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REPORT OF THE COMMISSION TO THE GENERAL ASSEMBLY

DOCUMENT A/7610/REV.1

Report of the International Law Commission on the work of its twenty-first session, 2 June-8 August 1969

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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, in accordance with its Statute annexed thereto, as subsequently amended, held its twenty-first session at the United Nations Office at Geneva from 2 June to 8 August 1969. 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-nine additional draft articles on representatives of States to international organizations, consisting of provisions on permanent missions to international organizations, and commentaries thereon. Chapter III, on succession of States and Governments, contains an account of the historical background of the whole topic and a description of the Commission's work on one of the headings of the topic, namely succession in respect of matters other than treaties. Chapters IV and V relate to the progress of the Commission's work on State responsibility and the most-favoured-nation clause, respectively. Chapter VI deals with the organization of the Commission's future work and a number of administrative and other questions.

A. MEMBERSHIP

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 BEDJAOU (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).

B. OFFICERS

3. At its 990th meeting, held on 2 June 1969, the Commission elected the following officers:

Chairman: Mr. Nikolai Ushakov;
First Vice-Chairman: Mr. Jorge Castañeda;
Second Vice-Chairman: Mr. Nagendra Singh;
Rapporteur: Mr. Constantin Th. Eustathiades.

C. DRAFTING COMMITTEE

4. At its 1007th meeting, held on 24 June 1969, the Commission appointed a Drafting Committee composed as follows:

Chairman: Mr. Jorge Castañeda;

Members: Mr. Roberto Ago; Mr. Milan Bartoš; Mr. Louis Ignacio-Pinto; Mr. Eduardo Jiménez de Aréchaga; Mr. Paul Reuter; Mr. Abdul Hakim Tabibi; Mr. Arnold J. P. Tammes; Mr. Senjin Tsuruoka; Mr. Endre Ustor and Sir Humphrey Waldock. Mr. Fernando Albónico and Mr. Richard D. Kearney took part in the Committee's work in the absence of Mr. Eduardo Jiménez de Aréchaga and Sir Humphrey Waldock, respectively. Mr. Constantin Th. Eustathiades also took part in the Committee's work in his capacity as Rapporteur of the Commission.

D. SECRETARIAT

5. Mr. Constantin A. Stavropoulos, Legal Counsel, attended the 990th to 999th meetings held from 2 to 13 June 1969, and represented the Secretary-General on those occasions. Mr. Anatoly P. Movchan, Director of the Codification Division of the Office of Legal Affairs, represented the Secretary-General at the other meetings of the session, and acted as Secretary to the Commission. Mr. Nicolas Teslenko acted as Deputy Secretary to the Commission. Mr. Santiago Torres-Bernárdez and Mr. Eduardo Valencia-Ospina served as Assistant Secretaries.

E. AGENDA

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

1. Relations between States and international organizations.
2. Succession of States and Governments:
 - (a) Succession in respect of treaties;
 - (b) Succession in respect of matters other than treaties.
3. State responsibility.
4. Most-favoured-nation clause.
5. Co-operation with other bodies.
6. Organization of future work.
7. Dates and places of the Commission's meetings in 1970.
8. Other business.

7. In the course of the session, the Commission held fifty-two public meetings (990th to 1041st meetings) and four private meetings (on 21, 24, 29 and 31 July 1969, respectively). In addition, the Drafting Committee held ten meetings. The Commission considered all the items on its agenda with the exception of sub-item 2 (a) (Succession in respect of treaties).

8. The Commission received from the Secretary-General a letter entitled "Tribute to the International Law Commission" (A/CN.4/219), dated 3 June 1969 and addressed to the Chairman of the Commission, transmitting the text of a resolution adopted unanimously by the United Nations Conference on the Law of Treaties at its thirty-sixth plenary meeting, on 22 May 1969, entitled "Tribute to the International Law Commission".

CHAPTER II

Relations between States and international organizations

A. INTRODUCTION

1. *Summary of the Commission's proceedings*¹

9. At its 986th meeting, on 31 July 1968, the Commission adopted a provisional draft of twenty-one articles on representatives of States to international organizations, with the Commission's commentary on each article.² The first five articles form part I (General provisions), covering: use of terms, scope of the articles, their relationship with the relevant rules of international organizations and with other existing international agreements and derogation from the articles. The remaining articles make up section 1 of part II (Permanent missions to international organizations). This section is entitled "Permanent missions in general". It regulates the following questions: establishment of permanent missions; functions of a permanent mission; accreditation to two or more international organizations or assignment to two or more permanent missions; accreditation, assignment or appointment of a member of a permanent mission to other functions; appointment of the members of the permanent mission and their nationality; credentials of the permanent representative, his accreditation to organs of the organization and his full powers to represent the State in the conclusion of treaties; composition of the permanent mission and its size; notifications, *chargés d'affaires ad interim*; precedence; offices of permanent missions and the use of the flag and emblem.

10. 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.³

11. At the present session of the Commission, the Special Rapporteur, Mr. Abdullah El-Erian, submitted a fourth report (A/CN.4/218 and Add.1) containing a revised set of draft articles, with commentaries, on representatives of States to international organizations. Those draft articles covered the following subjects: facilities, privileges and immunities of permanent missions

¹ An account of the historical background of the topic is contained in the report of the International Law Commission on the work of its twentieth session, *Yearbook of the International Law Commission, 1968*, vol. II, document A/7209/Rev.1, pp. 193 and 194, paras. 9-20.

² *Ibid.*, para. 21.

³ *Ibid.*, para. 22.

to international organizations; conduct of the permanent mission and its members; and end of the functions of the permanent representative (sections 2, 3 and 4 of part II). The Special Rapporteur also submitted a working paper (A/CN.4/L.136) containing draft articles on permanent observers of non-members to international organizations.

12. The fourth report also included a summary of the discussion which had taken place in the Sixth Committee during the twenty-third session of the General Assembly on the "Report of the International Law Commission on the Work of its Twentieth Session" (agenda item 84)⁴ and on the "Draft Convention on Special Missions" (agenda item 85),⁵ since those discussions had touched on certain questions which may present some interest as regards representatives of States to international organizations and conferences.

2. The scope of the present group of draft articles

13. The Commission considered the fourth report of the Special Rapporteur from its 991st to its 999th meetings and referred the draft articles contained therein to the Drafting Committee. From its 1014th to its 1035th meetings the Commission considered the reports of the Drafting Committee. The Commission adopted a provisional draft of twenty-nine articles on the subjects included in sections 2 (Facilities, privileges and immunities), 3 (Conduct of the permanent mission and its members) and 4 (End of functions) of part II (Permanent missions to international organizations). The provisional draft of the twenty-nine articles is reproduced below in the present chapter, together with commentaries. For the sake of convenience, the articles of the present group are numbered consecutively after the last article of the previous group. Accordingly, the first article of the present group is numbered 22.

14. The present group of draft articles has been arranged in three sections covering: (a) facilities, privileges and immunities of permanent missions to international organizations; (b) conduct of the permanent mission and its members, and (c) end of functions. The explanations of the terms used contained in article 1 of part I are also applicable to part II. At the same time, as is pointed out in paragraph (4) of the commentary on article 25, it was found necessary to add a further explanation, for the purposes of this part, of the term the "premises of the permanent mission". The explanation constitutes a new sub-paragraph of article 1, designated provisionally as (*k bis*), the text of which will be found in the commentary on article 25. Furthermore, during the discussion of this article, the question was raised whether the person charged by the sending State with the duty of acting as the head of the permanent mission

should be referred to as "the permanent representative", as laid down in sub-paragraph (e) of article 1. As is indicated below in paragraph (5) of the commentary on article 25, the Commission decided to examine, at the second reading of article 1, the use of the term "permanent representative" in sub-paragraph (e) of that article.

15. In preparing these draft articles, the Commission has sought to codify the modern rules of international law concerning permanent representatives to international organizations, and the articles formulated by the Commission contain elements of progressive development as well as of codification of the law.

16. In accordance with articles 16 and 21 of its Statute, the Commission decided to transmit the present group of draft articles, through the Secretary-General, to Governments for their observations. It also decided to transmit it, together with the previous group, to the Secretariats of the United Nations, the specialized agencies and the International Atomic Energy Agency (IAEA), for their observations. Bearing in mind the position of Switzerland as the host State in relation to the Office of the United Nations at Geneva and to a number of specialized agencies, as well as the wish expressed by the Government of that country, the Commission deemed it useful to transmit also both groups of draft articles to that Government for its observations.

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

18. The Commission also briefly considered the desirability of dealing, in separate articles, with the possible effects of exceptional situations—such as absence of recognition, absence or severance of diplomatic relations or armed conflict—on the representation of States in international organizations. In view of the delicate and complex nature of those questions, the Commission decided to resume their examination at a future session and to postpone any decision on them for the time being.

19. The text of articles 22 to 50 with commentaries, as adopted by the Commission at the present session on the proposal of the Special Rapporteur, is reproduced below.

⁴ *Official Records of the General Assembly, Twenty-third Session, Sixth Committee, 1029th to 1039th meetings.*

⁵ *Ibid.*, 1039th to 1059th, 1061st to 1072nd and 1087th to 1090th meetings.

B. DRAFT ARTICLES ON REPRESENTATIVES OF STATES
TO INTERNATIONAL ORGANIZATIONS

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

SECTION 2. FACILITIES, PRIVILEGES AND IMMUNITIES

General comments

(1) As a general rule, the headquarters agreements of international organizations, whether universal or regional, include provisions for the enjoyment by permanent representatives of foreign States of privileges and immunities which the host State "accords to diplomatic envoys accredited to it". Usually, these headquarters agreements do not contain restrictions on the privileges and immunities of permanent representatives which are based on the application of the principle of reciprocity in the relations between the host State and the sending State. However, the relevant articles of some of the headquarters agreements include a proviso which makes it an obligation of the host State to concede to permanent representatives the privileges and immunities which it accords to diplomatic envoys accredited to it, "subject to corresponding conditions and obligations". Examples are provided by: article V, section 15, of the Headquarters Agreement of the United Nations;⁶ article XI, section 24, paragraph (a), of the Headquarters Agreement of the Food and Agriculture Organization of the United Nations (FAO);⁷ article I of the Headquarters Agreement of the Organization of American States (OAS).⁸

(2) In determining the rationale of diplomatic privileges and immunities, the International Law Commission discussed, at its tenth session in 1958, the theories which have exercised influence on the development of diplomatic privileges and immunities. The Commission mentioned the "extritoriality" theory, according to which the premises of the mission represent a sort of extension of the territory of the sending State; and the "representative character" theory, which bases such privileges and immunities on the idea that the diplomatic mission personifies the sending State. The Commission pointed out that "there is now a third theory which appears to be gaining ground in modern times, namely, the 'functional necessity' theory, which justifies privileges and immunities as being necessary to enable the mission to perform its functions".⁹

(3) Functional necessity is one of the bases of the privileges and immunities of representatives of States to international organizations. In accordance with Article 105, paragraph 2, of the Charter of the United Nations. "Representatives of the Members of the United

Nations and officials of the Organization shall . . . enjoy such privileges and immunities as are necessary for the independent exercise of their functions in connexion with the Organization".

(4) The representation of States in international organizations is the basic function of permanent missions as defined in article 7 of the twenty-one provisional articles adopted by the Commission at its twentieth session. Article 1, sub-paragraph (d), of these articles, defines a "permanent mission" as "a mission of representative and permanent character sent by a State member of an international organization to the Organization". Paragraph (2) of the commentary on article 7 states that:

Sub-paragraph (a) is devoted to the representational function of the permanent mission. It provides that the mission represent 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.¹⁰

(5) The representation of States within the framework of the diplomacy of international organizations and conferences has its particular characteristics. The representative of a State to an international organization is not the representative of his State to the host State, as is the case of the diplomat accredited to the State. In the latter case, the diplomatic agent is accredited to the receiving State in order to perform certain functions of representation and negotiation between it and his own State. The representative of a State to an international organization represents his State before the organization.

Article 22. General facilities

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

Commentary

(1) The first sentence of article 22 is based on article 25 of the Vienna Convention on Diplomatic Relations.¹¹

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

⁶ United Nations, *Treaty Series*, vol. 11, p. 26.

⁷ *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. 187.

⁸ United Nations, *Treaty Series*, vol. 181, p. 148.

⁹ *Yearbook of the International Law Commission, 1958*, vol. II, document A/3859, pp. 94 and 95.

¹⁰ *Yearbook of the International Law Commission, 1968*, vol. II, document A/7209/Rev.1, p. 200.

¹¹ United Nations, *Treaty Series*, vol. 500, p. 96.

(3) The words "as lie within its own competence" at the end of the second sentence of article 22 are designed to emphasize both that the facilities which an organization is able to grant are limited and that the granting of facilities to a permanent mission by an organization is subject to the relevant rules of the organization, in particular those concerning budgetary and administrative matters.

Article 23. Accommodation of the permanent mission and its members

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

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

Commentary

(1) Article 23 is based on article 21 of the Vienna Convention on Diplomatic Relations. As indicated by the International Law Commission in the commentary on the relevant provision (art. 19) of its draft articles on diplomatic intercourse and immunities,¹² which served as the basis for the Vienna Convention, the laws and regulations of a given country may make it impossible for a mission to acquire the premises necessary for it. For that reason the Commission inserted in article 23 a rule which makes it obligatory for the receiving State to ensure the provision of accommodation for the mission if the latter is not permitted to acquire it. These considerations equally underlie paragraph 1 of the present article.

(2) Certain members of the Commission pointed out during the discussion of the article that in some cases property rights over the premises of a permanent mission could not be obtained by acquisition under the applicable municipal law and that in other cases the premises were acquired not by the sending State but, on its behalf, by the permanent representative. They believed therefore that the expressions "acquisition" and "by the sending State" unduly restricted the scope of article 23. It was, however, observed that both series of cases would come under the clause of article 23 obliging the host State to assist the sending State "in obtaining accommodation in some other way". The Commission decided, therefore, to retain in the article the expressions in question.

(3) The assistance which the Organization may give to the members of the mission in obtaining suitable accommodation under paragraph 2 would be very useful, among other reasons, because the Organization itself would have a vast experience of the real estate market and the conditions governing it.

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

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

Commentary

One of the characteristics of representation to international organizations springs from the fact that the observance of juridical rules governing privileges and immunities is not solely the concern of the sending State as in the case of bilateral diplomacy. In the discussion of the "Question of diplomatic privileges and immunities" (agenda item 98) which took place in the Sixth Committee during the twenty-second session of the General Assembly, it was generally agreed that the United Nations itself had an interest in the enjoyment by the representatives of Member States of the privileges and immunities necessary to enable them to carry out their tasks. It was also recognized that the Secretary-General should maintain his efforts to ensure that the privileges and immunities concerned were respected.¹³ In his statement at the 1016th meeting of the Sixth Committee the Legal Counsel, speaking as the representative of the Secretary-General, stated that:

... the rights of representatives should properly be protected by the Organization and not left entirely to bilateral action of the States immediately involved. The Secretary-General would therefore continue to feel obligated in the future, as he has done in the past, to assert the rights and interests of the Organization on behalf of representatives of Members as the occasion may arise. I would not understand from the discussion in this Committee that the Members of the Organization would wish him to act in any way different from that which I have just indicated. Likewise, since the Organization itself has an interest in protecting the rights of representatives, a difference with respect to such rights may arise between the United Nations and a Member and consequently be the subject of a request for an advisory opinion under section 30 of the Convention (the Convention on the Privileges and Immunities of the United Nations of 1946). It is thus clear that the United Nations may be one of the "parties" as that term is used in section 30.¹⁴

Article 25. Inviolability of the premises of the permanent mission

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

¹² *Yearbook of the International Law Commission, 1958*, vol. II, document A/3859, p. 95.

¹³ *Official Records of the General Assembly, Twenty-second Session, Annexes*, agenda item 98, document A/6965, para. 14.

¹⁴ *Ibid.*, document A/C.6/385, para. 8.

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

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

Commentary

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

There is no specific reference to mission premises in the Headquarters Agreement and the diplomatic status of these premises therefore arises from the diplomatic status of a resident representative and his staff.¹⁵

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

(3) The inviolability of the premises of the United Nations and the specialized agencies was sanctioned in article II, section 3, of the Convention on the Privileges and Immunities of the United Nations and article III, section 5, of the Convention on the Privileges and Immunities of the Specialized Agencies¹⁶ respectively. These provisions state that the property and assets of the United Nations and the specialized agencies, wherever located and by whomsoever held, shall be immune from search, requisition, confiscation, expropriation and any other form of interference, whether by executive, administrative, judicial or legislative action.

(4) As a result of its consideration of article 25 the Commission decided to insert in article 1 (Use of terms) adopted at its twentieth session¹⁷ a new paragraph designated provisionally as (*k bis*) relating to the term "the premises of the permanent mission". The new paragraph (*k bis*), which is based on paragraph (*i*) of article 1 of the Vienna Convention on Diplomatic Relations reads as follows:

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

¹⁵ "The practice of the United Nations, the specialized agencies and the International Atomic Energy Agency concerning their status, privileges and immunities: study prepared by the Secretariat" (hereinafter referred to as "Study of the Secretariat"), *Yearbook of the International Law Commission, 1967*, vol. II, documents A/CN.4/L.118 and Add.1 and 2, p. 187, para. 154.

¹⁶ United Nations, *Treaty Series*, vol. 33, p. 262.

¹⁷ *Yearbook of the International Law Commission, 1968*, vol. II, document A/7209/Rev.1, p. 196.

(5) During the discussion in the Commission some members pointed out that it would be preferable to refer to the person in charge of the mission as "head of the mission" since the permanent representative was not always the head of the permanent mission and several members of the permanent mission might be permanent representatives to different organizations. Further, the permanent mission's premises could be located within the premises occupied by the diplomatic mission of the sending State or possibly by a consular mission. The question would then arise as to which representative of the sending State was responsible for the premises concerned. Considering that the term "permanent representative" was the one used in the twenty-one articles provisionally adopted at its previous session, the Commission decided for the sake of harmony between those articles and the present group of articles to conform to the terminology already used. Further consideration will be given, however, to this question when the Commission undertakes the second reading of the draft articles. The Commission intends to examine again the use of the term "permanent representative" as defined in sub-paragraph (*e*) of article 1.

(6) The third sentence of paragraph 1 reproduces part of the text of the amendment submitted by Argentina to article 25 of the draft articles on special missions and adopted at the 1088th meeting of the Sixth Committee during the latter's consideration of the item entitled "Draft Convention on Special Missions" at the twenty-third session of the General Assembly.¹⁸

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

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

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

Commentary

(1) Article 26 is based on article 23 of the Vienna Convention on Diplomatic Relations, with the addition in paragraphs 1 and 2 of the expression "or another member of the permanent mission acting on behalf of the mission", which appears in article 24 of the draft articles on special missions.

¹⁸ *Official Records of the General Assembly, Twenty-third Session, Annexes*, agenda item 85, document A/7375, paras. 190, 192, 194 and 195.

(2) The replies of the United Nations and the specialized agencies indicate that the exemption provided for in this article is generally recognized. Examples of provisions of headquarters agreements for such exemption are to be found in article XI of the Headquarters Agreement of FAO and in articles XII and XIII of the Headquarters Agreement of IAEA.¹⁹

(3) During the discussion of article 26 the attention of the Commission was drawn to the inequality resulting from the provisions of paragraph 2 as between a State that was able to buy property to house its mission, or the mission staff, and a State which found itself obliged to lease premises for the same purpose. It was pointed out that although the paragraph was based on the corresponding provisions of the 1961 Vienna Convention on Diplomatic Relations and the 1963 Vienna Convention on Consular Relations²⁰ and broadly reflected existing practice, the inequality in question did not represent a universal practice. Thus in the case of IAEA, no taxes are imposed by the host State on the premises used by missions or delegates, including rented premises and parts of buildings. It was suggested that the Commission should examine the problem in order to ascertain whether it was possible to incorporate in article 26 an element of progressive development for the purpose of eliminating that unsatisfactory inequality. It was also pointed out in the discussion that it would be desirable to ascertain whether a certain practice regarding refunds or rebates of taxes on leased premises was general. The Commission intends to examine these matters again at the second reading of the draft articles in the light of the information which the Special Rapporteur would elicit from the specialized agencies and the views of Governments.

Article 27. Inviolability of archives and documents

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

Commentary

(1) Article 27 is based on article 24 of the Vienna Convention on Diplomatic Relations.

(2) In paragraph 3 of its commentary on article 22 (Inviolability of the archives) of its draft articles on diplomatic intercourse and immunities adopted in 1958, the International Law Commission stated:

Although the inviolability of the mission's archives and documents is at least partly covered by the inviolability of the mission's premises and property, a special provision is desirable because of the importance of the inviolability to the functions of the mission. This inviolability is connected with the protection accorded by article 25 to the correspondence and communications of the mission.²¹

¹⁹ United Nations, *Treaty Series*, vol. 339, p. 152.

²⁰ *Ibid.*, vol. 596, p. 262.

²¹ *Yearbook of the International Law Commission, 1958*, vol. II, document A/3859, p. 96.

Article 28. Freedom of movement

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

Commentary

(1) This article is based on article 26 of the Vienna Convention on Diplomatic Relations.

(2) The only difference of substance between the two provisions is the addition in article 28 of the phrase "and members of their families forming part of their respective households". The Commission considered that the families of members of the permanent mission should have the right to travel freely in the host State. The Commission agreed that the present liberal practice with regard to the members of the families of diplomatic agents could be regarded as an expression of a customary rule but that it was preferable to insert a specific provision to that effect in the present draft articles in view, in particular, of the lack of reciprocity in multilateral diplomacy.

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

(4) During the discussion in the Commission some members raised the question whether the proper functioning of permanent missions to international organizations required that their members enjoy the same freedom of movement that was granted to members of diplomatic missions. They suggested that the freedom of movement guaranteed in article 28 should be qualified in the same manner as in the corresponding article (art. 27) of the draft articles on special missions.²² In their view it would be appropriate to restrict freedom of movement to what was necessary for the purpose of the functions of the permanent mission. The majority of the members of the Commission came to the conclusion that the only grounds on which the host State could validly restrict freedom of movement were those of national security, and the article already covered that point. They thought that any attempt to introduce a limitation based on the functional element would unduly restrict the freedom of movement of members of permanent missions. The view of the majority of members was that it would be preferable not to add the reservation which had been provided for in the case of special missions and which was justified by the particular character of those missions. Reference was made in this respect to the fact that if difficulties arose in the case of permanent missions, it would be possible to resort to the consultations envisaged in article 50. Reference was also made to the possibility of regulating such matters in the headquarters agreement between the host State and the Organization, a possibility which was covered by article 4.

²² *Yearbook of the International Law Commission, 1967*, vol. II, document A/6709/Rev.1 and Rev.1/Corr.1, p. 360.

Article 29. Freedom of communication

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

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

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

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

5. The courier of the permanent mission, who shall be provided with an official document indicating his status and the number of packages constituting the bag, shall be protected by the host State in the performance of his functions. He shall enjoy personal inviolability and shall not be liable to any form of arrest or detention.

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

7. The bag of the permanent mission may be entrusted to the captain of a ship or of a commercial aircraft scheduled to land at an authorized port of entry. He shall be provided with an official document indicating the number of packages constituting the bag but he shall not be considered to be a courier of the permanent mission. The permanent mission may send one of its members to take possession of the bag directly and freely from the captain of the ship or of the aircraft.

Commentary

(1) This article is based on article 27 of the Vienna Convention on Diplomatic Relations.

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

(3) Replies of the United Nations and the specialized agencies indicate also that the inviolability of correspondence, which is provided for in article IV, section 11 (b), of the Convention on the Privileges and Immunities of the United Nations²³ and in article V,

section 13 (b), of the Convention on the Privileges and Immunities of the Specialized Agencies, has been fully recognized.

(4) One difference between this article and article 27 of the Vienna Convention on Diplomatic Relations is the addition in paragraph 1 of the words "its special missions" in order to co-ordinate the article with article 28, paragraph 1, of the draft articles on special missions.²⁴ Another is the addition of the words "its permanent missions", in order to enable the permanent missions of the sending State to communicate with each other.

(5) A further difference is that paragraph 7 of article 29 provides that the bag of the permanent mission may be entrusted not only to the captain of a commercial aircraft, as provided for the diplomatic bag in article 27 of the Vienna Convention on Diplomatic Relations, but also to the captain of a merchant ship. This additional provision is taken from article 35 of the Vienna Convention on Consular Relations and article 28 of the draft articles on special missions.

(6) On the basis of article 28 of the draft articles on special missions, the article uses the expression "the bag of the permanent mission" and the "courier of the permanent mission". The expressions "diplomatic bag" and "diplomatic courier" were not used, in order to prevent any possibility of confusion with the bag and courier of the permanent diplomatic mission.

(7) The phrase "by arrangement with the appropriate authorities" which had been added to article 28, paragraph 7, of the draft articles on special missions, has not been included in paragraph 7. In the view of the Commission, although the provision might be of some value for special missions, which were not permanent, the same was not true of permanent missions, for which such arrangements were made on a continuing basis and not on each occasion. Permanent missions were in this respect similar to diplomatic missions. The view was expressed that the omission of the phrase was not, however, to be taken as implying that a member of the permanent mission could, for example, proceed to an aircraft without observing the applicable regulations.

Article 30. Personal Inviolability

The persons of the permanent representative and of the members of the diplomatic staff of the permanent mission shall be inviolable. They shall not be liable to any form of arrest or detention. The host State shall treat them with due respect and shall take all appropriate steps to prevent any attack on their persons, freedom or dignity.

Article 31. Inviolability of residence and property

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

²³ United Nations, *Treaty Series*, vol. I, p. 16.

²⁴ *Yearbook of the International Law Commission, 1967*, vol. II, document A/6709/Rev.1 and Rev.1/Corr.1, pp. 360 and 361.

2. Their papers, correspondence and, except as provided in paragraph 3 of article 32, their property, shall likewise enjoy inviolability.

Commentary

(1) Articles 30 and 31 are based on the provisions of articles 29 and 30 of the Vienna Convention on Diplomatic Relations and of the draft articles on special missions (art. 29 and 30).²⁵

(2) Articles 30 and 31 deal with two generally recognized immunities which are essential for the performance of the functions of the permanent representative and of the members of the diplomatic staff of the permanent mission.

(3) The principle of the personal inviolability of the permanent representative and of the members of the diplomatic staff, which article 30 confirms, implies, as in the case of the inviolability of the premises of the permanent mission, the obligation for the host State to respect, and to ensure respect for, the person of the individuals concerned. The host State must take all necessary measures to that end, which may include the provision of a special guard if circumstances so require.

(4) Inviolability of all papers and documents of representatives of members to the organs of the organizations concerned is generally provided for in the Conventions on the Privileges and Immunities of the United Nations, the Specialized Agencies and other international organizations.

(5) In paragraph 1 of its commentary on article 28 (Inviolability of residence and property) of its draft articles on diplomatic intercourse and immunities adopted at its tenth session (1958), the International Law Commission stated that: "This article concerns the inviolability accorded to the diplomatic agent's residence and property. Because this inviolability arises from that attaching to the person of the diplomatic agent, the expression 'the private residence of a diplomatic agent' necessarily includes even a temporary residence of the diplomatic agent."²⁶

Article 32. Immunity from jurisdiction

1. The permanent representative and the members of the diplomatic staff of the permanent mission shall enjoy immunity from the criminal jurisdiction of the host State. They shall also enjoy immunity from its civil and administrative jurisdiction, except in the case of:

(a) A real action relating to private immovable property situated in the territory of the host State unless the person in question holds it on behalf of the sending State for the purposes of the permanent mission;

(b) An action relating to succession in which the person in question is involved as executor, administrator,

heir or legatee as a private person and not on behalf of the sending State;

(c) An action relating to any professional or commercial activity exercised by the person in question in the host State outside his official functions;

[(d) An action for damages arising out of an accident caused by a vehicle used outside the official functions of the person in question.]

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

3. No measures of execution may be taken in respect of the permanent representative or a member of the diplomatic staff of the permanent mission except in cases coming under sub-paragraphs (a), (b) [and] (c) [and (d)] of paragraph 1 of this article, and provided that the measures concerned can be taken without infringing the inviolability of his person or of his residence.

4. The immunity of the permanent representative or of a member of the diplomatic staff of the permanent mission from the jurisdiction of the host State does not exempt him from the jurisdiction of the sending State.

Commentary

(1) Article 32 is based on article 31 of the Vienna Convention on Diplomatic Relations.

(2) The immunity from criminal jurisdiction granted under paragraph 1 of article 32 is complete and the immunity from civil and administrative jurisdiction is subject only to the exceptions stated in paragraph 1 of the article. This constitutes the principal difference between the "diplomatic" immunity enjoyed by permanent missions and the "functional" immunity accorded to delegations to organs of international organizations and conferences by the Conventions on the Privileges and Immunities of the United Nations and of the Specialized Agencies. Article IV, section 11 (a), of the Convention on the Privileges and Immunities of the United Nations and article V, section 13 (a), of the Convention on the Privileges and Immunities of the Specialized Agencies accord to the representatives of members to the meetings of organs of the organization concerned or to the conferences convened by it "immunity from legal process of every kind" in respect of "words spoken or written and all acts done by them" in their official capacity.

(3) The Commission agreed that the phrase "civil and administrative jurisdiction" in paragraph 1 of article 32 is used in a general sense, in contradistinction to "criminal jurisdiction", and includes, for instance, commercial and labour jurisdiction.

(4) After a lengthy discussion, the Commission was unable, owing to a wide divergence of views, to reach any decision on the substance of the provision in subparagraph 1 (d). It decided to place the provision in brackets and to bring it to the attention of Governments. Those favouring the proposal, which was based on subparagraph (2) (d) of article 31 of the draft articles on special missions, argued that it would meet a real and

²⁵ *Ibid.*, p. 361.

²⁶ *Yearbook of the International Law Commission, 1958*, vol. II, p. 98.

growing problem which had, it was said, been inadequately recognized at the 1961 Vienna Conference on Diplomatic Intercourse and Immunities. Further, there were problems in some countries concerning the application and effect of insurance laws and practices as well as the adequacy of the insurance coverage. On the other hand, it was argued that the Vienna precedent should be followed, since it provided the closer analogy. In addition, considerable emphasis was placed on articles 34 and 45 of the present draft; the former provision, which goes beyond the corresponding resolution of the 1961 Vienna Conference, requires the sending State to waive immunity in respect of civil claims in the host State "when this can be done without impeding the performance of the functions of the permanent mission"; if immunity is not waived the sending State "shall use its best endeavours to bring about a just settlement of such claims". The latter provision requires all persons enjoying privileges and immunities to respect the laws and regulations of the host State. Those opposing the proposal in sub-paragraph 1 (d) also argued that one particular kind of claim should not be singled out in this way and that the functional line drawn in it would be difficult to apply.

Article 33. Waiver of immunity

1. The immunity from jurisdiction of the permanent representative or members of the diplomatic staff of the permanent mission and persons enjoying immunity under article 40 may be waived by the sending State.

2. Waiver must always be express.

3. The initiation of proceedings by the permanent representative, by a member of the diplomatic staff of the permanent mission or by a person enjoying immunity from jurisdiction under article 40 shall preclude him from invoking immunity from jurisdiction in respect of any counter-claim directly connected with the principal claim.

4. Waiver of immunity from jurisdiction in respect of civil or administrative proceedings shall not be held to imply waiver of immunity in respect of the execution of the judgment, for which a separate waiver shall be necessary.

Commentary

(1) Article 33 is based on the provisions of article 32 of the Vienna Convention on Diplomatic Relations. The basic principle of the waiver of immunity is contained in article IV, section 14, of the Convention on the Privileges and Immunities of the United Nations, which states:

Privileges and immunities are accorded to the representatives of Members not for the personal benefit of the individuals themselves, but in order to safeguard the independent exercise of their functions in connection with the United Nations. Consequently a Member not only has the right but is under a duty to waive the immunity of its representative in any case where in the opinion of the Member the immunity would impede the course of justice, and it can be waived without prejudice to the purpose for which the immunity is accorded.

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

Article 34. Settlement of civil claims

The sending State shall waive the immunity of any of the persons mentioned in paragraph 1 of article 33 in respect of civil claims in the host State when this can be done without impeding the performance of the functions of the permanent mission. If the sending State does not waive immunity, it shall use its best endeavours to bring about a just settlement of such claims.

Commentary

(1) This article is based on the important principle stated in resolution II adopted on 14 April 1961 by the United Nations Conference on Diplomatic Intercourse and Immunities.²⁷

(2) The International Law Commission embodied this principle in article 42 of its draft articles on special missions because, as stated in the commentary on that article, "the purpose of immunities is to protect the interests of one sending State, not those of the persons concerned, and in order to facilitate, as far as possible, the satisfactory settlement of civil claims made in the receiving State against members of special missions. This principle is also referred to in the draft preamble drawn up by the Commission."²⁸

Article 35. Exemption from social security legislation

1. Subject to the provisions of paragraph 3 of this article, the permanent representative and the members of the diplomatic staff of the permanent mission shall with respect to services rendered for the sending State be exempt from social security provisions which may be in force in the host State.

2. The exemption provided for in paragraph 1 of this article shall also apply to persons who are in the sole private employ of the permanent representative or of a member of the diplomatic staff of the permanent mission, on condition:

(a) That such employed persons are not nationals of or permanently resident in the host State; and

(b) That they are covered by the social security provisions which may be in force in the sending State or a third State.

²⁷ *Official Records of the United Nations Conference on Diplomatic Intercourse and Immunities* (1961), vol. II, document A/Conf.20/10/Add.1, p. 90.

²⁸ *Yearbook of the International Law Commission, 1967*, vol. II, document A/6709/Rev.1 and Rev.1/Corr.1, pp. 365, 367 and 368.

3. The permanent representative and the members of the diplomatic staff of the permanent mission who employ persons to whom the exemption provided for in paragraph 2 of this article does not apply shall observe the obligations which the social security provisions of the host State impose upon employers.

4. The exemption provided for in paragraphs 1 and 2 of this article shall not preclude voluntary participation in the social security system of the host State provided that such participation is permitted by that State.

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

Commentary

(1) Article 35 is based on article 33 of the Vienna Convention on Diplomatic Relations.

(2) Like paragraph 2 of article 32 of the draft on special missions, paragraph 2 of article 35 substitutes the expression "persons who are in the sole private employ" for the expression "private servants", which is used in article 33 of the Vienna Convention. Referring to this change in terminology, the International Law Commission stated in paragraph 2 of its commentary on article 32 of the draft articles on special missions: "Article 32... applies not only to servants in the strict sense of the term, but also to other persons in the private employ of members of the special mission such as children's tutors and nurses."²⁹

(3) The Commission intends to consider, in the light of the comments to be received from Governments, whether paragraph 5 is necessary in view of the provisions of articles 4 and 5 of the present draft.

Article 36. Exemption from dues and taxes

The permanent representative and the members of the diplomatic staff of the permanent mission shall be exempt from all dues and taxes, personal or real, national, regional or municipal, except:

(a) Indirect taxes of a kind which are normally incorporated in the price of goods or services;

(b) Dues and taxes on private immovable property situated in the territory of the host State, unless the person concerned holds it on behalf of the sending State for the purposes of the permanent mission;

(c) Estate, succession or inheritance duties levied by the host State, subject to the provisions of paragraph 4 of article 42;

(d) Dues and taxes on private income having its source in the host State and capital taxes on investments made in commercial undertakings in the host State;

(e) Charges levied for specific services rendered;

(f) Registration, court or record fees, mortgage dues and stamp duty, with respect to immovable property, subject to the provisions of article 26.

Commentary

(1) This article is based on article 34 of the Vienna Convention on Diplomatic Relations.

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

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

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

(4) Except in the case of nationals of the host State, representatives enjoy extensive exemption from taxation. In the International Civil Aviation Organization (ICAO) and the United Nations Educational, Scientific and Cultural Organization (UNESCO) all representatives, and in FAO and IAEA, resident representatives, are granted the same exemptions in respect of taxation as diplomats of the same rank accredited to the host State concerned. In the case of IAEA, no taxes are imposed by the host State on the premises used by missions or delegates, including rented premises and parts of buildings. Permanent missions to UNESCO pay taxes only for services rendered and real property tax (*contribution foncière*) when the permanent representative is the owner of the building. Permanent representatives are exempt from tax on movable property (*contribution mobilière*), a tax imposed in France on inhabitants of rented or occupied properties, in respect of their principal residence but not in respect of any secondary residence.³⁰

(5) The final phrase of paragraph (f) may give rise to difficulties of interpretation mainly because it states an exception to a rule which is itself an exception. It is, however, based on the corresponding provision (art. 34) of the Vienna Convention on Diplomatic Relations. The Commission would be interested to learn whether Governments have found any practical difficulties in applying that provision.

Article 37. Exemption from personal services

The host State shall exempt the permanent representative and the members of the diplomatic staff of the permanent mission from all personal services, from all

²⁹ Yearbook of the International Law Commission, 1967, vol. II, document A/6709/Rev.1 and Rev.1/Corr.1, p. 362.

³⁰ Study of the Secretariat, Yearbook of the International Law Commission, 1967, documents A/CN.4/L.118 and Add.1 and 2, p. 201, para. 45.

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

Commentary

(1) This article is based on the provisions of article 35 of the Vienna Convention on Diplomatic Relations. The Commission's commentary on the provision on which article 35 was based (article 33 of the draft articles on diplomatic intercourse and immunities), states that it dealt "with the case where certain categories of persons are obliged, as part of their general civic duties or in cases of emergency, to render personal services or to make personal contributions".³¹

(2) The immunity in respect of national service obligations provided in article IV, section 11 (*d*), of the Convention on the Privileges and Immunities, of the United Nations and article V, section 13 (*d*), of the Convention on the Privileges and Immunities of the Specialized Agencies has been widely acknowledged. That immunity does not normally apply when the representative is a national of the host State.³² The phrase "military obligations" covers military obligations of all kinds; the enumeration in article 37 is by way of example only.

Article 38. Exemption from customs duties and inspection

1. The host State shall, in accordance with such laws and regulations as it may adopt, permit entry of and grant exemption from all customs duties, taxes and related charges other than charges for storage, cartage and similar services, on:

(a) Articles for the official use of the permanent mission;

(b) Articles for the personal use of the permanent representative or a member of the diplomatic staff of the permanent mission or members of his family forming part of his household, including articles intended for his establishment.

2. The personal baggage of the permanent representative or a member of the diplomatic staff of the permanent mission shall be exempt from inspection, unless there are serious grounds for presuming that it contains articles not covered by the exemptions mentioned in paragraph 1 of this article, or articles the import or export of which is prohibited by the law or controlled by the quarantine regulations of the host State. Such inspection shall be conducted only in the presence of the person enjoying the exemption or of his authorized representative.

Commentary

(1) This article is based on article 36 of the Vienna Convention on Diplomatic Relations.

³¹ *Yearbook of the International Law Commission, 1958*, vol. II, document A/3859, p. 100.

³² Study of the Secretariat, *Yearbook of the International Law Commission, 1967*, document A/CN.4/L.118 and Add.1 and 2, p. 200, para. 37.

(2) While in general, permanent representatives and members of the diplomatic staff of permanent missions enjoy exemption from customs and excise duties, the detailed application of this exemption in practice varies from one host State to another according to the headquarters agreements and to the system of taxation in force.

(3) As regards the United Nations Headquarters, the United States Code of Federal Regulations, Title 19—Customs Duties (Revised 1964), provides in section 10.30 *b*, paragraph (*b*), that resident representatives and members of their staffs may import "...without entry and free of duty and internal-revenue tax articles for their personal or family use".³³

(4) At the United Nations Office at Geneva the matter is dealt with largely in the Swiss Customs Regulation of 23 April 1952. Briefly, permanent missions may import all articles for official use and belonging to the Government they represent (art. 15). In accordance with the declaration of the Swiss Federal Council of 20 May 1958,³⁴ the heads of permanent delegations may import free of duty all articles destined for their own use or that of their family (art. 16, para. 1). Other members of permanent delegations have a similar privilege except that the importation of furniture may only be made once (art. 16, para. 2).³⁵

(5) The position in respect of permanent missions to specialized agencies having their headquarters in Switzerland is identical with that of permanent missions to the United Nations Office at Geneva. In the case of FAO, the extent of the exemption of resident representatives depends on their diplomatic status and is granted in accordance with the general rules relating to diplomatic envoys. Permanent representatives to UNESCO assimilated to heads of diplomatic missions can import goods at any time for their own use and for that of their mission free of duty. Other members of permanent missions may import their household goods and effects free of duty at the time of taking up their appointment.

Article 39. Exemption from laws concerning acquisition of nationality

Members of the permanent mission not being nationals of the host State, and members of their families forming part of their household, shall not, solely by the operation of the law of the host State, acquire the nationality of that State.

Commentary

(1) This article is based on the rule stated in article II of the Optional Protocol concerning Acquisition of Nationality adopted on 18 April 1961 by the United

³³ *Ibid.*, p. 183, para. 134. For details of the position in respect of the various federal and State taxes in New York, *ibid.*, pp. 183-186, sect. 17 and 18.

³⁴ *Ibid.*, p. 173, para. 62.

³⁵ *Ibid.*, p. 183, para. 136.

Nations Conference on Diplomatic Intercourse and Immunities.³⁶

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

This article is based on the generally received view that a person enjoying diplomatic privileges and immunities should not acquire the nationality of the receiving State solely by the operation of the law of that State, and without his consent. In the first place the article is intended to cover the case of a child born on the territory of the receiving State of parents who are members of a foreign diplomatic mission and who also are not nationals of the receiving State. The child should not automatically acquire the nationality of the receiving State solely by virtue of the fact that the law of that State would normally confer local nationality in the circumstances. Such a child may, however, opt for that nationality later if the legislation of the receiving State provides for such an option. The article covers, secondly, the acquisition of the receiving State's nationality by a woman member of the mission in consequence of her marriage to a local national. Similar considerations apply in this case also and the article accordingly operates to prevent the automatic acquisition of local nationality in such a case. On the other hand, when the daughter of a member of the mission who is not a national of the receiving State marries a national of that State, the rule contained in this article would not prevent her from acquiring the nationality of that State, because, by marrying, she would cease to be part of the household of the member of the mission.³⁷

(3) In support of the Commission's recommendation that the provision should form an integral part of the draft articles on permanent missions, the Commission wishes to point out a significant difference between the Vienna Convention on Diplomatic Relations and the present draft with regard to the scope of application of the rule on acquisition of nationality. The Optional Protocol concerning Acquisition of Nationality of 1961 was intended to apply to the bilateral relationships between the great number of States members of the community of nations. In the case of permanent missions, on the other hand, the persons whose nationality is in question are on the territory of the host State in virtue of their State's membership of the international organization and not of any purely bilateral relation between the two States; indeed, bilateral diplomatic relations may even in some cases not exist between the host State and the sending State. Similarly, the element of reciprocity which exists in the case of diplomatic missions is not present in the case of permanent missions. Accordingly, the Commission considered that in the case of permanent missions exemption from the operation of the local laws of nationality should be made a matter of express provision and not relegated to an Optional Protocol.

³⁶ *Official Records of the United Nations Conference on Diplomatic Intercourse and Immunities* (1961), vol. II, document A/Conf.20/11, p. 88.

³⁷ *Yearbook of the International Law Commission, 1958*, vol. II, document A/3859, p. 101.

Article 40. Privileges and immunities of persons other than the permanent representative and the members of the diplomatic staff

1. The members of the family of the permanent representative forming part of his household and the members of the family of a member of the diplomatic staff of the permanent mission forming part of his household shall, if they are not nationals of the host State, enjoy the privileges and immunities specified in articles 30 to 38.

2. Members of the administrative and technical staff of the permanent mission, together with members of their families forming part of their respective households, shall, if they are not nationals of or permanently resident in the host State, enjoy the privileges and immunities specified in articles 30 to 37, except that the immunity from civil and administrative jurisdiction of the host State specified in paragraph 1 of article 32 shall not extend to acts performed outside the course of their duties. They shall also enjoy the privileges specified in paragraph 1 of article 38, in respect of articles imported at the time of first installation.

3. Members of the service staff of the permanent mission who are not nationals of or permanently resident in the host State shall enjoy immunity in respect of acts performed in the course of their duties, exemption from dues and taxes on the emoluments they receive by reason of their employment and the exemption contained in article 35.

4. Private staff of members of the permanent mission shall, if they are not nationals of or permanently resident in the host State, be exempt from dues and taxes on the emoluments they receive by reason of their employment. In other respects, they may enjoy privileges and immunities only to the extent admitted by the host State. However, the host State must exercise its jurisdiction over those persons in such a manner as not to interfere unduly with the performance of the functions of the permanent mission.

Commentary

(1) This article is based on article 37 of the Vienna Convention on Diplomatic Relations.

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

(3) In paragraph 4 of the article the expression "private servants" which appears in paragraph 4 of article 37 of the Vienna Convention on Diplomatic Relations, has been replaced by the expression "private staff" on the model of articles 32 and 38 of the draft articles on special missions. Paragraph 2 of the commentary on article 32 of the draft articles on special missions, quoted in paragraph (2) of the commentary on article 35 of the present draft, explains the change. That explanation is also valid for permanent missions to international organizations.

Article 41. Nationals of the host State and persons permanently resident in the host State

1. Except in so far as additional privileges and immunities may be granted by the host State, the permanent representative and any member of the diplomatic staff of the permanent mission who are nationals of or permanently resident in that State shall enjoy immunity from jurisdiction, and inviolability, only in respect of official acts performed in the exercise of their functions.

2. Other members of the staff of the permanent mission and persons on the private staff who are nationals of or permanently resident in the host State shall enjoy privileges and immunities only to the extent admitted by the host State. However, the host State must exercise its jurisdiction over those members and persons in such a manner as not to interfere unduly with the performance of the functions of the mission.

Commentary

(1) This article is based on article 38 of the Vienna Convention on Diplomatic Relations. Here, too, the expression "private servants" has been replaced by "private staff".

(2) A number of the conventions on the privileges and immunities of international organizations, whether universal or regional, stipulate that the provisions which define the privileges and immunities of the representatives 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. Since the case of permanent representatives who are nationals of the host State is covered in article 41, paragraph 1, the Commission did not deem it advisable to include in this paragraph a clause concerning permanent representatives who are, or have been, representatives of that State. It considered that any such clause would refer to such an exceptional situation that there was no need to mention it. Moreover, if a person represented or had represented the host State, he was very likely to be one of its nationals and therefore subject to the limitation already imposed by the paragraph.

Article 42. Duration of privileges and immunities

1. Every person entitled to privileges and immunities shall enjoy them from the moment he enters the territory of the host State on proceeding to take up his post or,

if already in its territory, from the moment when his appointment is notified to the host State by the Organization or by the sending State.

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

3. In case of the death of a member of the permanent mission, the members of his family shall continue to enjoy the privileges and immunities to which they are entitled until the expiry of a reasonable period in which to leave the country.

4. In the event of the death of a member of the permanent mission not a national of or permanently resident in the host State or of a member of his family forming part of his household, the host State shall permit the withdrawal of the movable property of the deceased, with the exception of any property acquired in the country the export of which was prohibited at the time of his death. Estate, succession and inheritance duties shall not be levied on movable property the presence of which in the host State was due solely to the presence there of the deceased as a member of the permanent mission or as a member of the family of a member of the permanent mission.

Commentary

(1) This article is based on the provisions of article 39 of the Vienna Convention on Diplomatic Relations. Having regard to the decision set out in paragraph 18 of this report, the Commission has not, however, included the reference to the case of armed conflict which appears in article 39 of the Vienna Convention.

(2) The first two paragraphs of the article deal with the times of commencement and termination of entitlements for persons who enjoy privileges and immunities in their official capacity. For those who do not enjoy privileges and immunities in their official capacity other dates may apply, viz. the dates of commencement and termination of the relationship which constitutes the grounds for the entitlement. The Commission noted that the Vienna Convention on Diplomatic Relations did not contain any specific provisions on the question, whereas the Vienna Convention on Consular Relations did so in article 53. The Commission wished to invite the views of Governments as to whether it was desirable to include a provision on these lines.

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

phrase. The reply contained the following: "You inquire whether the words 'while exercising their functions' should be given a narrow or 'broad' interpretation... I have no hesitation in believing that it was the broad interpretation that was intended by the authors of the Convention."³⁸

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

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

Article 43. Transit through the territory of a third State

1. If the permanent representative or a member of the diplomatic staff of the permanent mission passes through or is in the territory of a third State, which has granted him a passport visa if such visa was necessary, while proceeding to take up or to return to his post, or when returning to his own country, the third State shall accord him inviolability and such other immunities as may be required to ensure his transit or return. The same shall apply in the case of the members of his family enjoying privileges or immunities who are accompanying the permanent representative or member of the diplomatic staff of the permanent mission or travelling separately to join him or to return to their country.

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

3. Third States shall accord to official correspondence and other official communications in transit, including messages in code or cipher, the same freedom and protection as is accorded by the host State. They shall accord to the couriers of the permanent mission who have been granted a passport visa if such visa was necessary, and to the bags of the permanent mission in transit, the same inviolability and protection as the host State is bound to accord.

4. The obligations of third States under paragraphs 1, 2 and 3 of this article shall also apply to the persons mentioned respectively in those paragraphs, and to the official communications and bags of the permanent mission, whose presence in the territory of the third State is due to *force majeure*.

Commentary

(1) The provisions of this article are based on article 40 of the Vienna Convention on Diplomatic Relations.

(2) Reference has been made in paragraph (3) of the commentary on article 42 to the broad interpretation given by the Legal Counsel of the United Nations to the provision of article IV, section 11, of the Convention on the Privileges and Immunities of the United Nations and of article V, section 13, of the Convention on the Privileges and Immunities of the Specialized Agencies which stipulates that representatives shall enjoy the privileges and immunities listed in those Conventions while exercising their functions and during their journeys to and from the place of meeting.

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

While there is little practice, the Secretariat takes the position that such States are obliged to grant access and transit to the representatives of Member States for the purpose in question.³⁹

(4) During the discussion in the Commission the question was raised of deleting the sentence "which has granted him a passport visa if such visa was necessary" in paragraph 1 of article 43. It was noted, however, that when the Commission had drafted the corresponding articles of the Vienna Convention on Diplomatic Relations and of the draft on special missions, it had not intended to lay down an obligation for third States to grant transit, but merely wished to regulate the status of diplomatic agents in transit. Doubts were expressed as to whether such an obligation would be a positive rule at present and as to whether States would be prepared to accept it as *lex ferenda*. Reference was made to the difficulties which the obligation of granting transit would give rise to and in particular to the difficulties that would be encountered in the case in which the request for transit was made on behalf of a person who might be objectionable to the third State. Particular attention was given to the situation when a member of the permanent mission, being a national of a land-locked State, finds himself obliged to pass through the territory of the third State. In such an exceptional situation there is perhaps a case for asserting the existence of an obligation on the part of the third State, at least when it is a member of the organization concerned, by virtue of Articles 104 and 105 of the United Nations Charter and similar provisions in the constitutions of specialized agencies and regional organizations.

Article 44. Non-discrimination

In the application of the provisions of the present articles, no discrimination shall be made as between States.

³⁸ Study of the Secretariat, *Yearbook of the International Law Commission, 1967*, vol. II, documents A/CN.4/L.118 and Add.1 and 2, p. 176, para. 87.

³⁹ *Ibid.*, p. 190, para. 168.

Commentary

(1) Article 44 is based on paragraph 1 of article 47 of the Vienna Convention on Diplomatic Relations.

(2) A difference of substance between the two articles is the non-inclusion in article 44 of paragraph 2 of article 47 of the Vienna Convention. That paragraph refers to two cases in which, although an inequality of treatment is implied, no discrimination occurs, since the inequality of treatment in question is justified by the rule of reciprocity.

(3) In general, headquarters agreements of international organizations contain no restrictions on privileges and immunities of members of permanent missions based on the application of the principle of reciprocity in the relations between the host State and the sending State. Some headquarters agreements, however, include a clause providing that the host State shall grant permanent representatives the privileges and immunities which it accords to diplomatic envoys accredited to it, "subject to corresponding conditions and obligations". Examples of such clauses may be found in article V, section 15, of the Headquarters Agreement of the United Nations, article XI, section 24, paragraph (a), of the Headquarters Agreement of FAO and article 1 of the Headquarters Agreement of OAS.

(4) The Study of the Secretariat states that it has been the understanding of the Secretariat of the United Nations that the privileges and immunities granted should generally be those afforded to the diplomatic corps as a whole, and should not be subject to particular conditions imposed, on a basis of reciprocity, upon the diplomatic missions of particular States.⁴⁰ In his statement at the 1016th meeting of the Sixth Committee of the General Assembly, the Legal Counsel of the United Nations stated that:

The Secretary-General, in interpreting diplomatic privileges and immunities, would look to provisions of the Vienna Convention so far as they would appear relevant *mutatis mutandis* to representatives to United Nations organs and conferences. It should of course be noted that some provisions such as those relating to *agrément*, nationality or reciprocity have no relevancy in the situation of representatives to the United Nations.⁴¹

(5) In deciding not to include a second paragraph on the model of paragraph 2 of article 47 of the Vienna Convention on Diplomatic Relations, the Commission took into account the fact that the extension or restriction of privileges and immunities applies as a consequence of the operation of reciprocity within the framework of bilateral diplomatic relations between the sending State and the receiving State. In the case of multilateral diplomacy, however, it is a matter of relations among States and international organizations and not a matter which belongs exclusively to the relations between the host State and the sending State.

(6) Article 44 is formulated in such broad terms as to make its field of application cover all the obligations

provided for in the draft, whether assumed by the host State, the Organization or third States.

(7) The Commission wishes to point out that the article is placed provisionally and will be removed to the end of the whole draft in order to apply not only to permanent missions, but also to the parts on permanent observers from non-member States and delegations to organs of international organizations in the event that such parts are included in the draft.

SECTION 3. CONDUCT OF THE PERMANENT MISSION AND ITS MEMBERS

Article 45. Respect for the laws and regulations of the host State

1. Without prejudice to their privileges and immunities, it is the duty of all persons enjoying such privileges and immunities to respect the laws and regulations of the host State. They also have a duty not to interfere in the internal affairs of that State.

2. In case of grave and manifest violation of the criminal law of the host State by a person enjoying immunity from criminal jurisdiction, the sending State shall, unless it waives this immunity, recall the person concerned, terminate his functions with the mission or secure his departure, as appropriate. This provision shall not apply in the case of any act that the person concerned performed in carrying out the functions of the permanent mission within either the Organization or the premises of a permanent mission.

3. The premises of the permanent mission shall not be used in any manner incompatible with the exercise of the functions of the permanent mission.

Commentary

(1) Paragraphs 1 and 3 of this article are based on the provisions of article 41, paragraphs 1 and 3, of the Vienna Convention on Diplomatic Relations, and article 48 of the draft articles on special missions.

(2) Unlike paragraph 3 of article 41 of the Vienna Convention on Diplomatic Relations and paragraph 2 of article 48 of the draft articles on special missions, paragraph 3 of this article does not include the expression "as laid down (envisaged) in the present Convention (articles) or by (in) other rules of general international law", nor a phrase similar to that referring to "any special agreements in force between the sending and the receiving State". These were deemed unnecessary, particularly in the light of article 4 of the present draft.

(3) Paragraph 2 has been included in the present article in order to ensure the protection of the host State in the event of a grave and manifest breach of its criminal law by a person enjoying immunity from criminal jurisdiction in the absence of the *persona non grata* procedure in the context of relations between States and international organizations. The expression "unless it waives this immunity", has been included in paragraph 2

⁴⁰ *Ibid.*, p. 178, para. 96.

⁴¹ *Official Records of the General Assembly, Twenty-second Session, Annexes*, agenda item 98, document A/C.6/385, para. 4.

in order to emphasize that the provisions of the paragraph are not intended to derogate from those of article 33. The three alternatives offered to the sending State for the discharge of the obligation imposed on it by paragraph 2 are to be understood as covering the cases of the permanent representative or a member of the diplomatic staff, a member of one of the other categories in the permanent mission and the members of their families. The last sentence of the paragraph contains a saving clause intended *inter alia* to safeguard the independent exercise of the functions of the members of the permanent mission, while keeping within the rule grave crimes committed outside the Organization or the premises of permanent missions, including grave traffic violations.

Article 46. Professional activity

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

Commentary

(1) This article is based on the provisions of article 42 of the Vienna Convention on Diplomatic Relations and article 49 of the draft articles on special missions.

(2) In paragraph 2 of the commentary on article 49 of its draft articles on special missions, the Commission stated that:

Some Governments proposed the addition of a clause providing that the receiving State may permit the persons referred to in article 49 of the draft to practise a professional or commercial activity on its territory. The Commission took the view that the right of the receiving State to grant such permission is self-evident. It therefore preferred to make no substantive departure from the text of the Vienna Convention on this point.⁴²

SECTION 4. END OF FUNCTIONS

Article 47. End of the functions of the permanent representative or of a member of the diplomatic staff

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

(a) On notification to this effect by the sending State to the Organization;

(b) If the permanent mission is finally or temporarily recalled.

Commentary

(1) Sub-paragraph (a) of this article is based on the provisions of sub-paragraph (a) of article 43 of the Vienna Convention on Diplomatic Relations.

(2) Sub-paragraph (b) refers to the case where the sending State recalls the permanent mission for reasons which may or may not relate to the membership of the sending State in the organization to which that mission has been sent.

(3) This article does not contain a provision corresponding to sub-paragraph (b) of article 43 of the Vienna Convention on Diplomatic Relations, which provides as one of the modes of termination of the function of a diplomatic agent the "notification by the receiving State to the sending State that, in accordance with paragraph 2 of article 9, it refuses to recognize the diplomatic agent as a member of the mission". Under paragraph 2 of article 9 of the Vienna Convention on Diplomatic Relations, the receiving State may refuse such recognition if the sending State refuses or fails within a reasonable period to carry out its obligations under paragraph 1—relating to the declaration of a diplomatic agent as *persona non grata* by the receiving State. As mentioned in paragraph (3) of the commentary on article 10 of the present draft.

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.⁴³

It is also the basis of the right of the receiving State, to request the recall of the diplomatic agent when it declares him *persona non grata*.

Article 48. Facilities for departure

The host State shall, whenever requested, grant facilities in order to enable persons enjoying privileges and immunities, other than nationals of the host State, and members of the families of such persons irrespective of their nationality, to leave its territory. It shall, in case of emergency, place at their disposal the necessary means of transport for themselves and their property.

Commentary

(1) Article 48 is based on the provisions of article 44 of the Vienna Convention on Diplomatic Relations. However, the expression "even in case of armed conflict" has not been included in the present article in view of the decision set out in paragraph 18 of the present report. The Commission has substituted instead the words "whenever requested". Also, the words "in particular, in case of need", which appear in article 44 of the Vienna Convention, have been replaced by the expression "in case of emergency", in order to emphasize that the host State is under no obligation to put at the disposal of members of the permanent mission means of transportation for travel taking place under normal circumstances.

⁴² Yearbook of the International Law Commission, 1967, vol. II, document A/6709/Rev.1 and Rev.1/Corr.1, p. 367.

⁴³ Yearbook of the International Law Commission, 1968, vol. II, document A/7209/Rev.1, p. 203.

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

Article 49. Protection of premises and archives

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

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

Commentary

(1) The first sentence of paragraph 1 is based on the provisions of article 45 of the Vienna Convention on Diplomatic Relations, except as to the expression "even in case of armed conflict", which has been excluded in view of the decision set out in paragraph 18 of the present report.

(2) The second sentence of paragraph 1 does not appear in article 45 of the Vienna Convention on Diplomatic Relations. The Commission considered that its addition was needed because of the difference in character between a permanent mission and a diplomatic mission. Following a breach, diplomatic relations are normally resumed after a reasonable period. Withdrawal of a permanent mission to an international organization, on the other hand, may be due to a wide variety of causes and may even be final. The host State is not directly involved in the factors which may determine such a withdrawal or its duration. It would, therefore, mean imposing an unjustified burden on that State to require it to provide, for an unlimited period, special guarantees concerning the premises, archives and property of a permanent mission which has been recalled even on a temporary basis. It was therefore decided in article 49 that, in case of the recall of its permanent mission, the sending State must terminate this special duty of the host State within a reasonable time. The sending State is free to discharge that obligation in various ways, for instance, by removing its property and archives from the territory of the host State or by entrusting them to its diplomatic mission or to the diplomatic mission of another State. The second sentence of article 49, paragraph 1, has been drafted in the most general terms in order to cover all these possibilities. The premises similarly cease to enjoy special protection from the time the property and archives situated in them have been withdrawn or, after the expiry of a reasonable period, have ceased to enjoy special protection. Where the sending State has failed to discharge its obligation

within a reasonable period, the host State ceases to be bound by the special duty imposed by article 49, but, with respect to the property, archives and premises, remains bound by any obligations which may be imposed upon it by its municipal law, by general international law or by special agreements.

(3) Paragraph 2 of article 49 is based on article 46, paragraph 2, of the draft articles on special missions.

Article 50.⁴⁴ Consultations between the sending State, the host State and the Organization

If any question arises between a sending State and the host State concerning the application of the present articles, consultations between the host State, the sending State and the Organization shall be held upon the request of either State or the Organization itself.

Commentary

(1) In connexion with the examination of the provisional twenty-one draft articles adopted by the Commission in the course of its twentieth session, suggestions were made by some members of the Commission that the Special Rapporteur prepare a provision of general scope of application on the question of consultations between the sending State, the host State and the Organization.⁴⁵ The purpose of the consultations in question would be to seek solutions for any difficulties between the host State and the sending State in connexion with the establishment and the activities of the permanent mission. The need for such consultations is underlined by the difficulties which may arise as a result of the non-applicability between States members of international organizations and between States members and the organizations, of rules of inter-State bilateral diplomatic relations regarding *agrément*, the declaring of a diplomatic agent as *persona non grata* and reciprocity.

(2) Article 50 is intended to be sufficiently flexible to envisage the holding of consultations between the sending State and the host State or between either or both of them and the organization concerned. Moreover, the article provides that those consultations shall be held not only upon the request of the States concerned, but also upon the request of the Organization itself. It applies, in particular, to the case where a question arises between the host State on the one hand, and several sending States, on the other. In such a case, all the sending States concerned can participate in the consultations with the host State and the Organization.

⁴⁴ Article 50 was put provisionally at the end of the group of articles adopted by the Commission at its twenty-first session. Its place in the draft as a whole will be determined by the Commission at a later stage.

⁴⁵ See paragraph (8) of the commentary on article 16 in the report of the International Law Commission on the work of its twentieth session (*Yearbook of the International Law Commission, 1968*, vol. II, document A/7209, p. 209) and paragraph 5 of the Special Rapporteur's fourth report on relations between States and international organizations (A/CN.4/218 and Add.1).

(3) As regards the duty of the Organization to ensure the application of the provisions of the present draft, the Commission refers to article 24.

(4) The provision for consultations is not uncommon in international agreements. It may be found for example in article IV, section 14, of the Agreement of 26 June 1947 between the United Nations and the United States of America regarding the Headquarters of the United Nations and in article 6 of the Inter-American Treaty of Reciprocal Assistance of 2 September 1947.⁴⁶

(5) In his fourth report, the Special Rapporteur had proposed the addition to this article, which was then article 49, of a second paragraph drafted as follows:

2. The preceding paragraph is without prejudice to provisions concerning settlement of disputes contained in the present articles or other international agreements in force between States or between States and international organizations or to any relevant rules of the Organization.⁴⁷

The Commission did not consider it advisable to add this paragraph in view of the terms of articles 3, 4 and 5 concerning the application of the relevant rules of international organizations and of international agreements. It also reserved the possibility of including at the end of the draft articles a provision concerning the settlement of disputes which might arise from the application of the articles.

CHAPTER III

Succession of States and Governments

A. HISTORICAL BACKGROUND

20. At its first session, held in 1949, the International Law Commission listed the topic "Succession of States and Governments" among the fourteen selected for codification but did not give priority to its study.⁴⁸ Following the adoption by the General Assembly of resolution 1686 (XVI) of 18 December 1961, entitled "Future work in the field of the codification and progressive development of international law", the International Law Commission in 1962, at its fourteenth session, decided to include "Succession of States and Governments" in its programme of work, in view of the fact that the General Assembly, in sub-paragraph 3 (a) of the above-mentioned resolution, had recommended the Commission to include that topic in its priority list.⁴⁹

21. 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 requested 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. The Sub-Committee held two private meetings, on 16 May and 21 June 1962. In the light of the Sub-Committee's suggestions, the Commission took some procedural decisions at its 668th and 669th meetings, held on 26 and 27 June 1962. It decided, *inter alia*, to request the Sub-Committee to meet at Geneva in January 1963, in order to continue its work, and to place on the agenda for its fifteenth session the item "Report of the Sub-Committee on Succession of States and Governments".⁵⁰ The Secretary-General sent a circular note to the Governments of Member 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 had achieved independence since the Second World War.⁵¹ By its resolution 1765 (XVII) of 20 November 1962, the General Assembly recommended that the Commission

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.

22. 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). 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. 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).⁵²

⁴⁶ United Nations, *Treaty Series*, vol. 11, p. 12 and *ibid.*, vol. 21, p. 92. For other examples, see P. Guggenheim, *Traité de droit international public* (Geneva, Librairie de l'Université, Georg et Cie S.A., 1954), vol. II, pp. 198-200.

⁴⁷ A/CN.4/218 and Add.1, art. 49.

⁴⁸ *Yearbook of the International Law Commission, 1949*, document A/925, p. 281, para. 16.

⁴⁹ *Yearbook of the International Law Commission, 1962*, vol. II, document A/5209, p. 190, para. 60.

⁵⁰ *Yearbook of the International Law Commission, 1962*, vol. II, document A/5209, pp. 189-192, paras. 54, 55, 70 to 72.

⁵¹ *Ibid.*, p. 192, para. 73.

⁵² *Yearbook of the International Law Commission, 1963*, vol. II, document A/5509, annex II, pp. 260-300.

23. 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. The Commission unanimously approved the Sub-Committee's report and gave its general approval to the recommendations contained therein. At the same time, the Commission appointed Mr. Lachs as Special Rapporteur on the topic "Succession of States and Governments". The Sub-Committee proposed that the Commission should remind Governments of the Secretary-General's circular note referred to above, and the Commission gave instructions to the Secretariat with a view to obtaining further information on the practice of States.⁵³

24. The Commission endorsed the Sub-Committee's view that the objectives 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". Several members emphasized that in view of the modern phenomenon of decolonization, "special attention should be given to the problems of concern to the new States". 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". Likewise, the Commission underlined that it was "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". 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" was also endorsed by the Commission. The broad outline, the order of priority of the headings and the detailed division of the topic recommended by the Sub-Committee were 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.

25. 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 topic, "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". Occupied with the codification of other branches of international law, such as the law of treaties and special missions, the International Law Commission did not consider the topic of the successions of States and Governments at its sixteenth (1964), seventeenth (1965/1966) and eighteenth (1966) sessions.⁵⁴ 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)".

26. At its nineteenth session (1967), the International Law Commission made new arrangements for the work on the succession of States and Governments. The topic was placed on the agenda of the Commission for that session in accordance with a decision taken in 1966.⁵⁵ Taking into account the agreed broad outline of the subject laid down in the report submitted by its Sub-Committee in 1963, and the fact that Mr. Lachs, the Special Rapporteur on the topic, had ceased to be a member of the Commission because of his election to the International Court of Justice in December 1966, the Commission, in order to advance its study more rapidly and acting on a suggestion previously made by Mr. Lachs, decided to divide the topic into the three headings mentioned in the Sub-Committee's report (see para. 24 above) and appointed Special Rapporteurs for two of them: 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

⁵⁴ The final draft articles on the law of treaties adopted by the Commission in 1966 did 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" (*Yearbook of the International Law Commission, 1966*, vol. II, document A/6309/Rev.1, part II, p. 177, para. 30 of the report, and p. 256, para. 6 of the commentary on article 58 of the draft). Article 69 of the draft articles on the law of treaties embodied a reservation on this matter. The position of the Commission was in accordance with the decision of principle which it had adopted in 1963 in the context of the topic "Succession of States and Governments" (see para. 24 above). However, in the process of codifying the law of treaties reference was made to the succession of States and Governments, in 1963, in connexion with the extinction of the international personality of a State and the termination of treaties and, in 1964, with regard to the territorial scope of treaties and the effects of treaties on third States.

⁵⁵ *Yearbook of the International Law Commission, 1966*, vol. II, document A/6309/Rev.1, part II, p. 278, para. 74.

⁵³ *Ibid.*, pp. 224 and 225, paras. 56-61.

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 international organizations. Consequently, the Commission did not appoint a Special Rapporteur for this heading.⁵⁶

27. 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 its work on that aspect of the topic as rapidly as possible as from its twentieth session in 1968. 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".

28. The Commission's decisions referred to in paragraphs 26 and 27 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)".

29. At its twentieth session (1968), 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 "Succession of States and Governments in respect of treaties" (A/CN.4/202) 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.

30. 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 were reproduced in the Committee's report on the session together with a summary of the views expressed by the members of the Commission during the discussion preceding their adoption.⁵⁷

31. 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 to 968th meetings. The Commission endorsed the suggestion of the Special Rapporteur that it was unnecessary to repeat in the context of the Commission's 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 connexion with succession in respect of treaties. The Commission's report reproduced, however, a summary of views expressed on questions such as the title of the topic, the dividing line between the two topics of succession, and the nature and form of the work. Following the discussion, the Commission concluded that it was not called upon to take any formal decision in regard to "Succession in respect of treaties".⁵⁸

32. As reflected in the pertinent chapter of the report on the work of its twentieth session, the Commission deemed it desirable, *inter alia*, to complete the study of succession in respect of treaties and to make progress on the study of succession in respect of matters other than treaties during the remainder of the Commission's term of office in its present composition.⁵⁹ At the General Assembly's twenty-third session, it was noted with satisfaction that the International Law Commission, following the recommendation of the General Assembly, had begun to consider in depth the topic of succession of States and Governments, and that some progress had already been achieved at the Commission's twentieth session. Once again, the General Assembly, in its resolution 2400 (XXIII) of 11 December 1968, noted with

⁵⁶ *Yearbook of the International Law Commission, 1967*, vol. II, document A/6709/Rev.1, p. 368, paras. 38-41.

⁵⁷ *Yearbook of the International Law Commission, 1968*, vol. II, document A/7209/Rev.1, pp. 216-221, paras. 45-79.

⁵⁸ *Ibid.*, pp. 221 and 222, paras. 80-91.

⁵⁹ *Ibid.*, pp. 223 and 224, paras. 100, 101, 103 and 104.

approval the programme of work planned by the International Law Commission and recommended the Commission to 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)".

33. At the present session of the Commission, Mr. Mohammed Bedjaoui, Special Rapporteur on succession in respect of matters other than treaties, submitted a second report (A/CN.4/216/Rev.1) entitled "Economic and financial acquired rights and State succession". Sir Humphrey Waldock, Special Rapporteur on succession in respect of treaties, submitted also a second report (A/CN.4/214 and Add.1 and 2) on this other aspect of the topic. Owing to the lack of time the Commission considered only the report submitted by Mr. Bedjaoui at the 1000th to 1003rd and 1005th to 1009th meetings.

34. The Secretariat distributed, at the present session of the Commission, a new study in the series "Succession of States to multilateral treaties". The study, the sixth of the series, was entitled "Food and Agricultural Organization of the United Nations: Constitution and multilateral conventions and agreements concluded within the Organization and deposited with its Director-General" (A/CN.4/210).⁶⁰

B. SUCCESSION IN RESPECT OF MATTERS OTHER THAN TREATIES

35. In 1968, at its twentieth session, the Commission decided to begin its study of succession in respect of matters other than treaties with the aspect of the topic

⁶⁰ As recorded in paragraph 43 of the Commission's Report on the work of its twentieth session, the Secretariat had previously prepared and distributed, in accordance with the Commission's requests, the following documents and publication relating to succession of States and Governments: (a) a memorandum on "The succession of States in relation to membership in the United Nations" (*Yearbook of the International Law Commission, 1962*, vol. II, documents A/CN.4/149 and Add.1, p. 101); (b) a memorandum on "Succession of States in relation to general multilateral treaties of which the Secretary-General is the depositary" (*ibid.*, document A/CN.4/150, p. 106); (c) a study entitled "Digest of the decisions of international tribunals relating to State Succession" (*ibid.*, document A/CN.4/151, p. 131); (d) a study entitled "Digest of decisions of national courts relating to succession of States and Governments" (*Yearbook of the International Law Commission, 1963*, vol. II, document A/CN.4/157, p. 95); (e) five studies in the series "Succession of States to multilateral treaties", entitled respectively "International Union for the Protection of Literary and Artistic Work: Berne Convention of 1886 and subsequent Acts of revision" (Study I), "Permanent Court of Arbitration and The Hague Conventions of 1889 and 1907" (Study II), "The Geneva Humanitarian Conventions and the International Red Cross" (Study III), "International Union for the Protection of Industrial Property: Paris Convention of 1883 and subsequent Acts of revision and special agreements" (Study IV) and "The General Agreement on Tariffs and Trade and its subsidiary instruments" (Study V) (*Yearbook of the International Law Commission, 1968*, vol. II, documents A/CN.4/200 and Add.1 and 2, p. 1); (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 paragraphs 21 and 23 above.

relating to "succession of States in economic and financial matters" and instructed the Special Rapporteur, Mr. Mohammed Bedjaoui, to prepare a report on it for the next session of the Commission.⁶¹ At the present session, as indicated in paragraph 33 above, the Special Rapporteur submitted a report (A/CN.4/216/Rev.1), dealing with the question of "economic and financial acquired rights and State succession" and the Commission devoted nine meetings to its consideration (1000th to 1003rd and 1005th to 1009th meetings). An account is given below of the views expressed by the Special Rapporteur and other members of the Commission during the consideration of the report as well as of the conclusions reached and decisions taken by the Commission at the end of the debate.

1. General views on the scope, approach and conclusions of the report submitted by the Special Rapporteur

36. As reflected in his report, the Special Rapporteur took as his starting-point the principle of equality of States and went on to show that international law does not recognize two categories of States, that of successor State constituting an inferior category. Even if a special status were to be accorded to the successor States, account would nevertheless have to be taken of a number of principles of contemporary international law and relevant resolutions adopted by the United Nations General Assembly which recognized that all peoples are entitled to decide freely their political and economic system.

37. The Special Rapporteur was of the opinion that acquired rights could not have a legal basis in a transfer of sovereignty from the predecessor State to the successor State entailing a transfer of obligations. There was no transfer but a substitution of sovereignties by the extinction of one and the creation of another. The successor State possessed its own sovereignty as an attribute that international law attached to statehood. On the other hand, a transfer would imply, in his opinion, a change in the character of the obligations themselves, making them more onerous for the successor State. In the light of contradictions in practice, jurisprudence and doctrine, the Special Rapporteur regarded also as neither provable nor useful the thesis that the successor State was obliged to respect acquired rights by virtue of an autonomous obligation of international law. Likewise, he saw a certain inadequacy in the theory of acquired rights as applied to the problems of compensation for derogations therefrom, in particular with regard to acquired rights of aliens. Considering that antinomy existed between decolonization and acquired rights, the Special Rapporteur felt that the theory of acquired rights was even more untenable in the case of newly independent States.

38. Finding no legal basis for the theory of acquired rights and convinced of the highly contradictory nature of the precedents, which needed re-examination, the Special Rapporteur held, in short, that the successor State was not bound by the acquired rights granted by the

⁶¹ *Yearbook of the International Law Commission, 1968*, vol. II, document A/7209/Rev.1, p. 221, para. 79.

predecessor State, and that it was so bound only if it acknowledged those rights of its own free will or if its competence was restricted by treaty. But the competence of the successor State was obviously not arbitrary. In its actions, it must not depart at any time from the rules of conduct governing every State. For, before becoming a successor State, it was a State, in other words, a legal entity having, in addition to its rights, international obligations the violation of which would engage its international responsibility.

39. The approach and conclusions of the report were supported in principle by some members of the Commission, who found it a complete presentation of the various trends existing on the subject in practice and theory. Some members agreed with certain of the arguments advanced in the report but deemed it difficult to subscribe without reservation to its conclusions. Thus, it was pointed out that the principle of equality of States is not impaired because a State assumes additional obligations arising out of a valid treaty or from the application of a rule of general international law. Other members, however, disagreed with the content and conclusions of the report because, in their opinion, the issues were not adequately developed, and the presentation of the material was incomplete and somewhat lacking in balance. Express reservations as to the legal analysis of a number of issues dealt with in the report were also made by certain members of the Commission.

40. The Special Rapporteur's views that State succession implied a substitution and not a transfer of sovereignty, that under international law the sovereignty of a successor State was an attribute of its statehood, and that in its actions it was subject to the rules of international law applicable to any State were shared by several members. Some members of the Commission commended the Special Rapporteur on having studied the theory of acquired rights in the light of basic principles of contemporary international law and relevant declarations recently adopted by the General Assembly or by international conferences convened under the auspices of the United Nations. Others thought that those principles were not absolute and sometimes not acceptable and that, consequently, unrestrained discretion could not be allowed to the States invoking them. It was also added that the legal meaning and scope of General Assembly resolutions (e.g. resolution 1803 (XVII) of 14 December 1962 on permanent sovereignty over natural resources) should be invoked with caution because they reflected a delicate political compromise between Member States, and their interpretation was controversial.

41. The need to study all origins and types of succession in order to formulate appropriate rules was stressed by several members. For some, there were good reasons to place emphasis on decolonization but that type of succession, which would probably require special treatment, did not exhaust the subject. The study should, therefore, cover other causes of succession, such as the establishment and dissolution of unions, mergers, partitions and partial transfers of territory. Other members thought that the process of succession arising from decolonization should not be studied exclusively from the standpoint of the relationship between the predecessor

and the successor States, because relations with third States or among the successor States themselves (dissolution of colonial federations) could be likewise at stake. Some members were of the opinion that decolonization was more a cause than a type of succession. Considering that decolonization had reached a very advanced stage, other members said that the Commission should focus its attention on the causes of succession which might become more frequent in the future (e.g. establishment of and secession from economic integrations and federal unions). Lastly, some members emphasized that the circumstances surrounding certain cases of succession, in particular cases of independence resulting from a freely accepted agreement, should not be overlooked.

42. In this connexion, the Special Rapporteur stated that, in his view, decolonization was not a momentary phenomenon which came to an end simply because independence was attained, but rather a lengthy process during which the structural changes involved had to be examined in the specific context of State succession. This view was shared by some members of the Commission, while others took a different view.

2. The succession of States and the problem of acquired rights

43. Some members of the Commission agreed with the Special Rapporteur's understanding that contemporary international law did not recognize so-called acquired rights in connexion with private persons, individuals or corporate bodies. The right of property has always been relative and subject to changes, and international law has allowed States to nationalize the property of aliens and nationals alike. Other members also considered juridically correct the thesis of the non-existence of a rule of international law on which acquired rights would be based but, at the same time, recognized that for political reasons certain elements of the concept had sometimes been applied in practice, or that it might occasionally help to solve some specific problems (e.g. debts of public utility, cases relating to certain types of private rights). With regard to certain public rights, it was pointed out that, where succession resulted from other causes than decolonization, certain rights of States (e.g., public property, public debts) deserved protection, and that the legal means of safeguarding them should be studied.

44. In the opinion of other members, the notion of acquired rights had been recognized in international practice and jurisprudence and in treaties and must be respected in cases of succession. Such rights might be not absolute, their concept might be somewhat imprecise, and they could be limited, but it was not possible to accept their outright suppression. The successor State must, like its predecessor, respect a minimum of rights of aliens (e.g. the right to property), including certain acquired rights; where appropriate, international law supported such respect of acquired rights by imposing an obligation to pay compensation. Exceptions to that principle were only admitted where the predecessor State had granted the rights in bad faith, where such rights

were not in conformity with the public and social order of the successor State, and where the maintenance of the rights in question was contrary to the general interest. It was also added by some members that acquired rights obtained by illegal means were not protected by international law.

45. Certain members considered it impossible either to reject the concept of acquired rights or to accept it without any qualifications. It had been recognized in the past by international jurisprudence as a rule of customary international law, but the position had shifted since then. At present, the concept was highly controversial. The Commission's task was not to engage in a doctrinal debate on the existence or non-existence of acquired rights, but to consider whether or not it was essential that, even in the case of State succession, aliens should be guaranteed the treatment accorded to them by international law.

46. It was also mentioned that no legal system could allow itself to reject all transitional rights. There could not be automatic extinction of all rights. The successor State was, by virtue of the rules governing State succession, under an obligation to respect those rights as long as no change of régime was introduced in its legal order, that change being, of course, subject to any limits laid down by the rules of international law.

47. For some members of the Commission, compensation was the remedy provided for by international law to reconcile the principle of acquired rights and the principle of the sovereign equality of States. Among the reasons advanced were the principles of unjust enrichment and equity. States had the right to nationalize or expropriate property rights which had the character of acquired rights, but the exercise of that right carried with it the obligation to pay compensation. Certain members referred to prompt, adequate and effective compensation. Others said that the compensation should be equitable, should be fixed according to the circumstances, and should take into consideration the capacity of the successor State to pay. While recognizing in principle the obligation to pay compensation, certain members excluded its automatic application in certain situations derived from some specific causes of succession.

48. On the other hand, other members were of the opinion that international law did not limit the sovereignty of the State in that respect, even though, for reasons of political or economic expediency, equitable compensation had been sometimes granted in practice, by agreement or otherwise. Some of them believed that in this matter a distinction should be made between large land-owners or corporations and private individuals of modest means. Only the latter should in certain cases receive reasonable compensation for reasons of humanity and equity.

49. Lastly, other members noted that the present trend was to have recourse to global settlements by international arrangements or agreements. It was also suggested that the problem of compensation should be approached in the light of the modern principles of international economic co-operation between developing and developed countries.

50. The principles of international law concerning unjust enrichment, human rights, good faith and equity were frequently mentioned during the debate as possible legal foundations for the protection of rights existing prior to the succession. Thus, it was said that the abolition by a successor State of certain economic and financial rights could involve an unjust enrichment, that the rules regarding human rights protected certain essential rights of aliens and nationals, including property rights, that good faith was at stake where investments were covered by formal or *de facto* agreements, and that equity could serve to remedy certain situations.

51. The Special Rapporteur for his part considered that in practice the notion of unjust enrichment would not be applicable in the context of decolonization, if only because, if applied, it would give rise to court cases which would not serve the cause of good relations between the predecessor and the successor States. As far as human rights were concerned, he voiced the opinion that present differences between the individualist and collectivist standpoints might also prove a source of difficulty. The notion of good faith was, in his view, too vague to be adopted as a basis. The Special Rapporteur's position on these points was the subject of lively controversy in the Commission.

3. *Economic and financial acquired rights and specific problems of new States*

52. Some members underlined that in cases of decolonization the starting-point should be that all so-called economic and financial acquired rights were void. In their view, the right of new States, as of all other States, to nationalize and exploit their natural resources in the way they believed most appropriate for their economic development should not be jeopardized. On the other hand, investments made during the colonial period had frequently been amortized long before independence and had paid off very often the equivalent of several times their value.

53. Other members considered that decolonization and respect for acquired rights were not necessarily contradictory. In their view, if the facts were that the respect of economic and financial acquired rights in a new State which was a former colony constituted a severe limitation on its economic development, this should be taken into account and appropriate remedies should be devised. Certain members affirmed that in the absence of particular agreements the principle of the respect of acquired rights remained valid, even in cases of succession resulting from decolonization.

54. Other members shared the view that compensation and terms of payment for expropriation of property should be calculated so as to take into account losses suffered by the former colony in connexion with that property. Benefits derived in the past under the colonial régime would have to be taken into consideration to avoid unjust enrichment.

55. Stress was laid on the difficulties which might arise in cases of decolonization where an enormous volume of rights became aliens' rights overnight. In such cases

the rules governing compensation were impracticable and should be replaced by equitable solutions based on international solidarity and economic co-operation. Once the decolonization process had been completed and there was again an equitable participation in economic and social progress in all continents, and flagrant inequalities had been remedied, the general rules of international law governing compensation would be seen in their normal perspective.

56. Lastly, certain members considered it important to ascertain what the economic and financial consequences might be of the maintenance, discontinuance or modification of the principle of acquired rights. In their view, large scale nationalization without compensation might adversely affect new States and developing countries by hindering the international assistance necessary for their economic development. On the other hand, equitable protection of economic and financial acquired rights could encourage foreign capital investment and technical assistance. Other members said that in this field not only legal but also economic and political factors should be taken into consideration in order to avoid reactions detrimental to the developing countries. Contemporary realities should be faced and acceptable safeguards and settlement procedures worked out.

4. *Succession in economic and financial matters as a question of continuity or discontinuity of legal situations existing prior to the succession*

57. In the opinion of some members the essential question was to ascertain the extent to which a successor State was bound to respect pre-existing legal situations (rights and obligations) lawfully constituted on the basis of the legal order of the predecessor State in respect of the territory which became that of the successor State. In other words, the problem was to find out in what situations, in the absence of a specific treaty régime, the very fact that a State had succeeded another introduced an element that authorized the successor to derogate from the general rules of international law applicable to those situations before the succession. The codification of the international law relating to succession in economic and financial matters would consist, for those members, in determining the possible exceptions to the general principle of the equality of rights and obligations of the predecessor and the successor States with regard to those legal situations. The Special Rapporteur and certain members deemed it reasonable to believe that the obligations of the successor State would be lessened because it had not participated in creating them (*res inter alios acta*).

5. *Relationship between succession in economic and financial matters, the rules governing the treatment of aliens and the topic of State responsibility*

58. It was generally agreed that problems relating to the protection of aliens and of their acquired rights arose both in connexion with State succession and in other contexts. The Special Rapporteur commented that it was not a question of determining whether or not

those problems arose exclusively in connexion with State succession, but whether they arose at the same time, and on the same terms, in the framework of succession in economic and financial matters. He considered that problems relating to the treatment of aliens would have to be dealt with specifically in the context of State succession.

59. Reference was made during the debate by certain members to matters such as the equal treatment of nationals and aliens, to the obsolescence of the distinction between nationals and aliens with respect to the protection of certain rights, to the desirability of giving separate treatment to economic and financial rights of individuals and to those which belonged to corporate bodies, to the difficult questions of nationality which arose from decolonization, and to the need of a reassessment of the notion of the "international minimum standard" in the light of present principles and rules of positive international law.

60. Some members took the view that the study of acquired rights belonged to the topic of State responsibility rather than to that of succession in economic and financial matters. Others considered that it could be studied either in the context of State succession or in that of State responsibility, or separately. The Special Rapporteur for the topic of succession in respect of matters other than treaties stated that succession was concerned only with the existence or non-existence of international obligations, namely with the question of what a successor State could or could not legally do, while State responsibility, as defined by the Special Rapporteur for that topic, dealt with the problems arising out of the violation of existing rules.

6. *Conclusions and decisions of the Commission*

61. At the end of the debate, most members of the Commission were of the opinion that the codification of the rules relating to succession in respect of matters other than treaties should not begin with the preparation of draft articles on acquired rights. The topic of acquired rights was extremely controversial and its study, at a premature stage, could only delay the Commission's work on the topic as a whole. The efforts of the Commission should, therefore, be directed to finding a solid basis on which to go forward with the codification and progressive development of the topic, taking into account the differing legal interests and current needs of States. Consequently, most members of the Commission considered that an empirical method should be adopted for the codification of succession in economic and financial matters, preferably commencing with a study of public property and public debts. Not until the Commission had made sufficient progress, or perhaps had even exhausted the entire subject, would it be in a position to deal directly with the problem of acquired rights.

62. Referring to the provisional decision adopted at its 1009th meeting and to paragraph 93 of this report, the Commission requested the Special Rapporteur to prepare another report containing draft articles on succession of States in respect of economic and financial matters, taking into account the comments of members

of the Commission on the reports he had already submitted at the Commission's twentieth and twenty-first sessions. The Commission took note of the Special Rapporteur's intention to devote his next report to public property and public debts. It thanked the Special Rapporteur for his second report on succession of States in respect of matters other than treaties, and confirmed its decision to give that topic priority at its twenty-second session, in 1970.

63. At the request of the Special Rapporteur, the Commission decided to ask the Secretary-General to circulate again a note inviting Governments of Member States to submit the texts of any treaties, laws, decrees, regulations and diplomatic correspondence relating to the process of succession and affecting States which have attained their independence since the Second World War, which had not been transmitted pursuant to the Secretary-General's notes of 27 July 1962 and 15 July 1963, as well as any additional documentation evidencing the practice followed by States in that respect. The Secretariat will compile and publish the information received in a volume of the United Nations Legislative Series. Further, the Secretariat will bring up to date the "Digest of the decisions of international tribunals relating to State succession" (A/CN.4/151), published in 1962.

CHAPTER IV

State responsibility

64. At its first session in 1949, the International Law Commission included "State responsibility" in the list of fourteen topics of international law selected for codification.⁶² The Commission, however, did not give priority to the study of the topic. By resolution 799 (VIII) of 7 December 1953, the General Assembly requested the Commission "as soon as it considers it advisable, to undertake the codification of the principles of international law governing State responsibility".

65. At its sixth session (1954), the International Law Commission took note of General Assembly resolution 799 (VIII). However, because of its heavy agenda, the Commission was unable to begin the study of the topic at that session.⁶³ The Commission had before it a memorandum (A/CN.4/80) on the request of the General Assembly submitted by one of its members, Mr. F. V. García Amador.⁶⁴ The memorandum described the background of the General Assembly's request,

the nature and scope of the matter and a plan of work. In 1955, at its seventh session, the Commission appointed Mr. F. V. García Amador Special Rapporteur for the topic of State responsibility.⁶⁵

66. Mr. F. V. García Amador, Special Rapporteur, submitted successively six reports on the topic to the Commission at its eighth (1956), ninth (1957), tenth (1958), eleventh (1959), twelfth (1960) and thirteenth (1961) sessions. The first report (A/CN.4/96), a preliminary one, was entitled "International Responsibility" and contained some "bases of discussion".⁶⁶ The second report (A/CN.4/106) added to the title the following sub-heading "Responsibility of the State for injuries caused in its territory to the person or property of aliens. Part I: Acts and Omissions" and contained a set of preliminary draft articles on that aspect of the topic.⁶⁷ All the reports which followed were equally limited to the study of questions relating to responsibility of the State for injuries caused in its territory to the person or property of aliens. The third report (A/CN.4/111) related to "Part II: The International Claim" contained also a set of preliminary draft articles,⁶⁸ the fourth (A/CN.4/119) undertook a new and more detailed study of certain questions already dealt with in the second report (international protection of acquired rights; expropriation in general; contractual rights)⁶⁹ and the fifth (A/CN.4/125), divided into three parts, continued the study made in the fourth report of measures affecting acquired rights, examined the problem of the constituent elements of the wrongful act, including "abuse of rights" and "fault", and revised the preliminary draft articles contained in the second and third reports.⁷⁰ The sixth and last report (A/CN.4/134 and Add.1) was devoted to the subject of "reparation of the injury". It included also an addendum containing revised texts of the preliminary draft articles submitted by the Special Rapporteur in his previous reports.⁷¹

67. Occupied with the codification of other branches of international law, such as arbitral procedure and diplomatic and consular intercourse and immunities, the Commission was not able between 1956 and 1961 to undertake the codification of State responsibility, although from time to time it held some general exchanges of

⁶² *Yearbook of the International Law Commission, 1955*, vol. II, document A/2934, p. 42, para. 33.

⁶³ *Yearbook of the International Law Commission, 1956*, vol. II, p. 173.

⁶⁴ *Yearbook of the International Law Commission, 1957*, vol. II, p. 104.

⁶⁵ *Yearbook of the International Law Commission, 1958*, vol. II, p. 47.

⁶⁶ *Yearbook of the International Law Commission, 1959*, vol. II, p. 1.

⁶⁷ *Yearbook of the International Law Commission, 1960*, vol. II, p. 41.

⁶⁸ *Yearbook of the International Law Commission, 1961*, vol. II, p. 1. Although the sixth report was among the documents prepared for the Commission's thirteenth session, it was only submitted in December 1961, that is after the closure of the session. As the term of office of the Commission's members ended at 31 December 1961 and Mr. García Amador was not re-elected, he submitted that report to the Commission, so that his contribution to the work of codification in the field of State responsibility should not remain incomplete.

⁶² *Yearbook of the International Law Commission, 1949*, document A/925, p. 281, para. 16. The Commission made the selection after undertaking a survey of the whole field of international law, in accordance with article 18, paragraph 1, of its Statute. In this connexion, the Commission used as a basis of discussion 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/Rev.1).

⁶³ *Yearbook of the International Law Commission, 1954*, vol. II, document A/2693, p. 162, para. 74.

⁶⁴ *Yearbook of the International Law Commission, 1954*, vol. II, p. 21.

views on the matter. Thus, at its eighth session (1956), the Commission considered the first report submitted by the Special Rapporteur, Mr. F. V. García Amador, and without taking any decision on particular points raised therein requested him to continue his work in the light of the views expressed by the members.⁷² At its ninth session (1957), the Commission limited itself to a general and preliminary discussion of the second report of the Special Rapporteur and again requested the Special Rapporteur to continue his work.⁷³ In 1959, at its eleventh session, the Commission held a brief discussion on State responsibility almost entirely devoted to comment on a preliminary report from representatives of the Harvard Law School on the work undertaken by that School on the subject.⁷⁴ At its twelfth session (1960), the Commission heard and its members commented briefly on, first, a statement on the problems of State responsibility made by the Observer for the Inter-American Juridical Committee, and, secondly, a new statement by the representative of the Harvard Law School.⁷⁵ In 1961, at its thirteenth session, the Commission heard another statement by the representative of the Harvard Law School on the draft convention on the international responsibility of States for injury to aliens, prepared as part of the programme of international studies of the Harvard Law School.⁷⁶

⁷² *Yearbook of the International Law Commission, 1956*, vol. II, document A/3159, p. 301, para. 35. The discussion took place at the 370th to 373rd meetings of the Commission.

⁷³ *Yearbook of the International Law Commission, 1957*, vol. II, document A/3623, p. 143, para. 17. The discussion took place at its 413th to 416th meetings.

⁷⁴ *Yearbook of the International Law Commission, 1959*, vol. II, document A/4169, p. 88, para. 7. The discussion took place at its 512th and 513th meetings. In connexion with the preliminary work of the Commission for the study of the principles governing State responsibility, the Harvard Law School Research Center had decided, at the request of the Commission's Secretariat, to revise and bring up to date the "Draft Convention on responsibility of States for damages done in their territory to the person or property of foreigners" prepared by the Center in 1929. The Commission, at its eighth session (1956), confirmed the request of the Secretariat (*Yearbook of the International Law Commission, 1956*, vol. I, 370th meeting, p. 228, paras. 16-18).

⁷⁵ *Yearbook of the International Law Commission, 1960*, vol. II, document A/4425, pp. 144 and 181, paras. 7 and 44. The Commission considered the statements at its 566th and 568th meetings. The Inter-American Council of Jurists and its permanent committee, the Inter-American Juridical Committee, had been requested by the Tenth Inter-American Conference (1954) to prepare a study or report on the contribution of the American Continent to the principles of international law that govern the responsibility of the State. The Inter-American Juridical Committee adopted, in 1961, a report setting out the principles which the Latin American countries considered to be applicable in the matter. The Inter-American Council of Jurists, at its fifth session held at San Salvador in 1965, adopted a resolution on the subject recalling the principles stated in the Committee's report and declaring that they presented the Latin American contribution to the principles of international law that govern the responsibility of the State. The resolution requested the Committee to prepare a supplementary report on the contribution of the United States of America. In 1965, the Inter-American Juridical Committee prepared a second report setting out the principles of international law that govern the responsibility of the State in the opinion of the United States of America.

⁷⁶ *Yearbook of the International Law Commission, 1961*, vol. II, document A/4843, p. 129, para. 46. The Commission heard the statement at its 613th meeting.

68. In 1960, during the consideration of the International Law Commission's report on the work of its twelfth session, the question of the codification of State responsibility was raised in the Sixth Committee of the General Assembly for the first time since 1953. Different views having been expressed on the principles governing State responsibility and its codification, as well as with regard to the codification of other topics of international law, the General Assembly by its resolution 1505 (XV) of 12 December 1960 decided to place the question "Future work in the field of the codification and progressive development of international law" on the provisional agenda of its sixteenth session and invited Member States to submit in writing any views or suggestions they might have on that question. Following the adoption of the above-mentioned General Assembly resolution, the International Law Commission, at its thirteenth session (1961), had a general discussion on the planning of its future work in the light of the debate which had taken place in the Sixth Committee of the General Assembly. During that discussion, the question of the work to be done on the topic of State responsibility was raised. All the members of the Commission who spoke on the subject believed that it should be included among the priority topics. There were again differences of opinion, however, regarding the approach to the subject, and in particular as to whether the Commission should begin by codifying the general rules governing State responsibility, or whether it should codify at the same time the rules whose violation entailed international responsibility.⁷⁷

69. At the sixteenth session of the General Assembly, in 1961, the Sixth Committee discussed the question of future work in the field of the codification and progressive development of international law. After that discussion the General Assembly by resolution 1686 (XVI) of 18 December 1961 recommended the International Law Commission, in sub-paragraph 3 (a) of the resolution, to continue, *inter alia*, its work in the field of State responsibility and, in sub-paragraph 3 (b), to consider at its fourteenth session its future programme of work "on the basis" of sub-paragraph 3 (a) of the resolution "and in the light of the discussion in the Sixth Committee at the fifteenth and sixteenth sessions of the General Assembly and of the observations of Member States submitted pursuant to resolution 1505 (XV), and to report to the Assembly at its seventeenth session on the conclusions it has reached".

70. In pursuance of General Assembly resolution 1686 (XVI), the International Law Commission considered its future programme of work at its fourteenth session (1962), at the 629th to 637th and 668th and 669th meetings. On the recommendation of a Committee set up by the Commission, it was agreed, in accordance with sub-paragraph 3 (a) of resolution 1686 (XVI), to include "State responsibility" in the future programme of work of the Commission as one of the three main topics under

⁷⁷ *Yearbook of the International Law Commission, 1961*, vol. I, pp. 206-223, and vol. II, document A/4843, pp. 128 and 129, paras. 40 and 41. The general debate took place at the 614th to 616th meetings of the Commission.

study out of the seven listed in the approved programme.⁷⁸ During the discussion, the opinion that State responsibility should be included among the priority topics was shared by all members of the Commission. It was pointed out, however, that as Mr. García Amador was no longer a member of the Commission, and as his reports had not been discussed or approved by the Commission, it was not merely a question of continuing work already begun on the topic of State responsibility, as recommended by the General Assembly, but of taking up the subject *ex novo*. There were divergent views, however, concerning the best approach to the study of the question and the issues which the study should cover, as well as different opinions concerning the method of work which should be adopted for the codification of the topic. As a result of the discussion, the Commission agreed that it would be necessary to undertake preparatory work before a special rapporteur was appointed. Accordingly, at its 637th meeting on 7 May 1962, the Commission decided to set up a Sub-Committee consisting of the following ten members: Mr. Ago (Chairman), Mr. Briggs, Mr. Gros, Mr. Jiménez de Aréchaga, Mr. Lachs, Mr. de Luna, Mr. Paredes, Mr. Tsuruoka, Mr. Tunkin and Mr. Yasseen. The Sub-Committee held a private meeting, on 21 June 1962, and submitted some suggestions which were considered by the Commission at its 668th meeting on 26 June 1962. In the light of those suggestions, the Commission adopted the following decisions: (a) the Sub-Committee was to meet at Geneva from 7 to 16 January 1963; (b) its work was to be devoted primarily to the general aspects of State responsibility; (c) the members of the Sub-Committee were to prepare for it specific memoranda relating to the main aspects of the subject; (d) the Chairman of the Sub-Committee was to prepare a report on the results of its work to be submitted to the Commission at its next session. Accordingly, the Commission, at its 669th meeting, decided to include an item entitled "Report of the Sub-Committee on State Responsibility" in the agenda of its fifteenth session.⁷⁹

71. The General Assembly, at its seventeenth session, noting that the International Law Commission had established a Sub-Committee on State Responsibility to study the scope of and approach to the topic and that the work of the Sub-Committee was to be devoted primarily to the general aspects of the topic, recommended the Commission in its resolution 1765 (XVII) of 20 November 1962 to "continue its work on State responsibility, taking into account the views expressed at the seventeenth session of the General Assembly and the report of the Sub-Committee on State Responsibility and giving due consideration to the purposes and principles enshrined in the Charter of the United Nations". This recommendation was shortly to be confirmed in the declaration contained in part II of resolution 1803 (XVII) on "Permanent sovereignty over natural resources", adopted by the General Assembly on 14 December 1962, on the recommendation of the Second Committee. In

that declaration, the Assembly stated that it "welcomes the decision of the International Law Commission to speed up its work on the codification of the topic of responsibility of States for the consideration of the General Assembly".⁸⁰

72. The Sub-Committee on State Responsibility held seven meetings during its 1963 January session. All its members were present, with the exception of Mr. Lachs, who was absent because of illness. The Sub-Committee had before it memoranda prepared by the following members: Mr. Jiménez de Aréchaga (ILC (XIV) SC.1/WP.1); Mr. Paredes (ILC (XIV) SC.1/WP.2 and Add.1, A/CN.4/SC.1/WP.7); Mr. Gros (A/CN.4/SC.1/WP.3); Mr. Tsuruoka (A/CN.4/SC.1/WP.4); Mr. Yasseen (A/CN.4/SC.1/WP.5); Mr. Ago (A/CN.4/SC.1/WP.6). The Sub-Committee held a general debate on the questions to be studied in connexion with the work relating to the international responsibility of States, and with the directives to be given by the Commission to the Special Rapporteur on that topic. The Sub-Committee agreed unanimously to recommend that the Commission should, with a view to the codification of the topic, give priority to the definition of the general rules governing the international responsibility of the State. It was agreed, firstly, that there would be no question of neglecting the experience and material gathered in certain special sectors, specially that of responsibility for injuries to the person or property of aliens; and, secondly, that careful attention should be paid to the possible repercussions which new developments in international law may have had on responsibility.⁸¹

73. Having reached this general conclusion, the Sub-Committee discussed in detail an outline programme of work submitted by Mr. Ago and decided unanimously to give the Commission some indications as to the main points to be taken into consideration in connexion with the general aspects of the international responsibility of the State. These indications, which would serve as a guide to the work of a future special rapporteur to be appointed by the Commission, referred to the following points: (a) definition of the concept of the international responsibility of the State; (b) origin of international responsibility (international wrongful act; determination

⁸⁰ This recommendation followed the request contained in a passage of operative paragraph 8 of resolution I A annexed to the report submitted in 1961 by the "Commission on Permanent Sovereignty over Natural Resources". This report is printed in a publication (A/AC.97/5/Rev.2; E/3511; A/AC.97/13) (United Nations publication, Sales No.: 62.V.6), which also contains the Secretariat study on "The status of permanent sovereignty over natural wealth and resources", chapter III of which gives a useful survey of international jurisprudence and codification drafts on the responsibility of the State for the property of aliens and contracts concluded by them (paras. 1-179).

⁸¹ The report (A/CN.4/152) by Mr. Ago, Chairman of the Sub-Committee on State Responsibility, approved by the Sub-Committee, was appended as annex I to the report of the International Law Commission on the work of its fifteenth session (*Yearbook of the International Law Commission, 1963*, vol. 11, document A/5509, pp. 227 and 228). The *Yearbook of the International Law Commission, 1963*, vol. 11, reproduced also, in pages 228 to 259, the summary records of the second to fifth meetings of the Sub-Committee as well as the memoranda submitted by the members of the Sub-Committee.

⁷⁸ *Yearbook of the International Law Commission, 1962*, vol. II, document A/5209, pp. 190 and 191, paras. 57-63.

⁷⁹ *Ibid.*, pp. 188, 189 and 191, paras. 35-56 and 67-69.

of the components parts of the international wrongful act, including the objective element and the subjective element; the various kinds of violations of international obligations; and circumstances in which an act is not wrongful); (c) the forms of international responsibility (the duty to make reparation; reparation; different forms of sanctions). The Sub-Committee suggested that the question of the responsibility of subjects of international law other than States, such as international organizations, should be left aside.

74. The work of the Sub-Committee on State Responsibility was reviewed by the International Law Commission at its 686th meeting, held during its fifteenth session (1963), on the basis of the report (A/CN.4/152) submitted by the Chairman of the Sub-Committee, Mr. Roberto Ago. All the members of the Commission who took part in the discussion agreed with the general conclusions recommended by the Sub-Committee. The members of the Commission also approved the programme of work proposed by the Sub-Committee without prejudice to their position on the substance of the questions set out in that programme. In this connexion, it was pointed out that these questions were intended solely to serve as a guide for the Special Rapporteur in his substantive study of specific aspects of the formulation of the general rules governing the international responsibility of States. After having unanimously approved the report of the Sub-Committee, the Commission appointed Mr. Roberto Ago as Special Rapporteur for the topic of State responsibility. It was also agreed that the Secretariat would prepare some working papers on the topic.⁸²

75. The report of the International Law Commission on the work of its fifteenth session was considered by the Sixth Committee during the eighteenth session of the General Assembly. The conclusions reached by the Commission on the codification of State responsibility were generally approved. By its resolution 1902 (XVIII) of 18 November 1963, the General Assembly recommended the International Law Commission to "continue its work on State responsibility, taking into account the views expressed at the eighteenth session of the General Assembly and the report of the Sub-Committee on State Responsibility and giving due consideration to the purposes and principles enshrined in the Charter of the United Nations". Owing, however, to the fact that the term of office of the members of the Commission would expire at the end of 1966, and that it was desirable to complete, by that date, the study of the topics which were already in an advanced state, the Commission decided to devote its 1964, 1965 and 1966 sessions to the completion of the work on the law of treaties and special missions, and not to begin its consideration of the substance of the question of State responsibility until it had completed its study of those other topics.⁸³ The General Assembly, in its resolution 2045 (XX) of 8 December 1965, recommended the Commission to

continue, "when possible", its work on State responsibility, "taking into account the views and considerations referred to in General Assembly resolution 1902 (XVIII)" and, in its resolution 2167 (XXI) of 5 December 1966, to continue its work on State responsibility, "taking into account the views and considerations referred to in General Assembly resolutions 1765 (XVII) and 1902 (XVIII)".

76. In 1967, at its nineteenth session, the Commission had before it a note (A/CN.4/196) on State responsibility submitted by Mr. Roberto Ago, Special Rapporteur. Since the membership of the Commission had been altered as a result of the election which took place in the General Assembly in 1966, the Special Rapporteur expressed the wish that the Commission, as newly constituted, should confirm the instructions given to him in 1963. The Commission confirmed these instructions and noted with satisfaction that Mr. Ago will submit an initial report on the topic at the twenty-first session of the Commission.⁸⁴ At the twenty-second session of the General Assembly, the hope was expressed in the Sixth Committee that the Commission would finally be in a position to make progress with the topic of State responsibility. The General Assembly accordingly recommended, in its resolution 2272 (XXII) of 1 December 1967, that the Commission should "expedite the study of the topic of State responsibility". At its twentieth session (1968), the International Law Commission proceeded to review its programme of work as decided by it in 1967, and taking into consideration General Assembly resolution 2272 (XXII), stressed that a special effort should be made in order to do substantive work on State responsibility at the 1969 session of the Commission.⁸⁵ The General Assembly by its resolution 2400 (XXIII) of 11 December 1968 recommended the Commission to "make every effort to begin substantive work on State responsibility as from its next session, taking into account the views and considerations referred to in General Assembly resolutions 1765 (XVII) and 1902 (XVIII)".

77. In conformity with the decision taken by the Commission referred to in paragraph 74 above, the Secretariat published in 1964, as documents of the sixteenth session of the International Law Commission, the following documents relating to the topic of State responsibility:⁸⁶ (a) a working paper containing a summary of the discussions in various United Nations organs and the resulting decisions (A/CN.4/165); (b) a digest of the decisions of international tribunals relating to State responsibility (A/CN.4/169). At the present session of the Commission, the Secretariat published a supplement (A/CN.4/209)

⁸² *Yearbook of the International Law Commission, 1963*, vol. II, document A/5509, pp. 223 and 224, paras. 51-55.

⁸³ *Yearbook of the International Law Commission, 1964*, vol. II, document A/5809, p. 226, para. 36.

⁸⁴ *Yearbook of the International Law Commission, 1967*, vol. II, document A/6709/Rev.1 and Rev.1/Corr.1, p. 368, para. 42. The Commission considered the note at its 934th and 935th meetings. The note is reproduced in *Yearbook of the International Law Commission, 1967*, vol. II, p. 325.

⁸⁵ *Yearbook of the International Law Commission, 1968*, vol. II, document A/7209/Rev.1, p. 224, para. 101.

⁸⁶ *Yearbook of the International Law Commission, 1964*, vol. II, pp. 125-171.

to the working paper and a supplement (A/CN.4/208) to the digest.

78. At the present session of the Commission Mr. Roberto Ago, Special Rapporteur, submitted his first report on State responsibility (A/CN.4/217). This report, entitled "Review of previous work on codification of the topic of the international responsibility of States", gives a general description of the codification work undertaken on the subject by the United Nations, individual scholars, learned societies, regional bodies and the League of Nations. The most important texts prepared in the course of that earlier codification work were reproduced as annexes to the report for the convenience of the members of the Commission. The main purpose of this first report was to give the Commission, at the start of its substantive work on the topic of State responsibility, a full account of the work which had been done on the subject in the past and which could still be of great use in certain cases. At the same time this first report was intended to bring out, in historical perspective, some of the main obstacles which have hitherto frustrated all attempts to codify the topic, thus drawing attention to certain risks which must be avoided if the new undertaking was to succeed.

79. The Commission examined the report at its 1011th to 1013th meetings and at its 1036th meeting. The detailed exchange of views that took place at those meetings revealed a great identity of ideas in the Commission as to the most appropriate way to set about codifying the topic of State responsibility and as to the criteria that should govern the preparation of the different parts of the draft articles which the Commission now proposes to draw up on the subject. The Special Rapporteur, in summing up the debate, gave an account of the views of members of the Commission and announced his future plan of work. There was general agreement on the main lines of the programme to be undertaken on the subject during the next sessions.

80. Thus the Commission was in general agreement in recognizing that the codification of the topic of the international responsibility of States should not start with a definition of the contents of those rules of international law which laid obligations upon States in one or other sector of inter-State relations. The starting point should be the imputability to a State of the violation of one of the obligations arising from those rules, irrespective of their origin, nature and object. The aim, then, will be to establish, in an initial part of the proposed draft articles, the conditions under which an act which is internationally illicit and which, as such, generates an international responsibility can be imputed to a State. This first stage of the study will include the definition of the objective and subjective conditions for such imputation; the determination of the different possible characteristics of the act or omission imputed, and of its possible consequences; and an indication of the circumstances which, in exceptional cases, may prevent the imputation. The Special Rapporteur was asked to submit a report on the topic, containing a first set of draft articles, at the Commission's twenty-second session.

81. Once this first essential task has been accomplished, the Commission proposes to proceed to the second

stage, which concerns determination of the consequences of imputing to a State an internationally illicit act and, consequently, the definition of the various forms and degrees of responsibility. To that end, the Commission was in general agreement in recognizing that two factors in particular would guide it in arriving at the required definition: namely, the greater or lesser importance to the international community of the rules giving rise to the obligations violated, and the greater or lesser seriousness of the violation itself. A definition of the degrees of international responsibility will include determination of the respective roles of reparation and sanction and, particularly in connexion with the latter, separate consideration of the cases in which responsibility is reflected only in the establishment of a legal relationship between the defaulting State and the injured State and the cases in which, on the contrary, a particularly serious offence might also give rise to the establishment of a legal relationship between the guilty State and a group of States, or eventually between that State and the entire international community.

82. At a third stage it will be possible to take up certain problems concerning what has been termed the "implementation" of responsibility, and questions concerning the settlement of disputes which might be caused by a specific violation of the rules relating to international responsibility.

83. The Commission also agreed in recognizing the importance, alongside that of responsibility for internationally illicit acts, of the so-called responsibility for risk arising out of the performance of certain lawful activities, such as spatial and nuclear activities. However, questions in this latter category will not be dealt with simultaneously with those in the former category, mainly in order to avoid any confusion between two such sharply different hypotheses, which might have an adverse effect on the understanding of the main subject. Any examination of such questions will therefore be deferred until a later stage in the Commission's work. The same will apply to the study of questions relating to the responsibility of subjects of international law other than States.

84. The Commission was also in agreement in recognizing that the strict criteria by which it proposes to be guided in codifying the topic of the international responsibility of States do not necessarily entail renouncing the idea of proceeding, under a separate heading, with the codification of certain separate subjects of international law with which that of responsibility has often been linked.

CHAPTER V

The most-favoured-nation clause

85. At its sixteenth session, in 1964, the Commission considered a proposal put forward by one of its members, Mr. Jiménez de Aréchaga, to the effect that it should include in its draft on the law of treaties a provision on the so-called "most-favoured-nation clause". The suggested provision was intended to reserve formally

the clause from the operation of the articles dealing with the problem of the effect of treaties on third States.⁸⁷ In support of the proposal it was urged that the broad and general terms in which the articles relating to third States had been provisionally adopted by the Commission might blur the distinction between provisions in favour of third States and the operation of the most-favoured-nation clause, a matter that might be of particular importance in connexion with the article dealing with the revocation or amendment of provisions regarding obligations or rights of States not parties to treaties. The Commission, however, while recognizing the importance of not prejudicing in any way the operation of most-favoured-nation clauses, did not consider that these clauses were in any way touched by the articles in question and for that reason decided that there was no need to include a saving clause of the kind proposed. In regard to most-favoured-nation clauses in general, the Commission did not think it advisable to deal with them in the codification of the general law of treaties, although it felt that they might at some future time appropriately form the subject of a special study.⁸⁸ The Commission maintained this position in the course of its eighteenth session.⁸⁹

86. At its nineteenth session, in 1967, the Commission noted that several representatives in the Sixth Committee at the twenty-first session of the General Assembly had urged that it should deal with the most-favoured-nation clause as an aspect of the general law of treaties. In view of the interest expressed in the matter and of the fact that clarification of its legal aspects might be of assistance to the United Nations Commission on International Trade Law (UNCITRAL) the Commission decided to place on its programme the topic of most-favoured-nation clauses in the law of treaties and appointed Mr. Endre Ustor as Special Rapporteur thereon.⁹⁰

87. At its twentieth session, in 1968, the Special Rapporteur submitted a working paper⁹¹ giving an account of the preparatory work undertaken by him on the topic and outlining the possible contents of a report to be presented at a later stage. The Special Rapporteur also submitted a questionnaire listing points on which he specifically asked the members of the Commission to express their opinion. The Commission, while recognizing the fundamental importance of the role of the most-favoured-nation clause in the domain of international trade, instructed the Special Rapporteur not to confine his studies to that area but to explore the major fields of application of the clause. The Commission considered that it should focus on the legal character of

the clause and the legal conditions governing its application and that it should clarify the scope and effect of the clause as a legal institution in the context of all aspects of its practical application. The Commission wished to base its studies on the broadest possible foundations without, however, entering into fields outside its functions. In the light of these considerations, the Commission instructed the Special Rapporteur to consult, through the Secretariat, all organizations and interested agencies which may have particular experience in the application of the most-favoured-nation clause.

88. By resolution 2400 (XXIII) of 11 December 1968, the General Assembly recommended that the Commission, *inter alia*, continue its study of the most-favoured-nation clause.

89. At the present session of the Commission, the Special Rapporteur submitted his first report (A/CN.4/213), containing a history of the most-favoured-nation clause up to the time of the Second World War, with particular emphasis on the work on the clause undertaken in the League of Nations or under its aegis. The Commission considered the report at its 1036th meeting and accepting the suggestion of the Special Rapporteur instructed him to prepare next a study based mainly on the replies from organizations and interested agencies consulted by the Secretary-General and having regard also to three cases dealt with by the International Court of Justice relevant to the clause.⁹²

CHAPTER VI

Other decisions and conclusions of the Commission

A. REVIEW OF THE COMMISSION'S PROGRAMME AND METHODS OF WORK

90. The Commission referred to its initiative, as indicated in paragraph 98 (a) of its report on the work of its twentieth session,⁹³ in proposing that the term of office of its members should be extended in order better to ensure the necessary continuity in its membership, having regard to the method of work provided for in its Statute and the nature of the codification process itself, especially when it was engaged in the preparation of legal texts for the codification of particularly large and important sectors of international law. With a view to removing all doubt concerning this intention, the Commission wishes to make it clear that, in its opinion and in the light of its experience, the term of office of its members should preferably be seven years and that, in making a proposal for such an extension, it had solely intended to refer to the future terms of office of Commission members.

⁸⁷ *Yearbook of the International Law Commission, 1964*, vol. I, 752nd meeting, para. 2.

⁸⁸ *Yearbook of the International Law Commission, 1964*, vol. II, document A/5809, p. 176, para. 21.

⁸⁹ *Yearbook of the International Law Commission, 1966*, vol. II, document A/6309/Rev.1, part II, p. 177, para. 32.

⁹⁰ *Yearbook of the International Law Commission, 1967*, vol. II, document A/6709/Rev.1 and Rev.1/Corr.1, p. 369, para. 48.

⁹¹ *Yearbook of the International Law Commission, 1968*, vol. II, document A/CN.4/L.127, p. 165.

⁹² *Anglo-Iranian Oil Company Case (Jurisdiction)*, ICJ Reports 1952, p. 93; *Case concerning rights of nationals of United States of America in Morocco*, ICJ Reports 1952, p. 176; *Ambatielos Case (Merits: obligation to arbitrate)*, ICJ Reports 1953, p. 10.

⁹³ *Yearbook of the International Law Commission, 1968*, vol. II, document A/7209/Rev.1, p. 191.

91. The Commission confirmed its intention of bringing up to date in 1970 or 1971 its long-term programme of work, taking into account the 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. For this purpose the Commission will again survey the topics suitable for codification in the whole field of international law, in accordance with article 18 of its Statute. It asked the Secretary-General to submit a preparatory working paper with a view to facilitating this task.

B. ORGANIZATION OF FUTURE WORK

92. The Commission reaffirms its view that it is desirable to complete the study of relations between States and international organizations before the expiry of the term of office of its present membership. As already stated in paragraph 104 of the report on the work of its twentieth session, the Commission aims, *inter alia*, at concluding its work on that topic at its twenty-third session, in 1971, if the scope of the work on the subject should allow it. In view of the stage which the work on the topic has now reached and taking into account the time-lapse for the receipt of comments from Governments, the Commission considers that its needs would not best be met by requesting authorization from the General Assembly to hold a winter session in 1970, a possibility that had been reserved in the Commission's report on the work of its twentieth session.⁹⁴ However, it deems it necessary to reserve the possibility of holding an additional or extended session in 1971 in order to achieve its stated aim. The Commission agreed to record this decision in the present report so that arrangements for budgetary appropriations could be made in time.

93. The Commission intends, as a matter of priority, at its twenty-second session in 1970, to conclude the first reading of its draft on relations between States and international organizations and to undertake substantive consideration of State responsibility and succession in respect of treaties. Also at that session, the Commission plans to further its study of succession of States in economic and financial matters. During its mandate, the Commission will continue its study of the most-favoured-nation clause.

C. RELATIONS WITH THE INTERNATIONAL COURT OF JUSTICE

94. The Commission devoted its 1004th meeting to the visit of the President of the International Court of Justice, Mr. José Luis Bustamante y Rivero, who commented on the features characterizing the functions of the Court and the Commission for the furtherance of international law, in accordance with their respective statutes.

D. CO-OPERATION WITH OTHER BODIES

1. Asian-African Legal Consultative Committee

95. At the 1010th meeting, Mr. Abdul Hakim Tabibi introduced his report (A/CN.4/212) on the tenth session of the Asian-African Legal Consultative Committee, held at Karachi from 21 to 30 January 1969, which he had attended as an observer for the Commission.

96. The Asian-African Legal Consultative Committee was represented before the Commission by Mr. Shari-fuddin Pirzada, President of the tenth session of that Committee, who addressed the Commission at the 1021st meeting. He commented on the origins and tasks of the Committee, which had, at its various sessions, discussed and formulated principles on such topics as the privileges and immunities of diplomatic envoys, the extradition of offenders, free legal aid, reciprocal enforcement of foreign judgments, arbitral procedure and the legality of nuclear tests. He indicated that at its Karachi session the Committee had devoted considerable time to the Commission's draft articles on the law of treaties in an attempt to reach agreement on certain important articles in the interests of Asian-African solidarity. The Committee had also considered the law of international rivers, with particular attention to the needs of the Asian-African countries, as well as the subject of the rights of refugees, on which a resolution had been unanimously adopted. In this respect, he recalled that at its eighth session in Bangkok the Committee had adopted a report on the rights of refugees and had agreed to reconsider at its following session the Bangkok principles concerning the treatment of refugees. He stated that the Committee was taking a particular interest in such items on the Commission's present agenda as relations between States and international organizations, succession of States and Governments, and State responsibility.

97. 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 Ghana. The Commission requested its Chairman, Mr. Nikolai Ushakov, 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

98. The European Committee on Legal Co-operation was represented by Mr. H. Golsong, who addressed the Commission at the 1029th meeting.

99. He mentioned that since the Commission's twentieth session a European international agreement concerning the immunity of persons summoned to appear before the European Commission or Court of Human Rights had been opened to signature and had been signed by several States. Also, two further documents had been virtually completed: a convention on State immunity from jurisdiction, and a report on the privileges and immunities of international organizations. He further referred to the resolution approved by the Committee of Ministers, adopting and publishing a guide to an index of digests of national State practice in the field of public

⁹⁴ *Ibid.*, p. 224, paras. 103 and 104.

international law. He indicated that the Committee's current work included a draft on third party risk insurance for motorists, a draft on harmonization of processes for computerizing legal data in the western European countries, in particular, the terminology of international treaties, and a draft convention on the international validity of judicial decisions in penal matters. He also called attention to the Committee's decision, taken at its session in June 1969, to hold exchanges of views between its member States on the International Law Commission's draft more frequently than had taken place at times in the past.

100. 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 at Strasbourg in December 1969. The Commission requested its Chairman, Mr. Nikolai Ushakov, 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*

101. At the 1010th meeting, Mr. José María Ruda introduced his report (A/CN.4/215) on the 1968 meeting of the Inter-American Juridical Committee, held at Rio de Janeiro, from mid-June to early September 1968, which he had attended from 26 to 30 August as an observer for the Commission.

102. The Inter-American Juridical Committee was represented by Mr. José Joaquín Caicedo Castilla, who addressed the Commission at its 999th meeting. He drew attention to the resolution adopted by the Committee on the occasion of the attendance at some of its meetings of the Commission's Chairman. He referred to the items of substance dealt with by the Committee in 1968, namely: harmonization of the legislation of the Latin-American countries on companies, including the problem of international companies; an Inter-American Convention on Reciprocal Recognition of Companies and Juridical Person; a uniform law for Latin America on commercial documents, and the rules of private international law applicable to the above matters. He further referred to the preparation of the preliminary draft of the Committee's Statutes and indicated that during the present year, the Committee would study the problems of improving the inter-American system for the peaceful settlement of disputes and of the juridical status of the so-called "foreign guerillas". He stated that the Committee was also concerned with the question of State responsibility. In a report approved in 1961, entitled "Contribution of the American continent to the principles of international law that govern the responsibility of the State", the Committee had laid down ten principles which expressed Latin American law on the subject. He expressed the hope that, in discussing the topic of State responsibility, the Commission would take the Latin American position into account as a new element which had introduced a change in the previously accepted rules of international law.

103. The Commission was informed that the 1969 session of the Committee, to which it has a standing invitation to send an observer, would be held at Rio

de Janeiro. The Commission requested its Chairman, Mr. Nikolai Ushakov, to attend the Committee's session or, if he was unable to do so, to appoint another member of the Commission for the purpose.

E. DATE AND PLACE OF THE TWENTY-SECOND SESSION

104. The Commission decided to hold its next session at the United Nations Office at Geneva for ten weeks from 4 May to 10 July 1970.

F. REPRESENTATION AT THE TWENTY-FOURTH SESSION OF THE GENERAL ASSEMBLY

105. The Commission decided that it would be represented at the twenty-fourth session of the General Assembly by its Chairman, Mr. Nikolai Ushakov.

G. SEMINAR ON INTERNATIONAL LAW

106. In pursuance of General Assembly resolution 2400 (XXIII) of 11 December 1968, the United Nations Office at Geneva organized during the twenty-first session of the Commission a fifth session of the Seminar on International Law for advanced students and young government officials whose functions habitually included a consideration of questions of international law.

107. Between 16 June and 4 July 1969, the Seminar held thirteen meetings devoted to lectures followed by discussion. It was attended by twenty-two students, all from different countries; they also attended meetings of the Commission during that period and had access to the facilities provided by the Library in the Palais des Nations. They heard lectures by nine members of the Commission (Mr. Albónico, Mr. Bartoš, Mr. Castrén, Mr. Kearney, Mr. Rosenne, Mr. Tabibi, Mr. Ustor, Sir Humphrey Waldock and Mr. Yasseen), a former member of the Commission (Mr. Žourek), the Legal Adviser to the International Labour Office (Mr. Wolf) and one member of the Secretariat (Mr. Raton). The lectures were given on various subjects connected with the work of the Commission, such as the codification and development of international law in the United Nations and the problems raised by the Vienna Conventions on diplomatic law, consular law and the law of treaties. Other lectures dealt with the question of special missions, the international unification of private law and the activities of UNCITRAL, the principle of co-operation in international law and the problems of land-locked States. One lecture was devoted to the International Labour Organisation.

108. The Seminar was held without cost to the United Nations, which assumed 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, but two were unable

to attend the session. Three students holding scholarships granted by the United Nations Institute for Training and Research were also admitted to the Seminar. The grant of scholarships is making it possible to achieve a much better geographical distribution of students and to bring deserving candidates from distant countries, who would otherwise be unable to attend the session solely for pecuniary reasons. It is therefore desirable that scholarships should again be granted for the next session.

109. 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.

H. INDEX OF THE COMMISSION'S DOCUMENTS

110. The Commission was informed that the United Nations Library at Geneva is preparing an Index of the main documents of the Commission issued during its first twenty sessions. The Commission expresses its appreciation of the initiative taken by the Library at Geneva; it is convinced that the Index will be of value to the Commission and to jurists throughout the world.