pointed out at the 1016th meeting of the Sixth Committee, on 6 December 1967, 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.”<sup>42</sup>

(4) The position of permanent representatives and delegates to the United Nations in relation to the host State and to the Secretary-General with reference to the question of acceptance was described by one writer as follows:

“The representatives of Members, however, are not accredited to the Government of the United States in any way or in any sense. *Agrément* implies prior approval and national control. It has its traditional place and significance in connexion with diplomatic representatives of foreign States who are to transact business with the United States Government. Representatives of Members to the United Nations have no business to transact with the United States. Representatives to meetings of the General Assembly or to other organs of the United Nations bear credentials which are scrutinized by those organs. Permanent delegates, although they present their credentials to him, are not accredited to the Secretary-General for this would imply control and the right to reject persons appointed by Members. No such right has been conceded by the sovereign Members to the Secretary-General.”<sup>43</sup>

<sup>42</sup> *Official Records of the General Assembly, Twenty-second Session, Annexes*, agenda item 98, document A/C.6/385, para. 4.

<sup>43</sup> Leo Gross, *Immunities and Privileges of Delegations to the United Nations*, in *International Organization*, vol. XVI, No. 3, Summer 1962, p. 491.

### *Article 11. Nationality of the members of the permanent mission*

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

#### *Commentary*

(1) The Convention on the Privileges and Immunities of the United Nations does not contain any restrictions on the choice by the sending State of non-nationals as its representatives. Section 15 provides, however, that:

“The provisions of Sections 11, 12 and 13 [which define the privileges and immunities of the representatives of members] 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 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 the Organization,<sup>44</sup> article 12 (a) of the General Agreement on Privileges and Immunities of the Council of Europe,<sup>45</sup> article 15 of the Convention on the Privileges and Immunities of the League of Arab States,<sup>46</sup> and article V, paragraph 5, of the General Convention on the Privileges and Immunities of the Organization of African Unity.<sup>47</sup> 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<sup>48</sup> (United Kingdom), and paragraph 6 of the Order in Council PC 1791 relating to the Privileges and Immunities of the International Civil Aviation Organization<sup>49</sup> (Canada).

(2) 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. In support of that view they stated that the study of State practice and treaty and statutory provisions reveals that the consent of the host State is not required for the appointment of one of its nationals as a member of a permanent mission of another State.

<sup>44</sup> *United Nations Legislative Series, Legislative texts and treaty provisions concerning the legal status, privileges and immunities of international organizations*, vol. II (ST/LEG/SER.B/11), p. 371.

<sup>45</sup> *Ibid.*, p. 393.

<sup>46</sup> *Ibid.*, p. 417.

<sup>47</sup> Text published by the Secretariat of the Organization of African Unity, Addis Ababa.

<sup>48</sup> *United Nations Legislative Series, Legislative texts and treaty provisions concerning the legal status, privileges and immunities of international organizations* (ST/LEG/SER.B/10), p. 116.

<sup>49</sup> *Ibid.*, vol. II (ST/LEG/SER.B/11), p. 22.

They observed that the question was usually dealt with in terms of the immunities granted to the members of the mission, and that a number of States made a distinction between nationals and non-nationals in this regard.

(3) This view, however, was not accepted by the majority of the members of the Commission. The Commission, therefore, decided to include in the present draft articles a provision based on paragraphs 1 and 2 of article 8 of the Vienna Convention on Diplomatic Relations. This provision—contained in article 11—states that the permanent representative and the members of the diplomatic staff of the permanent mission should in principle be of the nationality of the sending State, and that they may not be appointed from among persons having the nationality of the host State, except with the consent of that State.

(4) The Commission decided to limit the scope of that provision to nationals of the host State and not to extend it to nationals of a third State. It therefore did not include in article 11 the rule laid down in paragraph 3 of article 8 of the Vienna Convention on Diplomatic Relations. The highly technical character of some international organizations makes it desirable not to restrict unduly the free selection of members of the mission since the sending State may find it necessary to appoint, as members of its permanent mission, nationals of a third State who possess the required training and experience.

(5) 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.

(6) The Commission also considered the question of the appointment to permanent missions of stateless persons or persons with dual nationality. It concluded that, like the cases falling under the two Vienna Conventions and the draft articles on special missions, the matter should be settled according to the relevant rules of international law.

#### *Article 12. Credentials of the permanent representative*

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

#### *Commentary*

(1) Article 12 is based on the first operative paragraph of General Assembly resolution 257 A (III) on permanent missions, adopted on 3 December 1948 dur-

ing the first part of the third session. That 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 for 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 consideration<sup>50</sup> 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, headed by the Secretary-General, and that the permanent representatives were accredited to him, and because the permanent representatives had to have full powers to enable them to accomplish certain actions, such as the signing of conventions. As matters stood, [certain] permanent representative[s] . . . had full powers and not 'credentials' (*lettres de créance*)."<sup>51</sup> 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.<sup>52</sup>
- (3) The rules of procedure of United Nations organs use in the English text the word "credentials" and in the French text "*pouvoirs*" or "*lettres de créance*" (rules 27 to 29 of the rules of procedure of the General Assembly, chapter III of the provisional rules of procedure of the Security Council, rule 19 of the rules of procedure of the Economic and Social Council and rules 14 to 17 of the rules of procedure of the Trusteeship Council). The word "credentials" is also the term commonly used in the rules of procedure of other international organizations (for example: rule III (2) of the general rules of FAO, chapter 5 of the general regulations annexed to the International Telecommunication Convention<sup>53</sup> and rule 22 (b) of the rules of procedure of the World Health Assembly of WHO).
- (4) 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 one or two 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. Thus, credentials for representatives to CAO are usually signed by the Minister for Foreign

<sup>50</sup> See foot-note 31.

<sup>51</sup> *Official Records of the General Assembly, Third Session, Part I, Sixth Committee*, 125th meeting, pp. 624 and 625.

<sup>52</sup> *Ibid.*, pp. 626, 628 and 630.

<sup>53</sup> *International Telecommunication Convention* (ITU publication) annex 4, chapter 5, p. 102.

Affairs of the Minister of Communications or Transport. In WHO credentials may be issued by the Head of State, the Minister for Foreign Affairs, or the Minister of Health or by any other appropriate authority.

(5) 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 to on the matter. The last operative paragraph of the 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 Conference (FAO), or the Board of Governors (IAEA). There are also some organizations which have no procedure of this kind in relation to credentials. Article 12 is 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 permanent representatives to the competent organ of the Organization, whether the chief administrative officer of the Organization or any other organ designated for that purpose.

### *Article 13. Accreditation to organs of the Organization*

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

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

#### *Commentary*

(1) Article 13 regulates the position of permanent representatives with regard to the representation of the sending State in the organs of the Organization. Paragraph 1 is derived from operative paragraph 4 of General Assembly resolution 257 A (III).

(2) The competence of a permanent representative to represent his State on the Interim Committee of the General Assembly was discussed by the 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."<sup>54</sup>

(3) According to the information supplied to the Special Rapporteur by the legal advisers of the specialized agencies, the position on whether a permanent representative accredited to a particular agency is entitled to represent his State before all organs of the agency varies to some extent from agency to agency. It would seem to be a general rule, however, that accreditation as a permanent representative does not entitle the representative to participate in the proceedings of any organ to which he is not specifically accredited.

(4) While paragraph 1 of article 13 takes account of this practice, paragraph 2 seeks to develop the practice in favour of granting to the permanent representative general competence to represent his country in the different organs of the organizations to which he is accredited. As a residual rule, it establishes a presumption to that effect.

(5) As the reservation stated in the first phrase of paragraph 2 makes it clear, the principle that the permanent representative has competence to represent his State in the organs of the organizations to which he is accredited is subject to exceptions. The sending State may provide otherwise either in the credentials of the permanent representative or by accrediting another representative to a particular organ. Another exception is expressly provided for in the last phrase of paragraph 2. This exception concerns the organs for which special requirements are prescribed as regards accreditation or representation. Special credentials, for instance, are required for the representative of a Member State in the Security Council. Also the constituent instruments of some international organizations or the rules of procedure of some of their organs allow member States to be represented by only a limited number of representatives. For example, Article 9, paragraph 2, of the Charter of the United Nations and rule 25 of the rules of procedure of the General Assembly provide that each Member shall have not more than five representatives in the General Assembly. In the case of the Security Council, the Economic and Social Council and

<sup>54</sup> *Official Records of the General Assembly, Third Session, Supplement No. 10, document A/606, paras. 67 and 68.*

the Trusteeship Council, each Member may have only one representative (Article 23, paragraph 3; Article 61, paragraph 4, and Article 86, paragraph 2, of the Charter). There are also organs of international organizations with special requirements regarding representation; that is true of the employers' and workers' delegates to the General Conference of the International Labour Organisation. Another case is that of representatives who are appointed to certain organs in their personal capacity notwithstanding the fact that they represent States—for example the government members of the Governing Body of the International Labour Organisation and the members of the Executive Board of UNESCO.

(6) It should also be noted that the rule stated in paragraph 2 of article 13 is without prejudice to the functions of the credentials committees which may be set up or to other procedures followed by the different organs to examine the credentials of delegates to their meetings.

(7) Some members of the Commission expressed certain misgivings as to the difficulties of interpretation which might arise from the wording of article 13. They, therefore, suggested the following formulation:

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

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

That formulation, however, was not put to the vote.

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

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

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

*Commentary*

(1) The Commission decided to limit the scope of article 14 to treaties between States and international organizations; the article does not cover treaties concluded in organs of international organizations or in conferences convened under the auspices of international

organizations. This decision is based on the fact that the conclusion of treaties in the latter category usually involves delegations to organs of international organizations or to conferences convened under the auspices of the organizations. Those treaties therefore fall outside the scope of the draft articles being considered by the Commission at the present stage of its work.

(2) The language of paragraph 1 of article 14 is based on the relevant provisions of article 6 of the Draft Convention on the Law of Treaties as adopted in 1968 by the Committee of the Whole at the first session of the Vienna Conference.<sup>55</sup> Those provisions were in turn derived from sub-paragraph 2 (b) of article 4 of the draft articles on the law of treaties adopted provisionally by the International Law Commission in 1962.<sup>56</sup> Sub-paragraph 2 (b) treated heads of permanent missions to international organizations on a similar basis as heads of diplomatic missions, so that they would automatically have been considered as representing their States in regard to treaties drawn up under the auspices of the Organization and also in regard to treaties between their States and the Organization. In its commentary on the sub-paragraph the Commission stated in 1962 that "The practice of establishing permanent missions at the headquarters of certain international organizations to represent the State and to invest the permanent representatives with powers similar to those of the Head of a diplomatic mission is now extremely common."<sup>57</sup> In the process of finalizing its draft articles on the Law of Treaties, the Commission decided in 1966 to amend sub-paragraph 2 (b) of article 4. In its commentary on the amended provision—which became sub-paragraph 2 (c) of article 6 of the 1966 draft—the Commission explained its decision as follows: "In the light of the comments of Governments and on a further examination of the practice, the Commission concluded that it was not justified in attributing to heads of permanent missions . . . a general qualification to represent the State in the conclusion of treaties."<sup>58</sup> Sub-paragraph 2 (c) of article 6 of the 1966 draft contained therefore no reference to representatives accredited by States to international organizations as such. It applied only to "representatives accredited by States to an international conference or to an *organ* of an international organization". However, at the first session of the Conference on the

<sup>55</sup> The provisions in question read:

"Article 6. Full powers to represent the State in the conclusion of treaties

" . . .

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

" . . .

"(c) Representatives accredited by States to an international conference or to an international organization or one of its organs, for the purpose of the adoption of the text of a treaty in that conference, organization or organ" (A/CONF.39/C.1/L.370/Add.4).

<sup>56</sup> See *Yearbook of the International Law Commission, 1962*, vol. II, document A/5209, p. 165.

<sup>57</sup> *Ibid.*

<sup>58</sup> See *Yearbook of the International Law Commission, 1966*, vol. II, document A/6309/Rev.1, part II, p. 193.

Law of Treaties held at Vienna in the spring of 1968, the Committee of the Whole added to sub-paragraph 2 (c) of article 6 the expression "representatives accredited by States to . . . an international organization", thus reverting to the idea underlying the Commission's 1962 draft. The Committee of the Whole therefore appears to have taken the view—a view shared by the Commission at the present session—that permanent representatives are invested with powers similar to those of the head of a diplomatic mission in relation to the adoption of treaties. The Commission has not taken a definite position on whether paragraph 1 of article 14 merely reflects existing practice or lays down a rule entailing progressive development of international law.

(3) Paragraph 2 of article 14 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 of the United Nations in response to an enquiry 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."<sup>59</sup>

(4) 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 14 a clause which dispenses with the production of full powers if "it appears from the circumstances that the intention of the Parties was to dispense with full powers".

(5) Some members of the Commission raised the question of full powers relating to termination of treaties. The Commission may consider this matter later, together with other changes which it may find necessary to introduce in article 14 in the light of the final text of the Convention which will be adopted by the Conference on the Law of Treaties.

#### *Article 15. Composition of the permanent mission*

**In addition to the permanent representative, a permanent mission may include members of the diplomatic**

<sup>59</sup> Study of the Secretariat. See *Yearbook of the International Law Commission, 1967*, vol. II, document A/CN.4/L.118 and Add.1 and 2, p. 169, para. 35. For the practice of specialized agencies, see *ibid.*, pp. 195 and 196, para. 12; see also "Summary of the Practice of the Secretary-General as Depository of Multilateral Agreements" (ST/LEG/7), paras. 28-36.

**staff, the administrative and technical staff and the service staff.**

#### *Commentary*

(1) Article 15 is based on article 1 of the Vienna Convention on Diplomatic Relations and article 9 of the draft articles on special missions.

(2) Every permanent mission must include at least one representative of the sending State, that is to say, a person to whom that State has assigned the task of being its representative in the permanent mission. As was explained in paragraph (5) of the commentary to article 1, "permanent representative" is the term generally used at present to designate heads of permanent missions to international organizations.

(3) During the discussion of article 15 in the Commission reference was made to the practice of certain States Members of the United Nations 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. It was observed, however, that while that practice was often followed at the Organization's Headquarters in New York, it was not a common occurrence at its Office in Geneva or at the headquarters of other international organizations.

(4) The term "representatives" is defined in section 16 of article IV of the Convention on the Privileges and Immunities of the United Nations. Article IV deals with the privileges and immunities to be accorded to representatives of Member States. Section 16 provides:

"In this article the expression 'representatives' shall be deemed to include all delegates, deputy delegates, advisers, technical experts and secretaries of delegations."

That definition is repeated in section 13 of Article IV of the Interim Arrangement on Privileges and Immunities of the United Nations concluded between the Secretary-General and the Swiss Federal Council.<sup>60</sup> Similar definitions appear in the Convention on the Privileges and Immunities of the Specialized Agencies (section 1 (v)) and in most of the corresponding instruments of regional organizations. The term "secretaries of delegations" in section 16 quoted above clearly refers to diplomatic secretaries and not to the clerical staff. In this respect the Headquarters Agreement between ICAO and Canada, which reproduces the substance of section 16, specifies that the "secretaries of delegations . . . include the equivalent of third secretaries of diplomatic missions but not the clerical staff" [section 1 (f)].<sup>61</sup>

(5) The composition of permanent missions is very similar to that of diplomatic missions which States accredit to each other. In paragraphs (7) and (8) of its commentary to articles 13 to 16 of the 1958 draft articles on diplomatic intercourse and immunities, the International Law Commission stated as regards the composition of diplomatic missions:

<sup>60</sup> United Nations, *Treaty Series*, vol. I, p. 173.

<sup>61</sup> United Nations, *Treaty Series*, vol. 96, p. 158.

"The Commission did not feel called upon to deal in the draft with the rank of the members of the mission's diplomatic staff. This staff comprises the following classes:

- "Ministers or minister-counsellors;
- "Counsellors;
- "First secretaries;
- "Second secretaries;
- "Third secretaries;
- "Attachés.

"There are also specialized officials such as military, naval, air, commercial, cultural or other attachés, who may be placed in one of the above-mentioned [classes]." <sup>62</sup>

(6) As mentioned before in paragraph (6) of the commentary to article 1, permanent missions often include experts and advisers who play an important role, especially as regards international organizations of a technical character.

(7) Article 7 of the Vienna Convention on Diplomatic Relations expressly provides that in the case of military, naval and air attachés, the receiving State may, in accordance with what was already a fairly common practice, require their names to be submitted beforehand, for its approval. Within the framework of international organizations, and except as regards regional organizations for military purposes, the staff of permanent missions does not include military, naval or air attachés. States do not in practice appoint such attachés to their permanent missions to the United Nations, the specialized agencies, regional organizations of general competence or regional organizations of limited competence for non-military purposes. One exception concerns the permanent members of the Security Council of the United Nations, which in that capacity are members of the Military Staff Committee. For the purpose of their representation at that Committee, these members appoint to their permanent missions officials specialized in military, naval and air matters. The question of the prior approval of those officials by the host State does not arise. As stated before, the members of permanent missions are not accredited to the host State.

#### *Article 16. Size of the permanent mission*

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

#### *Commentary*

(1) Article 16 is based on paragraph 1 of article 11 of the Vienna 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* that the

size of a mission be kept within limits considered by it to be reasonable and normal...". That provision is derived from paragraph 1 of article 10 of the draft articles on diplomatic intercourse and immunities adopted by the Commission in 1958. Paragraph 1 of article 10 used the expression "the receiving State *may refuse* to accept a size exceeding what is reasonable and normal...".<sup>63</sup> Article 16 of the present draft articles states the problem differently. It lays down as a guideline to be observed by the sending State that the latter should endeavour, when establishing the composition of its permanent mission, not to make it excessively large.

(2) The problem of limiting the size of missions was dealt with differently by the International Law Commission in its draft articles on special missions. In paragraph (6) of the commentary to article 9 of those draft articles the Commission noted that in view of the obligation of the sending State, under the terms of article 8, to inform the receiving State in advance of the number of persons it intended to appoint to a special mission, the Commission had decided that there was no need to include in the draft the rule set forth in article 11 of the Vienna Convention.

(3) In their replies to the questionnaire addressed to them by 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.<sup>64</sup>

(4) When negotiations were held with the United States authorities concerning the Headquarters Agreement, 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.<sup>65</sup> This compromise is reflected in section 15, paragraph (2), of 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;"

<sup>63</sup> *Ibid.*, p. 92.

<sup>64</sup> See *Yearbook of the International Law Commission, 1967*, vol. II, document A/CN.4/L.118 and Add.1 and 2, p. 166, para. 18.

<sup>65</sup> *Ibid.* See also the joint report of the Secretary-General and the Negotiating Committee on the negotiations with the authorities of the United States of America concerning the arrangements required as a result of the establishment of the seat of the United Nations in the United States of America, A/67 and A/67/Add.1; reproduced in "Handbook on the Legal Status, Privileges and Immunities of the United Nations" (ST/LEG/2), p. 441.

<sup>62</sup> See *Yearbook of the International Law Commission, 1958*, vol. II, document A/3859, p. 94.

(5) The main difference between article 16 and the corresponding provision of the Vienna Convention on Diplomatic Relations has already been indicated in paragraph (1) of the commentary. In this respect, the Commission wishes to observe that, unlike the case of bilateral diplomacy, the members of permanent 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 recognized to the receiving State in bilateral diplomacy, prerogatives which flow 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 permanent missions to international organizations, remedies must be sought in consultations between the host State, the organization concerned and the sending State, but the principle of the freedom of the sending State in the composition of its permanent mission and the choice of its members must be recognized (see paragraph (8) below).

(6) Like paragraph 1 of article 11 of the Vienna Convention on Diplomatic Relations, article 16 lays down as guiding 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 it 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; hence, the role of the permanent representatives to those agencies tended to be of a formal and occasional nature rather than of day-to-day importance.

(7) Specific mention should be made of those cases in which a permanent mission represents the sending State before two or more international organizations. In such cases, particularly if there is more than one permanent representative, from the legal point of view there is more than one mission. Also, the particular needs of a mission which has a function of representation to more than one organization may be different from those of a permanent mission representing the sending State in one organization only.

(8) Some members of the Commission raised the question of the remedies available to the host State in case of non-observance by the sending State of the rule laid down in article 16. They suggested that a provision should be included in the text of the article for consultation between the host State, the sending State and the organization. When it takes up the remainder of draft articles, the Commission will consider inclusion of an article of general scope concerning remedies available to the host State in the event of claimed abuses by a permanent mission.

### *Article 17. Notifications*

#### **1. The sending State shall notify the Organization of:**

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

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

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

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

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

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

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

#### *Commentary*

(1) Article 17 is modelled on article 10 of the Vienna Convention on Diplomatic Relations, with the changes required by the particular nature of permanent missions to international organization.

(2) It is desirable for the Organization and the host State to know the names of the persons who may claim privileges and immunities. The question to what extent the sending State is obliged to give notification of the composition of the mission and the arrival and departure of its members, arises with regard to permanent missions to international organizations just as it does with regard to diplomatic and special missions. However, the question whether the sending State is obliged to give the notification referred to in paragraph 1 of article 17 to the Organization or to the host State or to both applies specifically to permanent missions to international organizations.

(3) When the Secretariat of the United Nations wrote to Member States in December 1947 informing them that the Headquarters Agreement had come into effect and recalling the terms of General Assembly resolution 169 (II),<sup>66</sup> it requested them to communicate the

<sup>66</sup> The resolution is divided into two parts. Part A approves the Headquarters Agreement. Part B reads:

*"The General Assembly*

*"Decides to recommend to the Secretary-General and to the appropriate authorities of the United States of America to use section 16 of the General Convention on the Privileges and Immunities of the United Nations as a guide in considering*

name and rank of all persons who, in the opinion of the State concerned, came within the categories covered by sub-sections (1) and (2) of section 15 of the Headquarters Agreement.<sup>67</sup> 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) whose operative paragraph 2 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 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-section (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. 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."<sup>68</sup>

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—under sub-section 2 and the last sentence of section 15 of the above-mentioned Agreement regarding the Headquarters—what classes of persons on the staff of delegations might be included in the lists to be drawn up by agreement between the Secretary-General, the Government of the United States of America and the Government of the Member State concerned."

<sup>67</sup> These sub-section read:

"(1) Every person designated by a Member as the principal resident representative to the United Nations of such Member or as a resident representative with the rank of ambassador or minister plenipotentiary;

"(2) Such resident members of their staffs as may be agreed upon between the Secretary-General, the Government of the United States and the Government of the Member concerned;

"... shall, whether residing inside or outside the headquarters district, be entitled in the territory of the United States to the same privileges and immunities, subject to corresponding conditions and obligations, as it accords to diplomatic envoys accredited to it. In the case of Members, whose Governments are not recognized by the United States, such privileges and immunities need be extended to such representatives, or persons on the staffs of such representatives, only within the headquarters district, at their residences and offices outside the district, in transit between the district and such residences and offices, and in transit on official business to or from foreign countries."

<sup>68</sup> *United Nations Legislative Series, Legislative texts and treaty provisions concerning the legal status, privileges and immunities of international organizations* (ST/LEG/SER.B/10), p. 92.

(5) The practice of the specialized agencies regarding the procedure for notification of the composition of permanent missions and the arrival and departure of its members varies and is far from systematized. For example, the International Labour Organisation has indicated that in certain cases the Director-General is merely informed by member States that a person has been designated as permanent representative to the Organisation. This information is given either before or immediately after the representative's arrival. In other cases the person designated submits his credentials. It is the practice for the Director-General, in reply to a communication on the subject, to inform the member State concerned that he has taken note of that communication. The International Labour Organisation has no procedure similar to that established in the United Nations under General Assembly resolution 257 A (III). Member States notify directly the host State of the arrival and departure of representatives, members of their families and private servants. UNESCO has indicated that when a permanent representative submits his credentials to the Director-General, it is the Organization which requests the host State to provide the representative with a diplomatic card; this request constitutes implicit notification. In a small number of cases the request is made by the Embassy of the State concerned, without the intervention of the Organization. Other agencies (e.g. WHO) stated that there are no formal arrangements in this regard and that the chief administrative officer is merely informed of the appointment of permanent representatives either directly by the Ministry of Foreign Affairs of the member concerned or through the Office of the United Nations at Geneva. The agencies in question do not, as a general rule, notify the host State of the arrival and departure of representatives. Mention should also be made of the distinction drawn by some specialized agencies between the notification of appointment, on the one hand, and the notification of arrivals and departures, on the other. While the appointment to the post of permanent representative is communicated to the agency, member States usually notify the host State of the arrival and departure of representatives directly through ordinary diplomatic channels.

(6) It would appear from the foregoing survey of practice that while the United Nations has developed a system of notification of the appointment of members of permanent missions and of their departures and arrivals, the arrangements applied within the different specialized agencies are fragmentary and far from systematized. In laying down a rule for notifications one may consider two possibilities: either to take note of the practice of international organizations and adopt a rule setting out different alternatives, or to establish a uniform regulation. The Commission believes that it would be desirable to establish a uniform regulation and article 17 seeks to do this.

(7) The rule formulated in article 17 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 (paragraph 1). Those notifications are transmitted to the host State by the Organization (paragraph 3). Paragraph 4 of the article makes it optional for the sending State to address notifications directly to the host State. It should be noted that paragraph 4 provides a supplement to and not an alternative or a substitute for the basic pattern prescribed in paragraphs 1 and 3 of the article.

#### Article 18. *Chargé d'affaires ad interim*

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

#### Commentary

(1) Article 18 provides for situations where the post of head of mission falls vacant, or the head of the mission is unable to perform his functions. It corresponds to paragraph 1 of article 19 of the Vienna Convention on Diplomatic Relations. However, the word "provisionally", which appears in that paragraph has not been retained in article 18; 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.

(2) 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. Operative 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".

(3) In the list of permanent missions published by the United Nations ("blue book") the designation "*chargé d'affaires, a.i.*" is used once the Secretariat has been informed of such an appointment. The specialized agencies gave differing replies to the question whether there is a practice in those organizations for permanent missions to give notification that an acting permanent representative or *chargé d'affaires* has become temporary head of mission. A number of them indicated that notifications are usually received concerning the designation of acting permanent representatives. Some of the agencies replied that in practice certain permanent missions notify them that the deputy permanent representative has assumed the functions of temporary head of mission or inform them that a permanent representative *ad interim* or a *chargé d'affaires* is temporarily in charge of a mission. Others indicated that no such practice existed. One or two agencies pointed out that since missions frequently consist of only the resident representative and

seldom exceed three members, no practice in respect of the question has so far developed.

(4) 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 19. *Precedence*

**Precedence among permanent representatives shall be determined by the alphabetical order or according to the time and date of the submission of their credentials to the competent organ of the Organization, in accordance with the practice established in the Organization.**

#### Commentary

(1) Article 19 regulates only precedence among permanent representatives. It does not regulate the precedence of permanent representatives in relation to representatives to organs to international organizations; neither does it deal with precedence among members of delegations to such organs or to conferences convened by international organizations.

(2) The question of the precedence of permanent representatives was not included in the questionnaire prepared by the Legal Counsel of the United Nations, and the replies of the legal advisers of the specialized agencies to that questionnaire contained no information on the matter. On 3 July 1968, the Secretary-General submitted to the Commission a note<sup>69</sup> entitled "Precedence of representatives to the United Nations". The information supplied in the note related mainly to representatives of Member States to the General Assembly of the United Nations.

(3) Treatises on diplomatic practice and protocol deal chiefly with the question of precedence in the relations between States. A recent work on protocol, however, devotes a section to the United Nations. It States, in particular:

"The principle of the equality of States prevails absolutely. When their representatives meet officially they are disposed according to the English alphabetical order of their country. This alphabetical order changes annually at the opening of the General Assembly. Members of missions take their places grade by grade in the same alphabetical order. No special favours are granted to an agent who is called upon to replace the chief of mission when he is absent or unable to attend . . . . The heads of permanent missions, whether permanent or temporary, constitute a first category whose members are seated . . . according to the English alphabetical order of the States which delegated them."<sup>70</sup>

(4) Some members of the Commission observed that the practice of international organizations concerning

<sup>69</sup> See p. 163 above (A/CN.4/L.129).

<sup>70</sup> Jean Serres, *Manuel pratique de protocole*, Vitry-le-François, 1965, paras. 730 and 733.

precedence varied greatly and expressed doubts about the desirability of including a rule on the matter in the draft articles. But most of the members of the Commission thought that the draft articles, like the Vienna Convention on Diplomatic Relations, should contain a rule on precedence. The absence of such a rule would leave an unnecessary gap in the draft. They differed, however, as to the order of precedence which should be laid down in the rule to be adopted by the Commission. Some favoured the alphabetical order, stating that it was followed in most international organizations. Others observed that as regards precedence there was no essential difference between the situation of permanent representatives and that of heads of diplomatic missions. They suggested therefore that the order of the time and date of submission of credentials should be adopted. A third alternative mentioned during the discussion would have determined precedence in accordance with the order applied in each of the organizations concerned.

(5) The rule adopted by the Commission in article 19 is based on two variants, the first being the alphabetical order and the second the order of time and date of submission of credentials, in accordance with the practice established in the Organization.

(6) Unlike article 16 of the Vienna Convention on Diplomatic Relations, article 19 does not make reference to the classes of permanent representative. The division of heads of diplomatic missions into the classes of ambassadors, ministers and *chargés d'affaires en pied* is not applicable to permanent missions to international organizations.<sup>71</sup>

#### Article 20. Offices of permanent missions

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

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

#### Commentary

(1) The provisions of article 20 have been included in the draft to avoid the awkward situation which would result for the host State in an office of a permanent mission was established in a locality other than that in which

<sup>71</sup> This division is dealt with in article 14 of the Vienna Convention on Diplomatic Relations. Article 14 reads:

"1. Heads of mission are divided into three classes—namely:

"(a) That of ambassadors or nuncios accredited to Heads of State, and other heads of mission of equivalent rank;

"(b) That of envoys, ministers and internuncios accredited to Heads of State;

"(c) That of *chargés d'affaires* accredited to Ministers for Foreign Affairs.

"2. Except as concerns precedence and etiquette, there shall be no differentiation between heads of mission by reason of their class."

the seat or an office of the Organization is established. The article deals also with the rare cases in which sending States wish to establish offices of their permanent missions outside the territory of the host State.

(2) There is no specific reference to the offices of permanent missions in the United Nations Headquarters Agreement. General Assembly resolution 257 A (III) refers to the personnel of the permanent missions (credentials) of a permanent representative communication of appointment of the staff of a permanent mission, etc.) but does not deal with the offices of such missions. The practice relating to the matter at United Nations Headquarters was summarized as follows in a letter sent by the Legal Counsel of the United Nations to the legal adviser of one of the specialized agencies:

"In practice permanent missions do not inform us in advance of their intention to set up an office at a given location, and I understand do not inform the United States Mission, unless they desire assistance of some kind in obtaining the property or otherwise. They do of course advise us of the address of their office once it is established and of any changes of address. We publish the address in the monthly list of Permanent Missions. We also inform the United States Mission of new addresses, and the United States Mission is sometimes informed directly by the permanent mission, but there is no special procedure, consultation or acceptance, tacit or express, involved."<sup>72</sup>

(3) As regards the United Nations Office at Geneva, the Swiss Federal Authorities informed permanent missions that they had no objection in principle to the same mission representing the sending State both at Berne and at the Geneva Office, but that they would recognize such a mission as an embassy only when its premises were situated in Berne. At the present time all permanent missions at the Geneva Office are located in Geneva, with the exception of two in Berne and one in Paris.<sup>73</sup>

(4) The replies of the specialized agencies to the questionnaire prepared by the Legal Counsel indicate in general that no restrictions on the location of the premises of a permanent mission have been imposed by the host State. One organization—IAEA pointed out in its reply that "the premises of some permanent missions accredited to IAEA are not in Austria, but in other European countries".

#### Article 21. Use of flag and emblem

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

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

<sup>72</sup> Study of the Secretariat. See *Yearbook of the International Law Commission, 1967*, vol. II, document A/CN.A/L.118 and Add.1 and 2, p. 181, para. 154.

<sup>73</sup> *Ibid.*, para. 155.

### Commentary

(1) Paragraph 1 of this article is based on article 20 of the Vienna Convention on Diplomatic Relations. There is, however, a difference in drafting between the two texts. Unlike article 20 of the Vienna Convention, paragraph 1 of article 21 is divided into two sentences to make clearer the distinction between the right granted therein to the permanent mission as such and the right granted to the permanent representative.

(2) Paragraph 2 of article 21 is modelled on paragraph 3 of article 29 of the Vienna Convention on Consular Relations and on paragraph 2 of article 19 of the draft articles on special missions.

(3) So far no express provisions appear to regulate the question of the use by permanent missions of national flags and emblems. In the practice of the United Nations, Member States have used their national flags and emblems on the premises of their permanent missions and, to a lesser extent, on the residence and means of transport of their permanent representatives.<sup>74</sup> In Geneva national flags are flown only on national days and on special occasions.<sup>75</sup>

(4) The replies of the specialized agencies and IAEA to the questionnaire prepared by the Legal Counsel can be summarized as follows. In a number of cases the national flags of member States are flown from the offices of their permanent missions and, to a lesser extent, on the cars used by the permanent representatives. National flags are not flown from the offices of permanent mission located in the UNESCO building. IAEA stated that it had no knowledge of resident representatives having flown a national flag from their offices unless they were at the same time accredited to the host State. On the other hand, permanent representatives to UNESCO who are assimilated to heads of diplomatic missions normally fly the national flag on their cars when travelling on official business. In general, however, it would appear that the fact that many representatives are members of diplomatic missions and that many premises are also used for other purposes (e.g., as an embassy or consulate) has prevented any clear or uniform practice from emerging.<sup>76</sup>

## CHAPTER III

### Succession of States and Governments

#### A. BACKGROUND

29. At its first session, held in 1949, the International Law Commission included "Succession of States and Governments" among the fourteen topics selected for codification, listed in paragraph 16 of its reports for that

<sup>74</sup> *Ibid.*, para. 159.

<sup>75</sup> *Ibid.*

<sup>76</sup> *Ibid.*, p. 203, para. 58.

year.<sup>77</sup> The Commission did not give priority to this topic, however, and because it was occupied with the codification of other branches of international law, such as arbitral procedure, the law of the sea, nationality, including statelessness, and diplomatic and consular intercourse and immunities, it did not revert to "Succession of States and Governments" until its fourteenth session held in 1962. On that occasion, the International Law Commission considered its future programme of work, in accordance with General Assembly resolution 1686 (XVI) of 18 December 1961.<sup>78</sup> Bearing in mind that paragraph 3 (a) of this resolution recommended the Commission to include "on its priority list the topic of succession of States and Governments", the Commission decided to include that topic in its future programme of work.<sup>79</sup>

30. During its fourteenth session, at the 637th meeting, held on 7 May 1962, the Commission set up a Sub-Committee on the Succession of States and Governments, which it entrusted to submit suggestions on the scope of the subject, the method of approach for a study and the means of providing the necessary documentation. The Sub-Committee consisted of the following ten members: Mr. Lachs (Chairman), Mr. Bartoš, Mr. Briggs, Mr. Castrén, Mr. El-Erian, Mr. Elias, Mr. Liu, Mr. Rosenne, Mr. Tabibi and Mr. Tunkin.<sup>80</sup> The Sub-Committee held two private meetings, on 16 May and 21 June 1962.<sup>81</sup>

31. In the light of the Sub-Committee's suggestions, the Commission took the following decisions at its 668th meeting, held on 26 June 1962: (1) the Sub-Committee was to meet at Geneva in January 1963 to continue its work; (2) the members of the Sub-Committee were to submit memoranda dealing essentially with the scope of and approach to the subject; (3) the Chairman of the Sub-Committee was to submit to the latter a working paper containing a summary of the views expressed in the memoranda; (4) the Chairman of the Sub-Committee was to prepare a report on the results of its work, for submission to the Commission at its fifteenth session; (5) the Secretariat was to undertake specific studies.<sup>82</sup> In addition, at its 669th meeting, held on 27 June 1962, the Commission decided to place on the agenda for its fifteenth session the item "Report of

<sup>77</sup> *Official Records of the General Assembly, Fourth Session, Supplement No. 10 (A/1925); Yearbook of the International Law Commission, 1949, p. 279.* The Commission selected the fourteen topics after reviewing twenty-five, on the basis of a memorandum by the Secretary-General entitled "Survey of International Law in relation to the Work of Codification of the International Law Commission (document A/CN.4/1/Rev.1, published in English and French only).

<sup>78</sup> The General Assembly adopted resolution 1686 (XVI) after considering the item "Future work in the field of the codification and progressive development of international law", which had been placed on the provisional agenda of its sixteenth session pursuant to resolution 1505 (XV) of 12 December 1960.

<sup>79</sup> See *Yearbook of the International Law Commission, 1962, vol. II, document A/5209, p. 190, para. 60.*

<sup>80</sup> See *Yearbook of the International Law Commission, 1962, vol. II, document A/5209, p. 189, para. 54.*

<sup>81</sup> *Ibid.*, pp. 189, 190 and 191, paras. 55, 70 and 71.

<sup>82</sup> *Ibid.*, pp. 191 and 192, para. 72.

the Sub-Committee on Succession of States and Governments".<sup>83</sup>

32. By its resolution 1765 (XVII) of 20 November 1962, the General Assembly, noting that the International Law Commission, in order to expedite its work on the succession of States and Governments, had established a Sub-Committee which was to meet at Geneva in January 1963 to study the scope of, and approach to, that topic, recommended that the Commission should "continue its work on the succession of States and Governments taking into account the views expressed at the seventeenth session of the General Assembly and the report of the Sub-Committee on the Succession of States and Governments with appropriate reference to the views of States which have achieved independence since the Second World War".

33. The Sub-Committee on the Succession of States and Governments met at Geneva from 17 to 25 January 1963 and again on 6 June 1963, at the beginning of the International Law Commission's fifteenth session. On concluding its work, the Sub-Committee approved a report (A/CN.4/160), which appears as annex II to the report of the International Law Commission to the General Assembly on the work of its fifteenth session (1963).<sup>84</sup> The Sub-Committee's report contains its conclusions on the scope of the topic of succession of States and Governments and its recommendations on the approach the Commission should adopt in its study. In the *Yearbook of the International Law Commission, 1963*, the Sub-Committee's report is accompanied by its two appendices.<sup>85</sup> Appendix I reproduces the summary records of the meetings held by the Sub-Committee in January 1963 and on 6 June of the same year, and appendix II contains the memoranda and working papers submitted to the Sub-Committee by Mr. Elias (ILC (XIV)/SC.2/WP.1 and A/CN.4/SC.2/WP.6), Mr. Tabibi (A/CN.4/SC.2/WP.2), Mr. Rosenne (A/CN.4/SC.2/WP.3), Mr. Castrén (A/CN.4/SC.2/WP.4) Mr. Bartoš (A/CN.4/SC.2/WP.5) and Mr. Lachs (Chairman of the Sub-Committee) (A/CN.4/SC.2/WP.7).

34. The report of the Sub-Committee on the Succession of States and Governments was discussed by the Commission during its fifteenth session (1963), at the 702nd meeting, after being introduced by Mr. Lachs, the Chairman of the Sub-Committee, who explained the Sub-Committee's conclusions and recommendations.<sup>86</sup> The Commission unanimously approved the Sub-Committee's report and gave its general approval to the recommendations contained therein. The Commission "considered that the priority given to the study of the question of State succession was fully justified", and stated that the succession of Governments would, for the time being, be considered "only to the extent necessary to supplement the study on State succession". Several members emphasized that, in view of the modern phe-

nomenon of decolonization, "special attention should be given to the problems of concern to the new States". The Commission endorsed the Sub-Committee's opinion that succession in the matter of treaties should be "considered in connexion with the succession of States rather than in the context of the law of treaties", and considered it "essential to establish some degree of co-ordination between the Special Rapporteurs on, respectively, the law of treaties, State responsibility, and the succession of States". It also endorsed the Sub-Committee's view that the objective should be a "survey and evaluation of the present state of the law and practice in the matter of State succession and the preparation of draft articles on the topic in the light of new developments in international law". The broad outline, the order of priority of the headings and the detailed division of the topic recommended by the Sub-Committee were likewise agreed to by the Commission, it being understood that the purpose was to lay down "guiding principles to be followed by the Special Rapporteur" and that the Commission's approval was "without prejudice to the position of each member with regard to the substance of the questions included in the programme". The headings into which the topic was divided were as follows: (i) succession in respect of treaties; (ii) succession in respect of rights and duties resulting from sources other than treaties; (iii) succession in respect of membership of international organizations.

35. Lastly, at its fifteenth session, the Commission appointed Mr. Lachs as Special Rapporteur on the topic of the succession of States and Governments and gave instructions to the Secretariat with regard to obtaining information on the practice of States.<sup>87</sup> The Secretary-General had sent a circular note to the Governments of Members States, in accordance with the relevant provisions of the Commission's Statute, inviting them to submit the text of any treaties, laws, decrees, regulations, diplomatic correspondence, etc., concerning the procedure of succession relating to the States which have achieved independence since the Second World War.<sup>88</sup>

36. In its resolution 1902 (XVIII) of 18 November 1963, the General Assembly, noting that the work of codification of the topic of succession of States and Governments was proceeding satisfactorily, recommended that the International Law Commission should "continue its work on the succession of States and Governments, taking into account the views expressed at the eighteenth session of the General Assembly, the report of the Sub-Committee on the Succession of States and Governments and the comments which may be submitted by Governments, with appropriate reference to the views of States which have achieved independence since the Second World War.

37. Having regard to the fact that the term of office of its members would expire in 1966, the International

<sup>83</sup> *Ibid.*, p. 192, para. 74.

<sup>84</sup> See *Yearbook of the International Law Commission, 1963*, vol. II, document A/5509, p. 260.

<sup>85</sup> *Ibid.*, pp. 262-300.

<sup>86</sup> *Ibid.*, pp. 224 and 225, paras. 56-61.

<sup>87</sup> *Ibid.*, pp. 224 and 225, para. 61.

<sup>88</sup> See *Yearbook of the International Law Commission, 1962*, vol. II, document A/5209, p. 192, para. 73. The Sub-Committee had proposed that the Commission should remind Governments of the Secretary-General's circular note.

Law Commission decided, in 1964, to devote its 1965 and 1966 sessions to the work then in progress on the law of treaties and on special missions, since some considerable time would be needed to complete that work. The question of succession of States and Governments would be dealt with as soon as the study of those subjects and of relations between States and inter-governmental organizations had been completed.<sup>89</sup> Consequently, the Commission did not consider the topic of the succession of States and Governments at its sixteenth (1964), seventeenth (1965/1966) and eighteenth (1966) sessions. In 1966, the Commission decided to place the topic of the succession of States and Governments on the provisional agenda for its nineteenth session (1967).<sup>90</sup>

38. In its work on the law of treaties the Commission noted certain points to which the succession of States or Governments might be relevant. Examples which may be mentioned are the reference to the succession of States and Governments made in 1963, in connexion with the extinction of the international personality of a State and the termination of treaties,<sup>91</sup> and the reference made in 1964 to the territorial scope of treaties and the effects of treaties on third States.<sup>92</sup> However, in accordance with the decision of principle referred to in paragraph 34 above, the Commission decided not to concern itself with these points in the context of the codification of the law of treaties. The introduction to the final draft on the law of treaties, adopted by the Commission in 1966, states that "the draft articles do not contain provisions concerning the succession of States in respect of treaties, which the Commission considers can be more appropriately dealt with under the item of its agenda relating to succession of States and Governments, or concerning the effect of the extinction of the international personality of a State upon the termination of treaties".<sup>93</sup> Article 69 of the final draft articles on the law of treaties expresses the following reservation on this matter: "The provisions of the present articles are without prejudice to any question that may arise in regard to a treaty from succession of States or from the international responsibility of a State."

39. In its resolutions 2045 (XX) of 8 December 1965 and 2167 (XXI) of 5 December 1966, the General Assembly noted with approval the Commission's programme of work referred to in its reports of 1964, 1965 and 1966. Resolution 2045 (XX) recommended that the Commission should continue, "when possible", its work

on the succession of States and Governments, "taking into account the views and considerations referred to in General Assembly resolution 1902 (XVIII)". Resolution 2167 (XXI) in turn recommended that the Commission should continue that work "taking into account the views and considerations referred to in General Assembly resolutions 1765 (XVII) and 1902 (XVIII)".

40. At its nineteenth session (1967), the Commission made new arrangements for the work on this topic.<sup>94</sup> In doing so it took account of the broad outline of the subject laid down in the report by its Sub-Committee in 1963, which has been agreed to by the Commission in the same year, and of the fact that in December 1966 Mr. Lachs, the Special Rapporteur on succession of States and Governments, had been elected to the International Court of Justice and had ceased to be a member of the Commission. Acting on a suggestion previously made by Mr. Lachs, the Commission decided to divide the topic of succession of States and Governments in order to advance its study more rapidly. Taking into account the division of the topic into three headings by the Sub-Committee (see paragraph 34 above), the Commission decided to appoint Special Rapporteurs for two of these. Sir Humphrey Waldock, formerly Special Rapporteur of the Commission on the law of treaties, was appointed Special Rapporteur for "succession in respect of treaties" and Mr. Mohammed Bedjaoui, Special Rapporteur for "succession in respect of rights and duties resulting from sources other than treaties". The Commission decided to leave aside, for the time being, the third heading in the division made by the Sub-Committee, namely, "succession in respect of membership of international organizations", which it considered to be related both to succession in respect of treaties and to relations between States and inter-governmental organizations. Consequently, the Commission did not appoint a Special Rapporteur for his heading.

41. With regard to "succession in respect of treaties", the Commission observed that it had already decided in 1963 to give priority to this aspect of the topic, and that the convocation by General Assembly resolution 2166 (XXI), of 5 December 1966, of a conference on the law of treaties in 1968 and 1969 had made its codification more urgent. The Commission therefore decided to advance the work on that aspect of the topic as rapidly as possible at its twentieth session in 1968.<sup>95</sup> The Commission considered that the second aspect of the topic, namely, "succession in respect of rights and duties resulting from sources other than treaties", was a diverse and complex matter which would require some preparatory study. It requested the Special Rapporteur for this second aspect of the topic "to present an introductory report which would enable the Commission to decide what parts of the subject should be dealt with, the priorities to be given to them, and the general manner of treatment".<sup>96</sup>

<sup>89</sup> See *Yearbook of the International Law Commission, 1964*, vol. II, document A/5809, p. 226, paras. 36 and 37.

<sup>90</sup> See *Yearbook of the International Law Commission, 1966*, vol. II, document A/6309/Rev.1, part II, p. 278, para. 74.

<sup>91</sup> See *Yearbook of the International Law Commission, 1963*, vol. II, document A/5509, p. 206, para. (3) of the commentary to article 43.

<sup>92</sup> See *Yearbook of the International Law Commission, 1964*, vol. II, document A/5809, p. 175, para. 18.

<sup>93</sup> See *Yearbook of the International Law Commission, 1966*, vol. II, document A/6309/Rev.1, part II, pp. 177 and 256, para. 30 of the report and para. (6) of the commentary to article 58 of the draft.

<sup>94</sup> See *Yearbook of the International Law Commission, 1967*, vol. II, document A/6709/Rev.1 and Rev.1/Corr.1, p. 368, paras. 38-41.

<sup>95</sup> *Ibid.*, para. 39.

<sup>96</sup> *Ibid.*, para. 40.

42. The Commission's decisions referred to in paragraphs 40 and 41 above received general support in the Sixth Committee at the General Assembly's twenty-second session. The Assembly, in its resolution 2272 (XXII) of 1 December 1967, noted with approval the International Law Commission's programme of work for 1968, and, repeating the terms of its resolution 2167 (XXI), recommended that the Commission should continue its work on succession of States and Governments, "taking into account the views and considerations referred to in General Assembly resolutions 1765 (XVII) and 1902 (XVIII)".

#### B. STUDIES BY THE SECRETARIAT

43. In connexion with the topic of "Succession of States and Governments", the Secretariat has so far prepared and distributed the following documents and publications:<sup>97</sup> (a) a memorandum on the succession of States in relation to membership in the United Nations (A/CN.4/149 and Add.1); (b) a memorandum on the succession of States in relation to general multilateral treaties of which the Secretary-General is the depositary (A/CN.4/150); (c) a study entitled "Digest of the decisions of international tribunals relating to State succession" (A/CN.4/151); (d) a study entitled "Digest of decisions of national courts relating to succession of States and Governments" (A/CN.4/157); (e) five studies on the succession of States to multilateral treaties (A/CN.4/200 and Add.1 and 2); (f) a volume of the *United Nations Legislative Series* entitled "Material on succession of States" (ST/LEG/SER.B/14), containing the information provided or indicated by Governments of Member States in response to the Secretary-General's request referred to in paragraph 35 above. The first three documents, which were distributed in January 1962,<sup>98</sup> were submitted to the Sub-Committee in January 1963 and the fourth to the Commission some months later at its fifteenth session.<sup>99</sup> At the present session, the five studies<sup>100</sup> and the volume of the *United Nations Legislative Series* mentioned in (e) and (f) above were distributed. The Commission expressed its high appreciation for the studies prepared by the Secretariat.

#### C. COMMISSION'S DEBATE AT ITS TWENTIETH SESSION

44. At its twentieth session, the Commission had before it a first report on "Succession of States in respect of rights and duties resulting from sources other than treaties" (A/CN.4/204) submitted by Mr. Mohammed

Bedjaoui, Special Rapporteur on that aspect of the topic, and a first report on the succession of States and Governments in respect of treaties (A/CN.4/202)<sup>101</sup> submitted by Sir Humphrey Waldock, Special Rapporteur on succession in respect of treaties. The two reports were considered successively, beginning with the report on succession of States in respect of rights and duties resulting from sources other than treaties.

#### (a) SUCCESSION IN RESPECT OF MATTERS OTHER THAN TREATIES

45. The Commission considered the report (A/CN.4/204) submitted by Mr. Mohammed Bedjaoui, the Special Rapporteur, at its 960th to 965th and 968th meetings. After a general debate on the report the Commission requested the Special Rapporteur to prepare a list of preliminary questions relating to points on which he wished to have the Commission's views. In compliance with that request the Special Rapporteur submitted to the Commission, at its 962nd meeting, a questionnaire on the following eight points: (a) title and scope of the topic; (b) general definition of State succession; (c) method of work; (d) form of the work; (e) origins and types of State succession; (f) specific problems of new States; (g) judicial settlement of disputes; (h) order of priority or choice of certain aspects of the topic. At its 965th meeting, the Commission provisionally adopted a number of conclusions on the points listed in the Special Rapporteur's questionnaire, pending whatever decisions it might take on succession in respect of treaties. After considering the report (A/CN.4/202) submitted by Sir Humphrey Waldock, the Commission, at its 968th meeting, reaffirmed the conclusions it had reached concerning succession in respect of matters other than treaties. These conclusions are given below together with a summary of the views expressed by the members of the Commission during the discussion preceding their adoption.

##### 1. Title and scope of the topic

46. All the members of the Commission who participated in the debate agreed that the criterion for demarcation between this topic and that concerning succession in respect of treaties was "the subject-matter of succession" i.e., the content of succession and not its modalities. In order to avoid all ambiguity, it was decided, in accordance with the Special Rapporteur's suggestion, to delete from the title of the topic all reference to "sources", since any such reference might imply that it was intended to divide up the topic by distinguishing between conventional and non-conventional succession. The Commission accordingly replaced the original title, "Succession in respect of rights and duties resulting from sources other than treaties", by the following title: "Succession in respect of matters other than treaties". Some members of the Commission added that, to delimit the subject properly, it was also necessary to take account of the distinction between questions pertaining to the international law of succession and those pertaining to

<sup>97</sup> For the studies, documentation and publications requested from the Secretariat, see *Yearbook of the International Law Commission, 1962*, vol. II, document A/5209, pp. 191-193, paras. 72 and 73, and *Yearbook of the International Law Commission, 1963*, vol. II, document A/5509, pp. 224 and 225, para. 61, and annex II, p. 262, paras. 16 and 17.

<sup>98</sup> Reproduced in the *Yearbook of the International Law Commission, 1962*, vol. II.

<sup>99</sup> Reproduced in the *Yearbook of the International Law Commission, 1963*, vol. II.

<sup>100</sup> See p. 119, above.

<sup>101</sup> See p. 87, above.

other branches of international law, and of the distinction between the international law of succession and succession in internal law.

## 2. General definition of State succession

47. Some members observed that if a general definition was considered necessary, the Commission could take as its starting point the definition given in paragraph 2 (a) of draft article 1 in the report (A/CN.4/202) submitted by Sir Humphrey Waldock, or at least temporarily attribute to "succession" the meaning suggested in that sub-paragraph, namely, a change in the possession of "competence" to conclude treaties with respect to a given territory. The use of the term "competence" instead of "sovereignty" would, in the opinion of certain members, have the advantage that the definition would cover a greater number of international situations (international mandates; territories under trusteeship; protectorates; maritimes zones over which the adjacent coastal State can exercise limited jurisdiction, etc.). Other members preferred the term "sovereignty", however, as it would exclude certain situations; for instance, those arising from a military occupation. It was also pointed out that if a definition was drawn up, it would be necessary to take account of partial succession and deal with every case in which a displacement of sovereignty occurred, even if that displacement affected only a fraction, however small, of the territory of a State.

48. Many members of the Commission considered that at the present stage of the work the drafting of a general definition of "State succession" was a theoretical or academic matter which should be avoided. In their opinion, the Commission's task was to formulate rules on the concrete problems raised by the topic and not to attempt to draw up definitions, which would necessarily be of an abstract nature and of doubtful utility. The problems raised by the formulation of a definition of that kind really went beyond the scope of the topic of succession proper; moreover, the immediate usefulness of a definition would be very relative, for as its study of the topic progressed, the Commission would probably have to amend or adapt the formula originally adopted. These members thought that the best course would be to explain, at a later stage in the work, the meaning of the terms used in the draft or drafts prepared, in other words, to try to give an agreed meaning to those terms in the context of the draft in question. They added that the Special Rapporteurs should consult each other before defining the terms to be used in their respective drafts.

49. Some members of the Commission considered the use of the term "succession" unsatisfactory, though they agreed that it should continue to be used so long as no more acceptable term was found. Other members, on the other hand, found it appropriate, since it was a term now widely used in international law; they pointed out that this was not the only case in which public international law made use of an expression that had its origin in private law. Lastly, it was also pointed out that the use of the term "succession" in future drafts would largely depend on the rules formulated in them.

50. The Commission decided: (a) that there was no need to attempt to draw up a general definition of State succession or, for the time being, of the term "succession"; (b) that it might be advisable, at a later stage, to give some explanations concerning the meaning of the expressions used in the draft; (c) that the term "succession" would meanwhile continue to be used.

## 3. Method of work

51. The Commission decided that the study of the topic of succession of States should combine the technique of codification with that of progressive development. Drawing attention to the link between the codification and the progressive development of international law, the members of the Commission took the view that it was not really a question of choosing between one and the other, but of achieving a balance between the two in the rules to be formulated, taking into account the comments which would be submitted by Governments in due course.

52. According to some members, the succession of States would lend itself particularly well to progressive development, because of the very recent phenomenon of decolonization. While not denying the value of traditional rules or the importance of rules laid down in treaties, these members pointed out that such rules are changing under the influence of the development of the general principles of international law, the recognition of the existence of certain peremptory norms and State practice. Consequently, in formulating general rules on the succession of States, the Commission should endeavour to harmonize the old rules with contemporary conditions.

53. Other members, while noting that the diverse character of the practice in State succession would clearly necessitate a certain element of progressive development, considered it essential to ascertain what the international community accepted as law in regard to State succession, with a view to formulating a balanced system of rules that would take account of all the relevant precedents and factors and all the legitimate interests. The objectives stated in the report of the Sub-Committee of 1963, approved by the Commission the same year, should continue to serve as a general guide and should not be changed without good reason.

## 4. Form of the work

54. All the members of the Commission who spoke in the debate rejected the idea of preparing a mere dissertation or commentary. Although some considered that what was important at the present stage was to formulate a set of rules, irrespective of whether they were stated in the language of treaties or in less rigorous terms, the majority of the Commission was in favour of preparing a draft of articles with reasoned commentaries on the aspects of the topic it was decided to select.

55. Some members said that the articles should be so drafted that they could subsequently serve as the basis for a convention. However, the prevailing opinion was that until the Commission had a complete set of draft

articles before it, it could not decide on the final form to be given to its work on succession of States in respect of matters other than treaties. Finally, some members urged that the draft rules or articles should be formulated concisely and should not enter into unnecessary details.

56. In conclusion, the Commission requested the Special Rapporteur to prepare draft articles, or possibly a set of rules, and postponed its decision on the final form of the work.

#### 5. *Origins and types of State succession*

57. In his report, the Special Rapporteur provisionally classified the succession of States in three general types: "dismemberment", "decolonization" and "merger". Reservations were expressed on the grounds that those were not the only types and that in practice they were frequently mixed, and also because the Special Rapporteur thought it desirable to distinguish between past, present and future types of State succession. Some members of the Commission considered that this classification provided a useful working hypothesis.

58. In this connexion, it was pointed out that each type of succession raises specific problems which must be approached in a different way. For instance, succession through the cession or transfer of part of the territory of a State cannot always be dealt with according to the same criteria as succession resulting from the birth of a new State. Moreover, the typology of successions makes it possible to study the material basis of the changes which have occurred in the rules governing State succession. For this reason, some members thought that the Commission should consider the advisability of devoting a separate chapter of the future draft to decolonization. Other members expressed doubts regarding that idea and stressed that, in spite of the importance of decolonization, other causes of succession might become more frequent in the future (economic integrations; forms of federalism).

59. Nevertheless, the members of the Commission unanimously agreed that it was not advisable to deal separately with the origins and types of State succession. For the purposes of codifying the rules relating to succession, it was considered sufficient for the Commission and the Special Rapporteurs on the topic to bear in mind the various situations, with a view to formulating, when necessary, a special rule for the case of a succession due to a particular cause. The Special Rapporteurs could consult each other when the need arose.

#### 6. *Specific problems of new States*

60. As stated in paragraphs 32 and 36 above, the General Assembly in its resolutions 1765 (XVII) and 1902 (XVIII) recommended that the Commission should continue its work on the succession of States and Governments "with appropriate reference to the views of States which have achieved independence since the Second World War".

61. After the views summarized in the following paragraphs of this section had been put forward in the

debate, the Commission concluded that the problem of new States should be given special attention throughout the study of the topic, without, however, neglecting other causes of succession on that account.

62. Emphasizing that the present importance of the topic of State succession is due to the phenomenon of decolonization, various members of the Commission expressed the view that succession resulting from decolonization should be the subject of a special study in the context of the topic. Under the impact of the principles embodied in the United Nations Charter and the relevant resolutions and declarations adopted by the General Assembly, decolonization has become one of the aims of the international community and is proceeding under its supervision. As a result, succession resulting from decolonization presents—in the opinion of these members—specific aspects which are peculiar to it and which distinguish it from other causes of succession. Decolonization has given rise to rules which affect the rules of traditional succession. The Commission should therefore give decolonization problems all the attention they deserve. Although the process of emancipation is now nearly complete, some countries have still not achieved their independence; moreover, in nearly every case a number of questions remain in dispute between the new State and the former metropolitan country. Problems also arise in the relations of each new State with States other than the former metropolitan country. Consequently, formulation of the rules relating to succession problems connected with decolonization might prove useful even for the purpose of consolidating the political and economic independence of the recently emancipated States. It was not a question of minimizing the other aspects of succession, but of emphasizing the aspects resulting from decolonization.

63. Some members also drew attention to the difference in nature between decolonization and other cases of succession. They said that decolonization may bring a radical change in the social structure of new States and not merely a formal change of sovereignty. Its political, economic and social objectives are not the same as those of traditional succession. Conditions are not the same in the successor State and in the predecessor State. It was also pointed out that succession resulting from decolonization involves not only the transfer of sovereignty from one State to another, but sometimes also the return of an earlier sovereignty. All this affects the permanence of the acts performed by the predecessor State, so that the elements of rupture tend to carry more weight than those of continuity.

64. Other members stressed the need to avoid confusing State succession with decolonization. Decolonization is merely one of the processes of transferring sovereignty from one State to another which create succession problems. These members thought it unnecessary to stress unduly the differences between the old and new theories of State succession. There have always been new States. Countries undergoing these processes, whether they are former colonies or not, are faced with succession problems which are basically the same. Elements of continuity and rupture appear both in decoloni-

zation and in traditional succession. Decolonization is approaching completion, and the adoption of rules governing it will not satisfy future needs. Hence, attention should be devoted mainly to the cases of succession most likely to occur in the future (dissolution; merger; economic integration) and not only to the important, but transitory, problems of decolonization. If the Commission were to deal only with certain aspects of succession, such as decolonization, the rules it drew up would be ephemeral and ill-balanced. It should avoid establishing a special law for the problems of the new States, since that would reduce the value of its work of codification, the object of which is, precisely, uniformity. For all these reasons, the members in question were opposed to the Commission's limiting its objective to the drafting of rules governing only one aspect of succession, and concentrating its efforts on the present situation to the exclusion of future needs.

65. Other members took the view that since the Commission was to study the problems of succession affecting all new States, the question of studying decolonization was ultimately only a matter of priorities. The fact of giving priority to the study of the recent problems of decolonization did not mean that the other problems of succession should be overlooked. In this connexion, it was noted that in the absence of comments by Governments, the Commission did not have sufficient information to be able to determine which aspects of State succession were of immediate importance for the international community in general.

66. As regards the question how much importance the Commission should attach, in its work on the topic, to the views of States which have achieved independence since the Second World War, some members drew attention to relevant resolutions of the General Assembly and stressed the fact that due account should be taken by the Commission of the General Assembly's recommendations. Hence due account must be taken of the views of the new States, which reflected recent practice and experience, especially in the matter of decolonization. The old rules and precedents had not lost all their force but they should be adapted and brought into line with present requirements and the development undergone by the principles of international law. Other members, while not underestimating the importance of the views of new States, thought it necessary to consider all views and make use of all existing practice. Otherwise, valuable and useful assistance would be lost and there would be some danger of the draft articles being difficult for all to accept. In preparing its codification drafts the Commission took account of the views of States, without making any distinction between old and new States.

67. It was also pointed out that State succession, and particularly succession resulting from decolonization concerns not only relations between the new State and the former metropolitan country and its nationals, but also relations between the new State and third States and their nationals. Certain situations may even be foreign to relations between the former metropolitan country and the new State. Problems frequently arise which affect relations between new States and international organiza-

tions, as well as relations between the former metropolitan country and third States or international organizations. Not even relations between the new States themselves can be disregarded. In fact, the problems raised by succession resulting from decolonization are of concern to the whole international community, so that it is necessary to reconcile and protect the legitimate interests of all the interested parties in order to promote the welfare and collaboration of States and thereby consolidate world peace. Some members, however, observed that it would be necessary to draw up special rules for cases in which third States had profited from the colonial occupation, as otherwise the new States would be obliged to suffer the consequences of the acts of the colonial Power which had deprived them of freedom.

68. Some members thought that the best method would be to identify the specific problems raised for new States by a given general rule, and subsequently to formulate, when necessary, a special rule for decolonization or any other type of State succession requiring it. Others considered that the Commission should not try to draw up specific rules, but should concentrate on drafting general rules. A set of general rules on State succession would be more suitable for all States, including the new States. It could be stipulated in the draft being prepared that the rules laid down in it were without prejudice to special regulations.

69. Referring to devolution treaties, some members said that the Commission should take them into account when it draws up the rules concerning the birth of a new State, and that the aspects of such treaties coming under the separate headings into which the topic of succession of States and Governments had been divided, should be studied on the same basis. The effects of these treaties, and questions relating to their validity, would be governed by the law of treaties, unless the Commission found valid reasons for proposing some special rule on the subject. In this connexion it was pointed out that the draft articles on the law of treaties, which are being considered by the United Nations Conference on the Law of Treaties, contain an exhaustive enumeration of the grounds for invalidity of treaties. Devolution treaties may sometimes raise delicate problems including their effects on third States; but any suggestion that this kind of treaty may be void simply as such should be examined with the greatest caution. Experience shows that such treaties have been accepted as often as they have been rejected and the Commission should not examine controversial matters which belonged more properly to other branches of law. Devolution agreements might also, no doubt, provide indications of customary rules but that was part of the general problem of appreciating the State practice in regard to succession.

70. Other members considered that the specific problems of the new States born of decolonization should be solved in accordance with the general principles of contemporary international law rather than conventional rules. Devolution treaties may be a disguised means of maintaining a colonial relationship contrary to international law. It will be necessary to consider whether the consent of the former colonies to these treaties was

an expression of their free will or the price paid for their emancipation. If a devolution treaty so limits the sovereignty of a new State that the relationship it creates does not differ substantially from the former colonial relationship (unequal treaties), the treaty in question will violate the rule of international law which prohibits colonialism in all its forms and manifestations and is therefore void or voidable. The fact that this is difficult to determine in each specific case does not detract from the value of the principle. These members considered that the question of the relationship between treaties and the rules on State succession is one of the aspects of the topic that calls for separate treatment, according to whether the new State was created by decolonization or in some other manner.

#### 7. *Judicial settlement of disputes*

71. During the debate, some members expressed the view that the Commission should deal with the judicial settlement of disputes arising out of State succession and should attempt to work out an adequate system. Other members were of the opinion that the question of the judicial settlement of disputes went beyond the scope of the topic and should be excluded from the Commission's work on succession of States in respect of matters other than treaties.

72. The prevailing opinion among members of the Commission was that no decision should be taken on this question until more progress had been made in studying the substance of the topic. Only then would it be possible to determine the types of dispute which might arise from the rules proposed, and the procedures or methods of settlement best suited to those aspects concerning which it might be considered advisable to work out a system of settlement. The Special Rapporteur should have complete freedom to examine the question and to submit his proposals to the Commission when he saw fit. The Commission concluded that it was premature to take a decision on the question of the judicial settlement of disputes.

#### 8. *Particular comments by some members on certain aspects of the topic*

73. During the debate, some members of the Commission referred to certain particular aspects of the topic (public property; public debts; territorial problems; legal régime of the predecessor State; territorial problems; status of the inhabitants; acquired rights) and made a few preliminary comments on them. The Commission did not discuss these subjects.

74. With regard to "public property", opinions differed on the desirability of abandoning the traditional distinction between the public domain and the private domain of the State and it was considered advisable to formulate rules on the fate of archives and libraries. The general interest of the territory passing to the successor State was considered the decisive factor for determining succession in respect of public debts. Some members, believing that there is no succession to the legal régime of the predecessor State, considered that

anything relating to succession to that régime should be omitted, whereas others thought that the Commission should examine the *de facto* problems that arose in this connexion. With regard to the question of the status of the inhabitants, attention was drawn to questions of nationality, the right of option and the protection of persons and their property.

75. It was also pointed out that the Commission should not formulate rules which might encourage States to question boundaries established legally, but should consider whether the wisest course would not be to formulate a general reservation on territorial problems and to examine those problems in detail outside the framework of the topic of State succession. Other members thought that territorial disputes between new States should not be settled according to an excessively formalistic criterion based on treaty provisions which might have their origin in unequal or colonial treaties, but according to the principle of self-determination and other general principles of international law stated in the United Nations Charter. In this connexion it was pointed out that there is no satisfactory definition of a "boundary", "frontier" or "line of demarcation" and that a boundary is not merely a question of drawing up a line but it involves a territory with a people whose right of self-determination should be respected. In addition, it was suggested by a member that in territorial questions the Commission might perhaps not be able to go beyond the study of international servitudes.

76. Lastly, with regard to so-called "acquired rights", some members took the view that, except for obligations arising out of treaties, such rights exist only if the successor State decides to subrogate itself in the contract of the predecessor State (novation). The Commission should endeavour to strengthen the sovereignty of new States, avoiding the perpetuation, as acquired rights, of earlier situations which it would be right to bring to an end. States have no obligation, on the international plane, to draw a distinction between so-called acquired rights and other property rights, which their legislation can modify when the general interest so requires. What aliens are entitled to claim is equality of treatment with nationals. On the other hand, the contractual nature of concession and other pre-existing government contracts cannot be invoked, because the successor State has not given its consent to them. As the whole question of State succession presents itself in terms of continuity or rupture, i.e., the maintenance or extinction of rights or situations acquired by a State or by a private person, some of these members maintained that acquired rights should not constitute a separate chapter of the future draft.

77. Other members thought that the Commission should not adopt a dogmatic attitude in the matter. Reasons of justice and equity required that the Commission should take due account of the question of acquired rights, with a view to codifying the rules governing it and, if necessary, developing them progressively. If the possessors of private rights are nationals of a third State, the successor State does not have unlimited freedom of action, since it is obliged to observe the relevant rules

of international law. In the view of these members, save in exceptional cases the termination of concessions granted to aliens entails payment of compensation and the Commission should examine the circumstances in which the Successor State is entitled to cancel or modify the terms of such concessions. For although it is true that a new State cannot permit the perpetuation of acquired rights which would prevent it from developing its economy adequately, such rights cannot be suddenly abolished without seriously disrupting its economy.

#### 9. Order of priority or choice of certain aspects of the topic

78. In view of the breadth and complexity of the task entrusted to the Special Rapporteur, the members of the Commission were in favour of giving priority to one or two aspects for immediate study, on the understanding that this did not in any way imply that all the other questions coming under the same heading would not be considered later. It was also pointed out that the order in which subjects would be studied would not affect their positions in the draft finally adopted.

79. Among the aspects to which priority should be given, the following were mentioned: (a) public property and public debts; (b) the question of natural resources; (c) territorial questions which came under the heading; (d) special problems arising from decolonization; (e) nationality changes resulting from succession; (f) certain aspects of succession to the legal régime of the predecessor State. The predominant view was that the economic aspects of succession should be considered first. At the outset, it was suggested that the problems of public property and public debts should be considered first. But, since that aspect appeared too limited, it was proposed that it should be combined with the question of natural resources as to cover problems of succession in respect of the different economic resources (interests and rights) including the associated questions of concession rights and government contracts (acquired rights). The Commission accordingly decided to entitle that aspect of the topic "Succession of States in economic and financial matters" and instructed the Special Rapporteur to prepare a report on it for the next session.

#### (b) SUCCESSION IN RESPECT OF TREATIES

80. The Commission considered the first report on succession of States and Governments in respect of treaties (A/CN.4/202) by Sir Humphrey Waldock, the Special Rapporteur, at its 965th, 966th, 967th and 968th meetings. The Commission endorsed the suggestion of the Special Rapporteur that it was unnecessary to repeat in the context of the present report the general debate which had taken place on the several aspects of succession in matters other than treaties which might also be of interest in regard to succession in respect of treaties. It would be for the Special Rapporteur to take account of the views expressed by members of the Commission in that debate in so far as they might also have relevance in the present connexion.

81. Following the discussion of the Special Rapporteur's report, summarized below, the Commission concluded that it was not called upon to take any formal decision in regard to "Succession in respect of treaties".

82. The Commission noted the view of the Special Rapporteur that he interpreted his own task as strictly limited to succession with respect to treaties, i.e., to the question how far treaties previously concluded and applicable with respect to a given territory might still be applicable after a change in the sovereignty over that territory; and that here would be the broad dividing line between the present topic and the topic entrusted to Mr. Bedjaoui. If in some instances the particular subject-matter of the treaty might require consideration for its possible implications in regard to succession, the Special Rapporteur proposed to proceed on the basis that the present topic was essentially concerned only with the question of succession in respect of the treaty as such.

#### 1. Dividing line between the two topics of succession

82. The Commission noted the view of the Special Rapporteur that he interpreted his own task as strictly limited to succession with respect to treaties, i.e., to the question how far treaties previously concluded and applicable with respect to a given territory might still be applicable after a change in the sovereignty over that territory; and that here would be the broad dividing line between the present topic and the topic entrusted to Mr. Bedjaoui. If in some instances the particular subject-matter of the treaty might require consideration for its possible implications in regard to succession, the Special Rapporteur proposed to proceed on the basis that the present topic was essentially concerned only with the question of succession in respect of the treaty as such.

#### 2. Nature and form of the work

83. The Commission, in line with the decision mentioned in paragraph 51 of this chapter, was in agreement that the present topic also should combine the technique of codification with that of progressive development.

84. The Commission noted the statement of the Special Rapporteur in introducing his report that he was casting his work in the form of draft articles on the model of a convention in order to provide the Commission with specific texts on which to focus the discussion and in order to clarify the issues; and that, in adopting this form for the work, he had not intended in any way to anticipate the ultimate decision of the Commission on this point.

85. One member of the Commission, without questioning the method of work for purposes of study, expressed doubts as to the advisability of a draft convention because of the difficulties which might arise in any endeavour to make such a convention effective. The succession or non-succession of the former dependent territories was now largely completed and the solutions adopted had varied with respect to varying types of treaties. The question therefore would arise whether the drafts articles would apply to the positions already taken by the "successor" States. Equally, in regard to future new States or mergers of States the problem would arise as to how the convention on succession could be made binding on a State which only came into existence after its adoption; for the convention could not include a mandatory provision that a new State would automatically be subject to the rules contained in it. The Special Rapporteur pointed out that analogous objections had formerly been made to the whole idea of the convention on the law of treaties which was even now before a diplomatic conference and that objections of a somewhat similar kind could be made to almost any codifying convention. In any case, examination of the question seemed premature and meanwhile the formulation of articles would provide a useful technique for isolating what might be genuine rules of law from practice which merely reflected considerations of expediency or policy.

86. Some members of the Commission expressed reservations in regard to the suggestion in paragraph 9 of the Special Rapporteur's report that the solution of the problems of succession in respect of treaties is today to be sought within the framework of the law of treaties rather than of any general law of succession. These members said that it was doubtful whether what took place at the time of succession could be explained solely by the law of treaties. The practice in succession to treaties, particularly to multilateral treaties, tended to show that a right of succession was created in favour of the successor State, and at the same time did not show that there was any obligation to succeed. Whether that constituted a rule or was merely a description of what occurred, the question remained whether it was to be explained solely by the rules of the law of treaties. If it should be necessary to postulate a general law of succession, it might hardly be justifiable to consider succession in respect of treaties within the framework of the law of treaties rather than of any general law of succession. They also recalled that the Commission itself in 1963 and 1966 had appeared to envisage that the question of succession in respect of treaties would be dealt with within the context of the law of succession rather than of the law or treaties.

87. Other members observed that the Commission's decision to appoint two rapporteurs for succession of States and Governments indicated that the present topic should be treated in its own right, and that its choice as Special Rapporteur of its former rapporteur on the law of treaties suggested that the starting point should be the law of treaties. This did not mean that the aspects of State succession was to be disregarded but rather that, at the present stage of the work, an approach to the topic from the point of view of the law of treaties would give the best chance of achieving concrete results. Clearly, since the topic was succession of States in respect of treaties, it could not be studied solely within the framework of the law of treaties or solely within the framework of the law of succession.

88. The Special Rapporteur emphasized that the statement in his report which had given rise to the discussion did not go beyond suggesting that the solution of the problems of succession in respect of treaties was today to be sought within the framework of the law of treaties rather than of any general law of succession. As the title of the topic itself indicated, there could not be any question of detaching the present topic altogether from succession of States or from such general principles of succession as the Commission might find to exist. In his view, the position was that the problems to be solved were problems of the law of treaties which arose in a special context—a succession of States. Succession of States took different forms resulting from such processes as decolonization, dismemberment, fusion and transfers of territory and these different forms of succession could have different implications when viewed as the context of the problems of succession in respect of treaties which required solution. He shared the view expressed by some members that in the case of large multilateral treaties an extensive practice indicated that there might

exist at least one basic rule: that a new State was entitled, by using one procedure or another, to continue the application of the treaty to its own territory as a party in its own right, independently of the actual provisions of the final clauses of the treaty concerning participation; in this connexion he pointed out that the draft Vienna Convention on the law of treaties had a new article—article 9 *bis*—providing in general terms for “other methods” of participation in treaties in addition to signature, ratification, acceptance, etc. Such a right, if endorsed by the Commission, fell outside the normal institutions of the law of treaties and might be considered as a form of “succession”; for even in municipal law, as pointed out by a member in the debate, the need for an element of consent was not inconsistent with the concept of “succession”. But the case would be one of succession to a right to be a party to the treaty not of a direct succession to the rights and obligations of the treaty. The State practice in itself showed considerable divergence on the question whether the “successor” State regarded itself as standing in the shoes of its predecessor or as entering the treaty in the guise of an entirely new Party. In general, it was, of course, essential—indeed inevitable—that the Commission should examine the different causes of “succession” situations and their implications with regard to succession in respect of treaties.

89. In the same general connexion, the question was raised in the discussions as to whether the drafts on the present topic should be considered as a sequel to the draft articles on the law of treaties rather than as one section of a single codification of a comprehensive codification of a general law of succession of States. For the time being, however, it was merely noted that the draft would be prepared in the form of an autonomous group of articles on the specific topic of succession in respect of treaties. During the discussion, various particular aspects of the topic were touched upon by members, including the definition of succession, but were not pursued by members having regard to the preliminary character of the debate.

### 3. Title of the topic

90. Some members noted that the title to the topic used in the report was “Succession of States and Governments” in respect of treaties, and suggested that it should be changed in the light of the view previously expressed in the Commission that it should cover only succession of States and leave succession of Governments aside. In the introduction to his report, the Special Rapporteur had recalled the recommendation of the Sub-Committee in 1963 that the Special Rapporteur should “initially concentrate on the topic of State succession, and should study succession of Governments in so far as necessary to complement the study of State succession”.

91. During the debate on Mr. Bedjaoui's report, the Special Rapporteur suggested that the wording of the title of the present topic might be brought closely into line with that of the new title to the other topic. The Commission noted that the title would read “Succession in respect of treaties”.

## CHAPTER IV

**The most-favoured-nation clause**

92. The Special Rapporteur, Mr. Endre Ustor, submitted at the present session a working paper (A/CN.4/L.127) 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 working paper was aimed mainly at soliciting comments and guidance from the members of the Commission. The Special Rapporteur also submitted a questionnaire listing points on which he specifically asked the members of the Commission to express their opinion.

93. The Commission discussed the matter in the course of its 975th, 976th and 979th meetings. While recognizing the fundamental importance of the role of the most-favoured-nation clause in the domain of international trade, the Commission 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 considers that it should focus on the legal character of the clause and the legal conditions governing its application. It intends to clarify the scope and effect of the clause as a legal institution in the context of all aspects of its practical application. To this end the Commission wishes to base its studies on the broadest possible foundations without, however, entering into fields outside its functions.

94. In the light of the foregoing considerations the Commission accepted a suggestion of the Special Rapporteur and instructed him to consult, through the Secretariat, all organizations and interested agencies which may have particular experience in the application of the most-favoured-nation clause.

## CHAPTER V

**Other decisions and conclusions of the Commission****A. REVIEW OF THE COMMISSION'S PROGRAMME AND METHODS OF WORK**

95. Having in mind that its 1968 session would be the twentieth, the Commission decided in 1967 to place on the provisional agenda of the session an item on review of its programme and methods of work.<sup>102</sup>

96. The Commission discussed this item at the 957th to 959th, 974th, and 977th to 979th meetings and at two private meetings held on 18 and 19 July 1968. The Commission had before it two working papers prepared by the Secretariat on the programme and on the methods of work of the Commission (A/CN.4/L.128; ILC(XX) Misc.2), which it decided to include as an annex to the present report. An account is given below of the various

questions dealt with by the Commission under this item and of its conclusions and decisions thereon. At the end of its consideration of the item the Commission expressed the wish that in introducing this report to the twenty-third session of the General Assembly its Chairman should also make a statement giving a general appraisal of the Commission's twenty years of activity.

97. At its two private meetings, the Commission discussed certain aspects of its organization, the arrangement of its sessions and the process of consideration of a topic of international law with a view to its codification and progressive development. The decisions of the Commission in this regard were announced by its Chairman at the 979th meeting.

98. (a) The Commission deemed it suitable to propose that the term of office should be extended from five to six or seven years. Experience had shown that, given the time-consuming nature of the codification process, a period of six or seven years was the minimum required for the completion of a programme of work, particularly when the programme includes a major topic. The five-year term of office had remained unchanged since 1955, when the Commission was composed of fifteen members, even though its size had been increased to twenty-one in 1956 and twenty-five in 1961, the larger membership necessarily requiring more time for discussion. The general need of codification, as demonstrated by the proliferation of United Nations bodies dealing with international law, called for the increased ability to plan and execute a balanced programme that would result from the proposed extension.

(b) The Commission also deemed it necessary to express its concern at the present situation regarding honoraria and *per diem*. It further agreed to recommend that an additional special allowance should be made available to Special Rapporteurs in order to help them defray travel and incidental expenses in connexion with their work.

(c) Finally, the Commission stressed the need to increase the staff of the Codification Division of the Office of Legal Affairs so that it could provide additional assistance to the Commission and to its Special Rapporteurs.

99. The Commission agreed that it should give attention to its long-term programme of work before the term of office of the present membership expired. For this purpose, the Commission decided to ask the Secretary-General to prepare a new survey of the whole field of international law on the lines of the memorandum entitled "Survey of international law in relation to the work of codification of the International Law Commission" (A/CN.4/1/Rev.1) submitted at the Commission's first session in 1949. On the basis of such a new survey, the Commission, in 1970 or 1971, could draw up a list of topics that were ripe for codification, taking into account General Assembly recommendations and the international community's current needs, and discarding those topics on the 1949 list which were no longer suitable for treatment.

100. With regard to the Commission's present programme of work, for the next three years the Commission would be fully occupied, in accordance with pre-

<sup>102</sup> See *Yearbook of the International Law Commission, 1967*, vol. II, document A/6709/Rev.1 and Rev.1/Corr.1, p. 369, para. 49.

vious decisions of the Commission endorsed by the General Assembly, with the consideration of four of those topics, namely "State responsibility", "Relations between States and international organizations", "Most-favoured-nation clause" and "Succession of States and Governments", this last topic having been divided into two parts (succession in respect of treaties and succession in respect of matters other than treaties). Although the reasons were still valid which in 1967 had led the Commission to postpone consideration of the two other topics in the present programme of work ("Right of asylum"; "Juridical régime of historic waters, including historic bays"),<sup>103</sup> the possibility had to be envisaged of dealing in the near future with a new topic. The Committee of the Whole of the United Nations Conference on the Law of Treaties has adopted a draft resolution concerning the study of the question of treaties concluded between States and international organizations, or between two or more international organizations. If this draft resolution were to be adopted in plenary meeting at the second session of the Conference in 1969, the General Assembly might recommend to the Commission to place the question referred to in the draft resolution on its programme of work and the Commission would then give full consideration to that recommendation and add this new topic to its programme.

101. As reflected in the pertinent chapters of this report, the Commission has already undertaken the active consideration of three topics—"Relations between States and international organizations", "Succession of States and Governments" and "Most-favoured-nation clause"—out of the four to which it had given priority. With respect to the fourth topic, namely "State responsibility", since the General Assembly, by its resolution 2272 (XXII) of 1 December 1967, had recommended that the Commission should expedite the study of that topic, it was stressed that a special effort should be made in order to do substantive work on it at the 1969 session of the Commission.

102. At the 957th and 959th meetings of the Commission, Mr. Roberto Ago raised the question of the outcome of conventions codifying international law after the adoption of the text by a diplomatic conference, and announced his submission of a written memorandum thereon. A preliminary discussion on the question raised took place at the 959th and 974th meetings, and a more thorough discussion at the 977th and 978th meetings. In the course of these discussions Mr. Ago introduced in final form a memorandum entitled "The final stage of the codification of international law" (A/CN.4/205/Rev.1). The memorandum focused on the desirability of expediting the process of ratification of or accession to codification conventions in order to shorten the final stage of the codification of international law. It dealt with the possible means of attaining that end, emphasizing the rule applied by certain specialized agencies (the International Labour Organisation, UNESCO, WHO), whereby States are required to submit conventions to their constitutional authorities within a given

period and to keep the organization in question informed of the situation. Finally, the memorandum considered the methods whereby a similar system could be applied in connexion with the codification work undertaken by the United Nations, such as the adoption of a recommendation of the General Assembly or the signature of an additional protocol to a convention to be adopted by a diplomatic codification conference.

#### B. ORGANIZATION OF FUTURE WORK

103. The Commission deemed it desirable to complete the study of relations between States and international organizations and of succession in respect of treaties, and to make progress on the study of State responsibility and of succession in respect of matters other than treaties during the remainder of the Commission's term of office in its present composition. To this effect the Commission deemed it necessary to reserve the possibility of a winter session in 1970 and agreed to record this decision in the present report in order that arrangements for budgetary appropriations could be made in time.

104. The Commission intends, at its twenty-first session, in 1969, and at its suggested winter session early in 1970, to conclude the first reading of its drafts on relations between States and international organizations and on succession in respect of treaties. After comments have been received from Governments on the two drafts, the Commission aims at concluding its work on both topics at its twenty-third session in 1971 if the scope of the work on these subjects should allow it. At its twenty-first session, in 1969, the Commission plans also to undertake substantive consideration of State responsibility. The study of this topic, as well as of succession in respect of matters other than treaties, would be given priority at the Commission's twenty-second session in 1970. During its mandate the Commission plans also to continue its study of the most-favoured-nation clause.

#### C. DATE AND PLACE OF THE TWENTY-FIRST SESSION

105. The Commission decided to hold its next session at the United Nations Office at Geneva for ten weeks from 2 June to 8 August 1969.

#### D. RELATIONS WITH THE INTERNATIONAL COURT OF JUSTICE

106. The Vice-President of the International Court of Justice, Mr. Vladimir M. Koretsky, visited the Commission at its 971st meeting and addressed it on behalf of the President and the members of the Court. He referred to the natural link existing between the Court and the Commission and commented on the importance of the Commission's work and its recognition by the General Assembly.

#### E. CO-OPERATION WITH OTHER BODIES

##### 1. *Asian-African Legal Consultative Committee*

107. Mr. Mustafa Kamil Yasseen reported orally at the 952nd meeting and later in writing (A/CN.4/207)

<sup>103</sup> *Ibid.*, para. 45.

on his attendance as an observer on behalf of the Commission at the Asian-African Legal Consultative Committee during its ninth session, held in New Delhi from 18 to 29 December 1967.

108. The Asian-African Legal Consultative Committee was represented before the Commission by its Secretary-General, Mr. B. Sen, who addressed the Commission at its 952nd meeting. He commented on the importance of the Commission's work for Asian and African countries and on the functions and work of the Committee, which had dealt with topics such as the legal problems connected with the status and rights of refugees, dual or multiple nationality, the legality of nuclear tests, the extradition of refugee offenders and the status and treatment of aliens, and which had also twice been called upon to advise its member Governments on draft articles prepared by the Commission. He stated that at its next session the Committee would mainly consider the law of treaties in the light of the first session of the United Nations Conference on the Law of Treaties.

109. The Commission was informed that the next session of the Committee, to which it has a standing invitation to send an observer, would be held in Pakistan in December 1968. The Commission requested its Chairman, Mr. José María Ruda, to attend the Committee's 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

110. The Commission had before it a document (A/CN.4/L.126) reproducing the letters exchanged between Sir Humphrey Waldock, Chairman of the International Law Commission at its nineteenth session, and Mr. H. Golsong, Director of Legal Affairs of the Council of Europe, concerning the eighth session of the European Committee on Legal Co-operation held at Strasbourg in December 1967.

111. The European Committee on Legal Co-operation was represented by Mr. H. Golsong, who addressed the Commission at its 985th meeting. He referred to the adoption or conclusion, within the Council of Europe, of four new conventions, namely, the European Convention on Consular Functions; the Convention for the Abolition of the Legalization of Acts drawn up by Diplomatic or Consular Agents; the European Convention on Information on Foreign Law; and the European Convention on the Adoption of Children. He commented on the Committee's work in progress, which included a study of the problem of State immunity from jurisdiction and that of the privileges and immunities of international organizations. He stated that at its next session the Committee would consider among other items the number of ratifications of universal conventions by Member States.

112. The commission was informed that the next session of the Committee, to which it has a standing invitation to send an observer, would open in Strasbourg on 11 November 1968. The Commission requested its Chairman, Mr. José María Ruda, to attend the session

or, if he were unable to do so, to appoint another member of the Commission for the purpose.

## 3. Inter-American Juridical Committee

113. The Inter-American Juridical Committee was represented by Mr. José Joaquín Caicedo Castilla, who addressed the Commission at its 957th meeting. He commented on the various amendments introduced to the Charter of the Organization of American States by the Third Special Inter-American Conference held at Buenos Aires in April 1967. He pointed out that the Charter, as amended, assigned to the Committee the following tasks: codification and development of public and private international law in the Americas; uniformity of legislation, wherever possible, in American countries; advisory opinions to American Governments or to the OAS itself; legal problems concerning the integration of the developing countries of the American Continent; studies and projects assigned to it by the Councils of the Organization. He referred to draft conventions prepared by the Committee on the following subjects: the industrial and agricultural use of international rivers; extradition law; definition of political crimes for the purpose of the application of the conventions on asylum; the breadth of the territorial sea; double taxation; commercial arbitration; and simplification of frontier formalities for nationals of American States. He also referred to the completion by the Committee of a draft code of private international law and to its formulation of ten principles concerning international responsibility.

114. The Commission was informed that the 1968 session of the Committee, to which it has a standing invitation to send an observer, would be held at Rio de Janeiro from 16 June to 15 September. The Commission requested its Chairman, Mr. José María Ruda, to attend the meetings of the Committee's session.

## F. REPRESENTATION AT THE TWENTY-THIRD SESSION OF THE GENERAL ASSEMBLY

115. The Commission decided that it will be represented at the twenty-third session of the General Assembly by its Chairman, Mr. José María Ruda.

## G. SEMINAR ON INTERNATIONAL LAW

116. In pursuance of General Assembly resolution 2272 (XXII) of 1 December 1967, the United Nations Office at Geneva organized a fourth session of the Seminar on International Law for advanced students of the subject and young government officials responsible in their respective countries for dealing with questions of international law, to take place during the twentieth session of the Commission. The Seminar, which held thirteen meetings between 8 and 26 July 1968, was attended by twenty-two students, all from different countries. Participants also attended meetings of the Commission during that period. They heard lectures by nine members of the Commission (Mr. Bartoš, Mr. El Erian, Mr. Eustathiades, Mr. Nagendra Singh, Mr. Rosenne, Mr. Ruda, Mr. Ustor, Mr. Yasseen and Sir Humphrey Waldock), Professor Virally of Geneva University,

Mr. F. Wolf, Legal Adviser to the ILO, and one member of the Secretariat (Mr. P. Raton). Lectures were given on various subjects connected with the work of the Commission, such as the problem of the development of international law in the United Nations; various problems related to the codification of the law of treaties, including the results of the first session of the Vienna Conference; the question of special missions; the question of permanent missions to international organizations, and the breadth of the territorial sea. One lecture was devoted to the question of International Trade Law and the United Nations Commission on International Trade Law and one to the International Labour Organisation and International Labour Law.

117. The Seminar was held without cost to the United Nations, which undertook no responsibility for the travel

or living expenses of the participants. However, the Governments of Denmark, Finland, the Federal Republic of Germany, Israel, the Netherlands, Norway and Sweden offered scholarships for participants from developing countries. Nine candidates were chosen to be beneficiaries of the scholarships. The increased number of scholarships made it possible this year to further the aim of admitting a larger number of nationals from developing countries. It is hoped that scholarships will again be granted next year.

118. The Commission expressed appreciation, in particular to Mr. Pierre Raton, for the manner in which the Seminar was organized, the high level of discussion and the results achieved. The Commission recommended that future seminars be held in conjunction with its sessions.

## ANNEX

### Review of the Commission's programme and methods of work

#### *Working paper prepared by the Secretariat\**

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\* The introduction and section A were issued earlier, in a different form, under the symbol A/CN.4/L.128; section B was issued in its entirety under the symbol ILC(XX) Misc. 2.

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### Introduction

1. At its last session, in 1967, the Commission decided to place on the provisional agenda for its twentieth session an item on "Review of the Commission's programme and methods of work." As stated in paragraph 49 of the report on its nineteenth session, the Commission

"having in mind that next year it will hold its twentieth session, considered that that session would be an appropriate time for a general review of the topics which had been suggested for codification and progressive development, of the relation between its work and that of other United Nations organs engaged in development of the law, and its procedures and methods of work under its Statute."<sup>1</sup>

2. By resolution 2272 (XXII) of 1 December 1967, the General Assembly recommended that the International Law Commission should "carry out a review of its programme and methods of work".

3. The present working paper has been prepared in order to facilitate the review by the Commission of its programme and methods of work, in accordance with the decision referred to in paragraph 1 above as well as its consideration of the item entitled "Organization of future work" included as usual in the agenda of the twentieth session of the Commission.

#### Section A. Programme of work

4. The present section revises, completes and up-dates the information given in the paper on organization of future work (A/CN.4/L.119) which the Secretariat submitted to the Com-

mission at its nineteenth session. Brief indications of recent activities and achievements of other United Nations organs engaged in the development of the law have been added when appropriate.

#### I. LIST OF TOPICS FOR CODIFICATION DRAWN UP BY THE COMMISSION IN 1949

5. The list of topics of international law provisionally selected for codification by the Commission in 1949<sup>2</sup> is given hereunder, with brief notes indicating the extent to which they have been dealt with by the Commission and by the General Assembly and codification conferences which considered drafts prepared by it.

##### (1) *Recognition of States and Governments*

Article 11 of the draft Declaration on Rights and Duties of States, adopted by the Commission at its first session (1949), refers to a duty of States to refrain from recognizing any territorial acquisition made by illegal means by another State, but the Commission "concluded that the whole matter of recognition was too delicate and too fraught with political implications to be dealt with in a brief paragraph in this draft Declaration...". Paragraph 2 of article 7 of the draft articles on special missions adopted by the Commission at its nineteenth session (1967) states: "A State may send a special mission to a State, or receive one from a State which it does not recognize". As indicated in the commentary to the draft article, the Commission did not, however, decide the question whether the sending or reception of a special mission pre-judges the solution of the problem of recognition, as that problem lies outside the scope of the topic of special missions.

<sup>1</sup> See *Yearbook of the International Law Commission, 1967*, vol. II, document A/6709/Rev.1 and Rev.1/Corr.1, p. 369, para. 49.

<sup>2</sup> See *Yearbook of the International Law Commission, 1949*, document A/925, p. 281, para. 16.

(2) *Succession of States and Governments*

Currently under study by the International Law Commission (see paragraph 12 (2) below).

(3) *Jurisdictional immunities and their property*

The immunities of State-owned ships and warships are referred to in the Convention on the Territorial Sea and Contiguous Zone and the Convention on the High Seas, both adopted at the first United Nations Conference on the Law of the Sea (1958). The immunities of State property used in connexion with diplomatic missions are regulated in the Vienna Convention on Diplomatic Relations (1961), and those of such property used in connexion with consular posts in the Vienna Convention on Consular Relations (1963). The draft articles on special missions, adopted by the Commission at its nineteenth session (1967), also contain provisions on the immunity of State property, and so presumably will the draft articles on relations between States and inter-governmental organizations. One main aspect of the topic which has not yet been touched on by the Commission is the immunities, if any, of State-owned property used for commercial purposes.

(4) *Jurisdiction with regard to crimes committed outside national territory*

The Convention on the Territorial Sea and the Contiguous Zone (1958) and the Convention on the High Seas (1958) contain provisions concerning crimes committed at sea. One aspect not yet touched on by the Commission is jurisdiction with regard to crimes committed on land in foreign countries (except for those committed by persons with diplomatic or consular status, which have been or are being dealt with by the Commission).

(5) *Régime of the high seas*

Part II (articles 26 to 73) of the draft articles concerning the law of the sea adopted by the Commission at its eighteenth session (1956).<sup>3</sup> The first United Nations Conference on the Law of the Sea (1958) adopted: (1) the Convention on the High Seas<sup>4</sup> (articles 26 to 43 and 61 to 65 of the Commission's draft on the law of the sea); (2) the Convention on Fishing and Conservation of the Living Resources of the High Seas<sup>5</sup> (articles 49 to 60 of the Commission's draft on

<sup>3</sup> In pursuance of General Assembly resolution 899 (IX) of 14 December 1954, the Commission grouped together systematically all the rules it had adopted concerning the high seas, the territorial sea, the continental shelf, the contiguous zone and the conservation of the living resources of the sea. The final draft was entitled "Articles concerning the law of the sea".

<sup>4</sup> The Convention of the High Seas entered into force on 30 September 1962. By September 1968 the following forty-two States had deposited their instruments of ratification or accession or given notification of succession (in chronological order): Afghanistan, United Kingdom of Great Britain and Northern Ireland, Cambodia, Haiti, Union of Soviet Socialist Republics, Malaysia, Ukrainian Soviet Socialist Republic, Byelorussian Soviet Socialist Republic, United States of America, Senegal, Nigeria, Indonesia, Venezuela, Czechoslovakia, Israel, Guatemala, Hungary, Romania, Sierra Leone, Poland, Madagascar, Bulgaria, Central African Republic, Nepal, Portugal, South Africa, Australia, Dominican Republic, Uganda, Albania, Italy, Finland, Upper Volta, Jamaica, Malawi, Yugoslavia, Netherlands, Trinidad and Tobago, Switzerland, Mexico, Japan, Thailand.

<sup>5</sup> The Convention on Fishing and Conservation of the Living Resources of the High Seas entered into force on 20 March 1966. By September 1968 the following twenty-six States had deposited instruments of ratification or accession or given notification of

the law of the sea); (3) the Convention on the Continental Shelf<sup>6</sup> (articles 67 to 73 of the Commission's draft on the law of the sea). Article 66 (Contiguous Zone) was considered by the Conference together with part I (Territorial sea) of the Commission's draft on the law of the sea (see "Régime of territorial waters" below).<sup>7</sup>

(6) *Régime of territorial waters*

Part I of the draft articles concerning the law of the sea adopted by the Commission at its eighteenth session (1956).<sup>8</sup> The first United Nations Conference on the Law of the Sea (1958) adopted the Convention on the Territorial Sea and the Contiguous Zone.<sup>9</sup> The questions of the breadth of the territorial sea and fishery limits were considered at the Second United Nations Conference on the Law of the Sea (1960), but the Conference did not adopt any decisions on those questions. The topic of "Juridical régime of historic waters, including historic bays" (see below, paragraph 13 (1)) is also connected with this topic.

succession (in chronological order): United Kingdom of Great Britain and Northern Ireland, Cambodia, Haiti, Malaysia, United States of America, Senegal, Nigeria, Sierra Leone, Madagascar, Colombia, Portugal, South Africa, Australia, Venezuela, Jamaica, Dominican Republic, Uganda, Finland, Upper Volta, Malawi, Yugoslavia, Netherlands, Trinidad and Tobago, Switzerland, Mexico, Thailand.

<sup>6</sup> The Convention on the Continental Shelf entered into force on 10 June 1964. By September 1968 the following thirty-nine States had deposited instruments of ratification or accession or given notification of succession (in chronological order): Cambodia, Haiti, Union of Soviet Socialist Republics, Malaysia, Ukrainian Soviet Socialist Republic, Byelorussian Soviet Socialist Republic, United States of America, Senegal, Venezuela, Czechoslovakia, Israel, Guatemala, Romania, Colombia, Poland, Madagascar, Bulgaria, Portugal, South Africa, Australia, Denmark, United Kingdom of Great Britain and Northern Ireland, Dominican Republic, Uganda, Albania, New Zealand, Finland, France, Jamaica, Malawi, Yugoslavia, Netherlands, Switzerland, Malta, Sweden, Mexico, Sierra Leone, Thailand, Trinidad and Tobago.

<sup>7</sup> At its twenty-second-session, the General Assembly adopted resolution 2340 (XXII) of 18 December 1967 entitled "Examination of the question of the reservation exclusively for peaceful purposes of the sea-bed and the ocean floor, and the subsoil thereof, underlying the high seas beyond the limits of present national jurisdiction, and the use of their resources in the interests of mankind". The resolution established the *Ad Hoc* Committee to study the Peaceful Uses of the Sea-Bed and the Ocean Floor beyond the Limits of National Jurisdiction. The *Ad Hoc* Committee is entrusted with the task of studying the scope and various aspects (scientific, technical, economic, legal, etc.) of the item. During the First Committee's debate leading to the adoption of resolution 2340 (XXII) many representatives underlined the relationship between this new subject and the existing conventions on the law of the sea. Particular reference was made to the definition of the "continental shelf" embodied in article 1 of the Convention on the Continental Shelf.

<sup>8</sup> See foot-note 3 above.

<sup>9</sup> The Convention on the Territorial Sea and the Contiguous Zone entered into force on 10 September 1964. By September 1968 the following thirty-five States had deposited their instruments of ratification or accession or given notification of succession (in chronological order): United Kingdom of Great Britain and Northern Ireland, Cambodia, Haiti, Union of Soviet Socialist Republics, Malaysia, Ukrainian Soviet Socialist Republic, Byelorussian Soviet Socialist Republic, United States of America, Senegal, Nigeria, Venezuela, Czechoslovakia, Israel, Hungary, Romania, Sierra Leone, Madagascar, Bulgaria, Portugal, South Africa, Australia, Dominican Republic, Uganda, Italy, Finland, Jamaica, Malawi, Yugoslavia, Netherlands, Trinidad and Tobago, Switzerland, Malta, Mexico, Japan, Thailand.

(7) *Nationality, including statelessness*

At its sixth session (1954), the Commission adopted a draft convention on the elimination of future statelessness and a draft convention on the reduction of future statelessness as well as some suggestions concerning the problem of present statelessness. At the same session, the Commission decided to defer any further consideration of multiple nationality and other questions relating to nationality. A conference which met in 1959 and 1961 adopted the Convention on the Reduction of Statelessness, which has not yet come into force.<sup>10</sup>

(8) *Treatment of aliens*

From its eighth (1956) to its thirteenth (1961) sessions, the Commission had before it a series of six reports on State responsibility which were mainly devoted to the development and explanation of a draft on the responsibility of a State for injuries caused in its territory to the person or property of aliens. The Commission, which was occupied with other work, was unable to give full consideration to these reports. After considering at its fifteenth session (1963) a report of a sub-committee on State responsibility, the Commission agreed "(1) that, in an attempt to codify the topic of State responsibility, priority should be given to the definitions of the general rules governing the international responsibility of the State, and (2) that in defining these general rules the experience and material gathered in certain special sectors, especially that of responsibility for injuries to the persons or property of aliens, should not be overlooked..." (see paragraph 12 (3) below).

(9) *Right of asylum*

See paragraph 13 (2) below.

(10) *Law of treaties*

The Commission adopted a set of draft articles at its eighteenth session (1966). By resolution 2166 (XXI) of 5 December 1966, the General Assembly decided that an international conference of plenipotentiaries should be convened to consider the law of treaties and to embody the results of its work in an international convention and such other instruments as it might deem appropriate. The draft articles on the law of treaties adopted by the International Law Commission were referred to the conference by the said General Assembly resolution as the basic proposal for consideration by the conference. During the first session of the United Nations Conference on the Law of Treaties (Vienna, 26 March to 24 May 1968), the Committee of the Whole established by the Conference considered the draft articles adopted by the International Law Commission and the amendments thereto. A second session of the Conference will be convened in 1969.

(11) *Diplomatic intercourse and immunities*

At its tenth session (1958), the Commission adopted its final draft articles on diplomatic intercourse and immunities. The draft dealt only with diplomatic relations between States and permanent diplomatic missions. On the basis of that draft the United Nations Conference on Diplomatic Intercourse and Immunities (1961) adopted the Vienna Convention on

Diplomatic Relations.<sup>11</sup> At its nineteenth session (1967), the International Law Commission adopted a set of draft articles on special missions. The General Assembly, by resolution 2273 (XXII) of 1 December 1967, decided to include an item entitled "Draft Convention on Special Missions" in the provisional agenda of its twenty-third session, with a view to the adoption of a convention by the General Assembly. The aspects of the item "Relations between States and inter-governmental organizations", currently under study by the International Law Commission (see paragraph 12 (1) below), also constitute part of this topic.<sup>12</sup>

(12) *Consular intercourse and immunities*

Final draft articles on consular relations were adopted by the Commission at its thirteenth session (1961). On the basis of that draft the United Nations Conference on Consular Relations (1963) adopted the Vienna Convention on Consular Relations.<sup>13</sup>

<sup>11</sup> The Convention, adopted on 18 April 1961, entered into force on 24 April 1964. By September 1968 the following seventy-nine States had ratified the Convention, acceded to it or given notification of succession (in chronological order): Pakistan, Liberia, Ghana, Mauritania, Sierra Leone, Ivory Coast, United Republic of Tanzania, Laos, Niger, Congo (Brazzaville), Yugoslavia, Czechoslovakia, Jamaica, Madagascar, Cuba, Guatemala, Argentina, Iraq, Switzerland, Panama, Dominican Republic, Union of Soviet Socialist Republics, Gabon, Algeria, Rwanda, Holy See, Liechtenstein, Byelorussian Soviet Socialist Republic, Japan, United Arab Republic, Ukrainian Soviet Socialist Republic, United Kingdom of Great Britain and Northern Ireland, Ecuador, Costa Rica, Federal Republic of Germany, Iran, Venezuela, Brazil, Uganda, Poland, Malawi, Mexico, Kenya, Democratic Republic of the Congo, Cambodia, San Marino, Hungary, Nepal, Afghanistan, India, Trinidad and Tobago, Malaysia, Philippines, El Salvador, Austria, Canada, Luxembourg, Mongolia, Malta, Sweden, Dahomey, Ireland, Nigeria, Norway, Spain, Chile, Guinea, Bulgaria, Tunisia, Australia, Honduras, Mali, Somalia, Burundi, Belgium, Barbados, Morocco, Cyprus, Portugal.

<sup>12</sup> At its twenty-second session, the General Assembly adopted resolution 2328 (XXII) of 18 December 1967 entitled "Question of diplomatic privileges and immunities". By paragraphs 2 to 5 of the operative part of that resolution, the General Assembly urges: (a) States Members of the United Nations which have not yet done so to accede to the Convention on the Privileges and Immunities of the United Nations, adopted by the General Assembly of the United Nations on 13 February 1946; (b) States Members of the United Nations, whether or not they have acceded to the Convention on the Privileges and Immunities of the United Nations to take every measure necessary to secure the implementation of the privileges and immunities accorded under Article 105 of the Charter to the Organization, to the representatives of Members and to the officials of the Organization; (c) States which have not yet done so to ratify or accede to the Vienna Convention on Diplomatic Relations of 18 April 1961; (d) States, whether or not they are parties to the Vienna Convention on Diplomatic Relations, to take every measure necessary to secure the implementation of the rules of international law governing diplomatic relations, and in particular to protect diplomatic missions and to enable diplomatic agents to fulfil their tasks in conformity with international law.

<sup>13</sup> The Convention, adopted on 24 April 1963, entered into force on 19 March 1967. By September 1968 the following thirty-three States had ratified the Convention or acceded to it (in chronological order): Ghana, Dominican Republic, Algeria, Tunisia, Upper Volta, Yugoslavia, Gabon, Ecuador, Switzerland, Mexico, United Arab Republic, Kenya, Nepal, Cuba, Trinidad and Tobago, Venezuela, Philippines, Niger, Senegal, Liechtenstein, Costa Rica, Madagascar, Argentina, Ireland, Brazil, Cameroon, Panama, Chile, Nigeria, Honduras, Czechoslovakia, Mali, Somalia.

<sup>10</sup> It may also be mentioned that the nationality of married women, a topic which the Commission was requested to study by Economic and Social Council resolution 304 D (XI) of 17 July 1950, is the subject of a convention, which was adopted by the General Assembly in its resolution 1040 (XI) of 29 January 1957, and which is now in force.

(13) *State responsibility*

Currently under study by the International Law Commission (see paragraphs 12 (3) below and 5 (8) above).

(14) *Arbitral procedure*

The Commission at its fifth session (1953) adopted a draft Convention on Arbitral Procedure, which was the subject of General Assembly resolution 989 (X) of 14 December 1955. At its tenth session (1958) the Commission adopted a set of Model Rules on Arbitral Procedure, which were the subject of General Assembly resolution 1262 (XIII) of 14 November 1958.

## II. TOPICS OTHER THAN THOSE INCLUDED IN THE 1949 PROVISIONAL LIST ON WHICH THE COMMISSION HAS SUBMITTED DRAFTS OR REPORTS

6. With the exception of the topic "Ways and means for making the evidence of customary international law more readily available" considered by the Commission in accordance with article 24 of its Statute, all other topics listed under this heading have been considered by the Commission at the request of the General Assembly. However, the question of participation of new States in certain general multilateral treaties had originally been brought to the attention of the General Assembly by the Commission itself in connexion with the codification of the law of treaties.

### (1) *Draft Declaration on the Rights and Duties of States* (General Assembly resolution 178 (II) of 21 November 1947)

At its first session, in 1949, the Commission drew up a draft Declaration on the Rights and Duties of States on the basis of a draft referred to it by General Assembly resolution 178 (II) of 21 November 1947. By resolution 375 (IV) of 6 December 1949, the General Assembly commenced the draft Declaration to the continuing attention of Member States and of jurists of all nations and requested Member States to provide their comments on the draft. The General Assembly, in resolution 596 (VI) of 7 December 1951, decided to postpone consideration of the matter until a sufficient number of States had transmitted their comments and suggestions, and in any case to undertake consideration as soon as a majority of the Member States had transmitted such replies.

### (2) *Ways and means for making the evidence of customary international law more readily available* (article 24 of the Commission's Statute)

At its second session, in 1950, the Commission completed the consideration of this topic and made a report to the General Assembly, containing specific ways and means suggested by the Commission. Since these recommendations were made, the General Assembly has authorized the Secretary-General to issue most of the publications suggested by the Commission and certain other publications relevant to the Commission's recommendations.

### (3) *Formulation of the Nürnberg principles* (General Assembly resolution 177 (II) of 21 November 1947)

The formulation of the principles of international law recognized in the Charter of the Nürnberg Tribunal and in the judgement of the Tribunal was completed by the Commission at its second session (1950). By resolution 488 (V) of 12 December 1950, the General Assembly decided to send the formulation to the Governments of Member States for comments, and requested the Commission, in preparing the draft code of offences against the peace and security of mankind, to take

account of the observations made on this formulation by delegations and Governments.

### (4) *Question of international criminal jurisdiction* (General Assembly resolution 260 B (III) of 9 December 1948)

The Commission concluded, at its second session (1950), that the establishment of an international juridical organ for the trial of persons charged with genocide or other crimes was both desirable and possible. It recommended against such an organ being set up as a chamber of the International Court of Justice. The task of preparing concrete proposals relating to the creation and the statute of an international criminal court and of studying the implications and consequences of establishing such a court was entrusted by the General Assembly to two Committees composed of the representatives of seventeen Member States set up respectively by resolutions 489 (V) of 12 December 1950 and 687 (VII) of 5 December 1952. General Assembly resolutions 898 (IX) of 14 December 1954 and 1187 (XII) of 11 December 1957 deferred discussion of the topic until such a time as the Assembly again took up two related items, namely the question of defining aggression and the draft code of offences against the peace and security of mankind.

### (5) *Reservations to multilateral conventions* (General Assembly resolution 478 (V) of 16 November 1950)

The Commission's conclusions on this topic were reported to the General Assembly in the report of the Commission covering the work of its third session (1951). The question was the subject of General Assembly resolutions 598 (VI) of 12 January 1952 and 1452 (XIV) of 7 December 1959. The Commission returned again to the subject in the course of its preparation of draft articles on the law of treaties (see paragraph 5 (10) above).

### (6) *Question of defining aggression* (General Assembly resolution 378 (V) of 17 November 1950)

The Commission considered the question at its third session (1951) but it did not draw up a definition of aggression. During the same session, however, the matter was reconsidered in connexion with the preparation of the draft code of offences against the peace and security of mankind and the Commission decided to include among the offences defined in the draft code any act of aggression and any threat of aggression.

By resolution 599 (VI) of 31 January 1952, the General Assembly concluded that it was "possible and desirable" to define aggression. A Special Committee composed of the representatives of fifteen Member States was established by resolution 688 (VII) of 20 December 1952 to submit to the General Assembly "draft definitions of aggression or draft statements of the notion of aggression". Another Special Committee, consisting of the representatives of nineteen Member States, was established by General Assembly resolution 895 (IX) of 4 December 1954. By resolution 1181 (XII) of 29 November 1957, the General Assembly decided to establish a new Committee, composed of the Member States which served on the General Committee of the Assembly at its most recent regular session, and entrusted the Committee with the procedural task of studying Governments' comments "for the purpose of determining when it shall be appropriate for the General Assembly to consider again the question of defining aggression". The Committee established by resolution 1181 (XII) met in 1959, 1962, 1965 and 1967, but on each occasion found itself unable to determine any particular time as appropriate for the Assembly to resume consideration of the question of defining aggression.

At its twenty-second session (1967), the General Assembly included in its agenda an item entitled "Need to expedite the drafting of a definition of aggression in the light of the present international situation". As a result of the consideration of that item, the General Assembly, by resolution 2330 (XXII) of 18 December 1967: (1) recognized that there is a widespread conviction of the need to expedite the definition of aggression; (2) established a Special Committee on the Question of Defining Aggression, composed of thirty-five Member States; (3) instructed the Special Committee to consider all aspects of the question so that an adequate definition of aggression may be prepared and to submit to the General Assembly at its twenty-third session a report which will reflect all the views expressed and the proposals made; (4) decided to include in the provisional agenda of its twenty-third session an item entitled "Report of the Special Committee on the Question of Defining Aggression". The Special Committee on the Question of Defining Aggression established by resolution 2330 (XXII) met at Geneva in June 1968.

(7) *Draft code of offences against the peace and security of mankind* (General Assembly resolution 177 (II) of 21 November 1947)

The Commission, at its sixth session in 1954, adopted the text of a draft code of offences against the peace and security of mankind and submitted it to the General Assembly. By resolution 897 (IX) of 4 December 1954 the General Assembly postponed consideration of the draft code until the Special Committee on the question of defining aggression established by resolution 895 (IX) has submitted its report. Resolution 1186 (XII) of 11 December 1957 transmitted the text of the draft code to Member States for comment and further deferred the consideration of the topic until such time as the General Assembly takes up again the question of defining aggression.

(8) *Extended participation in general multilateral treaties concluded under the auspices of the League of Nations* (General Assembly resolution 1766 (XVII) of 20 November 1962)

The conclusions resulting from the Commission's study of this question are summarized in the report covering the work of its fifteenth session (1963). On the basis of these conclusions the General Assembly, in resolution 1903 (XVIII) of 18 November 1963, decided that the Assembly was the appropriate organ of the United Nations to exercise the functions of the League Council under twenty-one general multilateral treaties of a technical and non-political character concluded under the auspices of the League of Nations; it also placed on record the assent to this decision by Members of the United Nations. The resolution requested the Secretary-General to invite certain States to accede to the treaties in question by depositing an instrument of accession with the Secretary-General of the United Nations. By resolution 2021 (XX) of 5 November 1965, the General Assembly recognized that nine of these treaties, listed in the annex to the resolution, might be of interest for accession by additional States within the terms of resolution 1903 (XVIII) and drew the attention of the parties to the desirability of adopting some of them to contemporary conditions.

### III. TOPICS SUGGESTED FOR STUDY BY THE COMMISSION, WHICH HAVE NOT YET BEEN PLACED ON ITS PROGRAMME OF WORK

#### (a) *Topics suggested in 1949, but not included by the Commission in its provisional list for codification*

7. The provisional list of topics for codification referred to in paragraph 5 above was drawn up after consideration of a

memorandum by the Secretary-General entitled "Survey of international law in relation to the work of codification of the International Law Commission" (A/CN.4/1/Rev.1). That memorandum suggested certain topics which after discussion by the Commission were not selected by it, and those topics, concerning which the memorandum makes full explanation, were the following:<sup>14</sup>

- (1) Subjects of international law
- (2) Sources of international law
- (3) Obligations of international law in relation to the law of States
- (4) Fundamental rights and duties of States<sup>15</sup>
- (5) Domestic jurisdiction
- (6) Recognition of acts of foreign States
- (7) Obligations of territorial jurisdiction
- (8) Territorial domain of States
- (9) Pacific settlement of international disputes<sup>16</sup>
- (10) Extradition.

(b) *New topics suggested by Governments in response to General Assembly resolution 1505 (XV) and in the Sixth Committee at the fifteenth and sixteenth sessions*

8. The General Assembly, by resolution 1505 (XV) of 12 December 1960, decided to place on the provisional agenda of its sixteenth session an item entitled "Future work in the field of codification and progressive development of international law", and also asked for the views and suggestions of Member States thereon. Various suggestions were made by Members in written form, and other suggestions were made orally in the Sixth Committee, at the fifteenth and sixteenth sessions. The General Assembly, by resolution 1686 (XVI) of 18 December 1961, operative paragraph 3 (b), requested the International Law Commission to consider its future programme of work in the light of all the suggestions.<sup>17</sup> The Secretariat prepared a

<sup>14</sup> The Commission also discussed the topic of the laws of war, which had not been suggested in the memorandum; the topic was not included in the list.

<sup>15</sup> The Commission at its first session (1949) adopted a draft Declaration on Rights and Duties of States (see paragraph 6 (1) above).

<sup>16</sup> Without attempting to recall all the various efforts of the United Nations on this topic, it may be mentioned that an item entitled "Peaceful settlement of disputes" has been discussed at the twentieth (item 99) and twenty-first sessions (item 36) of the General Assembly, but no resolution on it has been adopted. Also, one of the principles considered by the Special Committee on Principles of International Law concerning Friendly Relations and Co-operation among States is "the principle that States shall settle their international disputes by peaceful means in such a manner that international peace and security, and justice, are not endangered" (see foot-note 17 below).

<sup>17</sup> By operative paragraph 4 of the same resolution, the General Assembly decided to place on the provisional agenda of its seventeenth session the question entitled "Consideration of principles of international law concerning friendly relations and co-operation among States in accordance with the Charter of the United Nations". In 1962 the General Assembly, pursuant to Article 13 of the Charter, resolved to undertake a study of these principles with a view to their progressive development and codification, the aim of the study being the adoption by the General Assembly of a declaration containing an enunciation of the principles. Since then, the Sixth Committee and the Special Committee on Principles of International Law concerning Friendly Relations and Co-operation among States, established in 1963 and reconstituted in 1965, have examined the following seven principles: (1) the principle that States shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of

*Working paper concerning the future work in the field of the codification and progressive development of international law* (A/CN.4/145)<sup>18</sup> summarizing what had been suggested. The Commission considered the matter at its fourteenth session (1962) and decided to limit its future programme of work, for the time being, to the three main topics under study or to be studied pursuant to operative paragraph 3 (a) of resolution 1686 (XVI) (Law of treaties, State responsibility, and Succession of States and Governments) and to four additional topics of more limited scope (Special missions, Relations between States and inter-governmental organizations, the Right of asylum, and the Juridical régime of historic waters, including historic bays) which had been referred to it by earlier General Assembly resolutions. As to other topics the Commission considered:

“that many of the topics proposed by Governments deserved study with a view to codification. In drawing up its future programme of work, however, it is obliged to take account of its resources . . . . The Commission . . . considers it inadvisable for the time being to add anything further to the already long list of topics on its agenda.”<sup>19</sup>

9. The seven new topics suggested by Governments, as given in the Secretariat's working paper referred to in the preceding paragraph, are listed below with brief indications of recent United Nations legal activities relating thereto:

(1) *Law of space*

Space law is being studied by the General Assembly's Committee on the Peaceful Uses of Outer Space. At its twenty-first session the General Assembly adopted resolution 2222 (XXI) of 19 December 1966, relating to the Treaty on Principles Governing the Activities of States in the Exploration and Uses of Outer Space, including the Moon and Other Celestial Bodies. At its last session, by resolution 2260 (XXII) of 3 November 1967, the General Assembly requested the Committee on the Peaceful Uses of Outer Space “in the further progressive development of the law of outer space, to continue with a sense of urgency its work on the elaboration of an agreement on liability for damage caused by the launching of objects into outer space and an agreement on assistance to and return of astronauts and space vehicles, and to pursue actively its work on questions relative to the

any State, or in any other manner inconsistent with the purposes of the United Nations; (2) the principle that States shall settle their international disputes by peaceful means in such a manner that international peace and security and justice are not endangered; (3) the duty not to intervene in matters within the domestic jurisdiction of any State, in accordance with the Charter; (4) the principle of sovereign equality of States; (5) the duty of States to co-operate with one another in accordance with the Charter; (6) the principle of equal rights and self-determination of peoples; (7) the principle that States shall fulfil in good faith the obligations assumed by them in accordance with the Charter. In 1966, the Special Committee adopted formulations for principles (2) and (4) and linked the principle of non-intervention with General Assembly resolution 2131 (XX) of 21 December 1965. Texts concerning principles (5) and (7) were agreed upon, in 1967, by the Drafting Committee of the Special Committee. At its twenty-second session, the General Assembly, by resolution 2327 (XXII) of 18 December 1967, decided to ask the Special Committee to meet in 1968 in order to complete the formulation of principles (1) and (6) and to consider proposals compatible with General Assembly resolution 2131 (XX) on principle (3) with the aim of widening the area of agreement already expressed in that resolution. As in previous sessions, the item will be considered by the General Assembly at its twenty-third session.

<sup>18</sup> See *Yearbook of the International Law Commission, 1962*, vol. II, p. 84.

<sup>19</sup> *Ibid.*, document A/5209, p. 190, para. 61.

definition of outer space and the utilization of outer space and celestial bodies, including the various implications of space communications”.

(2) *Law of international organizations*

Under this heading were grouped various suggestions relating in general not only to the status of international organizations and their relations with States but also to their responsibility, the law of treaties respecting them, and the entrance of new members to the international community. The relations between States and inter-governmental organizations is one of the topics currently under study by the International Law Commission (see paragraph 12 (1) below). The study of the question of treaties concluded between States and international organizations or between two or more international organizations is recommended in a draft resolution adopted by the Committee of the Whole of the United Nations Conference on the Law of Treaties (see paragraph 11 below).

(3) *Human rights and defence of democracy*

The United Nations bodies mainly responsible for promotion and protection of human rights and fundamental freedoms are the Commission on Human Rights, the Commission on the Status of Women, the Economic and Social Council and the Third Committee of the General Assembly. Recently the General Assembly adopted the International Convention on the Elimination of all Forms of Racial Discrimination (resolution 2106 (XX) of 21 December 1965), the International Covenant on Economic, Social and Cultural Rights, the International Covenant on Civil and Political Rights and the Optional Protocol to the International Covenant on Civil and Political Rights (resolution 2200 (XXI) of 16 December 1966) and the Declaration on the Elimination of Discrimination against Women (resolution 2263 (XXII) of 7 November 1967). By resolution 2295 (XXII) of 11 December 1967, the General Assembly decided to accord priority during its twenty-third session to the consideration of the draft Declaration on the Elimination of All Forms of Religious Intolerance and the draft International Convention on the Elimination of All Forms of Intolerance and of Discrimination based on Religion or Belief.

(4) *Independence and sovereignty of States*

Four out of the seven principles examined in connexion with the item “Consideration of principles of international law concerning friendly relations and co-operation among States in accordance with the Charter of the United Nations” relate to this topic, namely principles listed (1), (3), (4) and (6) in foot-note 17 above.

(5) *Enforcement of international law*

As indicated above (see foot-notes 16 and 17), “The principle that States shall settle their international disputes by peaceful means in such a manner that international peace and security and justice are not endangered” is being studied as one of the principles of international law concerning friendly relations and co-operation among States.

(6) *Utilization of international rivers*

By resolution 1401 (XIV) of 21 November 1959, the General Assembly, considering it desirable to initiate preliminary studies on this topic “with a view to determining whether the subject is appropriate for codification”, requested the Secretary-General to submit a report on legal problems relating to the utilization and use of international rivers. The Secretary-General accordingly prepared and circulated to

Member States a report (A/5409) as requested by the General Assembly's resolution. A collection of legislative texts and treaty provisions on the subject has been printed in the *United Nations Legislative Series*.<sup>20</sup>

(7) *Economic and trade relations*

The General Assembly, by resolution 2205 (XXI) of 17 December 1966, decided to establish the United Nations Commission on International Trade Law. At its first session (29 January-26 February 1968), a great number of delegations considered that the future programme of work of the Commission should contain the following topics: (1) international sale of goods; (2) commercial arbitration; (3) transportation; (4) insurance; (5) international payments; (6) intellectual property; (7) elimination of discrimination in laws affecting international trade; (8) agency; (9) legalization of documents. The United Nations Commission on International Trade Law decided that the following topics should be given priority: (1) international sale of goods; (2) international payments; (3) international commercial arbitration. In respect of the topic "Elimination of discrimination in laws affecting international trade", one representative noted that his delegation "reserved its position on the inclusion of the most-favoured-nation clause under that topic pending the future steps to be taken by the International Law Commission concerning the legal aspects of that question" (see chapter IV of the report of the United Nations Commission on International Trade Law on the work of its first session).<sup>21</sup>

(c) *Additional topics for inclusion in the programme of work suggested by members of the Commission at its nineteenth session*

10. As stated below,<sup>22</sup> the Commission decided, at its nineteenth session, to place on its programme of work the topic of most-favoured-nation clauses in the law of treaties. During the debate leading to such a decision several members suggested other additional topics for consideration by the Commission in the future when its other work might permit. The Commission's report on the session<sup>23</sup> summarized the views expressed in this respect as follows:

"46. Among the other topics mentioned were the effect of unilateral acts; the use of international rivers; and international bays and international straits. The possibility was also mentioned that the Commission might return to some of the topics it dealt with in its early years, such as the draft Declaration on the Rights and Duties of States,<sup>24</sup> and the question of international criminal jurisdiction and related matters.<sup>25</sup> Other members thought that the Commission

<sup>20</sup> *Legislative texts and treaty provisions concerning the utilization of international rivers for other purposes than navigation*/Textes législatifs et dispositions de traités concernant l'utilisation des fleuves internationaux à des fins autres que la navigation (ST/LEG/SER.B/12).

<sup>21</sup> *Official Records of the General Assembly, Twenty-third Session, Supplement No. 16 (A/7216)*.

<sup>22</sup> See paragraph 12 (4) below.

<sup>23</sup> *Yearbook of the International Law Commission, 1967*, vol. II, document A/6709/Rev.1 and Rev.1/Corr.1, p. 369, paras. 46 and 47.

<sup>24</sup> See paragraph 6 (1) above.

<sup>25</sup> See paragraph 6 (4) above. As recommended by the Third Committee, the General Assembly adopted, at its twenty-second session, resolution 2338 (XXII) of 18 December 1967 concerning the question of the punishment of war criminals and of persons who have committed crimes against humanity. By this resolution the Assembly decided to give high priority to the completion of the draft convention on the non-applicability of statutory

should envisage work on questions of international legal procedure,<sup>26</sup> such as model rules for conciliation, arrangements to enable international organizations to be parties to cases before the International Court of Justice, or drawing up the statute of a new United Nations body for fact-finding in order to assist the General Assembly in its consideration of that question.<sup>27</sup>

"47. While some members felt that several of these topics, and in particular unilateral acts and international rivers, were suitable for work by the Commission in the future, it was believed that their wide scope precluded their being taken up at the present time, when the Commission was preparing to deal with the major topics of State succession and State responsibility...".

(d) *Draft resolution adopted by the Committee of the Whole of the United Nations Conference on the Law of Treaties concerning the study of the question of treaties concluded between States and international organizations or between two or more international organizations*

11. Article 1 of the draft articles on the law of treaties adopted by the International Law Commission in 1966 and referred by General Assembly resolution 2166 (XXI) of 5 December 1966 to the United Nations Conference on the Law of Treaties states that "the present articles relate to treaties concluded between States". At the Committee of the Whole of the Conference two amendments were submitted to that article with a view to extending the scope of the future convention to treaties concluded between subjects of international law other than States or treaties concluded between States and other subjects of international law. The two amendments having been withdrawn, the Committee of the Whole, as orally proposed by Sweden, charged the Drafting Committee with the task of formulating a resolution to be adopted by the Conference recommending that the General Assembly of the United Nations ask the International Law Commission to study the question of treaties concluded between States and international organizations or between two or more international organizations. At its eleventh meeting, the Committee of the Whole adopted unanimously the text of the draft resolution submitted by the Drafting Committee and recommended it to the Conference for adoption. The plenary will consider the draft resolution next year during the second session of the Conference. The draft resolution reads as follows:

"The United Nations Conference on the Law of Treaties,

"Recalling that the General Assembly of the United Nations, by its resolution 2166 (XXI) of 5 December 1966, referred to the Conference the draft articles contained in chapter II of the report of the International Law Commission on the work of its eighteenth session,

"Taking note that the Commission's draft articles deal only with treaties concluded between States,

limitation to war crimes and crimes against humanity, with a view to its adoption at the twenty-third session.

<sup>26</sup> By resolution 268 (III) of 28 April 1949, the General Assembly revised the General Act for the Pacific Settlement of International Disputes of 26 September 1928 and opened the revised text to accession by States (United Nations, *Treaty Series*, vol. 71, p. 101).

<sup>27</sup> General Assembly resolution 2329 (XXII) of 18 December 1967 did not establish any new body for fact-finding. Operative paragraph 4 requests the Secretary-General "to prepare a register of experts in legal and other fields, whose services the States parties to a dispute may use by agreement for fact-finding in relation to the dispute, and requests Member States to nominate up to five of their nationals to be included in such a register".

"Recognizing the importance of the question of treaties concluded between States and international organizations or between two or more international organizations,

"Recommends to the General Assembly of the United Nations that it refer to the International Law Commission the study of the question of treaties concluded between States and international organizations or between two or more international organizations."

#### IV. TOPICS OF INTERNATIONAL LAW CURRENTLY UNDER STUDY BY THE INTERNATIONAL LAW COMMISSION

12. Following the completion of its work on the law of treaties at the eighteenth session, the Commission, at its nineteenth session, completed likewise its work on special missions and added to its programme an additional topic. This means that there are now four topics of international law under current study by the Commission. However, the Commission is at present working, as in recent years, with five special rapporteurs, because two were appointed at the Commission's last session to deal respectively with two of the three main headings into which one of the topics has been divided. The four topics under current study are listed below with the Commission's latest decisions and General Assembly recommendations related thereto. The latest documents furnishing a basis for their consideration are also mentioned.

##### (1) *Relations between States and inter-governmental organizations*

Second report (A/CN.4/195 and Add.1) and third report (A/CN.4/203 and Add.1-5) of Mr. Abdullah El-Erian, Special Rapporteur. At its nineteenth session (1967), the Commission decided to discuss both reports in 1968. The General Assembly, by resolution 2272 (XXII) of 1 December 1967, recommended that the Commission should continue its work on the topic, taking into account the views and considerations referred to in General Assembly resolutions 1765 (XVII) and 1902 (XVIII). The Secretariat prepared a study entitled "The practice of the United Nations, the specialized agencies and the International Atomic Energy Agency concerning their status, privileges and immunities" (A/CN.4/L.118 and Add.1 and 2).

##### (2) *Succession of States and Governments*

At its nineteenth session in 1967, the Commission made new arrangements for dealing with this topic. It decided to divide the topic among more than one special rapporteur, the basis for the division being the three main headings of the broad outline of the subject laid down in the report of a Sub-Committee of the Commission (1963) and agreed to by the Commission the same year. By resolution 2272 (XXII) of 1 December 1967, the General Assembly recommended, at its twenty-second session, that the International Law Commission should continue its work on succession of States and Governments, taking into account the views and considerations referred to in General Assembly resolutions 1765 (XVII) and 1902 (XVIII). A volume of the *United Nations Legislative Series (ST/LEG/SER.B/14)* entitled *Materials on Succession of States* has been published by the Secretariat.

##### (i) *Succession in respect of treaties*

First report (A/CN.4/202) by Sir Humphrey Waldock, Special Rapporteur. The Commission decided in 1967 to advance the work on this aspect of succession as rapidly as possible at its twentieth session in 1968. The Secretariat prepared five studies on "Succession of States to multilateral treaties" (A/CN.4/200 and Corr.1 and Add.1 and 2).

##### (ii) *Succession in respect of rights and duties resulting from sources other than treaties*

First report (A/CN.4/204) of Mr. Mahommed Bedjaoui, Special Rapporteur. In 1967, the Commission requested the Special Rapporteur to present an introductory report which would enable the Commission to decide what parts of the subject should be dealt with, the priorities to be given to them, and the general manner of treatment.

##### (iii) *Succession in respect of membership of international organizations*

At its nineteenth session (1967), the Commission decided to leave aside for the time being this aspect of succession, without assigning it to a special rapporteur. It was considered that succession in respect of membership of international organizations related both to succession in respect of treaties and to relations between States and inter-governmental organizations.

##### (3) *State responsibility*

In 1967, Mr. Roberto Ago, Special Rapporteur, submitted a note (A/CN.4/196) on the topic. The Commission confirmed the instructions given to the Special Rapporteur at the fifteenth session in 1963, as set forth in his paper. The Commission noted that Mr. Ago would submit a substantive report on the topic at the twenty-first session (1969) of the Commission. At its twenty-second session, the General Assembly recommended "that the International Law Commission should expedite the study of the topic of State responsibility" (resolution 2272 (XXII) of 1 December 1967).

##### (4) *Most-favoured-nation clause*

At its nineteenth session (1967), the Commission decided to place this topic on its programme. At its twenty-second session, the General Assembly, by resolution 2272 (XXII) of 1 December 1967, recommended "that the International Law Commission should study the topic of most-favoured-nation clauses in the law of treaties". Mr. Endre Ustor, Special Rapporteur, submitted a working paper (A/CN.4/L.127) for consideration at the twentieth session of the Commission.

#### V. TOPICS WHICH THE COMMISSION HAS PLACED ON ITS PROGRAMME OF WORK, BUT ON WHICH NO SPECIAL RAPporteur HAS YET BEEN APPOINTED

13. At its fourteenth session, in 1962, the Commission, without appointing special rapporteurs, placed on its programme of work two topics—"Right of asylum" and "Juridical régime of historic waters, including historic bays"—whose codification had earlier been requested by the General Assembly. The advisability of proceeding actively in the near future with the study of these topics was examined by the Commission at its nineteenth session, in 1967. Paragraph 45 of the Commission's report on that session summarized the views expressed on the matter as follows:

"The Commission considered in the first place two topics which the General Assembly had requested it to take up as soon as it considered it advisable, and which had been included in its programme of work, though no Special Rapporteur had ever been appointed to deal with them. These were the right of asylum, referred to the Commission by General Assembly resolution 1400 (XIV) of 21 November 1959, and historic waters, including historic bays, referred by General Assembly resolution 1453 (XIV) of 7 December 1959. Most members doubted whether the time had yet come to proceed actively with either of these topics. Both were of considerable scope and raised some political problems

and to undertake either of them at the present time might seriously delay the completion of work on the important topics already under study, on which several resolutions of the General Assembly had recommended that the Commission should continue its work.”<sup>28</sup>

(1) *Juridical régime of historic waters, including historic bays*

The first United Nations Conference on the Law of the Sea (1958) adopted, in paragraph 6 of article 7 of the Convention on the Territorial Sea and Contiguous Zone, a provision to the effect that its rules on bays “shall not apply to so-called ‘historic’ bays”.<sup>29</sup> The Conference on 27 April 1958 also adopted a resolution requesting the General Assembly to arrange for the study of the juridical régime of historic waters, including historic bays. The General Assembly thereafter adopted resolution 1453 (XIV) of 7 December 1959, which requests “the International Law Commission, as soon as it considers it advisable, to undertake the study of the question of the juridical régime of historic waters, including historic bays, and to make such recommendations regarding the matter as the Commission deems appropriate”. The Commission, at its twelfth session (1960) requested the Secretariat to undertake a study of the topic, and deferred further consideration to a future session.<sup>30</sup> A study prepared by the Secretariat (A/CN.4/143) was published in 1962.<sup>31</sup> Also in 1962, the Commission, at its fourteenth session, decided to include the topic in its programme, but without setting any date for the start of its consideration.<sup>32</sup>

(2) *Right of asylum*

(i) *Inclusion of the topic in the programme of work of the Commission*

This topic was included in the provisional list for codification drawn up by the Commission in 1949. The General Assembly, at its fourteenth session, adopted resolution 1400 (XIV) of 21 November 1959, which requested “the International Law Commission, as soon as it considers it advisable, to undertake the codification of the principles and rules of international law relating to the right of asylum”. The Commission, at its twelfth session (1960), “took note of the resolution and decided to defer further consideration of this question to a future session”.<sup>33</sup> At its fourteenth session (1962), the Commission decided to include the topic in its programme, but without setting any date for the start of its consideration.<sup>34</sup>

(ii) *Adoption of a Declaration on Territorial Asylum at the twenty-second session of the General Assembly*

By resolution 2312 (XXII) of 14 December 1967, the General Assembly adopted, at its twenty-second session, a Declaration on Territorial Asylum. The culmination of many years of effort by the Commission on Human Rights (1957-1960), the Third Committee (1962-1964), and the Sixth

Committee (1965-1967), the Declaration constitutes an elaboration of article 14 of the Universal Declaration on Human Rights. Resolution 2312 (XXII) contains a preambular part which reads as follows:

“The General Assembly,

“Recalling its resolutions 1839 (XVII) of 19 December 1962, 2100 (XX) of 20 December 1965 and 2203 (XXI) of 16 December 1966 concerning a declaration on the right of asylum,

“Considering the work of codification to be undertaken by the International Law Commission in accordance with General Assembly resolution 1400 (XIV) of 21 November 1959,

“Adopts the following Declaration:”

In this connexion the Sixth Committee’s report indicates:

“It was further explained that the sponsors had found it necessary, in order to stress that the adoption of a declaration on territorial asylum would not bring to an end the work of the United Nations in codifying the rules and principles relating to the institution of asylum, to make a reference at the very beginning of the draft resolution, in a preambular paragraph to the proposed declaration, to the work of codification of the right of asylum to be undertaken by the International Law Commission pursuant to General Assembly resolution 1400 (XIV) of 21 November 1959.

“Some other delegations, while accepting such a reference, recorded their understanding that the preambular paragraph in question should not be understood as modifying or prejudicing in any way the order of priorities for the consideration of items already established by the International Law Commission and by the General Assembly.”<sup>35</sup>

The views expressed on the meaning of the Declaration on Territorial Asylum for the future codification of legal rules relating to the rights of asylum are summarized in the Sixth Committee’s report as follows:

“It was also said that the practical effect given to the declaration by States would help to indicate whether or not the time was ripe for the final step of elaborating and codifying precise legal rules relating to asylum. In this respect, many representatives expressed the conviction that the declaration, when adopted, should be regarded as a transitional step, which should lead in the future to the adoption of binding rules of law in an international convention. They drew attention to the fact that asylum was on the programme of work of the International Law Commission pursuant to General Assembly resolution 1400 (XIV) of 21 November 1959. The declaration now to be adopted would be one of the elements to be considered by the Commission in its work. Certain of these representatives expressed the hope that, when it took up the codification of the institution of asylum, the Commission would correct some of the ambiguities in the terms of the Declaration and would also extend the subject to cover other forms of asylum, such as diplomatic asylum, on which there was extensive Latin American treaty law and practice, both in Latin America and elsewhere. It was also said that the existence of the Declaration should not in any way diminish the scope or depth of the work to be undertaken when the International Law Commission took up the subject of asylum.”<sup>36</sup>

<sup>28</sup> See *Yearbook of the International Law Commission, 1967*, vol. II, document A/6709/Rev.1 and Rev.1/Corr.1, p. 369.

<sup>29</sup> See *Official Records of the United Nations Conference on the Law of the Sea (1958)*, vol. II, p. 145.

<sup>30</sup> See *Yearbook of the International Law Commission, 1960*, vol. II, document A/4425, p. 180, para. 40.

<sup>31</sup> See *Yearbook of the International Law Commission, 1962*, vol. II, p. 1.

<sup>32</sup> *Ibid.*, document A/5209, p. 190, para. 60.

<sup>33</sup> See *Yearbook of the International Law Commission, 1960*, vol. II, document A/4425, p. 180, para. 39.

<sup>34</sup> See *Yearbook of the International Law Commission, 1962*, vol. II, document A/5209, p. 190, para. 60.

<sup>35</sup> *Official Records of the General Assembly, Twenty-second Session, Annexes*, agenda item 89, document A/6912, paras. 64 and 65.

<sup>36</sup> *Ibid.*, para. 16.

## Section B. Methods of work

14. The present section is not intended to be comprehensive, historically or otherwise, but merely to provide summary information on some relevant aspects of the establishment of the Commission, its organization, the arrangement of its sessions and the process followed for consideration of a topic of international law with a view to its codification and progressive development, from the time when it is placed on the Commission's programme of work until a final draft or report is submitted to the General Assembly. In the light of the Commission's decision to review its methods of work as they have evolved after twenty years, this section aims at presenting the aspects selected as they appear under the existing organization and practices of the Commission.

## I. ESTABLISHMENT OF THE INTERNATIONAL LAW COMMISSION

(a) *Subsidiary organ of the General Assembly*

15. As a means of fulfilling the task entrusted to it under Article 13 (1) (a) of the Charter of the United Nations the General Assembly, following the recommendations of the Committee on the progressive development of international law and its codification,<sup>37</sup> by resolution 174 (II) of 21 November 1947 established the International Law Commission, as a subsidiary organ, to be constituted and to exercise its functions in accordance with the provisions of the statute annexed thereto. The fact that the Commission is governed by its own statute sets it apart from other organs of the General Assembly and gives it a considerable degree of initiative, further acknowledged, expressly or impliedly, in some of the statutory provisions<sup>38</sup> and confirmed by the practice of the General Assembly.<sup>39</sup> Nevertheless, the constitutional and, in the final analysis, operational dependency of the Commission results from the fact that, being embodied in a resolution of the General Assembly, the Commission's Statute can be amended or revoked only by the latter.<sup>40</sup> This dependency is further manifested by the existence of provisions in the Statute whereby, *inter alia*, the Commission is to give priority to the requests of the General Assembly to deal with any question,<sup>41</sup> and it is for the General Assembly to determine the final outcome of the Commission's work once submitted as a completed draft.<sup>42</sup> Also, the General Assembly considers annually the Commission's report and adopts recommendations and instructions regarding the Commission's work.

<sup>37</sup> A/AC.10/51, reissued as A/331. The Committee was established by General Assembly resolution 94 (I) of 11 December 1946.

<sup>38</sup> See, *inter alia*, *Statute of the International Law Commission* (hereinafter referred to as Statute), articles 11 and 18 (2).

<sup>39</sup> See, *inter alia*, *Official Records of the General Assembly, Fourth Session, Sixth Committee*, 158th to 164th meetings; *ibid.*, *Resolutions* (A/1251), resolution 373 (IV) of 6 December 1949.

<sup>40</sup> The Commission's Statute has been amended by the General Assembly in resolutions 485 (V) of 12 December 1950, 984 (X) and 985 (X) of 3 December 1955, 1103 (XI) of 18 December 1956 and 1647 (XVI) of 6 November 1961. With the exception of the last two, all other amendments were adopted on the initial recommendation of the Commission itself. By resolution 484 (V) of 12 December 1950, the General Assembly requested the International Law Commission to review its Statute with the object of making recommendations to the General Assembly concerning revisions of the Statute; the General Assembly, however, failed to act upon the recommendations made by the Commission [resolution 600 (VI) of 31 January 1952, see para. 19 below].

<sup>41</sup> Statute, article 18 (3).

<sup>42</sup> *Ibid.*, articles 16 (j), 17 (d), 22 and 23.

(b) *Object of the Commission*

16. The Commission's object is the promotion of the progressive development of international law and its codification. The Commission shall concern itself primarily with public international law, but is not precluded from entering the field of private international law.<sup>43</sup> Although a clear distinction between public and private international law is not easy to draw, it might still be said that with the possible exception of the topic of nationality, including statelessness, the attention of the Commission has been focused on subjects of public international law proper.<sup>44</sup> At the invitation of the Legal Counsel of the United Nations and in accordance with suggestions made in the Sixth Committee at the twentieth session of the General Assembly, the Commission, at its eighteenth session, discussed the question of the responsibilities of United Nations organs in furthering co-operation in the development of the law of international trade and in promoting its progressive unification and harmonization. The Commission, however, was of the opinion that it should not undertake responsibility for studying the topic in question.<sup>45</sup>

## II. ORGANIZATION OF THE COMMISSION

17. The International Law Commission, as at present constituted, is a permanent and part-time body, composed of twenty-five members elected for five years in their personal capacity, in a manner such as to assure representation in the Commission as a whole of the main forms of civilization and of the principal legal systems of the world.

(a) *Permanent body*

18. As envisaged by the Committee on the Progressive Development of International Law and its Codification when making its recommendation in favour of a single commission,<sup>46</sup> the General Assembly established the International Law Commission as a permanent body, furnishing it with its own Statute. The Commission's permanency, as distinguished from the term of office of its members, has been likewise recognized by the Commission itself<sup>47</sup> and acknowledged by the Secretary-General.<sup>48</sup> This characteristic has been at the root of the selection made by the Commission in 1949 of a list of topics for codification as well as the decisions taken by the Commission from time to time concerning its programme and the planning of its future work. Thus, the Commission has made arrangements to ensure the continuation of work on the topics selected for codification and progressive development, even though aware of the freedom of action of a new membership.<sup>49</sup> Also, the Commission has arrived at<sup>50</sup> and further confirmed<sup>51</sup> the conclusion that a Special Rapporteur who had been re-elected should continue his work unless and until the newly constituted Commission decided otherwise.

<sup>43</sup> *Ibid.*, article 1 (2).

<sup>44</sup> See section A above.

<sup>45</sup> *Yearbook of the International Law Commission, 1966*, vol. I, part II, pp. 249-252, paras. 38-66.

<sup>46</sup> A/AC.10/SR.7.

<sup>47</sup> See *Yearbook of the International Law Commission, 1966*, vol. II, document A/6309/Rev.1, p. 277, para. 72.

<sup>48</sup> See *Yearbook of the International Law Commission, 1950*, vol. I, p. 249, para. 10.

<sup>49</sup> See *Yearbook of the International Law Commission, 1966*, vol. II, document A/6309/Rev.1, part II, p. 277, para. 72.

<sup>50</sup> See *Yearbook of the International Law Commission, 1953*, vol. II, document A/2456, p. 231, para. 172.

<sup>51</sup> See *Yearbook of the International Law Commission, 1966*, vol. II, document A/6309/Rev.1, part II, p. 277, para. 73.

(b) *Part-time body*

19. Although the Commission has always functioned as a part-time organ, suggestions have been made sporadically to place it on a full-time basis. In the Committee on the Progressive Development of International Law and its Codification opinions differed on the question whether the members of the Commission should be required to render full-time service. The Committee, by a majority vote, thought that this would be both desirable and necessary.<sup>52</sup> Its suggestion was, however, rejected by the General Assembly in 1947 on the unanimous recommendation of Sub-Committee 2 of the Sixth Committee, based on the imperative necessity for the greatest possible reduction in the United Nations budget, and the consideration that such a composition would make the acceptance of membership more difficult.<sup>53</sup> At its third session in 1951, the International Law Commission, having undertaken a review of its Statute at the request of the General Assembly (resolution 484 (V) of 12 December 1950), also recommended that its work be placed on a full-time basis.<sup>54</sup> The General Assembly, by resolution 600 (VI) of 31 January 1952, adopted on the recommendation of the Sixth Committee, decided "for the time being not to take any action in respect of the revision of [the Commission's] Statute".

(c) *Membership of the Commission*(i) *Size*

20. As presently constituted, the Commission is composed of twenty-five members.<sup>55</sup> The Statute, however, originally provided for a membership of fifteen. This size was increased in 1956 to twenty-one by General Assembly resolution 1103 (XI) of 18 December 1956 and to the present number in 1961 by General Assembly resolution 1647 (XVI) of 6 November 1961.

(ii) *Election of members*

21. Members are elected by the General Assembly in their capacity as persons of recognized competence in international law from a list of candidates nominated by the Governments of States Members of the United Nations. No two members of the Commission shall be nationals of the same State.<sup>56</sup> Electors shall bear in mind that candidates should individually possess the qualifications required and that in the Commission as a whole representation should be assured of the main forms of civilization and of the principal legal systems of the world.<sup>57</sup> Casual vacancies are filled by the Commission itself having regard to the same provisions originally addressed to the General Assembly concerning qualifications.<sup>58</sup>

(iii) *Term of office*

22. At present, members are elected to serve in the Commission for five years.<sup>59</sup> The original term of office provided in the Statute was however three years. The extension of the term was made by General Assembly resolution 985 (X) of 3 December 1955, on the recommendation of the Commission itself.<sup>60</sup> The Commission's members are eligible for re-election.<sup>61</sup>

<sup>52</sup> A/AC.10/51, reissued as A/331; see also A/AC.10/SR.24.

<sup>53</sup> A/C.6/193, para. 4.

<sup>54</sup> See *Yearbook of the International Law Commission, 1951*, vol. II, document A/1858, pp. 137-139, paras. 60-71.

<sup>55</sup> *Statute*, article 2.

<sup>56</sup> *Ibid.*, articles 2 and 3.

<sup>57</sup> *Ibid.*, article 8.

<sup>58</sup> *Ibid.*, article 11.

<sup>59</sup> *Ibid.*, article 10.

<sup>60</sup> *Yearbook of the International Law Commission, 1955*, vol. II, document A/2934, pp. 41 and 42, paras. 27 and 28.

<sup>61</sup> *Statute*, article 10.

Elections have taken place in 1948,<sup>62</sup> 1953, 1956, 1961 and 1966. The next election will take place at the twenty-sixth regular session of the General Assembly in 1971.

(iv) *Emoluments*

23. Article 13 of the Statute originally provided:

"Members of the Commission shall be paid travel expenses and shall also receive a *per diem* allowance at the same rate as the allowance paid to members of commissions of experts of the Economic and Social Council."

The Commission, however, at its first and second sessions suggested to the General Assembly to reconsider the terms of the above provision since the *per diem* allowance was hardly sufficient to meet the living expenses of its members.<sup>63</sup> The Commission's point of view met with the approval of the Sixth Committee and the opposition of the Fifth Committee at the fourth and fifth sessions of the General Assembly in 1949 and 1950 respectively.<sup>64</sup> At its fifth session, however, the General Assembly amended article 13 of the Statute to read as it does at present:

Members of the Commission shall be paid travel expenses and shall also receive a special allowance the amount of which shall be determined by the General Assembly."<sup>65</sup>

By the same resolution, the General Assembly fixed the special allowance at \$US35 per day.<sup>66</sup>

24. At its eleventh session, in 1956, the General Assembly established the principle that "the subsistence allowance shall be paid uniformly to members of all eligible bodies" and set the rate of that allowance at the equivalent in local currency of \$US20 a day for meetings away from New York.<sup>67</sup> Although members of the Commission continued to be paid \$US35 per day of attendance, \$US20 of that was considered to be a "subsistence allowance" and \$US15 a "special allowance".<sup>68</sup>

25. At its twelfth session in 1957, the General Assembly, on the basis of reports submitted by the Secretary-General<sup>69</sup> and the Advisory Committee on Administrative and Budgetary Questions<sup>70</sup> adopted recommendations made by the Fifth Committee<sup>71</sup> to the effect, *inter alia*, that:

"...

<sup>62</sup> By General Assembly resolution 486 (V) of 12 December 1950, the original three-year term of office of the Commission's members was extended by two years, making a total period of five years from their election in 1948.

<sup>63</sup> See *Yearbook of the International Law Commission, 1949*, document A/925, p. 284, para. 42; see also *Yearbook of the International Law Commission, 1950*, vol. II, document A/1316, p. 367, para. 21.

<sup>64</sup> *Official Records of the General Assembly, Fourth Session, Sixth Committee, 168th meeting*; see also A/C.5/320; *ibid.*, Fifth Committee, 222nd meeting; cf. *ibid.*, Annexes, agenda item 52, documents A/1639, paras. 6-16, and A/1648; *ibid.*, Fifth Committee, 258th and 259th meetings.

<sup>65</sup> *Official Records of the General Assembly, Fifth Session, Supplement No. 20 (A/1775)*, resolution 485 (V) of 12 December 1950.

<sup>66</sup> See also *ibid.*, Ninth Session, Supplement No. 21 (A/2890), resolution 875 (IX).

<sup>67</sup> *Ibid.*, Eleventh Session, Supplement No. 17 (A/3572 and Corr.1), resolution 1075 (XI) of 7 December 1956, annex, para. 6.

<sup>68</sup> *Ibid.*, Eleventh Session, Supplement No. 17 (A/3572 and Corr.1), resolution 1106 (XI) of 21 February 1957.

<sup>69</sup> *Ibid.*, Twelfth Session, Annexes, agenda item 41, document A/C.5/713.

<sup>70</sup> *Ibid.*, document A/3705.

<sup>71</sup> *Ibid.*, document A/3766.

"(a) There are to be only two types of payments to members of experts bodies of the United Nations;

"(i) Subsistence allowance

"(ii) Payments additional to this allowance

"(b) The subsistence allowance shall be paid uniformly to members of all eligible bodies at the rates approved by the General Assembly in its resolution 1075 (XI) of 7 December 1956:

"(i) \$US25 *per diem* for meetings at Headquarters,

"(ii) \$US20 *per diem* for meetings away from Headquarters,

"...

"(c) Payment in addition to the subsistence allowance shall be made to the following:

"...

"(iii) The Chairman, the Special Rapporteurs and the other members of the International Law Commission;

"(d) Methods of payments:

"(i) Additional payments shall be consolidated and shall be paid as honoraria in the following lump sums

"...

"Chairman of the International Law Commission: \$US2,500<sup>c</sup>

"Special Rapporteurs of the International Law Commission: \$US2,500<sup>c</sup>

"Other members of the International Law Commission: \$US1,000

"...

"(ii) The above sums would be payable for any year during which the recipient attends the meetings of the body of which he is a member.

"<sup>c</sup> In the case of the International Law Commission, the payment of the higher sum shall be subject to the preparation of specific reports or studies between sessions of the Commission."<sup>72</sup>

26. After 1958, therefore, members of the Commission have enjoyed, in addition to travel expenses, a subsistence allowance of \$US20 per day and honoraria of \$US1,000 per annum, payable at the rate of \$US100 per week of attendance during the regular ten-week session. By a decision of the General Assembly taken at its fifteenth session, the subsistence allowance payable to eligible members of organs and subsidiary organs were set at the following rates:

*US dollars*

- "(a) While attending meetings at Headquarters, New York . . . . . 30
- "(b) While attending meetings in Geneva, the equivalent in local currency of . . . . . 23
- "(c) While attending meetings at other places, a rate to be fixed by the Secretary-General and not to exceed the equivalent in local currency of . . . 23"<sup>73</sup>

<sup>72</sup> *Ibid.*, para. 6. See also *ibid.*, *Twelfth Session, Plenary Meetings*, 729th meeting, 13 December 1957. For an account of the historical development prior to 1957 of the honoraria paid to Special Rapporteurs see *ibid.*, *Annexes*, agenda item 41, document A/3766, annex, paras. 2-8.

<sup>73</sup> *Ibid.*, *Fifteenth Session, Supplement No. 16 A* (A/4684), resolution 1588 (XV) of 20 December 1960.

### III. ARRANGEMENT OF THE COMMISSION'S SESSION

#### (a) *Place of session*

27. Articles 12 of the Statute originally provided that:

"The Commission shall sit at the Headquarters of the United Nations. The Commission shall, however, have the right to hold meetings at other places after consultation with the Secretary-General."

On the recommendation of the Commission, the General Assembly, by resolution 984 (X) of 3 December 1955, amended the first sentence of article 12 to read as it does at present: "The Commission shall sit at the European Office of the United Nations at Geneva". With the exception of the first session, held in New York in 1949, the sixth session, held in Paris in 1954 owing to the temporary lack of facilities in Geneva, and the second part of the seventeenth session, held at Monaco in 1966 at the invitation of the Government of the Principality of Monaco, all sessions of the Commission have been held at Geneva.

28. When expressing itself on the question of the place to meet, the Commission has favoured Geneva, since, in its opinion, the general conditions or atmosphere in that city are more conducive to efficiency in the kind of work to be performed. The fact has also been stressed by the Commission that there exists in Geneva an exceptionally well planned legal library, unsurpassed in the field of international law.<sup>74</sup>

29. The Commission's preference reflected in the Statute, has been given further recognition by the General Assembly in resolution 2116 (XX) of 21 December 1965, "Pattern of conferences", whose operative paragraph 2 (a) reads as follows:

"...

"2. *Decides further* that, as a general principle, meetings of United Nations bodies shall be held at the established headquarters of the bodies concerned with the following exceptions:

"(a) The sessions of the International Law Commission shall be held at Geneva;"<sup>75</sup>

30. As regards the Commission's statutory right to hold meetings at other places than Geneva after consultation with the Secretary-General, the terms of operative paragraph 2 (h) of resolution 2116 (XX) should be borne in mind, whereby the General Assembly decided that:

"...

"(h) In other cases meetings may be held away from the established headquarters or authorized meeting-place of any body when a Government issuing an invitation for a meeting to be held within its territory has agreed to defray, after consultation with the Secretary-General as to their nature and possible extent, the actual additional costs directly and indirectly involved;"<sup>76</sup>

#### (b) *Date of session*

31. Since its establishment, and with the exception of the second part of its seventeenth session held in the winter of 1966 (see paragraph 34 below), the Commission has annually con-

<sup>74</sup> See *Yearbook of the International Law Commission, 1953*, vol. II, document A/2456, p. 232, para. 173; see also *Yearbook of the International Law Commission, 1955*, vol. II, document A/2934, p. 41, para. 26.

<sup>75</sup> See also *Official Records of the General Assembly, Seventeenth Session, Supplement No. 17* (A/5217), resolution 1851 (XVII) of 19 December 1962.

<sup>76</sup> See also *Official Records of the General Assembly, Twelfth Session, Supplement No. 18* (A/3805), resolution 1202 (XII) of 13 December 1957.

vened in the spring or early summer. This time of the year has been deemed most appropriate by the Commission to facilitate the full attendance of its members and ensure the timely submission of its annual report to the immediately ensuing session of the General Assembly.<sup>77</sup> As of 1953, a more compelling reason for this choice, given the Commission's preference for Geneva as the place to meet, resulted from the decision taken by the General Assembly at its seventh session in 1952, and reaffirmed at its twelfth session in 1957, to the effect that "the International Law Commission would meet in Geneva only when its session could be held there without overlapping with the summer session of the Economic and Social Council".<sup>78</sup> This condition, however, was eliminated by the General Assembly in 1962.<sup>79</sup>

32. Before the removal of the limitation referred to in the preceding paragraph the Commission, at its fourteenth session, had decided on the first Monday in May as the most convenient opening date for its annual session in order to minimize the duration of overlapping with the session of the Economic and Social Council and the period during which members would find it difficult to take part in the Commission's work.<sup>80</sup> Although this decision has not been strictly complied with, the opening date of the Commission's last six sessions has nevertheless taken place in May.<sup>81</sup> The actual opening date of the Commission's session may depend on factors such as the convening of a codification conference by the General Assembly, as was the case at the twentieth session of the Commission, whose opening date was postponed in view of the dates of the first session of the Vienna Conference on the Law of Treaties.<sup>82</sup>

33. The average length of the Commission's annual session has been ten weeks. This period has been considered by the Commission to be the "indispensable minimum it would require to carry out its work".<sup>83</sup> Extensions of the scheduled ten-week period have taken place, by one week in 1964 on the Commission's own decision<sup>84</sup> and by one week in 1966 on the approval by the General Assembly of a recommendation made by the Commission.<sup>85</sup>

<sup>77</sup> See *Yearbook of the International Law Commission, 1951*, vol. II, document A/1858, p. 138, para. 64; see also *Yearbook of the International Law Commission, 1953*, vol. II, document A/2456, p. 232, para. 174.

<sup>78</sup> *Official Records of the General Assembly, Seventh Session, Supplement No. 20 (A/2361)*, resolution 694 (VII) of 20 December 1952; *ibid.*, *Twelfth Session, Supplement No. 18 (A/3805)*, resolution 1202 (XII) of 13 December 1957.

<sup>79</sup> *Ibid.*, *Seventeenth Session, Supplement No. 17 (A/5217)*, resolution 1851 (XVII) of 19 December 1962.

<sup>80</sup> See *Yearbook of the International Law Commission, 1962*, vol. II, document A/5209, p. 193, para. 83.

<sup>81</sup> The sixteenth and nineteenth sessions of the Commission opened on the second Monday in May of 1964 and 1967, respectively. The twentieth session opened on the last Tuesday in May of 1968.

<sup>82</sup> See *Yearbook of the International Law Commission, 1967*, vol. II, document A/6709/Rev.1 and Rev.1/Corr.1, p. 369, para. 50; cf. *Yearbook of the International Law Commission, 1962*, vol. II, document A/5209, p. 193, para. 82, regarding the Vienna Conference on Consular Relations.

<sup>83</sup> See *Yearbook of the International Law Commission, 1953*, vol. II, document A/2456, p. 232, para. 176; see also *Yearbook of the International Law Commission, 1955*, vol. II, document A/2934, p. 42, para. 30; *Yearbook of the International Law Commission, 1956*, vol. II, document A/3159, p. 302, para. 50; *Yearbook of the International Law Commission, 1957*, vol. II, document A/3623, pp. 145 and 146, para. 34.

<sup>84</sup> See *Yearbook of the International Law Commission, 1964*, vol. II, document A/5809, p. 226, para. 38.

<sup>85</sup> See *Yearbook of the International Law Commission, 1965*, vol. II, document A/6009, p. 194, para. 54; see also *Yearbook of*

34. At its fifteenth to seventeenth sessions, the Commission considered the question of holding winter sessions in order to finish before the end of the term of office of its members its draft articles on the law of treaties on special missions. At its fifteenth session in 1963, the Commission decided that a three-week winter session should take place in January 1964 and reported to the General Assembly that suggestions had been made also for a winter session, in January 1965.<sup>86</sup> The General Assembly, however, at its eighteenth session, made no appropriations for the 1964 winter session of the Commission. At its sixteenth session in 1964, the Commission again reported to the General Assembly its belief that it was essential to hold a four-week winter session in 1966.<sup>87</sup> No action having been taken by the General Assembly due to the circumstances prevailing at its nineteenth session, the Commission, at its seventeenth session, considered the question whether the proposed winter session could be replaced by extensions of the regular sessions of 1965 and 1966. Concluding, respectively, that such extensions were not possible or sufficient, it reaffirmed its recommendation of 1964 to the General Assembly that arrangements should be made for the Commission to meet for four weeks in January 1966, those meetings to constitute the second part of the seventeenth session of the Commission.<sup>88</sup> The Commission also decided in principle to accept an invitation of the Government of the Principality of Monaco to hold those meetings in Monaco.<sup>89</sup> The General Assembly, by resolution 2045 (XX) of 8 December 1965, approved the Commission's proposal. The second part of the Commission's seventeenth session was therefore held in Monaco from 3 to 28 January 1966.<sup>90</sup>

#### (c) Rules of procedure

35. Since the Commission is a subsidiary organ of the General Assembly, it is governed in principle by rule 162 of the rules of procedure of the General Assembly, which provides in part:

"... The rules relating to the procedure of committees of the General Assembly, as well as rules 45 and 62, shall apply to the procedure of any subsidiary organ, unless the General Assembly or the subsidiary organ decides otherwise."<sup>91</sup>

The Commission, at its first session in 1949, decided that the rules of procedure referred to in rule 162 should apply to the procedure of the Commission, and that the Commission should, when the need arose, adopt its own rules of procedure.<sup>92</sup>

#### (d) Meetings of the Commission

36. As a general rule, the Commission meets once a day in plenary, for three hours Monday through Friday. In

*the International Law Commission, 1966*, vol. II, document A/6309/Rev.1, part II, p. 173, para. 1; *Official Records of the General Assembly, Twentieth Session, Supplement No. 14 (A/6014)*, resolution 2045 (XX) of 8 December 1965.

<sup>86</sup> See *Yearbook of the International Law Commission, 1963*, vol. II, document A/5509, pp. 225 and 226, paras. 72-74.

<sup>87</sup> See *Yearbook of the International Law Commission, 1964*, vol. II, document A/5809, p. 226, para. 38.

<sup>88</sup> See *Yearbook of the International Law Commission, 1965*, vol. II, document A/6009, pp. 193 and 194, para. 53.

<sup>89</sup> *Ibid.*, p. 195, para. 65.

<sup>90</sup> See *Yearbook of the International Law Commission, 1966*, vol. II, document A/6309/Rev.1, part I, p. 169, paras. 1-3.

<sup>91</sup> Rule 45 relates to the duties of the Secretary-General. Rule 62 states the general principles concerning the public or private meetings of the General Assembly, its Committees and Sub-Committees.

<sup>92</sup> See *Yearbook of the International Law Commission, 1949*, document A/925, p. 278, para. 5; see also *ibid.*, p. 281, para. 18.

accordance with rule 62 of the rules of procedure of the General Assembly, these meetings are held in public. Under the same rule, however, the Commission is empowered to meet in private if it deems it necessary; it has done so when filling casual vacancies and occasionally when dealing with internal organizational matters.<sup>93</sup> The decisions to fill a casual vacancy and, when appropriate, on organizational matters, are announced by the Chairman at a subsequent public meeting of the Commission.<sup>94</sup> Records of the Commission's public meetings are published in summary form as mimeographed documents and are subsequently printed in volume I of the Commission's *Yearbook*. As to the practice of holding only one plenary meeting a day, its endorsement by the Commission has been mainly based on the need to allow sufficient time for the private and individual work of members, and to enable the Special Rapporteur of the topic being considered, the General Rapporteur and the members of the Drafting Committee to keep pace with the work of the Commission and fully participate in its plenary discussions.<sup>95</sup>

(e) *Quorum*

37. In accordance with rule 110 of the rules of procedure of the General Assembly, one third of the members of the Commission (9 members) constitute the quorum. The presence, however, of a majority of the Commission's members (13 members) is required for a decision to be taken.

(f) *The Bureau*

38. At the beginning of each session, the Commission elects the officers who constitute its Bureau, on the proposal of the Commission's members, as follows: the Chairman, the First and Second Vice-Chairmen and the General Rapporteur. Apart from its functions under rules 108 and 109 of the rules of procedure of the General Assembly, the Commission's Chairman performs tasks such as to propose the members who are to be appointed to the Drafting Committee for the session. The Commission's First Vice-Chairman has been the Chairman of the Drafting Committee, beginning at the seventh session. The General Rapporteur is responsible for the preparation of the draft of the Commission's annual report to the General Assembly.

(g) *Agenda*

39. As distinguished from its programme of work, the Commission adopts at the beginning of each session the agenda for the session. The provisional agenda is prepared by the Secretariat on the basis of the relevant decisions of the General Assembly and the Commission and the pertinent provisions of the Commission's Statute. The order in which items are listed in the agenda adopted does not necessarily determine their actual order of consideration by the Commission, the latter being rather a result of *ad hoc* decisions.

(h) *Report of the session*

40. At the end of each session the Commission adopts a report to the General Assembly, covering the work of the session, on the basis of a draft which the Commission examines paragraph by paragraph, prepared by the General Rapporteur with the assistance of the Special Rapporteurs concerned and the Secretariat. Apart from standard chapters (Organization of

the session; Other decisions and conclusions of the Commission), the report devotes separate chapters to the topics given substantive consideration at the session. The report includes, as appropriate, drafts and reports on particular topics with commentaries and recommendations relating thereto, information on the progress of work on the topics under study and on the future work of the Commission and other recommendations calling for a decision on the part of the General Assembly. Comments by Governments on the Commission's drafts are normally printed as an annex to the report when the drafts are presented in their final form. Apart from being the vehicle for their submission to the General Assembly,<sup>96</sup> the report serves as a means of giving to the Commission's drafts and reports all necessary publicity.<sup>97</sup> An item entitled "Report of the International Law Commission" is included by the General Assembly in its agenda for each regular session and allocated to the Sixth Committee. The report is customarily<sup>98</sup> introduced in this Committee by the Commission's Chairman, in whose presence the consideration of the item takes place.

IV. PROCESS OF CONSIDERATION OF A TOPIC OF INTERNATIONAL LAW WITH A VIEW TO ITS CODIFICATION AND PROGRESSIVE DEVELOPMENT

41. As a methodological standard the distinction embodied in chapter II of the Statute between codification and progressive development of international law has not been maintained in the practice of the Commission. A single consolidated procedure based on its Statute has been evolved by the Commission out of the need to incorporate elements of both *lex lata* and *lex ferenda* in the rules to be formulated. This procedure comprises basically the formulation by the Commission of a plan of work and the appointment of a Special Rapporteur, the request for data and information from Governments, the submission of studies and research projects by the Secretariat, the discussion of the reports and drafts submitted by the Special Rapporteur, the elaboration of drafts and their submission to Governments for comments, the revision of the provisional drafts in the light of the written comments and oral observations from Governments and the submission of final drafts with recommendations to the General Assembly.

(a) *Plan of work*

42. After the decision has been taken by the Commission to undertake work on a topic already placed on its programme of work,<sup>99</sup> the Commission engages in a general discussion as to when and how best to deal with it. This discussion normally results in the appointment of a Special Rapporteur for the topic in question.

43. On two occasions, the appointment of a Special Rapporteur has been preceded by the assignment of the topic to a sub-committee for examination. At its fourteenth session in 1962, the Commission appointed Sub-Committees, composed of ten members each, on State responsibility and succession of

<sup>96</sup> *Statute*, articles 16 (f), 17 (c), 20 and 22.

<sup>97</sup> *Ibid.*, articles 16 (g) and 21 (d).

<sup>98</sup> At its eighth session, the Commission, on the proposal of the Chairman, decided that the Special Rapporteur on the régimes of the high sea and territorial sea should attend the eleventh session of the General Assembly and furnish such information on the Commission's draft on the law of the sea as might be required in connexion with the consideration of the matter by the Assembly. *Yearbook of the International Law Commission, 1956*, vol. II, document A/3159, p. 302, para. 48.

<sup>99</sup> The inclusion of a topic in the Commission's programme of work has not implied its actual consideration by the Commission. See paragraph 13 above.

<sup>93</sup> See, *inter alia*, *Yearbook of the International Law Commission, 1952*, vol. I, 135th meeting.

<sup>94</sup> See *inter alia*, *Yearbook of the International Law Commission, 1955*, vol. I, 292nd meeting.

<sup>95</sup> See *Yearbook of the International Law Commission, 1957*, vol. II, document A/3623, pp. 144 and 145, para. 26.

States and Governments.<sup>100</sup> The Sub-Committee met during the Commission's regular session<sup>101</sup> and in January 1963 at Geneva. The conclusions and recommendations set out in the Sub-Committee's reports, including a plan of work, were approved by the Commission at its fifteenth session in 1963.<sup>102</sup> After this approval, the Commission appointed the Chairman of the two Sub-Committees as Special Rapporteurs for the respective topics.<sup>103</sup> At its last session in 1967, however, new arrangements were made by the Commission for dealing with the topic "Succession of States and Governments", which had been divided into three main aspects by the 1963 Sub-Committee. Two of the aspects were assigned each to a Special Rapporteur, but the third was left aside for the time being, without being so assigned.<sup>104</sup>

44. Once appointed, the Special Rapporteur is expected to submit to the Commission, at a subsequent session, a substantive report on the topic entrusted to him. However, his initial presentation may be, at the Commission's request or on his initiative, of a general and exploratory character, in the form of a working paper or preliminary report.<sup>105</sup> Whatever the case, the practice of the Commission has not been consistent regarding its reference to time limits for the submission of a first paper by a newly appointed Special Rapporteur. At its last session, in 1967, the Commission decided "to advance . . . as rapidly as possible at its twentieth session in 1968" its work on one of the aspects of a topic already taken up by the Commission, while appointing a Special Rapporteur to deal specifically with that aspect for the first time.<sup>106</sup> On other occasions, the Commission has refrained from expressly making any such reference.<sup>107</sup> This difference in the Commission's attitude is mainly a result of its decisions concerning the organization of its future work.

(b) *The Special Rapporteur*

45. The Special Rapporteur for a topic is selected by the Commission from among its members. In principle, it has been the practice of the Commission to allow a newly elected Special Rapporteur to deal with his topic as he deems it most appropriate.<sup>108</sup> The Commission, however, on the occasion of the appointment of the Special Rapporteur or upon his submission of a working paper or a preliminary or further report, may engage in a discussion aimed at giving him guidelines<sup>109</sup> or

instructions on aspects such as the manner of treatment, parts of the subject to be dealt with and priorities to be given to them, especially in the light of relevant decisions of the General Assembly<sup>110</sup> or in cases where the topic has been already dealt with by a previous Special Rapporteur or it is related to subjects already dealt with or being dealt with by the Commission.<sup>111</sup> For the preparation of his reports the Special Rapporteur, aside from the data and information furnished by Governments or intergovernmental organizations and the substantive assistance of the Secretariat, may also ascertain the specific views of the Commission's members by circulating among them a questionnaire.<sup>112</sup> The Special Rapporteur may also be allowed to consult with experts with a view to elucidating technical questions.<sup>113</sup>

(c) *Request for data and information from Governments*

46. Following the decision to undertake work on a given topic, the Commission usually asked the Secretary-General to address a request to Governments to furnish it with data and information relevant to the topic in question, which may take the form of texts of laws, decrees, judicial decisions, treaties, diplomatic correspondence and other materials.<sup>114</sup> The request may also take the form of a questionnaire prepared by the Secretariat<sup>115</sup> to which Governments may reply specifically or

Sub-Committee on State Responsibility and Succession of States and Government (para. 31 above), nevertheless pointed out that the questions listed in the first report were intended solely to serve as an *aide-mémoire* and that the second report laid down guiding principles for the Special Rapporteur, who would not be obliged to conform to them in detail. *Yearbook of the International Law Commission, 1963*, vol. II, document A/5509, p. 224, paras. 54 and 60.

<sup>110</sup> The General Assembly, *inter alia*, by resolutions 1765 (XVII) of 20 November 1962 and 1902 (XVIII) of 18 November 1963 recommended that: (a) the law of treaties "be placed upon the widest and most secure foundations"; (b) on State Responsibility, due consideration be given "to the purposes and principles enshrined in the Charter of the United Nations"; (c) on Succession of States and Governments, appropriate reference be made "to the views of States which have achieved independence since the Second World War". *Official Records of the General Assembly, Seventeenth Session, Supplement No. 17 (A/5217)*; *ibid.*, *Eighteenth Session, Supplement No. 15 (A/5515)*.

<sup>111</sup> See *Yearbook of the International Law Commission, 1961*, vol. I, 597th meeting, p. 99, para. 33; 621st meeting, p. 258, para. 47; see also *Yearbook of the International Law Commission, 1963*, vol. II, document A/5509, p. 225, paras. 62-64; *Yearbook of the International Law Commission, 1964*, vol. II, document A/5809, pp. 175 and 176, 226 and 227, paras. 18, 41, 42; *Yearbook of the International Law Commission, 1967*, vol. II, document A/6709/Rev.1 and Rev.1/Corr.1, p. 368, para. 40; see also *Yearbook of the International Law Commission, 1968*, vol. I, 962nd to 965th and 968th meetings.

<sup>112</sup> See *Yearbook of the International Law Commission, 1956*, vol. II, document A/3159, p. 301, para. 36; *Yearbook of the International Law Commission, 1959*, vol. II, document A/4169, para. 23.

<sup>113</sup> See *Yearbook of the International Law Commission, 1954*, vol. II, document A/2693, p. 152, paras. 60 and 63; *Yearbook of the International Law Commission, 1956*, vol. II, document A/3159, p. 255, paras. 15-18.

<sup>114</sup> See *Yearbook of the International Law Commission, 1954*, vol. II, document A/2693, p. 152, paras. 60 and 64; *Yearbook of the International Law Commission, 1962*, vol. II, document A/2693, p. 152, paras. 60 and 64; *Yearbook of the International Law Commission, 1962*, vol. II, document A/5209, p. 192, para. 73; *Yearbook of the International Law Commission, 1963*, vol. II, document A/5509, pp. 224 and 225, para. 61.

<sup>115</sup> See *Yearbook of the International Law Commission, 1950*, vol. II, document A/1316, pp. 380 and 381, paras. 160 and 165.

<sup>100</sup> See *Yearbook of the International Law Commission, 1962*, vol. II, document A/5209, pp. 188-190, paras. 33-56, 62.

<sup>101</sup> *Ibid.*, pp. 191 and 192, paras. 67-74 (one and two private meetings, respectively).

<sup>102</sup> See *Yearbook of the International Law Commission, 1963*, vol. II, document A/5509, pp. 223-225, paras. 51-61; *ibid.*, annexes 1 and 2.

<sup>103</sup> *Ibid.*, pp. 224 and 225, paras. 55 and 61.

<sup>104</sup> See *Yearbook of the International Law Commission, 1967*, vol. II, document A/6709/Rev.1 and Rev.1/Corr.1, p. 368, paras. 38-40.

<sup>105</sup> See, *inter alia*, *ibid.*, p. 368, para. 40; *Yearbook of the International Law Commission, 1963*, vol. II, document A/5509, p. 225, para. 66; and A/CN.4/L.127.

<sup>106</sup> See *Yearbook of the International Law Commission, 1967*, vol. II, document A/6709/Rev.1 and Rev.1/Corr.1, p. 368, para. 39; see also *Yearbook of the International Law Commission, 1961*, vol. I, 621st meeting, p. 258, para. 47 (iii); *Yearbook of the International Law Commission, 1962*, vol. II, document A/5209, p. 192, para. 75.

<sup>107</sup> See *Yearbook of the International Law Commission, 1963*, vol. II, document A/5509, p. 224, para. 55.

<sup>108</sup> See, *inter alia*, *Yearbook of the International Law Commission, 1968*, vol. I, 965th meeting, p. 132, para. 65.

<sup>109</sup> At its fifteenth session in 1963, the Commission, while approving the recommendations contained in the reports of the

by way of general observations. The Secretariat systematizes the data and information thus gathered, which is transmitted to the Special Rapporteur and published as a compilation in the *United Nations Legislative Series* or in documents later to be included in the Commission's *Yearbook*.

(d) *Studies and research projects by the Secretariat*

47. Among its functions as regards the Commission, the Secretariat, at the Commission's request or on its own initiative, prepares substantive studies and research projects to facilitate the Commission's work and to aid the Special Rapporteurs in the fulfilment of their tasks. The Secretariat also, when appropriate, addresses itself to concrete substantive questions that may arise during the consideration of the reports submitted by the Special Rapporteur.<sup>116</sup>

(e) *Discussion of the Special Rapporteur's reports*

48. The reports submitted by the Special Rapporteur for the Commission's consideration, as distinguished from working papers or preliminary reports, normally contain a set of draft articles with commentaries.<sup>117</sup> After its introduction by the Special Rapporteur and an exchange of views thereon, the Commission proceeds to an article by article discussion with a view to the formulation of a set of draft articles. Prior to its consideration by the Commission, each draft article is introduced by the Special Rapporteur. Members may submit amendments or alternative formulations to the draft articles presented by the Special Rapporteur<sup>118</sup> or written memoranda thereon.<sup>119</sup> Upon the conclusion of its consideration on a given draft article, the Commission transmits it, together with pertinent suggestions and proposals to the Drafting Committee, in the light of the debate and the decisions taken.

(f) *The Drafting Committee*

49. Although committees in the nature of drafting committees were set up by the Commission to deal with specific topics or questions at its first three sessions,<sup>120</sup> a standing Drafting Committee has been used at each session of the Commission since its fourth session in 1952.<sup>121</sup> The Drafting Committee

prepares texts of draft articles for the consideration of the Commission. These texts embody solutions not only to drafting points but also to questions of substance which the Commission "has been unable to resolve or which appeared likely to give rise to unduly protracted discussion".<sup>122</sup> Beginning at the Commission's seventh session, in 1955, the Chairman of the Drafting Committee has been the Commission's first Vice-Chairman.<sup>123</sup> Customarily also, the General Rapporteur is appointed to be a member of the Drafting Committee.<sup>124</sup> Other members are appointed by the Commission on the recommendation of its Chairman with a view to ensuring an adequate representation and taking into account, among other factors, their linguistic competence in English, French and Spanish, these being the languages of the texts of the draft articles for which the Drafting Committee is responsible.<sup>125</sup> When a member of the Drafting Committee cannot attend its meetings, he is normally replaced by a member of the Commission of the same language or from the same geographical region.<sup>126</sup> Special Rapporteurs who have not been appointed members of the Drafting Committee, take part in the Drafting Committee's work when the draft articles relating to their topics are considered.<sup>127</sup> Under the Commission's terms of referral, the Special Rapporteur prepares and submits new texts to the Drafting Committee as a basis for the consideration of the draft article in question. The Drafting Committee enjoys interpretation services but no records are kept of its discussions.

(g) *Consideration by the Commission of the texts approved by the Drafting Committee*

50. The Commission discusses the text of each of the draft articles adopted by the Drafting Committee, following its introduction by the Chairman of the Drafting Committee. The Drafting Committee's texts may be subjects to amendments or alternative formulations submitted by members of the Commission and may be referred back by the Commission to the Drafting Committee for further consideration. The texts of the draft articles are voted upon by the Commission and those adopted are included in the relevant chapter of the Commission's report for the session. Detailed explanations of dissenting opinions are not inserted in the report but merely a statement to the effect that for the reasons given in the summary records a member was opposed to the adoption of a certain article.<sup>128</sup>

(h) *Submission of drafts to Governments for comments*

51. Once adopted, the preliminary drafts are submitted by the Commission, through the Secretary-General, to Governments

<sup>116</sup> See, *inter alia*, *Yearbook of the International Law Commission*, 1962, vol. II, document A/5209, pp. 191 and 192, paras. 72 and 76; *Yearbook of the International Law Commission*, 1963, vol. II, document A/5509, pp. 224 and 225, paras. 55 and 61; and A/CN.4/200 and Add.1 and 2, A/CN.4/L.129.

<sup>117</sup> See, *inter alia*, *Yearbook of the International Law Commission*, 1963, vol. II, document A/5509, p. 225, paras. 64 and 66; *Yearbook of the International Law Commission*, 1967, vol. II, document A/6709/Rev.1 and Rev.1/Corr.1, p. 369, para. 43; A/CN.4/201.

<sup>118</sup> See *Yearbook of the International Law Commission*, 1958, vol. II, document A/3859, p. 108, para. 64; *Yearbook of the International Law Commission*, 1959, vol. II, document A/4169, p. 110, para. 28; *Yearbook of the International Law Commission*, 1960, vol. II, document A/4425, p. 179, para. 31.

<sup>119</sup> See *Yearbook of the International Law Commission*, 1953, vol. I, 227th meeting, pp. 277 and 278, paras. 35-38.

<sup>120</sup> See *Yearbook of the International Law Commission*, 1949, vol. I, 16th meeting, p. 129, paras. 112-116; 29th meeting, p. 214, para. 68; *Yearbook of the International Law Commission*, 1950, vol. I, 62nd meeting p. 177, para. 146; *Yearbook of the International Law Commission*, 1951, vol. I, 117th meeting, pp. 299 and 300, paras. 71-88.

<sup>121</sup> See *Yearbook of the International Law Commission*, 1952, vol. I, 143rd meeting, p. 41, para. 62.

<sup>122</sup> See *Yearbook of the International Law Commission*, 1958, vol. II, document A/3859, p. 108, para. 65.

<sup>123</sup> See *Yearbook of the International Law Commission*, 1955, vol. I, 295th meeting, p. 170, para. 13.

<sup>124</sup> See *Yearbook of the International Law Commission*, 1952, vol. I, 143rd meeting, p. 41, para. 62; *Yearbook of the International Law Commission*, 1954, vol. I, 250th meeting, p. 45, para. 61.

<sup>125</sup> See *Yearbook of the International Law Commission*, 1964, vol. II, document A/5809, p. 174, para. 5.

<sup>126</sup> See *Yearbook of the International Law Commission*, 1959, vol. I, 491st meeting, p. 52, para. 7.

<sup>127</sup> See *Yearbook of the International Law Commission*, 1952, vol. I, 143rd meeting, p. 41, para. 62.

<sup>128</sup> See *Yearbook of the International Law Commission*, 1953, vol. II, document A/2456, pp. 230 and 231, para. 163; *Yearbook of the International Law Commission*, 1955, vol. II, document A/2934, p. 43, para. 38.

of Member States for their written comments.<sup>129</sup> Normally, a two-year period is allowed for the receipt of such comments.<sup>130</sup> The necessities of its work may move the Commission to submit to Governments for comments preliminary drafts either in whole or in part. The inclusion of the preliminary drafts in the Report of the session to the General Assembly further allows the expression of oral views by representatives of Member States in the Sixth Committee. The General Assembly usually requests the Secretary-General to transmit to the Commission the records of the debates on the Commission's Report.

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<sup>129</sup> *Statute*, articles 16 (h) and 21 (2); see, however, *Yearbook of the International Law Commission, 1958*, vol. I, 432nd meeting, p. 3, paras 11 and 12, and 478th meeting, p. 257, paras. 33-38; cf. *Yearbook of the International Law Commission, 1968*, vol. I, 956th meeting.

<sup>130</sup> See *Yearbook of the International Law Commission, 1958*, vol. II, document A/3859, pp. 108 and 109, paras. 60 and 61; *Yearbook of the International Law Commission, 1964*, vol. II, document A/5809, pp. 175 and 226, paras. 16 and 40.

(i) *Adoption of final drafts with recommendations and submission thereof to the General Assembly*

52. In the light of the written comments received from Governments and the oral observations made in the Sixth Committee, the Commission re-examines the preliminary drafts adopted, on the basis of further reports by the Special Rapporteur. A procedure similar to that described above (paras. 48-50) is followed by the Commission when undertaking this re-examination. After a final draft containing a set of draft articles is adopted, the Commission submits it with its recommendations to the General Assembly. The General Assembly may refer the draft back to the Commission<sup>131</sup> or accept it as final and decide then on its outcome.

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<sup>131</sup> *Official Records of the General Assembly, Tenth Session, Supplement No. 19 (A/3116)*, resolution 989 (X) of 14 December 1955.