

YEARBOOK
OF THE
INTERNATIONAL
LAW COMMISSION
1967

Volume II

*Documents of the nineteenth session
including the report of the Commission
to the General Assembly*

UNITED NATIONS



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SPECIAL MISSIONS

[Agenda item 1]

DOCUMENTS A/CN.4/194 AND ADD.1-5

Fourth Report on special missions, by Mr. Milan Bartoš, Special Rapporteur

[Original text: French]

[5 April, 18 April, 21 April, 9 May, 10 May and 17 May 1967]

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Preliminary note

1. Since the membership of the International Law Commission changed as a result of the 1966 elections and since the material on special missions is scattered in different places, the Special Rapporteur has thought it necessary in this fourth report to summarize all the previous reports and submit them as a whole. The purpose of this presentation is to provide the members of the Commission with adequate information and with a guide for their work at the nineteenth session, in order to facilitate a final decision on the draft articles on special missions. This report therefore combines in a single document the substance of the first, second and third reports (A/CN.4/166, A/CN.4/179 and A/CN.4/189 and Add.1 and 2).

2. The Special Rapporteur feels obliged to point out that at its eighteenth session the Commission did not have time to study thoroughly the material put forward in his third report on special missions but confined itself to studying the general questions dealt with in that report, particularly in chapter II (A/CN.4/189). For that reason, the Special Rapporteur considers that the Commission should give particular attention to the detailed suggestions on each article, since it will be the first time that they will have received such consideration.

3. As a result of the decision taken by the International Law Commission at its eighteenth session and in accordance with resolution 2167 (XXI), adopted by the General Assembly on 5 December 1966, Member States were allowed extra time to submit comments on the

draft articles. When that period expired, on 1 March 1967, the Special Rapporteur had received comments from the Governments of the Netherlands and Pakistan and a reply from the Government of Kuwait stating that it had no comments to make. The Special Rapporteur also studied the comments made in the Sixth Committee at the twenty-first session of the General Assembly and the Commission will have to give special attention to those comments at its nineteenth session in view of the instructions given by the General Assembly in paragraph 6 of its resolution 2167 (XXI).

4. At the twenty-first session of the General Assembly, the representative of the Byelorussian Soviet Socialist Republic in the Sixth Committee said he thought that articles 1, 7, 13 and 18 could benefit from some revision. The Special Rapporteur considers that it is unnecessary to ask Governments of Member States for their views on these articles again as this request is implicit in the general invitation addressed by the Commission and the General Assembly to the Governments of all Member States, asking them to transmit before 1 March 1967 their opinions, suggestions and proposals on all the questions and thus on that question as well. Furthermore, in paragraph 4 (a) of resolution 2167 (XXI), the General Assembly recommended the International Law Commission to complete its work on the draft articles on special missions at the nineteenth session. The Commission, therefore, will not be able to invite Governments to transmit their comments on specific points after the nineteenth session, but they will still be able to submit their views to the body in which represen-

tatives of States take their final decision on the draft articles.

CHAPTER I

History of the idea of defining rules relating to special missions

5. At its tenth session, in 1958, the International Law Commission adopted a set of draft articles on diplomatic intercourse and immunities. The Commission observed, however, that the draft dealt only with permanent diplomatic missions. Diplomatic relations between States also assumed other forms that might be placed under the heading of "ad hoc diplomacy", covering itinerant envoys, diplomatic conferences and special missions sent to a State for limited purposes. The Commission considered that these forms of diplomacy should also be studied, in order to bring out the rules of law governing them, and requested the Special Rapporteur to make a study of the question and to submit his report at a future session.¹ The Commission decided at its eleventh session (1959) to place the question of ad hoc diplomacy as a special topic on the agenda for its twelfth session (1960).

6. Mr. A. E. F. Sandström was appointed Special Rapporteur. He submitted his report² to the twelfth session, and on the basis of this report the Commission took decisions and drew up recommendations for the rules concerning special missions.³ The Commission's draft was very brief. It was based on the idea that the rules on diplomatic intercourse and immunities in general prepared by the Commission should on the whole be applied to special missions by analogy. The Commission expressed the opinion that this brief draft should be referred to the Conference on Diplomatic Intercourse and Immunities convened at Vienna in the spring of 1961. But the Commission stressed that it had not been able to give this draft the thorough study it would normally have done. For that reason, the Commission regarded its draft as only a preliminary survey, carried out in order to put forward certain ideas and suggestions which should be taken into account at the Vienna Conference.⁴

7. At its 943rd plenary meeting on 12 December 1960, the General Assembly decided, on the recommendation of the Sixth Committee, that these draft articles should be referred to the Vienna Conference with the recommendation that the Conference should consider them together with the draft articles on diplomatic intercourse and immunities.⁵ The Vienna Conference placed this question on its agenda and appointed a special Sub-Committee to study it.⁶

¹ Yearbook of the International Law Commission, 1958, vol. II, p. 89, para. 51.

² Yearbook of the International Law Commission, 1960, vol. II, p. 108, document A/CN.4/129.

³ Ibid., pp. 179 and 180.

⁴ Ibid., p. 179, para. 37.

⁵ Resolution 1504 (XV).

⁶ The Sub-Committee was composed of the representatives of Ecuador, Iraq, Italy, Japan, Senegal, USSR, United Kingdom, United States of America and Yugoslavia.

8. The Sub-Committee noted that the draft articles did little more than indicate which of the rules on permanent missions applied to special missions and which did not. The Sub-Committee took the view that the draft articles were unsuitable for inclusion in the final convention without long and detailed study which could take place only after a set of rules on permanent missions had been finally adopted. For this reason, the Sub-Committee recommended that the Conference should refer this question back to the General Assembly so that the Assembly could recommend to the International Law Commission further study of the topic, i.e., that it continue to study the topic in the light of the Vienna Convention on Diplomatic Relations which was then drawn up. At its fourth plenary meeting, on 10 April 1961, the Conference adopted the Sub-Committee's recommendation.⁷

9. The matter was again submitted to the General Assembly. On 18 December 1961, the General Assembly, on the recommendation of the Sixth Committee, adopted resolution 1687 (XVI), in which it requested the International Law Commission to study the subject further and to report thereon to the General Assembly.

10. In pursuance of that resolution, the question was referred back to the International Law Commission, which decided, at its 669th meeting, on 27 June 1962, to place it on the agenda for its fifteenth session. The Commission also requested the Secretariat to prepare a working paper on the subject.

11. During its fifteenth session, at the 712th meeting, the Commission appointed Mr. Milan Bartoš as Special Rapporteur for the topic of special missions.

12. On that occasion, the Commission took the following decision:

With regard to the approach to the codification of the topic, the Commission decided that the Special Rapporteur should prepare a draft of articles. These articles should be based on the provisions of the Vienna Convention on Diplomatic Relations, 1961, but the Special Rapporteur should keep in mind that special missions are, both by virtue of their functions and by their nature, an institution distinct from permanent missions. In addition, the Commission thought that the time was not yet ripe for deciding whether the draft articles on special missions should be in the form of an additional protocol to the Vienna Convention, 1961, or should be embodied in a separate convention or put in any other appropriate form, and that the Commission should await the Special Rapporteur's recommendations on that subject.⁸

13. In addition, the Commission considered again whether the topic of special missions should also cover the status of government delegates to congresses and conferences. In this connexion, at its fifteenth session, the Commission inserted the following paragraph in its annual report to the General Assembly:

With regard to the scope of the topic, the members agreed that the topic of special missions should also cover itinerant envoys, in accordance with its decision at its 1960 session.⁹ At that session

⁷ Yearbook of the International Law Commission, 1963, vol. II, p. 157, document A/CN.4/155, paras. 44-45.

⁸ Ibid., p. 225, para. 64.

⁹ Yearbook of the International Law Commission, 1960, vol. I, p. 260, para. 26.

the Commission had also decided¹⁰ not to deal with the privileges and immunities of delegates to congresses and conferences as part of the study of special missions, because the topic of diplomatic conferences was connected with that of relations between States and inter-governmental organizations. At the present session, the question was raised again, with particular reference to conferences convened by States. Most of the members expressed the opinion, however, that for the time being the terms of reference of the Special Rapporteur should not cover the question of delegates to congresses and conferences.¹¹

14. The Special Rapporteur submitted his report,¹² which was placed on the agenda for the Commission's sixteenth session.

15. The Commission considered the report twice. First, at the 723rd, 724th and 725th meetings, it engaged in a general discussion and gave the Special Rapporteur general instructions for continuing his study and submitting the continuation of his report at the following session. Secondly, at the 757th, 758th, 760th-763rd and 768th-770th meetings, it examined a number of draft articles and adopted sixteen articles subject to their being supplemented, if necessary, during its seventeenth session. These articles were submitted to the General Assembly and to the Governments of Member States for information.

16. Owing to the circumstances prevailing at the time of its regular session in 1964, the General Assembly did not discuss the report and consequently did not express its opinion to the Commission. Accordingly, the Commission had to resume its work on the topic at the point it had reached at its sixteenth session in 1964. The Special Rapporteur expressed the hope that the reports on this topic submitted at the 1964 and 1965 sessions would be consolidated in a single report.

17. The topic of special missions was placed on the agenda for the Commission's seventeenth session, at which the Special Rapporteur submitted his second report.¹³ The Commission considered that report at its 804th-809th, 817th, 819th and 820th meetings.

18. The Commission considered all the articles proposed in the Special Rapporteur's second report. It adopted twenty-eight articles of the draft, which follow on from the sixteen articles adopted at the sixteenth session. The Commission requested that the General Assembly should consider all the articles adopted at the sixteenth and seventeenth sessions as a single draft.

19. In preparing the draft articles, the Commission has sought to codify the modern rules of international law concerning special missions, and the articles formulated by the Commission contain elements of progressive development as well as of codification of the law.

20. In conformity with articles 16 and 21 of its Statute, the Commission decided to communicate its draft articles

on special missions to Governments through the Secretary-General, inviting their comments. Governments were asked to submit their comments by 1 May 1966. This short time-limit was regarded as essential if the Commission was to be able to complete its final draft on special missions with its present membership.

21. The Commission decided to submit to the General Assembly and to the Governments of Member States, in addition to the draft articles in chapter III, section B of its report, certain other decisions, suggestions and observations set forth in section C, on which the Commission requested any comments likely to facilitate its subsequent work.

22. At its twentieth session the General Assembly discussed the draft articles, which were transmitted to the Governments of Member States for comment. By the opening of the Commission's eighteenth session, however, only a limited number of States had submitted their comments.

23. At its eighteenth session, the International Law Commission only considered the general questions relating to special missions which had been raised by the Governments of Member States in their comments and suggestions or which had been brought up by the delegations of Member States in the Sixth Committee at the twentieth session of the General Assembly. It took decisions of principle on those questions. They were: the nature of the provisions relating to special missions; the distinction between the different kinds of special missions; the question of introducing into the draft articles a provision prohibiting discrimination; reciprocity in the application of the rules on special missions; relationship with other international agreements; the form of the instrument relating to special missions; the adoption of the instrument relating to special missions; the preamble. The Commission did not have time to deal with the comments on the actual draft articles because it concentrated all its efforts at that session on preparing the draft articles on the law of treaties.

24. In its report to the General Assembly on the work of its eighteenth session, the International Law Commission informed the Assembly of the decisions it had taken on those questions of principle, of the instructions it had given to the Special Rapporteur and of the fact that only a few States had transmitted their observations and comments on the draft articles. It asked the Secretary-General to invite the Governments of Member States again to forward their comments, before 1 March 1967, since the Commission had not yet been able to consider individual comments.

25. At the twenty-first session of the General Assembly, the Sixth Committee considered that report and some representatives stated their position on it. In its resolution 2167 (XXI) of 5 December 1966, the General Assembly invited the International Law Commission to continue its work of codification and progressive development of the international law relating to special missions and to present a final draft on the topic in its report on the work of its nineteenth session, taking into account the views expressed by the representatives of Member States at the twenty-first session of the General Assembly and

¹⁰ *Ibid.*, para. 25.

¹¹ *Yearbook of the International Law Commission, 1963*, vol. II, p. 225, para. 63.

¹² *Yearbook of the International Law Commission, 1964*, vol. II, p. 67, document A/CN.4/166.

¹³ *Yearbook of the International Law Commission, 1965*, vol. II, p. 109, document A/CN.4/179.

any comments which might be submitted by Governments.

26. At its eighteenth session, the International Law Commission requested the Special Rapporteur, Mr. Milan Bartoš, despite the fact that his term of office as a member of the Commission was to expire on 31 December 1966, to continue his work on the rules relating to special missions if he were re-elected a member of the Commission. Since he was re-elected by the General Assembly on 10 November 1966, the Special Rapporteur has continued his work.

CHAPTER II

Introduction

1. *The object of this report and the practical importance of the question*

27. The problem of *ad hoc* diplomacy is becoming increasingly important in international law and in international relations, where it appears in a new form while at the same time, in theory, it has remained, as it were, non-existent — or rather, writers on international law do not make it a special object of their research and mention it only in passing, as an adjunct to the general notion of diplomacy.

28. Many writers are still in bondage to the “classic” conception of this notion. They speak of *ad hoc* diplomacy in the past tense, as though it were something fallen into disuse and displaced by resident, permanent diplomacy. There are writers, even today, who regard *ad hoc* diplomacy as simply a matter of ceremonial or etiquette missions, which they believe to have been for some time past the only occasions for the dispatch of special ambassadors, all other diplomatic affairs having been transferred to permanent missions. Other writers, more realistic in outlook, concede that the assignment of special envoys and missions of sovereign States to international congresses and conferences, which are becoming increasingly frequent, also constitutes *ad hoc* diplomacy in the form of special delegations and delegates, and they rightly regard this as a virtual revival of the institution of *ad hoc* diplomacy. This is not all, however. The ever-growing influence of political control, the democratization of State political systems in general, the increasingly active participation of politicians, and particularly of Heads of Government and Ministers for Foreign Affairs, in international relations, and the closer and more direct “summit” and “high-level” contacts have resulted in the transference of a large volume of affairs from resident to *ad hoc* diplomacy. As statesmen become more mobile, communications more rapid, and the diplomatic apparatus more bureaucratic, and as it becomes necessary to find speedy solutions to international political problems, *ad hoc* diplomacy has assumed new forms and a new content. The real importance of “flying diplomacy” increases daily. Travel by high-ranking representatives of States, contacts between them, rapid discussions of a range of subjects, and “high-level” negotiations between States, have never been so common as they

are today. It is no exaggeration to state that the regular duties of Ministers for Foreign Affairs include flying to other States for negotiations, or to prepare for negotiations, with their colleagues, and in turn receiving these in their own home countries. One of the chroniclers of our age tells us that, in the great capital cities, there are “queues” of ministers from foreign countries “awaiting their turn”, because *ad hoc* diplomacy has not yet succeeded in emancipating itself from certain rules of protocol which prohibit the simultaneous reception of more than one senior official if they are not taking part in joint negotiations. He foresees that this rule of protocol will soon have to be dropped, so that “flying diplomacy” may be recorded in a number of separate columns in the host’s appointments book. This alone suffices to show how far *ad hoc* diplomacy has become a real necessity in advanced international relations and in their emancipation from the monopoly of resident diplomacy as the sole instrument of international negotiations, outside international congresses and conferences.

29. A further point is that international relations are no longer purely political and consular. There is no field of social life today in which direct contacts between States are lacking. It would be wrong to assume that technical contacts between sovereign States are concentrated entirely in such international organizations as the specialized agencies. On the contrary, the specialized agencies, despite their desire to become centres of international life in specific technical fields, generally stimulate and encourage direct bilateral contacts among their own members; in some cases, the agencies even impose an obligation on their members to maintain relations with each other, either permanently or at intervals, for negotiations, the conclusion of agreements, the exchange of information, and the solution of current affairs. A mere glance at the activities of this kind carried on by the International Civil Aviation Organization suffices to prove this. The practical implementation of its instruments, as multilateral treaties, requires permanent contacts between the member countries of the Organization, while the latter confines itself to registering and studying the results of those contacts and taking action to smooth out any resulting difficulties. The list of contracts registered — bilateral, multilateral, restricted and regional — which is published by ICAO shows clearly how many international contacts were necessary before results were achieved. In studying documents of this kind, the Special Rapporteur could not fail to note that most of the contracts to which they relate were brought into being through *ad hoc* diplomacy, whereas arrangements concluded through negotiations and contacts between resident missions and representatives of the receiving State in which the treaty was concluded are very rare. Needless to say, this example applies to all fields.

30. In his desire to go thoroughly into the question of *ad hoc* diplomacy, the Special Rapporteur is obliged to point out that, according to one school of thought, such diplomacy is limited entirely to strictly political missions, and the notion of *ad hoc* diplomacy does not extend to “technical” missions. In his view, this conception is fundamentally unsound and not in keeping with the notion of diplomacy in general. The characteristic of

diplomacy is that it represents the State in its relations with another subject (or with the other subjects) of international law. The object of these relations is any situation in which the relation of sovereignty is manifest. Any action in this category is international in nature, and consequently political in nature also; for all such questions are complex, in that they have both a technical aspect and a political aspect, although the latter is not present to the same degree in all such matters. It emerges more clearly in some situations, less clearly in others, but it is nevertheless everywhere present, and any international relation is a relation between sovereignties. Whenever any international contact takes place, it is the duty of diplomacy to represent the State in relations of that kind, and therefore special missions and special delegates responsible for dealing with these problems are *ad hoc* diplomats. It may be that, apart from the general rules, certain special rules also apply to such diplomats because of the specific nature of their functions, but their status must be, in substance, that of *ad hoc* diplomats, and everything which in general attaches to the status of *ad hoc* diplomats therefore, of necessity, applies also to them.

31. In view of the multiplicity of special missions and of special delegates with technical functions, and of the fact that international co-operation is constantly expanding in these areas and that such functions are of a recent character, it is clear that the notion of *ad hoc* diplomacy is acquiring new and greater importance and must be given special attention. This special attention must be devoted, not only to studies of an international phenomenon, but also to the need for establishing adequate rules of positive law setting out with precision the rights and obligations of *ad hoc* diplomacy and, as a corollary, regulating mutual relations between States which send and receive representatives of this kind.

32. The lack of special rules on this subject in positive public international law is due to the traditional idea that the time of *ad hoc* diplomacy is past, that it is now only employed in exceptional cases (ceremonial missions and international meetings), that it is limited to official visits of Heads of States and Governments (for which there are, moreover, special rules), and that its sporadic manifestations may be regulated by the analogous application of the rules of public international law concerning resident diplomacy. It took courage to present the problem of *ad hoc* diplomacy as a special subject for study and regulation, first to the International Law Commission and later to the General Assembly of the United Nations. This proposal was received favourably in principle, but it did not bear fruit. Established traditions, indeed, are not easily changed. For this, new conceptions are necessary, and as a first step, the new phenomena must be faced and analysed. The Special Rapporteur would not venture to assert that the idea of establishing rules on this subject on new foundations was entirely rejected. However, the only result of this proposal within the Commission was the confirmation of the old rule concerning the application by analogy of the rules governing resident diplomacy. This was due, on the one hand, to lack of time for a detailed survey of a new phenomenon, which had been inadequately explored in theoretical studies despite the abundant practice, and, on the other hand, to an error in the choice

of method used in approaching the problem. According to Article 13 of the United Nations Charter and to the Statute of the International Law Commission, there are undoubtedly two methods of formulating rules of international law, namely codification and progressive development. Although the Commission acknowledges in theory the need for an interpenetration of these two methods, the Special Rapporteur, as a member of that Commission who has participated in its work for the past ten years, must nevertheless confess that preference is still given to the straight codification method. In the present case, the Commission has also sought substantiation in existing positive international law. It is the Commission's practice, in adapting the existing system to new developments to amend and correct it.¹⁴ However, it has not hitherto shown either enough determination or enough courage to take account of recent developments in international relations and, abandoning rules previously in force which are already obsolete in practice, to establish adequate new rules. That is why its 1960 draft convention on *ad hoc* diplomacy proved abortive at the Vienna Conference on Diplomatic Relations (1961). The brief reference to the application by analogy of the rules governing permanent missions appeared weak and inadequate to the States participating in that Conference. They sought sounder and more comprehensive solutions, more consistent with the increasingly frequent instances of *ad hoc* diplomacy. That Conference, moreover, took a coupling of the functional theory and the representative theory as its starting point and as the fundamental idea for permanent diplomatic missions. In the Vienna Convention on Diplomatic Relations all the provisions were thought out in terms of the actual situation and the functioning of the permanent missions. To put forward the abstract idea that the functioning of *ad hoc* diplomacy was identical with that of permanent missions would be to ignore the facts. However, in order to bring these facts to light and to establish the legal rules appropriate to them, a detailed analysis must be made of international relations as they really exist. That is why this problem is again on the agenda of the International Law Commission. The international community of today expects that this question will be resolved as soon as possible and that the convention on *ad hoc* diplomacy will become the third chapter in a code of modern diplomatic law, the first two chapters of which have already been written.¹⁵ A decision has already been taken to prepare the fourth chapter also (on relations between States and inter-governmental organizations), which — as conceived by the International Law Commission — will include certain matters concerning *ad hoc*

¹⁴ Admittedly the Commission had deliberately abandoned this method and was seeking new solutions, when it displayed a preference for the progressive development of international law in its draft which, at the first Conference on the Law of the Sea (Geneva, 1958) gave rise to Convention III (on the Living Resources of the High Seas), but the reason for that is to be found in the relevant resolutions of FAO and the United Nations General Assembly.

¹⁵ These are the Vienna Convention on Diplomatic Relations, 1961, i.e., on the legal relations applicable to permanent diplomatic missions, and the Vienna Convention on Consular Relations, 1963.

diplomacy (question of the status of State delegations to international meetings).¹⁶ State practice is impatiently awaiting this part of the diplomatic code. It would not be wrong to say that it is an absolute necessity of contemporary international law. To meet the needs, however, this part should not only be based on thorough analysis and be in accord with the functional theory of the position of the organs whose status it is to regulate, but should also take account in its rules of the contemporary conditions of the international community and of the progress and transformation of international law. In other words, these rules should be a contribution to the further progressive evolution of international law, chiefly by their adaptation to the principles serving the further development of friendly and peaceful relations among peoples, and should seek to be an instrument of peaceful coexistence.

33. The Special Rapporteur will seek to set out here, from the legal viewpoint, the status of *ad hoc* diplomacy, the ways and prospects of finding solutions, and the rules governing *ad hoc* diplomacy in public international law, confining himself exclusively to that area of *ad hoc* diplomacy which should constitute a separate subject, according to the conception of the International Law Commission. Consequently, he will exclude from his report certain phenomena which otherwise, in his opinion, would form an integral part of the notion of

¹⁶ In the Special Rapporteur's view, the considerations that led the Commission to isolate the legal status of State delegations to international meetings from the domain of *ad hoc* diplomacy and to transfer it to the system of rules governing international organizations were unduly pragmatic and practical. The Commission's decision was based on two special considerations: (a) since most present-day international meetings are held under the auspices of international organizations and the latter have standardized rules concerning the status of delegations participating in such meetings, the Commission in practice made no distinction between those meetings and the meetings of the main and subsidiary organs of the international organizations (which, in the Special Rapporteur's opinion, is not correct); (b) the legal rules concerning meetings held under the auspices of international organizations must be expected to crystallize and be applied also to other international meetings not convened by or connected with international organizations. To try to find and codify special legal rules for this second group would be a duplication of work. The task will be easier when the rules to be applied to meetings taking place under the auspices of international organizations have been established. It should be noted that for both groups there are abundant positive law sources not only in the standardized provisions of international organizations (although these have their distinguishing features — for example, the system of *curiae* in the International Labour Organisation), but also in the customary rules and the regulations of a number of international conferences and congresses. In both cases the Commission could make much more use of the codification method, using for this purpose also the abundant literature dealing with the practice, customs and rules pertaining to international meetings. This literature has developed principally in commentaries and studies on the functioning of the League of Nations, the United Nations, the specialized agencies and their organs. In its work on special missions, the Commission has shown some flexibility on the issue whether the status of delegations to international conferences should be finally separated from the principles and rules relating to special missions. Consequently, the Commission decided that the Special Rapporteur on relations between States and inter-governmental organizations and the Special Rapporteur on special missions should jointly study that question and submit a report to the Commission so that it might reach a final decision.

ad hoc diplomacy. Accordingly, in this report he does not propose to deal with matters relating to:

(a) Visits by Heads of States and Governments and by Ministers for Foreign Affairs, when they are State or official visits to another State, even though on such occasions certain diplomatic actions may be undertaken and consequently, such visits represent, in substance, the performance of an *ad hoc* diplomatic mission. The reason for excluding them is that the status of the participants in these actions and that of their collaborators and of the persons in their party are regulated by special rules hallowed by usage which distinguish this group of actions from the notion of *ad hoc* diplomacy;

(b) Specialized permanent missions existing side by side with or replacing the ordinary diplomatic missions, for these are extraordinary permanent missions and not *ad hoc* diplomatic missions and consequently by definition they do not come under the notion of *ad hoc* diplomacy. At present there are no general rules of international law applicable to these missions, but their status is generally regulated by treaty between the sending State and the receiving State;

(c) The activities, even if performed regularly, of delegates of States to institutional commissions which are established by international agreement and whose status is regulated in advance. These are permanent organs in which *ad hoc* diplomats participate, but their status is the subject of special provisions;

(d) Delegates and delegations to permanent international organizations. This is a new form of resident diplomacy, which is wholly unrelated to *ad hoc* diplomacy.

34. On the other hand, it should be understood, even when it is not stated explicitly, that the Special Rapporteur's report covers the notion of *ad hoc* diplomacy in the more limited sense, including not only periodic missions and delegates with purely political functions, but also those whose tasks are considered as being of a technical character. He regards them all as *ad hoc* diplomats. Modern international relations can no longer remain wedded to the conservative view that *ad hoc* diplomacy is composed of special missions of a ceremonial character or possibly of persons who carry out certain political missions or hold a specific diplomatic rank. Even the functions of resident diplomats are today no longer exclusively diplomatic and political. More new technical activities are assigned to them each day, in the light of the development of international relations at the present time. For this reason permanent missions today include an ever increasing number of experts styled special attachés, and of advisers of diplomatic rank or at least with diplomatic status. As long as they perform their functions by representing their sovereign State and maintaining international relations, nobody thinks of contesting their diplomatic character. If this is true of the members of permanent missions, it should *a fortiori* be true of the members of special missions and special delegates. They should, indeed they must, be included in the ranks of *ad hoc* diplomats.

35. Consequently, this report deals with a specific international phenomenon which, the Special Rapporteur

is convinced, has particular importance for modern international relations.

36. Although the expression "*ad hoc* diplomacy" is certainly correct from the standpoint of theory, the Special Rapporteur, following the opinion of the majority of the Commission, has replaced it with the expression "special mission" in his draft rules. The expression "*ad hoc* diplomacy" has aroused the disapproval and opposition of career diplomats who consider that it might lead to confusion of the ideas of resident diplomacy and *ad hoc* diplomacy, particularly as that expression would be used to designate persons performing either form of diplomacy. However, the adoption of a different expression does not change the substance of the preceding statement.

2. *Preliminary question: should the rules governing special missions cover the regulation of the legal status of delegations and delegates to international conferences and congresses?*

37. At its fifteenth session, the International Law Commission did not take a definitive position on this question. It decided not to take a final decision until it had received the recommendations of the Special Rapporteur on the topic of special missions and of the Special Rapporteur on the relations between States and inter-governmental organizations.

38. The Special Rapporteur on the topic of special missions has come to believe that the status of delegations and delegates to international inter-governmental conferences and congresses should be viewed from two angles. On the one hand, consideration should be given to congresses and conferences convened by international organizations or held under their auspices. In view of the widespread and, today, almost universally adopted practice whereby the status of such delegations and delegates is determined in advance either by the rules of the organization convening the conference or congress or by the letter of convocation, and whereby, in such cases, a legal relationship is created between the delegations and delegates to such meetings, on the one hand, and, simultaneously, the convening organization and the participating States on the other hand, the Special Rapporteur considers that the status of such delegations and delegates could be regulated under the legal rules governing the relations between States and international organizations, even though these delegations are essentially identical with those taking part in conferences and congresses held outside international organizations. The status of delegations and delegates to conferences and congresses convened by one or more States outside the international organizations is similar in all respects to the status of special missions and, in the Special Rapporteur's opinion, should be regulated by the rules on special missions. He would point out, however, that the distinction between the two types of delegations is purely formal, the criterion being who convenes the meeting.

39. The Special Rapporteur suggests that, as this question is a preliminary one, it should be discussed before the main question is taken up.

40. It should here be noted that delegates attending international conferences and congresses are the most common example of *ad hoc* diplomats. Although the Special Rapporteur does not intend to deal with this category of diplomacy which, in the opinion of the International Law Commission, should be considered with the rules concerning relations between States and inter-governmental organizations (a view with which he is only partly in agreement), he is nevertheless compelled to stress here one point only referring to this kind of *ad hoc* diplomacy. The membership of special missions of this kind sometimes includes representatives of the sending State who are diplomats already permanently accredited to particular States. Since other rules exist concerning the activities in public of permanently accredited diplomats (courteous conduct in public with respect to the State to which they are accredited) and there is the rule regarding the full freedom of representation of a State at international conferences, even though the State concerned may be exposed to severe judgements and possibly violent opposition and critical statements in the public meetings of the conference, there is undeniably a certain conflict in this case, at least so far as protocol is concerned. However, the idea that during the conference and in the performance of the delegate's function, his status as an *ad hoc* diplomat takes precedence over his status as a resident diplomat¹⁷ is gaining more and more ground.

41. During the period that such a representative is an *ad hoc* diplomat, he does not cease to be a resident diplomatic agent as well. That depends on the circumstances and the capacity in which he acts. Undeniably such situations are not always desirable or agreeable. That is why, when preparations are being made for a conference of this kind and if the situation during the conference is likely to be unpleasant, heads of permanent diplomatic missions urge their Governments to excuse them from the responsibility of acting as the head or a member of such delegations and recommend that these missions should be entrusted to third persons. They generally argue that such missions may adversely affect the performance of their diplomatic functions after the conference has ended.¹⁸

42. On the other hand, the sending States consider it practical and less expensive to entrust these functions to the heads of their permanent diplomatic missions at the place where the conference is to be held.

43. Obviously, when the head of the permanent mission ceases to act as an *ad hoc* diplomat, he retains his standing as a resident diplomat and loses his duality of functions. He can no longer act in the receiving State as an *ad*

¹⁷ At the Vienna Conferences on Diplomatic Relations (1961) and Consular Relations (1963) many States had appointed the heads of their permanent diplomatic missions accredited in Austria to head their delegations. In some cases they were obliged to challenge the views of the Austrian delegation or else those of the President of the Conference, who was the head of the Austrian delegation. Nevertheless, both sides should have understood that the delegations in question were acting in a dual capacity.

¹⁸ This is one of the reasons why the ambassadors of the United States and the United Kingdom were not included in the delegations of their States to the Vienna Conferences in 1961 and 1963.

hoc diplomat, with respect to the State to which he is accredited.

44. In discussing the question whether the rules relating to special missions should also cover the legal status of delegations of States to international conferences, several members of the Commission were in some doubt whether that subject should be included in the rules on special missions or whether it constituted a separate topic. Mr. Yasseen thought that the Commission might consider entrusting the entire question of conferences to a third special rapporteur; but there seemed to be no insurmountable obstacle to assigning it to the Rapporteur on special missions (SR.723, para. 76). Mr. Tunkin also took that view; referring to the rules concerning international conferences, he said that they were now becoming a separate subject in international law (SR.724, para. 19). Mr. Tabibi expressed the same opinion (SR.725, para. 17).

45. The Commission did not come to a decision to treat this as a different subject and to entrust it to a separate special rapporteur for the "law of conferences". At its seventeenth session, however, it was still in favour of having the Special Rapporteur on special missions and the Special Rapporteur on relations between States and inter-governmental organizations study this question and submit their opinions and recommendations.

3. *Preliminary question: with respect to special missions, should there or should there not be an additional protocol to the Vienna Convention on Diplomatic Relations or a special draft linked to that Convention by a reference clause?*

46. This question was left pending by the International Law Commission at its fifteenth session, in the belief that the time was not yet ripe for deciding it and that the Commission should await the Special Rapporteur's recommendation on the subject.

47. The Special Rapporteur believes that it would be wrong to append the draft articles on special missions to the Vienna Convention on Diplomatic Relations as a mere additional protocol; for he cannot lose sight of the basic idea of the decision taken by the Commission, namely, that the Special Rapporteur "should keep in mind that special missions are, both by virtue of their functions and by their nature, an institution distinct from permanent missions". His study of the functioning of special missions has convinced the Special Rapporteur that simply to append the draft articles to the rules governing diplomatic relations would not be adequate for some special missions, so far as their status is concerned.

48. The Special Rapporteur has also adopted in part, the argument, put forward at the meetings of the Commission by Mr. Rosenne, that although special missions represent sovereign States in international relations they cannot, because of their functions, always be treated as diplomatic missions but should, in some cases, be treated as consular missions.¹⁰ Consequently, it must be

anticipated that the rules relating to special missions will contain a reference to the Vienna Conventions on Diplomatic Relations (1961) and on Consular Relations (1963) also. This reference will be parallel and will depend on the nature of the special mission and on the requirements of each individual case.

49. The Special Rapporteur believes, however, that no attempt should be made to settle this question until the final clauses of the draft rules are taken up.

50. At the time when the Special Rapporteur was asked to undertake this task, the Commission considered the preliminary question whether the instrument it would be drafting would be complementary to the Vienna Convention on Diplomatic Relations or a separate convention.

51. During the discussion on this point, a further preliminary question arose, namely whether the instrument to be drafted would be in the nature of a treaty or would be a set of model rules. The majority of the members was in favour of the idea that the purpose was to draft treaty provisions.

52. The question whether the object should be to draw up a set of model rules was considered in particular by Mr. de Luna. He said that the history of diplomatic relations had shown that the method of drawing up model rules was not satisfactory, whereas a separate convention had an authoritative status, even if its ratification might cause some difficulties, and might serve as a model. Mr. de Luna went on to say, however, that those were simply preliminary remarks; the Commission would be better able to weigh the advantages of one solution against the other at a later stage in its work (SR.725, para. 28). Mr. de Luna's point of view was virtually adopted by the Commission, and all the subsequent comments, while subject to Mr. de Luna's proviso that the Commission would decide later on the final form of the instrument, were based on the tacit understanding that for the time being the Commission was drafting an instrument in the nature of a treaty.

53. Following up this idea, the Commission considered whether the rules to be laid down in the instrument should be regarded as *jus cogens* or *jus dispositivum*. Mr. Rosenne maintained that the draft articles should contain elements of both. He described *jus dispositivum* rules as "residual rules" which he defined as "a set of rules made available to States for incorporation in their own agreements as desired" (SR. 725, paras. 8-10). Mr. Yasseen gave a much more stringent definition of these residual rules, since he made a reservation limiting the rights of States. In his view a State would be free to derogate from the general convention by means of bilateral agreements, to the extent that such derogations *did not conflict* with *jus cogens* rules (SR.725, para. 21). Mr. Castrén was also of this opinion; he said that only exceptionally could the rules be rules of *jus dispositivum* (SR.725, para. 23). Still more light was thrown on the subject by Mr. de Luna, who expressed a like opinion, saying that the articles which the Commission was drafting involved inviolable rules of *jus cogens*, or rules of *jus dispositivum* which ranked as residual rules in cases where States had not otherwise provided by bilateral

¹⁰ See summary record of the 711th meeting, para. 77, in *Yearbook of the International Law Commission, 1963*, vol. I, p. 260.

agreement (SR.725, para. 26). Mr. de Luna's view therefore was that the text itself would decide from which rules it would be possible to derogate, whereas Sir Humphrey Waldock thought that the Commission should follow the example of the two Vienna Conferences and refrain from trying to determine which rules governing special missions were of the character of *jus cogens* (SR.725, para. 35). The Special Rapporteur considers that when the Commission drafted the rules in the operative part of the articles, it followed the course suggested by Mr. de Luna; a clear instance will be found in the language of article 9.

54. Similarly, at the sixteenth session of the Commission, the question was raised whether the Commission should draft an additional protocol to the Vienna Convention on Diplomatic Relations, 1961, or a separate instrument. This was another of the preliminary questions, and three opinions were expressed during the general debate in the Commission.

55. The first of these was that the Commission should decide in favour of an additional protocol. Mr. Tabibi stated that the Commission was called upon to complete diplomatic law by adding a new chapter to the two Vienna Conventions (SR.725, para. 15).

56. Other members of the Commission, especially Mr. de Luna (SR.725, para. 27), expressed a different opinion, namely that the Commission was dealing with a separate topic and that a separate convention was therefore required.

57. This view was shared by Mr. Verdross, who held that the convention should be complementary to the two existing Vienna Conventions (SR.723, para. 62). Sir Humphrey Waldock expressed a like opinion (SR.723, para. 68), but later changed his mind (see below).

58. Many members of the Commission who endorsed this second opinion thought that it might still be necessary, in drafting an independent instrument relating to special missions, to adhere as far as possible to the ideas, structure and terminology of the Vienna Convention on Diplomatic Relations. Statements to that effect were made by Mr. Ago (SR.724, para. 57), Mr. Castrén (SR.725, paras. 23, 24 and 25), Mr. Elias (SR.725, para. 30), Mr. El-Erian (SR.723, paras. 44 and 46; SR.725, paras. 38 and 39), Mr. Jiménez de Aréchaga (S.R.723, para. 50), Mr. Rosenne and Mr. Briggs — more especially in the Drafting Committee but, as regards Mr. Rosenne, also in the general debate (SR.724, paras. 35, 63 and 64; SR.725, paras. 3, 4, 8 and 46). To some extent this was also Mr. Tunkin's opinion (SR.724, para. 50).

59. Mr. Amado's view was that the Commission should produce a self-contained draft and should not let itself be excessively preoccupied with existing conventions, especially the Vienna Convention on Diplomatic Relations, though there would be no objection to cross-references (SR.725, para. 42; SR.724, para. 61). Similarly, Mr. Yasseen thought that the Commission should draft a separate convention, though this would not preclude a reference to other conventions (SR.725, paras. 21 and 22).

60. The third point of view was that, for the time being, the Commission should deal with the substance of

the topic; later, after completing its work, it might see whether the results showed that the rules relating to special missions corresponded with or, on the contrary, differed from the provisions of the Vienna Convention on Diplomatic Relations, and then decide whether it would adopt the first or the second of the opinions described above. This was the view put forward by Mr. Tunkin (SR.725, para. 24) and it was supported by Sir Humphrey Waldock (SR.725, para. 45) and Mr. Ago (SR.725, para. 48). Mr. Tunkin gave the reasons for his attitude in a further statement (SR.725, paras. 33 and 34), which was supported by Mr. Tsuruoka (SR.725, para. 47) and by Sir Humphrey Waldock (SR.725, paras. 35-36).

61. The Commission provisionally adopted the third solution, and the rules are being drafted as to substance, the decision concerning the formal relationship between those rules and the Vienna Convention on Diplomatic Relations being postponed.

62. During the general debate, members of the Commission also mentioned the 1963 Vienna Convention on Consular Relations as a source of legal rules which should be taken into account in the drafting of articles on special missions. All of these members, however, regarded that Convention either as part of the future code of diplomatic law or as a secondary instrument, and they considered the Vienna Convention on Diplomatic Relations to be more important.

63. In this connexion, Mr. Amado protested against any attempt to take the rules concerning consular immunities as a model in dealing with the question of the immunities of special missions, for (he said) the Commission's duty was precisely to take into account the development of modern diplomacy, which tended to make increasing use of special missions (SR.724, para. 61). Although Mr. Amado's view was that the rules relating to special missions should be drafted without undue preoccupation with existing conventions, his specific reference was to the Vienna Convention on Diplomatic Relations (SR.725, para. 42) and not to the Convention on Consular Relations.

64. Mr. Elias made only an indirect reference to the Vienna Convention on Consular Relations; he considered that it would not be easy to assimilate the status of members of special missions to that of consuls because special missions differed so widely in their composition (SR.724, para. 37).

65. Mr. Castrén mentioned the Vienna Convention on Consular Relations only when comparing it with the Vienna Convention on Diplomatic Relations (SR.725, para. 24); he did not recommend that it should be used.

66. Mr. Jiménez de Aréchaga's view was that the privileges and immunities granted to members of purely technical missions should be limited to those necessary for the exercise of their duties: they should be similar to those enjoyed by consuls under the Vienna Convention on Consular Relations rather than to those enjoyed by diplomatic agents under the Vienna Convention on Diplomatic Relations (SR.723, para. 50).

67. Mr. Rosenne stated that, although certain special missions fulfilled quasi-consular functions, as, for

example, when they dealt with migration problems, he had in no way wished to suggest in his statement at the 711th meeting (SR.711, para. 77) that there should be separate rules for special missions which fulfilled quasi-consular functions. He was of the opinion, however, that the Commission should not only draw inspiration from the Vienna Convention on Diplomatic Relations but should also bear in mind the contents of the Vienna Convention on Consular Relations (SR.724, para. 63).

68. Mr. Tabibi considered that the rules relating to special missions should complete diplomatic law, including the two Vienna Conventions (SR.725, para. 15).

69. The conclusion to be drawn from these comments, more especially from those of Mr. Ago (SR.724, para. 58), is that the Commission should not draw dangerous analogies with the position of consular missions. Accordingly, the position is that, although the Commission has not declined to use the Vienna Convention on Consular Relations, it attaches greater importance to the Vienna Convention on Diplomatic Relations as a source, and even then it will take into account the peculiar characteristics of special missions.

70. Mr. Verdross raised the question of the position of the rules relating to special missions in the general code of diplomatic law. His view was that the Commission should codify the whole of diplomatic law: if it wanted its work to be useful it should leave no point uncovered. In addition to the Convention on Diplomatic Relations and the Convention on Consular Relations, the field to be covered included relations between States and inter-governmental organizations and the other problems of special diplomacy in the broadest possible sense of the term (SR.723, para. 62). The same opinion was voiced by Mr. Castrén (SR.724, para. 12; SR.725, para. 23), Mr. Elias (SR.725, para. 30) and Mr. Yasseen (SR.725, para. 21). Mr. Tabibi (SR.725, para. 12), Mr. Rosenne (SR.725, paras. 3-11) and Mr. El-Erian (SR.725, para. 37) held that all those rules were interrelated.

71. Several members who spoke in the discussion considered that the rules relating to special missions should, so far as possible, be drafted in such a way that the result would be the unification of the rules concerning special missions. It was not suggested, however, that the rules must be absolutely identical.

72. For instance, Mr. Yasseen, though supporting the unification of the rules, said that that did not mean that all special missions should be governed by identical rules (SR.723, para. 18). Special missions were so varied that it was impossible to draft uniform rules; the rules would have to differ in certain respects (SR.724, para. 34).

73. Mr. Jiménez de Aréchaga supported Mr. Yasseen (SR.723, paras. 49 and 50).

74. Mr. de Luna considered that all the rules should also apply to those special missions which were delegations to conferences (SR.723, para. 63).

75. Mr. Castrén's view was that the rules might certainly cover all sorts of official functions performed by special missions, but immediately afterwards he went on to say that the rules governing special missions might vary with their functions (SR.724, para. 10).

76. Mr. Cadieux, too, thought that it was impossible to envisage a single uniform status for all categories of special missions (SR.724, para. 45).

77. The statements cited above show that, despite opposing arguments, the members of the Commission have a common attitude. On the one hand, it is desired to achieve a uniform body of rules for all special missions — a *lex generalis* — and on the other hand it is held that there should be special rules — *lex specialis* — for certain types of mission that would derogate from the uniform rules.

78. During the discussion by the Sixth Committee of the General Assembly of the reports of the International Law Commission on its sixteenth and seventeenth sessions, several delegations stated their views on this question. The delegation of Brazil took the view that: . . . there was ground for hope that a text on special missions might be added by an international conference to the 1961 Vienna Convention on Diplomatic Relations and the 1963 Vienna Convention on Consular Relations.²⁰

79. The Special Rapporteur considers that this statement supports the drafting of a separate convention on special missions which would be organically linked with the two Vienna Conventions.

80. The Czechoslovak delegation said that "the draft articles should be embodied in an international treaty".²¹

81. The Swedish delegation pointed out that "a convention on special missions had been deemed necessary to complement the 1961 Vienna Convention on Diplomatic Relations".²²

82. The Greek delegation said that the law on special missions should be codified in order to supplement the Vienna Conventions on Diplomatic and Consular Relations,²³ i.e., both conventions, not merely that on Diplomatic Relations.

83. The Romanian delegation expressed itself firmly on the question, as follows:

His delegation accepted the view widely held that special missions were distinct from permanent diplomatic missions and considered that the rules regarding the former should be set out in a single separate convention to be drafted at a special conference of plenipotentiaries.²⁴

84. The French delegation expressed the opinion that: . . . the draft convention on special missions would certainly be useful, especially if it employed the same terminology as the 1961 Vienna Convention on Diplomatic Relations while remaining independent of that Convention.²⁵

85. The delegation of Iraq took the view that:

It would be preferable for them [the draft articles] to constitute a separate convention instead of forming an additional protocol to the 1961 Vienna Convention.²⁶

²⁰ *Official Records of the General Assembly, Twentieth Session, Sixth Committee, 840th meeting, para. 14.*

²¹ *Ibid.*, 843rd meeting, para. 17.

²² *Ibid.*, 844th meeting, para. 9.

²³ *Ibid.*, 845th meeting, para. 45.

²⁴ *Ibid.*, 848th meeting, para. 12.

²⁵ *Ibid.*, 849th meeting, para. 20.

²⁶ *Ibid.*, 849th meeting, para. 34.

The same delegation thought that "the draft articles would seem in their general lines already to constitute the foundations for a convention".

86. Only the delegation of the Netherlands advocated codification in the form of "one unified statute book".²⁷

87. The Government of Israel, in its written comments, expressed itself as follows:

The question of the final form in which the draft articles are to be couched will undoubtedly require careful consideration. An international convention on the lines of the 1961 Vienna Convention on Diplomatic Relations and the 1963 Vienna Convention on Consular Relations would be an achievement well worth striving for, yet it is felt that it may eventually prove difficult to achieve the codification of this topic by means of a convention drawn up in a conference of plenipotentiaries. It would therefore appear desirable for the Commission to explore any other possibilities that may suggest themselves.

It is hoped that it may be found possible to bring the draft articles, dealing as they do with a closely related subject, even more closely into line with the 1961 Vienna Convention (and, where appropriate, with the 1963 Vienna Convention) both with regard to the language used and to the arrangement of the articles.

88. The Yugoslav Government has also expressed its opinion on this question in its written comments. It considers that the rules on special missions should be embodied in a separate international convention in the same manner as the Vienna Convention on Diplomatic Relations, 1961, and the Vienna Convention on Consular Relations, 1963.

89. Taking into account all these statements by Member States, the Special Rapporteur reiterates the opinion he expressed in paragraph 28 of his first report on special missions, submitted to the Commission at its sixteenth session.²⁸ This opinion was summed up as follows: "The Special Rapporteur believes that it would be wrong to append the draft articles on special missions to the Vienna Convention on Diplomatic Relations as a mere additional protocol; for he cannot lose sight of the basic idea of the decision taken by the Commission, namely, that the Special Rapporteur should keep in mind that special missions are, both by virtue of their functions and by their nature, an institution distinct from permanent missions."

90. The Special Rapporteur is more than ever convinced that the draft articles on special missions should be a separate diplomatic instrument, but that their terms should take account of the Vienna Convention on Diplomatic Relations.

91. The Commission also took a position on this question during its eighteenth session and, in its report to the General Assembly on the work of that session, of which the Assembly took note in resolution 2167 (XXI) of 5 December 1966, stated that:

During its fifteenth session, at the 712th meeting, the Commission expressed the opinion that the time was not yet ripe for deciding whether the draft articles on special missions should be in the form of an additional protocol to the 1961 Vienna Convention, or should be embodied in a separate Convention or put in

any other appropriate form; it decided to await the Special Rapporteur's recommendations on that subject. During the discussion by the Sixth Committee of the General Assembly of the reports of the International Law Commission on its sixteenth and seventeenth sessions, several delegations stated their views on this question. In the light of those opinions and of the written comments by Governments, the Commission requested the Special Rapporteur to continue his work on the draft articles on special missions on the assumption that the draft would be in the form of a separate instrument, though keeping as closely as possible to the structure of the Vienna Convention on Diplomatic Relations.²⁹

92. Several members pointed out that, in addition to the Vienna Conventions on Diplomatic and Consular Relations, the Convention on the Privileges and Immunities of the United Nations should also be regarded as a source for the rules relating to special missions. The Convention in question was referred to by Mr. Jiménez de Aréchaga (SR.723, paras. 50 and 67), Mr. Elias (SR.723, para. 65), Mr. Rosenne (SR.723, para. 77) and Mr. Verdross (SR.724, para. 39). Some of these members pointed out that the Convention on the Privileges and Immunities of the United Nations imposed fewer restrictions on the territorial State.

93. In the course of its work the Commission, while giving priority to the Vienna Conventions, also took into account the Convention on the Privileges and Immunities of the United Nations.

4. Relationship with other international agreements

94. In his second report on special missions the Special Rapporteur proposed an article 40, containing a provision on the relationship between the articles on special missions and other international agreements; this article corresponds to article 73 of the Vienna Convention on Consular Relations (1963). At its seventeenth session in 1965, the Commission decided not to accept this proposal by the Special Rapporteur for the time being, and noted its decision in paragraph 50 of its report.

95. In its written comments, the Belgian Government stated its views on this question in the following terms:

As to the question whether the draft should contain a provision on the relationship between it and other international agreements, two points should be singled out:

(a) if the status of special missions to conferences and congresses convened both by States and by international organizations is eventually covered by this draft convention, the convention should stipulate that it does not prejudice agreements relating to international organizations in so far as they regulate the problems contemplated in the draft;

(b) more generally, the Belgian Government has no objection to the inclusion in the draft of an article similar to article 73 of the Vienna Convention on Consular Relations.

96. The Government of Israel, in its comments, emphasized the importance of the matter, saying that:

The question of the relationship between the articles on special missions and other international agreements is undoubtedly of great importance, and it is hoped that it will be given further consideration by the Commission in due course.

²⁷ *Ibid.*, 847th meeting, para. 7.

²⁸ *Yearbook of the International Law Commission, 1964*, vol. II, p. 74.

²⁹ *Yearbook of the International Law Commission, 1966*, vol. II, p. 276, para. 65.

97. In its written comments, the Swedish Government expressed the following opinion:

The question whether the draft "should contain a provision on the relationship between the articles on special missions and other international agreements" is closely connected with the problem whether the articles should have a subsidiary dispositive character or whether some of them should be *jus cogens*. Whatever course the Commission decides to follow in this respect, the character of the articles should be clearly defined in the draft.

98. Although only three Governments stated their views on this question, the Special Rapporteur took the view that it was incumbent on the Commission to revert to it and take a final decision.

99. The Commission took a position on this question at its eighteenth session and, in its report to the General Assembly, it stated the following conclusions:

In paragraph 50 of its report on the work of the first part of its seventeenth session (1965), the Commission referred to the question whether the draft articles on special missions should include a provision on the relationship between the articles and other international agreements, corresponding to article 73 of the Vienna Convention on Consular Relations. After considering the comments by Governments and the Special Rapporteur's views on the point, the Commission asked the Special Rapporteur to submit a draft article on the subject based on the Convention on the Privileges and Immunities of the United Nations, the Vienna Convention on Diplomatic Relations and the Vienna Convention on Consular Relations.³⁰

5. *Body competent to adopt the instruments relating to special missions*

100. Neither the Special Rapporteur nor the Commission, during the preparation of the draft articles on special missions, concentrated on determining what body would be competent to establish the instrument by which the articles relating to special missions would be adopted as rules of international law. The Special Rapporteur and the Commission considered that the question depended on the procedure laid down by the Statute of the International Law Commission and that it could be raised only when the preparation of the preliminary draft by the Commission was concluded. Nevertheless, the question was raised during the discussion in the Sixth Committee at the twentieth session of the General Assembly and in the written comments later submitted by the Governments of Member States.

101. The delegation of Israel said it was not convinced at present that the draft articles on special missions should be put before a diplomatic conference.³¹ The Government of Israel reiterated this opinion in its written comments, inviting the Commission to consider whether there was not perhaps some other possible way of bringing the Convention into being.

102. The delegation of Brazil hoped that the text on special missions would be adopted by an international conference.³²

103. The Romanian delegation considered that there should be a "single separate convention to be drafted at a special conference of plenipotentiaries".³³

104. The Yugoslav Government gave its views on this question in its written comments. Its opinion is as follows:

The convention should be adopted at a special meeting of State plenipotentiaries which might be held at the time of a session of the General Assembly of the United Nations. The convention could thus be adopted either before or after the session.

105. The Special Rapporteur considered that it was his duty to inform the Commission of the above opinions and recommended that it should deal with this question in its final report, suggesting that the instrument be adopted by a special conference of plenipotentiaries of States.

106. At its eighteenth session the Commission only touched on the question without taking a final decision on it. In its report to the General Assembly it defined its position as follows:

Although the Commission did not ask Governments how, in their opinion, the text of the instrument relating to special missions should be adopted, several Governments expressed their views on this question, either in the Sixth Committee of the General Assembly or in their written comments. The Commission deferred its decision on this question until its next session.³⁴

6. *Is it possible in this connexion to seek historical continuity with the rules relating to special missions which formerly existed (explanation of the method to be used in seeking sources)?*

107. The Special Rapporteur will not dwell on the well-known historical truth that permanent diplomatic missions are of comparatively recent origin. All sources show that, in the earliest years of the modern era, Heads of State exchanged temporary agents and emissaries for specific purposes and on limited missions, with the result that several special envoys from one Head of State might be present at one court at the same time. The question how long permanent diplomatic missions have existed is of little importance for the purposes of this report, although it has given rise to much debate and to attempts to establish that this historic turning point came in the period between the Treaties of Westphalia (1648) and the Congress of Vienna (1815).

108. Suffice it to note that, between the Congress of Vienna and the outbreak of the Second World War, *ad hoc* missions occurred only sporadically, and their use has declined with the growth of permanent diplomatic missions.

109. A survey of diplomatic practice, as it grew up during the Second World War, and more particularly since 1945, discloses that *ad hoc* missions have taken on a new lease of life. They are becoming more and more frequent, more and more important in the functions they perform, and more and more diversified in the subjects with which they have to deal.

³⁰ *Ibid.*, para. 64.

³¹ *Official Records of the General Assembly, Twentieth Session, Sixth Committee*, 840th meeting, para. 7.

³² *Ibid.*, para. 14.

³³ *Ibid.*, 848th meeting, para. 12.

³⁴ *Yearbook of the International Law Commission, 1966*, vol. II, p. 276, para. 66.

110. The question arose whether this was a revival of something which had died out, or at least had become more rare; is the repeated use of such missions something new, or is it an extension of something which existed in the past? There are two opposing schools of thought on this question. The first holds that *ad hoc* missions never ceased to be used; they declined in number, but the institution remained in existence. Consequently, if their use has been revived, there has been no substantial change in the notion and the workings of the institution itself; there has merely been an increase in the number of instances. It follows that the institution as such must be re-examined, since there is an historical continuity between what was in the past and what is now, and we are thus dealing with a single juridical phenomenon in public international law, with all its legality. What was valid in the past and was maintained through sporadic application still remains the legal rule and must be applied. Opposed to this interpretation is another school of thought, which asserts that special missions generally have changed in substance and have acquired new importance and a new content. It follows that, although the *ad hoc* diplomacy of the past resembles that of the present day in a formal sense — since we are accustomed to classify institutions according to their outward forms — we are now dealing with something entirely different in substance. The spirit and the needs of the new age have perhaps not entirely destroyed the old form of *ad hoc* diplomacy, and more particularly its representative character, but they have produced, side by side with it, a new form which is usually functional in character. Special missions are dispatched, not solely for the purpose of communicating the will of the sovereign, but primarily to settle the political and technical problems which confront States. This is a natural consequence of the evolution of social life and of relations within the international community, and this is why a legal institution, ancient in its form, has become new in its content. This very fact makes it necessary to provide for a new legal regulation of this phenomenon. The old rules have become inadequate and, indeed, too cumbersome because, as a logical result of the representative character of *ad hoc* missions, they attached too much importance to the ceremonial and etiquette aspect. These rules could no longer serve the new *ad hoc* diplomacy, and they are not in keeping with current conceptions of life in the international community. The tendency to dispense with empty forms of protocol, the rapid pace of life, and the sphere of action of the new *ad hoc* diplomacy require new legal rules for the latter, adequate to protect its functioning. Some writers draw attention to the fact that the multiplicity of *ad hoc* missions in the present age is one factor necessitating the simplification of the old rules in the interest of the receiving State, which is no longer able to receive, escort and offer hospitality to the *ad hoc* missions coming to its territory. It is necessary to reduce all this to reasonable proportions, to stop being guided by the representative principles of an earlier age, and to adapt to the necessities imposed by reality, by applying the functional theory to *ad hoc* diplomacy.

111. The foregoing shows that, in these times, legal arguments concerning *ad hoc* diplomacy can scarcely

remain the same as in a period when it was something sporadic and representative in character. With the change in its character, its substance has also changed, and that is why new forms have appeared in States which dispatch *ad hoc* diplomats. It follows that it would be vain to attempt to argue on the juridical basis of a certain continuity between the old and the new *ad hoc* diplomacy, irrespective of all other considerations. This does not mean that some *ad hoc* missions have not retained a representative character and are not treated according to the old rules of protocol; but in these days they are, if not an anachronism, at least rare vestiges of the past, which are dying out with the passing of the remnants of conservative forms of political structure.

112. There is, however, one norm which shows why the quest for historical and legal continuity between the old and the new *ad hoc* diplomacy must be abandoned; it is the general conception of the nature of diplomacy. On the occasion of the most recent codification of diplomatic law relating to permanent missions (Vienna Convention on Diplomatic Relations, 1961), it was made clear that the guiding principle of the new clauses must be not only the representative theory but especially the functional theory. Once this is accepted for permanent missions, it applies even more to *ad hoc* diplomacy, which is seeking, in new forms, appropriate solutions which the old rules governing *ad hoc* diplomacy could not provide. It follows from the foregoing that continuity irrespective of all other considerations is impossible. In the new circumstances, a new study of the institution and new rules for its operation are needed.

7. *Are there or are there not any rules of positive public international law concerning special missions?*

113. All the research carried out by the Special Rapporteur to establish the existence of universally applicable rules of positive law in this matter has produced very little result. Despite abundant examples of the use of special missions, the Special Rapporteur has failed to establish the existence of any great number of sources of law of more recent origin which might serve as a reliable basis for the formulation of rules concerning special missions. His research has led him to the following conclusions:

114. (I) Although the dispatch of special missions and itinerant envoys has been common practice in recent times and, as the Special Rapporteur would agree, represents the use of the most practical institutions for the settlement of questions outside the ordinary run of affairs arising in international relations, whether multilateral or bilateral, they have no firm foundation in law. Whereas ordinary matters remain within the exclusive competence of permanent missions and there are many sources of positive international law which relate to these organs of international relations — in fact, a complete system, with the Vienna Convention on Diplomatic Relations (1961) as its culminating point — the rules of law relative to *ad hoc* diplomacy and the sources from which they are drawn are scanty and unreliable. There are very few studies which relate to the period prior to the Treaties of Westphalia (1648),

or even to that prior to the Congress of Vienna (1815), in which juridical sources for this matter can be sought. It is probable that the increased use and expansion of permanent missions, and even the work of temporary delegates in co-operation with permanent missions, have somewhat obscured this juridical matter. The Special Rapporteur is prepared to admit that the provisions of the Regulation of Vienna (1815) are much to blame for this, although concerned merely with rank.³⁵ In article 3 it is stated that "diplomatic officials on extraordinary missions shall not by this fact be entitled to any superiority of rank".

115. From the records and documentation of the Congress of Vienna, it might be deduced that the rule applied only to special formal or ceremonial missions, and that other missions were not taken into consideration. Hence the belief that those missions are on the same footing as permanent missions with regard to rank, that their heads should have the rank of ambassador,³⁶ in order to have representative character, and that the general rules of diplomatic law apply to those missions. This, in the Special Rapporteur's opinion, had two consequences:

(a) First, after the Congress of Vienna, *ad hoc* diplomacy was involved only in the case of special ambassadors, i.e., those with ceremonial or etiquette functions;

(b) Secondly, the old rules governing *ad hoc* diplomacy, which covered special missions and itinerant envoys used for other purposes, were abandoned.

116. (II) One question has exercised jurists, both as a matter of practice and of doctrine: what is the scope of the facilities, privileges and immunities to which such missions are entitled and which the receiving States are obliged to guarantee to them? In the absence of other rules, attempts have been made to find rules in the comity of nations and to discover analogies with the rules of diplomatic law.

117. When *ad hoc* diplomacy was once again practised on a larger scale, there was little time or opportunity to undertake the codification of the question, although it raised difficult problems for the League of Nations and aroused special concern in the Preparatory Commission of the United Nations. As a result, at the first regular session of the United Nations General Assembly (London, 1946), the question arose in connexion not only with the privileges and immunities of the United Nations staff, but also with those of the representatives of the States participating in the work of the United Nations.³⁷ Although the International Law Commission now considers that the question of the regulation of the status of *ad hoc* diplomats should be distinguished from the

question of relations between States and inter-governmental organizations and that of delegates sent by a State to international conferences (whether or not under the auspices of international organizations), the rules of *ad hoc* diplomacy established in the United Nations are of great importance for the future development of the system of rules of public international law relating to *ad hoc* diplomacy. In the first place, it was not quite certain whether the position adopted was that the rules applicable to *ad hoc* diplomacy should be identical with or analogous to those applying to resident diplomacy. With regard to the regulations required for the functioning of the United Nations, the representative principle was rejected in favour of the functional theory,³⁸ together with the theory that immunities belong not to the *ad hoc* diplomat personally but to his State, as guarantees of the normal exercise of his functions without interference on the part of foreign States.

118. (III) This state of affairs was reflected in the literature also. Most writers on public international law have touched on the question of special missions and *ad hoc* delegates, with particular reference to the sending of special missions for ceremonial purposes as a special form of *ad hoc* diplomacy, but without going into details regarding the determination of the status of such missions.³⁹ Hence, the work of the majority of authors could not serve as a guide in preparing future draft rules of law on the subject along any specific lines. Without making any comprehensive analysis of the subject, they repeated the rule relating to the right of *ad hoc* diplomacy to benefit by such rules as exist in positive international law concerning resident diplomacy. Writers on inter-

³⁸ The coupling of these two theories was also adopted at the Vienna Conference on Diplomatic Intercourse and Immunities (1961) and was inserted in the preamble to the Convention on Diplomatic Relations. The theory of functional immunity has come to prevail and has been adopted as a general principle. The emphasis on the special representative character of the *ad hoc* diplomat, recognized under article 2 of the Vienna Protocol only in the case of ambassadors has been generally abandoned. This is a result of the trend towards the equalization — still incomplete — of the various classes of heads of diplomatic missions, as they all now bear the single title of ambassador, and towards the general use of the rank of ambassador. Ambassadors are no longer merely the representatives exchanged exclusively by the great Powers.

³⁹ A similar notion is to be found in the principal works dealing with the status or history of diplomacy, of which the following are cited as examples: Bluntschli, *Le droit international codifié*, Paris, 1870; Krause, *Die Entwicklung der Ständigen Diplomatie*, Leipzig, 1885; Pessôa, *Projecto de Código de Direito Internacional Público*, Rio de Janeiro, 1911; Fiore, *International Law Codified*, New York, 1918; K. Strupp, *Réforme et codification du droit international*, Vienna, 1926; Lord Phillimore, *Proposed Codification of the Law Regarding the Representation of States*, London, 1926; Wriston, *Executive Agents in American Foreign Relations*, Baltimore, 1929; Feller and Hudson, *Diplomatic and Consular Laws and Regulations*, Washington, 1931; Genet, *Traité de diplomatie et de droit diplomatique*, 3 volumes, Paris, 1931; Potemkin, *Histoire de la diplomatie*, Paris, 1948; Satow, *Guide to Diplomatic Practice*, London, 1957; Waters, "The Ad Hoc Diplomat" (*Wayne Law Review*, 1959-1960); Wriston, "The Special Envoy" (*Foreign Affairs*, January 1960); Cahier, *Le droit diplomatique contemporain*, Geneva, 1962; Blishchenko, *Durdenevsky, Diplomaticheskoe i konsulskoe pravo*, Moscow, 1962; Waters, *The Ad Hoc Diplomat — A Study in Municipal and International Law*, The Hague, 1963; Sen, *A Diplomat's Handbook of International Law and Practice*, The Hague, 1965.

³⁵ G. F. de Martens, *Nouveau Recueil général de traités*, vol. II, p. 449; the text of the Regulation is also cited in *Yearbook of the International Law Commission*, 1957, vol. II, p. 135, foot-note 6.

³⁶ Article 2 of the Regulation of Vienna on the classification of diplomatic agents.

³⁷ When the draft Convention on the Privileges and Immunities of the United Nations with particular reference to representatives of States was discussed at Church House, London, no clear idea of the status of permanent delegations (missions) and representatives to the United Nations had yet emerged, so that at that time the question remained more or less unresolved. Attention was devoted exclusively to *ad hoc* representatives.

national law, obsessed with this idea, have generally been blind to the special problems raised by *ad hoc* diplomacy.

119. (IV) There is a whole series of bilateral conventions which regulate the status of *ad hoc* diplomats in their ordinary relations, covering, for instance, the guarantee of complete diplomatic immunity to members of frontier demarcation commissions or the right of return of envoys. Among these, however, isolated and widely differing *ad hoc* solutions would appear to predominate, offering nothing that may be regarded as evidence of any uniform international practice and, accordingly, useless as sources of international law except as concerns relations between the contracting parties. In these circumstances, where there are no general conventions and where bilateral conventions are sporadic and differ not only as between different States but also as between the same States at different periods and under different circumstances, there can hardly be said to be any conventional sources of international law on this subject capable of supporting certain broader conclusions; it is very doubtful, indeed, whether these sources are worth quoting here, as they are not in the nature of universal rules of law.

120. (V) With no well-established juridical customs and no clearly defined practice, with changes occurring in general criteria, even in those relating to resident diplomacy, with no well-grounded positions in the literature and with no institutions which can be described as accepted by the civilized nations (i.e., the nations at present forming the international community), it is interesting to find that those who have sought to create international law *de lege ferenda* have failed to make any advance. All the proposals made for this purpose merely mention the existence of *ad hoc* diplomacy and recognize its rights by analogy with the status of resident diplomacy. That was the case at the meetings of the Institute of International Law (Cambridge 1895), of the International Law Association (Vienna 1926) and of the Sixth International American Conference of States (Havana 1928).

121. This general paucity of rules of positive law on the subject eliminated all possibility of codification by the method of collecting and redrafting existing rules of international law and integrating them into a system. Moreover, the confusion caused by differences in past and present realities created fresh difficulties when attempts were made to apply in combination the methods of codification and progressive development of international law. These combined methods together represent the evolution both of existing trends and of developments it is desired to bring about, i.e., the unification of the rules *de lege lata* and the rules *de lege ferenda* in a single consistent system. It is difficult to apply this method when there are no established rules and it is not clear what rules should be introduced.

122. (VI) The International Law Commission was faced with this situation when it had to make a decision on the establishment of the rules of law relating to special missions. It was clear to all the members of the Commission that there were no definite rules of positive law which could serve as a basis for the preparation of

the rules of law on *ad hoc* diplomacy. The Secretariat reached the following conclusion:

Whilst the various instruments and studies referred to above do not purport to reflect the actual practice of States in every particular, it is probable that they represent the position adopted by the majority of States in respect to special missions. Four broad principles at least appear to be generally recognized: (i) that, subject to consent, special missions may be sent; (ii) that such missions, being composed of State representatives, are entitled to diplomatic privileges and immunities; (iii) that they receive no precedence *ex proprio vigore* over permanent missions; and (iv) that the mission is terminated when the object is achieved.⁴⁰

123. But these four principles extracted from the abundant sources on special missions were not sufficient to guide the Commission in the task of preparing the new positive law concerning special missions.

124. (VII) The secretariat of the International Law Commission had received the impression that there were only three different positions on this subject in the Commission, namely:

(a) What might be described as the idea of the *limited application to ad hoc* diplomacy of the rules relating to permanent missions. This was the idea of the Commission's previous Special Rapporteur, Mr. A. E. F. Sandström, who made the following general statement:

Broadly speaking, it seems natural that rules relating to special features of a permanent mission which do not obtain in respect of special missions should not apply, whereas rules inspired by considerations of the similar nature and aims of the functions in question should be applied.⁴¹

125. The present Special Rapporteur cannot endorse that idea and considers the theory false, although it was accepted by the majority in the Commission. Not only do special missions not have all the features of permanent diplomatic missions, but they have their own special features. These would lead us not only to apply to *ad hoc* diplomacy the rules governing permanent diplomacy and to determine whether all those rules are applicable, but also to seek solutions in accordance with those rules. It is difficult in life generally, and hence in international relations also, to follow a set path and to classify everything under existing headings. Life gives rise to and shapes the most diverse events. Each of those events requires legal regulation, and although social events may be influenced by means of legal rules, the law itself must none the less reflect social reality. Its object cannot be to have everything that deviates from the norm considered as a departure from the legal system. Although the Special Rapporteur does not accept "case law" and is not in favour of the establishment of exceptions at any price, it is nevertheless true that those responsible for formulating rules of law must bear in mind that the law is only the product of society. The international community as a social form is constantly subject to transformations, which have become especially marked since the end of the Second World War. *Ad hoc* diplomacy is in fact a new phenomenon,

⁴⁰ From the working paper on special missions prepared by the United Nations Secretariat, document A/CN.4/155, para. 11, in *Yearbook of the International Law Commission*, 1963, vol. II.

⁴¹ *Yearbook of the International Law Commission*, 1960, vol. II, p. 108, para. 7.

because it can hardly be described as a mere revival of past practice; in this Rapporteur's view, it would in fact be wrong to do so. New forms of *ad hoc* diplomacy have been evolved which must be regulated, and this cannot be done by a mere blanket rejection of everything which does not apply to *ad hoc* diplomacy but continues to apply to resident diplomacy.

126. Although he is a member of the International Law Commission, the Special Rapporteur considers that the Commission is very far from having found a satisfactory solution to the problem. Because of the limited time it had at its disposal, the Commission was unable to get to the heart of the matter. It is difficult to speak of any complete analogy between two institutions which have neither the same purpose nor the same consequences. That, in the Special Rapporteur's opinion, is why a more thorough analysis should first have been made: if that had been done the Commission would not have remained wedded to this theory.

(b) The dissenting opinion concerning the Sandström report expressed in the Commission by Mr. Jiménez de Aréchaga⁴² is considered as constituting the second approach.

127. In stating his views before the Commission, Mr. Jiménez de Aréchaga took the position that all provisions of diplomatic law concerning permanent missions applied also to special missions, with the difference that additional provisions were required arising out of the special nature or specific assignments of special missions. From this point of view, his theory might be called an *integration* theory. He himself expresses it as follows:

... all the provisions of the 1958 draft are relevant to special missions and should be made applicable to them, with the proviso that article 3 (Functions of a diplomatic mission) should be interpreted as applying only within the scope of the specific task assigned to the special mission.

The only additional provision which seems to be required in the case of special missions is one concerning termination of the mission on fulfilment of the entrusted assignment. . .⁴³

128. The Special Rapporteur cannot say that he entirely agrees with this theory of integration either. In the first place, it is not correct that all the provisions of public international law relating to permanent missions should be applied to special missions. Among those provisions, there are some which are not consistent with the very nature of an *ad hoc* mission. On the other hand, the rule formulated by Mr. Jiménez de Aréchaga is correct in the sense that the nature of an *ad hoc* mission also calls for special rules; in other words, it is necessary to elaborate them and to include them in a document with supplementary material.

(c) The third approach formulated in this connexion is that reflected in the suggestion by Sir Gerald Fitzmaurice that the draft rules relating to permanent diplomacy should in principle apply to *ad hoc* diplomacy, but only *mutatis mutandis*.⁴⁴ According to this theory, there

is unquestionably a similarity of situation between permanent missions and *ad hoc* missions but there are also differences. That was why Sir Gerald expressed the view that the rules relating to permanent missions should be applied to *ad hoc* diplomacy in principle but such application should be limited to the extent that the rules are applicable to the particular case. Thus, Sir Gerald's suggestion was also based on the idea of analogy. On the other hand, his suggestion also reflects the general approach of Anglo-Saxon law — a great latitude in the application of general rules by relying on the rule of reason, so that by use of the "case method" a uniform body of law is developed for those cases which do not fit the general rule. If international law at its present stage of development offered the necessary guarantees for the evolution of a uniform system of applying rules in accordance with the principles mentioned above, the Special Rapporteur could agree with Sir Gerald's proposal. However, it must be borne in mind that the provisions of international law have to be universal in their application, they have to be applied by the most diverse agencies of all States, using the most varied legal criteria, and they have to lend themselves to concrete analysis. That is why international law demands specific solutions for specific circumstances. It seeks rules that are not liable to very broad interpretation and consequently to circumvention. They are supposed to eliminate disputes, and not to give rise to new disputes in connexion with their interpretation and application. For this, the method of analogy quite obviously does not offer the necessary guarantees. If, in addition, this method is to be applied *mutatis mutandis*, it will become impossible with such an approach to achieve the objective set by the United Nations General Assembly or to establish order and a firm foundation for the application of international law in this field.

129. (VIII) In not accepting any one of these three approaches, the International Law Commission adopted a position of principle, though taking as its point of departure for the study of the status of *ad hoc* diplomacy the rules applicable to permanent missions. This position of principle is expressed by the idea that in view of the similarity between the activities of permanent missions and those of special missions, it is natural that the rules governing the status of permanent missions should to a large extent also apply to special missions.⁴⁵

130. Nevertheless, the Commission was not able to establish this similarity as an absolute rule. It was obliged to note that there were many institutions and provisions relating to permanent missions which could not be applied to special missions. These are the rules dealing with the establishment, functioning and status of permanent diplomatic missions. On the other hand, the nature of the activities the two types of mission engage in calls for the same guarantees. That was why the Commission took the view that the provisions of sections II, III and IV of the 1958 draft on diplomatic intercourse (i.e. the

⁴² *Ibid.*, pp. 115 *et seq.*

⁴³ *Ibid.*, p. 117, paras. 18 and 19.

⁴⁴ *Yearbook of the International Law Commission, 1960*, vol. I, summary record of the 565th meeting, para. 16.

⁴⁵ This thought is expressed in paragraph (1) of the commentary of the International Law Commission to article 2 of the draft articles on special missions. See *Yearbook of the International Law Commission, 1960*, vol. II, p. 180.

Vienna Convention of 1961) should also apply to *ad hoc* diplomacy.⁴⁶

131. The Special Rapporteur is quite convinced that this approach is wrong in its very essence. The functions are not the same in the two cases, and it is with an eye to the security of functions that the rules relating to permanent diplomatic missions were drawn up. He is of the opinion that each question should be studied in greater detail and a solution found which is not based on the *mutatis mutandis* rule but on the needs, which are different.

132. The *mutatis mutandis* method is too abstract. It does not take account of real needs but limits itself to the course of least resistance. The Special Rapporteur recognizes that it is very difficult to find a sure way of resolving all these problems. That is why the International Law Commission has tried to dispose of this question by agreeing to a kind of solution which, by its own admission, was not based on "the thorough study it would normally..." have given the topic.⁴⁷

133. (IX) What is its normal way of studying a topic? An attempt to initiate a normal study was made by Mr. Sandström, the previous Special Rapporteur. He outlined two alternative approaches to a solution of this problem which would have resulted in a study of the application of certain rules of resident diplomacy to *ad hoc* diplomacy. These outlines had gaps; they had not been thoroughly analysed and were therefore wide open to criticism. Moreover, the Commission had very little time in which to prepare the text containing the rules relating to *ad hoc* diplomacy wanted for the Vienna Conference, which was soon to convene. All this contributed to the Commission's deciding on a principle. It did so basically, by turning to the *mutatis mutandis* theory.⁴⁸

134. However, this solution was not accepted at the Vienna Conference in 1961. The representatives of States were not satisfied with a procedure that consisted simply in stating a principle, and they were not convinced that was an adequate solution of the problem. They wanted the problem restudied, and precise rules worked out consistent with the nature of *ad hoc* diplomacy. It was the private opinion of most of the members of the Sub-Committee, of which the Special Rapporteur as head of the Yugoslav delegation had the honour to be a member, that it would have been better to do without any new rule of law than to give an indication which every State could interpret as it pleased. Above all, it was argued that the functional theory should be taken as the point of departure and that the status of *ad hoc* diplomacy should be regulated in the light of actual needs and circumstances and not in accordance with certain standards which would not always be applicable to actual conditions but which would serve the purposes of *ad hoc*

diplomacy by conceding to it more than is strictly necessary.

135. (X) The Special Rapporteur believes that the positive sources of public international law relating to *ad hoc* diplomacy are, at present, in a condition which is worse than critical. There is not even an authoritative text *de lege ferenda*, for the Vienna Conference on Diplomatic Intercourse and Immunities did not adopt the International Law Commission's draft which was submitted to it for approval. In effect, it rejected the draft with a polite explanation:

... although the draft articles provided an adequate basis for discussions, they were unsuitable for inclusion in a final convention without extensive and time-consuming study, which could only properly take place after a complete set of rules on permanent missions had been approved. In view of the short time available to the Sub-Committee in which to carry out such a study, or for its results to be considered by the Committee of the Whole and by the Conference itself, the Sub-Committee determined that it should recommend to the Committee of the Whole that the Conference should refer the question of special missions back to the General Assembly; it was suggested that the Assembly should recommend to the International Law Commission the task of further study of the topic in the light of the Convention to be established by the Conference.⁴⁹

136. The present situation demands that a solid foundation for a positive system of law in this field be laid without delay and that the rules of such a system be formulated in detail. The old has been found wanting, the new does not exist, and every day brings new concrete situations which require a solution. Reality demands it.

137. During the discussion at the Commission's sixteenth session, many members stressed the question of the legal basis of the rules relating to special missions.

138. In view of the theoretical discussion in the literature as to whether the rules relating to special missions should be based on law or on international courtesy, the Special Rapporteur asked the Commission what it considered to be the legal basis of the rules on special missions which the Commission was drafting. The most categorical reply to this question was given by Mr. Tunkin, a member of the Commission. He said that the Commission's function was to codify or to draft rules of international law; consequently, the rules relating to special missions provided by the Commission were rules of law (SR.725, para. 32). Mr. Amado (SR.725, paras. 40-43), Mr. Yasseen (SR.725, para. 21), Mr. Verdross (SR.725, para. 18) and Mr. de Luna (SR.724, para. 40) took the same view.

139. Particular attention is drawn to the very clear answer given by Mr. de Luna, who said that the privileges and immunities of temporary missions were based on law, *ex jure*, and not on the comity of nations, *comitas gentium* (SR.724, para. 40). So far as *comitas gentium* is concerned, that view was shared by Mr. Verdross (SR.725, para. 18). Mr. Amado also opposed the notion that the legal basis of the rules was *comitas gentium* rather than law (SR.725, para. 40).

⁴⁶ See the reservations in paragraphs (2) to (6) of the commentary to article 2 and in the text of, and commentary to, article 3 of the Commission's 1960 draft, *loc. cit.*

⁴⁷ *Ibid.*, p. 179, para. 37.

⁴⁸ Although the Commission rejected Sir Gerald's suggestions in a formal vote.

⁴⁹ From the working paper on special missions prepared by the United Nations Secretariat, document A/CN.4/155, para. 44, in *Yearbook of the International Law Commission, 1963*, vol. II.

140. During the discussion, Mr. Briggs (SR.725, para. 48), Mr. Castrén (SR.725, para. 23), Mr. Elias (SR.725, para. 29), Mr. El-Erian (SR.725, para. 37), Mr. Rosenne (SR.725, paras. 8-11 and 46), Mr. Tabibi (SR.725, paras. 12, 15 and 16), Mr. Tsuruoka (SR.725, para. 47) and Sir Humphrey Waldock (SR.725, para. 35) took the view that the status of special missions should be governed by rules of law. All these members of the Commission stated that the Commission's function was to draft legal rules without determining whether the whole question of special missions had hitherto been governed by rules of law or whether international relations of that kind were to some extent founded on *comitas gentium*.

141. The Commission therefore during the discussion adopted the view that the rules it was drafting on special missions were rules of law and that they were not based on *comitas gentium*. No member of the Commission opposed that view.

142. The Commission had also considered the question of the relationship between the rules relating to special missions and customary international law. Neither the Special Rapporteur nor the members of the Commission failed to realize that certain rules applicable to the legal status of special missions may be found in customary international law. That was Mr. Ago's opinion (SR.723, para. 55). Mr. de Luna also considered that supplementary rules on the subject were derived from international custom (SR.724, para. 40). Accordingly, in drawing up specific rules on legal institutions, the Commission applied the idea that the legal rules relating to special missions are influenced by customary international law and relied on the practice of customary law in cases where it was satisfied that a universally recognized custom existed.

143. During the sixteenth session, the question was raised whether the Commission, when drafting the rules relating to special missions, should stress codification or progressive development. It is the invariable practice of the Commission when drafting articles incorporating rules of international law to combine straightforward codification (if there are sufficient customary or written rules of international law) with the method of progressive development of international law (in cases where, although there are no such rules, certain trends exist in international relations, or in cases where it is necessary to make good a deficiency or to alter existing rules).

144. During the general debate on the rules relating to special missions, reference was made to the question of applying the method of the progressive development of international law. Mr. de Luna (SR.723, para. 63) was the first to mention this method and he was followed by Mr. Castrén (SR.724, para. 10) and Mr. Amado, who considered that the Commission should feel its way step by step (SR.724, para. 21). No member of the Commission insisted that it should confine itself strictly to codification in drawing up these rules.

8. *Legal status of the articles relating to special missions*

145. This question has been considered on several occasions by the International Law Commission. The problem is whether the provisions relating to special missions should be considered as mandatory rules of

law or as residuary rules. The Commission took the view that there were, in fact, few rules on the subject which had the character of *jus cogens*, and tried to bring out in the wording of the articles that they were residuary rules which would apply unless the parties agreed otherwise.

146. The Swedish Government particularly stressed that point in its comments. It expressed its opinion in the following terms:

The question to what extent the articles of the draft should be peremptory or *jus cogens* was also discussed by the Swedish delegate on the occasion referred to above. He said in that respect:

"My next point on the draft on special missions derives not from the report of the Commission, but from the second report by Professor Bartoš, from which — on page 9 — it appears that States would be free to derogate from such articles only as expressly allow it. The others would be peremptory, *jus cogens*. In the draft articles submitted to us, some are found, indeed, which expressly allow States to derogate, e.g. article 3. However, article 15, which provides that a special mission shall have the right to display its flag and emblem on its premises, on the residence of its head of mission, and on its means of transport, contains no clause expressly allowing two States to derogate from it by agreement in the case of some particular mission. Yet, it would be hard to see why they should be precluded from so doing. The same argument could be adduced with respect to several other articles. Indeed, I wonder if it would not be wiser to accept as basic presumption that States are free to derogate from the rules, by express agreement between themselves, unless the contrary appears."⁵⁰

The Swedish Government considers that as the sending of a special mission in each case depends on an agreement between the sending and the receiving States, it would be natural to let the two States decide not only on the sending and task of the mission but also, in the last resort, on the status of the mission. The status needed by a mission may vary according to the task it shall carry out and already from that point of view flexibility should be allowed. Furthermore: supposing that for some reason the receiving State would be willing to accord to a special mission only a very limited amount of privileges and supposing that the sending State in that case would prefer to accept such very limited privileges for its mission rather than not sending the mission at all, why should the States not be permitted to derogate from the régime laid down in the instrument which in due time may result from the draft? In other words: the ambition to provide, through peremptory rules, an effective status for special missions may result in no mission being sent at all. It seems that the sending and the receiving States could be trusted to regulate freely, if they so wish, the status and conditions of work to be accorded to the mission. The purpose of the draft regulation should rather be to provide subsidiary rules which could be applied whenever the sending and receiving States have omitted to settle the matter by agreement.

147. The Special Rapporteur considers that this is a fundamental question on which the Commission must take a decision, since the final form of the whole draft will depend on how it is answered. He himself does not advocate the solution proposed by the Swedish Government, which is to adopt a general provision stipulating that all the rules relating to special missions are residuary rules. On the contrary, he is convinced that even at the present time there are binding customary rules of inter-

⁵⁰ This statement was made at the 844th meeting of the Sixth Committee of the General Assembly, the records of which are published in summary form.

national law on the subject, and that it is for the Commission to specify the cases in which the provisions of the articles should be considered as residuary rules, from which the States concerned may derogate unless they have agreed otherwise.

148. Concerning this point, the Commission during its eighteenth session took the following decision, which was recorded in its report to the General Assembly:

After examining the comments by Governments on this point, the Commission decided to ask the Special Rapporteur to base his draft on the view that the provisions of the draft articles on special missions could not in principle constitute rules from which the parties would be unable to derogate by mutual agreement. The Special Rapporteur was asked to submit to the Commission a draft article which would convey that view and indicate specifically which of the provisions, if any, should in his opinion be excepted from this principle.⁵¹

149. In accordance with this decision, the Special Rapporteur has prepared a special article in the final clauses of the draft articles relating to special missions in which he has indicated the clauses from which, in his opinion, there may be no derogation, even if the States concerned have agreed otherwise. To assist the members of the Commission in their consideration of this matter, the Special Rapporteur has added at the end of the commentary on each article his opinion concerning the nature of the article in that regard.

150. After the eighteenth session of the Commission, the Government of the Netherlands submitted the following comments:

Scope and legal status of the regulation

Although the far-reaching privileges and immunities (codified in the Vienna Convention of 1961) that are extended to permanent diplomatic missions can be explained as being a result of the inclination to respect what history has made conventional, this cannot be said of "ad hoc diplomatic missions". This and the fact that such a variety of intergovernmental activities are covered by the term "special mission" * are arguments in favour of the narrowest regulation possible. Where necessary the Governments concerned can always make additional arrangements for each of certain special missions separately, or bilaterally, or regionally in the relations between certain States.

Another argument in favour of narrow regulations is the frequency of special missions.

Next, the Netherlands Government would point out the danger inherent in the creation of precedents. If the present arrangement is raised to the level of that in force for permanent diplomatic missions before adequate assurance has been obtained that each of the rules is a *sine qua non* for the independent discharging of duties, the status of government representatives at international conferences and the status of officers of international organizations might be determined too readily by the same regulations.

Finally, the difference in function between special missions from countries with centrally planned economies and from countries with market economies should be borne in mind. Not only is the number of cases in which the study of commercial possibilities or the establishment of commercial relations figure among the duties of government representatives greater in countries with centrally planned economies than in countries with market

economies, but views on the duties of governmental commercial missions in countries where all commerce is a state activity differ from those in countries where commerce is left primarily to private enterprises. To grant privileges and immunities to commercial missions acting on behalf of a State would mean favouring these States more than those that usually leave the sending of commercial missions to trade and industry.

Against the arguments in favour of limitation is the fact that in some regions, particularly in the newly independent countries, privileges and immunities for government representatives are valued more highly than in countries with long-standing diplomatic traditions. Some newly independent countries look upon such privileges and immunities not only as means of facilitating the discharge of duties but also as symbols of their recently acquired independence.

Moreover, missions to territories lacking stable governmental control might need additional safeguards to enable them to discharge their duties smoothly and without interruption.

Therefore the Netherlands Government would not wish to narrow down the regulations by leaving out any rule that cannot be applicable to all categories of special mission. Many of the rules drafted by the I.L.C., although not applicable under all circumstances, may without doubt be of great value in some situations and constitute a contribution towards the progressive development of international law.

It would be much better if restriction could be secured by giving States greater liberty to depart from the drafted rules whenever it is desirable to do so.

The special rapporteur's idea (see para. 26 of the second report by Mr. Bartoš (A/CN.4/179) was that it should be apparent from the text of each of the articles from which rules the parties would be free to derogate. There is evidence of the same idea in expressions such as "except as otherwise agreed" in articles 6 (3), 9 (1), 13 (1), 21 and 41, and in the wording of the articles e.g., "normally" in article 7, "in principle" and "the receiving State may reserve" in article 14; see also the second sentence in article 34.

Therefore the Netherlands Government suggests that the rules that will apply to each special mission be made narrower than is proposed by the I.L.C. (*jus cogens*) and that on the other hand more liberty be given than is given in the I.L.C. draft (*jus dispositivum*):

- To suspend some rules by mutual consent (i.e. "unless otherwise agreed . . .") or
- To supplement the rules by mutual consent by the simple method of declaring additional rules already drawn up incidentally applicable ("at the request of the sending State, and provided the receiving State does not object . . .").

Apart from this, additional agreements of greater scope may naturally be entered into, but it is not necessary specifically to provide for this in the present draft.

It is this train of thought that has prompted the Netherlands Government's comments on each article. This arrangement is also better suited to the progressive development of this chapter of international law, much of the substance of which has yet to be moulded and refined in accordance with the dictates of practical experience gained by States.⁵²

151. The Special Rapporteur considers that the comments of the Netherlands Government quoted above may be very useful in determining the categories of clauses relating to special missions which should be generally obligatory for States bound by the instrument relating to special missions and for those States which consider them as *jus dispositivum* which they may change

⁵¹ *Yearbook of the International Law Commission, 1966*, vol. II, p. 276, para. 60.

* Cf. the categories enumerated in paras. 79 to 117 on p. 43 ff. of the first report by Mr. Bartoš (A/CN.4/166).

⁵² See *Yearbook of the International Law Commission, 1967*, vol. II, document A/6709/Rev.1, annex I.

at will, but he cannot recommend that the Commission should adopt the general idea that all clauses relating to special missions are exclusively of that character, for that would serve neither legal certainty in international relations nor the development of international law.

9. Controversies concerning the concept of special missions

152. There is much controversy about what is comprised in modern *ad hoc* diplomacy. It is a question with which the International Law Commission, too, had to deal in drafting rules concerning special missions. After several detours the Commission arrived at the following definition:

The expression "special mission" means an official mission of State representatives sent by one State to another in order to carry out a special task. It also applies to an itinerant envoy who carries out special tasks in the States to which he proceeds.⁵³

153. This might be called definition by specification. The point of departure is the view that a "special mission" is an exception to the rule, which is the resident diplomatic mission. This is a view that is also found in Satow, i.e. that, in addition to the head of the permanent mission, another diplomatic agent may be accredited for special purposes.⁵⁴

154. The Special Rapporteur considers that this approach is too incomplete to serve as a sufficient basis for a definition. Apart from the distinction between a special mission and a permanent mission of a general character, an *ad hoc* diplomat should not be entrusted with a special mission if it is of a lasting nature. More and more frequently in recent times, in addition to the regular general diplomatic missions, recourse is being had to the creation of specialized but permanent diplomatic missions. In performing special duties they function in the foreign countries concerned side by side with the regular general diplomatic mission, in the same State and in the same place but with a specific task. This category of missions includes, for example, a reparations delegation of one State in another (but not a delegation to an international organization). Also in this category are separate permanent diplomatic missions concerned with economic and technical co-operation between two countries, etc. These are specialized permanent missions, a particular type of resident diplomacy, and not special missions or *ad hoc* diplomacy. The distinguishing feature of a mission dealt with through *ad hoc* diplomacy is its limited and provisional character. A few words are in order on the question of this provisional character. "Provisional" does not mean "brief" in the strict sense; but even if the mission is prolonged, its duration depends on the completion of a specific task, which may take a relatively long time.⁵⁵

⁵³ *Yearbook of the International Law Commission, 1960*, vol. II, p. 179.

⁵⁴ Sir Ernest Satow, *A Guide to Diplomatic Practice*, London, 1957, p. 115. It must be pointed out that in paragraph 186 of his book Satow does not regard a person as an *ad hoc* diplomat unless he is accredited for reasons of ceremony or protocol.

⁵⁵ For example, delegations responsible for the demarcation of frontiers, but not missions for the maintenance of order and the settlement of incidents, which are permanent functions; the

155. In the opinion of the Special Rapporteur, the concept of *ad hoc* diplomacy also embraces the delegates which represent a State at certain international meetings: congresses, conferences, etc. This was also the view of Mr. Sandström, the previous Special Rapporteur.⁵⁶ However, the Commission, without finally rejecting this idea, took the position that such delegates were a special kind of State representatives, that they ought to be dealt with separately and that it was more correct to treat them as members of missions concerned with relations between States and international organizations, including diplomatic conferences. That is why today such missions are not technically covered by the concept of *ad hoc* diplomacy, although logically they should be. The reason is probably that a constantly growing number of special legal rules and even separate systems and régimes are being created for this type of *ad hoc* diplomacy, so that it is assuming a distinct and special form.⁵⁷ To try to bring it within the general rules of *ad hoc* diplomacy might lead to a twofold confusion. On the one hand, the special rules already established for such missions do not correspond in all respects with the rules relating to diplomacy in general, and it would be difficult to form a common system. On the other hand, the contractual privileges granted to delegates attending meetings of the United Nations and the specialized agencies could not, without difficulty, be recognized as general standards applicable to *ad hoc* diplomacy as a whole. For those two reasons, a technical distinction has to be made between this type of periodic diplomacy and the general concept of *ad hoc* diplomacy.

156. The International Law Commission drew the practical consequences of this approach. It took the position that diplomatic missions which are responsible for relations of States with international organizations or which take part in international conferences or congresses should be studied as a separate topic and it appointed a Special Rapporteur for the purpose. This is why the author has decided to omit treatment of this topic from the present report, although he realizes that the matter could have been handled in other ways.⁵⁸

157. Nevertheless, the procedure of the International Law Commission described above involved a logical as well as a practical error. There are some international conferences which are not connected with international

United States diplomatic missions after the Second World War responsible for tracing the whereabouts of the remains of United States soldiers and for their transportation to the United States, but not the missions for the maintenance of military cemeteries; repatriation missions, but not missions responsible for dealing with a country's own citizens in a foreign country, etc.

⁵⁶ *Yearbook of the International Law Commission, 1960*, vol. II, pp. 113 and 114.

⁵⁷ It is sufficient to note that for this type of diplomacy — periodic State delegations and delegates — the United Nations and the specialized agencies have drawn up a series of conventions, laid down detailed procedures and concluded special treaties with the States in which their headquarters are situated or in which their international conferences are held.

⁵⁸ Decision of the Commission at its fourteenth session (1962). Mr. Abdullah El-Erian was appointed Special Rapporteur on relations between States and inter-governmental organizations (see *Yearbook of the International Law Commission, 1962*, vol. II, p. 192, para. 75).

organizations, and in those cases *ad hoc* diplomacy is involved; in their case, the rules which led the Commission to take into account the newly formed juridical systems concerning delegations and delegates of States to international meetings do not apply. Such cases, in the opinion of the Special Rapporteur, are cases of *ad hoc* diplomacy in the full meaning of the term.

158. In connexion with this reduction in the number of missions and persons that fall under the concept of *ad hoc* diplomacy, the Special Rapporteur considers it necessary to note that most writers on diplomatic law in fact include the representatives of States to congresses and conferences in the concept of *ad hoc* diplomacy.⁵⁹

159. The Special Rapporteur has already indicated in the introduction the limitations of the concept of *ad hoc* diplomacy and considers that in its strict sense *ad hoc* diplomacy should be understood to apply only to State agents having the following characteristics:

(a) They must be delegated or appointed by a State for the purpose of carrying out a special task with respect to another State or to several other specific States;

(b) Their mission must not be regarded as permanent but must be linked to the performance of a specific temporary task;

(c) Their task must consist in representing the State as the lawful holder of sovereignty vis-à-vis the other State (or other States) and must not be concerned with matters in which the State does not appear as the holder of sovereignty or with relations with particular individuals or bodies corporate which are not subjects of public international law.

160. The Special Rapporteur is convinced that unless these three constituent elements are all present a case cannot be deemed to fall within the sphere of *ad hoc* diplomacy.

161. On the other hand, he rejects certain criteria which have been laid down for the purpose of determining whether a particular agent of a foreign State is, or owing to certain circumstances is not, an *ad hoc* diplomat. Among these criteria he would include those resulting from the view:

(a) That a person cannot be considered an *ad hoc* diplomat unless he holds diplomatic rank. Under present circumstances this condition has become meaningless.

(b) That he is engaged purely in a so-called "diplomatic" mission, or ceremonial and representative mission, to the exclusion of any idea that the mission of an *ad hoc* diplomat may include technical duties. Present-day diplomacy is marked by its functional and not its representative character. On the other hand, the functions of

diplomacy are expanding as is the whole sphere of international relations. The narrow approach characteristic of the aristocratic conception of the diplomat, which held diplomacy to be purely political and representative and which persisted even after its bureaucratization, rejected the very notion that a diplomat could perform technical duties. Little by little, diplomacy began to bring economic and financial relations within its scope. This marked the beginning of its transformation. The technical duties with which diplomacy was concerned continued to increase. Technical assistants became more and more numerous in permanent missions. Thus life itself imposed a change in the concept of diplomatic duties. Ultimately, it was concluded that any action implying the representation of the sovereign State at the international level in its relations with other subjects of public international law comes within the scope of diplomacy in general, and consequently, of *ad hoc* diplomacy also.

162. The question is whether the agents of a State who are not part of its internal diplomatic machinery or, more specifically, of its Ministry for Foreign Affairs, and who are not career diplomats, may be classed as diplomats if they are given the task of representing their State's interests temporarily in contacts, generally in the form of negotiations, with the representatives of other States, even if those contacts take place in the territory of their own State. This is what generally happens in bilateral negotiations. In principle, the negotiators on both sides — those of the foreign country and those of the host country — have the same duties and character. Strictly speaking, therefore, the agents of the host State, though performing their task in their own territory, are *ad hoc* diplomats. Consequently, they should be regarded as *ad hoc* diplomats during the exercise of their functions or at least in their relations with their foreign counterparts. However, because they are in the territory of their own State and, consequently, cannot claim any special privileges, their character as diplomats is generally disregarded in practice as well as in theory. The question is not even raised with much insistence. Nevertheless, the Special Rapporteur believes that this is wrong and that these diplomats, at least in their relations with their foreign counterparts, should be aware of their diplomatic role and of their duty to comport themselves as *ad hoc* diplomats towards them, since in these relations, except for certain specific features, the rights and duties of the two parties are equal although the host country has more duties. The Special Rapporteur will limit himself here to emphasizing that these persons, under certain specific conditions, fall within the category of *ad hoc* diplomats, and it is not his intention, in the remainder of this report, to enter too deeply into a study of their status.

163. As already mentioned above, the notion of *ad hoc* diplomacy requires some study of the causes of the recent numerical increase in the functions of *ad hoc* diplomacy. In this connexion, the following points may be noted:

164. There is much discussion of the question of the nature of the special missions which have become increasingly frequent since the Second World War and of the

⁵⁹ Sir Ernest Satow, *op. cit.*, p. 208; Convention on Diplomatic Officers adopted by the Sixth International Conference of American States, signed at Havana, 20 February 1928, article 2 *in fine* (text in League of Nations, *Treaty Series*, vol. CLV; also in United Nations Legislative Series, vol. VII, *Laws and Regulations regarding Diplomatic and Consular Privileges and Immunities*, United Nations publication, Sales No.: 58.V.3); Dr. Karl Strupp, *Réforme et Codification du droit international* — Report of the Thirty-Fourth Conference of the International Law Association, London, 1927, pp. 426 *et seq.*

reasons why, despite an expansion of the staffs of permanent diplomatic missions, the services of *ad hoc* diplomacy are being used more and more.

165. In looking closely at the development of international relations, the Special Rapporteur cannot help noting that diplomatic missions are being progressively reduced to the level of bureaucratic machines and that embassies are becoming a kind of headquarters for the organization of work, for observation, and for the performance of the special tasks for which they are responsible. For this reason, regular diplomatic missions are increasingly being relieved of high political functions and also of purely technical duties.

166. In the first place, many political questions of principle have been removed from the ambit of bilateral relations to that of meetings at the headquarters of international organizations and at wider international conferences. This does not mean, however, that embassies are relieved of the duty to deal with these questions, but they do not participate in their settlement at the decisive stage. The final settlement is a matter for international meetings. Nevertheless, resident diplomacy continues to be responsible for testing reactions to proposals, for obtaining information on the attitudes of the other State, for bringing the desired influence to bear, and even for seeking proper instructions for delegations participating in such meetings. Similarly, resident diplomacy resumes its activities — once a decision has been taken in the organizations or at international meetings — in connexion with the attitude of States towards the measures adopted, the way in which and the extent to which they are implemented, and even the sabotaging of such decisions. This indicates that, although many of the duties of resident diplomacy which are of general interest have been transferred to a special type of *ad hoc* diplomacy — to delegations — it would nevertheless be a mistake to believe that, generally speaking, such work has been taken completely out of the hands of the regular diplomatic missions. In a sense, it forms an integral part of the link between the regular diplomatic machinery and *ad hoc* diplomacy, since the representation of a State in international relations should be regarded as an integrated whole.

167. It has also been noted that negotiation and the search for answers to certain political questions of the highest importance are more and more frequently carried on, in relations between the State to which the permanent mission belongs and the State to which it is accredited, without the participation of the regular ambassadors. There is a vast difference between the conferences of ambassadors which used to meet in London before the First World War to decide the fate of the world and the contacts between ambassadors in a capital city in the present age. When the settlement of an important political question is to be worked out, there appears on the scene — notwithstanding preliminary feelers and negotiations through the regular diplomatic channel — *ad hoc* diplomacy, personified in meetings between the highest representatives of the States involved, often Heads of Government (less frequently Heads of State, although this practice has been revived in recent years)

or Ministers for Foreign Affairs. At these meetings, and during these contacts, decisions are taken on vital political and military questions affecting the mutual relations of the participating States. Although ambassadors are not reduced to the role of passive observers in these activities and are not relieved of the duty to prepare for the negotiations and although in most cases they are members of the delegations, there is little doubt that their importance in this respect is diminishing, that they are usually assigned a secondary role in the negotiations, and that the lustre of their rank is dimmed by the presence of leaders who take the most prominent part in contacts of this kind. On the one hand, regular diplomacy is being relieved of the most important political questions, and on the other, such questions are passing more and more into the competence of *ad hoc* diplomacy, as represented at the appropriate time by responsible political figures from the countries invited to take part, with the result that the importance of such *ad hoc* diplomats undoubtedly exceeds that of regular diplomats.

168. A further point is that the volume of affairs which give rise to the formation of international relations, the widening competence of the international organs, and the growing importance of the machinery of State in connexion with specific matters involved in bilateral relations, are bringing about qualitative changes in the functions of regular diplomacy. Some diplomatic historians state that the “classic” diplomat of the second half of the nineteenth century had to be guided by questions of protocol and by an understanding of the political interests of his own country. High politics and routine work were the typical functions of regular diplomatic missions. With the passage of time, many purely technical tasks were also transferred to diplomacy, and this modified its structure in two ways. In addition to his regular staff, versed in general diplomacy, the head of the regular diplomatic mission acquires an ever-increasing number of specialized technical staff who have, in a sense, a particular sphere of competence and are subject only to the over-all political supervision of the head of the diplomatic mission. They establish relations — albeit through the diplomatic channel — with the technical organs of the receiving State. It becomes necessary, from time to time, to enter into negotiations or to discuss the most important problems of this kind between the two States. For such negotiations a country must, of course, delegate qualified experts with authority to seek a settlement of the problems involved. This is a new kind of *ad hoc* diplomacy, and it places regular diplomacy in a very precarious position. The permanent missions maintained at first that such special diplomats occupied a secondary position and were merely assistants to the head of the permanent diplomatic mission. In time, however, such “technical” missions, or negotiators, were able to free themselves almost completely from the influence of the regular missions. They would arrive from their own country with quite precise instructions, with special full powers, and with the right and the duty to maintain direct relations with the competent central authorities; as a result, their position was soon consolidated and they were emancipated from the machinery of the permanent missions, to which they

were linked only through the central organs of government. Consequently, these *ad hoc* diplomats, during their stay in a country, did not become part of the permanent mission.

169. It follows from the foregoing that *ad hoc* diplomacy appears in two forms, according to its functions. It may be responsible for the most important political functions, or it may be a mission qualified to maintain technical relations. The latter, a complete enumeration of which is difficult because of their great diversity, may be said to include primarily trade relations, financial relations, cultural relations, scientific relations, relations in the matter of communications, and in particular sea and air transport, and so forth. A certain rivalry exists between permanent missions and *ad hoc* diplomacy with respect to their mutual relations. The permanent missions assert their primacy, and *ad hoc* diplomacy its authority to treat directly at the international level; but in relation to the outside world, i.e., to the receiving country, *ad hoc* diplomats have a special legal status and do not form an integral part of the permanent mission.

170. During its sixteenth session, the Commission paid particular attention to the definition of special missions. Mr. Tunkin in particular dealt with this question. In his view, special missions formed part of diplomacy. The essential point was that they should represent the State; it was immaterial whether their task was political or technical. Special missions, he said, had varied tasks which were not always limited; often they were of a very general kind. The main point was that a special mission was temporary (SR.724, paras. 14-16).

171. A number of references to Mr. Tunkin's ideas were made by members of the Commission in the course of the discussion of articles 1 and 2 of the draft on special missions. The Commission's view was that special missions were temporary in character and had specific tasks.

172. All those who spoke in the general debate stressed that one of the essential characteristics of special missions was their temporary nature. This point was made for instance by Mr. Cadieux (SR.723, para. 26). Mr. Tsuruoka described the special mission as "sporadic and partial" (SR.724, para. 5). Mr. Tunkin made further reference to that characteristic in his statement and suggested therefore that the term "special mission" should be dropped in favour of "temporary mission" (SR.724, paras. 16 and 53). Mr. Amado made a distinction between permanent contacts through ordinary missions and temporary contacts through special missions (SR.724, para. 20). He said later that temporary diplomacy had become a tree in the forest of law (SR.725, para. 43). Mr. Verdross (SR.724, para. 39) and Mr. Ago (SR.724, para. 59) stressed the same characteristic.

173. It was evident that the Commission was unanimous in regarding special missions as temporary in character. It therefore endorsed with little discussion the Special Rapporteur's view that a distinction should be drawn between special missions which are temporary and specialized missions of a permanent character existing side by side with regular missions.

174. There was also a lively discussion as to whether the idea of special missions should be limited only to special missions of a political character. This question was considered in the general debate at the sixteenth session. Many members of the Commission spoke on the question whether the expression "special missions" should be construed to mean only those of a definitely political character or also those which represented States in matters of a technical nature. Mr. Verdross was the first to speak on the subject. He considered that special missions of a technical character as well as those of a political character were employed in official relations between States and that the rules should therefore cover all special missions (SR.723, paras. 15 and 16). Mr. Yasseen expressed the same view (SR.723, para. 17). Mr. de Luna did not think that a distinction should be drawn between special missions of a political character and those of a technical character (SR.723, para. 19). Mr. Cadieux likewise considered that it was not so important to stress the political or technical character of the special mission as to take into account the level and importance of that mission (SR.723, para. 26). Mr. Pal said that there was no reason to restrict the concept of special missions to purely political activities; in the light of recent developments, it was clear that special technical missions should also be covered (SR.723, para. 29). Mr. Elias thought that it was difficult to differentiate in special missions between political and technical matters (SR.723, para. 30). Mr. Ago was even more categorical. He thought that it would be absurd to try to draw a distinction between a political special mission and a technical special mission (SR.723, para. 33). Mr. El-Erian agreed that it was not easy to draw a distinction between political special missions and other special missions (SR.723, para. 24). Mr. Jiménez de Aréchaga said that, while he agreed that technical special missions should be studied as well as political special missions, their inclusion did not mean that all special missions should be subject to the same body of rules (SR.723, para. 49). Mr. Tsuruoka thought that the distinction between political and technical missions was not very great in practice (SR.724, para. 7). Mr. Castrén was prepared to accept that view in principle but thought that rules governing special missions might vary according to the functions assigned to them (SR.724, para. 10). Mr. Tunkin agreed with the general view that it was immaterial whether a mission was to carry out a political or a technical task; the essential point was that it should represent the State in its relations with another State (SR.724, paras. 13-15). Mr. Amado, the last speaker in the debate on this point, drew a logical conclusion when he said with regard to the substance of the question: "The Commission was right to resist the idea that technical missions should be regarded as a special class, for in modern times sovereignty found expression in technical matters as much as in the traditional processes of politics" (SR.724, para. 20).

175. Thus all those who spoke in the general debate expressed their unanimous belief that special missions may have a purely political or technical character, but in either case they represent the same concept. At the same time, some speakers pointed out that the

level, importance and particular function of special missions should be taken into account (Mr. Cadieux, Mr. Jiménez de Aréchaga, Mr. Castrén and Mr. Tunkin). Hence, in the case of certain missions there could be special rules (a view expressed by Mr. Cadieux, Mr. Jiménez de Aréchaga and Mr. Castrén).

176. The question of the extent and basis of the privileges and immunities of a special mission and its members and of the members of its staff was also discussed at length in the general debate at the sixteenth session.

177. Some members said that national parliaments were not prepared to enlarge the scope of privileges and immunities in general, and in particular were reluctant to enlarge those of special missions, their members and members of their staffs, and that accordingly the Commission should proceed cautiously, if it wished parliaments to adopt the rules drafted. Mr. Cadieux first drew attention to that point (SR.723, para. 28), and this tendency to restrict the immunities and privileges granted to special missions was also stressed by Mr. Verdross (SR.724, para. 39) and Mr. Elias (SR.724, para. 38).

178. Mr. de Luna mentioned, as a practical point not to be overlooked, the reluctance of parliaments and Governments to grant immunities (SR.723, para. 73).

179. Sir Humphrey Waldock also referred to the tendency to keep the privileges and immunities of special missions within certain bounds, a tendency evident even in the United Kingdom. He was however in favour of giving such missions the maximum protection necessary for the efficient performance of their functions while at the same time confining privileges within reasonable limits (SR.724, para. 56).

180. Mr. Amado agreed that States were very circumspect with regard to the extent of the privileges and immunities granted, but in his view States were chiefly concerned with their own interests. Hence they not only restricted the extent of privileges but at the same time they weighed their own interests and decided whether reciprocity would yield them the equivalent of what they granted to others. The concern of States should be interpreted in that light (SR.724, para. 62).

181. Some members of the Commission stressed that immunities and privileges should vary according to the various categories of missions and staff. That was the view expressed by Mr. Cadieux (SR.724, para. 46) and Mr. Castrén, who said that the rules governing special missions might vary with their functions (SR.724, para. 10).

182. Mr. Jiménez de Aréchaga said that States might be unwilling to grant immunities to the members of purely technical missions, for example to a mission for the control of animal diseases (SR.723, para. 50).

183. Mr. Yasseen thought that restrictions should not be excessive; the fundamental consideration should be the need to safeguard the normal and regular performance of functions (SR.724, paras. 33 and 34).

184. Mr. Tunkin said that in any discussion on limitations of privileges and immunities the functional needs of special missions should be considered. No limitations

should be imposed that would hinder them in the performance of their tasks (SR.724, para. 53).

185. Mr. Ago, speaking as Chairman, said that States did not seem prepared to treat political diplomatic missions and special missions on an equal footing; he added, however, that special missions should have at least the minimum of privileges and immunities essential for the performance of their tasks (SR.724, paras. 30 and 57).

186. Some members of the Commission thought that uniform rules should govern privileges and immunities in general. Mr. Elias thought that identical rules should be made in the matter for members of special missions and United Nations experts (SR.723, para. 65). Mr. El-Erian pointed out that a like problem arose in connexion with special missions to international organizations (SR.723, para. 70). The same point was also raised by Mr. Jiménez de Aréchaga, who opposed a difference in treatment as between special missions in bilateral relations and special missions participating in conferences convened by international organizations. Mr. de Luna said that the Commission would have to prepare rules covering delegations to conferences convened by States (SR.723, para. 73).

187. Mr. Rosenne thought that the problem of the unification of the rules governing immunities and privileges for special missions and for all international conferences should be settled within the framework of the United Nations and at the highest level (SR.723, para. 77). He pointed out that, although they appeared similar in substance, there was a difference between the rules laid down for privileges and immunities in the Vienna Convention on Diplomatic Relations and the various conventions on the privileges and immunities of international organizations. There might be a close similarity between the two sets of rules but their legal basis was entirely different (SR.723, para. 79). Later, however, he stressed the need to consider, in the drafting of rules concerning privileges and immunities, their effectiveness in the protection of functions, which meant that the legal regulation should draw a distinction between the different categories of persons composing a mission (SR.724, paras. 63 and 64).

188. Mr. Yasseen also thought that special missions were so varied that it was impossible to draft uniform rules for all of them. In his view, criteria should be found by which special missions could be differentiated according to their importance and their tasks. He thought therefore that rules should be drafted which would differ in certain respects (SR.724, para. 33).

189. From all the statements made in the debate it was evident that the Commission was convinced of the need to provide special missions with the facilities, privileges and immunities essential to the efficient performance of their functions, including not only the accomplishment of their tasks but also the function of representing the State. Nevertheless, the Commission realized that it was not necessary to grant identical facilities, privileges and immunities to all members of mission staffs or even to all special missions, for these differ in their respective tasks, importance and levels.

190. In the general debate the question arose whether the legal status of special missions should be regulated on the basis of the functional or on that of the representative theory.

191. In his statement Mr. Tunkin made a decisive contribution to the solution of the problem. He pointed out that the Vienna Convention on Diplomatic Relations should be taken as a starting-point. In the first place, he said, the Vienna Conference of 1961 had based its conclusions not only on the functional theory but also on the representative theory; that was clear from the fourth paragraph of the preamble to the Convention adopted at the Conference. Secondly, special missions might also, by reason of their tasks, have a representative character (SR.724, paras. 50-54). Mr. Ago thought that in order to find a solution the Commission should look to both theories (SR.724, para. 57). Mr. Rosenne also supported Mr. Tunkin's view (SR.724, para. 64). Sir Humphrey Waldock considered that the Commission should find a practical solution and avoid taking a stand on theoretical issues (SR.724, para. 55).

192. Mr. de Luna based his views on the functional theory, adding that even in the case of special missions there were, in addition to what was necessary for the performance of their functions, additional privileges and immunities deriving from international custom with regard to the position of the head of the special mission (SR.724, para. 40).

193. Other members of the Commission also spoke on this question.

194. Mr. Castrén said that, in devising solutions and establishing legal rules for special missions the Commission should bear in mind the importance of the function of such missions (SR.724, para. 10).

195. Mr. Elias also supported the functional theory (SR.723, para. 32).

196. Mr. El-Erian, who based his views on the functional theory, pointed out, however, that at the Vienna Conference on Diplomatic Intercourse and Immunities (1961) it had been thought necessary to couple the theory of functional necessity with that of the representative character of diplomatic missions (SR.723, para. 46).

197. Mr. Yasseen thought that the functional theory should especially be followed (SR.724, para. 34).

198. Despite the diversity of views held by members of the Commission on this question, the Commission may be said to have coupled the two theories in drawing up and adopting the first sixteen articles of the draft.

10. Some special aspects of special missions

199. The Special Rapporteur believes that the first questions to be settled are whether certain types of missions may be regarded as special missions, and where the demarcation line separating them from regular diplomacy lies. He is of the opinion that the categories listed below should be considered special missions. The question whether the status of these categories should be governed by the legal rules relating to special missions depends on the preliminary decision of the Commission. The Special Rapporteur believes that these categories should be

recognized as special missions (with the possible exception of categories D, G, H, and I, where he hesitates between the arguments for and against, since in practice they appear to be equally plausible).

A. Special missions with ceremonial functions

200. The Special Rapporteur will not deal at great length with this category of *ad hoc* diplomacy, although it was for a time the most common type and has remained largely in use up to the present day. It is mentioned only for the sake of completeness. It should be pointed out that the generally accepted practice before the First World War was to appoint ambassadors, other than the permanent diplomatic representatives, as special envoys of a State for special missions to another State on extraordinary occasions. The Soviet author Potemkin supposes them to be ambassadors appointed to represent their countries at such national ceremonies as the coronation, marriage or funeral of a sovereign or of his heir. Conversely, Potemkin says, it was customary for kings and emperors to send special ambassadors to one another to announce their accession to the throne. These ambassadors, of course, had purely ceremonial functions.⁶⁰

201. Potemkin regards the dispatch of such occasional ambassadors as not only customary but required by etiquette.⁶¹ Failure to send such ambassadors was interpreted as a breach of the rule that honour should be rendered where it was due. Consequently, Potemkin says, if the State in question was unable, for justifiable reasons, to send an ambassador of this kind, its omission might nevertheless be regarded as a breach of etiquette. In order to avoid this, the practice grew up of designating the permanent diplomatic representative in the country in question as special, or *ad hoc*, ambassador to the very country to which he was accredited. Two offices are then merged in the person of the one ambassador, but only for the duration of the ceremonies. Throughout that period — before, during and after the ceremony — he is still the head of the permanent mission, and during the ceremonies he is also the *ad hoc* ambassador. This is important, as emphasizing the presence of a special ambassador; moreover, during the ceremony, *ad hoc* ambassadors have precedence over regularly accredited ambassadors. Notwithstanding the fact that an ambassador may be regularly accredited, he must be specially accredited as *ad hoc* ambassador.

202. In the countries of Latin America, the rule that *ad hoc* ambassadors should participate in the ceremonies known as the inauguration of the President of the Republic is jealousy applied.

203. As a general rule, where an *ad hoc* mission is sent to such a ceremony, the head of the permanent mission in the country concerned is not usually head of the *ad hoc* mission, but is simply one of its members. In this case, he occupies his special rank in the *ad hoc* mission, which differs from the rank to which he is entitled as head of the permanent diplomatic mission.

⁶⁰ V. Potemkin, *Histoire de la diplomatie*, Paris, 1947, vol. III, p. 800.

⁶¹ *Ibid.*

204. Genet refers to a mission of this kind as a courtesy mission. It is interesting to note that he also regards missions of apology, which no longer exist today, as occasional missions. The custom now is not to send special missions or a special ambassador to apologize, but to perform this act through resident diplomacy.⁶²

B. Ad hoc diplomacy with special functions

205. As has been noted above, such special functions may be very diverse, and the essential point appears to be that they should be defined by agreements (formal or tacit) between the sending State and the receiving State concerning the mission's assignment.

206. The Special Rapporteur's researches have shown that various categories of special missions, classified according to the tasks they are required to perform, are encountered in practice. The main categories are:

(a) Special missions with purely political functions, either in bilateral relations or at multilateral meetings, organized outside the international organizations and without their participation. Some of these missions have been not only highly political, but also historic; one need only mention special missions for the conclusion of political or peace treaties.

(b) Special missions with military functions. This category includes not only missions responsible for concluding military agreements, but also missions with specific operational military assignments. Some authorities also include among these missions the representatives of foreign armed forces attending manœuvres of other armed forces.

(c) Special missions for the settlement of frontier problems, and in particular for the tracing and maintenance of demarcation lines and the placing of frontier marks.

(d) Special missions with police functions, operating either within the framework of co-operation between the States concerned or in frontier areas.

(e) Special missions to negotiate on transport questions. In practice, such missions are considered to be political in nature where they are concerned with policy relating to all forms of transport (sea, air, rail, river, road, and posts and telecommunications), while they are regarded as technical missions if they are concerned only with the practical application of established principles.

(f) Special missions concerned with water-supply problems. These missions are sub-divided in the same way as those mentioned in group (e).

(g) Special economic missions, including, in particular, missions for the purpose of concluding agreements on questions of trade, finance, and currency.

(h) Special missions to resolve specific customs problems.

(i) Special missions concerned with veterinary and phytopathological services.

(j) Special missions concerned with questions relating to health services.

(k) Special missions for the purpose of tracing and repatriating citizens of the sending State.

(l) Special missions of a humanitarian character, which may be very varied in nature.

(m) Special missions for the recruitment of labour and the control of immigration.

(n) Special missions for the purpose of tracing the graves of soldiers killed in action and repatriating their remains.

207. The purpose of this list, which is by no means exhaustive, is simply to draw the Commission's attention to the fact that special missions are very varied in nature and, consequently, have different functional needs. There has for years been a difference of opinion, in the various meetings connected with the Administrative Committee on Co-ordination (between the United Nations and the specialized agencies), as to whether all such missions should be placed in one category, so that they would all be subject to the same rules of international law, particularly as regards facilities, privileges and immunities, or whether a distinction should be drawn between missions to be recognized as diplomatic in nature and others of a strictly technical nature, which could operate normally without being treated as diplomatic in nature. The latter might, perhaps, be granted something akin to consular status. Some of them require special rules. The Special Rapporteur considers that the Member States should have an opportunity to regulate finally by common agreement the status to be granted to individual types of special missions.

C. The ad hoc diplomat as messenger

208. There very often appears in a third country an *ad hoc* diplomat of a special kind. He is usually a person of high political standing or occupying an important post in his country's administration who is sent on a special mission by the Head of State or Head of Government to carry, present or communicate a message to a high official of the same rank in the other country. Such an envoy is not a delegate, since he does not enter into negotiations. He may possibly receive a reply or comments on the written or oral message which he has conveyed. He is not a diplomatic courier, because the message he brings is delivered directly either to the Head of State or to a high official of a foreign country, whereas the diplomatic courier operates between the administration of his State and its representative abroad. A messenger of this kind is today regarded as an *ad hoc* diplomat, and not as a courier, and he is received with special courtesy.

209. Here again, the question of the relations between an *ad hoc* diplomat of this kind and the permanent diplomatic mission arises. Protocol practice does not always dissociate this category of *ad hoc* diplomat from the permanent mission. As a rule, the permanent mission requests that the messenger should be accepted and received. He is introduced, on rare occasions accompanied (depending on the messenger's rank), and presented by the head of the permanent diplomatic mission. However, the latter is not necessarily aware of the terms of the message and does not always have to be present at the

⁶² Raoul Genet, *Traité de diplomatie et de droit diplomatique*, Paris, 1931, vol. I, pp. 85-92.

discussion between the messenger and the person to whom the message has been delivered. It might be said that, in this case, there is only an outward link between the *ad hoc* diplomat and the permanent mission, and that so far as the substance of his assignment is concerned there is no link.

210. The practice of sending messengers as *ad hoc* diplomats was very common in the past, particularly in relations between monarchs. Special messengers of very high rank were the bearers of messages known as *lettres de cabinet*. Very often, these were family letters or courtesy communications on such occasions as a marriage, a birth or the presentation of condolences, or they might be notes concerning changes in the family affairs of the sender. Even then, however, it was common, and it has become more so today, to employ such messengers for missions whose purpose was to transmit political communications, containing notices of action to be taken, appeals for joint action, statements of views and positions on important political problems, or warnings from the Head of State or of Government to his counterpart concerning the serious consequences which might arise in a period of crisis. Several examples of the use of messengers in modern times may be cited — for instance the famous mission of Colonel Donovan, who took a message from President Roosevelt of the United States to the Heads of State of the Balkan countries on the eve of Hitler's drive into the Balkans (1941). At the time of the Cuban crisis (1962), there was a many-sided exchange of messages by special messenger between Heads of State. In this connexion, a distinction should be drawn, from the political but not from the juridical standpoint, between the dispatch of a messenger to a given country with a special message and what are known as circular messages, delivered to various countries by one messenger. This makes no difference from the juridical standpoint, and the messenger's status is the same in both cases.

211. The question arises whether a diplomat who is the head, or a member of a permanent mission, when performing the function of a messenger to the Head of State or any official of the State to which he or his mission is accredited, has the status of a permanent diplomat or that of an *ad hoc* diplomat. The existence of such a distinction is assumed by analogy to the distinction between the functions of a permanent ambassador and those of a special envoy merged in one person in cases where the head of the permanent mission is given special powers or credentials to represent his State, particularly on ceremonial occasions (e.g., a wedding or an enthronement). It is asserted, on the other hand — and the Special Rapporteur agrees with this view — that the transmission of written or oral messages is one of the normal functions of the head of the resident diplomatic mission, and that in transmitting or forwarding such messages he retains his status as a permanent diplomat. This is important for certain courtesy reasons and also, more particularly, for political reasons. The sending of certain messages by special messenger was regarded, in the case of etiquette messages, as a gesture of special courtesy, and in the case of political messages this act accentuated the special importance of the message, whereas its importance is

definitely diminished when it is delivered through the regular diplomatic channel.

212. As regards the question of the messenger as an *ad hoc* diplomat, it is often emphasized that messengers were used much more often before the age of open diplomacy, for usually the messengers were also secret emissaries, and it was only in exceptional circumstances that the arrival of the messenger and the contents of the message were made public. In the past, the normal practice was to give publicity to such missions and messages in the case of ceremonial and formal missions, while in the case of political messages publicity was very rare, and indeed exceptional, being given especially when it was intended, in certain circumstances, to make clear to world public opinion the importance of the agreement which had been reached or the notice which had been received. Today, however, publicity is much more general, but it would be a mistake to believe that the messenger is not, even now, sometimes a secret messenger, that public opinion is always informed of the contents of the message, and in particular that the full text of the latter is sure to be published.

213. The Special Rapporteur ought to draw attention to one characteristic of the messenger as an *ad hoc* diplomat — his representative character. Irrespective of the powers given to him, the messenger represents the person who commissioned him to deliver the message, and for this reason he is treated with the courtesy due, not to his personal rank, but to the rank to which a special envoy of the author of the message is entitled. Precisely because of this capacity, however, it is customary for the messenger, as an *ad hoc* diplomat, to be of special personal standing or to occupy a high position in his own country. It is discourteous to entrust a mission of this kind to persons of inferior rank, although, even if that were done, such an *ad hoc* diplomat would possess in every respect the legal status of a messenger. It is known that on several occasions during the Second World War, the Heads of State of the United Nations coalition made use of such messengers, who were military officers of no particularly high rank. They were known as liaison officers, but no one questioned either their status as messengers or their capacity as *ad hoc* diplomats. They were regarded, in their capacity as the technical bearers of messages, as persons enjoying special confidence.

D. Secret emissaries

214. The oldest type of *ad hoc* diplomat is probably the so-called secret emissary, who is instructed by one State, which he represents, to make contact with another State, neither State having the right to disclose his presence or the nature of his functions, by virtue of an agreement between them and in the light of the circumstances.

215. A secret emissary may be sent by one Government to another, whether or not normal diplomatic channels exist. Where such relations exist, it is presumed that the head of the permanent diplomatic mission is not aware of the nature of the secret emissary's mission, or at least that it lies outside his own sphere of activity (this often causes the permanent ambassador to protest

or even to resign, since strictly speaking all relations are within his competence). Where there are no normal diplomatic channels, the two Governments, or at least one of them, do not wish the existence of such contacts to be divulged.⁶³

216. In practice, references are found to several categories of secret emissaries, who may be regarded as *ad hoc* diplomats. Among such emissaries, the following should be noted:

(a) The secret messenger, who has been discussed in a separate section. He is usually regarded today as being relatively secret. In many cases, his role, or at least his visit, is not made public until he has left the country in which he had a function to perform. Whether the contents of the message he was carrying will be published is a question apart, the answer to which depends on agreements between the Governments.

(b) The confidential envoy or secret negotiator. He discusses or concludes, on behalf of his Government, agreements on matters which must be kept secret, at least during the conversations. With the establishment of the rule that international treaties must be made public, this category is disappearing, although secret negotiations still take place. It would be a mistake to believe that this category of agent no longer exists at all. There are numerous instances to prove that States still resort to the practice of using secret emissaries who put out feelers, i.e., pass on information and study the possibilities of opening official negotiations on specific matters. Such was the mission of Prince Sixtus of Bourbon-Parma, who in 1917 probed the possibility of concluding a separate peace between Austria-Hungary and the Entente Powers; and such is the role of those who today prepare the ground for either the resumption of diplomatic relations which have been broken off between two States or the recognition of a new State.

(c) The confidential observer residing in the territory of a State, who has the secret mission of sending information to his Government, with the permission of the country of residence, but whose mission is regarded as temporary, who is not a member of the diplomatic mission, and whose presence is not made public.

(d) The secret agent who keeps watch on citizens of the sending State and who has been authorized by the receiving State to do so (generally in close collaboration with the security organs or intelligence service of the latter). In this connexion, mention may be made in particular of the police of Czarist Russia and the intelligence service of Nazi Germany in countries where the Hitler régime had influence.

217. A distinctive characteristic of these categories of secret envoys and others who are accorded the status of *ad hoc* diplomats is that the receiving State has agreed to admit them to its territory and has granted them the right to perform specific activities (often by tacit agreement). The two parties are bound to regard these agents and their mission as confidential and to ensure that their activities are not discovered. Another characteristic of

these categories of envoys is that they are accorded the privileges and immunities necessary for the performance of their duties.

218. Not to be confused with envoys whose functions come under the heading of *ad hoc* diplomacy are the agents whom a Government unilaterally sends to the territory of a foreign State, including those whose presence is tolerated by the State of residence even though without any obligation to accord them recognition. There are a number of categories of such agents, including unofficial observers, unauthorized informants (who may be spies) and voluntary envoys, who often have a decisive influence on relations between the countries concerned and are more reliable channels of communication than the permanent ambassadors but nevertheless do not have the status of *ad hoc* diplomats.⁶⁴

E. Observers as *ad hoc* diplomats

219. Potemkin notes the existence of a special category of *ad hoc* diplomats — the observers who appear on the international scene as special diplomatic envoys to attend international conferences or other meetings to which their States have been invited but in which they have refused to participate. This refusal may be prompted by considerations of principle, where the State in question does not approve of the meeting and its purpose, or may be due to its inability or unwillingness to adopt that particular course of action. Potemkin points out that, although such a country declines actually to participate in the meeting, the sending of observers shows that it takes a special interest in the matter under consideration and wishes either to influence the course of deliberations through its observers or to obtain direction information. Potemkin attributes this practice to the United States.⁶⁵ In the opinion of the Special Rapporteur, however, this is a more general phenomenon whose causes can be traced back further than the period between the two wars; today, the practice is widespread.

220. The role of an observer is by its very nature a diplomatic one. It is temporary and is limited to the period of the meeting. The status of an observer varies in accordance with the meeting's rules of procedure or its decisions. Nowadays, it is the practice in all cases to permit an observer to take part in discussions, though

⁶⁴ Genet (*loc. cit.*) cites one such voluntary envoy who worked on behalf of the Duc de Richelieu. The envoy in question was Fr. Joseph Leclerc du Tremblay, who was referred to by his contemporaries as the *Eminence grise*. During the Second World War, Hitler made use of such secret envoys in every State on which he wished to exert pressure, choosing them from among the nationals of the State concerned. Through these individuals, he was able to hint at the direst consequences without accepting any responsibility for their statements, even though it was perfectly obvious that they were authorized to make them. According to a book published in Yugoslavia in 1941 during the occupation of that country, the author, Dr. Danilo Gregorić, played such a role in Yugoslavia on the eve of the war. There were envoys of this kind in every European country at that time. Important though they in fact were, however, they must be distinguished from secret envoys having the status of *ad hoc* diplomats. Under international law, they are regarded as mere agents.

⁶⁵ V. Potemkin, *op. cit.*, vol. III, p. 880. Raoul Genet, *op. cit.*, vol. I, p. 97.

⁶⁸ Raoul Genet, *op. cit.*, vol. I, p. 31.

without the right to participate in votes or in decisions. As a general rule, observers are accorded the same honours, privileges and immunities as delegates to the conference.⁶⁶

221. In United States diplomatic practice, according to Genet, observers are divided into two categories: official observers, who represent their Government, and unofficial observers, who are confined to the role of technical observers. The Soviet Union followed this practice for a time. The Swiss Government has recognized the existence of these two categories, the practical line of demarcation between which is not very clear, since both make the same claim to all privileges and immunities and in fact enjoy them. In theory, observers of the first type are entitled to make observations on behalf of their Governments; whereas unofficial observers merely gather information and passively attend meetings and negotiations.⁶⁷

222. Mention might also be made of those observers who are secret envoys. In their case, however, the special rules apply.

F. Ambassadors at large

223. The diplomatic machinery of some States includes a category of special officials whose predetermined function it is to carry out *ad hoc* diplomatic missions. In the United States, it is customary to give these officials the title of "ambassadors at large". They are not accredited to a particular country but are empowered to conduct negotiations with various States on behalf of their own State and to attend various international conferences. When they deal with foreign countries, they are accorded the same honours as ambassadors.⁶⁸

224. Genet holds that it is possible not only for ambassadors but for all diplomatic agents to be, in a broad sense, without ties to any particular Government. In his opinion, however, they are also a part of general diplomacy.⁶⁹

225. The Special Rapporteur believes that the title of ambassador at large indicates only that the person to whom it is given is responsible for the exercise of various functions connected with special missions or international meetings. That still does not mean, however, that such a person, simply because he bears such a title, may be classified as a special delegate; he will become one only if he has been entrusted with a special mission.

⁶⁶ Protests have been raised by other participants in negotiations against the right of observers to take part in discussions or to make suggestions and statements of any kind. In the opinion of the Turkish delegation to the Lausanne Conference, for example, their presence gives rise to a situation of inequality between States. Although observers do not have the right to vote, since they do not wish to have it, they assume the right to make suggestions and to sound warnings; thus, the influence they wield is of an irresponsible kind, since the adoption of any suggestion they make is not binding on the State they represent. For that reason, the Turkish delegation took the position that observers should confine themselves to a passive role, so that theirs would be a function of secret diplomacy (of observation).

⁶⁷ Genet, *loc. cit.*

⁶⁸ V. Potemkin, *op. cit.*, vol. III, p. 800.

⁶⁹ Raoul Genet, *op. cit.*, vol. I, p. 79.

G. The suite of a Head of State considered as an *ad hoc* mission

226. Some writers hold that the suite accompanying a Head of State on an official visit to another State constitutes a special mission, regardless of the powers conferred on its members, and that the latter are in all cases to be regarded as *ad hoc* diplomats.⁷⁰

227. The commencement of the special mission of a member of the suite of a Head of State need not entirely coincide with the official visit of the Head of State. The Special Rapporteur holds the view that the mission may begin earlier when he arrives in the host State, in a State of transit, or in a third State, to make preparations for the visit of the Head of State; it may also continue in being even after the return of the Head of State if the member of the suite has been made specially responsible for winding up the relations established by the visit.

228. The Special Rapporteur is undecided about the status of these persons. They are *ad hoc* diplomats, since as members of the suite they perform an official function and the person whom they are accompanying is carrying out a mission as a representative of his State. On the other hand, it is difficult to define what is their personal role in the performance of this function. Hence, there is probably equal justification for taking a different view, viz. that these are distinguished foreigners who must be shown special courtesy. The Special Rapporteur is undecided on this point because he knows from personal observation of such missions that the suite includes both persons with duties to perform and persons who are simply "guests" of the Head of State and who form what is known as the private section of the suite, which, as a matter of courtesy on the part of the host State, is not separated from the official party (for example, an intimate friend of the Head of State accompanying him on an official journey). This point is even clearer if the Head of State is on a private rather than an official visit.

229. Those members of the suite who are responsible for the personal safety of the Head of State receive special attention, and it might also be noted that a special body of practice is developing with regard to the authority granted to such persons and the manner in which they work with the security organs of the receiving State.

230. Of late, the crews of the means of transport employed (particularly the crews of vessels, aircraft, trains and special coaches, drivers, etc.) have also come to be regarded as part of the suite. It is becoming customary to treat them as also forming a special category under the heading of *ad hoc* diplomacy. Higher-level personnel, including officers, are placed on an equal footing with persons performing functions of *ad hoc* diplomacy who possess diplomatic status, while lower-level personnel are, in practice, grouped with the technical personnel of permanent diplomatic missions. In all cases, all members of the suite come within the ambit of *ad hoc* diplomacy in the broad sense.

⁷⁰ Sir Ernest Satow, *op. cit.*, p. 43.

231. The Special Rapporteur did not cover in his first report (A/CN.4/166) the special missions which take place in connexion with the visit of a foreign Head of State, on the ground that, in the opinion of learned authors, such missions are governed by international custom. Nevertheless, during the discussion on this report at the sixteenth session of the Commission several members expressed the opinion that the question should be covered in the part of the report dealing with special aspects of special missions.

232. Mr. Yasseen proposed that special missions should also include visits by Heads of State and Ministers for Foreign Affairs (SR.723, paras. 18 and 40).

233. Mr. Rosenne said he was not convinced that visits by Heads of State, Heads of Government and Ministers should be covered by the rules since few important practical legal problems arose in connexion with such visits (SR.723, para. 24).

234. Mr. Elias thought that the rules relating to visits by Heads of State and Ministers should be included in the system of legal rules on special missions (SR.723, para. 31). In his view, special rules were needed in the case of such missions according to whether they were led by the Head of State, the Head of Government, the Minister for Foreign Affairs, some other head of department or permanent secretary. The rules would depend on the level and the rank of the head of mission (SR.724, para. 37).

H. Political agents not possessing diplomatic status

235. Genet includes in this category all temporary envoys (and even permanent ones, who are not under discussion here) sent by one State to another State or Government for the purpose of carrying out a political mission.⁷¹ According to Genet, these agents do not have diplomatic status because they are not part of the diplomatic corps. He also includes in this category the delegates of States whose sovereignty has not been recognized (a situation which antedates the adoption of the United Nations Charter), of *de facto* Governments (i.e. those which have not yet obtained international recognition), and of insurgents who are recognized as belligerents in a civil war (the representatives of forces participating in the colonial peoples' struggle for independence, such as the FLN delegates at Evian, may also be placed in this category).

236. The Special Rapporteur includes in this group, in particular, the envoys of Governments which are in process of formation and of embryonic political bodies in developing countries, i.e. envoys who function during a period of transition towards independence and the assumption of sovereignty. Modern history contains a number of instances of the so-called peaceful transfer of sovereignty, so that this question is not necessarily linked — although it may be — with civil war and the armed struggle of peoples in exercise of their right of self-determination. One such instance was the case of Kenya during the interval between the decision to grant the country its independence in the near future — a period

during which it already had its own Government — and the time of its assumption of sovereign rights over its national territory, i.e. the so-called effective date of sovereignty. In the case of Kenya and of a number of other countries, these "States about to be born" entered into *de facto* diplomatic relations through special missions before the effective date of sovereignty. The Special Rapporteur believes that such political agents should be accorded the status of special missions. However, he considers that the Commission will have to take a decision on this point.

237. In considering this point, the Commission adopted the view that the sending of special missions might occur between States which did not maintain, or had not yet established diplomatic relations, and even between States and insurgents. (See the commentary on draft articles 1 and 2.)

238. The Special Rapporteur considers that the functions of these envoys are at least partly diplomatic, in nature, even though they are not part of the diplomatic corps. In his opinion, what is involved is *ad hoc* diplomacy *sui generis*, and experience shows that the treatment of such envoys reflects recognition of that fact.

I. Private agents

239. The so-called private agents of a Head of State are also regarded as *ad hoc* diplomats. The Head of State sends them abroad on his own behalf and not on behalf of the State which he represents. Genet⁷² denies diplomatic status to such agents. A similar view can be inferred from the definition given by the International Law Commission, according to which an agent, to qualify for recognition as an *ad hoc* diplomat, must be entrusted by one State with the carrying out of a task in another State.⁷³

240. Genet says that the Head of State usually entrusts such agents with certain matters of a private, non-diplomatic nature, such as handling personal relations and private business and managing his property abroad. Because of this, Genet states categorically that the individuals in question never have diplomatic status.

241. The Special Rapporteur cannot accept this view. He considers that private agents are often entrusted with political functions, and in particular with taking political soundings in matters regarding which the Head of State has no authority to send official agents without the consent of some other organ. This is true of the personal envoys whom the President of the United States sends on his own behalf and who are essentially — even though the nature of their functions is such that they do not represent the State but merely the Head of State as an individual — equivalent to the *ad hoc* diplomats of other States. In theory and strictly speaking, all special ambassadors who are sent on a ceremonial mission should also be included in this category if they act on behalf of the Head of State and not on behalf of the State itself. Owing to certain traditional usages, however,

⁷² Raoul Genet, *op. cit.*, vol. I, p. 83.

⁷³ *Yearbook of the International Law Commission, 1960, vol. II, p. 179, draft article 1.*

⁷¹ Raoul Genet, *op. cit.*, vol. I, p. 80.

this practice is not followed, and, in everyday life, this kind of special ambassador is considered an *ad hoc* diplomat.

242. Nevertheless, since the State's sphere of competence is constantly expanding by virtue of the sovereign authority it wields in economic relations with foreign countries, the question arises whether the status of private agents or that of *ad hoc* diplomats should be accorded to envoys sent to foreign countries by some States (and not by the Heads of State) in order to negotiate and establish economic relations and conclude specific transactions, e.g. to negotiate a loan, conduct exploratory talks or conclude a delivery contract (regardless of whether the State in question is placing the order or making the delivery). The trend is increasingly towards the view that such individuals should be accepted as *ad hoc* diplomats by the host State. This practice is often carried even further in that the envoys in question are accorded this status even when they conduct their business with persons who are not subjects of international law (e.g. a banking syndicate with which they are negotiating a State loan). This shows that the notion of what constitutes an *ad hoc* diplomat is becoming broader, but it is uncertain whether this broadening process rests on international law (which seems doubtful) or on such precarious foundations as tolerance and courtesy. The Special Rapporteur is inclined to take the latter view. The difference is not a very great one, however, since in either case the host State has the right to deny its hospitality. Yet, a difference exists in that the State in question, while declining to accord the status of *ad hoc* diplomats to such agents, should not deny them hospitality; it can simply inform them that they will no longer enjoy the privileges, facilities and immunities previously accorded to them and that they will be subject to its jurisdiction in all respects. Hence, these envoys' status as *ad hoc* diplomats is a precarious one.

243. The Special Rapporteur believes that each of these categories should have a place in the body of legal rules relating to special missions, and he will endeavour to submit appropriate proposals to the Commission.

244. Of late, however, certain types of special missions have appeared which, in the opinion of the Special Rapporteur, cannot be said to represent universally accepted practice under international law. He considers, therefore, that the proposed rules should make no provision for missions of these types, which are the following:

(a) Joint State and party delegations of the kind exchanged by the socialist States and by these States and the States developing along socialist lines;

(b) Technical assistance missions, which do not follow any uniform practice and are usually based on bilateral agreements;

(c) Visits made for study purposes, by prior agreement between the Governments concerned, which do not constitute missions, since their object is not the performance of an official task within the scope of international relations as between States.

245. The Special Rapporteur has also thought it inadvisable to deal with the status of distinguished foreigners or with semi-official visits by prominent

persons, even if arranged officially. He deems it particularly important, however, to stress that it is wrong to consider as special delegates persons who, because of their regular functions, hold diplomatic passports and who travel in the territory of another State for matters in which they do not represent their State as a sovereign subject of international law, but perform a different mission, even though it may be of an honorary character (giving lectures, attending ceremonies, etc.).

11. Competence of special missions

246. The question of the line of demarcation between the competence of resident diplomacy and of special missions was discussed by the Commission during its sixteenth session.

247. The Commission held that special missions are undoubtedly an instrument of a special character for the purpose of representing States. By reason of the temporary nature of special missions and the specific character of their tasks, this instrument differs from the instrument constituted by the regular permanent diplomatic missions. It differs from specialized resident diplomacy by its temporary character, in that specialized resident diplomacy, although having specific tasks, is in principle of a permanent character. Lastly, special missions also differ from consular representation, although they may from time to time perform quasi-consular tasks. The Commission further considered that in modern international life special missions are an instrument much employed by States at every level (which varies according to their composition) and for widely differing tasks.

248. The Commission did not, however, pursue the question of the line of demarcation between the competence of regular diplomacy and specialized resident diplomacy on the one hand and that of special missions on the other. Mr. Cadieux and Mr. Tsuruoka stressed the greater competence and responsibilities of traditional resident diplomacy, but the Commission neither adopted nor rejected their views. Similarly, when drafting article 7, the Commission rejected the efforts of the Special Rapporteur to initiate a discussion on the delimitation of the authority of special missions as compared with that of regular diplomatic missions. While the Special Rapporteur treats this attitude of the Commission as having the force of a binding direction, he must point out once again that the Commission did not indicate its views on the subject. He thinks that the Commission's attitude is accounted for by the great divergence in practice, the vagueness of views and the political character of the subject. This is perhaps one of the cases where the question cannot be considered ripe for codification.

249. During the general debate some members of the Commission said that great caution was needed in formulating rules on special missions, for if an equal right to represent the State was granted both to regular missions and to special missions, the unity of expression of the sovereign will of States might be jeopardized. Mr. Cadieux, in particular, drew attention to this point, saying that the Commission would have to be very tactful in its handling of diplomats of the traditional kind

(SR.723, para. 28). Mr. Tsuruoka was even more explicit; he said:

... the co-existence of those two forms of diplomacy raised a question of responsibility. Conflict between the permanent diplomatic mission and a special mission of one State in another State was not inconceivable. However, the presumption was always that the will of the State was single: both missions had the same purpose and the special mission became part of the permanent diplomacy.

He thought that even in the case of a visit by a Head of State the responsibility in any case fell on the ambassador (SR.724, para. 6). Although the Special Rapporteur pointed out that the maintenance of the unity of the State's will was a question which should be settled within the State, whereas international legal relations required that statements made by special missions should have binding force, Mr. Tsuruoka insisted that such questions must be regulated by international law since the fact that the will of the State was expressed in two different ways might affect relations between two States (SR.724, para. 28). Mr. Ago, speaking as Chairman, agreed that the problem was an extremely delicate one which he thought was connected rather with the Law of Treaties, the attribution to the State of the will expressed by its representative. He suggested that for the time being the Commission consider only the question of privileges and immunities (SR.724, paras. 31 and 32).

250. Accordingly, no solution was found for this important problem in the general debate in the Commission. The uncertainty was the more marked on account of a divergence of fundamental views between the members of the Commission who had raised the question and the Special Rapporteur. The Special Rapporteur held that any organs or representatives of the State, acting within the scope of their competence or full powers, validly expressed the will of the State they represented and that the other contracting State had no obligation or need to verify whether the representative of a State acted according to internal rules on consultation or co-ordination so long as he acted within the limits laid down in his terms of reference or within those customary in international law. The Special Rapporteur indicated moreover in his statement of principle that the modern practice of special missions had met with opposition from the so-called regular diplomacy in different States, and that the problem of co-ordination was an internal matter for each State, not the concern of the State receiving the mission.

12. *Categories of special mission staff*

251. At its sixteenth session, the Commission took up the question of the classes of special missions and, in addition, that of the division of mission staff into categories. The members of the Commission have not reached the formal conclusion that missions should be treated in different ways.

252. The opinion which emerged during the general debate was that not all missions and not all the mission staff could have the same legal status, but that this status depends on the specific class of the mission and its staff.

253. Mr. Yasseen pointed out that the classes of missions were, by virtue of their respective tasks, numerous and varied. He did not, however, reach the conclusion that separate rules were needed concerning the status of each (SR.724, para. 33). He was even opposed to any tendency to impose excessive restrictions, by reason of the functional theory concerning special missions (SR.724, para. 34).

254. Mr. Elias thought that special provision would have to be made for subordinate members of special missions (SR.724, para. 37).

255. Mr. Verdross favoured the idea of introducing a different set of rules for members of special missions, especially in view of the general tendency to restrict the immunities and privileges of special missions (SR.724, para. 39).

256. Mr. de Luna thought that as many immunities as possible should be accorded to members of special missions but that they should be limited to those necessary for the performance of their functions without prejudice to the accomplishment of the mission (SR.724, para. 40).

257. Mr. Cadieux thought that the Commission should classify special missions according to their functions and in particular should draw a distinction between State agents and their assistants in special missions, with due regard to the level (SR.724, paras. 45 and 46).

258. Mr. Tunkin thought it might prove difficult to draft a single text which would cover every category of special mission and that it might be better to distinguish between the various categories and to accord them different status (SR.724, para. 54).

259. Mr. Rosenne agreed that a distinction should be drawn between the different categories of persons serving on a special mission; such a distinction would serve as a basis for the legal regulation of privileges and immunities along the lines of the two Vienna Conventions (1961 and 1963) (SR.724, para. 64).

260. Mr. Ago, speaking as Chairman, said it would be difficult to classify missions according to the level of their head (SR.724, para. 59).

261. The Special Rapporteur considers that the Commission accepted in principle the division of mission staff into categories, as is evident from article 6, paragraph 2, as adopted. It is therefore his task to formulate the facilities, privileges and immunities of the members of the staff of special missions in different ways according to the categories of staff.

262. Concerning the division of mission staff into categories, the Commission followed in general the categories laid down in the Vienna Convention on Diplomatic Relations (1961).

263. However, the question of the distinction between the different kinds of special missions arose again in the Sixth Committee of the General Assembly. The delegations of several States expressed their opinion on this question. The opinion of the delegation of Brazil is quoted by way of example:

The Commission had already rejected the idea that a distinction must be made between missions of a political nature and technical missions. Political missions could have important technical

aspects, just as technical missions could have a significant political character.⁷⁴

The delegation of Czechoslovakia expressed the following opinion:

In view of the constantly increasing number of special missions entrusted with tasks ranging from the highly political to the purely technical, it might be advisable to draw a clearer line between the kind of missions that fell within the draft articles and those that did not.⁷⁵

264. As the Special Rapporteur was not in a position to draw any reliable conclusion from that statement, he hoped to find one in the written comments submitted by the Czechoslovak Government. These comments contain the following passage:

The Government of the Czechoslovak Socialist Republic shares the views expressed by a number of members of the International Law Commission and likewise contained in the report of the Special Rapporteur, namely that the term special missions covers a great number of State organs for international relations which are entrusted with tasks of the most diverse character. It also shares the view that the tasks and legal status of special missions (except delegations to international conferences and congresses as well as delegations and representatives of international organizations) should be regulated within the general codification of diplomatic law by one convention. At the same time, however, it is of the opinion that in view of the fundamental difference in the character of the individual special missions it would be necessary to differentiate their legal status according to the functions assumed by them with the agreement of the participating States. (To characterize the individual categories of special missions would be undoubtedly very difficult and moreover they might be outdated by the relatively rapid development.) Proceeding from this fact the Government of the Czechoslovak Socialist Republic is inclined to believe that in the case of special missions of a predominantly technical and administrative character privileges and immunities of more limited character emanating from the theory of functional necessity would correspond better to the state of international law and to the needs of States. Therefore, it suggests that it might be purposeful that the Commission when definitively formulating the draft convention should proceed e.g. from a division of special missions into at least two categories. The first category might include special missions of a political character and the second special missions of predominantly technical and administrative character. The formulation of provisions concerning special missions of political character should proceed from the Vienna Convention on Diplomatic Relations. However, special missions of a predominantly technical and administrative character should be granted only such privileges and immunities as are necessary for expeditious and efficient performance of their tasks.⁷⁶

265. From that explanation the Special Rapporteur deduced that the Government of Czechoslovakia took the view that the differences in the character of special missions, according to their task, would justify different measures in regard to the granting of privileges and immunities, according to the theory of functional necessity.

266. The delegation of Mali also took the position that the nature of the special mission itself should be taken into account. On this point its representative said:

... given the large number of missions and their varied nature, it would be wise to limit the application of the relevant rules to a clearly defined category of missions.⁷⁷

267. The delegation of Finland also expressed an opinion on this question. It criticized the Commission, on the ground that:

... the Commission had failed to recognize that most special missions were purely technical and that such drastic exemptions were therefore unnecessary. It should seek to limit the scope of application of those articles, or, failing that, it should at least establish a clear distinction between different groups of special missions, and condense the articles as much as possible.⁷⁸

268. The Special Rapporteur feels bound to point out, with regard to this comment by the Finnish delegation, that the Commission was not unaware of the fact that most special missions are of a technical character, but that it nevertheless recognized that they also have a functional and a representative aspect, and that the facilities, privileges and immunities provided for in the draft articles should be accorded to them for the performance of their functions, having regard to their nature and task (draft article 17).

269. In order to allay the anxieties of certain Governments, however, the Special Rapporteur proposes that the Commission should insert in article 17 a paragraph 2, reading as follows:

2. The facilities, privileges and immunities provided for in Part II of these articles shall be granted to the extent required by these articles, unless the receiving State and the sending State agree otherwise.

270. During its eighteenth session, the Commission considered the question of the distinction between the different kinds of special missions and took the following position:

The Commission gave attention to the comments by Governments on this point and in particular to the possibility of distinguishing between special missions of a political character and those which were of a purely technical character. The question thus arose whether it was not desirable to distinguish between special missions in respect of the privileges and immunities of members of missions of a technical character. The Commission reaffirmed its view that it was impossible to make a distinction between special missions of a political nature and those of a technical nature; every special mission represented a sovereign State in its relations with another State. On the other hand, the Commission concluded that there was some justification for the proposal by Governments that the extent of certain privileges and immunities should be limited in the case of particular categories of special missions. The Commission requested the Special Rapporteur to re-examine the problem, more particularly the question of applying the functional theory and the question of limiting the extent of certain privileges and immunities in the case of particular categories of special missions. The Commission instructed the Special Rapporteur to submit to it a draft provision on the subject which would provide *inter alia* that any limitation of that nature should be regulated by agreement between the States concerned.⁷⁹

⁷⁴ *Official Records of the General Assembly, Twentieth Session, Sixth Committee*, 840th meeting, para. 15.

⁷⁵ *Ibid.*, 843rd meeting, para. 17.

⁷⁶ See *Yearbook of the International Law Commission, 1967*, vol. II, document A/6709/Rev.1, annex I.

⁷⁷ *Official Records of the General Assembly, Twentieth Session, Sixth Committee*, 845th meeting, para. 21.

⁷⁸ *Ibid.*, 850th meeting, para. 3.

⁷⁹ *Yearbook of the International Law Commission, 1966*, vol. II, p. 276, para. 61.

271. The Special Rapporteur still believes that all special missions must be assured all the privileges, immunities and facilities which they require to represent properly the State whose sovereign will they express and to exercise without hindrance the functions entrusted to them, but he confirms the opinion which he had previously expressed in his third report, namely, that there should be inserted in the draft articles a clause providing that the States concerned, which are best qualified to assess the extent of the freedom and guarantees necessary for their special missions, shall be responsible for determining by agreement among themselves the outer limits of the privileges, immunities and facilities to be guaranteed to special missions.

13. Draft provisions concerning so-called high-level special missions

272. This led the Special Rapporteur to submit to the Commission, in his second report, draft provisions concerning so-called high-level special missions. However, the Commission did not discuss this draft in detail, but merely reproduced it as an annex to its report to the General Assembly on the work of its seventeenth session,⁸⁰ and indicated that it would appreciate the opinion of Member States on this matter and hoped to receive their suggestions.

273. On the one hand, the Special Rapporteur understands the arguments of the members of the Commission who hold the view that particular importance must be accorded to high-level special missions, i.e., the special missions led by Heads of States, Heads of Governments, or persons holding high office in the States concerned. On the other hand, he considers that this would give exaggerated prominence to the representative character of such missions whereas the purpose of the draft drawn up by the Commission is the protection of the free exercise of functions by special missions. Consequently, he also sympathizes with States which are not prepared to establish a distinction for the benefit of high-level special missions. He takes the liberty of adding that the character of a special mission which has already commenced may be changed in the course of its functions, by the arrival of a person to lead the mission who would cause it to be ranked as a high-level mission, or his departure, without any change in the nature of its assignment.

274. The Commission, on the basis of the reports submitted by the Special Rapporteur, resumed the discussion of this question and reached the following decision at its eighteenth session:

At its sixteenth session, the International Law Commission decided to ask the Special Rapporteur to submit at its next session articles dealing with the legal status of so-called high-level special missions, in particular special missions led by Heads of States, Heads of Governments, Ministers for Foreign Affairs, and Cabinet Ministers. In his second report (A/CN.4/179), the Special Rapporteur submitted to the seventeenth session of the Commission a set of draft provisions concerning so-called high-level special missions. The Commission did not discuss this draft at its seventeenth session, but considered whether special rules of law should

or should not be drafted for so-called high-level special missions, whose heads hold high office in their States. It said that it would appreciate the opinion of Governments on this matter, and hoped that their suggestions would be as specific as possible. After noting the opinions of Governments, the Commission recommended the Special Rapporteur not to prepare draft provisions concerning so-called high-level special missions, to include in part II of the draft articles a provision concerning the status of the Head of State as head of a special mission, and to consider whether it was desirable to mention the particular situation of this category of special missions in the provisions dealing with certain immunities. The Special Rapporteur was, accordingly, instructed to undertake the necessary studies on this subject and to submit appropriate conclusions to the Commission.⁸¹

275. In accordance with this decision of the Commission, the Special Rapporteur prepared a special article concerning the status of the Head of State as head of a special mission and included it in the draft articles, which are set out in chapter III of this report. As to the other cases of so-called high-level special missions, he still holds the view that they should have the ordinary status of special missions, unless the States concerned adopt explicit and special agreements laying down other rules governing their status.

276. During the twenty-first session of the General Assembly, the representative of the Byelorussian Soviet Socialist Republic proposed in the Sixth Committee that an explicit provision concerning high-level special missions should be included in the draft articles.⁸² The representatives of the other States expressed no interest in this question.

14. Introduction of a provision prohibiting discrimination and requiring reciprocity in the application of the articles

277. In his second report on special missions (A/CN.4/179), submitted to the International Law Commission at its seventeenth session, the Special Rapporteur included an article 39, entitled "Non-discrimination". His intention in doing so was to include in the draft articles on special missions a provision corresponding to article 47 of the 1961 Vienna Convention on Diplomatic Relations and article 72 of the Vienna Convention on Consular Relations. In paragraph 49 of its report on the work of its seventeenth session⁸³ (1965) the Commission recorded its decision not to accept that suggestion "on the ground that the nature and tasks of special missions are so diverse that in practice such missions have inevitably to be differentiated *inter se*".

278. The Governments of various States reacted to this passage in the Commission's report in different ways:

(a) In its comments, the Government of Yugoslavia stated that it

considers as justified the proposal for the inclusion of a provision forbidding discrimination, as in article 47 of the Vienna Conven-

⁸¹ *Yearbook of the International Law Commission, 1966*, vol. II, p. 277, para. 69.

⁸² *Official Records of the General Assembly, Twenty-first Session, Sixth Committee*, 908th meeting, para 11.

⁸³ *Yearbook of the International Law Commission, 1965*, vol. II, document A/6009.

⁸⁰ *Yearbook of the International Law Commission, 1965*, vol. II, pp. 192 and 193.

tion on Diplomatic Relations and article 72 of the Vienna Convention on Consular Relations.⁸⁴

(b) The Belgian Government stated that it agrees with the Commission that no provision on non-discrimination should be included in the draft, as special missions are so diverse.⁸⁵

(c) The Swedish Government also dealt with the question in its written comments, and stated that:

The Swedish Government agrees with the stand taken by the Commission that a provision on non-discrimination would be out of place with respect to special missions.⁸⁶

279. As can be seen from the foregoing summary, no Government of any Member State except Yugoslavia expressed itself in favour of inserting a provision of this nature.

280. The Commission considered this question again at its eighteenth session and took the following decision:

After reviewing the comments by Governments and their opinions on the question raised by the Commission in paragraph 49 of its report on the work of the first part of its seventeenth session (1965), the Commission reconsidered its previous decision on the point and requested the Special Rapporteur to submit a draft article prohibiting discrimination, based on article 47 of the Vienna Convention on Diplomatic Relations and article 72 of the Vienna Convention on Consular Relations. The article would, however, have to allow for the diversity of the nature and tasks of special missions and for the fact that circumstances might lead to distinctions being made in practice.⁸⁷

281. The Special Rapporteur, in accordance with this decision, laid down the rule of non-discrimination, but stipulated that it should be limited to special missions which were related *inter se*.

282. The Commission also considered the question of reciprocity in the application of the articles relating to special missions.

283. In its written comments on the draft articles, the Belgian Government expressed the view that "there should be a provision on reciprocity in the application of this draft."

284. The Special Rapporteur is of the opinion that all provisions of conventions should be applied on condition of reciprocity, and that no special provision requiring reciprocity should be included in the draft articles.

285. At its eighteenth session, the Commission endorsed the Special Rapporteur's opinion concerning reciprocity in the future application of the articles relating to special missions. It stated its position in the following terms:

The Commission took note of one Government's opinion that there should be a provision on reciprocity in the draft article on special missions. The Commission, however, endorsed the Special Rapporteur's opinion that reciprocity was a condition underlying the provisions of any treaty; it was therefore unnecessary to

include in the draft articles on special missions an explicit provision to the effect that the principle of reciprocity must be observed.⁸⁸

15. Introductory article

286. In recent times, the conventions and other international instruments drawn up by the United Nations have regularly included a special article containing definitions of the concepts used in these texts, but it is customary to place these definitions in an introductory article which is drafted only at the end of the preparatory work on the convention. In this case, the same procedure has been followed.

287. In this connexion, it will be recalled that in paragraph 46 of its report on the work of the first part of its seventeenth session (1965), the Commission "instructed the Special Rapporteur to prepare and submit to the Commission an introductory article on the use of terms in the draft, in order that the text might be simplified and condensed".

288. This idea met with general approval, both in the discussions in the Sixth Committee of the General Assembly and in the written comments by Governments.

289. During the discussions in the Sixth Committee, the representatives of Hungary,⁸⁹ Turkey⁹⁰ and Ceylon⁹¹ spoke in favour of an introductory article comprising definitions. The representatives of Israel⁹² and Finland⁹³ considered that such an article would make it possible to condense the text of the draft. They also referred to the need to keep the terminology of the articles on special missions as close as possible to that of the Vienna Conventions of 1961 and 1963. The representatives of Hungary,⁹⁴ Sweden⁹⁵ and France⁹⁶ also expressed this view, whereas the representative of Jordan⁹⁷ said that only the 1961 Vienna Convention on Diplomatic Relations should be taken into consideration.

290. It is interesting to note that the delegation of Afghanistan⁹⁸ had a different opinion on terminology: it proposed that the term "special mission" should be rejected in favour of "temporary mission" and that "a standard terminology of international law" should be adopted in formulating the rules.

291. The Government of Israel devoted particular attention to this point in its comments, where it says:

With this object in mind, it would be most helpful if an article containing definitions of terms frequently used could be drawn up and embodied in the draft, giving those terms the same mean-

⁸⁸ *Ibid.*, para. 63.

⁸⁹ *Official Records of the General Assembly, Twentieth Session, Sixth Committee*, 843rd meeting, para. 36.

⁹⁰ *Ibid.*, 847th meeting, para. 24.

⁹¹ *Ibid.*, 850th meeting, para. 8.

⁹² *Ibid.*, 840th meeting, paras. 6 and 7.

⁹³ *Ibid.*, 850th meeting, para. 3.

⁹⁴ *Ibid.*, 843rd meeting, para. 37.

⁹⁵ *Ibid.*, 844th meeting, para. 12.

⁹⁶ *Ibid.*, 849th meeting, para. 20.

⁹⁷ *Ibid.*, 842nd meeting, para. 42.

⁹⁸ *Ibid.*, 850th meeting, paras. 23 and 26.

⁸⁴ See *Yearbook of the International Law Commission, 1967*, vol. II, document A/6709/Rev.1, annex I.

⁸⁵ *Ibid.*

⁸⁶ *Ibid.*

⁸⁷ *Yearbook of the International Law Commission, 1966*, vol. II, p. 276, para. 62.

ings as in the 1961 Vienna Convention, and, whenever possible, making use of cross-references to the said Convention.

The definitions would probably include such terms as: special missions, head of special mission, members of special mission, staff (diplomatic, administrative and technical, service, personal), premises, etc.

It is believed that the draft articles would gain by being shortened, and that this could be achieved by such cross-references and by combining some articles.⁹⁹

292. The Yugoslav Government also dealt with this matter in its comments. It states that it

agrees with the International Law Commission's proposal that an article defining the terms used in the convention should be inserted as article 1 of the future convention.¹⁰⁰

293. In accordance with the Commission's decision and with the opinions expressed by delegations and Governments, the Special Rapporteur proposed the introductory article, set out below, which contained definitions of the expressions used in several articles of the draft, and explained that if the Commission adopted this article, the texts of a number of articles could be shortened, since the repetition of descriptive definitions could be avoided.

294. The text of the introductory article proposed by the Special Rapporteur in his third report is as follows:

Article 0 (provisional number). — Expressions used

For the purposes of the present articles

(a) A "special mission" is a temporary special mission which a State proposes to send to another State, with the consent of that State, for the performance of a specific task;

(b) A "permanent diplomatic mission" is a diplomatic mission sent in accordance with the 1961 Vienna Convention on Diplomatic Relations;

(c) A "consular post" is a consular post established under the 1963 Vienna Convention on Consular Relations;

(d) The "head of a special mission" is the person charged by the sending State with the duty of acting in that capacity;

(e) A "representative" is a person charged by the sending State with the duty of acting alone as a special mission;

(f) A "delegation" is a special mission consisting of a head and other members;

(g) The "members of a special mission" are the head of the special mission and the members authorized by the sending State to represent it as plenipotentiaries;

(h) The "members and staff of the special mission" are the head and members of the special mission and the members of the staff of the special mission;

(i) The "members of the staff of the special mission" are the members of the diplomatic staff, the adminis-

trative and technical staff and the service staff of the special mission;

(j) The "members of the diplomatic staff" are the members of the staff of the special mission to whom the sending State has given diplomatic rank;

(k) The "members of the administrative and technical staff" are the members of the staff of the special mission employed in the administrative and technical service of the special mission;

(l) The "members of the service staff" are the members of the staff of the special mission employed in unskilled and domestic service within the special mission;

(m) The "private staff" are persons employed in the private service of the members and staff of the special mission;

(n) The "sending State" is the State which has sent the special mission;

(o) The "receiving State" is the State which has received on its territory a special mission from the sending State for the purpose of transacting official business with it;

(p) A "third State" is a State on the territory of which special missions perform their tasks or through whose territory they pass in transit;

(q) The "task of a special mission" is the task specified by mutual consent of the sending State and of the receiving State;

(r) The "premises of the special mission" are the buildings or parts of buildings and the land ancillary thereto, irrespective of ownership, used for the purposes of the special mission, including the residence or accommodation of the members and staff of the special mission.

295. The Commission did not consider this text during its eighteenth session, and merely took a general decision in the following terms:

In paragraph 46 of its report on the work of its seventeenth session (1965), the Commission instructed the Special Rapporteur to prepare and submit to the Commission an introductory article on the use of terms in the draft, in order that the text might be simplified and condensed. This idea met with general approval, both in the discussion in the Sixth Committee of the General Assembly and in the written comments of Governments. In pursuance of the Commission's decision and in the light of the opinions expressed by Governments, the Special Rapporteur submitted to the Commission at its eighteenth session a draft introductory article defining the terms and concepts used in several articles of the draft on special missions. This draft introductory article gives definitions for a number of the following terms: special mission, permanent diplomatic mission, consular post, head of a special mission, representative, delegation, members of a special mission, members and staff of the special mission, members of the staff of the special mission, members of diplomatic staff, members of the administrative and technical staff, members of the service staff, private staff, sending State, receiving State, third State, task of a special mission, and premises of the special mission. The Commission recognized the usefulness of an article of this kind which, if it were adopted, would help to shorten the text of a number of articles. The Commission decided to defer consideration of the introductory article, and instructed the

⁹⁹ See *Yearbook of the International Law Commission, 1967*, vol. II, document A/6709/Rev.1, annex I.

¹⁰⁰ *Ibid.*

Special Rapporteur to consider this new article again and, if necessary, to revise it, and to submit it to the Commission.¹⁰¹

296. Although the Commission did not discuss the introductory article, some comments were made concerning the terms and definitions used; mention should be made in particular, of the remarks of Mr. Castrén during the eighteenth session of the Commission and the written comments of the Netherlands Government. The Government of Pakistan stressed the usefulness of a revision of the terms and definitions.

297. In this connexion, the Special Rapporteur refers to his third report and stresses the fact that the introductory article was preceded by the following sentence:

If the Commission adopts this article, the texts of a number of articles can be shortened, since the repetition of descriptive definitions can be avoided.¹⁰²

298. The discrepancies pointed out by Mr. Castrén and by the Netherlands Government were known to the Special Rapporteur, but he did not think that he should make changes because such discrepancies would be finally conditioned by the terminology and the definitions of the introductory article.

299. The Special Rapporteur considers, moreover, that many of these remarks cannot be endorsed, for they adhere too closely to the Vienna Convention of 1961 without taking into account the difference between the nature and functions of permanent diplomatic missions and the nature and functions of special missions.

16. *Question of the preamble of the future instrument relating to special missions*

300. In his first two reports, the Special Rapporteur did not raise the question of the preparation of a preamble to the future instrument. He had taken the view that this question, as a general rule, was not within the competence of the International Law Commission, but that it should be raised in the organs which would prepare the final draft of the future instrument.

301. In his third report, he noted, however, that the Yugoslav Government, in its written comments, stated that it

... considers that the preamble to the convention should give a definition of a special mission and emphasize the differences between special missions and permanent diplomatic missions.¹⁰³

302. In bringing this statement to the attention of the Commission, the Special Rapporteur explained that he thought that the Commission should not take any further action on this desideratum of the Yugoslav Government.

303. The Commission considered this question at its eighteenth session and stated its position in the following terms:

Although it is not current practice for the Commission to prepare preambles to the drafts which it submits to the General Assembly, one Government, in its written comments, expressed

¹⁰¹ *Yearbook of the International Law Commission, 1966*, vol. II, p. 277, para. 70.

¹⁰² *Ibid.*, document A/CN.4/189 and Add.1, para. 269.

¹⁰³ See *Yearbook of the International Law Commission, 1967*, vol. II, document A/6709/Rev.1, annex I.

the view that the preamble to the convention on special missions should give a definition of a special mission and emphasize the differences between special missions and permanent diplomatic missions. After discussing the matter, the Commission instructed the Special Rapporteur to draft a preamble and submit it to the Commission.¹⁰⁴

304. The Special Rapporteur took the view that the preparation of the draft preamble should be entrusted to a legal body and that a text of this kind should not be drafted directly by the representatives of States, since the preamble, despite debatable opinions concerning its binding character, was at all events, according to the rules generally accepted by text-writers and judicial decisions, an aid in the interpretation of the provisions of the instrument in question. Disregarding the decision at San Francisco that the Preamble of the United Nations Charter was a binding text, which was an exception, the Special Rapporteur thinks that it is difficult to deny legal significance to the text of a preamble, and he is convinced that in the future the better practice would be for the Commission to submit a draft preamble with any draft instrument which it transmits to the General Assembly.

305. The Special Rapporteur accordingly has included a draft preamble in the draft articles relating to special missions which are set out in chapter III of this report.

17. *Legal status of special missions in relation to third States*

306. The International Law Commission took the view that special missions were not simply institutions which functioned between the sending State and the receiving State, but that they also concerned third States, whether they passed through the territory of a third State or they received permission to carry out certain assignments there.

307. Diplomatic history abounds in examples of special missions making their appearance in the territories of third States, particularly where the sending State and the receiving State are not directly contiguous or the frontiers are closed as in the case of armed conflict. In the past, third States have, as a courtesy, permitted transit through their territory or have made it possible for missions of the States concerned to meet on their territory. The Commission took the view that this question must not depend on *comitas gentium*, but should be determined *ex jure*.

308. At the Commission's sixteenth session, during the general debate, it was pointed out on several occasions that the rules concerning the legal status of special missions should also in certain cases, apply to third States as well as to the States sending and receiving special missions. That was emphasized by Mr. Rosenne (SR.723, para. 23) and Mr. Ago (SR.723, para. 35).

309. The idea received expression in article 16, as adopted, of the rules relating to special missions. The Special Rapporteur hopes that this idea will be supplemented and developed by the additions to be made to the text already accepted by the Commission.

¹⁰⁴ *Yearbook of the International Law Commission, 1966*, vol. II, p. 277, para. 67.

CHAPTER III

Draft articles on special missions¹⁰⁵PART I. GENERAL RULES¹⁰⁶

310. This part reproduces the text of the different articles and the commentaries as they were adopted by the Commission and submitted to the Governments of Member States for their comments and suggestions.

311. It is followed by the comments of Member States on the articles and commentaries submitted to them. These in turn are followed by the Special Rapporteur's conclusions and his proposals when it is necessary to amend the text of an article or the commentary.

312. If the Special Rapporteur is of the opinion that the text should be amended for drafting reasons, in the light of the draft definitions contained in article 0, which appears at the end of the draft articles, the proposed amendment is also given in the conclusions accompanying each article.

313. At the end of his comments on each article, the Special Rapporteur states whether in his opinion the provision in question should be generally compulsory or optional.

Article 1.¹⁰⁷ — The sending of special missions

1. For the performance of specific tasks, States may send temporary special missions with the consent of the State to which they are to be sent.

2. The existence of diplomatic or consular relations between States is not necessary for the sending or reception of special missions.

Commentary

(1) Article 1 of the draft on special missions differs from the provisions of the Vienna Convention on Diplomatic Relations. The difference is due to the fact that the tasks and duration of special missions differ from those of regular missions.

(2) A special mission must possess the following characteristics:

(a) It must be sent by a State to another State. Special missions cannot be considered to include missions sent by political movements to establish contact with a particular State, or missions sent by States to establish contact with a movement. In the case of insurrection or civil war,

¹⁰⁵ Articles 1-16 were adopted by the Commission at its sixteenth session (1964) on the basis of the Special Rapporteur's first report (A/CN.4/166). Articles 16-36 of that report were not discussed by the Commission and were replaced by articles 17-40 of the Special Rapporteur's second report (A/CN.4/179) which was discussed by the Commission at its seventeenth session and formed the basis of articles 17-44 of these draft articles.

¹⁰⁶ Title adopted at the 819th meeting.

¹⁰⁷ Introduced as article 1 of Special Rapporteur's first report (A/CN.4/166). Discussed at the 757th and 758th meetings of the Commission. Drafting Committee's text discussed and adopted at the 768th meeting. Commentary adopted at the 772nd meeting. The Commission decided that this article would be preceded by a definitions article.

however, any such movements which have been recognized as belligerents and have become subjects of international law have the capacity to send and receive special missions. The same concept will be found in the Vienna Convention on Diplomatic Relations (article 3, paragraph 1 (a)).

(b) It must not be in the nature of a mission responsible for maintaining general diplomatic relations between the States; its task must be precisely defined. But the fact that a task is defined does not mean that its scope is severely limited; in practice, some special missions are given far-reaching tasks of a general nature, including the review of relations between the States concerned and even the formulation of the general policy to be followed in their relations. But the task of a special mission is in any case specified and it differs from the functions of a permanent diplomatic mission, which acts as a general representative of the sending State (article 3, paragraph 1 (a) of the Vienna Convention on Diplomatic Relations). In the Commission's view, the specified task of a special mission should be to represent the sending State in political or technical matters.

(c) A State is not obliged to receive a special mission from another State unless it has undertaken in advance to do so. Here, the draft follows the principle set out in article 2 of the Vienna Convention, but the Commission points out that the way in which consent is expressed to the sending of a permanent diplomatic mission differs from that used in connexion with the sending of a special mission. In the case of a special mission, consent usually takes a more flexible form. In practice, such an undertaking is generally given only by informal agreement; less frequently, it is given by formal treaty providing that a specific task will be entrusted to the special mission; one characteristic of a special mission, therefore, is that consent for it must have been given in advance for a specific purpose.

(d) It is of a temporary nature. Its temporary nature may be established either by the term fixed for the duration of the mission or by its being given a specific task, the mission usually being terminated either on the expiry of its term or on the completion of its task.¹⁰⁸ Regular diplomatic missions are not of this temporary nature, since they are permanent (article 2 of the Vienna Convention on Diplomatic Relations). However, a permanent specialized mission which has a specific sphere of competence and may exist side by side with the regular permanent diplomatic mission is not a special mission and does not possess the characteristics of a special mission. Examples of permanent specialized missions are the United States missions for economic co-operation and assistance to certain countries, the Australian immigration missions, the industrial co-operation missions of the socialist countries, and commercial missions or delegations which are of a diplomatic nature, etc.

(3) The sending and reception of special missions may — and most frequently does — occur between States which maintain regular diplomatic or consular relations with each other, but the existence of such relations is not an essential prerequisite. Where such

¹⁰⁸ See article 12.

relations do exist and the regular diplomatic mission is functioning, the special mission's particular task may be one which would have been within the competence of the ordinary mission if there had been no special mission. During the existence of the special mission, however, States are entitled to conduct through the special mission relations which are within the competence of the general mission. The Commission deemed it advisable to stress that the existence of diplomatic or consular relations between the States in question is not a prerequisite for the sending and reception of special missions. The Commission considered that special missions can be even more useful where such relations do not exist. The question whether special missions can be used between States or Governments which do not recognize each other was also raised. The Commission considered that, even in those cases, special missions could be helpful in improving relations between States, but it did not consider it necessary to add a clause to that effect to article 1.

(4) The manner in which the agreement for sending and receiving a special mission is concluded is a separate question. In practice, there are a number of ways of doing so, namely:

(a) An informal diplomatic agreement providing that a special mission will be sent and received;

(b) A formal treaty providing that certain questions will be discussed and settled through a special mission;

(c) An offer by one State to send a special mission for a specific purpose, and the acceptance, even tacit, of such a mission by the other State;

(d) An invitation from one party to the other to send a special mission for a specific purpose, and the acceptance of the invitation by the other party.

(5) Where regular diplomatic relations are not in existence between the States concerned — whether because such relations have been broken off or because armed hostilities are in progress between the States — the sending and reception of special missions are subject to the same rules cited above. Experience shows that special missions are often used for the settlement of preliminary questions with a view to the establishment of regular diplomatic relations.

(6) The fact that a special mission is sent and received does not mean that both States must entrust the settlement of the problem in question to special missions appointed by the two parties. Negotiations with a delegation sent by a State for a specific purpose may also be conducted by the regular organs of the receiving State without a special mission being appointed. Both these practices are considered to be usual, and in the second case the special mission acts on the one side and the Ministry (or some other permanent organ) on the other. The Commission did not deem it necessary to refer to this concept in the text.

(7) Cases also arise in practice in which a specific delegation, composed of the head or of members of the regular permanent diplomatic mission accredited to the country in which the negotiations are taking place, appears in the capacity of a special mission. Practice provides no clear-cut answer to the question whether this is a special

mission in the proper sense or an activity of the permanent mission.

New suggestions by Governments

(8) The Swedish Government devoted special attention in its comments to the question of the use of special missions between States or Governments which did not recognize each other, and in relations with insurgents. The Swedish Government commented in the following terms:

In its commentary to article 1 the Commission says:

“The question whether special missions can be used between States or Governments which do not recognize each other was also raised. The Commission considered that, even in those cases, special missions could be helpful in improving relations between States, but it did not consider it necessary to add a clause to that effect to article 1.”

The Commission's view that special missions can be helpful in improving relations between States or Governments which do not recognize each other is certainly correct. Special missions are sometimes used to remove obstacles to recognition. It is, however, obvious that special missions can be used for these purposes only if it is clear that the mere sending of a special mission does not imply recognition. If it could be successfully argued that a State by sending to or receiving from a State or Government a special mission had recognized that State or Government, a special mission would no longer be a useful instrument for *preparing the way* to recognition. It might be useful further to investigate this problem and, if it is found warranted, include in article 1 a clause stating that sending or receiving a special mission does not in itself imply recognition.

The Commission also states in its commentary to article 1:

“In the case of insurrection or civil war, however, any such movements which have been recognized as belligerents and have become subjects of international law have the capacity to send and receive special missions. The same concept will be found in the Vienna Convention on Diplomatic Relations (article 3, paragraph 1 (a)).”

First, if also belligerents have the capacity to send and receive special missions, the term “States” in the text of article 1 is hardly adequate. Secondly, the meaning of the reference to article 3 of the Vienna Convention on Diplomatic Relations is not apparent. Thirdly, supposing that States A and B are both parties to the future instrument on special missions, supposing further that there is an insurrection in State A, that State B recognizes the insurgents as belligerents, and that State A protests against that recognition as an intervention in its internal affairs, supposing finally that State B sends a special mission to the insurgents, would State A be obliged to consider the mission as a special mission under the instrument? If so, is State A to be considered as a third State in relation to the special mission? How in that case would article 16 be applied? If the insurgents were defeated and the mission captured by State A on its territory what is the mission's status? The questions could be multiplied. It therefore seems that, if insurgents recognized as belligerents are to be covered by article 1, the matter should be further explored and that more precise provisions thereon should be drafted. The short reference in the commentary is not sufficient to clarify and settle the question.¹⁰⁹

(9) The Special Rapporteur considers these comments by the Swedish Government to be useful and well founded, but in his opinion they are not such as to necessitate

¹⁰⁹ See *Yearbook of the International Law Commission, 1967*, vol. II, document A/6709/Rev.1, annex I.

amendment of the actual text of the article. Nevertheless, they should be included in the commentary.

(10) The Belgian Government takes the view that, in article 1, paragraph 1,

the words “*for the performance of specific tasks*” and “*temporary*” should be deleted, because they refer to characteristics of a special mission which should be stated in the definition.¹¹⁰

(11) The Special Rapporteur considers that this comment by the Belgian Government does not lack justification from a structural point of view, but that the characteristics involved are so essential to the concept of a special mission that there would be a risk of mutilating the whole draft if these words were omitted from the text of the provisions themselves. Lastly, it should not be overlooked that the purpose of this provision is to show what the Governments of States must agree on if a special mission is to exist.

(12) The Belgian Government then raises an objection to the use of the term “consent”. In its opinion this word

does not seem to correspond with the facts of international life. It connotes tolerance rather than approval, whereas what often happens in practice is that a proposal is made which is followed by an invitation.¹¹¹

(13) The Special Rapporteur considers that this comment goes beyond the Commission’s intention. The Commission has taken the position that what is referred to is *consent* in the true sense of the term, which is the real expression of the will of the State and does not necessarily imply an invitation, strict formality not being required. The Special Rapporteur accordingly proposes to disregard this objection.

(14) Another comment by the Belgian Government relates to the meaning of the provision in article 1, paragraph 2. It is worded as follows:

Belgium endorses the Commission’s opinion that special missions may be sent between States or Governments which do not recognize each other, but wishes to make it clear that this in no way prejudices subsequent recognition.¹¹²

(15) The Special Rapporteur considers that, in this case, paragraph (3) of the Commission’s commentary on article 1 should be amplified by incorporating the sense of the Belgian comment “that this in no way prejudices subsequent recognition”.

(16) During the discussion which took place in the Sixth Committee of the General Assembly, the representative of Ceylon expressed his delegation’s opinion on this question. He proposed that the application of the rules concerning special missions should be confined to States which had diplomatic relations with each other.¹¹³ The Special Rapporteur is unable to accept that proposal, and points out that, according to the International Law Commission, special missions are very often used in practice — to the great advantage of international

relations — precisely in cases where no diplomatic relations exist.¹¹⁴

(17) The delegation of Ceylon further considered that the articles on special missions should include provisions governing the legal status of delegations to international conferences. The Special Rapporteur is unable to accept that view, because the Commission has considered the question in principle and has recognized that, although there are many similarities between special missions in direct relations between States and special missions which represent States at international conferences, the rules governing the last-named missions should not be included in the present draft. The Special Rapporteur stresses that it will be necessary for the Commission to revert to this question, which will be studied jointly by two special rapporteurs (the Special Rapporteur on special missions and the Special Rapporteur on relations between States and inter-governmental organizations).

(18) In its written comments, the United Kingdom Government puts forward a proposal concerning article 1, paragraph 1 of the draft. The proposal is as follows:

Article 1. In paragraph 1 the word “express” should be inserted before “consent” in order to eliminate reliance upon alleged tacit or informal consent as a basis for invoking the special treatment provided for in the draft articles.¹¹⁵

(19) The Special Rapporteur is not in favour of taking up the United Kingdom proposal, since the Commission, in requiring the consent of the receiving State, deliberately avoided qualifying that consent in any way, so as to make the provision as flexible and informal as possible. Contrary to the opinion of the Belgian Government that the word “consent” connotes tolerance, the United Kingdom Government proposes that express consent should be required. Although the Commission is of the opinion that consent should be consent in the proper sense of the term, a genuine expression of the will of the receiving State, it takes into consideration the fact that consent is often given informally or even tacitly. The Special Rapporteur accordingly considers that if the United Kingdom proposal was adopted, it would call in question the whole system on which the draft articles are based.

(20) In the United Kingdom Government’s written comments concerning the relationship between the concept of special missions and the concept of permanent specialized missions, it is suggested that the latter should also be brought within the scope of the draft articles on special missions, although the application of the articles might be made subject in each specific case to the conditions to be determined with the express consent of the receiving State. The United Kingdom Government’s proposal reads as follows:

In paragraph 2 (*d*) of the commentary the question of permanent specialized missions is discussed. It is made clear that the Special Missions to be covered by the draft Articles are temporary in character. Although permanent specialized missions may in some cases be staffed by members of the staff of the diplomatic

¹¹⁰ *Ibid.*

¹¹¹ *Ibid.*

¹¹² *Ibid.*

¹¹³ *Official Records of the General Assembly, Twentieth Session, Sixth Committee, 850th meeting, para. 8.*

¹¹⁴ *Yearbook of the International Law Commission, 1964, vol. II, p. 211, para. (3) of commentary to article 1.*

¹¹⁵ See *Yearbook of the International Law Commission, 1967, vol. II, document A/6709/Rev.1, annex I.*

mission of the country concerned and occupy "premises of the mission" in a manner bringing them within the scope of the Vienna Convention on Diplomatic Relations, there will be other cases to which that Convention will not be applicable since the purposes of the permanent specialized mission will not be "purposes of the mission". In some cases a permanent mission is accredited to an international organization and its status is regulated by an international agreement governing the privileges and immunities of the organization. The United Kingdom Government believe that permanent missions which do not fall into either of these categories should be brought within the scope of the present draft articles. It appears desirable to regulate their status by international agreement and there seems no reason to do this by a separate code of rules. It is further suggested that the application of the rules laid down in these draft articles to permanent specialized missions might be made subject in each case to the express consent of the receiving State.¹¹⁶

(21) Although that proposal was made in connexion with the text of the Commission's commentary on article 1, it actually bears no relation to the commentary: it is rather a suggestion for an amendment to the text of the article itself, and should be considered as such. The question accordingly arises as to whether the scope of the draft articles should be extended to cover categories other than special missions. The Special Rapporteur does not consider that it should; otherwise the draft articles would have to deal with all kinds of related institutions. He does not think that the Commission would be prepared to follow up this idea, and does not therefore recommend the adoption of the United Kingdom proposal.

(22) The United Kingdom comments include a suggestion referring to the matter dealt with in paragraph (7) of the commentary on article 1. In discussing the commentary, the United Kingdom Government again suggests a change in the text of the draft article itself. This is what it says on the subject:

With regard to paragraph (7) of the commentary, the United Kingdom Government suggest that a provision should be added to the article to make clear that where members of the regular permanent diplomatic mission act also in connexion with a special mission, their position as members of the permanent mission should determine their status.¹¹⁷

(23) The Special Rapporteur does not agree with the United Kingdom Government. Admittedly, members of a regular diplomatic mission should retain their diplomatic status even when they are members of a special mission, if the permanent mission is accredited to the same receiving State as the special mission. But the Special Rapporteur thinks that in such a case a career diplomat is entitled to make use of the privileges he enjoys in his capacity as head or member of a special mission, and that it is his duty, in performing the tasks of the special mission, to discharge the obligations arising from the rules on special missions. Hence, he has a dual status. For these reasons the Special Rapporteur considers that the attitude adopted by the Commission hitherto, i.e., that the question should be mentioned only in the commentary on article 1, and that there should be no reference to the substance in the article itself, is correct.

(24) In their written comments, the Governments of the USSR and the Ukrainian SSR concentrate on the question whether the existence of diplomatic or consular relations, or recognition between the sending and receiving States, are necessary for the sending or reception of special missions. These Governments consider that the text of the draft articles should be made quite clear on this point, and propose that article 1, paragraph 2 of the draft should be worded as follows:

Neither diplomatic and consular relations nor recognition is necessary for the sending and reception of special missions.¹¹⁸

(25) As several Governments and several delegations to the General Assembly touched on this question, the Special Rapporteur is of the opinion that the proposal made by the USSR and the Ukrainian SSR should be adopted, since it has the advantage of also covering the question of recognition between States sending or receiving special missions.

(26) The comments of the Netherlands Government, which relate to articles 1 and 2, are as follows:

These articles do not indicate clearly under what circumstances a mission has the status of "special mission". Although the rules governing special missions cannot be meant to apply to every conceivable group of travelling government representatives, articles 1 and 2 create the impression that every mission charged with a specific duty and accepted by the receiving State (or possibly accepted tacitly only, as is implied in para. 4 (c) of the I.L.C. commentary on art. 1) is a "special mission". This imprecision might result in a receiving State that did not wish to object to the announced visit of some mission being caught unawares by the sending State demanding for the mission the status, including the privileges and immunities, of a special mission after the mission's arrival.

The Netherlands Government believes that a mission should only be a special mission if both sending State and receiving State desire to accord it the status of special mission. Accordingly, the Netherlands Government proposes that art. 2 be amended to read:

"The task of a special mission *and its status as such* shall be determined by mutual consent . . . etc."

With reference to the question in para. 5 of the I.L.C. commentary on art. 2, the Netherlands Government can see no need for any rule delimiting the special mission's and the permanent mission's competencies. In practice it might be a good thing if governments were at liberty to consult one another through different channels.¹¹⁹

(27) The Special Rapporteur is of the opinion that the nature of special missions does not depend on the fact that Governments have agreed to confer the status of special mission on a group of representatives but that special missions are specific institutions in international law. He therefore considers that articles 1 and 2 should not be combined and that article 1 should be a general and compulsory provision.

(28) Accordingly, the Special Rapporteur considers that:

(a) Article 1, paragraph 2, should be amended as proposed by the Governments of the USSR and the Ukrainian SSR, so that the text would read as follows: "Neither diplomatic and consular relations nor recogni-

¹¹⁶ *Ibid.*

¹¹⁷ *Ibid.*

¹¹⁸ *Ibid.*

¹¹⁹ *Ibid.*

tion is necessary for the sending and reception of special missions”.

(b) There should be inserted in the commentary on article 1 the Swedish Government's comment on the capacity of insurgents to send and receive special missions, followed by the Belgian Government's suggestion that the sending and reception of special missions do not prejudice the question of recognition of States and Governments. As far as the other suggestions are concerned, the Special Rapporteur considers that they should not be included in the commentary on the final text, even for polemical purposes, and that no negative opinion should be given on the suggestions in the commentary. It is open to the Commission to do so, however, if it thinks fit.

(c) It is not necessary to amend the text for drafting reasons.

(d) The amended text of this article should be of a generally compulsory character.

Article 2.¹²⁰ — The task of a special mission

The task of a special mission shall be specified by mutual consent of the sending State and of the receiving State.

Commentary

(1) The text of this article differs from the corresponding article (article 4) of the Vienna Convention on Diplomatic Relations.

(2) The scope and content of the task of a special mission are determined by mutual consent. Such consent may be expressed by any of the means indicated in paragraph (4) of the commentary on article 1. In practice, however, the agreement to the sending and reception of special missions is usually of an informal nature, often merely stating the purpose of the mission. In most cases, the exact scope of the task becomes clear only during the negotiations, and it frequently depends on the full powers or the authority conferred on the representatives of the negotiating parties.

(3) Diplomatic history records a number of cases where special missions have exceeded the task for which they were sent and received. The customary comment is that this is done to take advantage of the opportunity, and that any good diplomat makes use of such opportunities. There are also a number of cases showing that special missions for ceremonial and formal purposes have taken advantage of propitious circumstances to conduct negotiations on other matters. The limits of the capacity of a special mission to transact business are normally determined by full powers, given in good and due form, but in practice the legal validity of acts by special missions which exceed the missions' powers often depends upon their acceptance by the respective Governments. Though the Commission considered this question

to be of importance to the stability of relations between States, it did not deem it necessary to propose an article dealing with it and considered that its solution was closely related to section II (Conclusion of treaties by States) of part I of the draft articles on the law of treaties.¹²¹

(4) The tasks of a special mission are sometimes determined by a prior treaty. In this case, the special mission's task and the extent of its powers depend on the treaty. This is so, for instance, in the case of commissions appointed to draw up trading plans for a specific period under a trade treaty. However, these cases must be regarded as exceptional. In most cases, on the contrary, the task is determined by informal, *ad hoc* mutual agreement.

(5) In connexion with the task and the extent of the powers of a special mission, the question also arises whether its existence encroaches upon the competence of the regular diplomatic mission of the sending State accredited to the other party. It is generally agreed that the permanent mission retains its competence, even during the existence of the special mission, to transmit to the other contracting party, to which it is accredited, communications from its Government concerning, *inter alia*, the limit of the special mission's powers and, if need be, the complete or partial revocation of the full powers given to it or the decision to break off or suspend the negotiations; but all such actions can apply only to future acts of the special mission. The question of the parallel existence of permanent and special missions, and the problem of overlapping authority, are of considerable importance for the validity of acts performed by special missions. Some members of the Commission held that, during the existence of the special mission, its task is assumed to be excluded from the competence of the permanent diplomatic mission. The Commission decided to draw the attention of Governments to this point and to ask them to decide whether or not a rule on the matter should be included in the final text of the articles, and if so, to what effect.

(6) If the special mission's activity or existence comes to an end, the full competence of the permanent diplomatic mission is usually restored, even with respect to matters relating to the special mission's task, except in cases where special missions have been given exclusive competence, by treaty, to regulate relations in respect of certain matters between the States concerned.

New suggestions by Governments

(7) The Belgian Government submitted an observation on paragraph (5) of the commentary to article 2. The opinion it expressed was as follows:

Belgium does not believe that the division of competence between a special mission and a permanent diplomatic mission is likely to give rise to difficulties, at any rate for the receiving State, for it is for the sending State to determine the methods of contact among its various missions and to intervene should there be any overlapping of authority. Moreover, it will frequently be the

¹²⁰ Introduced as article 2 of Special Rapporteur's first report (A/CN.4/166). Discussed at the 758th meeting of the Commission. Drafting Committee's text discussed and adopted at the 768th meeting. Commentary adopted at the 772nd meeting.

¹²¹ See *Yearbook of the International Law Commission, 1962*, vol. II, document A/5209, chap. II, sect. B, arts. 4 and 5, pp. 164-166.

case that a member of the diplomatic mission will be attached to a special mission; he may even lead it as its *ad hoc* head.¹²²

(8) The Special Rapporteur draws attention to the fact that the Commission did not endeavour to settle this point in the text of article 2, but “decided to draw the attention of Governments to this point and to ask them to decide whether or not a rule on the matter should be included in the final text of the articles, and if so to what effect”.

(9) The Government of the Republic of the Upper Volta also referred to this paragraph of the commentary in its observations. It expressed itself in the following terms:

The problem here concerns the parallel existence of permanent and special missions and their respective areas of competence, and, in this context, the question of the validity of acts performed by special missions is raised.

Special missions differ by nature from permanent missions, as is made clear, incidentally, in article 1 and its commentary.

In the first place, States send special missions for specific tasks: their tasks are not of a general nature like those of a permanent mission; special missions are of a temporary nature. We mention these few facts concerning the nature of special missions in order to stress the difference, which we consider to be fundamental, between them and permanent missions; it is these individual features of special missions that determine the position of the Upper Volta Government with regard to the respective areas of competence of special missions and permanent missions. The Government of the Upper Volta therefore considers that since a special mission is established for a specific task and since it is temporary, it should be able to act independently of the permanent mission, and the tasks entrusted to it by the States concerned ought to be regarded as being outside the competence of the permanent diplomatic mission.¹²³

(10) The replies from the Belgian and Upper Volta Governments to the question raised are similar to that submitted by the Yugoslav Government. In that Government's opinion:

... it should be stated, in article 2 of the convention, as an addition to the text already adopted, that a special mission cannot accomplish the task entrusted to it, nor can it exceed its powers, except by prior agreement with the receiving State. This would avoid any overlapping of the competence of special missions with that of permanent diplomatic missions.

The Government of the Socialist Federal Republic of Yugoslavia considers that some wording should be added to the commentary on that article, stating that the task of a special mission should not be specified in those cases where the special mission's field of activity is known, and this should be considered as a definition of its task. An example of that would be the sending and receiving of experts in hydro-technology who are sent and received when two neighbouring countries are threatened by floods in areas liable to flooding.¹²⁴

(11) The comments of all these three Governments show that there is no need whatever to change the text of article 2, but that the Special Rapporteur will be compelled to change paragraph (5) of the commentary to that article when he puts it into final form.

(12) The United Kingdom Government is not satisfied with the Commission's proposal concerning the determination of the task of a special mission. In its opinion, it would be desirable, when determining the mission's task, not to apply the rules on special missions on every occasion and for all kinds of missions coming from another State on official or quasi-official business. It is afraid that the existing text of the draft may create an obligation for the receiving State to accord privileges and immunities to every “mission” of this kind. The United Kingdom Government expresses this concern in its written comments, as follows:

Article 2. It appears desirable to limit in some way the purposes for which a special mission qualifying for the treatment contemplated in the draft Articles may be constituted — otherwise there is a danger that the provisions of an eventual Convention could be invoked in any case of a visit to one State by a person or group of persons from another on official or quasi-official business, whatever its nature. There may be cases in which the receiving State wishes to permit a mission to come without necessarily according it the full privileges and immunities laid down in the draft articles but as the articles are at present drafted this might be very difficult.¹²⁵

(13) The Special Rapporteur understands the United Kingdom Government's concern, but he thinks that the meaning of the draft articles on special missions submitted by the Commission had not been fully grasped. In the first place, no State is obliged to receive a special mission from another State without its consent. Secondly, in the Commission's draft, the task of a special mission is determined by mutual consent of the sending State and of the receiving State; on receiving a visiting foreign mission, the receiving State is entitled to make it clear that it is not considered as a special mission; and finally, the existence and extent of privileges and immunities can also be determined by mutual consent of the States concerned. It is very difficult to make reservations in the text of the article with regard to certain categories of special missions. For that reason, the Commission left it to States themselves to determine what they would regard as a special mission.

(14) In connexion with paragraph (5) of the commentary on article 2, the United Kingdom Government also referred to the extremely difficult question of the relationship between special missions and permanent diplomatic missions as regards their respective competence. It is among the few Governments that were kind enough to reply to the question put by the Commission in the last sentence of this paragraph of the commentary. In its reply, the United Kingdom Government states that it sees no need to include a rule on this subject in article 2, but the reply in itself is typical of the underlying legal concept. It reads as follows:

With reference to paragraph 5 of the commentary, the United Kingdom Government see no need for a rule of the exclusion of the tasks or functions of a Special Mission from the competence of the permanent diplomatic mission. The matter seems to be entirely one between the sending State and its two missions and the receiving State should be entitled to presume that either the permanent or the special mission (within the scope of its task) has authority to perform any acts which it purports to perform. If

¹²² See *Yearbook of the International Law Commission, 1967*, vol. II, document A/6709/Rev.1, annex I.

¹²³ *Ibid.*

¹²⁴ *Ibid.*

¹²⁵ *Ibid.*

difficulties are likely to arise, they can be dealt with by an *ad hoc* arrangement on the subject.¹²⁶

(15) The Special Rapporteur is of the opinion that this reply from the United Kingdom Government is worthy of mention in the commentary, and will try to reproduce it fully when drafting the final text. He himself considers that from the point of view of law the solution proposed is likely to increase the stability of legal relations between States.

(16) The Government of Malta dealt with this question in its written comments. Its opinion on the matter is as follows:

Article 2. The question of overlapping authority resulting from the parallel existence of permanent diplomatic missions and special missions is of considerable importance and it is felt that a rule on the matter should be included in the final text of the articles. The absence of any such rule could leave open to question the validity of acts performed by the special mission and this is most undesirable. The competence or authority of a mission is a fundamental issue which unless regulated could undermine the essential quality of a mission, namely its authority to function.

As to the nature of the rule that ought to be included in the final text, it is agreed that certain powers are retained by the permanent mission notwithstanding that a special mission is functioning. These functions, however, relate to matters touching the special mission itself: its powers, including their limits and their revocation, certain changes in the composition of the mission, particularly those affecting the head of mission, and the recalling of the special mission. On the other hand, once the sending State has deemed it necessary or expedient to send a special mission, it is to be presumed, in the absence of an express statement to the contrary, that the task of that mission is temporarily excluded from the competence of the permanent diplomatic mission.¹²⁷

(17) The Special Rapporteur is grateful to the Government of Malta for having responded to the Commission's appeal and given its opinion on this difficult question. Having regard to the opinions expressed in the comments of Malta and the United Kingdom, the Special Rapporteur believes it would be useful for the comments of the Government of Malta also to be reproduced in full in the final text of the Commission's commentary.

(18) In its written comments, the Government of Austria deals with the question of overlapping and possible conflicts of competence between the special mission and the regular permanent diplomatic missions of the sending State. It expresses the following view on the subject:

Moreover, in the further elaboration of the draft articles, care should be taken that their provisions impair the position of traditional diplomacy as little as possible.

Accordingly, it is essential that the relationship between permanent representative authorities (diplomatic missions and consulates) and special missions should be expressly regulated, so as to avoid overlapping and conflicts in the matter of privileges. This would appear to be especially necessary in dealing with the immunities granted under article 26 *et seq.*¹²⁸

(19) The Special Rapporteur takes this opportunity to thank the Austrian Government for its comments, but

his opinion on the subject remains as stated in paragraph (6) above.

(20) In this connexion, the Special Rapporteur wishes to draw attention to the remark made by the Austrian Government in its comments on article 19, paragraph 1, which refers to the question of allowing agents of the receiving State access to the premises of a special mission. The text of the Austrian comment is reproduced in the section devoted to article 19.

(21) The Special Rapporteur does not regard this as a case of overlapping between the functions of a special mission and those of a regular diplomatic mission, as the only actual conflict of competence the Commission had in mind concerns the representation of the State in respect of the specific task assigned to a special mission, and not the legal protection of the mission's status, the subject dealt with in article 19 of the draft.

(22) The comments of the Netherlands Government on this article were reproduced under article 2 and the Special Rapporteur considers that they need not be repeated here.

(23) Accordingly, the Special Rapporteur considers that:

(a) All the comments indicate that it is not necessary to amend the existing text of the draft article, which the Commission drafted in such a way that it is merely a principle;

(b) Paragraph (5) of the commentary should be expanded along the lines of the comments made by the Governments of Belgium, Upper Volta, and Yugoslavia;

(c) There is no need to amend the text for drafting reasons;

(d) The article should be of a generally compulsory nature and by its nature guarantees the freedom of the contracting States to determine the task of a special mission.

Article 3.¹²⁹ — Appointment of the head and members of the special mission or of members of its staff

Except as otherwise agreed, the sending State may freely appoint the head of the special mission and its members as well as its staff. Such appointments do not require the prior consent of the receiving State.

Commentary

(1) In regard to the head of the special mission, the text of article 3 differs from the rule in article 4 of the Vienna Convention on Diplomatic Relations. Whereas the head of a permanent diplomatic mission must receive the *agrément* of the receiving State, as a general rule no *agrément* is required for the appointment of the head of a special mission. In regard to the members and staff of the special mission, article 3 is based on the idea expressed in the first sentence of article 7 of the Vienna Con-

¹²⁶ *Ibid.*

¹²⁷ *Ibid.*

¹²⁸ *Ibid.*

¹²⁹ Introduced as article 3 of Special Rapporteur's first report (A/CN.4/166). Discussed at the 760th meeting of the Commission. Drafting Committee's text discussed and adopted at the 768th meeting. Commentary adopted at the 773rd meeting.

vention on Diplomatic Relations: that the sending State may freely appoint them.

(2) The Commission notes that, in State practice, consent to the sending and receiving of a special mission does not ordinarily imply acceptance of its head, members or staff. The Commission does not share the view that the declaration of acceptance of the persons forming the special mission should be included in the actual agreement to receive the mission; it considered that consent to receive a special mission and consent to the persons forming it are two distinct matters.¹³⁰

(3) The proposition that no *agrément* or prior consent shall be required for the head, members or staff of a special mission in no way infringes the sovereign rights of the receiving State. Its sovereign rights and interests are safeguarded by article 4 (persons declared *non grata* or not acceptable).

(4) In practice, there are several ways in which, in the absence of prior agreement, the receiving State can limit the sending State's freedom of choice. The following instances may be quoted:

(a) Consent can be given in the form of a visa issued in response to a request from the sending State indicating the purpose of the journey, or in the form of acceptance of the notice of the arrival of a specific person on a special mission.

(b) The receiving State can express its wishes with regard to the level of the delegations.

(c) In practice the formal or informal agreement concerning the sending and reception of a special mission sometimes includes a clause specifically designating the person or persons who will form the special mission. In this case the sending State cannot make any changes in the composition of the special mission without the prior consent of the State to which it is being sent. In practice all that is done is to send notice of the change in good time, and in the absence of any reaction, the other party is presumed to have accepted the notice without any reservation.

(5) In some cases, although less frequently, it is stipulated in a prior agreement that the receiving State must give its consent. This occurs primarily where important and delicate subjects are to be dealt with through the special mission, and especially in cases where the head of the mission and its members must be eminent politicians.

(6) The question arises whether the receiving State is recognized as having the right to make acceptance of the person appointed conditional upon its own consent. In this case it sometimes happens that the State which raises the objection asks to be consulted on the selection of the person. Its refusal does not mean that it considers the person proposed *persona non grata*, being of an objective and procedural rather than a personal nature, although it is difficult to separate these two aspects in practice. The Commission considers that this is not the general practice and that provision for such a situation should be made in a special agreement.

(7) The head of the special mission and its members are not in practice designated by name in the prior agreement, but in certain cases an indication is given of the qualifications they should possess. This applies either to meetings at a specific level (e.g., meetings of Ministers for Foreign Affairs or of other eminent persons) or to missions which must be composed of specially qualified experts (e.g., meetings of hydraulic engineers or other experts). In such cases, the special mission is regularly composed of its head and its members possess certain qualifications or hold certain posts and thus the sending State is subject to certain restrictions with respect to the selection and the composition of its special mission. Even though this is a widespread practice, the Commission considered that there was no need to include a rule to that effect in article 3, but that the situation was already covered by the proviso "except as otherwise agreed".

(8) The Commission also took into consideration the practice whereby certain States (by analogy with the provision contained in the last sentence of article 7 of the Vienna Convention on Diplomatic Relations) require prior consent in the case of members of the armed forces and persons of similar standing. The Commission considers that this rule is out of date and not universally applied.

New suggestions by Governments

(9) The only comment on article 3 in the Sixth Committee of the General Assembly seems to have been that of the Hungarian representative, who stated "In draft articles 3, 4 and 6 on special missions, the latter comprised only the head of the mission and other principal delegates".¹³¹ The Hungarian representative regarded failure to mention the staff of the mission as a defect in those articles. The Special Rapporteur believes there must be some misunderstanding, for the text of article 3 as proposed by the Commission expressly states "as well as its staff". He therefore considers that this comment should be disregarded.

(10) In its written comments on article 3 the Swedish Government has the following to say:

Should the principle be accepted that all the rules concerning the status of the special mission would be applicable unless the parties agree otherwise, the phrase "except as otherwise agreed" in this and corresponding phrases in some other articles would have to be replaced by a more general provision. The second phrase of the article seems to be superfluous.¹³²

(11) With regard to this comment by the Swedish Government, the Special Rapporteur wishes to point out that the aim throughout the draft is to lay down certain general rules and at the same time to draw attention to those which are of a residual nature. The expression "except as otherwise agreed" indicates a residual rule. In our opinion, this expression cannot be omitted in all cases, because that would suggest that all the provisions without distinction were of a residual nature.

¹³¹ *Official Records of the General Assembly, Twentieth Session, Sixth Committee, 843rd meeting, para. 37.*

¹³² See *Yearbook of the International Law Commission, 1967, vol. II, document A/6709/Rev.1, annex I.*

¹³⁰ For the contrary view, see *Yearbook of the International Law Commission, 1960, vol. II, pp. 112-117.*

(12) The Netherlands Government submitted some suggestions on articles 3 and 4.¹³³ They take as their starting point the opposite idea to the one expressed in the second sentence of article 3 that appointments of the head of a special mission and the other persons belonging to it do not require the prior consent of the receiving State. The Special Rapporteur considers it a sounder idea not to require the prior consent of the receiving State as a kind of *agrément* for the head and other members of a mission.

(13) The Special Rapporteur does not consider that articles 3 and 4 should be combined in a single article, because they contain two ideas. Article 3 is based on the idea that prior consent is not necessary and article 4 on the receiving State's right at any time to deny hospitality, if necessary, to a person it considers undesirable. The Special Rapporteur, therefore, will state his views on article 4 when he has dealt with that article.

(14) Accordingly, the Special Rapporteur considers that:

(a) It is not necessary to amend the text of article 3 as suggested, because the expression "except as otherwise agreed" is a warning that the provision contained in the first sentence of the article is a rule which, if necessary, can be waived by prior agreement between the parties;

(b) It is not necessary, either, to amend the commentary on article 3, because the idea expressed by the phrase "except as otherwise agreed" is dealt with at sufficient length in the present paragraphs (2), (3), (4) and (5) of the commentary;

(c) As far as drafting amendments are concerned, in view of the definition proposed in the introductory article, the expression "the head of the special mission and its members as well as its staff" should be replaced by "the members and staff of the special mission".

(d) The provision contained in the second sentence of the article should be of a generally compulsory nature as one of the principles applicable to the institution of special missions; as far as the expression "except as otherwise agreed" is concerned, it indicates that the provision is taken to be compulsory unless it can be shown that there is an agreement to the contrary. This condition that the existence of such an agreement must be demonstrated is necessary, because what is involved is limits on the authority of the State over the composition of its special missions.

*Article 4.*¹³⁴ — *Persons declared non grata or not acceptable*

1. The receiving State may, at any time and without having to explain its decision, notify the sending State that the head or any other member of the special mission or a member of its staff is *persona non grata* or not acceptable.

¹³³ *Ibid.*

¹³⁴ Introduced as article 4 of Special Rapporteur's first report (A/CN.4/166). Discussed at the 760th meeting of the Commission. Drafting Committee's text discussed and adopted at the 768th meeting. Commentary adopted at the 773rd meeting.

2. In any such case, the sending State shall either recall the person concerned or terminate his functions with the special mission. If the sending State refuses to carry out this obligation, the receiving State may refuse to recognize the person concerned as the head or a member of the special mission or as a member of its staff.

Commentary

(1) The text of article 4 follows article 9 of the Vienna Convention on Diplomatic Relations.

(2) Whether or not the receiving State has accepted the mission, it unquestionably has the right to declare the head or a member of a special mission or a member of the mission's staff *persona non grata* or not acceptable at any time. It is not obliged to state its reasons for this decision.¹³⁵

(3) It may be added that, in practice, a person is seldom declared *persona non grata* or not acceptable if the receiving State has already signified its acceptance of a particular person; but the majority of the Commission takes the view that even in that case the receiving State is entitled to make such a declaration. Nevertheless, the receiving State very rarely takes advantage of this prerogative; but in practice it may sometimes inform the sending State, through the regular diplomatic channel, that the head or a certain member of the special mission, even though consent has already been given to his appointment, represents an obstacle to the fulfilment of the mission's task.

(4) In practice, the right of the receiving State to declare the head or a member of the special mission *persona non grata* or not acceptable is not often exercised inasmuch as such missions are of short duration and have specific tasks. Nevertheless, instances do occur. In one case, the head of a special mission sent the minister of the receiving State a letter considered offensive by that State, which therefore announced that it would have no further relations with the writer. As a result, the activities of the special mission were virtually paralysed, and the sending State was obliged to recall the head of the special mission and to replace him.

(5) Where the meetings with the special mission are to be held at a specific level, or where the head or the members of the mission are required to possess certain specific qualifications and no other person in the sending State possesses such qualifications, it must be presumed that in practice the person concerned cannot be declared *persona non grata* or not acceptable, and that the only course is to break off the conversations, since the sending State is not in a position to choose among several persons with the necessary qualifications. The receiving State cannot, for instance, ask the sending State to change its Minister for Foreign Affairs because he is regarded as *persona non grata*, for that would constitute interference in the domestic affairs of the sending State. Nevertheless, it is under no obligation to enter into contact with an undesirable person, if it considers that refusal to do so

¹³⁵ This was also the opinion of the International Law Commission in 1960. See *Yearbook of the International Law Commission, 1960*, vol. II, pp. 112-115 and p. 180.

is more advantageous to it than the actual contact with the other State. This, however, is not a juridical question, and the Commission therefore decided not to deal with this situation or to regulate it in the text of the article.

New suggestions by Governments

(6) The Belgian Government comments as follows on article 4, paragraph 2:

To make the alternative stated at the end of the first sentence clearer, it would be advisable to add the words "as appropriate" as in article 9, paragraph 1 of the Vienna Convention on Diplomatic Relations.¹³⁶

(7) The Government of Israel expresses the same view and also proposes the insertion of the expression "as appropriate".¹³⁷ The Special Rapporteur finds these proposals acceptable.

(8) In its comments, the Yugoslav Government expressed the view that:

Consideration should be given to the possibility of adding to article 4 a provision stating that the receiving State may not declare a person *persona non grata* if that State, by prior agreement with the sending State, had already signified its acceptance of that person as head of the mission, assuming that States agree, at the level of Ministers for Foreign Affairs, to send and receive missions and that, between the agreement and the appointment of the special mission, no change of Ministers took place.¹³⁸

(9) The Special Rapporteur is unable to support this proposal, for he too has abandoned his previous opinion that the receiving State would have to renounce its right to have recourse to the *persona non grata* procedure if that State has agreed in advance to accept a particular person; every State has the right to make use of this procedure at any time and it can consequently do so for reasons arising after its acceptance of the person concerned.

(10) The Hungarian delegation also commented on this article in connexion with the membership of the mission and in particular of its staff.¹³⁹ The Special Rapporteur considers that this comment has already been replied to in principle in connexion with the discussion on article 3.

(11) The Turkish representative pointed out that draft articles 4, 21 and 42, on the membership of the mission, were based on the 1961 Vienna Convention on Diplomatic Relations and his delegation found it difficult to accept them in the case of special missions.¹⁴⁰ The Special Rapporteur does not see how this difficulty arises in connexion with article 4, since experience shows that, even in the case of special missions, individual States may find themselves unable to work with the head of the special mission or a member of its staff and that it is therefore in the interest of good relations and of the successful accomplishment of the task of the special mission that the right to declare a person *persona non grata* or not acceptable should also be available in the case of special missions. Accordingly, the Special Rapporteur

believes there is no need to introduce any changes in the idea conveyed in draft article 4.

(12) The suggestions made by the Netherlands Government on articles 3 and 4 together were reproduced under article 3. The Special Rapporteur is of the opinion, as he stated above, that it is not necessary to combine articles 3 and 4 and considers it superfluous to repeat his reasons. He considers, moreover, that the Netherlands amendment would not achieve the Commission's purpose. The article is not concerned solely with a static situation — a State's defence against undesirable members of a mission at the time of its formation and sending — but rather with a permanent safeguard consisting in the right of the receiving State to send such undesirable and inadmissible persons away throughout the existence and operation of the special mission.

(13) Accordingly, the Special Rapporteur considers that:

(a) It is not necessary to amend article 4, unless the Commission wants to include the expression "as appropriate" at the end of the first sentence of paragraph 2, which is a question of drafting and should be left to the Drafting Committee;

(b) It is necessary to include in the commentary a comment covering the Special Rapporteur's reply to the suggestion of the Netherlands and Yugoslav Governments, to the effect that the authority given to the receiving State to declare a person *persona non grata* or not acceptable should be irrevocable and permanent throughout the entire existence of the special mission;

(c) For drafting reasons, in accordance with the definition proposed in the introductory article, the expression "the head or any other member of the special mission or a member of its staff" in paragraph 1 and the expression "the head or a member of the special mission or as a member of its staff" in paragraph 2 can be replaced, *mutatis mutandis*, by the expression "the members and staff of the special mission";

(d) This article is of an institutional nature and is of fundamental importance for the existence of the special mission and consequently should be of a generally compulsory character.

Article 5.¹⁴¹ — Sending the same special mission to more than one State

A State may send the same special mission to more than one State. In that case the sending State shall give the States concerned prior notice of the sending of that mission. Each of those States may refuse to receive such a mission.

Commentary

(1) There is no corresponding provision in the Vienna Convention on Diplomatic Relations.

¹⁴¹ Introduced as article 5 of Special Rapporteur's first report (A/CN.4/166). Discussed at the 761st meeting of the Commission. Drafting Committee's text discussed and adopted at the 768th meeting. Commentary adopted at the 773rd meeting.

¹³⁶ See *Yearbook of the International Law Commission, 1967*, vol. II, document A/6709/Rev.1, annex I.

¹³⁷ *Ibid.*

¹³⁸ *Ibid.*

¹³⁹ *Official Records of the General Assembly, Twentieth Session, Sixth Committee, 843rd meeting, para. 37.*

¹⁴⁰ *Ibid.*, 847th meeting, para. 24.

(2) The International Law Commission scarcely considered this question in 1960, and it has been given scant attention in the literature. At that time the majority of the Commission took the view that it was completely unnecessary to make provision for the matter, and the previous Special Rapporteur, Mr. Sandström, believed that the question did not arise at all.¹⁴² Mr. Jiménez de Aréchaga, however, expressed the view on that occasion that the situation envisaged was by no means unusual. He pointed out that special missions were sent to a number of neighbouring States when changes of government took place in the sending States and on ceremonial occasions.¹⁴³ Subsequently studies have shown that cases of special missions being sent to more than one State occur in practice.

(3) Observations of practice indicate that there are two cases in which the problem of the appointment of a special mission to more than one State clearly arises. They are the following:

(a) Where the same special mission, with the same membership and the same task, is sent to several States, which are usually neighbours or situated in the same geographical region. In the case of political missions (e.g., goodwill missions), there have been instances of States refusing to enter into contact with a mission appointed to several other States with which they did not enjoy good relations. Thus the question is not simply one of relations between the sending and receiving States, but also of relations between the States to which the special mission is sent. Although this raises a political issue, it is tantamount, from the juridical standpoint, to a proviso that where special missions are sent to more than one State, simultaneously or successively, consent must be obtained from each of the States concerned.

(b) Although, according to the strict rule, a special mission is appointed individually, either simultaneously or successively, to each of the States with which contacts are desired, certain exceptions arise in practice. One custom is that known as circular appointment, which — rightly, in the view of the Commission — is considered discourteous by experts in diplomatic protocol. In this case a special mission or an itinerant envoy is given full powers to visit more than one country, or a circular note is sent to more than one State informing them of the intention to send a special mission of this kind. If the special mission is an important one, the general practice is to lodge a protest against this breach of courtesy. If the special mission is sent to obtain information regarding future technical negotiations, the matter is usually overlooked, although it may be observed that such special missions are placed on the level of a commercial traveller with general powers of agency. A distinction must be made between this practice of so-called circular appointment and the case of a special mission authorized to conduct negotiations for the conclusion of a multilateral convention which is not of general concern. In this case its full powers may consist of a single document

accrediting it to all the States with which the convention is to be concluded (e.g., the Bulgarian-Greek-Yugoslav negotiations for a settlement of certain questions connected with their common frontier).

(4) It should also be mentioned that, in practice, a special mission of the kind referred to in paragraph (3) (a) above, having been accepted in principle, sometimes finds itself in the position of being requested, because of the position it has adopted during its contacts with the representatives of the first State visited, to make no contact with another specific State to which it is being sent. This occurs particularly in cases where it is announced that the special mission has granted the first State certain advantages which are contrary to the interests of the second State. The latter may consider that the matter to be dealt with has been prejudged, and may announce that the special mission which it had already accepted has become pointless. This is not the same as declaring the head and members of the mission *persona non grata*, since in this case the refusal to accept them is based not on their subjective qualities but on the objective political situation created by the special mission's actions and the position taken by the sending State. It is, as it were, a restriction of diplomatic relations expressed solely in the revocation of the consent of the receiving State to accept the special mission. This clearly demonstrates the delicacy of the situation created by the practice of sending the same special mission to more than one State.

(5) The Commission found that in this case the sending State is required to give prior notice to the States concerned of its intention to send such a special mission to more than one State. This prior notice is needed in order to inform the States concerned in due time not only of the task of a special mission but also of its itinerary. This information is deemed necessary in order to enable the States concerned to decide in advance whether they will receive the proposed special mission. The Commission stressed that it was essential that the States so notified should be entitled only to state their position on the receivability of the special mission, and not to request that such a mission should not be sent to another State as well.

New suggestions by Governments

(6) The Swedish Government comments that article 5 seems to it to be superfluous. It says:

The article seems to be superfluous as article 1, paragraph 1, sufficiently covers the case. If State A wants to send a special mission to State B whose relations with State C are difficult, State A would certainly in some way or other consult authorities in State B before sending the mission on to State C. A special rule to that effect is unnecessary and could in any case be easily evaded, e.g., if State A so wishes, it could postpone telling State B about its intention to send the mission to State C until the mission has accomplished its task in State B.¹⁴⁴

(7) The Special Rapporteur does not consider that there are good grounds for these comments by the Swedish Government, since the sending of the same

¹⁴² *Yearbook of the International Law Commission, 1960*, vol. II, pp. 109 and 180.

¹⁴³ *Ibid.*, p. 116.

¹⁴⁴ See *Yearbook of the International Law Commission, 1967*, vol. II, document A/6709/Rev.1, annex I.

special mission to two or more States would give rise to disputes of a special kind.

(8) With regard to article 5 of the draft, the Government of the USSR makes the same comment as the Government of Sweden. Its written comments contain the following passage:

In view of the tasks which are usually given to special missions, it is unnecessary to include in the draft provisions relating to the possibility of sending the same special mission to more than one State (article 5) and to the size of the staff of a special mission (article 6, paragraph 3). These provisions should therefore be deleted from the draft.¹⁴⁵

(9) The Special Rapporteur expressed his views on the substance of this idea in his comments on the Swedish Government's observation and the same arguments apply to the comments of the USSR.

(10) The Government of the Ukrainian Soviet Socialist Republic has proposed the deletion of this article, without giving any detailed reasons.¹⁴⁶

(11) The Netherlands Government expressed the following opinion on this article:

There is no objection to this article, although it is doubtful whether there is any need for it.¹⁴⁷

(12) Accordingly, the Special Rapporteur considers that:

(a) There is no reason for him to change his position and the article should be retained;

(b) A new paragraph should be added in the commentary stating that some States had expressed contrary views, opposing the article;

(c) It is not necessary to amend the text for drafting reasons;

(d) The last provision in the article shows by its nature that the article is not of a generally compulsory nature.

Article 5 bis. — Sending of the same special mission by two or more States

New suggestions by Governments

(1) This is a proposal for a new article.

(2) The Belgian Government, while accepting the text of article 5, has the following comment to make:

This article is unilateral; the converse situation is also conceivable, i.e. the sending of the same mission by two or more States. Belgium therefore proposes the addition of a new article, which might be drafted as follows:

"Article 5 bis. A special mission may be sent by two or more States. In that case, the sending States shall give the receiving State prior notice of the sending of that mission. Any State may refuse to receive such a mission."¹⁴⁸

(3) From the point of view of doctrine, the Special Rapporteur sees no objection to this proposal of the Belgian Government's in support of which the same arguments can be adduced as those which led the 1961 Vienna Conference to adopt article 6 of the Vienna

Convention on Diplomatic Relations. There is however an all-important difference between the text of the Vienna Convention and the Belgian Government's proposal. The Vienna Convention deals with the case where the same person is accredited by several States (a subjective consideration) whereas the Belgian proposal refers to the sending of the same mission (an objective consideration). Moreover, there is more and more emphasis on the reasons against joint missions (the predominance of the strongest State in such a partnership, leading to inequality of rights, unequal protection of interests, conflict of interests between States, and so forth). The Special Rapporteur is, however, prepared to admit that special missions of this kind are sent by States belonging to a community or union. After studying the problem, the Special Rapporteur, though grateful to the Belgian Government for having drawn attention to it, does not advise the Commission to adopt the Belgian proposal.

Article 6.¹⁴⁹ — Composition of the special mission

1. The special mission may consist of a single representative or of a delegation composed of a head and other members.

2. The special mission may include diplomatic staff, administrative and technical staff and service staff.

3. In the absence of an express agreement as to the size of the staff of a special mission, the receiving State may require that the size of the staff be kept within limits considered by it to be reasonable and normal, having regard to circumstances, to the tasks and to the needs of the special mission.

Commentary

(1) The text of article 6, paragraphs 2 and 3, adopted by the Commission is based on article 1 (c) and article 11, paragraph 1, of the Vienna Convention on Diplomatic Relations. The text of paragraph 1 of article 6 reflects the special features of the institution of special missions.

(2) In practice, a special mission may be composed of only one member or of several members. If the special mission is entrusted to only one member, the latter is then a special delegate, described by the Commission in article 6 as a "representative". If it has two members, the sending State decides which of the two will be the head or first delegate. If the special mission consists of three or more members, the rule observed in practice is that a head of the mission (chairman of the delegation) should be designated.

(3) Precedence within the delegation is fixed, according to general practice, by the sending State, and is communicated to the receiving State or published in the manner normally adopted with respect to multilateral meetings. Neither the rank of the delegates according to the protocol of the sending State nor the title or function of the indi-

¹⁴⁵ *Ibid.*

¹⁴⁶ *Ibid.*

¹⁴⁷ *Ibid.*

¹⁴⁸ *Ibid.*

¹⁴⁹ Introduced as article 6, paragraphs 1 and 4 of Special Rapporteur's first report (A/CN.4/166). Discussed at the 761st meeting of the Commission. Drafting Committee's text discussed and adopted at the 768th meeting. Commentary adopted at the 773rd meeting.

vidual delegates authorizes *ex jure* any automatic change in the order of precedence established in the list communicated, without subsequent communication of an official rectification to the receiving State. However, according to international custom, a member of the Government takes precedence over other officials, and the head of delegation must not have lower diplomatic rank than the members of the delegation; but, as this custom is not observed in all cases and is not regarded as obligatory, it is not reflected in the text.

(4) In practice a special mission may include, in addition to the head, his deputy, the other titular members and their deputies. The Commission considered that the composition of the special mission and the titles of its members were a matter exclusively within the competence of the sending State and that in the absence of an agreement on it by the parties it was not governed by any international rule. Accordingly, the Commission did not think it necessary to include a rule on it in the article.

(5) Whether a special mission is composed of a single representative or of a delegation, it may be accompanied by the necessary staff. The Commission accepted the designation of the staff set out in article 1 (c) of the Vienna Convention on Diplomatic Relations, but pointed out that the staff of special missions often includes specific categories such as advisers and experts. The Commission considered that these were included in the category of diplomatic staff.

(6) In practice, even in special missions the problem of limiting the size of the mission arises. The rule relating to permanent missions is contained in article 11 of the Vienna Convention on Diplomatic Relations and the text of article 6, paragraph 3, proposed by the Commission is based on that rule.

(7) With regard to the limitation of the size of the special mission, attention should be drawn not only to the general rule, but also to certain particular cases which occur in practice. On this point:

(a) It is customary for the receiving State to notify the sending State that it wishes the size of the mission to be restricted because, for example, the housing, transport and other facilities it can offer are limited.

(b) Less frequently, in practice, the agreement on the establishment or reception of the special mission limits the size of the mission; in some cases the agreement specifies a minimum number of members (joint meetings) and even calls for a mission specifically composed of members having stated qualifications (generally according to the problems to be treated).

(c) With respect to the size of the mission, attention should also be drawn to the practice of "balancing rank". It is customary, during preliminary conversations and negotiations on the sending and receiving of a mission, to designate the rank and status of the head and members of the special mission, so that the other party may act accordingly and thus avoid any disparity, for if representatives were received by a person of lower rank than their own, it might be considered an affront to their country. This, however, is a question of protocol rather than of law.

New suggestions by Governments

(8) The Belgian Government made certain comments on the terminology used in paragraph 1 of article 6. The text of its comments is as follows:

In order to prevent any confusion with diplomatic terminology, the word "delegate" should be substituted for the word "representative". What should be made quite explicit in the definition of a special mission is its official character, i.e. the fact that it is composed of persons designated by a State to negotiate on its behalf. Consequently, it seems excessive to confer on them automatically a representative character, as that term is construed in diplomacy and politics.

The expression "other members" causes many ambiguities in the articles of the present draft. In the Vienna Convention on Diplomatic Relations, the term "members of the mission" is entirely general and means the head of the mission and the members of the staff, the latter being sub-divided into members of the diplomatic staff, members of the administrative and technical staff, and members of the service staff.

The introduction into the present draft of a new specific concept without giving it a specific name considerably impairs the intelligibility of the text.¹⁵⁰

(9) The Commission is not unfamiliar with the problem of terminology raised by the Belgian Government. In his first draft, the Special Rapporteur also used the term "delegate", but some members of the Commission rightly observed that in practice all the members of a special mission who have full powers are regarded as delegates. For this reason, the Commission took the position that where a special mission included only one representative with full powers he should be called "a single representative", in contrast to the situation where there is "a delegation composed of a head and other members".

(10) The Special Rapporteur does not share the view expressed by the Belgian Government that the term "representative" is essentially incorrect because it implies a representative character, which the Belgian Government considers excessive. His understanding is that the Commission has recognized that special missions also have a representative character, even when their task is not purely diplomatic or political. This argument of the Belgian Government would therefore call for a departure from the attitude hitherto adopted by the Commission.

(11) As to the expression "other members", it might, as the Belgian Government has rightly observed, give rise to confusion between a member of the mission in the strict sense of the word and a member in the wider sense, meaning a member of the mission's staff. The Commission has therefore distinguished between these two meanings and made this distinction in the introductory article containing the definitions. Hence it is not considered necessary to revert to this question.

(12) The Belgian Government also commented on paragraph 2 of this article. It considers that

A similar confusion is caused by the use of the term "diplomatic staff". If these words applied to advisers and experts, as stated in paragraph (5) of the commentary on the article, there is no

¹⁵⁰ See *Yearbook of the International Law Commission, 1967, vol. II, document A/6709/Rev.1, annex I.*

reason for not saying so explicitly. Besides, it is to be presumed that the "other members" also enjoy diplomatic status.¹⁵¹

(13) The Special Rapporteur does not think he should recommend that the text of the convention should specify the functions which the diplomatic staff of the special mission are entitled to perform. Even in the commentary referred to by the Belgian Government it is not stated that the diplomatic staff is composed of advisers and experts; they are merely mentioned by way of example. In practice, the diplomatic staff of special missions is designated by a wide variety of titles, such as assistant delegate, secretary of the mission, military adviser, etc. For this reason, the Special Rapporteur is of the opinion that, even in the case of special missions, the Commission should keep to the general term "diplomatic staff", as was done in the 1961 Vienna Convention on Diplomatic Relations.

(14) The comments of the Government of Israel also deal with article 6. They concern paragraph 3 of the article and are as follows:

Article 6 distinguishes between "a delegation" and "the staff" (see, for example, paragraph (5) of the commentary to that article). Paragraph 3 of the article provides for the limiting of the size of the staff, but keeps silent about the size of the delegation. Article 11 of the 1961 Vienna Convention provides for the possibility of limiting the size of "the mission", which in the present article would mean "the delegation", and it would appear that a similar provision would be desirable in the present article. *Article 6, paragraph 3*, would then read:

"In the absence of an express agreement as to the size of a special mission and its staff, the receiving State may require that the size of the special mission and its staff be kept within limits. . . ." ¹⁵²

(15) The Special Rapporteur considers that this proposal by the Government of Israel is justified and recommends the Commission to adopt it.

(16) In its written comments, the Government of the USSR suggests that paragraph 3 of article 6 (possible limitation of the size of the staff of a special mission) might be deleted (for this proposal, see paragraph (8) of the commentary on article 5).

(17) In submitting this proposal by the Government of the USSR, the Special Rapporteur draws attention to the fact that the problem of limiting the size of the special mission has already been dealt with in paragraphs (6) and (7) of the commentary on article 6, in which it is pointed out that article 6, paragraph 3 of the draft is based on article 11 of the Vienna Convention on Diplomatic Relations. The Special Rapporteur recalls that the Commission discussed the question fully at its sixteenth session,¹⁵³ and he does not think that any new problems have arisen in this connexion.

(18) The Government of the Ukrainian Soviet Socialist Republic has also proposed that paragraph 3 of this article should be deleted.¹⁵⁴

(19) The Netherlands Government has made some comments, which the Special Rapporteur has not succeeded in understanding.¹⁵⁵ He hopes that these comments will be explained in the course of the Commission's session.

(20) Accordingly, the Special Rapporteur considers that:

(a) There is no new consideration which makes it necessary to amend article 6, except the Israel Government's proposal concerning the rewording of the beginning of paragraph 3. The Special Rapporteur adopts the proposed wording because it indicates more clearly which members of the mission are meant;

(b) A new paragraph should be added in the commentary explaining that some States are opposed to the idea contained in paragraph 3;

(c) There is no need for any drafting changes;

(d) Paragraphs 1 and 2 contain generally compulsory provisions, while paragraph 3 indicates that there is a principle giving the receiving State a right which can only be waived by an express agreement.

Article 7.¹⁵⁶ Authority to act on behalf of the special mission

1. The head of the special mission is normally the only person authorized to act on behalf of the special mission and to send communications to the receiving State. Similarly, the receiving State shall normally address its communications to the head of the mission.

2. A member of the mission may be authorized either by the sending State or by the head of the special mission to replace the head of the mission if the latter is unable to perform his functions, and to perform particular acts on behalf of the mission.

Commentary

(1) Article 7 is not derived directly from the Vienna Convention on Diplomatic Relations. Its text was drawn up on the basis of contemporary international practice.

(2) The main question from the legal point of view is to determine the rules concerning authority to act on behalf of the special mission. Only the head of a special mission is normally authorized to act on behalf of the special mission and to address communications to the receiving State. The Commission laid stress on the word "normally", as the parties may also make provision for other persons than its head to act on behalf of a special mission. These other possibilities are, however, exceptional.¹⁵⁷

(3) *Head of the special mission.* As explained in the commentary on the preceding article, if the mission is composed of three or more members, it must as a general rule have a head. If it is composed of only two members,

¹⁵¹ *Ibid.*

¹⁵² *Ibid.*

¹⁵³ *Yearbook of the International Law Commission, 1964*, vol. I, pp. 249-252.

¹⁵⁴ See *Yearbook of the International Law Commission, 1967*, vol. II, document A/6709/Rev.1, annex I.

¹⁵⁵ *Ibid.*

¹⁵⁶ Introduced as article 6, paragraphs 2 and 3 of Special Rapporteur's first report (A/CN.4/166). Discussed at the 761st meeting of the Commission. Drafting Committee's text, numbered 6A, discussed and adopted at the 768th meeting. Commentary adopted at the 773rd meeting.

¹⁵⁷ See paragraphs (4)-(11) of this commentary.

the sending State decides whether one shall bear the title of first delegate or head of the special mission. Whether he is called first delegate or head of mission, he will be regarded as the head of the special mission by the receiving State, which will communicate with him and receive from him statements on behalf of the special mission. For this reason, the question of the existence of a head of mission is one of great importance, notwithstanding the fact that the International Law Commission did not deal with it in 1960. Mr. Jiménez de Aréchaga, on the other hand, considers that in practice a special mission has a head, but he does not go further into the question.¹⁵⁸ In the Commission's opinion, as expressed at its sixteenth session, the matter of the appointment of a head of the special mission is important from the legal standpoint.

(4) In article 7, paragraph 1, the Commission established a mere presumption that the head of the special mission is the person who gives any authorizations that may be required, but the sending State may in addition authorize the other members of the special mission to act on its behalf by giving them full powers. There are in practice instances of special missions whose members are delegates with equal rights under collective letters of credence for performing the tasks assigned to the special mission. Practice is not, however, uniform. Some States hold that the person mentioned first in the letters of credence issued to the special mission is its head. Others, particularly States which send delegations, claim equal rights for all members of such delegations. A common example is a mission composed of several members of a coalition government or of members of parliament representing various political groups. The advocates of the *in corpore* concept of equal rank argue that the composition of the delegation is a manifestation of the common outlook and the equal standing of the members of the delegation. The practice is not uniform.

(5) There are also instances in practice where the right to act on behalf of a special mission is held to vest only in some of its members who possess a collective authority (for the head and certain members of the mission to act collectively on its behalf) or a subsidiary authority (for a member of a mission to act on its behalf if the head of the mission is unable to perform his functions or if he authorizes him to do so). The Commission considers that these are exceptional cases falling outside normal practice and are determined by the practice of the sending State. It considered that there was no need to include rules covering such cases in the body of the article.

(6) The Commission did not cover in article 7, paragraph 1, the problem of the limits of the authority given to special missions. That is a question governed by the general rules.

(7) *Deputy head of special mission.* In speaking of the composition of the special mission, it was said that sometimes a deputy head of mission was also appointed. The deputy's function is indicated by the fact that he is designated by the organ of the sending State which also appointed the head of the special mission, and that as

a general rule the deputy head (who in practice is often called the vice-chairman of the delegation) acts without special appointment as head of the special mission whenever and wherever the head of mission is absent, unable to carry out his functions or recalled (in the last case, until the appointment of a new head has been notified to the other party). From the international standpoint, the rank of the deputy head in the special mission is considered to be next below that of the head of the mission. However, the deputy head does not take precedence of the members of the missions of other States with which his delegation enters into contact. His status as deputy head is effective only when he acts as head. The position of the deputy head of a special mission is referred to in article 7, paragraph 2.

(8) From the technical standpoint, a member of the special mission whom the head of the mission himself has designated as his deputy (i.e., the administrator of the mission) is not in practice regarded as the deputy head. The Commission did not, however, differentiate between these two classes of deputy head; it regarded them both as having the same status.

(9) *Chargé d'affaires ad interim of a special mission.* Very frequently the special mission arrives without its head or deputy head, that is to say, before them, since contact must be established and affairs conducted before their arrival. There may also be occasions when both its head and deputy head are absent during the course of its activities. In this case, a member of the mission provisionally assumes the duties of head of mission, acting on behalf of the head if the latter has so provided. The International Law Commission did not study this problem in 1960 and did not suggest that the rules of diplomatic law relating to *chargés d'affaires ad interim* should apply, in this connexion, to special missions.¹⁵⁹

(10) When a member of the mission is designated as *chargé d'affaires ad interim*, the rule in practice is for the appointment of the person to be entrusted with this function to be notified by the regular diplomatic mission of the sending State. This often occurs if the head of the mission is recalled "tacitly", if he leaves his post suddenly (as frequently happens when he returns to his country to get new instructions and remains there for some time) or if the mission arrives at its destination without its head and without his having given authorization in writing to the presumptive *chargé d'affaires*. The Commission regarded the position of such a person as comparable to that of an acting deputy and it provided that authority for him to carry out his duties could be given either by the sending State or by the head of the special mission.

(11) In the case of special missions dealing with a complex task, certain members of the special mission or of its staff are in practice given power to carry out specific acts on behalf of the special mission. The Commission considered this practice to be important from the legal point of view and it included a rule on the subject in the text (paragraph 2, *in fine*).

¹⁵⁸ *Yearbook of the International Law Commission, 1960, vol. II, pp. 116 and 179-180.*

¹⁵⁹ *Ibid.*, pp. 110 and 179-180. Mr. Sandström, the Special Rapporteur, was even of the opinion that this had no bearing on special missions.

(12) The Commission takes the view that the rules applicable to the head of the special mission also apply to a single delegate, described in the text of article 6 as the "representative".

New suggestions by Governments

(13) In its comments the Yugoslav Government says it considers that, in view of the fact that there is some inconsistency between the provisions of article 7 and the commentary on that article, the words "and a member of his diplomatic staff" should be inserted after the word "mission" at the beginning of article 7, paragraph 2.¹⁶⁰

(14) The Special Rapporteur is of the opinion that, in accordance with the intention of the Commission, only the head of a special mission is normally authorized, by virtue of his function, to act on behalf of the special mission, whereas paragraph 2 of the text provides for the possibility of authorizing some other person as well. After considering the Yugoslav comments the Special Rapporteur does not see why one of the members of the staff could not be authorized to perform certain acts on behalf of the mission; but he does not think that members of the staff can be authorized to replace the head of the mission. Consequently, the Special Rapporteur recommends that the Commission should adopt only part of the Yugoslav Government's proposal and should insert in the text of article 7 a new, additional paragraph 3, reading as follows:

A member of the staff of the special mission may be authorized to perform particular acts on behalf of the mission.¹⁶¹

(15) In its comments, the Belgian Government expresses the opinion that in order to make the article correspond better with the idea expressed in paragraph (2) of the commentary, it would be better to say "unless otherwise agreed" and to delete the word "normally".¹⁶² The Special Rapporteur cannot agree to this proposal; the word "normally" was used deliberately, because there may be cases which are not provided for in the agreement concluded between the parties, but which justify a derogation from the norm. For example, the head of a special mission might fall ill and he could then be replaced by his deputy or even by the chargé d'affaires *ad interim* of the special mission, as stated in paragraphs (7), (8), (9) and (10) of the commentary on article 7. The Special Rapporteur therefore recommends that the proposal of the Belgian Government should be disregarded.

(16) The Swedish Government also made some comments on article 7, which read as follows:

The phrase "normally" is a descriptive term and hardly appropriate here. The text should be rephrased. How, would depend upon whether the principle of the subsidiary character of the rules is accepted or not.¹⁶³

(17) The Special Rapporteur thinks that the reply given above to the Belgian Government's comments also applies to this observation by the Government of Sweden.

He reiterates that the word "normally" is an essential term and not a descriptive one, as stated above.

(18) The Government of Israel suggested in its comments that the text of article 41 of the draft articles on special missions should be incorporated in the text of article 7.¹⁶⁴ The Special Rapporteur does not share this view, because article 7 deals with authority to act on behalf of the special mission, whereas article 41 concerns the establishment of rules for designating the organ of the receiving State with which official business is conducted.

(19) The Government of Pakistan made the following suggestions:

Ordinarily, only the Head of Specialized Missions is authorized by virtue of his functions to act on behalf of the Special Missions whereas paragraph 2 of Article VII seems to provide for the possibility of authorizing some other person as well. This could be spelt out more precisely by the addition of paragraph 3 to Article VII in the following terms:

"3. Any member of the Special Mission may be authorized to perform particular acts on behalf of the Mission."¹⁶⁵

The Special Rapporteur is convinced that the suggested amendment would not confuse the meaning of the present text of article 7. However, the idea is already included in paragraph 2 and, consequently, although he endorses this idea, the Special Rapporteur considers it unnecessary to adopt the amendment.

(20) Accordingly, the Special Rapporteur considers that:

- (a) There is no need to amend the text of article 7;
- (b) The idea expressed by the Pakistan and Yugoslav Governments should be stated in the commentary;
- (c) As far as drafting is concerned, the words "A member of the mission" at the beginning of paragraph 2 should be replaced, in accordance with the definitions proposed in the introductory article, by the words "A member of a special mission or of its staff";
- (d) The term "normally", which is used twice in this article, should be retained, since it indicates that this provision establishes a presumption which may be rebutted by an agreement between the parties; this means that the entire article is of an optional nature.

Article 8.¹⁶⁶ Notification

1. The sending State shall notify the receiving State of:
 - (a) The composition of the special mission and of its staff, and any subsequent changes;
 - (b) The arrival and final departure of such persons and the termination of their functions with the mission;
 - (c) The arrival and final departure of any person accompanying the head or a member of the mission or a member of its staff;
 - (d) The engagement and discharge of persons residing in the receiving State as members of the mission or as

¹⁶⁴ *Ibid.*

¹⁶⁵ *Ibid.*

¹⁶⁶ Introduced as article 7 of Special Rapporteur's first report (A/CN.4/166). Discussed at the 762nd meeting of the Commission. Drafting Committee's text discussed and adopted at the 768th meeting. Commentary adopted at the 773rd meeting.

¹⁶⁰ See *Yearbook of the International Law Commission, 1967*, vol. II, document A/6709/Rev.1, annex I.

¹⁶¹ *Ibid.*

¹⁶² *Ibid.*

¹⁶³ *Ibid.*

private servants of the head or of a member of the mission's staff.

2. If the special mission has already commenced its functions, the notifications referred to in the preceding paragraph may be communicated by the head of the special mission or by a member of the mission or of its staff designated by the head of the special mission.

Commentary

(1) Article 8 is modelled on article 10, paragraph 1, of the Vienna Convention on Diplomatic Relations, with the changes required by the special features of the institution of special missions.

(2) In the case of special missions, too, the question arises to what extent the sending State is obliged to notify the composition of the special mission and the arrival and departure of its head, members and staff. As early as 1960, the International Law Commission adopted the position that in this respect the general rules on notification relating to permanent diplomatic missions are valid for special missions.¹⁶⁷

(3) In practice, however, the notification is not identical with that effected in the case of permanent diplomatic missions. In the first place, notification of the composition of a special mission usually takes place in two stages. The first is the preliminary notice, i.e., an announcement of arrival. This preliminary notice of the composition of the special mission should contain brief information concerning the persons arriving in the special mission and should be remitted in good time, so that the competent authorities of the receiving State (and the persons who, on its behalf, will maintain contact) are kept informed. The preliminary notice may in practice be remitted to the Ministry of Foreign Affairs of the receiving State or to its permanent diplomatic mission in the sending State. The second stage is the regular notification given through the diplomatic channel, i.e., through the permanent mission in the receiving State (in practice, the special mission itself gives this notification directly only if the sending State has no permanent mission in the receiving State and there is no mission there of a third State to which the sending State has entrusted the protection of its interests). The Commission has not indicated these two stages of notification in the text, but has merely laid down the duty of the sending State to give the notification.

(4) Consequently, there are in practice certain special rules for notification of the composition and arrival of a special mission. They arise from the need to inform the receiving State in a manner different from that used for permanent missions. The International Law Commission did not refer to this fact in 1960.

(5) On the other hand, it is not customary to give separate notifications of the special mission's departure. It is presumed that the mission will leave the receiving State after its task has been fulfilled. However, it is customary for the head and members of the special mission to inform the representatives of the receiving State with whom they are in contact verbally, either during

the course of their work or at the end of their mission, of the date and hour of their departure and the means of transport they propose to use. The Commission took the view that even in this case a regular notification should be given.

(6) A separate question is whether a head or member of a special mission who remains in the territory of the receiving State after his official mission has ended but while his visa is still valid should give notice of his extended stay. Opinion is divided on this question, and the answer depends on the receiving State's general laws governing aliens. If an extended stay of this kind does occur, however, it is an open question at what point of time the official stay becomes a private stay. Courtesy demands that the situation should be treated with some degree of tolerance. The Commission considers it unnecessary to include provisions governing this case in the text of the article.

(7) The right to recruit auxiliary staff for special missions locally is in practice limited to the recruitment of auxiliary staff without diplomatic rank or expert status, persons performing strictly technical functions (e.g., chauffeurs), and service staff. The rule observed in practice is that the receiving State should ensure the availability of such services, for the performance of the functions of the special mission is often dependent on them. In 1960 the International Law Commission inclined to the view that the availability of these services to special missions should be regarded as part of their general privileges. However, the receiving State is entitled to information on any local recruitment by special missions and, in the Commission's view, the latter must see that the authorities of the receiving State are kept regularly informed concerning the engagement and discharge of such staff, although all engagements of this kind, like the special mission itself, are of limited duration.

(8) In order to make notification easy and flexible in practice, the special mission, as soon as it begins to discharge its functions, effects notification direct, and not necessarily through the permanent diplomatic mission. The Commission has found this a sensible custom and has included a rule to that effect in the text of article 8, paragraph 2.

New suggestions by Governments

(9) In its comments on article 8 the Government of Israel says:

With regard to the expression "any person" used in *article 8*, paragraph 1 (*c*), it may perhaps be desirable to include an explanation in the commentary on that article, such as that given by the Special Rapporteur in paragraph 14 of the Summary Record of the 762nd meeting of the ILC.¹⁶⁸

(10) In the opinion of the Special Rapporteur, this comment should be taken into consideration; he will bear it in mind when drafting the commentaries.

(11) The Government of Yugoslavia comments on this article as follows:

... the commentary on article 8 should be made consistent with the provisions of that article. Whereas article 8, paragraph 1 (*d*),

¹⁶⁷ *Yearbook of the International Law Commission, 1960*, vol. II, pp. 113 and 179-180.

¹⁶⁸ See *Yearbook of the International Law Commission, 1967*, vol. II, document A/6709/Rev.1, annex I.

provides for the receiving State to be notified of the members of the mission, the private servants of the head or of a member of the mission or of a member of the mission's staff who are recruited from among the nationals of that State or from among aliens domiciled in its territory, it is stated in paragraph (7) of the commentary that such recruitment is in practice limited to auxiliary staff without diplomatic rank. Since some States allow the recruitment of staff with diplomatic rank, the Government considers that the following words should be inserted in paragraph (7) of the commentary: "In some countries such recruitment is in practice limited to auxiliary staff without diplomatic rank".¹⁶⁹

(12) Having considered this comment by the Yugoslav Government, the Special Rapporteur takes the view that the text of article 8, paragraph 1 (d) is correctly formulated, because it covers all recruitment of persons "residing in the receiving State as members of the mission or as private servants...", but that the observation on paragraph (7) of the commentary is justified. He is therefore of the opinion that the Yugoslav Government's proposal should be adopted in so far as it supplements the commentary.

(13) The Belgian Government's comments also contain a passage concerning article 8. First of all, it is said that as to the substance, it should be specified that there must be prior notification, which would avoid having to resort where necessary to the *non grata* procedure, which is always unpleasant for all parties concerned. The text of this paragraph should therefore read as follows:

"The sending State shall notify the receiving State in advance..."¹⁷⁰

(14) The Special Rapporteur is not able to recommend the Commission to adopt this suggestion by the Belgian Government. He is convinced that it is impossible in practice to give prior notification always, and in all circumstances, of all the facts listed in sub-paragraphs (a) to (d). This could not be done even in the case of regular diplomatic missions, and that is why the matter was regulated as follows in article 10, paragraph 2, of the 1961 Vienna Convention on Diplomatic Relations. "Where possible, prior notification of arrival and final departure shall also be given". If this cannot constitute a general rule, even for these two isolated events, in the case of permanent diplomatic missions, there is clearly no need to amend the text of the article. However, it might perhaps be useful to include the essence of the Belgian Government's observation in the commentary.

(15) The Belgian Government's comments contain another passage referring to article 8, paragraph 2, of the draft and reading as follows:

In this context, the notifications to be made when the special mission has already commenced its functions would concern only persons subsequently called upon to participate in the special mission's work, which would be more in line with the usual practice.¹⁷¹

(16) The Special Rapporteur, knowing the practice of special missions, considers that the Commission was right in laying down the rule for all cases arising after the

commencement of the special mission's functions and in including persons who have been the subject of notification by other organs of the sending State, and that this rule should not be limited to the notification of facts concerning persons forming part of the mission or arriving after it has commenced its functions. Until the time when the special mission commences its functions, the notification is made by other organs, because the special mission does not yet exist *de facto*; and once it has really begun to function there is no need to resort to notification by other organs.

(17) Accordingly, the Special Rapporteur considers that:

(a) There is no need to amend the text of article 8;

(b) The comments of the Israel and Yugoslav Governments should be included in the commentary, and the observations of the Belgian Government should be mentioned in a special paragraph in the commentary with the explanation that the Commission could not adopt them for the reasons stated above;

(c) In the light of the definitions contained in the proposed introductory article, some expressions in the text should be amended for drafting reasons: (1) in paragraph 1 (a), the words "of the special mission and of its staff" should be replaced by the expression "of the members and staff of the special mission"; (2) in paragraph 1 (b), the words "*des membres de la mission et du personnel*" in the French text should be replaced by the words "*des membres et du personnel de la mission spéciale*"; (3) in paragraph 1 (c) the words "the head or a member of the mission or a member of its staff" should be replaced by the expression "a member of the special mission or of its staff"; and in paragraph 1 (d), the words "as members of the mission or as private servants of the head or of a member of the mission or of a member of the mission's staff" should be replaced by the words "as members of the special mission or of its staff or as persons employed in the private services of the members or staff of the special mission";

(d) This article should include a new additional paragraph 3, which would read as follows:

The question of notification may be regulated differently or in more detail by agreement between the sending State and the receiving State.

It is the Special Rapporteur's view, however, that in the absence of such an arrangement, this provision would be considered as regularly compulsory, since the question of notification has often given rise to disputes in practice and is a sensitive matter involving the security of the receiving State.

Article 9.¹⁷² — General rules concerning precedence

1. Except as otherwise agreed, where two or more special missions meet in order to carry out a common task, precedence among the heads of the special missions

¹⁶⁹ *Ibid.*

¹⁷⁰ *Ibid.*

¹⁷¹ *Ibid.*

¹⁷² Introduced as article 8 of Special Rapporteur's first report (A/CN.4/166). Discussed at the 762nd meeting of the Commission. Drafting Committee's text discussed and adopted at the 768th meeting. Commentary adopted at the 773rd meeting

shall be determined by alphabetical order of the names of the States.

2. The precedence of the members and the staff of the special mission shall be notified to the appropriate authority of the receiving State.

Commentary

(1) The question of precedence among the heads of special missions arises only when several special missions meet, or when two missions meet on the territory of a third State. In practice, the rules of precedence among the heads of permanent diplomatic missions are not applied. The Commission did not consider that precedence among the heads of special missions should be governed by the provisions of the Vienna Convention, which are based on the presentation of credentials or on the date of arrival and on classes of heads of permanent missions — institutions irrelevant to special missions.

(2) The question of rank does not arise when a special mission meets with a delegation or organ of the receiving State. In practice, the rules of courtesy apply. The organ or delegation of the receiving State pays its compliments to the foreign special mission and the mission pays its respects to its hosts, but there is no question of precedence, properly so-called. The Commission has not dealt with this situation in the text of the articles, since it considers the rules of courtesy sufficient.

(3) The Commission believes that it would be wrong to include a rule that the order of precedence of heads of special missions should be determined by the diplomatic rank to which their titles would assign them under the general rules on classes of heads of permanent missions.

(4) Of particular significance is the fact that many heads of special missions have no diplomatic rank, and that heads of special missions are often personalities standing above all diplomatic rank. Some States make provision for such cases in their domestic law and in their practice, and give precedence to ministers who are members of the cabinet and to certain other high officials.

(5) The Commission wishes to stress that the rules of article 9 are not valid with respect to special missions having ceremonial or formal functions. This question is dealt with in article 10.

(6) The Commission considers that the rank of heads of special missions should be determined on the basis of the following considerations. Although in the case of *ad hoc* ceremonial diplomacy the heads of special missions are still divided into diplomatic classes (e.g., special ambassador, special envoy), the current practice is not to assign them any special diplomatic title. All heads of special missions represent their States and are equal among themselves in accordance with the principle of the equality of States.

(7) The International Law Commission did not take up this question in 1960. During the Commission's debates in 1960, however, Mr. Jiménez de Aréchaga expressed the view that the rules on classes of heads of missions

applied equally to special missions, and he did not restrict that conclusion to ceremonial missions.¹⁷³

(8) The practice developed in relations between States since the formation of the United Nations ignores the division of heads of special missions into classes according to their ranks, except in the case of ceremonial missions.

(9) There are two views concerning precedence among heads of special missions. According to the first, the question of rank does not arise with special missions. This follows from the legal rule laid down by article 3 of the Regulation of Vienna of 19 March 1815. This provides that diplomatic agents on special mission shall not by this fact be entitled to any superiority of rank. Genet¹⁷⁴ deduces from this rule that they have no special rank by virtue of their mission, although they do have diplomatic status. However, Satow¹⁷⁵ takes a different view. Although the heads of special missions are not ranked in the same order as the heads of the permanent diplomatic missions, there does exist an order by which their precedence can be established. This, says Satow, is an order *inter se*. It is based on their actual diplomatic rank; and where they perform identical functions, precedence among them is determined on the basis of the order of presentation of their credentials or full powers.

(10) In his 1960 proposal,¹⁷⁶ Mr. A. E. F. Sandström, Special Rapporteur of the International Law Commission, took the view that although, under the Regulation of Vienna, a special mission enjoys no superiority of rank, the heads of special missions, at least ceremonial missions, nevertheless rank among themselves according to the order of the presentation of their credentials. Yet while advancing this opinion in the preliminary part of his report, he limited himself in his operative proposal (alternative I, article 10, and alternative II, article 3) to inserting the negative provision that the head of a special mission should not, by such position only, be entitled to any superiority of rank.

(11) Mr. Sandström took as his starting point the idea that rank was defined by membership in the diplomatic service or by diplomatic category. He therefore made a distinction between diplomatic missions, missions regarded as being diplomatic, and technical missions, which were not of a diplomatic character.

(12) In the first place, the Commission, at its sixteenth session, held that it is not true that the person heading a special diplomatic mission of a political character will necessarily be a member of the diplomatic service and have diplomatic rank. Such missions may be headed by other persons, so that diplomatic rank is a very unreliable criterion. Why should a high official of the State (for example, a member of the Government) necessarily be ranked lower than a person bearing the title of ambassador? This would be incompatible with the current

¹⁷³ *Yearbook of the International Law Commission, 1960, vol. II, p. 116.*

¹⁷⁴ Raoul Genet, *Traité de diplomatie et de droit diplomatique*, Paris, 1931, vol. I, p. 86.

¹⁷⁵ Sir Ernest Satow, *A Guide to Diplomatic Practice*, fourth edition, London, 1957, p. 41.

¹⁷⁶ *Yearbook of the International Law Commission, 1960, vol. II, p. 109.*

functional conception of diplomacy. On the other hand, it is considered that it would be erroneous to classify heads of mission having diplomatic rank according to their titles (for example, ambassador and minister plenipotentiary). They are all heads of diplomatic missions and have the same authority to represent their sovereign States, which, under Article 2 of the United Nations Charter, enjoy the right to sovereign equality. It follows that precedence *inter se* cannot be determined on the basis of diplomatic rank, at least in so far as juridical treatment is concerned (this does not affect the matter of courtesy towards the head of the special mission).

(13) Secondly, the Commission discarded the idea that different principles apply to so-called technical missions. Such missions are today usually headed by a career diplomat, and the task of every technical mission includes some political and representative elements.

(14) Again, precedence can hardly be established according to the order of the presentation of credentials by the heads of special missions. At most meetings of special missions the presumption, consistent with the facts, is that they arrive simultaneously,¹⁷⁷ and the individual and ceremonial presentation of credentials is a distinct rarity. For this reason, the date of presentation is without significance in practice.

(15) Precedence among heads of special missions, limited as it is in its effect to their relations *inter se*, is important only in the case of a multilateral meeting or of contacts among two or three States, not counting the receiving State. In contacts between the special mission and the representatives of the receiving State alone, the question of precedence does not arise: as a matter of courtesy the host treats its guest with high consideration, and the latter is obliged to act in the same manner towards its host.

(16) The Commission considers that as a result, first, of the change which has taken place in the conception of the character of diplomacy, especially the abandonment of the theory of the exclusively representative character of diplomacy and the adoption of the functional theory,¹⁷⁸ and secondly, of the acceptance of the principle of the sovereign equality of States, the legal rules relating to precedence among heads of special missions have undergone a complete transformation. The principles of the Regulation of Vienna (1815) are no longer applicable. No general principle can be inferred, on the basis of analogy, from the rules of precedence governing permanent missions. For this reason, more and more use is being made of an automatic method of determining the precedence of heads of special missions, namely, the classification of delegates and delegations according to the alphabetical order of the names of the participating States. In view of the linguistic differences in the names of States, the custom is also to state the language in

which the classification will be made.¹⁷⁹ This is the only procedure which offers an order capable of replacing that based on rank, while at the same time ensuring the application of the rules on the sovereign equality of States.¹⁸⁰

(17) The International Law Commission did not go into the question of precedence within a special mission. It believes that each State must itself determine the internal order of precedence among the members of the special mission and that this is a matter of protocol only, the order of precedence being sent to the receiving State by the head of the special mission either direct or through the permanent diplomatic mission. This rule forms the subject of article 9, paragraph 2.

(18) The Commission also believes that there are no universal legal rules determining the order of precedence as between members of different special missions, or as between them and members of permanent diplomatic missions, or as between them and the administrative officials of the receiving State.

(19) It frequently happens that special missions meet in the territory of a third State which is not involved in their work. In this case it is important to the receiving State that the precedence of the heads of the special missions, or rather of the missions themselves, should be fixed, so that it does not, as host, run the risk of favouring one of them or of being guided by subjective considerations in determining their precedence.

(20) A brief comment must be made on the question of the use of the alphabetical order of names of States as a basis for determining the order of precedence of special missions. At the present time, the rule in the United Nations and in all the specialized agencies, in accordance with the principle of the sovereign equality of States, is to follow this method. While considering it to be the most correct one, the Commission concedes that the rule need not be strictly interpreted as requiring the use of the alphabetical order of the names of States in a specified language — English, for example. Some experts have drawn attention to the possibility of applying the same method but on the basis of the alphabetical order of names of States used in the official diplomatic list of the receiving State. The important thing is that the system applied should be objective and consistent with the principle of the sovereign equality of States. For this reason, the Commission adopted the principle of the alphabetical order of the names of States. The members of the Commission were divided on the question whether the order adopted should be that used by the United Nations or that used in the official diplomatic list of the receiving State.

¹⁷⁹ Mr. Sandström, too, used this method in dealing with the question of the participation of *ad hoc* diplomats in congresses and conferences (chap. II, art. 6).

¹⁸⁰ In order to bring the practice further into line with the principle of equality, it is now customary for lots to be drawn, the initial letter of the name of the State thus chosen indicating the beginning of the *ad hoc* alphabetical order. At United Nations meetings and meetings organized by the United Nations, lots are drawn at the opening of the session, to assign seats to the participating States for the duration of the session and whenever a roll-call vote is taken.

¹⁷⁷ See Mr. Jiménez de Aréchaga in *Yearbook of the International Law Commission*, 1960, vol. II, p. 116, para. 13.

¹⁷⁸ This cumulation of the functional and the representative character is confirmed by the fourth paragraph of the Preamble and by article 3 of the Vienna Convention on Diplomatic Relations.

(21) The Commission considers that everything stated in this article with regard to heads of special missions is also applicable to single representatives.

New suggestions by Governments

(22) The Belgian Government makes the following comment on article 9, paragraph 1:

Belgium is of the opinion that the choice of the language determining the alphabetical order should be made in accordance with the rules of protocol of the receiving State. The end of the paragraph should therefore read "... in conformity with the protocol in force in the receiving State".¹⁸¹

(23) The Special Rapporteur considers this to be an apposite comment which is in conformity with the idea expressed by the Commission in paragraph (20) of the commentary on article 9. He is willing to make the change proposed.

(24) The Belgian Government proposes in its comments that the text of article 9 should be expanded by the addition of a new paragraph. This proposal is worded as follows:

It is considered that it would be useful to lead up to the exception which is stated in the following article; there should accordingly be a new paragraph 3 stipulating that "the present article shall not affect the provisions of article 10 relating to special ceremonial and formal missions".¹⁸²

(25) The Special Rapporteur is not convinced of the need for this new paragraph, because article 10 immediately follows article 9.

(26) The comments of the Government of Israel include a proposal that articles 9 and 10 should be combined into a single article. The text of the proposal is as follows:

There would seem to be no necessity for applying different criteria in *article 9, paragraph 1* and *article 10*, and it is therefore suggested that they be combined as follows: "Except as otherwise agreed, where two or more special missions meet in order to carry out a common task, or on a ceremonial or formal occasion, precedence among their respective members and staff shall be determined by the alphabetical order of the names of the States concerned".¹⁸³

(27) The Special Rapporteur is of the opinion that modern special missions having a substantive task should not be associated with the traditional institution of special ceremonial and formal missions.

(28) In its comments on article 9 the Yugoslav Government says that:

As regards precedence and the alphabetical order to be applied under draft article 9, it is considered that the alphabetical order to be adopted should be the one in use in the receiving State, or, in the absence thereof, the method used by the United Nations.¹⁸⁴

(29) With regard to this comment, the Special Rapporteur takes the same position as he does on the Belgian Government's proposal referred to above. He considers it his duty to point out that the Yugoslav proposal is more complete, because it provides a choice between two alphabetical orders — that of the receiving State, and that

used by the United Nations. It might, perhaps, even be better to adopt this proposal as an addition to paragraph 1 of article 9.

(30) In its written comments, the Austrian Government refers to the question of the more precise determination of the alphabetical order of States as a basis for settling the problem of the precedence of special missions. Its observations on this subject are as follows:

Ad. article 9, paragraph 1:

It would seem desirable to render the provision more precise by showing in what language the alphabetical order is to be determined, especially as no unambiguous conclusions on this point can be drawn from the commentary.¹⁸⁵

(31) In principle, the Special Rapporteur endorses the proposal of the Austrian Government and suggests to the Commission that it should be co-ordinated with the proposals of the Belgian and Yugoslav Governments, set forth in paragraphs (22) and (28) of this commentary.

(32) The Netherlands Government made the following comment on articles 9 and 10:

The Netherlands Government believes that the whole matter of precedence had better be left to the protocol in force in the receiving State, as is done in article 10 for ceremonial missions. There is no need for an internationally applicable precedence regulation, except for multilateral conferences that are not convened by a receiving State. In fact, such conferences are outside the scope of the present articles. Therefore it is suggested that articles 9 and 10 be combined, leaving out paragraph 1 of article 9 and making article 10 applicable to all special missions.¹⁸⁶

(33) The Special Rapporteur cannot recommend that the Commission should adopt the Netherlands Government's idea, for it offers no assurance that there will be an international rule on the treatment of special missions; the Commission, moreover, has clearly decided that the modern special missions of today should not be confused with special missions of a ceremonial and formal character.

(34) Accordingly, the Special Rapporteur considers that:

(a) The only amendment that might be made in the text of paragraph 1 would be to determine more precisely the language or the use of the alphabetical order. (The Special Rapporteur thinks well of both the Belgian and the Yugoslav proposals and leaves it to the Commission to decide whether the adoption of these proposals is necessary and which is the most useful.) On the other hand, the Special Rapporteur does not recommend that articles 9 and 10 should be combined, as the Netherlands Government has suggested. The Special Rapporteur repeats that he is not convinced of the usefulness of the Belgian Government's proposal for the addition of a new paragraph in article 9;

(b) A more detailed explanation of the Belgian and Yugoslav proposals for a more precise determination of the language of the alphabetical order should be included in the commentary, regardless of whether or not these proposals are adopted;

(c) The commentary should mention the idea that modern special missions having substantive tasks should

¹⁸¹ See *Yearbook of the International Law Commission, 1967*, vol. II, document A/6709/Rev.1, annex I.

¹⁸² *Ibid.*

¹⁸³ *Ibid.*

¹⁸⁴ *Ibid.*

¹⁸⁵ *Ibid.*

¹⁸⁶ *Ibid.*

not be associated with the traditional institution of special ceremonial and formal missions, and should note the suggestion of certain States that this idea should be taken into consideration;

(d) It is not necessary to amend the text of article 9 for drafting reasons;

(e) Whereas the provision contained in paragraph 1 of this article is of an optional nature, the provision in paragraph 2 represents an international usage which has become custom and is of a generally compulsory nature.

Article 10.¹⁸⁷ — Precedence among special ceremonial and formal missions

Precedence among two or more special missions which meet on a ceremonial or formal occasion shall be governed by the protocol in force in the receiving State.

Commentary

(1) The Vienna Convention on Diplomatic Relations confines itself to provisions concerning permanent diplomatic missions and does not take into account either special missions or diplomatic ceremonial and formal missions, which have continued to exist in practice even after the establishment of permanent resident diplomacy, and continue to exist to this day.

(2) The Commission observed that the rules governing special ceremonial and formal missions vary from State to State. The question arises whether a selection should be made among the different customs, or whether the rule universally observed in practice should be adopted, namely, that the receiving State is competent to settle the order of precedence among special missions meeting on its territory on the occasion of a ceremony or a formal manifestation. The Commission favoured the second proposal.

(3) The different customs practised include the following:

(a) On such occasions the representatives of States customarily bear the title of special ambassadors extraordinary. Even a regular accredited ambassador, when assigned to represent his country on a ceremonial occasion, is given the title of *ad hoc* ambassador. This is regarded as a point of international courtesy.

(b) In accordance with the established interpretation of article 3 of the Regulation of Vienna of 1815, the *prior tempore* rule is held to apply even to these ambassadors, who should take precedence in the order of the time of presentation of the letters of credence issued for the *ad hoc* occasion. In practice, however, it has proved almost impossible to implement this rule. The funeral of King George VI of Great Britain was a case in point. A number of special missions were unable, for lack of time, to present their letters of credence, or even copies of them, to the new Queen before the funeral ceremony. Moreover, several missions arrived in London simultaneously, so that the rule providing for the deter-

mination of precedence according to the order of arrival was also inapplicable. For this reason, it was maintained that it would be preferable to select another criterion, more objective and closer to the principle of the sovereign equality of States, while retaining the division of heads of special missions into classes.

(c) It is becoming an increasingly frequent practice to send special delegates of higher rank than ambassador to be present on ceremonial occasions. Some countries consider that to give them the title of *ad hoc* ambassador would be to lower their status, for it is increasingly recognized that Heads of Government and ministers rank above all officials, including ambassadors. In practice, the domestic laws of a number of countries give such persons absolute precedence over diplomats.

(d) However, persons who do not belong to the groups mentioned in sub-paragraph (a) above are also sent as special *ad hoc* ambassadors, but are not given diplomatic titles because they do not want them. Very often these are distinguished persons in their own right. In practice there has been some uncertainty as to the rules applicable to their situation. One school of thought opposes the idea that such persons also take precedence over *ad hoc* ambassadors; and there are some who agree with the arguments in favour of this viewpoint, which are based on the fact that, if the State sending an emissary of this kind wishes to ensure that both the head of the special mission and itself are given preference, it should appoint him *ad hoc* ambassador. Any loss of precedence is the fault of the sending State.

(e) In such cases, the diplomatic status of the head of the special mission is determined *ad hoc*, irrespective of what is called (in the French texts) the *rang diplomatique réel*. The title of *ad hoc* ambassador is very often given, for a particular occasion, either to persons who do not belong to the diplomatic career service or to heads of permanent missions who belong to the second class. This fact should be explicitly mentioned in the special letters of credence for ceremonial or formal occasions.

(f) The issuance of special letters of credence covering a specific function of this kind is a customary practice. They should be in good and due form, like those of permanent ambassadors, but they differ from the latter in their terms, since the mission's task is strictly limited to a particular ceremonial or formal function. The issuance of such letters of credence is regarded as an international courtesy, and that is why heads of permanent diplomatic missions are expected to have such special letters of credence.

(g) Great difficulties are caused by the uncertainty of the rules of law concerning the relative rank of the head of a special mission for a ceremonial and formal function and the head of the mission regularly accredited to the Government of the country in which the ceremonial occasion takes place. Under the protocol instructions of the Court of St. James's the heads of special missions have precedence, the heads of regularly accredited diplomatic missions occupying the rank immediately below them, unless they are themselves acting in both capacities on the specific occasion in question. This solution is manifestly correct and is dictated by the

¹⁸⁷ Introduced as article 9 of Special Rapporteur's first report (A/CN.4/166). Discussed at the 762nd meeting of the Commission. Drafting Committee's text discussed and adopted at the 768th meeting. Commentary adopted at the 773rd meeting.

very nature of the function, since otherwise it would be utterly pointless to send a special mission.

(h) The situation of the members of a special mission of a ceremonial or formal nature in cases where the members are designated as equals and are given collective letters of credence for the performance of the ceremonial or formal function in question is not precisely known. As stated in paragraph (4) of the commentary on article 7, practice in this matter is not uniform.

(4) Some members of the Commission requested that, despite the Commission's unanimous decision to accept the rule incorporated in article 10, the Special Rapporteur's original text should also be included in the present report for purposes of information.¹⁸⁸ This text is as follows:

1. Where two or more special missions meet on a formal or ceremonial occasion (for example, a marriage, christening, coronation, installation of Head of State, funeral, etc.), precedence among the heads of missions shall be determined in accordance with the class to which each head of mission belongs by virtue of his diplomatic title, and within each class in accordance with the alphabetical order of the names of the States.

2. Heads of State, members of ruling families, chairmen of councils and ministers who are members of the Government represent special classes having precedence over the class of ambassadors.

3. Heads of special missions who do not possess the diplomatic rank of ambassador or minister plenipotentiary and who do not belong to the groups specified in paragraph 2 of this article shall constitute, irrespective of the functions they perform, a special group next following that of heads of special missions having the rank of minister plenipotentiary.

4. The diplomatic title used in determining precedence for the purposes of this article, except in the case of persons mentioned in paragraph 2, shall be that indicated in the credentials issued for the performance of the ceremonial or protocol function.

5. Heads of regular diplomatic missions shall not be considered to be heads of special missions for ceremonial or formal functions unless they have presented credentials issued specially for this particular purpose.

6. The rank of the staff of special ceremonial and formal missions shall be determined in accordance with the rank of the heads of mission.

7. When they appear at the ceremony to which their formal or ceremonial function relates, heads of special missions shall take precedence over the heads of regular diplomatic missions.

This text was communicated to the Commission, but the Commission did not consider it in detail because it had decided in principle to regulate the matter by reference rather than by substantive provisions.

New suggestions by Governments

(5) The Belgian Government formulated comments and proposals concerning article 10, in the following terms:

This article is ambiguous. It refers to special missions which meet on a ceremonial occasion; but, taken literally, it seems to refer to special missions of all kinds. It would be both clearer and simpler to state that "precedence among special ceremonial and formal missions shall be governed by the protocol in force in the receiving State". In that case, Belgium would not wish this

article to be regulated by a detailed text such as that proposed in paragraph (4) of the commentary.¹⁸⁹

(6) In the Special Rapporteur's view, the text proposed by the Belgian Government is identical in substance with the text of article 10 of the Commission's draft, but is perhaps more suitable because briefer.

(7) We recall that the Belgian Government has proposed an additional paragraph to article 9 containing a reference to article 10. The Special Rapporteur has given his opinion on this matter in the section relating to article 9.

(8) The Government of Israel proposes that article 9, paragraph 1, and article 10 should be combined, which would entail the deletion of article 10. The Special Rapporteur has already expressed his view on this proposal in connexion with article 9.

(9) The Netherlands Government's suggestion concerning the combining of articles 9 and 10 has already been set out above in the discussion of article 9.

(10) The Special Rapporteur holds the view that the proposals by the Governments of Israel and the Netherlands for the combining of articles 9 and 10 are unacceptable because of the fundamental and essential difference between modern special missions and ceremonial and formal missions, which has been discussed at greater length in connexion with article 9.

(11) Accordingly, the Special Rapporteur considers that:

(a) There is no need to amend the text of article 10;

(b) The difference between substantive special missions and special ceremonial and formal missions should be pointed out again in a special paragraph in the commentary;

(c) There is no need to amend the text of this article for drafting reasons;

(d) The provision contained in article 10 is of a generally compulsory character, inasmuch as it obliges the receiving State to apply to all special ceremonial and formal missions without distinction the protocol in force in the receiving State, but it is not concerned with the internal substance of that protocol.

Article 11.¹⁹⁰ — Commencement of the functions of a special mission

The functions of a special mission shall commence as soon as that mission enters into official contact with the appropriate organs of the receiving State. The commencement of its functions shall not depend upon presentation by the regular diplomatic mission or upon the submission of letters of credence or full powers.

Commentary

(1) The Vienna Convention on Diplomatic Relations contains no express provisions on the commencement of the functions of permanent diplomatic missions.

¹⁸⁹ See *Yearbook of the International Law Commission, 1967*, vol. II, document A/6709/Rev.1, annex I.

¹⁹⁰ Introduced as article 10 of Special Rapporteur's first report (A/CN.4/166). Discussed at the 762nd meeting of the Commission. Drafting Committee's text discussed and adopted at the 768th meeting. Commentary adopted at the 774th meeting.

¹⁸⁸ Document A/CN.4/166, article 9.

(2) The International Law Commission takes the view that, where the commencement of the functions of a special mission is concerned, the rules applicable to permanent diplomatic missions do not apply.¹⁹¹

(3) In practice, this matter is governed by a special usage. The functions of the special mission which have been the subject of prior notice and acknowledgement begin when the special mission arrives in the territory of the receiving State, unless it arrives prematurely — a situation which depends on the circumstances and on the notion of what constitutes a reasonable interval of time. If there has been no prior notice, the functions are deemed to begin when contact is made with the organs of the receiving State. A further point is that, in the case of special missions, the commencement of the function need not be deemed to take place only when copies of the letters of credence or full powers are presented, although this is taken into account in the case of *ad hoc* ambassadors. Heads of special missions in general, even in cases where they must have full powers, do not now present either the original or a copy in advance, but only when the time comes to prove their authority to assume obligations on behalf of the sending State. Thus there is a legal difference with respect to determining when the function commences, as compared with the case of the heads of permanent missions.

(4) Almost all the instructions by States concerning the exercise of functions related to diplomatic protocol are found to contain more rules on the procedure for welcoming a ceremonial *ad hoc* mission when it arrives and escorting it when it leaves than on its reception, which consists of an audience with the Minister for Foreign Affairs to introduce the mission, or the presentation of letters of introduction or copies of credentials. There are even fewer rules on audiences by Heads of State for the presentation of letters of credence. Even if the head of a special mission arrives with special letters of credence addressed to the Head of State, the practice is to present them more expeditiously — i.e., through the Chief of Protocol — and the functions of the mission commence immediately. An example of this custom is the case of an *ad hoc* mission sent to present the condolences of its own Head of State to the Head of State of another country upon the death of his predecessor or of a member of the royal family. In such a case, formal receptions are hardly in order; besides, there is usually little time. Nevertheless, missions of special importance are treated according to the general rules of protocol, both on arrival and when they leave.

(5) Contacts between special missions appointed to conduct political negotiations also generally take place immediately following the so-called protocol visit to the competent official with whom the negotiations are to be held.

(6) In the case of special missions appointed to conduct technical negotiations, it is not the practice to have either a ceremonial reception or a ceremonial presentation of credentials. It is customary, however, to make an

introductory visit or, if the parties already know each other, a visit for the purpose of establishing contact. There is a growing tendency to abandon the custom whereby the head of the special mission is accompanied on his first visit by the head of the diplomatic mission permanently accredited to the receiving State, or by some member of that mission, if the head of the special mission or his opposite number who is to receive him is of lower rank than the head of the permanent mission. In practice, however, this formality of introduction is becoming obsolete, and the Commission does not deem it essential.

(7) It should be noted that there is an essential difference between the reception of the head of a special mission and the presentation of his letters of credence or full powers on the one hand and the reception of the heads of permanent missions and the presentation of their credentials on the other. This difference relates, first of all, to the person from whom the full powers emanate, in cases other than that of a special ambassador or an *ad hoc* ceremonial mission. A special ambassador and the head of an *ad hoc* ceremonial mission receive their letters of credence from the Head of State, as do the regular heads of diplomatic missions of the first and second classes, and they are addressed to the Head of the State to which the persons concerned are being sent. This procedure is not necessarily followed in the case of other special missions. In accordance with a recently established custom, and by analogy to the rules concerning the regularity of credentials in the United Nations, full powers are issued either by the Head of State or of Government or by the Minister of Foreign Affairs, regardless of the rank of the delegate or of the head of the special mission.

(8) Again, this difference is seen in the fact that the letters of credence of the head of a permanent diplomatic mission are always in his name, while this is not so in the case of special missions, where even for a ceremonial mission, the letters of credence may be collective, in the sense that not only the head of the mission, but the other members also are appointed to exercise certain functions (a situation which could not occur in the case of regular missions, where there is no collective accreditation). Full powers may be either individual or collective, or possibly supplementary (granting authority only to the head of the mission, or stipulating that declarations on behalf of the State will be made by the head of the mission and by certain members or by one or more persons named in the full powers, irrespective of their position in the mission). It has recently become increasingly common to provide special missions with supplementary collective full powers for the head of the mission or a particular member. This is a practical solution (in case the head of the mission should be unable to be present throughout the negotiations).

(9) In practice, the members and staff of a special mission are deemed to commence their function at the same time as the head of the mission, provided that they arrived together when the mission began its activities. If they arrived later, their function is deemed to commence on the day of their arrival, duly notified to the receiving State.

¹⁹¹ *Yearbook of the International Law Commission, 1960*, vol. II, pp. 116 and 180.

(10) It is becoming increasingly rare to accord a formal welcome to special missions when they arrive at their destination, i.e. at the place where the negotiations are to be held. In the case of important political missions, however, the rules concerning reception are strictly observed but this is of significance only from the standpoint of formal courtesy and has no legal effect.

(11) Members of permanent diplomatic missions who become members of a special mission are considered, despite their work with the special mission, to retain their capacity as permanent diplomats; consequently, the question of the commencement of their functions in the special mission is of secondary importance.

(12) In practice States complain of discrimination by the receiving State in the reception of special missions and the way in which they are permitted to begin to function even among special missions of the same character. The Commission believes that any such discrimination is contrary to the general principles governing international relations. It believes that the principle of non-discrimination should operate in this case too; and it requests Governments to advise it whether an appropriate rule should be included in the article. The reason why the Commission has refrained from drafting a provision on this subject is that very often differences in treatment are due to the varying degree of cordiality of relations between States.

New suggestions by Governments

(13) The Government of the Upper Volta proposes in its comments that the actual text of article 11 should include the idea of non-discrimination in the reception of special missions and the way in which they are permitted to begin to function, especially among special missions of the same character—the idea set forth in paragraph (12) of the commentary to article 11 of the draft. This proposal is worded as follows:

The problem raised in paragraph (12) of the commentary on article 11 — that of the discrimination to which some special missions may be subjected in practice in comparison with others — is of great importance at the present time. Such discrimination is contrary to the sovereign equality of States and to the principles which should guide States in their daily relations with each other; the differences in treatment in the reception of special missions and the way in which they are permitted to begin to function may prejudice the chances of success of the mission itself, which should be able to develop in an atmosphere of calm and confidence.

The Government of the Upper Volta considers that a provision on non-discrimination should be included in this article.¹⁹²

(14) The Special Rapporteur views this proposal with especial sympathy; he regards it as justified in law and founded on the principle of the equality of States. This idea also underlay the formulation of article 13, paragraph 2, of the 1961 Vienna Convention on Diplomatic Relations.

(15) The Belgian Government uses as a starting point for its comments a concept of the commencement of the special mission's functions differing from that adopted

by the vast body of international practice and by the Commission. The purpose of article 11 of the draft is to link the commencement of the special mission's functions to the time of effective contact between the special mission and the appropriate organs of the receiving State. The Belgian Government, however, has submitted a proposal which might lead to a different interpretation in the over-all solution of the problem. First, the commencement of the special mission's privileges and immunities should not be confused with the commencement of its functioning. In the Special Rapporteur's opinion, these are two different juridical institutions, although they occasionally coincide. For this reason, the Commission should take up a definite position on the Belgian proposal, which is worded as follows:

The usefulness of the first sentence of the article is open to question, as the commencement of privileges and immunities is governed by article 37. Furthermore, the present wording may lead to confusion in connexion with protocol which is precisely where letters of credence may be required.

Lastly, a diplomatic mission should not be qualified as regular, but as permanent. The article might therefore be drafted as follows: "Where no other provision is made by the protocol in force in the receiving State for special ceremonial and formal missions, the exercise of the function of a special mission shall not depend upon presentation of the special mission by the permanent diplomatic mission or upon the submission of letters of credence or full powers".¹⁹³

(16) In its written comments, the United Kingdom Government refers to paragraph (12) of the commentary on article 11, in which the Commission raises the question of the need to include in the article a rule on non-discrimination against various sending States with regard to the commencement of the functions of their special missions. The Commission has made it clear that, in its view, discrimination is not permissible in practice. The United Kingdom Government's comment, which is contrary to that made by the Government of Upper Volta, is as follows:

Article 11. The United Kingdom Government considers, with reference to paragraph (12) of the commentary on this article, that it would not be necessary or appropriate to add to this article a reference to the principle of non-discrimination. They support fully the views of the Commission on this question.¹⁹⁴

(17) The Government of Malta also deals with this question in its written comments, in which it expresses the following view:

Article 11. The question as to whether an appropriate rule should be included to deal with non-discrimination between special missions by the receiving State appears to be limited in this article to discrimination "in the reception of special missions and the way they are permitted to begin to function even among special missions of the same character", while the broader question of non-discrimination is referred to in paragraph 49 of the report (page 38).

It is felt that a special provision in article 11 to deal with non-discrimination is not appropriate, since the scope of any such provision would be either too limited or, if extended to cover non-discrimination in general, out of place. On the other hand, it is felt that a new article corresponding to article 47 of the Vienna Convention on Diplomatic Relations and article 72 of

¹⁹² See *Yearbook of the International Law Commission, 1967*, vol. II, document A/6709/Rev.1, annex I.

¹⁹³ *Ibid.*

¹⁹⁴ *Ibid.*

the Vienna Convention on Consular Relations should be included in the final text. The fact that the nature and tasks of special missions are so diverse should not justify discrimination as between States in the application of the rules contained in the articles.¹⁹⁵

(18) The Special Rapporteur notes that the Governments of both the United Kingdom and Malta consider it unnecessary to include in article 11 a rule on non-discrimination in respect of the commencement of the functions of a special mission. The Special Rapporteur thinks that a summary of these two opinions and of the opinion expressed by the Government of Upper Volta should be included in the final text of the commentary.

(19) In its written comments, the Netherlands Government expressed the following opinion:

With reference to the question in paragraph (12) of the Commission's commentary: it is doubtful whether there is any need for a clause on non-discrimination between special missions.¹⁹⁸

(20) While summarizing all these opinions, the Special Rapporteur considers that the text of paragraph (12) of the commentary should be retained in its present form and that a formal clause on non-discrimination in the reception of special missions should not be included; he leaves it to the Commission to take a decision on the Belgian Government's proposal, although he personally considers that any provision of this kind would complicate the Commission's idea that the commencement of the functions of special missions should be as simple as possible.

(21) Accordingly, the Special Rapporteur considers that:

- (a) The text of this article should not be amended;
- (b) The provisions relating to complaints on grounds of discrimination in paragraph (12) of the commentary might be expanded;
- (c) There is no need to amend the text for drafting reasons;
- (d) This provision should be considered as generally compulsory.

Article 12.¹⁹⁷ — End of the functions of a special mission

The functions of a special mission shall come to an end, *inter alia*, upon:

- (a) The expiry of the duration assigned for the special mission;
- (b) The completion of the task of the special mission;
- (c) Notification of the recall of the special mission by the sending State;
- (d) Notification by the receiving State that it considers the mission terminated.

Commentary

(1) The Vienna Convention on Diplomatic Relations contains no rules dealing directly with the end of the

functions of permanent diplomatic missions. Its treatment of the subject is limited to one provision on the end of the function of a diplomatic agent (article 43) and the provision concerning the case of the breaking off of diplomatic relations or the recall of the mission (article 45).

(2) In its deliberations in 1960,¹⁹⁸ the International Law Commission accepted the view that a special mission came to an end for the same reasons as those terminating the functions of diplomatic agents belonging to permanent missions. However, the accomplishment of a special mission's task was added, as a special reason for the termination of its functions.¹⁹⁹

(3) The Commission accepted the view of the majority of authors that the task of a special mission sent for a ceremony or for a formal occasion should be regarded as accomplished when the ceremony or occasion is over.

(4) In the first proposal he submitted in 1960 as the Commission's Special Rapporteur, Mr. Sandström expressed the opinion that it was desirable also to consider the functions of the special mission ended when the transactions which had been its aim were interrupted. A resumption of negotiations would then be regarded as the commencement of the functions of another special mission. Some authors adopt the same view and consider that in such cases it is unnecessary for the special mission to be formally recalled. The Commission regarded as well-founded the argument that the functions of a special mission are ended, to all practical purposes, by the interruption or suspension *sine die* of negotiations or other deliberations. It considered it preferable, however, to leave it to the sending and receiving States to decide whether they deemed it necessary in such cases to bring the mission to an end by application of the provisions of article 12 (c) and (d).

New suggestions by Governments

(5) The Belgian Government proposes, in its comments, that sub-paragraphs (a) and (b), both dealing with causes of the cessation of the special mission's functions, should be combined in a single paragraph.²⁰⁰ Sub-paragraph (a) relates to "The expiry of the duration assigned for the special mission", while sub-paragraph (b) relates to "The completion of the task of the special mission". The Commission took the view that these two causes of the cessation of the special mission's functions should be separated, so as to emphasize that they were independent of each other. The Special Rapporteur is of the opinion that the wording adopted by the Commission should be left as it stands.

(6) The Belgian Government further proposes that in the French text the word "*rappel*" should be used rather than the word "*révocation*" (of the special mission), which it finds too strong.²⁰¹ The Special Rapporteur

¹⁹⁵ *Ibid.*

¹⁹⁶ *Ibid.*

¹⁹⁷ Introduced as article 11 of Special Rapporteur's first report (A/CN.4/166). Discussed at the 762nd meeting of the Commission. Drafting Committee's text discussed and adopted at the 769th meeting. Commentary adopted at the 774th meeting.

¹⁹⁸ *Yearbook of the International Law Commission, 1960*, vol. II, pp. 179-180.

¹⁹⁹ This addition was proposed by Mr. Jiménez de Aréchaga; *ibid.*, p. 115.

²⁰⁰ See *Yearbook of the International Law Commission, 1967*, vol. II, document A/6709/Rev.1, annex I.

²⁰¹ *Ibid.*

points out that both of these terms are used in practice, and that as this is a question of drafting it should be settled by the Drafting Committee.

(7) The Belgian Government considers that the provision in article 44, paragraph 2, of the Commission's draft should also be included in article 12.²⁰² This provision reads as follows: "The severance of diplomatic relations between the sending State and the receiving State shall not automatically have the effect of terminating special missions existing at the time of the severance of relations, but each of the two States may terminate the special mission". In this case the Commission was not referring to the mandatory termination of the special mission, so that adoption of the Belgian Government's proposal would upset the system which the Commission had in mind.

(8) The Government of the Upper Volta comments on article 12 as follows:

The Government of the Upper Volta would like to support the proposal, mentioned in the commentary on this article, which was submitted in 1960 by the Commission's Special Rapporteur, Mr. Sandström.

It is desirable to consider that when negotiations between the special mission and the local authorities are interrupted, the mission loses its purpose, and that consequently the interruption of negotiations marks the end of the functions of a special mission.²⁰³

(9) The Special Rapporteur is not sure of the purpose of this comment by the Government of the Upper Volta; that is to say, whether it is a proposal to transfer one of the ideas in the commentary to the actual text of the draft or whether it is an expression of support by the Government of a Member State for this idea, which is still an integral part of the commentary. If the Government of the Upper Volta considers that this idea should be transferred to the text of the article, the Special Rapporteur's view is that the position taken by the Commission on this question should be adhered to, and that no change should be made in the text of the draft. If what is intended is an expression of agreement with the opinion of the previous Special Rapporteur, Mr. Sandström, which should remain in the commentary, the Special Rapporteur sees no need for a further discussion of this question in the Commission.

(10) The Government of Israel suggests, in its comments, that article 12 should be transferred to the end of the draft and placed after articles 43 and 44.²⁰⁴ The Special Rapporteur considers that article 12 is appropriately placed and should stay where it is.

(11) Accordingly, the Special Rapporteur considers that:

(a) An amendment to the text of article 12 does not seem to be necessary; however, the Special Rapporteur leaves open the question whether in the French text it is preferable to use the term "*rappel*" in place of the term "*révocation*". After mature reflection, the Commission decided that "*révocation*" was a more appropriate word than "*rappel*" to designate the cessation of the existence

of special missions, since the latter term often denoted only a provisional recall.

The Special Rapporteur also considers that the severance of diplomatic relations should not be included in this article, since this question has been dealt with in article 44, paragraph 2, but that it might be useful to refer to that provision in the commentary on article 12.

The Special Rapporteur reiterates his view that a provision on the *de facto* interruption of negotiations without notification should not be included in paragraphs (c) and (d) of the article, since this question has been dealt with in paragraph (4) of the commentary.

(b) An addition to the commentary should relate the provisions of this article to those of draft article 44, paragraph 2;

(c) It is not necessary to amend the text for drafting reasons;

(d) This provision is of a general character and is generally compulsory, but in paragraphs (c) and (d) the parties are given ample freedom.

Article 13.²⁰⁵ — *Seat of the special mission*

1. In the absence of prior agreement, a special mission shall have its seat at the place proposed by the receiving State and approved by the sending State.

2. If the special mission's tasks involve travel or are performed by different sections or groups, the special mission may have more than one seat.

Commentary

(1) The provision of article 13 is not identical to that contained in the Vienna Convention on Diplomatic Relations (article 12). In the first place, permanent missions must have their seats in the same locality as the seat of the Government. The permanent mission is attached to the capital of the State to which it is accredited, whereas the special mission is usually sent to the locality in which it is to carry out its task. Only in exceptional cases does a permanent mission set up offices in another locality, whereas it frequently occurs that, for the performance of its task, a special mission has to move from place to place and its functions have to be carried out simultaneously by a number of groups or sections. Each group or section must have its own seat.

(2) Very little has been written on this question, and in 1960 the Commission did not consider it necessary to deal with it at length. Its basic thought was that the rules applicable to permanent missions in this connexion were not relevant to special missions and that no special rules on the subject were needed. Some members of the Commission did not entirely agree, however, because the absence of rules on the subject might encourage special missions to claim the right to

²⁰² *Ibid.*

²⁰³ *Ibid.*

²⁰⁴ *Ibid.*

²⁰⁵ Introduced as article 12 of Special Rapporteur's first report (A/CN.4/166). Discussed at the 763rd meeting of the Commission. Drafting Committee's text discussed and adopted at the 770th meeting. Commentary adopted at the 774th meeting.

choose their seat at will and to "open offices in any part of the territory of the receiving State".²⁰⁶

(3) In practice, special missions normally remain at the place designated by mutual agreement, which, in most cases, is not formally established by the sending State and the receiving State. Under that agreement the special mission generally establishes its offices near the locality where its functions are to be performed. If the place in question is the capital city of the receiving State and there are regular diplomatic relations between the two States, the official offices of the special mission are usually on the premises of the sending State's regular diplomatic mission, which (unless otherwise indicated) is its official address for communication purposes. Even in this case, however, the special mission may have a seat other than the embassy premises.

(4) It is very rare, in practice, for the seat of a special mission not to be chosen by prior agreement. In the exceptional case where the special mission's seat is not established in advance by agreement between the States concerned, the practice is that the receiving State proposes a suitable locality for the special mission's seat, chosen in the light of all the circumstances affecting the mission's efficient functioning. Opinion is divided on whether the sending State is required to accept the place chosen by the receiving State. It has been held that such a requirement would conflict with the principle of the United Nations Charter concerning the sovereign equality of States if the receiving State were to impose the choice of the seat. The Commission has suggested a compromise, namely, that the receiving State should have the right to propose the locality, but that in order to become effective, that choice should be accepted by the sending State. That solution would have certain shortcomings in cases where the proposal was not accepted. The Commission has left the question open.

(5) The Commission did not go into the details of rules to determine the difference between the main seat and other seats where the special mission's task makes it necessary for it to have more than one seat. Usage varies in practice. One solution proposed to the Commission was that the main seat should be in the locality in which the seat of the Ministry of Foreign Affairs of the receiving State is situated, or in some other locality chosen by mutual agreement, and that the other seats should be established with a view to facilitating the work of the sections or teams. However, the Commission preferred to leave this question to be settled by agreement of the parties.

New suggestions by Governments

(6) Commenting on article 13, paragraph 1, the Belgian Government says:

The need for the proviso "in the absence of prior agreement" is not readily apparent; for in any case the procedure contemplated consists of a proposal followed by its approval. It should also be noted that in practice the seat of a special mission is always determined by mutual consent.²⁰⁷

²⁰⁶ *Yearbook of the International Law Commission, 1960*, vol. II, pp. 116 and 179-180.

²⁰⁷ See *Yearbook of the International Law Commission, 1967*, vol. II, document A/6709/Rev.1, annex I.

(7) The Special Rapporteur shares, in principle, the Belgian Government's view that mutual consent is always involved; but that consent may either be reached in advance — which is the situation referred to in the phrase "in the absence of prior agreement" — or be reached later. The Special Rapporteur therefore considers that the text formulated by the Commission is correct, for it makes provision for both solutions.

(8) The comments by the Government of Israel also include one relating to the expression "in the absence of prior agreement"; it reads as follows:

The phrase "in the absence of prior agreement" is used in article 13, preceding the residual rule, whereas the expression "except as otherwise agreed" is used in article 9, and the expression "unless otherwise agreed" in articles 21 and 26. It is suggested that the same terminology be employed to express the residual rule throughout the draft.²⁰⁸

(9) The Special Rapporteur proposes that this point, being a matter of drafting, should be considered by the Drafting Committee, though he considers that the expression "in the absence of prior agreement" is here correctly used.

In paragraph (4) of the commentary on article 13, the Commission suggested a compromise, namely, that the receiving State should have the right to propose the locality, but that, in order to become effective, that choice should be accepted by the sending State. However, the Commission left this question open. Only the Government of the Upper Volta gave attention to this solution, expressing the following opinion in its written comments:

The Upper Volta considers that the compromise suggested by the Commission, namely that the sending State should have a part in choosing the seat of the special mission, might impair the sovereign authority of the receiving State over its own territory. The Government of the Upper Volta is of the opinion that the receiving State is competent to choose the seat of the mission, without the participation of the sending State, provided that the locality chosen by the receiving State is suitable in the light of all the circumstances which might affect the special mission's efficient functioning.²⁰⁹

(10) The Special Rapporteur considers that the Commission should take note of the opinion expressed by the Government of the Upper Volta, but that it is not such as to affect the actual text of the proposed article.

(11) The comments of the Netherlands Government are as follows:

The Netherlands Government believes that cases in which no prior agreement is sought and reached as to the location of a special mission's seat are less rare in practice than the International Law Commission states in paragraph (4) of its commentary. It is not at all customary to consult the receiving State in advance on the matter of the location of a special mission's seat, nor for the receiving State to make or await suggestions on the subject, particularly when the special mission has duties primarily of a political nature that can be discharged within a relatively short period (varying from a few hours to a few days), which is very often the case. It is more customary for this kind of special mission to be housed by the permanent mission of the sending State or to find accommodation themselves, in or in the immediate vicinity of the locality of the seat of Government of the receiving

²⁰⁸ *Ibid.*

²⁰⁹ *Ibid.*

State. In such cases the special mission's address is either care of the permanent mission or an address given beforehand by or on behalf of the sending State to the receiving State, whichever the sending State opts for. As a rule the receiving State will raise no objections against the choice of seat, although it is entitled to do so in exceptional cases.

Even in countries where in these days the movement of foreigners in general and of foreign diplomats in particular is still severely restricted, the receiving State need not necessarily interfere in matters concerning the location of the seat, provided a locality is chosen near that of the Government.

The Netherlands Government proposes that article 13, paragraph 1, be amended to read:

"1. In the absence of prior agreement, a special mission shall have its seat at the place chosen by the sending State, provided the receiving State does not object."²¹⁰

(12) The Special Rapporteur considers the text proposed by the Netherlands Government reads more smoothly than the Commission's paragraph 1. Nevertheless, the Commission, considering that such a text would not offer sufficient security to the Government of the receiving State, did not adopt that wording when it prepared the draft articles. The Commission might reconsider this question.

(13) Accordingly, the Special Rapporteur considers that:

(a) The question of the wording of article 13, paragraph 1, has been raised; the Commission must decide to adopt one of two solutions — the existing text or the wording proposed by the Netherlands Government;

(b) The amendment of the commentary will depend on whether or not the Netherlands Government's proposal is adopted; if it is adopted, a new paragraph 6 would be added to the commentary;

(c) It is not necessary to amend the text for drafting reasons;

(d) The very delicate question dealt with in this provision should be governed by a generally compulsory rule which is flexible only to the extent that it permits a prior agreement between the receiving State and the sending State.

Article 14.²¹¹ — Nationality of the head and the members of the special mission and of members of its staff

1. The head and members of a special mission and the members of its staff should in principle be of the nationality of the sending State.

2. Nationals of the receiving State may not be appointed to a special mission except with the consent of that State, which may be withdrawn at any time.

3. The receiving State may reserve the right provided for in paragraph 2 with regard to the nationals of a third State who are not also nationals of the sending State.

²¹⁰ *Ibid.*

²¹¹ Introduced as article 13 of Special Rapporteur's first report (A/CN.4/166). Discussed at the 763rd meeting of the Commission. Drafting Committee's text discussed and adopted at the 770th meeting. Commentary adopted at the 774th meeting.

Commentary

(1) Article 14 corresponds to article 8 of the Vienna Convention on Diplomatic Relations.

(2) In 1960 the International Law Commission did not consider it necessary to express an opinion on the question whether the rules concerning the nationality of diplomatic agents of permanent missions should also apply to special missions. It even formulated the rule that the relevant article of its 1958 draft — article 7 — did not apply directly to special missions.²¹²

(3) The relevant literature, on the other hand, does not consider it impossible for nationals of a country to be admitted by that country as members of special missions, but stresses that the problem has been dealt with differently by various countries at various times.²¹³

(4) In the Commission's view, there is no reason why nationals of the receiving State should not be employed as *ad hoc* diplomats of another State, but for that purpose, the consent of the receiving State has to be obtained.

(5) Apart from the question whether a national of the receiving State can perform the functions of *ad hoc* diplomat of another State, the problem arises whether an *ad hoc* diplomat must possess the nationality of the State on whose behalf he carries out his mission. Here again, the International Law Commission expressed no opinion in 1960. Recent practice shows that nationals of third States, and even stateless persons, may act as *ad hoc* diplomats of a State, although some members of the Commission held it to be undesirable that they should do so. Practical reasons sometimes make it necessary to adopt this expedient, and in practice it is for the receiving State alone to decide whether or not such persons should be recognized as *ad hoc* diplomats.

(6) The Commission has not specifically referred in the text to the possibility that the head of a special mission or one of its members or staff might have dual nationality. It believes that, in the case of a person who also possesses the nationality of the receiving State, that State has the right, in accordance with the existing rules on nationality in international law and with the practice of some countries, to consider such a person on the basis of the characterization theory, exclusively as one of its own nationals. In most States, the idea still prevails that nationality of the receiving State excludes any other nationality, and the argument that effective nationality excludes nominal nationality is not accepted in this case. The case of a person possessing more than one foreign nationality is juridically irrelevant, since it would be covered by paragraph 3 of this article.

(7) The Commission has also not considered whether persons possessing refugee status who are not natives of the receiving State can be employed, without the special approval of the receiving State, as heads or members of special missions or of their staffs.

(8) As regards nationals of the receiving State engaged locally by the special mission as auxiliary staff, and persons

²¹² *Yearbook of the International Law Commission, 1960, vol. II, pp. 179-180.*

²¹³ Sir Ernest Satow, *A Guide to Diplomatic Practice*, 4th edition, London, 1957, pp. 138-141.

having a permanent domicile in its territory, the Special Rapporteur believes that they should not be subject to the provisions of this article, but rather to the régime applicable in this respect under the domestic law of the receiving State. The Commission did not deem it necessary to adopt a special rule on the subject.

(9) Nor did the Commission express any views on the question whether, in this respect, aliens and stateless persons having a permanent domicile in the territory of the receiving State should be treated in the same way as nationals of that State.

New suggestions by Governments

(10) The comments by the Swedish Government include two proposals for the amendment of article 14. The first of these proposals is as follows:

The term "should in principle" is too vague. Paragraph 1 of the article could well be omitted.²¹⁴

(11) In the Special Rapporteur's opinion, the Commission was right to include in article 14, paragraph 1, of the draft on special missions, a provision corresponding to article 8, paragraph 1, of the 1961 Vienna Convention on Diplomatic Relations. It was right, as regards substance, too, since both these provisions express a general rule, subject to the exceptions referred to in the subsequent paragraphs, that members of a mission should in principle be of the nationality of the sending State. Consequently, the Special Rapporteur does not consider this comment justified.

(12) The Swedish Government's second proposal is that:

If the articles of the draft are given only a subsidiary character, paragraph 3 could also be omitted.²¹⁵

(13) The Special Rapporteur considers that the Commission was right to introduce this paragraph from article 8, paragraph 3, of the 1961 Vienna Convention on Diplomatic Relations. The question often arises, even as regards its substance. At the Vienna Conference, however, the Scandinavian States opposed this provision, although it proved generally acceptable.

(14) Accordingly, the Special Rapporteur considers that:

(a) The present text should be adhered to, and the Swedish Government's proposal for the deletion of this article and for the elimination of the restrictions concerning the nationality of the members and staff of special missions should not be adopted. This article is very flexibly worded and does not include any categorical rule; it only ensures the receiving State that the special mission sent to it will not include its own nationals or nationals of third States against its wish;

(b) The opinion of the Swedish Government should be clearly stated in the commentary for the information of other Member States;

(c) To improve the drafting, in paragraph 1 the words "The head and members of a special mission and the

members of its staff" should be replaced, in accordance with the spirit of the introductory article, by the words "The members and staff of the special mission";

(d) This provision should be a generally compulsory rule, but in substance it gives the receiving State wide discretion.

Article 15.²¹⁶ — Right of special missions to use the flag and emblem of the sending State

A special mission shall have the right to display the flag and emblem of the sending State on the premises of the mission, on the residence of the head of the mission and on the means of transport of the mission.

Commentary

(1) Article 15 is modelled on article 20 of the Vienna Convention on Diplomatic Relations.

(2) The Commission reserves the right to decide at a later stage whether article 15 should be placed in the section of the draft dealing with general matters or in the special section concerning facilities, privileges and immunities.

(3) In 1960, the International Law Commission recognized the right of special missions to use the national flag of the sending State upon the same conditions as permanent diplomatic missions.²¹⁷ In practice, the conditions are not identical, but nevertheless there are some instances where this is possible. The Commission's Special Rapporteur, Mr. Sandström, cited the case of the flying of the flag on the motor vehicle of the head of a ceremonial mission. During the discussion which took place in the Commission in 1960, Mr. Jiménez de Aréchaga expressed the view that all special missions (and not only ceremonial missions) have the right to use such flags on the ceremonial occasions where their use would be particularly appropriate.²¹⁸

(4) Current practice should be based on both a wider and a narrower approach: wider, because this right is not restricted to ceremonial missions but depends on the general circumstances (e.g., special missions of a technical nature moving in a frontier zone and all special missions on certain formal occasions); and narrower, because this usage is now limited in fact to the most formal occasions or to circumstances which warrant it, in the judgement of the mission. In practice, however, such cases are held within reasonable limits, and the tendency is towards restriction.

(5) All the rules applicable to the use of the national flag apply equally to the use of the national emblem, both in practice and in the opinion of the International Law Commission.

²¹⁴ See *Yearbook of the International Law Commission, 1967*, vol. II, document A/6709/Rev.1, annex I.

²¹⁵ *Ibid.*

²¹⁶ Introduced as article 15 of Special Rapporteur's first report (A/CN.4/166). Discussed at the 763rd meeting of the Commission. Drafting Committee's text, numbered 14, discussed and adopted at the 770th meeting. Commentary adopted at the 774th meeting.

²¹⁷ *Yearbook of the International Law Commission, 1960*, vol. II, pp. 108 and 180.

²¹⁸ *Ibid.*, p. 116.

(6) In practice, some receiving States assert that they have the right to require that the flag of the sending State should be flown on all means of transport used by the special mission when it is travelling in a particular area. It is claimed in support of this requirement that measures to protect the special mission itself will be easier to carry out if the attention of the authorities of the receiving State is drawn by an external distinguishing mark, particularly in frontier security zones and military zones and in special circumstances. Some States, however, object to this practice on the grounds that it very often causes difficulties and exposes the special mission to discrimination. The Commission holds that this practice is not universally recognized and it has therefore not included a rule regarding it in the text of article 15.

New suggestions by Governments

(7) In its comments the Belgian Government expressed the opinion "that the solution adopted in article 20 of the Vienna Convention on Diplomatic Relations should prevail and that the emblem should be used only on the means of transport of the head of the mission".²¹⁹

(8) The Special Rapporteur's view is that there are practical reasons, such as travel in the territory concerned, which make it necessary, in the interests of both States and for the information of the general public, for special missions to make wider use of the emblem of the sending State. This does not apply to permanent diplomatic missions, for which the privilege can be confined to heads of mission.

(9) During the discussion in the Sixth Committee of the General Assembly, the Hungarian representative expressed the view that there was no need to retain draft article 15, which should be regarded as an instance of the rule that special missions are required to comply with the laws and regulations of the receiving State.²²⁰

(10) The Special Rapporteur considers that the right of special missions to use the flag and emblem of the sending State is a specific right which should be guaranteed to special missions and that, accordingly, the exercise of that right cannot be left entirely to the discretion of the receiving State. In paragraph (2) of its commentary on article 15, the Commission stressed that it "reserves the right to decide at a later stage whether article 15 should be placed in the section of the draft dealing with general matters or in the special section concerning facilities, privileges and immunities". The Special Rapporteur's view is that it would be preferable to leave article 15 in part I of the convention, but he could agree to its being transferred to part II, where it would precede the present article 18.

(11) The Netherlands Government's comments on article 15 are as follows:

Although in general there need not be any objection to using the flag in the manner laid down in this article, this article does not seem acceptable as a *jus cogens* rule in view of the diversity of the activities included under the term "special mission". The two

²¹⁹ See *Yearbook of the International Law Commission, 1967, vol. II, document A/6709/Rev.1, annex I.*

²²⁰ *Official Records of the General Assembly, Twentieth Session, Sixth Committee, 843rd meeting, para. 39.*

States concerned should be free in each case to deviate from this article by mutual agreement. Therefore it is suggested that the article open with the words: "*Except as otherwise agreed*".

The words "*when used on official business*" should be added to the phrase "and on the means of transport of the mission", in conformity with article 29, paragraph 2, of the 1963 Vienna Convention on Consular Relations. If it appears desirable in a certain contingency to display flag and emblem on vehicles even when the vehicles are not in official use, some agreement can always be reached on the matter.²²¹

(12) The Special Rapporteur considers that both proposals of the Netherlands Government are very reasonable and should be adopted, but the adoption of these proposals would in a way be a disavowal of the rule that the special mission has *ex jure* the right to use the flag and emblems of its State if the sending State and the receiving State do not reach agreement on this matter. The Special Rapporteur points out these possible consequences to the Commission and asks it to take them into consideration.

(13) Accordingly, the Special Rapporteur considers that:

(a) The question of the amendment of the text by the adoption of the Netherlands Government's proposal is left open;

(b) If the proposal is adopted, a corresponding statement should be added to the commentary;

(c) It is not necessary to amend the text for drafting reasons;

(d) Even if the Netherlands Government's amendment permitting the question to be regulated by mutual agreement is adopted, the provision should be of a generally compulsory nature. It will be so *a fortiori* if this amendment is not adopted;

(e) As to whether this article should be included in part I or part II of the draft articles, there are arguments on both sides. The argument for retaining this article in part I is that it concerns a condition relating to the functioning of special missions, and the argument for its transfer to part II is that it concerns a privilege of special missions. The Special Rapporteur is rather inclined to adopt the first view.

Article 16.²²² — Activities of special missions in the territory of a third State

1. Special missions may not perform their functions in the territory of a third State without its consent.

2. The third State may impose conditions which must be observed by the sending State.

Commentary

(1) There is no corresponding rule in the Vienna Convention on Diplomatic Relations, but article 7 of the Vienna

²²¹ See *Yearbook of the International Law Commission, 1967, vol. II, document A/6709/Rev.1, annex I.*

²²² Introduced as article 14 of Special Rapporteur's first report (A/CN.4/166). Discussed at the 763rd meeting of the Commission. Drafting Committee's text, numbered 15, discussed and adopted at the 770th meeting. Commentary adopted at the 774th meeting.

Convention on Consular Relations of 1963 provides that a consular post established in a particular State may not exercise consular functions in another State if the latter objects.

(2) Very often, special missions from different States meet and carry on their activities in the territory of a third State. This is a very ancient practice, particularly in the case of meetings between *ad hoc* missions or diplomats belonging to States which are in armed conflict. The International Law Commission did not take note of this circumstance in 1960; nor have writers paid much attention to it, but some of them do mention it, particularly where the contact takes place through the third State. Whether or not the third State engages in mediation or extends its good offices, courtesy undoubtedly requires that it should be informed, and it is entitled to object to such meetings in its territory.

(3) Thus, the States concerned are not entitled to make arbitrary use of the territory of a third State for meetings of their special missions, if this is contrary to the wishes of that State. However, if the third State has been duly informed and does not express any objection (its formal consent is not necessary), it has a duty to treat special missions sent in these circumstances with every consideration, to assure them the necessary conditions to carry on their activities, and to offer them every facility, while the parties concerned, for their part, must refrain from any action which might harm the interests of the third State in whose territory they carry on their activities.

(4) In practice, the prior approval of the third State is often simply a matter of taking note of the intention to send a special mission to its territory (such intention may even be notified orally). If the third State makes no objection to the notification and allows the special mission to arrive in its territory, approval is considered to have been given.

(5) The Commission regards as correct the practice of some States—for example, Switzerland during the war—in imposing certain conditions which must be observed by parties sending special missions. The duty to comply with these conditions is without prejudice to the question whether, objectively, the mission's activities are considered to be prejudicial to the interests of the third State in whose territory they are carried on.

(6) A question which arises in practice is whether the third State must not only behave correctly and impartially towards the States whose missions meet in its territory by according them equal treatment, but must also respect any declarations it may itself have made in giving its prior approval. Since such approval can be given implicitly, it must be considered that a third State which goes even further by taking note, without objection, of a request for permission to use its territory is, in accordance with the theory of unilateral juridical acts in international law, bound by the request of the parties concerned, unless it has made certain reservations.

(7) Intercourse between a special mission of one State and the permanent diplomatic mission of another State accredited to the receiving State must be accorded the same treatment as the intercourse and activities of special missions in the territory of the third State. Such contacts

are frequent, and they are referred to by legal writers as irregular means of diplomatic communication. They make direct intercourse possible between States which do not maintain mutual diplomatic relations, even when the States concerned are in armed conflict.

(8) The right of the third State, at any time and without being obliged to give any reason, to withdraw its hospitality from special missions in its territory and to prohibit them from engaging in any activity is recognized. In such cases, the sending States are obliged to recall their special missions immediately, and the missions themselves are required to cease their activities as soon as they learn that hospitality has been withdrawn. The exercise of this right by the third State does not mean that diplomatic relations with the States in question are broken off or that the head of the mission or its members are declared *persona non grata*. It merely means that the third State's consent to the activities of special missions in its territory has been revoked. The Commission held that article 16, paragraph 1, was sufficient and that the word "consent" means that the consent of the third State continues to be required throughout the period during which the activities of the special missions of the other States are taking place.

New suggestions by Governments

(9) The Government of Israel comments as follows:

Although the right of the "third State" concerned to withdraw its consent appears to be implied in the wording of article 16, paragraph 1, it may be preferable to accord such an important eventuality a separate paragraph (on the lines of paragraph (8) of the commentary on that article), which could at the same time provide for an express agreement to the contrary:

"3. Unless otherwise agreed between the third State and the sending States concerned, the third State may at any time, and without being obliged to give any reason, withdraw its hospitality for special missions in its territory and prohibit them from engaging in any activity. In such a case, the sending States shall recall their respective special missions immediately, and the missions themselves shall cease their activities as soon as they are informed by the third State that hospitality has been withdrawn."²²³

(10) The Special Rapporteur reminds the Commission that he put forward the same idea in his second report and proposed that it be incorporated in the text of the article. He accordingly supports the proposal.

(11) The Government of Israel also proposes that certain changes should be made in article 16, paragraph 2. Its proposal is as follows:

With regard to article 16, paragraph 2, it is suggested to use the expression "the sending States", as obviously there must be more than one "sending State".²²⁴

(12) The Special Rapporteur accepts this proposal, as it would bring the English text into line with the French, which is his original text.

(13) The Belgian Government made a comment on this article and also proposes a new draft. Its comment reads:

²²³ See *Yearbook of the International Law Commission, 1967*, vol. II, document A/6709/Rev.1, annex I.

²²⁴ *Ibid.*

From the point of view of substance, a fundamental question arises, namely, whether the convention will apply in this case or whether on the contrary this article forms a separate entity.

In other words, is the situation with which it deals regulated solely by the terms of the conditions imposed by the host State or is the host State bound by the fact of its consent to apply the articles of the convention, and in particular those which concern privileges and immunities? In the latter case, to what extent can the conditions imposed by the third State derogate from the provisions of the convention?

From the point of view of drafting, it would be desirable to specify that the consent must be prior and may be withdrawn at any time. The text might therefore be amended to read as follows:

"1. Special missions may not perform their functions on the territory of a third State without its prior consent.

"2. The third State may impose conditions which must be observed by the sending State.

"3. The third State may at any time and without having to explain its decision, withdraw its consent."²²⁵

(14) The Special Rapporteur's view is that the draft proposed by the Belgian Government is an oversimplification. He prefers the wording proposed by the Government of Israel and reproduced above.

(15) In his statement to the Sixth Committee of the General Assembly, the Hungarian representative made suggestions similar to those of the Governments of Israel and Belgium, namely that the substance of paragraph (3) of the commentary on article 16 should be incorporated in the text of the article itself.²²⁶ As he has already explained when discussing these proposals, the Special Rapporteur is in favour of this idea.

(16) Accordingly, the Special Rapporteur considers that:

(a) A new paragraph 3 in the terms proposed by the Government of Israel should be added to the text of article 16;

(b) If the proposal of the Government of Israel is adopted, the text of paragraph (8) of the commentary should be amended;

(c) It is not necessary to amend the text for drafting reasons. This applies also to the text of paragraph 3 proposed by the Government of Israel;

(d) The provisions of this article contain certain legal rules which should be compulsory in the practice of international relations.

PART II. FACILITIES, PRIVILEGES AND IMMUNITIES²²⁷

General considerations

314. In the literature, in practice, and in the drafting of texts *de lege ferenda* on the law relating to *ad hoc* diplomacy, apart from matters of rank and etiquette, special attention has been given to the question what facilities, privileges and immunities are enjoyed by *ad hoc* diplomacy. Even on this fundamental question, however, opinions are not unanimous. While the drafts of

proposed rules (Institute of International Law, London, 1895; International Law Association, Vienna, 1924; Sixth International Conference of American States, Havana, 1928; International Law Commission of the United Nations, Geneva, 1960) all agree that *ad hoc* diplomacy has in the past been entitled to privileges by legal custom, and should in the future be entitled to them under a law-making treaty, the literature and the practice are still uncertain about the question whether such privileges attach to *ad hoc* diplomacy as of right or by virtue either of the comity of nations or of mere courtesy. One school of thought goes so far as to assert that the recognition of this legal status in the case of *ad hoc* diplomacy rests entirely on the goodwill of the receiving State or even, perhaps, on mere tolerance.

315. The question of the legal right of *ad hoc* diplomacy to the enjoyment of facilities, privileges and immunities is, of course, one of substance. It arises, perhaps, more in connexion with the consequences which may result in the rare cases where they are denied or refused than in regular practice. So long as they are granted, no one asks on what grounds; but if they are refused, the first question which arises is on what basis and to what extent the diplomat in question had any right to them. At the same time a further question arises: does this right attach to the *ad hoc* diplomat himself or to his State? For this reason, the Special Rapporteur feels obliged to consider all the arguments relating to the grounds on which the juridical status of *ad hoc* diplomacy is based. He will begin with those which he considers least sound and will emphasize, in the case of each, the following points: the obligation of the receiving State, the right of the *ad hoc* diplomat, and the right of the sending State.

316. If mere tolerance is taken as the basis, the whole structure becomes precarious. In this case, the *ad hoc* diplomat has no right to the enjoyment of facilities, privileges and immunities. Indeed, the receiving State may at any time declare or avow that no such tolerance exists (although some authorities maintain that it must be presumed to exist until such time as the receiving State expresses a contrary intention) or, if it has been practised in the past, whether in general or in a specific instance, that it may be discontinued. According to this view, in other words, the receiving State has no obligation in this respect towards an *ad hoc* diplomat, and the latter has no ground for asserting his rights against the receiving State. In these circumstances, the sending State can clearly have no legal authority either to demand the enjoyment of such privileges or to protest against their denial. All it can do in such a case is to make political representations or objections, according to the benefit or the harm which might accrue to good and smooth international relations through such action.

317. As will be indicated below, the Special Rapporteur has no hesitation in rejecting this theory summarily, since it is not in conformity with the principles essential to the maintenance of international relations—respect for State sovereignty and the establishment of conditions ensuring the normal functioning of the special mission assigned to the *ad hoc* diplomat and the latter's freedom and security.

²²⁵ *Ibid.*

²²⁶ *Official Records of the General Assembly, Twentieth Session, Sixth Committee, 843rd meeting, para. 40.*

²²⁷ Title adopted at the 819th meeting.

318. The case is similar, though by no means identical, if the enjoyment of these privileges by an *ad hoc* diplomat is based on the goodwill of the receiving State. In this event the goodwill displayed—provided that the other party has been notified of it—at least constitutes an autonomous source of public international law which may be invoked by foreigners and by foreign States. This is an action by the receiving State falling within the category of unilateral juridical acts under public international law.²²⁸ Consequently, a State is obliged to keep such unilateral promises, at least for so long as the *ad hoc* diplomats with respect to whom the sending State has been notified that such goodwill exists, in the form of a unilateral act, remain in its territory. This does not mean that a unilateral promise of this kind could not have been revoked, but such revocation would have no effect on situations already created and established; at the very most, it could be binding only for future cases.

319. Thus an *ad hoc* diplomat may invoke a promise made by unilateral act, whether or not he or his State has been notified of the act. Similarly, the sending State has the legal right to demand the fulfilment of the unilateral promise.

320. The Special Rapporteur must reject this theory also, even though it is less stringent than that of mere tolerance. His reasons for doing so are the same as in the preceding case. Nevertheless, he is prepared to accept, at least in part, the application of the theory of the unilateral goodwill of the receiving State, though only in cases where a unilateral promise of the kind referred to improves the conditions of *ad hoc* diplomacy, and to the extent that it does so effectively by granting to the latter more than is necessary to conform to the principles essential to the maintenance of international relations, mentioned above, and to existing juridical customs in the matter (although there is some doubt as to their true significance). A sovereign State may grant to other States more than the minimum it is obliged to grant under positive international law, but it may not wilfully deny them this minimum.

321. The theory of courtesy does not differ in any respect from the foregoing. In this case also, it depends on the goodwill of the State whether the rules of courtesy should be applied, and to what extent. There is, however, a shade of difference in the way this goodwill is formed. Convenience is not the sole criterion, as in the preceding case (para. 318). Here again, the receiving State acts in accordance with its own notions of courtesy, which usually tell it that courtesy is obligatory, at least between States maintaining good relations with each other. In this case, however, there is a presumption of reciprocal observance of the rules of the comity of nations, and a presumption of the right of the receiving State not to apply those rules if its expectations of reciprocity are not fulfilled.

322. The Special Rapporteur believes that in this instance both the *ad hoc* diplomat and the sending State may demand the enjoyment of facilities and privileges, and if they are denied, may challenge this breach of the rules

of courtesy by protesting in moderate terms. In the view of the Special Rapporteur, such demands and protests would be of a purely diplomatic nature. Considerations of law may enter in two cases, namely:

(a) If the other State grants the same privileges in its own territory to *ad hoc* diplomats of the receiving State. Where this is the case, the sending State may consider that the reciprocal granting of privileges has established a *modus vivendi* and that the two States, by practice, have adopted the rule *do ut des*; consequently, the denial of such privileges is regarded as an infringement of the *modus vivendi* and a breach of the duty to requite what has been received. In this instance, the State whose diplomat has not been allowed such privileges is entitled to demand its due by legal means;

(b) If the receiving State does not give identical treatment, from the standpoint of courtesy, to all the *ad hoc* diplomats of various States. In this case, the legal ground for complaint and protest is not a breach of the rules of courtesy, but a violation of the general principle of non-discrimination.²²⁹ In this case, however, the sending State must offer the same facilities (principle of reciprocity) since, according to the general principle, there is no discrimination if the State does not grant to other States the privileges which it claims for itself.

323. The Special Rapporteur believes that this system also is unacceptable in principle. One can speak of courtesy only if the range of facilities is to be extended, whereas the basic facilities are granted *ex jure*, and not by the comity of nations.

324. A superior basis would be a bilateral treaty between the States concerned, and this is undoubtedly the juridical basis frequently applied in this connexion. However, the agreements of this kind known to the Special Rapporteur are either very brief (containing references to the general rules of diplomatic law on facilities, privileges and immunities) or very specific, in which case they lay down the particular powers given to the special missions or itinerant envoys in question (for instance, an agreement between Italy and Yugoslavia on the joint use of an aqueduct having its sources in Yugoslav territory and administered by the Yugoslav State specifies the rights of the Italian inspectors in the performance of their functions; many bilateral conventions providing for the linking of electricity supply systems specify the rights of delegates of the respective States with respect to checking the quality and quantity of the electric power, etc.). There thus arise two series of legal questions, namely:

(a) What is meant by the right of *ad hoc* diplomacy to the enjoyment of diplomatic facilities, privileges and immunities? Does it mean the right to a status identical with, or similar to, that of permanent missions? In the view of the Special Rapporteur, it simply implies the application to *ad hoc* diplomacy by the States concerned of the general treatment given in principle to resident diplomacy. The whole matter, however, even in a case

²²⁸ Eric Suy, *Les actes juridiques unilatéraux en droit international public*, Paris, 1962.

²²⁹ This principle was adopted as applying to diplomatic law in the Vienna Convention on Diplomatic Relations, 1961, and its applicability to *ad hoc* diplomacy was envisaged by the International Law Commission in its draft rules on special missions.

explicitly provided for in a treaty, depends on the nature of the special mission's functions.

(b) Where the treaty grants specific exceptional rights to the special missions without mentioning the general code of treatment, does this mean that the special missions enjoy only the rights provided in the treaty, and not other rights also? The Special Rapporteur's view is that in this case the special missions, in addition to being covered by the normal rules relating to the status of diplomats, enjoy facilities which are not the customary rule but are essential to the performance of their assignment.

325. The Special Rapporteur believes that in either case both the *ad hoc* diplomat and the sending State are entitled to demand of the receiving State *ex jure* the application of the rules on facilities, privileges and immunities which are valid for *ad hoc* diplomacy and, in addition, of the provisions specifically laid down in the agreement. This, however, leaves unresolved the main question what these general rules are and what their scope is by analogy to the rules governing the treatment of the head and members of a permanent diplomatic mission. Thus, there is a certain vagueness about this whole question.

326. There still remains the fundamental question—what is the general legal custom (since codified rules are as yet lacking) with regard to the legal status of *ad hoc* diplomacy as regards the enjoyment of facilities, privileges and immunities? On this point theory, practice and the authors of the draft for the future regulation of this question agree. The International Law Commission took as its starting-point the assumption that *ad hoc* missions, being composed of State representatives, are entitled to diplomatic privileges and immunities.²³⁰ This, however, does not answer the question; for it has not yet been determined, either by the Commission or in practice, precisely to what extent *ad hoc* diplomacy enjoys these diplomatic facilities. The Commission itself wavered between the application of the *mutatis mutandis* principle and the direct (or analogous) application of the rules relating to permanent diplomatic missions. In any event, before a decision can be reached further studies will be needed, in order either to codify the undetermined and imprecise cases of application in practice (e.g., topics which are not yet ripe for codification) or to apply, by means of rational solutions, the method of the progressive development of international law.

327. Whichever course is adopted, however, the method of approach must be decided upon. What notion should be followed—the theory of representation or the functional theory?

328. The representative nature of diplomacy in general, which was recognized in the Vienna Regulation (1815)²³¹ in the case of ambassadors, has lost all significance with the passage of time. The Head of State is no longer the absolute repository of the diplomatic capacity of his

State. Democratic methods of State administration, irrespective of the forms of democracy, link the process of representation of the State in international relations to the constitutional order of the sending State. Diplomats represent the State, not the Head of State. The Vienna Convention on Diplomatic Relations (1961) therefore rejected any idea of the representative nature of resident diplomacy. It would be logical to assume that, if this is so in the case of permanent missions, it must be even more so in the case of *ad hoc* missions. The Special Rapporteur considers that this is correct in principle, but here again the notion of relativity in legal matters re-emerges, for there is no rule without an exception. Special ambassadors appointed for certain ceremonial or formal missions would be the exception. Although, even in these cases, it is increasingly clear that all acts are performed on behalf of the State, and not on behalf of the Head of State, there still remain vestiges of the former representative nature of such special ambassadors, and this is reflected, in the law, in certain norms of custom and protocol. As an increasing number of *ad hoc* missions have come to perform essentially political or technical tasks, however, the approach based on representation can no longer serve to determine the extent of the diplomatic facilities granted to *ad hoc* diplomats.

329. On the other hand, the functional theory of privileges and immunities adopted at the Vienna Conference (1961) as the starting-point for understanding and determining the status of resident diplomacy, together with the similar notion applied in the Convention on the Privileges and Immunities of the United Nations (1946) and the Convention on the Privileges and Immunities of the Specialized Agencies, indicate the correct approach to determining the extent of the facilities which the receiving State is legally obliged to grant to special missions and itinerant envoys. These represent the sovereign State, its dignity and its interests. They perform certain specific tasks on behalf of that State, and they should enjoy all the guarantees they need in order to carry out, freely and without hindrance, the mission entrusted to them. For this reason, the receiving State is required to give them all the facilities appropriate to their mission and to grant them all the privileges which are conferred on such representatives of the sending State and all the guarantees and immunities without which a mission of this kind could not be accomplished in a free and normal manner. All these privileges and facilities, however, are not granted by the receiving State to *ad hoc* diplomats in their personal capacity; they are enjoyed by them only because this assists them in the discharge of their duties and is necessary to their State. Thus according to the functional theory there is a direct juridical relation between the receiving State and the sending State. It is only by reflection that *ad hoc* diplomats enjoy such rights and privileges, their status depending on the rights which belong to their State and on the latter's willingness to ensure their enjoyment of them (the State is entitled to waive the immunity enjoyed by the *ad hoc* diplomat, since such immunity attaches to the State and not to the diplomat in question).

330. Thus, there is a general legal rule concerning the duty to grant facilities, privileges and immunities to

²³⁰ See the working paper on special missions prepared by the United Nations Secretariat, document A/CN.4/155, para. 11, in *Yearbook of the International Law Commission, 1963*, vol. II.

²³¹ The text of the Regulation of Vienna is quoted in the *Yearbook of the International Law Commission, 1957*, vol. II, p. 135, foot-note 6.

ad hoc diplomacy; but in view of the functional basis on which this legal custom is applied, there is a need to draft legal rules specifying to what extent and in what circumstances the enjoyment of such rights is necessary to *ad hoc* diplomacy, for the rules at present in existence are imprecise and the criteria are vague.

331. In presenting this argument, the Special Rapporteur believes that he has provided guidelines for a substantially correct solution. The juridical nature of these privileges, the legal relationship between States in matters affecting their mutual respect, is the linking of these privileges to function in international relations, and the effect of these rules *ex lege* and *ipso facto*, are the criteria on which the study and determination of the particular forms of facilities, privileges and immunities applicable to *ad hoc* diplomacy should be founded.

New suggestions by Governments

332. During the discussion in the Sixth Committee of the General Assembly, the Indian representative took his stand on the principle that the privileges and immunities of officials of special missions should be based not on formal criteria, but on "functional necessity." He expressed the fear that undue expansion of the categories of functionaries of special missions on whom diplomatic immunity and privileges were conferred might put them on an equal footing with permanent diplomatic missions and thus lead to many irritating situations and problems. In his opinion, that could be avoided without adversely affecting the functioning of special missions.²³²

333. The representative of Nigeria also pointed out that privileges and immunities should be granted to members of special missions on the basis of their functions and not of their personal status.²³³

334. The Special Rapporteur takes these two comments as evidence of a trend against granting officials of special missions the same legal status as members of permanent diplomatic missions, and points out that in the introduction to his first report he himself, unlike the majority of the Commission, was inclined to give precedence to the functional character of special missions rather than the representative character. As other States have not opposed the view of the majority, the Special Rapporteur does not consider it possible to abandon the system adopted by the Commission. Nevertheless, he feels bound to stress that these comments are such as to require the Commission to take a position on the matter: if the Commission changes its former opinion, it will be necessary to revise a whole series of provisions.

335. The Swedish Government devoted special attention to this question in its comments. Its main point is that the number of persons who will enjoy privileges and immunities in their capacity as members of special missions should be taken into account. The Swedish delegation advanced this opinion during the discussion in the Sixth Committee of the General Assembly, and

maintained it as a general remark in its written comments. This remark reads as follows:

During the discussion of the Commission's report in the Sixth Committee, at the twentieth session of the General Assembly, the Swedish delegate, in a speech on 8 October 1965, drew attention to the problem of granting immunities and privileges to a great number of people. He pointed out that this problem arises in connexion with special missions, and he continued:

"While the great quantity of these missions makes a codification desirable, it also makes it difficult, for immunities and privileges granted to a few may not meet insurmountable obstacles, but the same immunities and privileges given to many may cause a real problem.

"Now, as Professor Bartoš demonstrated in his first report on the subject, a great many kinds of special missions would come under the new régime: political, military, police, transport, water supply, economic, veterinary, humanitarian, labour-recruiting and others. Consequently, a great many persons would be immune from jurisdiction, would enjoy exemption from Customs control and duties, etc. This group of persons would be further widened at a later stage, when rules in the same vein were introduced for delegates to conferences convened by governments or international organizations. Yet, we know that in many countries the public and parliament already complain of the present extent of immunity and privileges. A wide extension would surely meet some resistance. Of course, to the extent that such widening is functionally indispensable, we must try to achieve its acceptance and persuade the opponents it will meet. However, it would seem highly desirable that the Commission should seek some means of reducing the circle of missions which would fall under the special régime or else of limiting the privileges and immunities granted. It is appreciated that there are great difficulties in distinguishing between missions. Diplomatic or non-diplomatic status cannot alone be decisive; a mission consisting of a minister of defence and generals sent to negotiate military co-operation may have as great a functional need to be under the special régime as a diplomatic delegation sent to negotiate a new trade agreement. Yet it may possibly be said that special missions, which by definition are *temporary*, generally have a somewhat more limited need, at least for privileges, than do permanent missions. In a great many cases the express agreement to send and receive a special mission may also be a guarantee that the receiving State will in all ways spontaneously facilitate the task of the mission, a guarantee that does not necessarily exist for permanent missions."²³⁴

336. The Swedish Government is of the opinion that great care should be taken to limit privileges and immunities as much as possible, both with respect to their extent and with respect to the categories of persons who would enjoy them. This is regarded as particularly important if it is the intention that a considerable part of the provisions regarding privileges and immunities shall be peremptory.

Article 17.²³⁵ — General facilities

The receiving State shall accord to the special mission full facilities for the performance of its functions,

²³² *Official Records of the General Assembly, Twentieth Session, Sixth Committee, 846th meeting, para. 5.*

²³³ *Ibid.*, 847th meeting, para. 17.

²³⁴ This statement was made at the 844th meeting of the Sixth Committee of the General Assembly, the records of which are published in summary form.

²³⁵ Introduced as article 17 of Special Rapporteur's second report (A/CN.4/179). Discussed at the 804th meeting of the Commission. Drafting Committee's text discussed and adopted at the 817th meeting. Commentary adopted at the 820th meeting.

having regard to the nature and task of the special mission.

Commentary

(1) This article is based on article 25 of the Vienna Convention on Diplomatic Relations.

(2) Proceeding from the fundamental idea that the facilities due to special missions depend on the nature, task and level of the special mission in question, the Commission considers that what must be ensured is the regular functioning of special missions with due regard to their nature and task. The Commission has not adopted the view expressed in 1960 that, in this respect, all the provisions applicable to permanent diplomatic missions should be applied to special missions. It was inclined to follow the fundamental idea underlying the resolution adopted by the Vienna Conference on Diplomatic Intercourse and Immunities,²³⁶ namely, that the problem of the application of the rules governing permanent missions to special missions deserves detailed study. This means that the application of these rules cannot be uniform and that each case must be considered separately.

(3) It is undeniable that the receiving State has a legal obligation to provide a special mission with all facilities necessary for the performance of its functions. In the literature, this rule is generally criticized on the ground that it is vague. The Commission is convinced that its content changes according to the task of the mission in question, and that the facilities to be provided by the receiving State vary. Consequently, the assessment of the extent and content of the above-mentioned obligation is not a question of fact; the obligation is an *ex jure* obligation, whose extent must be determined in the light of the special mission's needs, which depend on the circumstances, nature, level and task of the specific special mission. There remains the legal question whether the extent is determined fairly by the receiving State and thus matches what is due.

(4) The Commission is of the opinion that the difficulties which arise in practice are due to the fact that some special missions consider the receiving State obliged to provide them with all the facilities normally accorded to permanent diplomatic missions. The right approach is that of the States which offer to special missions only such facilities as are necessary, or at least useful, according to some objective criterion, for the performance of their task, whether or not they correspond to the list of facilities granted to permanent diplomatic missions as set forth in the Vienna Convention on Diplomatic Relations. Special missions may, however, in some exceptional cases, enjoy more facilities than permanent diplomatic missions, when this is necessary for the performance of their particular tasks, for example in the case of high-level special missions or frontier-demarcation special missions. This approach is consistent with the resolution on special missions adopted by the Vienna Conference on Diplomatic Intercourse and Immunities.

²³⁶ *United Nations Conference on Diplomatic Intercourse and Immunities, Official Records*, vol. II, document A/CONF. 20/10/Add.1, resolution I, p. 89.

New suggestions by Governments

(5) The Netherlands Government made a specific comment with a view to amending the text of article 17. This comment is as follows:

The last phrase "having regard to the nature and task of the special mission" has little or no effect on the general obligations of the receiving State described in the main clause of this article. In point of fact, the receiving State is also obliged "to have regard to the nature and task" of the permanent diplomatic or consular mission under the terms of article 25 of the 1961 Vienna Convention on Diplomatic Relations or under the terms of article 28 of the 1963 Vienna Convention on Consular Relations, even though the aforesaid phrase is not included in these two articles.

The fact that the functions discharged by special missions as distinct from those discharged by permanent diplomatic and consular missions are not necessarily in the interests of both the sending State and the receiving State prompts the placing in the present draft article of a somewhat different obligation on the receiving State with respect to special missions. Although maximum obligations, i.e. to provide full facilities, devolve upon the receiving State as regards permanent missions, the receiving State need only give a special mission the minimum of aid it requires to enable it to discharge its mission. The States concerned can always come to some agreement for each special case.

The Netherlands Government suggests that article 17 be amended to read:

"The receiving State shall accord to the special mission *such facilities as may be necessary* for the performance of its functions."²³⁷

(6) The Special Rapporteur considers that the phrase "having regard to the nature and task" is much more specific and more nearly satisfies the requirements of this kind of provision than the Netherlands Government supposes. The Special Rapporteur is particularly reluctant to endorse a wording which accords the receiving State the right to judge what may be necessary for the exercise of the functions of the special mission, without referring to the criteria by which it should decide that question.

(7) Accordingly, the Special Rapporteur considers that:

(a) The present text of article 17 should not be changed;

(b) There is no need to change the commentary, but the Netherlands Government's opinion should be noted in it;

(c) It is not necessary to amend the text for drafting reasons;

(d) The provision contained in this article embodies a fundamental idea and should be generally compulsory.

Article 17 bis. — Derogation by mutual agreement from the provisions of Part II

(1) The Government of Pakistan also made an observation concerning the general attitude towards special missions with regard to their facilities, privileges and immunities. It thinks that it would be advantageous to insert in article 17 a paragraph reading as follows:

The facilities, privileges and immunities provided for in Part II of these Articles, shall be granted to the extent required by these

²³⁷ See *Yearbook of the International Law Commission, 1967*, vol. II, document A/6709/Rev.1, annex I.

Articles, unless the receiving State and the sending State agree otherwise.²³⁸

(2) The Special Rapporteur is of the opinion that it would be preferable to add to the draft articles a new article 17 *bis* which would contain the provision proposed by the Pakistan Government.

(3) This article should, of course, be construed as generally compulsory, since it contains a rule permitting States to make exceptions to the provisions laid down in the draft articles, if they so agree. At the same time, however, such exceptions will exist only if Governments have so agreed, and in the absence of agreement among themselves, they must adhere to the provisions laid down in these articles as the general rule.

Article 17 ter (new). — Difference between categories of special missions

Distinctions may be introduced, by mutual agreement, in the extent of the facilities, privileges and immunities granted to special missions, having regard to the different categories of special missions and to the conditions needed to ensure the regular functioning of these particular categories, so that all special missions between the same States need not necessarily be treated in the same manner, but may be treated according to their nature and within the limits laid down by agreement between the sending State and the receiving State.

Comments by the Special Rapporteur

(1) The Special Rapporteur proposes the above text in pursuance of the task entrusted to him by the Commission in the decision recorded in paragraph 61 of its report on the work of its eighteenth session. This decision is as follows:

The Commission gave attention to the comments by Governments on this point and in particular to the possibility of distinguishing between special missions of a political character and those which were of a purely technical character. The question thus arose whether it was not desirable to distinguish between special missions in respect of the privileges and immunities of members of missions of a technical character. The Commission reaffirmed its view that it was impossible to make a distinction between special missions of a political nature and those of a technical nature; every special mission represented a sovereign State in its relations with another State. On the other hand, the Commission concluded that there was some justification for the proposal by Governments that the extent of certain privileges and immunities should be limited in the case of particular categories of special missions. The Commission requested the Special Rapporteur to re-examine the problem, more particularly the question of applying the functional theory and the question of limiting the extent of certain privileges and immunities in the case of particular categories of special missions. The Commission instructed the Special Rapporteur to submit to it a draft provision on the subject which would provide *inter alia* that any limitation of that nature should be regulated by agreement between the States concerned.²³⁹

(2) The Special Rapporteur has also adopted the view that it would be incorrect to divide special missions into abstract categories, since special missions of the same

kind may need to be treated differently in the relations between different countries, such treatment depending on the mutual confidence of States rather than on abstract legal rules. The only abstract legal rule should be the requirement that regard should be had for the nature and task of the special mission and for the establishment of the conditions necessary for the performance of its functions.

Article 17 quater (new). — Status of the Head of State

1. The Head of State who leads a special mission of the sending State enjoys in the receiving State all the facilities, privileges and immunities which are accorded, under the rules of international law and international custom, to a Head of State on an official visit to the receiving State.

2. All persons forming part of a special mission which is led by a Head of State and the members of his suite shall enjoy all the facilities, privileges and immunities which are enjoyed in the receiving State by the diplomatic staff of permanent diplomatic missions accredited to that State and all the facilities, privileges and immunities which may be necessary for the performance of the tasks incumbent on the members of special missions.

Comments by the Special Rapporteur

(1) The status of the Head of State as an organ of international communication is based on legal customs which had their origin, in the past, in the fiction of extraterritoriality; today it is based on the full recognition of his personal immunity from the jurisdiction of the territorial State, and he is also accorded all the facilities and privileges, including the special honours, which are due, in international relations, to the Heads of foreign States. It should be noted that, in practice, the arrival of a foreign Head of State is generally preceded by a special informal agreement which determines more particularly the status of the Head of State during the time that he performs the functions of head of the special mission. Even in the absence of such an agreement, however, his status is determined, from the juridical point of view, by customary law.

(2) According to unanimous and universal practice, the suite of the Head of State and the members and staff of the special mission which he leads enjoy, by way of exception, all the facilities, privileges and immunities accorded to diplomatic representatives in the receiving country or to the diplomatic staff of permanent diplomatic missions. Nevertheless, where necessary, these persons may also invoke the provisions relating to special missions if these provisions are, in some situations, more favourable to them than the regular treatment accorded to members of the diplomatic corps.

(3) This provision was introduced into the draft articles because of the Commission's decision to limit the idea of draft articles on so-called high-level special missions to a provision concerning the status of the Head of State as head of the special mission. This decision, which is recorded in paragraph 69 of the Commission's report on its eighteenth session, is as follows:

²³⁸ *Ibid.*

²³⁹ *Yearbook of the International Law Commission, 1966*, vol. II, document A/6309/Rev.1, p. 276.

At its sixteenth session, the International Law Commission decided to ask the Special Rapporteur to submit at its next session articles dealing with the legal status of so-called high-level special missions, in particular special missions led by Heads of States, Heads of Governments, Ministers for Foreign Affairs, and Cabinet Ministers. In his second report (A/CN.4/179), the Special Rapporteur submitted to the seventeenth session of the Commission a set of draft provisions concerning so-called high-level special missions. The Commission did not discuss this draft at its seventeenth session, but considered whether special rules of law should or should not be drafted for so-called high-level special missions, whose heads hold high office in their States. It said that it would appreciate the opinion of Governments on this matter, and hoped that their suggestions would be as specific as possible. After noting the opinions of Governments, the Commission recommended the Special Rapporteur not to prepare draft provisions concerning so-called high-level special missions, to include in part II of the draft articles a provision concerning the status of the Head of State as head of a special mission, and to consider whether it was desirable to mention the particular situation of this category of special missions in the provisions dealing with certain immunities. The Special Rapporteur was, accordingly, instructed to undertake the necessary studies on this subject and to submit appropriate conclusions to the Commission.²⁴⁰

(4) The Special Rapporteur is opposed to the introduction of special provisions on high-level special missions which are not led by a Head of State. See his comments on this subject in chapter II, section 13, of this report.

Article 18.²⁴¹ — Accommodation of the special mission and its members

The receiving State shall assist the special mission in obtaining appropriate premises and suitable accommodation for its members and staff and, if necessary, ensure that such premises and accommodation are at their disposal.

Commentary

(1) This article is based on article 21 of the Vienna Convention on Diplomatic Relations.

(2) However, article 18 is not identical with the said article 21. The Commission is of the opinion that it is not necessary to provide that the State sending a special mission has in all cases the right to acquire land for the construction of accommodation for the special mission or to acquire the premises required for accommodating it, as is provided for by the corresponding provisions of the Vienna Convention in regard to regular, permanent diplomatic missions. The Commission considers that in this connexion it is sufficient to ensure the provision of accommodation for special missions, which are temporary in character.

(3) Special missions should, however, have their accommodation guaranteed and the accommodation should be adequate for the special mission in question. On this point, the same rules should in principle apply as in the case of permanent diplomatic missions. But it is

held that there is no obligation upon the receiving State to permit the acquisition of the necessary premises in its territory, a proposition which does not rule out the possibility—though this is an exceptional case—of some States purchasing or leasing the premises necessary for the accommodation of successive special missions which they send to the same country.

(4) The task of special missions may be such that they need more than one seat. This is clear from paragraph (5) of the commentary to article 13. In particular, cases occur in practice where either the special mission as a whole or a section or group of the mission has to travel frequently in the territory of the receiving State. Such travel often involves a swift change in the seat of the special mission or the arrival of groups of the special mission at specific places, and the mission's or group's stay in a particular locality is often very brief. These circumstances sometimes make it impossible for the sending State itself to arrange accommodation for its special mission or a section thereof. In this case, it is the authorities of the receiving State which arrange accommodation.

New suggestions by Governments

(5) The only comment on this article comes from the Netherlands Government. It is as follows:

When comparing the present article with article 21 of the 1961 Vienna Convention, we see that no mention is made in the present article of aid in the acquisition of land or buildings, an omission of which the Netherlands Government approves. On the other hand the present article is more categorical: assistance in obtaining accommodation for members of the staff is made obligatory under all circumstances, whereas in the second paragraph of article 21 of the Vienna Convention only "where necessary". The Netherlands Government sees no reason for this extension. The term "special mission" covers so many different situations that no general rule can be laid down to the effect that the receiving State should help any and every kind of special mission. The various diplomatic missions all have comparable functions, all of which are in the interests of both the sending State and the receiving State, but the functions of the special missions vary considerably and occasionally a special mission will fulfil a mission that is only in the interest of the sending State. Therefore it is suggested that paragraph 18 open with the words:

"Where necessary, . . ."²⁴²

(6) The Special Rapporteur considers the Netherlands Government's suggestion pertinent and a useful drafting amendment.

(7) Accordingly, the Special Rapporteur considers that:

(a) The amendment suggested by the Netherlands Government should be adopted;

(b) There should be some minor changes in the commentary to stress the idea of necessity brought out by the Netherlands Government's amendment;

(c) The text of this article, with the amendment suggested by the Netherlands Government, does not require any drafting changes;

(d) The provisions contained in this article should be compulsory unless Governments agree otherwise (see the discussion of article 17 *bis* above).

²⁴⁰ *Yearbook of the International Law Commission, 1966*, vol. II, document A/6309/Rev.1, p. 277.

²⁴¹ Introduced as article 18 of Special Rapporteur's second report (A/CN.4/179). Discussed at the 804th meeting of the Commission. Drafting Committee's text discussed and adopted at the 817th meeting. Commentary adopted at the 820th meeting.

²⁴² See *Yearbook of the International Law Commission, 1967*, vol. II, document A/6709/Rev.1, annex II.

Article 19.²⁴³ — Inviolability of the premises

1. The premises of a special mission shall be inviolable. The agents of the receiving State may not enter the premises of the special mission, except with the consent of the head of the special mission or of the head of the permanent diplomatic mission of the sending State accredited to the receiving State.

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

3. The premises of the special mission, their furnishings, other property used in the operation of the special mission and its means of transport shall be immune from search, requisition, attachment or execution by the organs of the receiving State.

Commentary

(1) This article is based on article 22 of the Vienna Convention on Diplomatic Relations. However, the text has had to be adapted to the requirements imposed by the nature and practice of special missions.

(2) In 1960 the Commission considered that in this matter the rules applicable to permanent diplomatic missions should also apply to special missions. The previous Special Rapporteur, in his first draft, had held that "the official premises of... a special mission... shall enjoy... inviolability...".²⁴⁴

(3) In 1965 the Commission took the view that the provisions of the Vienna Convention on Diplomatic Relations concerning accommodation should be applied to special missions, with due regard for the circumstances of such missions. It should also be noted that the premises of a special mission are often combined with the living quarters of the members and staff of the special mission.

(4) The offices of special missions are often located in premises which already enjoy the privilege of inviolability. That is so if they are located in the premises of the permanent diplomatic mission of the sending State, if there is one at the place. If, however, the special mission occupies private premises, it must equally enjoy the inviolability of its premises, in order that it may perform its functions without hindrance and in privacy.

(5) The Commission discussed the situation which may arise in certain exceptional cases where the head of a special mission refuses to allow representatives of the authorities of the receiving State to enter the premises of the special mission. It has provided that in such cases the Ministry of Foreign Affairs of the receiving State

may appeal to the head of the permanent diplomatic mission of the sending State, asking for permission to enter the premises occupied by the special mission.

(6) As regards the property used by the special mission, the Commission considers that special protection should be accorded to such property, and accordingly it has drafted paragraph 3 of this article in terms granting such protection to all property, by whomsoever owned, which is used by the special mission.

New suggestions by Governments

(7) In its comments, the Government of Israel proposes an addition to article 19, paragraph 1. The proposal reads as follows:

With regard to article 19, paragraph 1, it would appear desirable, from a practical point of view, to add to it a provision similar to the last sentence of article 31, paragraph 2 of the 1963 Vienna Convention: "Such consent may, however, be assumed in case of fire or other disaster requiring prompt protective action".²⁴⁵

(8) The Special Rapporteur points out that in his second report he considered the possibility of introducing, in the text itself, a provision similar to that of article 31, paragraph 2, of the Vienna Convention on Consular Relations, concerning the right of the head of the receiving State to assume the consent of the head of a consular post in case of fire or other disaster requiring prompt protective action. The Commission studied this question very carefully and decided that it should not adopt the relevant provision of the Convention on Consular Relations, but should take the same position in the draft articles on special missions as had been taken in the Vienna Convention on Diplomatic Relations.

(9) The Government of Israel also makes the following suggestion concerning article 19:

Consideration may, perhaps, be given to drawing a distinction between the case of a special mission residing in a town where the sending State has a permanent mission and that of a special mission in a town where there is no such permanent mission, and allowing the aforesaid proposition only in the former case.²⁴⁶

(10) The Special Rapporteur is not convinced that this is a useful proposal, because the respective powers of the head of the special mission and the head of the permanent diplomatic mission remain the same in both cases.

(11) The Belgian Government, in its comments, proposes an amendment to article 19, paragraph 3. Its proposal is as follows:

The words "by the organs of the receiving State" might be deleted; they do not appear either in article 22 of the Vienna Convention on Diplomatic Relations or in article 31 of the Vienna Convention on Consular Relations. Furthermore, the term used should be "measure of execution".²⁴⁷

(12) The Special Rapporteur points out that although, when the articles on special missions were being drafted, there was a tendency to model the text as closely as possible on the Vienna Conventions on Diplomatic

²⁴³ Paragraphs 1 and 2 introduced as article 19 of the Special Rapporteur's second report (A/CN.4/179). Discussed at the 804th and 805th meetings of the Commission. Drafting Committee's text discussed and adopted at the 817th meeting. Paragraph 3 introduced as article 24 of the Special Rapporteur's second report. Discussed at the 806th meeting of the Commission. Drafting Committee's text discussed and referred back to Drafting Committee at the 817th meeting. Re-submitted and adopted at the 820th meeting. Commentary adopted at the 820th meeting.

²⁴⁴ *Yearbook of the International Law Commission, 1960*, vol. II, p. 112.

²⁴⁵ See *Yearbook of the International Law Commission, 1967*, vol. II, document A/6709/Rev.1, annex I.

²⁴⁶ *Ibid.*

²⁴⁷ *Ibid.*

Relations and on Consular Relations, certain special conditions and circumstances in which the tasks of special missions are performed were nevertheless taken into account. That was why the Special Rapporteur and the Commission thought it necessary to make the text clearer by introducing the words whose deletion is suggested by the Belgian Government solely on the ground that they do not appear in the texts of the two Vienna Conventions.

(13) In its written comments, the United Kingdom Government also refers to the text of article 19 of the Commission's draft. It states:

Article 19. The United Kingdom Government observes that this article accords the property of special missions a wider protection than is given to diplomatic missions by the Vienna Convention in that property not on the premises of the mission other than means of transport is covered by the article. The United Kingdom Government doubts whether this distinction is justifiable on functional grounds.²⁴⁸

(14) The Special Rapporteur wishes to point out that the question raised in this comment was discussed by the Commission; it was noted that, in view of the nature of the special mission, the property of special missions was not always located on the premises of the special mission proper and that, precisely on functional grounds, it was necessary to provide constant protection for such property, contrary to the opinion expressed by the United Kingdom Government. The Special Rapporteur accordingly proposes that this comment should be disregarded.

(15) In its written comments, the Austrian Government expresses the view that article 19, paragraph 1, of the draft implies some conflict of competence between the head of the special mission and the head of the regular permanent diplomatic mission. It is not opposed to such a solution for the purpose of allowing agents of the receiving State access to the premises of the special mission, but believes that the case in question calls for some modification of the commentary on article 2 of the draft. This opinion of the Austrian Government is expressed as follows:

Article 19, paragraph 1:

This paragraph states that the agents of the receiving State may be allowed access to the premises (including grounds) of the special mission both by the head of the special mission and by the head of the permanent diplomatic mission. This suggests the conclusion that, by analogy, the question raised in paragraph (5) of the commentary to article 2 as to the relationship between the permanent diplomatic mission and the special mission should be settled by recognizing the continuing competence of the former.²⁴⁹

(16) The Special Rapporteur thanks the Austrian Government for this comment, but does not believe that there is any question here of a dual competence which might give rise to an actual conflict of competence between the special mission and the regular permanent diplomatic mission, on which the Commission has expressed its views in paragraph (5) of the commentary on article 2. The subject discussed in that paragraph is the competence of the two types of missions with respect to the task of the

special mission during the latter's existence. The Special Rapporteur does not therefore believe that the amendment proposed is necessary.

(17) In its written comments, the Netherlands Government stated:

Paragraph 1, first sentence. It was not without some hesitation that the Netherlands Government concluded that this provision should be accepted. It assumes that the term "premises" does not as a matter of course include the residence of the mission's head or the dwellings occupied by the members of the staff. (Cf. the comment on the fourth example in section 2 of the present document and the end of paragraph 3 of the commission's commentary.)

Here again the difficulty lies in the great diversity of special missions. Some of them require a certain degree of inviolability for their office premises to enable them to discharge their duties without let or hindrance; other missions only need the personal inviolability of their members (article 24) and the inviolability of their documents (article 20). The matter is complicated by the fact that, as the Netherlands Government sees it, the minimum of inviolability cannot be determined by rules of *jus dispositivum*, to be settled by the States concerned in each particular case.

Therefore the Netherlands Government approves of the first sentence, but with the specifications and restrictions given below.

Paragraph 1. By analogy with article 31, paragraph 2 of the 1963 Vienna Convention on Consular Relations the following clause should be added to this paragraph:

"The consent of the head of the special mission may, however, be assumed in case of fire or other disaster requiring prompt protective action."

This addition would seem to be required in view of the frequency with which special missions find accommodation in buildings, such as hotels, where other people live and work.

New paragraph. Also for the reason given above it would seem advisable to have a new paragraph after paragraph 1, viz. the second sentence of article 19, paragraph 1 of the second report by Mr. Bartoš:

"2. Paragraph 1 shall apply even if the special mission is accommodated in a hotel or other public building, provided that the premises used by the special mission are identifiable."

Paragraph 2. No comment.

Paragraph 3. The immunity from search of the mission's means of transport is taken from article 22, paragraph 3 of the Vienna Convention on Diplomatic Relations, but because of its unspecific wording it might also be interpreted so widely in that context as to give far greater immunity than was ever intended. It would be hazardous to give a more detailed description in the draft article of the circumstances under which a means of transport should be "immune from search", since it would foster the placing of a wide interpretation on the corresponding article 22, paragraph 3 of the Vienna Convention. Therefore it is proposed that the word "search" be deleted from paragraph 3 of the draft article. In so far as this word refers to the premises, the furnishings and other objects on the premises such immunity is already given by paragraph 1. In so far as "search" refers to other objects used for the work of the special mission, but located outside the premises (and this is an amplification that goes beyond article 22 of the Vienna Convention), such immunity would seem of no practical importance in view of the immunity of persons (article 24) and of documents (article 20).²⁵⁰

(18) The Special Rapporteur requests the Commission to look more closely at the suggestions which have been made concerning this article and to consider, in particular:

²⁴⁸ *Ibid.*

²⁴⁹ *Ibid.*

²⁵⁰ *Ibid.*

(a) Whether it should adopt the idea that the consent of the head of the mission is assumed in case of fire or other disaster, as proposed by the Israel and Netherlands Governments;

(b) Whether it should include the new paragraph 1 (a) proposed by the Netherlands Government;

(c) Whether it should delete the word "search" in paragraph 3, as proposed by the Netherlands Government;

(d) Whether it should establish special protection for property used in the operation of the special mission as protection peculiar to such a mission.

(19) The decisions which the Commission takes on these matters will determine the proposals which the Special Rapporteur ultimately submits.

Article 20.²⁵¹ — Inviolability of archives and documents

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

Commentary

(1) This article reproduces *mutatis mutandis* article 24 of the Vienna Convention on Diplomatic Relations and article 33 of the Vienna Convention on Consular Relations.

(2) Here, too, the Commission took the view in 1960 that the rules applicable to permanent diplomatic missions apply also to special missions, which otherwise would scarcely be able to function normally.

(3) Because of the controversies which arise in practice, the Commission considers it necessary to stress the point concerning documents in the possession of the members or of the staff of a special mission, especially in the case of a special mission which does not have premises of its own and in cases where the special mission or a section or group of the special mission is itinerant. In such cases, the documents transported from place to place in the performance of the special mission's task are mobile archives rather than part of the baggage of the persons concerned.

(4) There have been no new suggestions since the seventeenth session of the Commission.

(5) The Special Rapporteur considers that the proposed text should not be changed, that the provision contained in it should be generally compulsory, and that no drafting amendments are necessary.

Article 21.²⁵² — Freedom of movement

Subject to its laws and regulations concerning zones entry into which is prohibited or regulated for reasons of national security, the receiving State shall ensure to all members of the special mission such freedom of move-

ment and travel on its territory as is necessary for the performance of its functions, unless otherwise agreed.

Commentary

(1) This article is based on article 26 of the Vienna Convention on Diplomatic Relations and article 34 of the Vienna Convention on Consular Relations. However, changes have been made in the text to take account of the special circumstances in which the task of special missions is performed. The article thus includes certain provisions which apply neither to permanent diplomatic missions nor to consulates.

(2) Special missions have limited tasks. It follows that they should be guaranteed freedom of movement only to the extent necessary for the performance of these tasks (this does not mean that they cannot go also to other parts of the territory of the receiving State, subject to the normal conditions applicable to other aliens).

(3) Guaranteed freedom for special missions to proceed to the seat of the sending State's permanent diplomatic mission to the receiving State or to a consular post of the sending State and to return to the place where the special mission performs its task is in practice not only a daily occurrence but also a necessity. That is because the special mission generally receives its instructions through the permanent diplomatic mission, because the latter is moreover the protector of the special mission and is directly interested in being kept up to date with respect to the performance of the special mission's task.

(4) One of the peculiarities of special missions is that they may operate through persons or teams situated in different places or responsible for specific tasks in the field. Because of the need for constant liaison between the different sections of a special mission there should be wide freedom of movement.

New suggestions by Governments

(5) In the Sixth Committee of the General Assembly during the twentieth session, the Turkish representative expressed the opinion that the International Law Commission had gone too far by granting all members of special missions, in principle, freedom of movement throughout the territory of the receiving State. He doubted whether it was necessary to retain that provision and thus place the special mission, in that respect, on an absolutely equal footing with the staff of permanent diplomatic missions.²⁵³ The Special Rapporteur points out that in his first and second reports he informed the Commission that in practice it was possible to lay down rules placing some restriction on the freedom of movement of the members and staff of a special mission in the territory of the receiving State. The Commission considered that it should start from the principle of full freedom of movement to the extent provided for in the Vienna Convention on Diplomatic Relations (1961). It decided, however, not to make the rule stated in article 21 of the draft an absolute rule. It regarded this provision as a residuary rule from which States might derogate in

²⁵¹ Introduced as article 20 of Special Rapporteur's second report (A/CN.4/179). Discussed at the 805th meeting of the Commission. Drafting Committee's text discussed and adopted at the 817th meeting. Commentary adopted at the 821st meeting.

²⁵² Introduced as article 21 of Special Rapporteur's second report (A/CN.4/179). Discussed at the 805th meeting of the Commission. Drafting Committee's text discussed and adopted at the 817th meeting. Commentary adopted at the 821st meeting.

²⁵³ *Official Records of the General Assembly, Twentieth Session, Sixth Committee, 847th meeting, para. 24.*

their mutual relations, making restrictions by agreement. The words "unless otherwise agreed" were accordingly added at the end of article 21. The Special Rapporteur proposes that the Commission should reconsider the principle as he himself attaches some weight to the comment made by the Turkish delegation.

(6) The Swedish Government also commented on this article, as follows:

Should the principle of the subsidiary character of the articles be accepted, the phrase "unless otherwise agreed" can be omitted.

If, on the other hand, the articles are in principle to constitute *jus cogens* the text should at least be re-worded along these lines: "In the absence of an agreement on the matter between the sending and the receiving State, the receiving State shall, subject to its laws, etc. ensure, etc." As now phrased the text seems to assume that the parties might agree not to accord such freedom of movement to the mission as is necessary for the performance of its functions.²⁵⁴

(7) The Special Rapporteur does not consider the phrase "unless otherwise agreed" superfluous. It is, in fact, necessary, in order to show what is held to be the general rule on the subject; but this general rule, being of a residuary character, will not be applied if the States concerned agree otherwise. The Special Rapporteur does not see the advantage of the new wording proposed by the Swedish Government.

(8) The Special Rapporteur believes that it is not necessary to change the text and does not suggest any amendments. The text itself shows that this article is of an optional nature.

Article 22.²⁵⁵ — Freedom of communication

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

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

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

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

5. The courier of the special 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 receiving 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 special mission may designate couriers *ad hoc* of the special 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 special mission's bag in his charge.

7. The bag of the special 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 special mission. By arrangement with the appropriate authorities, the special 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) In 1960 the Commission took the position that special missions enjoy the same rights as permanent diplomatic missions in this respect.

(3) It should be noted, however, that in practice special missions are not always granted the right to use messages in code or cipher. The Commission considered that special missions should be granted this right, since the use of messages in code or cipher is often necessary for the proper functioning of such missions.

(4) The Commission did not think that it should depart from the practice whereby special missions are not allowed to use wireless transmitters, unless there is a special agreement or a permit is given by the receiving State.

(5) The Vienna Convention on Diplomatic Relations (article 27, paragraph 3) lays down the principle of the absolute inviolability of the diplomatic bag. Under that provision, the diplomatic bag may not be opened or detained by the receiving State. The Vienna Convention on Consular Relations, on the other hand, confers limited protection on the consular bag (article 35, paragraph 3). It allows the consular bag to be detained if there are serious reasons for doing so and provides for a procedure for the opening of the bag. The question arises whether absolute inviolability of the special mission's bag should be guaranteed for all categories of special missions. The Commission considered this question and decided to recognize the absolute inviolability of the special mission's bag.

(6) The Commission adopted the rule that the special mission's bag may be entrusted to the captain of a commercial aircraft (article 27, paragraph 7, of the Vienna Convention on Diplomatic Relations; article 35, paragraph 7, of the Vienna Convention on Consular Relations) or to the captain of a ship (article 35, paragraph 7, of the Vienna Convention on Consular Relations). It has been observed recently that in exceptional cases special missions use the services of such persons for

²⁵⁴ See *Yearbook of the International Law Commission, 1967*, vol. II, document A/6709/Rev.1, annex I.

²⁵⁵ Introduced as article 22 of Special Rapporteur's second report (A/CN.4/179). Discussed at the 805th and 806th meetings of the Commission. Drafting Committee's text discussed and adopted at the 817th meeting. Commentary adopted at the 821st meeting.

the transport of the bag. The Commission considers that the captains of commercial inland waterway vessels may also be used for this purpose.

New suggestions by Governments

(7) The Yugoslav Government suggests that paragraph 6 of article 22 should be amended. It comments as follows:

... consideration should be given to the possibility of guaranteeing in article 22, the immunity of couriers *ad hoc* during their return journey also, if it immediately follows the delivery of the bag to the special mission.²⁵⁶

(8) The Special Rapporteur fully appreciates the reasons which led the Yugoslav Government to make this suggestion; he considers it very logical, but, in his opinion, it would be difficult to provide, for the couriers *ad hoc* of special missions, greater guarantees and more extensive rights than those enjoyed by the same category of couriers of regular and permanent diplomatic missions and consular posts. For this reason, he does not recommend the adoption of this suggestion by the Yugoslav Government. In the two Vienna Conventions, immunity was not conferred on this category of couriers as a personal safeguard, but as protection of the bag they carry.

(9) In its comments, the Belgian Government deals with several aspects of the text of article 22. In the first place, it emphasizes the inadequacy of the protection provided for the telegraphic communications of special missions, if they are not transmitted as communications of diplomatic or consular missions. It gives the following reminder:

With regard to wireless communications, the article provides that the special mission shall be entitled to send messages in code or cipher. But article 18 of the Telegraph Regulations annexed to the 1959 Geneva International Telecommunication Convention states:

“The sender of a telegram in secret language must produce the code from which the text or part of the text or the signature of the telegram is compiled if the office of origin or the Administration to which this office belongs asks him for it. This provision should not apply to Government telegrams.”

The only way to reconcile the provisions of this paragraph relating to secret messages with the provisions of the international Conventions relating to the telegraph service would be for special missions to transmit such messages as Government telegrams.

However, annex 3 of the Geneva International Telecommunication Convention gives a complete list of the persons authorized to send Government telegrams and it refers only to diplomatic or consular agents.

In short, in the present state of international conventional law, special missions would have to be authorized by their diplomatic or consular posts to hand in Government telegrams bearing the seal or stamp of the authority sending them.

If there is no such post the problem remains unsolved. This question might well be raised when the time comes to revise the International Telecommunication Convention.²⁵⁷

(10) The Special Rapporteur considers it his duty to thank the Belgian Government for having drawn attention to the provisions of the Geneva International Telecommunication Convention, but he adds that the International Law Commission had this provision in mind when

drafting article 22, paragraph 1 and decided to recognize the right of special missions to use messages in code or cipher and to use them directly, without using the permanent diplomatic or consular mission of the sending State as an intermediary. The Belgian Government is of the opinion that the convention under study cannot amend the Geneva International Telecommunication Convention, whereas in the International Law Commission the prevailing opinion was that the future convention on special missions, as a subsequent instrument, would be directly applicable. Nevertheless, it is the Special Rapporteur's duty to draw the Commission's attention to this comment by the Belgian Government.

(11) In its comments, the Belgian Government also refers to the last sentence of paragraph 1 of article 22, as follows:

With regard to wireless transmitters, it would be desirable to amend the last sentence of the present paragraph to read as follows:

“However, the special mission may install and use a wireless transmitter or any means of communication to be connected to the public network only with the consent of the receiving State.”

There are separate wireless telephone devices which can be linked to the public telephone network: if these devices are not in conformity with those approved by the competent technical services, they may cause disturbance in the network.²⁵⁸

(12) The Special Rapporteur points out that the sentence in the text of the draft article referred to by the Belgian Government in the above comment is copied from the last sentence of article 27, paragraph 1, of the Vienna Convention on Diplomatic Relations and the last sentence of article 35, paragraph 1 of the Vienna Convention on Consular Relations. The Belgian Government's proposal is more complete from the technical point of view and the Special Rapporteur has no objection to its adoption. If adopted, the Belgian text would replace the last sentence of paragraph 1 of article 22 of the Commission's draft.

(13) The Belgian Government also makes some comments on the provisions of article 22 relating to diplomatic bags. On this subject it says:

With regard to the postal service, it should be borne in mind that the Universal Postal Convention does not make provision for any special treatment of diplomatic bags from the point of view of rates. Some postal unions covering a limited area consent to carry such bags post-free, but this is solely because special reciprocal arrangements have been made; all proposals so far submitted for including a provision for their carriage post-free in the Universal Convention have been rejected.

As Belgium does not participate in an arrangement for the post-free carriage of diplomatic bags, this mail is subject to the ordinary postal rates.²⁵⁹

(14) After studying this comment by the Belgian Government, the Special Rapporteur feels bound to point out that what was intended by the Commission in paragraphs 3 and 4 of article 22 was solely the protection under substantive law of the inviolability of the contents and secrecy of the bag, and not any special treatment of

²⁵⁶ See *Yearbook of the International Law Commission, 1967*, vol. II, document A/6709/Rev.1, annex I.

²⁵⁷ *Ibid.*

²⁵⁸ *Ibid.*

²⁵⁹ *Ibid.*

diplomatic bags in respect of postal rates. The Special Rapporteur is of the opinion that the Commission should not discuss the question of privileged rates, which is not referred to in the Vienna Conventions of 1961 and 1963; the diplomatic bag should be uniformly protected regardless of the means used for its transport and there is no need to draw special attention to the situation of diplomatic bags sent by post.

(15) In its written comments, the United Kingdom Government states that it is opposed in principle to the special mission being entitled to have a diplomatic bag of its own, where the sending State has a permanent diplomatic mission in the receiving State. Its views on this subject are as follows:

Article 22. It should be made clear that the word "free" as used in paragraph 1 has the sense of "unrestricted".

The United Kingdom Government considers that the bag facilities of special missions should be restricted to the minimum and that where the sending State has a permanent diplomatic mission in the receiving State official documents etc. for the use of the special mission should be imported in the bag of the permanent mission. In this way the onus of ensuring that improper use is not made of the bag would rest with the head of the permanent mission who, unlike the head of the special mission, has a continuing duty to the receiving State in this respect. There appears to be nothing contrary to this in paragraph 4 of article 27 of the Vienna Convention.²⁶⁰

(16) The Special Rapporteur believes that, judged by the concepts of traditional diplomacy, this comment by the United Kingdom Government is contrary to the interests of special missions and to their freedom of action. But apart from these theoretical considerations, there are practical reasons for disagreement with the United Kingdom comment. Special missions are not always conveniently placed geographically for their communications to pass through the permanent diplomatic mission. They are very often situated at points in the territory of the receiving State from which it is much more convenient for them to communicate with their Governments directly and without the intervention of the permanent diplomatic mission. For this reason, the Special Rapporteur does not share the view expressed in this comment.

(17) In its written comments, the Netherlands Government made the following proposal:

The following introductory clause should be inserted in article 22 and subsequent paragraphs renumbered:

"1. Unless otherwise agreed, special missions shall have freedom of communication to the extent provided in this article."²⁶¹

(18) Accordingly, the Special Rapporteur considers that:

(a) A new paragraph 1, worded as the Netherlands Government has proposed, should be included in article 22, and the present paragraphs 1 to 7 should become paragraphs 2 to 8;

(b) It should be stressed in the commentary that the more detailed provisions on freedom of communications are dependent upon agreement between the Governments concerned, and that this article differs in that respect from

article 27 of the Vienna Convention on Diplomatic Relations of 1961, justifiably since it is not always necessary for all special missions to enjoy identical guarantees, as it is for permanent diplomatic missions. The Commission expressed the contrary view on this question in 1960;

(c) It is not necessary to amend the text for drafting reasons;

(d) Unless otherwise agreed by the parties, the provision contained in this article should be construed as generally compulsory.

Article 23.²⁶² — Exemption of the mission from taxation

1. The sending State and the head of the special mission and the members of its staff shall be exempt from all national, regional or municipal dues and taxes in respect of the premises of the special mission, 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 receiving State by persons contracting with the sending State or the head of the special mission.

Commentary

(1) This article reproduces *mutatis mutandis* article 23 of the Vienna Convention on Diplomatic Relations.

(2) In 1960 the Commission expressed the view that in this respect the legal rules applicable to permanent diplomatic missions should be applied to special missions. At its seventeenth session, the Commission reaffirmed that view.

(3) On the other hand, the Commission is of the opinion that article 28 of the Vienna Convention on Diplomatic Relations cannot be applied to special missions. It is the rule that special missions have no authority to levy any fees, dues or charges in foreign territory except in the cases specially provided for by international agreements. This does not, however, rule out the possibility that in certain exceptional cases provided for in international agreements special missions may be authorized to charge such dues. The Commission therefore decided not to include in the article any rule of law concerning the levying by special missions of fees, dues or charges in the territory of the receiving State, and to refer to the matter only in the commentary.

New suggestions by Governments

(4) With regard to article 23 of the draft, the Belgian Government comments as follows:

The Belgian view is that which it upheld in connexion with article 23 of the Vienna Convention on Diplomatic Relations, namely that the head of the mission is exempt from dues and taxes in respect of the premises of the mission only if he has acquired them in his capacity as head of the special mission and with a view to the performance of the functions of the mission.

²⁶² Introduced as article 23 of Special Rapporteur's second report (A/CN.4/179). Discussed at the 806th meeting of the Commission. Drafting Committee's text discussed and adopted at the 817th meeting. Commentary adopted at the 821st meeting.

²⁶⁰ *Ibid.*

²⁶¹ *Ibid.*

Accordingly, the words "in his capacity as such" should be inserted after "head of the special mission".²⁶³

(5) The Special Rapporteur considers this suggestion useful, as it removes all doubt about the meaning of the text.

(6) Although the proposal of the Government of Israel concerning questions of terminology²⁶⁴ includes article 23, we do not think it applies to this article, the text of which contains none of the terms whose standardization is aimed at in the above-mentioned proposal.

(7) In its written comments, the United Kingdom Government expresses the view that some addition should be made to the text of article 23 of the Commission's draft, and it makes the following proposal in this connexion:

Article 23. The expression "taxes in respect of the premises of the special mission" in paragraph 1 does not clearly cover capital gains tax on the disposal of the premises. The United Kingdom authorities would not seek to tax a gain accruing to the sending State under these circumstances and they accordingly suggest the addition of the words "including taxes on capital gains arising on disposal" after the words "premises of the special mission".²⁶⁵

(8) The Special Rapporteur wishes to point out that, in drawing up article 23 of the draft, the Commission took the text of article 23 of the 1961 Vienna Convention on Diplomatic Relations as a basis; it did not go into details, its aim being rather to produce a general text. Obviously, therefore, there are a considerable number of cases which would have to be inserted in the text of this article in order to make it comprehensive. The Special Rapporteur does not object in principle to the United Kingdom Government's proposal, but fears that the introduction of this detailed point might guarantee special missions an exemption from taxation to an extent which is not explicitly guaranteed to permanent diplomatic missions.

(9) The Netherlands Government made the following suggestions:

It is not clear from the first paragraph why, in addition to the sending State and the head of the special mission, the members of its staff should also be mentioned here; this phrase does not appear in article 23 of the Vienna Convention on Diplomatic Relations. No explanation of this seemingly superfluous addition is given in either the Commission's report or in the reports by Mr. Bartoš.

In the opinion of the Netherlands Government there is virtually no need for the exemption from taxation mentioned in article 23 for any of the special missions in view of their temporary character. This exemption, which to the diplomatic missions is a traditional privilege rather than a necessity, is not required for the due performance of the functions of temporary missions. The granting and registering of the exemption causes the receiving State more trouble than it is worth. Therefore it is suggested that article 23 be deleted.²⁶⁶

(10) The Special Rapporteur puts before the Commission the general question raised by the proposal of the United Kingdom Government; for his part, he considers it

inadvisable to enter into the details contained in this proposal.

(11) The Special Rapporteur also asks the Commission if it is prepared to adopt the Belgian Government's amendment inserting after the words "head of the special mission" the words "in his capacity as such". He considers that the adoption of this amendment would be useful.

(12) Lastly, the Special Rapporteur sees no virtue in the Netherlands Government's proposal for the deletion of article 23 and does not agree with the assertion that the cost to the receiving State is disproportionate in relation to the amount of the taxes. He therefore considers that this proposal should be rejected.

(13) In his opinion, the text of this article should remain as it is.

(14) The discrepancy between the French and English texts of paragraph 1 mentioned by the Netherlands Government is inexplicable. As the French text is the original prepared by the Special Rapporteur, the English text should be brought into line with it.

Article 24.²⁶⁷ — Personal inviolability

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

Commentary

(1) This article reproduces *mutatis mutandis* article 29 of the Vienna Convention on Diplomatic Relations.

(2) The Commission discussed the advisability of a provision granting to the members of special missions only a personal inviolability limited to the performance of their functions. The majority of the Commission did not consider such a provision acceptable.

New suggestions by Governments

(3) The Belgian Government comments as follows:

The Belgian Government is of the opinion that members of missions should be granted only a personal inviolability limited to the performance of their functions.²⁶⁸

(4) The Special Rapporteur points out that the Commission limited this guarantee to "the person of the head and members of the special mission and of the members of its diplomatic staff". The Commission recognized that these persons should be placed on an equal footing with the diplomatic agents referred to in article 29 of the 1961 Vienna Convention on Diplomatic Relations. This question is directly dependent on the answer to the general question whether the extent of the privileges

²⁶³ See *Yearbook of the International Law Commission, 1967*, vol. II, document A/6709/Rev.1, annex I.

²⁶⁴ *Ibid.*

²⁶⁵ *Ibid.*

²⁶⁶ *Ibid.*

²⁶⁷ Introduced as article 25 of Special Rapporteur's second report (A/CN.4/179). Discussed at the 806th and 807th meetings of the Commission. Drafting Committee's text discussed and adopted at the 817th meeting. Commentary adopted at the 821st meeting.

²⁶⁸ See *Yearbook of the International Law Commission, 1967*, vol. II, document A/6709/Rev.1, annex I.

and immunities to be granted to special missions should depend on the functions they have to perform. The point is dealt with in article 17, and the decision concerning the Belgian Government's comments will depend on the attitude taken with regard to this article. The Special Rapporteur nevertheless considers that personal inviolability is a fundamental guarantee which should, in any case, be granted to the persons mentioned above.

(5) In connexion with this article, the question also arises whether, in keeping with the spirit of the general comment by the Government of Israel,²⁶⁹ the Commission should aim at simplifying the term *staff* and apply it, without restriction, to the category of diplomatic staff. The Special Rapporteur reminds the Commission that it rejected his original idea that personal inviolability should be guaranteed to all categories of staff of the special mission. It kept to the analogy with article 29 of the Vienna Convention on Diplomatic Relations and considered it inadvisable to extend that privilege to other categories of staff.

(6) In its written comments on articles 24, 25 and 26, the United Kingdom Government expresses its concern that, if the rules of the 1961 Vienna Convention on Diplomatic Relations are applied to special missions, as provided for in the above-mentioned articles of the Commission's draft, immunities and privileges may be extended to a very large number of individuals.

(7) The Special Rapporteur believes that this remark by the United Kingdom Government is similar in substance to the comments made in chapter II, section 2, of his third report: "Distinction between the different kinds of special missions"²⁷⁰ and in the section on article 17 in chapter III of that report²⁷¹

(8) The United Kingdom Government's comments on these three articles are as follows:

Articles 24, 25, 26. The scale of immunity and inviolability prescribed in these articles, based on the corresponding provisions of the Vienna Convention on Diplomatic Relations, appears excessive, and inappropriate to the character and functions of special missions. While noting the Commission's basic hypothesis that special missions should be equated, so far as practicable, with permanent missions, the United Kingdom Government would prefer a restriction of immunity and inviolability to official documents and official acts.²⁷²

(9) The Special Rapporteur believes that this question has been answered in chapter II of his third report, but he will take these remarks into consideration in dealing with each of the three articles individually.

(10) In its general remarks on articles 24, 25 and 26—cited above—the United Kingdom Government would prefer a restriction of immunity and inviolability to official documents and official acts.

(11) The Special Rapporteur recalls that the Commission has already discussed this possibility, and has come to the conclusion that members of the special mission

could not perform their functions with complete freedom if they could be arrested, detained or brought before a court at any time by the authorities of the receiving State on the pretext of their responsibility for acts other than those performed in their official capacity. The Commission took the view that a guarantee of this kind would not be adequate for special missions, and had accordingly decided to adopt the provisions of the 1961 Vienna Convention on Diplomatic Relations in preference to those of the 1963 Vienna Convention on Consular Relations.

(12) Bound as he is by the Commission's decision, the Special Rapporteur cannot recommend the adoption of the text proposed by the United Kingdom Government.

(13) In its written comments, the Netherlands Government made the following suggestion:

This article extends to the members of special missions (and to the members of their diplomatic staffs) the envoy's personal inviolability that has typified diplomatic relations from time immemorial. It is undeniable that personal inviolability is essential if a mission is to perform its functions without let or hindrance, and it should outweigh any interests involving the legal order within the receiving State, at least as regards permanent missions and some special missions. However, these considerations do not apply to all special missions.

Accordingly, the Netherlands Government would join the minority referred to in paragraph (2) of the Commission's commentary and propose that personal inviolability be restricted to acts performed in the fulfilment of the mission's duties. A second paragraph stipulating that "*at the request of the sending State, and provided the receiving State does not object, personal inviolability shall be extended to include all deeds*" might be added to article 24 modified in the manner described.

If this proposal is accepted, a new article should be inserted after article 24 governing, for cases for which extended personal inviolability has not been agreed upon, arrest and detention for deeds falling outside the scope of the performance of functions proper, in the same way as is done in articles 40, 41 and 42 of the 1963 Vienna Convention for consular officers.²⁷³

(14) Accordingly, the Special Rapporteur considers that:

(a) The present text of article 24 should not be changed. Nevertheless, the Commission must take a definite decision on the Netherlands Government's proposal that personal inviolability should be restricted to functional immunity (to acts performed in the fulfilment of the mission's duties). If the Commission adopts the Netherlands Government's proposal, a second paragraph would have to be included in the text; however, the Special Rapporteur does not recommend it.

(b) In any event, special note must be taken, in the commentary, of the opinions of the United Kingdom and Netherlands Governments.

(c) In the light of the definitions proposed in the introductory article, it would be necessary to substitute the words "of the members of the special mission" for the words "of the head and members of the special mission".

(d) Even if the Netherlands and United Kingdom Governments' proposals are adopted, this article should be a generally compulsory rule, subject to the general limitation set out in article 17 *bis*.

²⁶⁹ *Ibid.*

²⁷⁰ *Yearbook of the International Law Commission, 1966*, vol. II, document A/CN.4/189 and Add.1 and 2, pp. 129 and 130.

²⁷¹ *Ibid.*, pp. 143 and 144.

²⁷² See *Yearbook of the International Law Commission, 1967*, vol. II, document A/6709/Rev.1, annex I.

²⁷³ *Ibid.*

Article 25.²⁷⁴ — Inviolability of the private accommodation

1. The private accommodation of the head and members of the special mission and of the members of its diplomatic staff shall enjoy the same inviolability and protection as the premises of the special mission.
2. The papers, correspondence and property of the persons referred to in paragraph 1 shall likewise enjoy inviolability.

Commentary

- (1) This article reproduces *mutatis mutandis* article 30 of the Vienna Convention on Diplomatic Relations.
- (2) The word "residence" used in the Vienna Convention on Diplomatic Relations has been replaced by the word "accommodation" because of the temporary nature of special missions.
- (3) The inviolability of the accommodation of the members of special missions should be guaranteed, regardless of whether they live in a separate building or in parts of another building, or even in a hotel. It was considered necessary to add this paragraph of the commentary because some States do not recognize this protection in cases where the mission is accommodated in a building accessible to the public.

New suggestions by Governments

- (4) In its comments, the Belgian Government makes the following proposal regarding article 25, paragraph 2:
It would be as well to introduce, as in article 30 of the Vienna Convention on Diplomatic Relations, a proviso regarding measures of execution on property in cases where immunity from civil and administrative jurisdiction does not apply, and accordingly to begin the paragraph with the words: "Except as provided in article 26, paragraph 4. . ." ²⁷⁵
- (5) The Special Rapporteur considers that this proposal by the Belgian Government is in conformity with the Commission's concern not to grant the staff of special missions more rights than are granted to diplomatic agents under the 1961 Vienna Convention on Diplomatic Relations; consequently, he is of the opinion that this proposal can be adopted.
- (6) In examining this article, account should also be taken of the comment by the Government of Israel concerning terminology. ²⁷⁶ The Special Rapporteur points out that the Commission also wished to restrict this right exclusively to the diplomatic staff of special missions, in order not to grant other members of the staff more privileges and immunities than are enjoyed by the other categories of staff of diplomatic missions. He therefore believes that the expression "members of its diplomatic staff" was not used without good reason.
- (7) It will be recalled that this article is also referred to in the United Kingdom Government's general remarks

²⁷⁴ Introduced as article 26 of Special Rapporteur's second report (A/CN.4/179). Discussed at the 807th meeting of the Commission. Drafting Committee's text discussed and adopted at the 817th meeting. Commentary adopted at the 821st meeting.

²⁷⁵ See *Yearbook of the International Law Commission, 1967*, vol. II, document A/6709/Rev.1, annex I.

²⁷⁶ *Ibid.*

on articles 24, 25 and 26, which are reproduced above in the discussion of article 24.

(8) The Special Rapporteur cannot see how the inviolability of the private accommodation of members of special missions could be restricted to official documents and official acts, particularly as members of the special mission move around the territory of the receiving State, their stay is only temporary, and their accommodation is such that it would be difficult to differentiate between objects relating to official acts and other objects. He is, therefore, unable to recommend that the Commission should adopt this proposal.

(9) In its written comments, the Netherlands Government makes the following proposals:

The *first* paragraph of this article should be deleted. The States concerned can enter upon additional agreements to cover any special cases of private residences or accommodation needing protection.

The *second* paragraph is superfluous in view of the provisions of articles 20 and 22. Therefore this paragraph can be deleted, too. ²⁷⁷

(10) The Special Rapporteur cannot endorse the Netherlands Government's proposal for the abolition of a guarantee as important as inviolability of the residence unless that should be done by virtue of the agreement provided for in article 17 *bis*. On the basis of his personal experience, he considers that inviolability of the residence, papers and correspondence is necessary for the regular and free performance of the special mission's functions.

(11) Accordingly, the Special Rapporteur considers that:

- (a) This article should not be amended;
- (b) The commentary should include the opinions of the Governments that supported the deletion of this article and the reasons that led the Commission not to endorse those opinions;
- (c) In paragraph 1, the words "head and" should be deleted for drafting reasons, in accordance with the definition in the introductory article;
- (d) The provision contained in this article should be generally compulsory, unless otherwise agreed in accordance with article 17 *bis*.

Article 26.²⁷⁸ — Immunity from jurisdiction

1. The head and members of the special mission and the members of its diplomatic staff shall enjoy immunity from the criminal jurisdiction of the receiving State.

2. Unless otherwise agreed, they shall also enjoy immunity from the civil and administrative jurisdiction of the receiving State, except in the case of:

- (a) A real action relating to private immovable property situated in the territory of the receiving State, unless the head or member of the special mission or the member of its diplomatic staff holds it on behalf of the sending State for the purposes of the mission;

²⁷⁷ *Ibid.*

²⁷⁸ Introduced as article 27 of Special Rapporteur's second report (A/CN.4/179). Discussed at the 807th meeting of the Commission. Drafting Committee's text discussed and adopted at the 817th meeting. Commentary adopted at the 821st meeting.

(b) An action relating to succession in which the person referred to in sub-paragraph (a) 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 referred to in sub-paragraph (a) in the receiving State outside his official functions.

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

4. No measures of execution may be taken in respect of the head or of a member of the special mission or of a member of its diplomatic staff except in the cases coming under sub-paragraphs (a), (b) and (c) of paragraph 2 of this article, and provided that the measures concerned can be taken without infringing the inviolability of this person or of his residence.

5. The immunity of the head and members of the special mission and of the members of its diplomatic staff from the jurisdiction of the receiving State does not exempt them from the jurisdiction of the sending State.

Commentary

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

(2) The Commission discussed the question whether members of special missions should or should not be granted complete and unlimited immunity from criminal, civil and administrative jurisdiction. Some members of the Commission took the view that, in principle, only functional immunity should be granted to all special missions. There should be no deviation from this rule, except in the matter of immunity from criminal jurisdiction; for any limitation of the liberty of the person prevents the free accomplishment of the special mission's tasks. Disagreeing with that opinion, the majority of the Commission decided that full immunity from the jurisdiction of the receiving State in all matters (criminal, civil and administrative) should be granted to the members of special missions.

(3) However, the Commission added in paragraph 2 the phrase "Unless otherwise agreed" to indicate that it is open to the States concerned to limit the immunity from *civil and administrative* jurisdiction. In short, the ordinary rule proposed by the Commission is complete immunity from civil and administrative jurisdiction, the States concerned being at liberty to agree on a limited form of immunity in this respect.

New suggestions by Governments

(4) Applicable to this article is the comment by the Government of Israel that the terminology should be revised and consideration given to the question whether the text should refer solely to members of the diplomatic staff of the special mission or to all categories of staff. The Special Rapporteur considers it his duty to mention that the Commission, following article 31 of the 1961 Vienna Convention on Diplomatic Relations, deliberately restricted the text to diplomatic staff only.

(5) This article also is referred to in the general remarks on articles 24, 25 and 26 in the written comments of the United Kingdom Government. The United Kingdom Government bases its arguments on the assumption that special missions should be accorded only what is known as minor or functional immunity. The Commission, on the other hand, strongly believes that members of the special mission should enjoy complete immunity from criminal jurisdiction, as a protection against the receiving State. This point has already been mentioned in the section on article 24, and the Special Rapporteur does not think that there is any reason for reverting to it here.

(6) The above-mentioned general remarks also relate to immunity from the civil and administrative jurisdiction of the receiving State. The United Kingdom Government believes that these forms of immunity should be restricted exclusively to official documents and official acts. The Commission's attitude, on the other hand, is based on the idea that members of the special mission must enjoy complete immunity in this respect also subject to two limitations. The first results from the proviso "unless otherwise agreed" in the text of article 26, and the second from the exceptions provided for in the Vienna Convention on Diplomatic Relations.

(7) The Special Rapporteur believes that the Commission should reconsider the question of the immunity of members of special missions in regard to the civil and administrative jurisdiction of the receiving State; and he would point out that in his first and second reports he himself supported the idea of functional immunity.

(8) In its written comments, the United Kingdom Government questions whether the text of article 26, paragraph 2, sub-paragraph (c), is wide enough to protect the receiving State against all abuses of immunity. Its remarks on this subject are as follows:

Article 26. There seems to be room for doubt whether the expression "professional or commercial activity" in paragraph 2 (c) is wide enough to cover, for instance, disputes about the ownership of, or liability for calls etc. on, shares in a company registered in the receiving State. The expression has in the case of the Vienna Convention on Diplomatic Relations given rise to difficulty and its scope should be made more clear.²⁷⁹

(9) The Special Rapporteur draws the Commission's attention to the fact that the question of the ownership of shares was discussed at the Vienna Conferences and referred to by the Special Rapporteur himself in his second report. The Commission, however, took the view that it was only one of many points of detail all of which could not be included in the text of the draft articles. The Special Rapporteur leaves it to the Commission to decide whether this matter should be included in the text or perhaps mentioned in the commentary, so as to make the Commission's intentions clearer.

(10) In its written comments, the United Kingdom Government also suggests that some attention should be given to paragraph (3) of the commentary on article 26. Its remarks are worded as follows:

²⁷⁹ See *Yearbook of the International Law Commission, 1967, vol. II, document A/6709/Rev.1, annex I.*

The commentary on this article implies that the phrase "unless otherwise agreed" in paragraph 2 does not contemplate the possibility of excluding all immunity from civil and administrative jurisdiction but only of limiting immunity to official acts. This should be made clear in the text.²⁸⁰

(11) The Special Rapporteur believes that this observation by the United Kingdom Government is in line with the attitude of that Government, as described in paragraph (6) above. The amendment of the text of the commentary will, therefore, depend on whether the Commission adheres to its existing position or adopts the idea of "minor" or so-called functional immunity.

(12) In its comments, the Netherlands Government also considered this article and stated:

Paragraphs 1 and 4. If the proposal put forward in section 26 is accepted, paragraphs 1 and 4 of article 26 will have to be restricted in the same way as article 24 in so far as immunity from criminal jurisdiction is concerned.

Paragraph 2. Apart from the question whether complete or limited immunity from criminal jurisdiction should be granted, it might be considered to what extent members of special missions should be withdrawn from the civil and administrative jurisdiction of the receiving State. The Netherlands Government believes that the legal order, particularly the legal protection of third persons who come into contact with members of the special mission demands that the liability under civil law of members of a special mission be affected as little as possible by immunity. The opposing interest, viz. the undisturbed performance of the mission's functions, is hardly affected by civil and administrative jurisdiction. It is unnecessary to allow intrusion upon the legal order of the receiving State to the same extent as is required when ensuring personal immunity from criminal jurisdiction. The Netherlands Government subscribes to the view held by the minority and described in paragraph 2 of the Commission's commentary, and therefore suggests replacing paragraph 2 by a rule analogous to the one in article 43 of the 1963 Vienna Convention on Consular Relations.²⁸¹

(13) The Special Rapporteur considers that the arguments put forward by the Netherlands Government are not new to the Commission, which has decided against them and in favour of the present text. He believes, therefore, that there is no new reason for adopting the Netherlands proposals.

(14) Accordingly, the Special Rapporteur considers that:

(a) The text should not be changed;

(b) The opinions of the United Kingdom and Netherlands Governments should be mentioned in the commentary, and it should be made clear that they do not conform to the ideas of the Commission, which considers the question of immunity from jurisdiction one of the fundamental guarantees of the regular and free performance of the special mission's functions;

(c) For drafting reasons, the words "The head and" at the beginning of paragraphs 1 and 3, the words "of the head or" in paragraph 4, and the words "the head and" in paragraph 5 should be deleted, since they are redundant in the light of the definitions contained in the proposed introductory article;

(d) The provisions contained in this article are substantive rules and should be considered as generally

compulsory, subject to the agreements provided for in article 17 *bis*.

Article 27.²⁸² — Waiver of immunity

1. The immunity from jurisdiction of the head and members of the special mission, of the members of its staff and of the members of their families, may be waived by the sending State.

2. Waiver must always be express.

3. The initiation of proceedings by one of the persons referred to in paragraph 1 of this article shall preclude him from invoking immunity from jurisdiction in respect of any counter-claim directly connected with the principal claim.

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

Commentary

(1) This article reproduces *mutatis mutandis* article 32 of the Vienna Convention on Diplomatic Relations.

(2) The Commission considers that the purpose of immunity is to protect the interests of the sending State, not those of the person enjoying the immunity.

New suggestions by Governments

(3) Taking into account the comment by the Government of Israel concerning terminology, the Special Rapporteur thinks that the expression "members of its staff" is correctly used in this article also, for the Commission took the view that this provision should apply to waiver of immunity for all persons, not only members of the diplomatic staff.

(4) Accordingly, the Special Rapporteur considers that:

(a) It is not necessary to make any changes in the text;

(b) The commentary should include an explanation that this is a general rule which refers to all categories of staff, not only to the diplomatic staff;

(c) To improve the drafting of paragraph 1, the words "of the members and staff of the special mission" should be substituted for the words "of the head and members of the special mission, of the members of its staff", in accordance with the definition proposed in the introductory article;

(d) The provisions contained in this article should be obligatory and a necessary guarantee of the free exercise of the functions of the members and staff of special missions, and consequently they should be generally compulsory rules, subject to the agreements provided for in article 17 *bis*.

²⁸⁰ *Ibid.*

²⁸¹ *Ibid.*

²⁸² Introduced by the Drafting Committee as article 27 *bis*. Discussed and adopted at the 817th meeting. Commentary adopted at the 821st meeting.

*Article 28.*²⁸³ — *Exemption from social security legislation*

1. The head and members of the special mission and the members of its staff shall be exempt, while in the territory of the receiving State for the purpose of carrying out the tasks of the special mission, from the social security provisions of that State.

2. The provisions of paragraph 1 of this article shall not apply:

(a) To nationals or permanent residents of the receiving State regardless of the position they may hold in the special mission;

(b) To locally recruited temporary staff of the special mission, irrespective of nationality.

3. The head and members of the special mission and the members of its staff who employ persons to whom the exemption provided for in paragraph 1 of this article does not apply shall observe the obligations which the social security provisions of the receiving State impose upon employers.

Commentary

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

(2) In practice, it is found necessary not to exempt from the social security system of the receiving State persons locally employed for the work of the special mission, for a number of reasons: the short duration of the special mission; the risk to life and health presented by the difficulty of the special mission's tasks in certain cases, especially in the case of special missions working in the field; and the still unsettled question of insurance after the termination of the special mission's task, if the employee was not engaged through and on the responsibility of the permanent diplomatic mission.

New suggestions by Governments

(3) Here, too, the Special Rapporteur has examined the applicability of the general comment on terminology made by the Government of Israel with regard to articles 23 to 32; he finds that the expression "member of its staff" is correctly used, and that it is unnecessary to specify the different categories of staff in greater detail in this article.

(4) In its written comments, the United Kingdom Government expresses the view that it is unnecessary to refer in article 28 of the draft to the exemption of persons who are nationals or permanent residents of the receiving State, as the status of these persons is defined in article 36 of the draft.²⁸⁴

(5) The Special Rapporteur believes that, despite the existence of a general provision concerning this category of persons in article 36 of the draft, it would nevertheless be more satisfactory for their position in regard to the social security legislation of the receiving State to be

clearly and explicitly dealt with in article 28 of the draft. It would otherwise be uncertain whether the privileges referred to in article 36 apply to these persons, since social security is connected with the performance of official functions in the special mission.

(6) In its written comments, the Netherlands Government also proposed the deletion of this article, on the ground that it was not required for the exercise of the functions of temporary missions.²⁸⁵ In view of the restriction laid down in paragraph 2, the Special Rapporteur believes that the exemptions guaranteed to the members of the special mission do not impose any limitation on the receiving State, but are necessary to the special mission itself and to the sending State.

(7) Accordingly, the Special Rapporteur considers that:

(a) The text of the article should not be changed;

(b) The opinion of the Netherlands Government should be noted in the commentary, which should also show the reasons why the persons referred to in paragraph 2, sub-paragraphs (a) and (b), are mentioned in this article, although their exemption may be presumed under the terms of article 36. The Special Rapporteur has indicated the reasons why he believes that there is no unnecessary duplication;

(c) From the point of view of drafting, and in accordance with the definition proposed in the introductory article, the words "The members and staff of the special mission" should be substituted for the words "The head and members of the special mission and the members of its staff" in paragraphs 1 and 3;

(d) Subject to the existence of an agreement concluded under article 17 *bis*, the provision contained in this article should be a compulsory rule of international law.

*Article 29.*²⁸⁶ — *Exemption from dues and taxes*

The head and members of the special mission and the members of its diplomatic staff shall be exempt from all dues and taxes, national, regional or municipal, in the receiving State on all income attaching to their functions with the special mission and in respect of all acts performed for the purposes of the special mission.

Commentary

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

(2) The Commission was of the opinion that the exemption of the members of special missions from dues and taxes should apply only to income attaching to their functions with the mission and in respect of all acts performed for the purposes of the mission. Accordingly, the Commission decided to omit from article 29 all the exceptions enumerated in the said article 34.

²⁸³ Introduced as article 28 of Special Rapporteur's second report (A/CN.4/179). Discussed at the 808th meeting of the Commission. Drafting Committee's text discussed and adopted at the 817th meeting. Commentary adopted at the 821st meeting.

²⁸⁴ See *Yearbook of the International Law Commission, 1967*, vol. II, document A/6709/Rev.1, annex I (comment on article 32).

²⁸⁵ See *Yearbook of the International Law Commission, 1967*, vol. II, document A/6709/Rev.1, annex I.

²⁸⁶ The proposal to introduce this article was made by the Special Rapporteur at the 808th meeting. Drafting Committee's text, numbered 28 *bis*, submitted and adopted at the 817th meeting. Commentary adopted at the 821st meeting.

New suggestions by Governments

(3) In considering this article, the Special Rapporteur kept in mind the general comment on terminology made by the Government of Israel with regard to articles 23 to 32 and he considers it unnecessary to confine the article to the members of the diplomatic staff of the special mission, without mentioning the other categories of staff of the special mission; these other categories come under the provisions of article 32.

(4) The United Kingdom Government has made a detailed comment on this article, in which it tries to show that the abridged text of article 29 of the draft, based on the provisions of article 34 of the 1961 Vienna Convention on Diplomatic Relations, is not altogether felicitous, as the curtailment of the text has left certain situations unsolved. The United Kingdom Government's remarks are as follows:

Article 29. The article as it stands does not fully carry out the intention of the Commission expressed in paragraph (2) of the commentary to accord a narrower scale of exemption than is accorded to permanent missions by article 34 of the Vienna Convention on Diplomatic Relations. Omission of the exceptions has had in some respects the contrary effect — for example, relief appears due from taxes normally included in the price of goods or services.

Moreover, unlike article 34 of the Vienna Convention on which it is said to be based, the article might be construed as exempting from stamp duty cheques, receipts, etc., given by the head, members and diplomatic staff of a special mission in the course of their duties. It will not be construed in the United Kingdom as having any effect in relation to duties chargeable under the Stamp Act 1891, as amended, on cheques and other instruments issued by the head, members or diplomatic staff of a special mission.

In the matter of income tax, because of the exclusion under article 36 of United Kingdom citizens and permanent residents in the United Kingdom from any exemption from United Kingdom tax under this article, it is only in exceptional cases that United Kingdom law would impose any liability to income tax. In such exceptional cases, the expression "income attaching to their functions with the special mission" is too wide. There is no objection to the exemption of emoluments or fees paid by the sending State or, so long as the mission is for the governmental purposes of the sending State, of emoluments or fees paid by other sources in the sending State. Article 42, however, does not appear to exclude the possibility of members of a special mission deriving income from the sale of goods in the receiving State, or the provision of services, or any other activity of a profit-making nature, if the activity attaches to their functions with the mission. A mission sent to promote the export trade of the sending State or to organise a fair or exhibition on behalf of the sending State might claim that the sale of large quantities of goods was within its functions. Income derived from such activities should not be exempt from tax in the receiving State.²⁸⁷

(5) The Special Rapporteur recognizes that all the arguments put forward in United Kingdom comment are technically sound; but he wonders whether the Commission, in a draft on special missions, considers it advisable to go into the details of fiscal legislation. He fears that this might cause it to become too deeply involved in the subject, particularly in view of the fact that no other State has made any comments on this article.

(6) In its written comments on article 32 of the draft, the United Kingdom Government expresses the view that it is not necessary to include in article 32 the clause referring to nationals of, and permanent residents in, the receiving State, since article 36 of the draft contains a general provision relating to these categories of persons on the staff of the special mission.

(7) The Special Rapporteur agrees in substance with this remark by the United Kingdom Government, but ventures to point out that, in drafting article 29, the Commission decided not to insert a clause relating to nationals and permanent residents, precisely because there is a general provision relating to this subject in article 36 of the draft.

(8) On the subject of article 38 the United Kingdom Government, in its written comments (see the text of the comments in the section on article 38), expresses the fear that the Commission's commentary on article 29 might be taken to mean that the possibility of profit-making special missions has not been excluded.

(9) Although this is a comment on the commentary, the Special Rapporteur does not think that it requires any attention from the Commission since, when drafting article 29 of the draft, the Commission intended that exemption from dues and taxes should apply only to income which can be considered as attaching to functions with the special mission and he believes that the matter should be left there.

(10) Accordingly, the Special Rapporteur considers that:

(a) It is not necessary to change to text of this article;

(b) It is not necessary to change the commentary on this article in any way or to add any new ideas;

(c) For drafting reasons, the words "The members and diplomatic staff of the special mission" should be substituted for the words "The head and members of the special mission and the members of its diplomatic staff", in accordance with the definitions proposed in the introductory article;

(d) Subject to the existence of an agreement concluded under article 17 *bis*, the provision contained in this article should be a compulsory rule of international law.

Article 30.²⁸⁸ — Exemption from personal services and contributions

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

Commentary

(1) This article reproduces *mutatis mutandis* article 35 of the Vienna Convention on Diplomatic Relations.

²⁸⁸ Introduced as article 29 of Special Rapporteur's second report (A/CN.4/179). Discussed at the 808th meeting of the Commission. Drafting Committee's text discussed and adopted at the 817th meeting. Commentary adopted at the 821st meeting.

²⁸⁷ See *Yearbook of the International Law Commission, 1967*, vol. II, document A/6709/Rev.1, annex I.

(2) In drafting article 30 the Special Rapporteur had started with the ideas underlying the said article 35, but had expanded the article in the following way:

(a) He had extended these exemptions to the entire staff and not merely to the head and members of the special mission. In his view, it was not possible otherwise to ensure the special mission's smooth operation;

(b) It was also his view that exemption from personal services and contributions ought to be accorded to locally recruited staff regardless of nationality and domicile. Otherwise, the special mission would be placed in a difficult position and would not be able to carry out its task until it succeeded in finding other staff exempt from such services and contributions. Calling on such locally recruited staff to render such services or contributions could be used as a powerful weapon by the receiving State to harass the special mission. On the other hand, the receiving State would not be imperilled by these exemptions, special missions generally being of very short duration and their staff very small.

(3) The Commission considered that the rules of law corresponding to these needs of the special mission would involve an excessive derogation from the sovereign rights of the receiving State, but it decided to mention in the commentary the arguments put forward by the Special Rapporteur.

New suggestions by Governments

(4) This article is restricted to members of the diplomatic staff, the privileges of the other categories of staff of the special mission being regulated by article 32. The Special Rapporteur points out that it was impossible to apply to article 30 the simplified formula proposed by the Government of Israel in its general comment on the terminology of articles 23 to 32.

(5) In its comments on article 32 of the draft, the United Kingdom Government states that it seems unnecessary to include in article 30 a clause relating to nationals of, and permanent residents in, the receiving State, as there is a general provision relating to these categories of persons in article 36 of the draft.

(6) The Special Rapporteur points out that the Commission was of the same opinion, and did not insert in article 30 of the draft a clause relating to nationals of, and permanent residents in, the receiving State.

(7) In its written comments, the Netherlands Government stated the following opinion:

With reference to paragraphs 2 and 3 of the Commission's commentary the Netherlands Government states that it endorses the view that there is no need to supplement this article as proposed by the Special Rapporteur.²⁸⁹

(8) The Special Rapporteur considers it sufficient that the opinion expressed by the Netherlands Government should be included in the commentary, and does not think it necessary to insert it in the text. He would like to have it mentioned in the Commission's report so that it may be taken into consideration at the conference of plenipotentiaries.

(9) Accordingly, the Special Rapporteur considers that:

(a) It is not necessary to change the proposed text;

(b) There is no need to change the commentary;

(c) For drafting reasons, the words "the members and diplomatic staff of the special mission" should be substituted for the words "the head and members of the special mission and the members of its diplomatic staff";

(d) Subject to the existence of an agreement concluded under article 17 *bis*, the provision contained in this article should be a compulsory rule of international law.

Article 31.²⁹⁰ — Exemption from customs duties and inspection

1. The receiving 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 special mission;

(b) Articles for the personal use of the head and members of the special mission, of the members of its diplomatic staff, or of the members of their family who accompany them.

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

Commentary

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

(2) The question of applying to special missions the rules exempting permanent diplomatic missions and their members from the payment of customs duties on articles imported for the establishment of the mission, its members or its staff seldom arises, although it may do so. In view of the rarity of such cases, the Commission considers that a special provision on this point should not be included in the text but that this eventuality should be mentioned in the commentary, in order to inform Governments that such situations occur and that they ought to settle them by specific decisions in individual cases.

(3) The claims of certain special missions, for themselves or for their members, to exemption from the payment of customs duties on the importation of consumer goods, have been challenged in practice. The Commission has refrained from proposing a solution for this case.

²⁸⁹ See *Yearbook of the International Law Commission, 1967, vol. II, document A/6709/Rev.1, annex I.*

²⁹⁰ Introduced as article 30 of Special Rapporteur's second report (A/CN.4/179). Discussed at the 808th meeting of the Commission. Drafting Committee's text discussed and adopted at the 817th meeting. Commentary adopted at the 821st meeting.

New suggestions by Governments

(4) The Belgian Government has a comment to make on article 31, paragraph 1 and proposes that the range of articles to which Customs privileges extend should be restricted. The proposal is worded as follows:

With regard to sub-paragraph (b), the word "articles" is too vague and is inadequate. The Belgian Government is prepared to grant exemption from Customs duties solely in the case of personal effects and baggages.²⁹¹

(5) The Special Rapporteur believes it to be necessary to grant to the members of special missions mentioned in article 31, paragraph 1, a fairly wide degree of customs exemption, not confined to personal effects and baggage in the strict sense, yet narrower than that granted under the Vienna Convention on Diplomatic Relations to diplomatic agents, who are granted this privilege in connexion with the entry of articles intended for their establishment. He considers that the provision laid down by the Commission is a just one and that it should not be restricted.

(6) The Belgian Government further considers that the privileges granted to the members of the families of the head and of members of a special mission and of its diplomatic staff should not be expressly mentioned, because this matter is explicitly regulated by article 35, paragraph 1. The Special Rapporteur considers that the Belgian Government's comment is well-founded and that that part of the provision relating to members of families could be omitted.

(7) In connexion with article 31, the Government of Israel, in its general comment on terminology, raises the question whether the restrictive expression "diplomatic staff" (of the special mission) or the general term "staff" should be used. In the Special Rapporteur's view, the specific term "members of its diplomatic staff" should be used here, because the position in the case of other types of staff is governed by a special provision in article 32.

(8) The Swedish Government also has a comment to make on article 31 in its written remarks. It says:

In view of the fact that there is a special article (article 35) dealing with the families, should not, in paragraph 1 (b) the words "or of the members of their family who accompany them" be omitted? (Cf. commentary (2) (a) to article 32). There also seems to be a discrepancy between the expression "who accompany them" in article 31, paragraph 1, and the expression "who are authorized by the receiving State to accompany them" in article 35, paragraph 1.²⁹²

(9) The Special Rapporteur regards this comment by the Swedish Government as essentially the same as that by the Belgian Government referred to above, which he considered well founded.

(10) The Austrian Government points out in its written comments that there is a certain inconsistency between the wording of articles 31 and 32 of the draft regarding exemption of administrative and technical staff from customs duties. The Austrian Government states in this connexion:

Article 36, paragraph 2 of the Vienna Convention on Diplomatic Relations contains a limitation in time of the customs exemptions granted to members of the administrative and technical staff. The omission of this limitation in the present draft articles would place the administrative and technical staff of a special mission in a substantially more favourable position than the corresponding staff members of a permanent mission.

In article 32, moreover, instead of referring to article 31 as a whole, reference should be made to article 31, paragraph 1 (b), since it can hardly be intended to grant to administrative and technical staff the same rights as are granted to diplomats in article 31, paragraph 2, which would be going beyond the corresponding provision in the Vienna Convention on Diplomatic Relations. Accordingly, in article 32 of the draft either the same time-limitation to "articles imported at the time of first installation" should be inserted and, in addition, the reference limited to article 31, paragraph 1 (b), or the reference to article 31 should be omitted altogether.²⁹³

(11) As this remark by the Austrian Government is almost identical in substance with the written comment of the United Kingdom Government, on which the Special Rapporteur expresses his views in the section on article 32, he does not think that there is any need here to express his opinion on the subject.

(12) Accordingly, the Special Rapporteur considers that:

(a) The text of article 31 should not be changed;

(b) The comments of the Austrian, Belgian, Swedish, and United Kingdom Governments which have been cited should be included in the commentary;

(c) For drafting reasons, paragraph 2 should begin with the words "The personal baggage of the members and diplomatic staff of the special mission shall be";

(d) Subject to the existence of an agreement concluded under article 17 *bis*, the provision contained in this article should be a compulsory rule of international law.

Article 32.²⁹⁴ — Administrative and technical staff

Members of the administrative and technical staff of the special mission shall, if they are not nationals of or permanently resident in the receiving State, enjoy the privileges and immunities specified in articles 24 to 31, except that the immunity from civil and administrative jurisdiction of the receiving State specified in paragraph 2 of article 26 shall not extend to acts performed outside the course of their duties.

Commentary

(1) This article is based on article 37, paragraph 2, of the Vienna Convention on Diplomatic Relations.

(2) The two texts differ in that article 32 omits two clauses which appear in the said article 37, paragraph 2:

(a) It omits any mention of members of the family, for these are dealt with in a separate article (article 35);

(b) It does not provide for customs exemption in respect of articles imported at the time of first installation,

²⁹³ *Ibid.*

²⁹⁴ Introduced as article 32 of Special Rapporteur's second report (A/CN.4/179). Discussed at the 808th meeting of the Commission. Drafting Committee's text, numbered 31, discussed and adopted at the 817th meeting. Commentary adopted at the 821st meeting.

²⁹¹ See *Yearbook of the International Law Commission, 1967*, vol. II, document 6709/Rev.1, annex I.

²⁹² *Ibid.*

as the Commission considered that this privilege should not be granted to the members of special missions (see article 31, paragraph (2) of the commentary).

New suggestions by Governments

(3) In its written comments, the Belgian Government expresses the view that the reference to nationality or permanent residence in article 32 should be omitted, on the ground that the matter is regulated by article 36.²⁹⁵ The Special Rapporteur's view is that, although this comment by the Belgian Government may strictly speaking be correct, the omission of these references from article 32 would make it necessary to insert a reference to article 36. The question is whether it is better to have a direct reservation, or an indirect reservation which would be less clear because it would merely take the form of a reference to another article.

(4) The Israel Government's general comment on terminology also refers to this article. The Special Rapporteur does not think that the abbreviated expression "the staff" can be used, because the Commission's idea, based on the 1961 Vienna Convention on Diplomatic Relations, is that the privileges and immunities of the administrative and technical staff should not be the same as those of the diplomatic staff.

(5) The Swedish Government's comment on article 31 (see above, article 31, paragraph (8) of the commentary) also refers to this article. The Special Rapporteur has already accepted this comment in connexion with article 31.

(6) In its written comments the United Kingdom Government expresses the fear that the wording of article 32 may be too wide, in that it confers "first installation" customs privilege on administrative and technical staff. Its remarks are as follows:

Article 32. According to paragraph 2 (b) of the commentary, the Commission did not intend the grant of "first installation" Customs privilege to administrative and technical staffs but the article as it stands confers on these staffs full diplomatic Customs privilege, contrary to intention.²⁹⁶

(7) The Special Rapporteur thanks the United Kingdom Government for this warning, but believes that the reference in the commentary is not to article 31 of the draft but to article 37 of the 1961 Vienna Convention on Diplomatic Relations, and that accordingly this staff does not enjoy "first installation" customs privilege which is not mentioned in article 31 of the draft, though there is a reference to it in article 37 of the above-mentioned Vienna Convention.

(8) In its written comments the United Kingdom Government, like the Belgian Government, expresses the view that it is unnecessary to insert here a clause relating to nationals of, and permanent residents in, the receiving State, since the relevant *sedes materiae* provision is to be found in article 36 of the draft.

(9) In the section on article 32, the Special Rapporteur recognizes the soundness of this observation; and he himself considers that the clause in question should be

retained in article 36 only, as suggested in the United Kingdom remark which reads as follows:

Since nationals of, and permanent residents in, the receiving State are excluded from privileges and immunities by article 36, the repetition of the exclusion in this article seems unnecessary and, as it is not repeated in articles 28, 29 and 30, confusing.²⁹⁷

(10) On the subject of article 35, the United Kingdom Government in its written comments, expresses the fear that the commentary on article 32 may give the impression that the draft accords full diplomatic customs privilege to families of administrative and technical staff.

(11) The Rapporteur wishes to confine himself for the moment to article 32 of the draft, and to point out that this article does not relate directly to members of families.

(12) The Netherlands Government has also submitted written comments concerning the text of this article:

No comments, except for the necessity of formal adaptation to article 26 if the proposal to change this article is adopted. If the proposal to change article 26, paragraph 2 is not adopted, article 32 should be amended in such a manner that liability for damage resulting from road accidents falls outside the scope of the immunity.²⁹⁸

(13) Reference should also be made to the general comment of the Austrian Government on articles 31 and 32, which is reproduced in the discussion of article 31.

(14) The Special Rapporteur believes that the Commission should not go into the question of responsibility for damages resulting from automobile accidents, but he is prepared to propose to the Commission that accidents of this kind should not be considered as covered by the "minor" immunities, which include acts committed by members of this staff in the course of their duties.

(15) Accordingly, the Special Rapporteur considers that:

(a) It is not necessary to change the text of article 32;

(b) The idea set forth in the Netherlands Government's proposal should be included in the commentary;

(c) It is not necessary to revise the text of this article for drafting reasons;

(d) Subject to the existence of an agreement concluded under article 17 *bis*, the provision contained in this article should be a compulsory rule of international law.

Article 33.²⁹⁹ — Members of the service staff

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

Commentary

(1) This article is based on article 37, paragraph 3, of the Vienna Convention on Diplomatic Relations.

²⁹⁷ *Ibid.*

²⁹⁸ *Ibid.*

²⁹⁹ Introduced as article 32 of Special Rapporteur's second report (A/CN.4/179). Discussed at the 808th meeting of the Commission. Drafting Committee's text, numbered 32, discussed and adopted at the 817th meeting. Commentary adopted at the 821st meeting.

²⁹⁵ See *Yearbook of the International Law Commission, 1967*, vol. II, document A/6709/Rev.1, annex I.

²⁹⁶ *Ibid.*

(2) The Commission considers that the text adopted is sufficient to provide the guarantees necessary for the members of the service staff of special missions.

(3) The Special Rapporteur suggested that the Commission should provide for the grant of the following additional privileges to members of the service staff:

(a) Exemption from personal services and contributions, for he is convinced that, unless members of the service staff are guaranteed this exemption, the authorities of the receiving State could paralyse the proper functioning of the special mission;

(b) Full immunity from the criminal jurisdiction of the receiving State, for the exercise of that jurisdiction in respect of members of the service staff could paralyse the functioning of the special mission entirely — a possibility which does not arise in the case of permanent diplomatic missions.

(4) The Commission did not accept the Special Rapporteur's suggestions, and it decided not to go further than the Vienna Convention on Diplomatic Relations in the matter. It decided to draw attention in the commentary to the Special Rapporteur's suggestions set out in paragraph (3) above.

New suggestions by Governments

(5) In its written comments, the Belgian Government proposes an addition to article 33. This proposal is worded as follows:

No reference is made to article 28 concerning social security. The following should therefore be added: "as well as the provisions of article 28 on social security."³⁰⁰

(6) The Special Rapporteur thanks the Belgian Government for this reminder, for article 28 (Exemption from social security legislation) refers to the staff of the special mission in general and consequently also to members of the service staff. The reference to article 28 proposed by the Belgian Government will therefore have to be inserted in article 33.

(7) The Belgian Government proposes in its comments that the reference to nationality or permanent residence of members of the service staff should be omitted from article 33, as the matter is regulated by article 36, paragraph 2. The Special Rapporteur considers this observation to be well-founded.

(8) In its remarks on article 33 of the draft, the United Kingdom Government refers to paragraphs (3) and (4) of the Commission's commentary on the article and, in its written comments, it states:

Article 33. The formulation of the Commission is preferred to the suggestion of the Rapporteur that service staffs of special missions should be accorded a level of immunity higher than that given in the case of permanent diplomatic missions.³⁰¹

(9) As the United Kingdom Government's remarks amount merely to acceptance of the Commission's view, as opposed to the separate opinion expressed by the Special Rapporteur, the latter believes that it is not necessary to include these remarks in the commentary.

(10) In its written comments, the Netherlands Government proposes the following:

Liability for damage resulting from road accidents should be excluded from the immunity.³⁰²

(11) Accordingly, the Special Rapporteur considers that:

(a) The Belgian Government's two suggestions for amendment of the text should be adopted;

(b) The commentary should be extended to include the Belgian amendments and the idea contained in the Netherlands Government's proposal;

(c) There is no need to amend the text for drafting reasons;

(d) Subject to the existence of an agreement concluded under article 17 *bis*, the provision contained in this article should be a compulsory rule of international law.

Article 34.³⁰³ — Private staff

Private staff of the head and members of the special mission and of members of its staff who are authorized by the receiving State to accompany them in the territory of the receiving State shall, if they are not nationals of or permanently resident in the receiving State, be exempt from dues and taxes on the emoluments they receive by reason of their employment. In all other respects, they may enjoy privileges and immunities only to the extent admitted by the receiving State. However, the receiving 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 special mission.

Commentary

(1) This article is based on article 37, paragraph 4, of the Vienna Convention on Diplomatic Relations.

(2) In 1960 the Commission took as the premise the proposition that the head, members and members of the staff of the special mission should be allowed to bring private staff with them, for such staff might be essential to their health or personal comfort.

(3) However, it is a moot point whether there is a right *de jure* to bring such staff. This matter is thought to lie within the discretionary power of the receiving State, which may therefore impose restrictions. However, where there are no restrictions or where the receiving State grants permission, the question arises in practice whether the privileges and immunities extend to private staff.

(4) The Special Rapporteur is of the opinion that this staff should be guaranteed functional immunity from criminal jurisdiction in respect of acts performed in the course of the duties they normally carry out on the orders of their employers. The Commission did not

³⁰² *Ibid.*

³⁰³ Introduced as article 32 of Special Rapporteur's second report (A/CN.4/179). Discussed at the 808th meeting of the Commission. Drafting Committee's text, numbered 33, discussed and adopted at the 817th meeting. Commentary adopted at the 821st meeting.

³⁰⁰ See *Yearbook of the International Law Commission, 1967*, vol. II, document A/6709/Rev.1, annex I.

³⁰¹ *Ibid.*

wish to go further than the Vienna Convention on this point.

New suggestions by Governments

(5) The Belgian Government takes the view that reference to nationality and permanent residence should be omitted from this article, on the ground that the position of private staff where nationality or permanent residence in the territory of the receiving State is concerned is regulated by article 36.³⁰⁴ The Belgian Government's observation is fully justified.

(6) In its written comments, the United Kingdom Government suggests that some restrictions should be introduced, and some amendments made, in the text of draft article 34 as drawn up by the Commission. While the Commission takes the view that "Private staff shall be exempt from dues and taxes on the emoluments they receive by reason of their employment", the United Kingdom Government takes the opposite view. Its objection is worded as follows:

Article 34. The United Kingdom Government oppose the exemption of private servants from income tax on their emoluments.

A private servant who is not himself permanently resident in the United Kingdom would be liable to United Kingdom tax on his emoluments for his services in the United Kingdom if he were in the United Kingdom for six months or more in any one income tax year. In such circumstances it is unlikely that the private servant would be liable to taxation on his emoluments in the sending State: if the receiving State were required to exempt him, he would be free of all taxation. By contrast, the staff of the special mission will normally be taxed by the sending State. If, exceptionally, the sending State should tax the private servant's emoluments, he would qualify for double taxation relief in the United Kingdom.³⁰⁵

(7) The Special Rapporteur feels obliged to point out that the exemption of private staff from taxes is also in accordance with the provision contained in article 37, paragraph 4, of the 1961 Vienna Convention on Diplomatic Relations, that it is frequently applied in practice and that it is not merely a privilege accorded to private staff but also a concession granted to the members of the special mission themselves, so that they do not have to waste time, during their brief sojourn in the receiving State, in studying its taxation system and procedure.

(8) With reference to this point, the Netherlands Government states that it is opposed to the use of the expression "private staff" and prefers the expression "private servants".³⁰⁶ However, the Commission rejected the term "servant", which had previously been discarded during the preparation of the Vienna Convention on Consular Relations of 1963. The Special Rapporteur thinks that the Commission should not revert to an expression previously rejected in international law.

(9) Accordingly, the Special Rapporteur considers that:

(a) The text of article 34 should not be changed;

(b) There should be an explanation in the commentary of why the expression "private servant" has not been used;

(c) For drafting reasons and in the light of the definitions proposed in the new article, the words "of the members of staff of the special mission" should be substituted for the words "of the head and members of the special mission and of members of its staff";

(d) Subject to the existence of an agreement concluded under article 17 *bis*, the provision contained in this article should be a compulsory rule of international law.

Article 35.³⁰⁷ — Members of the family

1. The members of the families of the head and members of the special mission and of its diplomatic staff who are authorized by the receiving State to accompany them shall, if they are not nationals of the receiving State, enjoy the privileges and immunities specified in articles 24 to 31.

2. Members of the families of the administrative and technical staff of the special mission who are authorized by the receiving State to accompany them shall, if they are not nationals of or permanently resident in the receiving State, enjoy the privileges and immunities specified in article 32.

Commentary

(1) This article is based on article 37 of the Vienna Convention on Diplomatic Relations, but some major changes were necessary to make it applicable to special missions.

(2) In practice, the question arises whether privileges and immunities also attach to family members accompanying the head and members of the special mission or members of its staff. One school of thought maintains that there can be no grounds for limiting privileges exclusively to the head and members of the special mission and members of its staff unless, owing to the nature of the work to be performed or by prior arrangement, the presence of family members in the territory of the receiving State is ruled out in advance.

(3) The Commission realized that the attempt to specify what persons are covered by the expression "members of the family" had at both the Vienna Conferences (in 1961 and 1963) ended in failure, but it believes that in the case of special missions the number of such persons should be limited. However, in the case of temporary residence it is a matter of no great consequence whether the relative concerned is a regular member of the household of the person whom he or she is accompanying.

(4) In practice, restrictions are sometimes general, sometimes limited in the sense that they except a specified number of family members, or else they may apply to certain periods of the special mission's visit or to access to certain parts of the territory. The Commission merely recognized, without going into details, that

³⁰⁴ See *Yearbook of the International Law Commission, 1967*, vol. II, document A/6709/Rev.1, annex I.

³⁰⁵ *Ibid.*

³⁰⁶ *Ibid.*

³⁰⁷ Introduced as article 31 of Special Rapporteur's second report (A/CN.4/179). Discussed at the 808th meeting of the Commission. Drafting Committee's text, numbered 34, discussed and adopted at the 819th meeting. Commentary adopted at the 821st meeting.

it is within the receiving State's power to impose restrictions in this respect.

New suggestions by Governments

(5) The Belgian Government has the following comment to make on article 35, paragraph 1:

The paragraph refers to articles 24 to 31, including article 29; but it is hard to see how a member of the family can enjoy tax exemption on income attaching to functions with the special mission.³⁰⁸

(6) Although in principle it is difficult to see how members of the families of members of the special mission and of its staff can have "income attaching to their functions with the special mission", the fact remains that in practice special missions entrust certain minor matters to members of the families of members of the special mission rather than to persons not connected with the mission. For this reason, the Special Rapporteur considers that the reference to article 29 should not be deleted from the text of article 35, paragraph 1.

(7) The Belgian Government also has some comments to make on article 35, paragraph 2. It says:

This paragraph refers to article 32, which itself refers back to the same articles; the comment on paragraph 1 therefore applies equally to this paragraph.

The drafting of this paragraph does not seem adequate; it would be clearer to word it: "Members of the families of the administrative and technical staff of the special mission who are authorized to accompany it shall enjoy the privileges and immunities referred to in article 32 except when they are nationals of or permanently resident in the receiving State."

An anomaly, which in fact exists in article 37, paragraph 1 of the Vienna Convention on Diplomatic Relations, but was corrected in article 71, paragraph 2 of the Vienna Convention on Consular Relations, should be pointed out. If a member of the mission is a national or permanent resident of the receiving State, he loses his immunities; taking the text literally, the members of his family who are not either nationals or permanent residents would enjoy the immunities.³⁰⁹

(8) The Special Rapporteur, while thanking the Belgian Government for its comment, does not accept this literal interpretation of the text. In his view, members of the family cannot possess privileges and immunities greater than those enjoyed by the member of the mission or the member of the staff from whom their privileged position is derived. Consequently, the Special Rapporteur sees no reason for changing the Commission's text.

(9) The Swedish Government's comment on article 31 (see above, article 31, paragraph (8) of the commentary) also refers to this article. The Special Rapporteur has already answered this comment by the Swedish Government in the section dealing with article 31.

(10) On the subject of this article, the United Kingdom Government expresses the view that the Commission's commentary on articles 31 and 32 should be more specific. In its opinion the consequence of these two articles, taken in conjunction with the text of article 35, would be that members of the family of administrative and

technical staff would enjoy excessive customs privileges, which the United Kingdom Government is not prepared to accept. The text of the comment by the United Kingdom Government is as follows:

Article 35. The comment on article 31 above applies equally to families. The provision which appears to accord full diplomatic Customs privilege to families of administrative and technical staff is presumably an error consequent upon that apparently existing in article 32, to which attention has already been drawn.³¹⁰

(11) The Special Rapporteur believes that there are no grounds for the concern expressed by the United Kingdom Government, and that the latter's comments apply to the commentary rather than to the text of the article. He will, nevertheless, take these comments into account in preparing the final text of the commentary.

(12) The Austrian Government considers that the wording of paragraph 2 of article 35 is incomplete and inconsistent with that of article 31, and suggests that the two texts should be brought into line with each other. Its remarks are worded as follows:

Article 35, paragraph 2:

This paragraph should, in the manner already explained in connexion with article 32, and in the light of the wording ultimately adopted for that article, be limited to the privilege set forth in article 31, paragraph 1 (b) and to articles imported at the time of first installation, unless this paragraph is omitted altogether.³¹¹

(13) The Special Rapporteur thanks the Austrian Government for giving him this warning and points out that he has already expressed his views on this question in the present section on article 35, in reply to a similar remark by the United Kingdom Government.

(14) The Netherlands Government, in its written comments, has also given its opinion on the text of article 35. Its comments are as follows:

This article is worded in such a manner that the permission of the receiving State would seem to be required whenever the head or members of the special mission or its diplomatic staff wish to bring members of their families with them. Even though circumstances are conceivable in which the receiving State would advise against bringing members of families or would even feel obliged to forbid it, it does not seem right to make it a general rule that the bringing of members of one's family shall be subject to the granting of permission. It is proposed that, by and large, matters concerning the presence and the status of members of families be omitted from the rules governing special missions. Only if the sending State desired that special status be accorded to the members of the families would the receiving State's permission be required. Therefore the words: "who are authorized by the receiving State to accompany them" should be deleted from article 35, paragraph 1; instead, the following words should be added at the end of the clause:

"... in articles 24 to 31, in so far as these privileges and immunities are granted to them by the receiving State".

Paragraph 2 should be amended accordingly.

If the proposal to amend article 26, paragraph 2 is rejected, article 35 should be amended in such a way that damage resulting from road accidents is not included in the immunity.³¹²

(15) The Special Rapporteur considers that the idea put forward by the Netherlands Government concerning

³⁰⁸ See *Yearbook of the International Law Commission, 1967*, vol. II, document A/6709/Rev.1, annex I.

³⁰⁹ *Ibid.*

³¹⁰ *Ibid.*

³¹¹ *Ibid.*

³¹² *Ibid.*

paragraph 1 is not in accord with the fundamental idea which guided the Commission. According to the Commission's conception, the members of the family should enjoy privileges and immunities to the same extent as the persons from whom they derive these privileges. On the other hand, according to the conception of the Netherlands Government, the extent of these privileges and immunities is determined by the receiving State. Since this is a substantive question, the Special Rapporteur considers that the Commission should take a definite decision on it; personally, he does not advise the adoption of this idea. As to the suggestion that the members of the family should not enjoy immunities in respect of damages resulting from automobile accidents, he is of the opinion that it might be adopted.

(16) Accordingly, the Special Rapporteur considers that:

(a) A decision should be taken on the Netherlands Government's proposed amendment to paragraph 1;

(b) In any event, the Netherlands Government's idea should be noted in the commentary;

(c) The words "of the members and diplomatic staff of the special mission" should be substituted for the words "of the head and members of the special mission and of its diplomatic staff" for drafting reasons and in accordance with the definition proposed in the introductory article;

(d) Subject to the existence of an agreement concluded under article 17 *bis*, the provision contained in this article should be a compulsory rule of international law.

*Article 36.*³¹³ — *Nationals of the receiving State and persons permanently resident in the territory of the receiving State*

1. Except in so far as additional privileges and immunities may be recognized by special agreement or by decision of the receiving State, the head and members of the special mission and the members of its diplomatic staff who are nationals of or permanently resident in that State shall enjoy only immunity from jurisdiction, and inviolability, in respect of official acts performed in the exercise of their functions.

2. Other members of the staff of the special mission and private staff who are nationals of or permanently resident in the receiving State shall enjoy privileges and immunities only to the extent admitted by the receiving State. However, the receiving 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 special mission.

Commentary

(1) This article is based on article 38 of the Vienna Convention on Diplomatic Relations, but the two texts are not identical. The starting-point is the idea that

³¹³ Introduced as article 33 of Special Rapporteur's second report (A/CN.4/179). Discussed at the 808th meeting of the Commission. Drafting Committee's text, numbered 35, discussed and adopted at the 819th meeting. Commentary adopted at the 821st meeting.

the receiving State is not obliged to admit, as head, member or member of the staff of the special mission, its own nationals or persons permanently resident in its own territory. This idea is set forth in article 14 concerning the nationality of the head and members of the special mission and of members of its staff.

(2) The difference between the aforesaid article 14 and the present article is that, in the latter, persons permanently resident in the territory of the receiving State are treated in the same manner as nationals of the receiving State.

(3) During the discussion of article 14, the Commission did not adopt the view that nationals of the receiving State and persons permanently resident in its territory should be treated in identical fashion. In adopting that decision, the Commission took account of the fact that article 8 of the Vienna Convention on Diplomatic Relations does not treat these persons in identical fashion. However, in regard to the enjoyment of privileges and immunities, the Vienna Convention on Diplomatic Relations accepts identical treatment of these two groups in article 38. The Commission considers that the same course should be adopted in the present article. It accepts the argument that the rules on special missions should not reduce the staff of special missions to a status lower than that resulting from the provisions of the Vienna Convention on Diplomatic Relations. However, it was also argued in the Commission that in settling the status of special missions the Commission should take care not to establish any further limitations on the sovereignty of receiving States. It is held that it would not be logical for certain members of special missions or of their staff to be favoured to the detriment of the interests of the receiving State.

(4) The Commission stresses that, in its view, it is better that this question should be settled by mutual agreement rather than that general international rules should be laid down on the subject.

New suggestions by Governments

(5) In its written comments, the Belgian Government states that the text of this article contains a drafting error. This comment is worded as follows:

The word "que" in the seventh line of the French text should be placed before the words "de l'immunité". This drafting error, which appeared in article 38, paragraph 1, of the Vienna Convention on Diplomatic Relations, was in fact corrected in article 71, paragraph 1 of the Vienna Convention on Consular Relations.³¹⁴

(6) The Special Rapporteur considers this comment to be of a drafting nature, but he is not sure whether it is a question of a "drafting error" or of two expressions that were used deliberately. The Drafting Committee will no doubt take the comment into consideration.

(7) The Swedish Government has the following to say about the commentary to article 36:

The commentary should be revised. As it now stands, it is confusing, in particular because the phrase "This idea is set

³¹⁴ See *Yearbook of the International Law Commission, 1967*, vol. II, document A/6709/Rev.1, annex I.

forth in article 14 etc." is not exact. As appears from paragraph (3) only part of the idea was incorporated in article 14.³¹⁵

(8) Since this comment by the Swedish Government relates only to the commentary, and since it is in large measure justified, the Special Rapporteur will endeavour to redraft the commentary on this article.

(9) In its written comments on article 32, the United Kingdom Government draws attention to the fundamental nature of article 36, and expresses the view that the article is sufficient in itself and that the clause relating to nationals of, and permanent residents in, the receiving State need not be repeated in the other articles of the draft.

(10) The Special Rapporteur agrees with this comment by the United Kingdom Government.

(11) In its written comments, the Netherlands Government opposed the retention of article 36.³¹⁶

(12) The Special Rapporteur cannot endorse the proposal of the Netherlands Government, since, perhaps through his fault, paragraph (4) of the commentary has been clumsily drafted. The Commission did not oppose this provision. It only expressed the opinion that it would be better in the first place to settle the status of members of the staff of the special mission who were nationals of the receiving State or who were permanently resident in its territory by mutual agreement rather than by general rules of international law. The Netherlands Government's proposal therefore goes beyond the Commission's wishes, and the Special Rapporteur cannot adopt it.

(13) Accordingly, the Special Rapporteur considers that:

(a) The Commission should first decide on the Netherlands Government's proposal for the deletion of this article. The Special Rapporteur does not recommend that the Commission should adopt this proposal. He also considers that the Drafting Committee should be requested to study the Belgian Government's proposal concerning what it considers to be "a drafting error";

(b) The reference to article 14 in paragraph (2) of the commentary should be revised in accordance with the observation made by the Swedish Government; moreover, the commentary should include a more detailed explanation of the meaning of paragraph (4), in accordance with the decision which the Commission takes on the Netherlands Government's proposal;

(c) For drafting reasons, the words "the members and diplomatic staff of the special mission" should be substituted for the words "the head and members of the special mission and the members of its diplomatic staff", in accordance with the definition in the introductory article;

(d) Subject to the existence of an agreement concluded under article 17 *bis*, the provision contained in this article should be a compulsory rule of international law.

Article 43.³¹⁷ — Right to leave the territory of the receiving State

The receiving State must, even in case of armed conflict, grant facilities in order to enable persons enjoying privileges and immunities, other than nationals of the receiving State, and members of the families of such persons irrespective of their nationality, to leave at the earliest possible moment. It must, in particular, in case of need, place at their disposal the necessary means of transport for themselves and their property.

Commentary

(1) This article reproduces *mutatis mutandis* article 44 of the Vienna Convention on Diplomatic Relations.

(2) The Commission considered that persons who had entered the receiving State's territory in order to form part of a special mission (other than nationals of the receiving State) had the right to leave that territory. The receiving State would be contravening the principle of personal inviolability if it prevented them from leaving.

New suggestions by Governments

(3) The Government of Israel considers that the terminology used in article 43 ought to be re-examined. It has drawn up two proposals on this subject.

(4) According to the first proposal of the Government of Israel:

Article 43 speaks of "persons enjoying privileges and immunities" and "members of the families of such persons", instead of referring to "members of the special mission, its staff, families, etc.", which would seem to be more in keeping with the language employed elsewhere in the draft articles.³¹⁸

(5) The Special Rapporteur observes that the terminology criticized by the Government of Israel was borrowed from article 44 of the 1961 Vienna Convention on Diplomatic Relations and that the Commission is not inclined to depart from that terminology unless obliged to do so. In this case, he does not see any need to depart from the wording of the Vienna Convention.

(6) The second proposal of the Government of Israel reads as follows:

Article 43 requires the receiving State to place at the disposal of the persons mentioned therein means of transport "for themselves and their property". Article 44, however, which deals with a very similar situation, likewise necessitating the withdrawal of the special mission and all that goes with it, speaks of "its property and archives", but makes no effective provision for the removal of such "property and archives" from the territory of the receiving State.³¹⁹

(7) The Special Rapporteur thinks that the purpose of article 43, which refers to the right of persons to leave the territory of the receiving State, and of article 44, which concerns the situation in case of the cessation of the special mission's functions cannot be considered

³¹⁷ Text, numbered 42, submitted by Drafting Committee and adopted at the 819th meeting. Commentary adopted at the 821st meeting.

³¹⁸ See *Yearbook of the International Law Commission, 1967*, vol. II, document A/6709/Rev.1, annex I.

³¹⁹ *Ibid.*

³¹⁵ *Ibid.*

³¹⁶ *Ibid.*

as identical. In his opinion, the correct solution is that which provides for the possibility of removing the archives only in the second case, for the archives in question are not those of persons who enjoy privileges and immunities but archives of special missions. The question raised, however, is an interesting one and deserves the Commission's attention.

(8) Accordingly, the Special Rapporteur considers that:

(a) The Commission should adopt the Israel Government's second proposal;

(b) It is not necessary to change the commentary, but it would be useful to add a new paragraph which would relate the provisions of article 43 to those of article 44 (cross-reference);

(c) There is no need to make any drafting changes in the text of this article;

(d) The provision contained in this article should be generally compulsory, and States may not, even by agreement, waive the right of the members of a special mission and its staff to leave the territory of the receiving State.

Article 37.³²⁰ — 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 receiving State for the purpose of performing his functions in a special mission, or, if already in its territory, from the moment when his appointment is notified to the competent organ of that 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, but shall subsist until that time, even in the case of armed conflict. However, with respect to acts performed by such a person in the exercise of his functions as a member of the special mission, immunity shall continue to subsist.

Commentary

(1) This article reproduces *mutatis mutandis* article 39, paragraphs 1 and 2, of the Vienna Convention on Diplomatic Relations. In the present draft the subject-matter of the other two paragraphs (3 and 4) of the said article 39 is dealt with in a separate article (article 38).

(2) In adopting article 37 the Commission based itself on the same reasons as determined the adoption of article 39 of the Vienna Convention on Diplomatic Relations.

New suggestions by Governments

(3) In its written comments, the Belgian Government raises the following objection of a terminological character to the drafting of article 37, paragraph 1:

³²⁰ Introduced as article 34 of Special Rapporteur's second report (A/CN.4/179). Discussed at the 809th meeting of the Commission. Drafting Committee's text, numbered 36, discussed and adopted at the 819th meeting. Commentary adopted at the 821st meeting.

The word "organ" in the seventh line should be replaced by some more neutral word such as "authority".³²¹

(4) The Special Rapporteur's view is that the issue is not merely one of terminology but also of modern concepts of comparative constitutional law. To the contemporary way of thinking, every official is not at the same time an *authority*, but he is certainly an *organ*.

(5) The Belgian Government also makes the following drafting comment on the French text of article 37, paragraph 2:

In the fifth line of the French text "*qu'il*" should read "*qui lui*".

(6) The Special Rapporteur leaves the decision on this point to the Drafting Committee.

(7) Accordingly, the Special Rapporteur considers that:

(a) It is not necessary to change the text, unless the Drafting Committee adopts the amendment to paragraph 2 proposed by the Belgian Government;

(b) It is not necessary to change the commentary;

(c) There is no need to amend the text for drafting reasons;

(d) Subject to the existence of an agreement concluded under article 17 *bis*, the provision contained in this article should be a compulsory rule of international law.

Article 38.³²² — Case of death

1. In the event of the death of the head or of a member of the special mission or of a member of its staff, 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.

2. In the event of the death of the head or of a member of the special mission or of a member of its staff, or of a member of their families, if those persons are not nationals of or permanently resident in the receiving State, the receiving State shall facilitate the collection and 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.

3. Estate, succession and inheritance duties shall not be levied on movable property the presence of which in the receiving State was due solely to the presence there of the deceased as the head or member of the special mission or member of its staff, or as a member of their families.

Commentary

(1) This article is based on paragraphs 3 and 4 of article 39 of the Vienna Convention on Diplomatic Relations. It contains no more than is needed in the case of special

³²¹ See *Yearbook of the International Law Commission, 1967, vol. II, document A/6709/Rev.1, annex I.*

³²² Introduced as article 35 of Special Rapporteur's second report (A/CN.4/179). Discussed at the 809th meeting of the Commission. Drafting Committee's text, numbered 37, discussed and adopted at the 819th meeting. Commentary adopted at the 821st meeting.

missions, which are not of the same nature as permanent diplomatic missions.

(2) The Commission takes the view that in addition to the provisions applicable to permanent diplomatic missions an obligation should be placed on the receiving State to take whatever measures of protection are necessary with regard to the movable property of members of special missions. It may be that members of special missions and their families are far from the seat of the sending State's permanent mission when death occurs, and the assistance of the local authorities is then necessary for the purpose of collecting and protecting the deceased's movable property. This situation does not arise in the case of the staff of diplomatic and consular missions.

New suggestions by Governments

(3) This article was not referred to in the discussions in the Sixth Committee.

(4) The United Kingdom Government has referred to the text of this article in its written comments, and has made the following proposal:

Article 38. If the possibility of profit-making special missions is to remain (see comment on article 29) the United Kingdom Government would prefer not to give exemption from estate duty to the personnel of such a mission.³²³

(5) The Special Rapporteur is of the opinion that the text of article 38 relates only to the movable property of members of special missions, and that the Commission was thinking only of movable property which such persons had brought in as luggage or acquired by legal means during their stay in the territory of the receiving State. He realizes that the extent of this movable property may not coincide with what the Commission had in mind; but, as the article deals with the case of death in the territory of the receiving State, he believes that the Commission might in some future revision of the draft consider the possibility that estate duty should be levied only on movable property which cannot be regarded as the luggage or personal effects of the deceased.

(6) Accordingly, the Special Rapporteur considers that:

(a) The text of this article should not be changed;

(b) With reference to the United Kingdom Government's observation, a commentary which would be in harmony with the Special Rapporteur's position and which would be worded to take account of the United Kingdom Government's comment should perhaps be included;

(c) For drafting reasons, the words "of a member of the special mission or of its staff" should be substituted for the words "of the head or of a member of the special mission or of a member of its staff" in paragraphs 1 and 2, since it is impossible to use the shorter form contained in the definition in the proposed introductory article;

(d) Subject to the existence of an agreement concluded under article 17 *bis*, the provision contained in this article should be a compulsory rule of international law.

³²³ See *Yearbook of the International Law Commission, 1967*, vol. II, document A/6709/Rev.1, annex I.

Article 39.³²⁴ — Transit through the territory of a third State

1. Subject to the provisions of paragraph 4, if the head or a member of the special mission or a member of its diplomatic staff passes through or is in the territory of a third State, while proceeding to take up his functions in a special mission performing its task in a foreign State, or when returning to his own country, the third State shall accord him inviolability and such other immunities as may be required to ensure his transit or return. The same shall apply in the case of any members of his family enjoying privileges or immunities who are accompanying the person referred to in this paragraph, 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 transit of members of the administrative and technical or service staff of the special 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 receiving State. Subject to the provisions of paragraph 4, they shall accord to the couriers and bags of the special mission in transit the same inviolability and protection as the receiving State is bound to accord.

4. The third State shall be bound to comply with the obligations mentioned in the foregoing three paragraphs only if it has been informed in advance, either in the visa application or by notification, of the transit of the special mission, and has raised no objection to it.

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

Commentary

(1) This article is based on article 40 of the Vienna Convention on Diplomatic Relations. The difference is that, whereas facilities, privileges and immunities must be granted to the head and the staff of the permanent diplomatic mission in all circumstances, in the case of special missions the duty of the third State is restricted to cases where it does not object to the transit through its own territory of the special mission.

(2) The Commission considers that a third State is not bound to accord to its nationals who form part of a foreign special mission passing through its territory the privileges and immunities which the receiving State is not bound to guarantee to its nationals who are members of a foreign special mission (see article 36 of the draft).

³²⁴ Introduced as article 36 of Special Rapporteur's second report (A/CN.4/179). Discussed at the 809th meeting of the Commission. Draft Committee's text, numbered 38, discussed and adopted at the 819th meeting. Commentary adopted at the 821st meeting.

New suggestions by Governments

(3) In its written comments, the Government of Israel proposes to change the adjective applied to the third State. Its proposal is as follows:

With regard to article 39, paragraph 1, attention is drawn to the use therein of the expression "in a foreign State"; and it is suggested that it may perhaps be preferable in the context to say "in another State", in view of the fact that except for a person's "own country" (which expression is also used in that paragraph) every other country is a "foreign State", including the "third State," (likewise mentioned in that paragraph).³²⁵

(4) The Special Rapporteur considers that this comment is justified and that the Drafting Committee should take it into account.

(5) The Government of Israel also has the following suggestion to make with regard to article 39, paragraph 4:

In respect of article 39, paragraph 4, it is suggested to delete the phrase "either in the visa application or by notification" and to substitute the word "notified" for the word "informed", in the third line of that paragraph.³²⁶

(6) The Special Rapporteur recalls that the phrase which the Government of Israel suggests should be deleted corresponded in its essential features to the position taken by the Commission, which was that the sending State was not always bound to notify the proposed transit by a formal note and that the visa application relating to the transit would suffice. The Special Rapporteur considers that failure to mention in the text the form which the notification should take might lead to misunderstandings in practice and, in consequence, he is not disposed to recommend the Commission to adopt this suggestion by the Government of Israel.

(7) The Belgian Government also proposes a change in article 39, paragraph 4, as follows:

It would be better to say "*soit dans le demande de visa*", as that wording would bring out better the obligation to inform at the time that the visa application is made.³²⁷

(8) The Special Rapporteur emphasizes that the intention of the Belgian proposal is to replace the word "*par*" by the word "*dans*", but the proposal is also useful from the point of view of substance, as it clearly brings out the idea that the visa application concerned must be an application arising out of the need for transit by the special mission itself. Accordingly, the Special Rapporteur is in favour of adopting the Belgian proposal.

(9) The United Kingdom Government in its written comments calls in question the whole principle of the obligation of States which accede to the convention on special missions to comply with the stipulation that third States shall accord immunities where they permit transit. The observations of the United Kingdom Government are as follows:

Article 39. As drafted this article obliges the third State to grant immunities where it permits transit. The United Kingdom Government would prefer that third States should instead be entitled

to permit transit without also granting immunities to a special mission.³²⁸

(10) The Special Rapporteur is convinced that adoption of the United Kingdom proposal would undermine the whole institution of special missions. He does believe, however, that this is a question of exceptional importance and that the Commission should consider it in greater detail.

(11) Article 39 was mentioned in the written comments of the Netherlands Government. Its observation is as follows:

The last few words of paragraph 4, viz. "and has raised no objection to it", make paragraphs 1, 2 and 3 meaningless. The Netherlands Government is of the opinion that the third State is only entitled to object to the transit of special missions in exceptional cases and after stating its reasons for doing so. There would have to be an objective criterion by which to judge the justifiability of refusals to allow special missions to pass, and that criterion would have to be set down in the present article. Since it is impossible to establish such a criterion, it would be better to dispense with the article altogether.³²⁹

(12) The Special Rapporteur does not regard the Netherlands Government's proposal as a contribution to the development of international law, for any provision, however incomplete, concerning the duty of the third State to permit transit is better than the deletion of the provision regulating this point. If the third State has, in principle, an obligation to permit transit, this obligation should be expressly stated.

(13) Accordingly, the Special Rapporteur considers that:

I (a) It is not necessary to adopt the United Kingdom Government's amendment;

(b) Consideration should be given to the Israel Government's suggestion, and a decision should be taken as to which expression is more correct: transit through the territory of a *third* State or transit through the territory of a *foreign* State. The Drafting Committee should take a decision on this amendment;

(c) The Commission should take a decision again as to whether the sending State has a duty to furnish an explanation in the note in which it applies for the visa. The Special Rapporteur considers that it would be advisable for the Commission to approve the reasons put forward by the Belgian and Israel Governments on this point;

II (a) If the Netherlands amendment is adopted—and the Special Rapporteur is opposed to its adoption—the question of an addition to the commentary will arise;

(b) If the United Kingdom amendment is adopted, it will be necessary to change paragraph 1 of the commentary;

(c) If either the Belgian or the Israel amendment is adopted, it will be necessary to add a new paragraph to the commentary;

III For drafting reasons, in the light of the definitions contained in the introductory article, the words "the head or" in paragraph 1 should be deleted.

³²⁵ See *Yearbook of the International Law Commission, 1967*, vol. II, document A/6709/Rev.1, annex I.

³²⁶ *Ibid.*

³²⁷ *Ibid.*

³²⁸ *Ibid.*

³²⁹ *Ibid.*

IV In principle, the provision contained in this article should be generally compulsory in the absence of a special agreement between the sending State and the third State concerned.

*Article 40 bis.*³³⁰ — *Non-discrimination*

1. In the application of the provisions of the present articles, the receiving State shall not discriminate as between States.

2. However, discrimination shall not be regarded as taking place:

(a) Where the receiving State applies any of the provisions of the present articles restrictively because of a restrictive application of that provision to its special mission in the sending State;

(b) Where by custom or agreement States extend to each other more favourable treatment than is required by the provisions of the present articles;

(c) Where States agree among themselves to reduce reciprocally the extent of the facilities, privileges and immunities for their special missions in general or for particular categories of their special missions, although such a limitation does not exist with regard to other States.

3. Discrimination also shall not be regarded as taking place where there is inequality in the treatment of special missions which belong to different categories or are received in different circumstances.

Commentary and comments by the Special Rapporteur

(1) Paragraph 1 and the first two sub-paragraphs of paragraph 2 correspond entirely to article 47 of the Vienna Convention on Diplomatic Relations and to article 72 of the Vienna Convention on Consular Relations, which two articles are identical. In the Special Rapporteur's opinion, these rules now represent the standard provisions concerning the application of international law.

(2) The third sub-paragraph of paragraph 2 is new. It was introduced because of the Commission's position that the extent of the facilities, privileges and immunities normally accorded where there are no agreements concerning limitations between the sending State and the receiving State may be changed and limited by mutual agreement. In this case, the States to which such agreements apply cannot be considered to be suffering discrimination.

³³⁰ In his second report on special missions (A/CN.4/179), submitted to the International Law Commission at its seventeenth session, the Special Rapporteur included an article 39, entitled "Non-discrimination",* the text of which was identical with that of paragraph 1 and paragraphs 2 (a) and 2 (b) of article 40 bis. At that session the Commission did not accept the Special Rapporteur's suggestion that a provision on non-discrimination should be included among the draft articles.** At its eighteenth session, however, the Commission reconsidered its previous decision on the point and requested the Special Rapporteur to submit a draft article prohibiting discrimination, concerning which it gave him instructions.***

* Yearbook of the International Law Commission, 1965, vol. II, p. 141.

** *Ibid.*, p. 191, para. 49.

*** Yearbook of the International Law Commission, 1966, vol. II, p. 276, para. 62.

(3) Paragraph 3 was included in the draft articles by the Special Rapporteur in accordance with the instructions given by the Commission. The tasks of the various categories of special missions are so diverse that they have to be treated differently, but the treatment accorded to them should always include the conditions necessary to ensure their functioning and the minimum required by international courtesy. In practice, different treatment is applied to different kinds of special missions, and a sending State may not consider that its special mission belonging to a certain category is being discriminated against if this special mission is not accorded all the facilities, immunities and privileges accorded to another State's special mission which belongs to another category. For example, a special mission for hydrotechnical works cannot claim the treatment accorded to another State's special mission which is responsible for political negotiations, but it has the right not to be subjected to any discrimination in respect of the treatment ordinarily accorded to a special mission of the other State entrusted with similar tasks in the hydrotechnical field.

PART III. MISCELLANEOUS CLAUSES

*Article 40.*³³¹ — *Obligation to respect the laws and regulations of the receiving State*

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

2. The premises of the special mission must not be used in any manner incompatible with the functions of the special mission as laid down in these articles or by other rules of general international law or by any special agreements in force between the sending and the receiving State.

Commentary and comments by the Special Rapporteur

(1) Paragraph 1 of this article reproduces *mutatis mutandis* paragraph 1 of article 41 of the Vienna Convention on Diplomatic Relations and of article 55 of the Vienna Convention on Consular Relations. The rule in question is at present a general rule of international law. The Special Rapporteur considered, furthermore, that this rule should be amplified by a proviso stating that the laws and regulations of the receiving State are not mandatory for the organs of the sending State if they are contrary to the general rules of international law or to the contractual rules which exist between the States. Such a proviso was discussed at both the Vienna Conferences (1961 and 1963) but was not inserted in the relevant articles, for it was presumed that as a general rule the receiving State would observe its general international

³³¹ Introduced as article 38, paragraphs 1 and 4 of Special Rapporteur's second report (A/CN.4/179). Discussed at the 809th meeting of the Commission. Drafting Committee's text, numbered 39, discussed and adopted at the 819th meeting. Commentary adopted at the 821st meeting.

obligations and its duties arising out of international agreements. In addition, it was pointed out that it would be undesirable to refer the diplomatic or consular organs to the general rules of international law and that in each specific case they had the right to enter into discussions with the Government of the receiving State about the conformity of its internal law with the rules of international law. Accordingly, the Commission adopted the rule in question for special missions, but omitted the proviso mentioned above.

(2) Paragraph 2 of this article reproduces *mutatis mutandis* paragraph 3 of article 41 of the Vienna Convention on Diplomatic Relations.

(3) There have been no further suggestions.

(4) The Special Rapporteur considers that neither the text of the article nor the commentary should be changed.

Article 42.³³² — Professional activity

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

Commentary

(1) This article reproduces *mutatis mutandis* article 42 of the Vienna Convention on Diplomatic Relations.

(2) With regard to the possibility of including in the article a clause stating that the right of the persons concerned to carry on a professional or commercial activity in the receiving State on behalf of the sending State is subject to the prior consent of the receiving State, some members contested the validity of the argument that prior consent should not be required in the case of special missions because it is not required in the case of permanent diplomatic missions. The other members took the view that such activity was permitted if in conformity with the law of the receiving State and that the question was settled by article 40, paragraph 1, of the draft (Obligation to respect the laws and regulations of the receiving State). The Commission decided not to include a clause on this question in the text, but to mention this difference of opinion in the commentary.

New suggestions by Governments

(3) The Belgian Government has stated its views on the question whether the provision forbidding members of special missions and their diplomatic staff to practise a professional or commercial activity should be on the lines of article 42 of the 1961 Vienna Convention on Diplomatic Relations, or on the lines of article 57 of the 1963 Vienna Convention on Consular Relations. In this connexion, it states:

The prohibition against practising any professional or commercial activity would be better rendered by the expression

³³² Introduced as article 37 of Special Rapporteur's second report (A/CN.4/179). Discussed at the 809th meeting of the Commission. Drafting Committee's text, numbered 41, discussed and adopted at the 819th meeting. Commentary adopted at the 821st meeting.

"shall not carry on", as in article 57 of the Vienna Convention on Consular Relations of 24 April 1963.³³³

(4) The Special Rapporteur reminds the Commission of the discussion held by it on the question whether the professional activity of the members of special missions should be regulated by a provision on the lines of one or other of those two Conventions.³³⁴ At the close of the discussion, the prevailing view was that the provisions of the Convention on Diplomatic Relations should be followed.

(5) In line with the attitude set forth above, the Belgian Government also made the following proposal:

In addition, the article should be supplemented by provisions similar to those in paragraph 2 of the aforesaid article 57.³³⁵

(6) The Special Rapporteur considers that the explanation given by him with respect to the preceding proposal also replies to this second proposal by the Belgian Government.

(7) The Government of Israel thinks that it might perhaps be better for the Commission to reconsider the essence of article 42. Its proposal reads as follows:

It is submitted that the wording of the second paragraph of the commentary to article 42 is not very clear. As to the substance of that article, it is suggested that the Commission may wish to reconsider the proposal to include a provision enabling members of a special mission, in particular instances, to engage in some professional or other activity whilst in the receiving State, e.g., by substituting a comma for the full-stop at the end of that article and adding thereto: "without the express prior permission of that State".³³⁶

(8) In connexion with this proposal by the Government of Israel, which is contrary to the line taken by the Belgian Government, the Special Rapporteur expresses the opinion that this question is a very delicate one and that a number of different attitudes can be taken towards it. He personally considers that the adopted text should be adhered to, but at the same time he recalls that this text was not adopted unanimously at the Commission's seventeenth session in 1965 and that consequently any doubts regarding it should be taken into consideration. He hopes that certain members of the Commission will give a more detailed explanation of the attitude taken by the Government of Israel.

(9) During the discussion which took place in the Sixth Committee of the General Assembly, the Turkish delegation stated that it hesitated to express an opinion concerning the advisability of adopting *mutatis mutandis*, in article 42 on special missions, the rules of article 42 of the Vienna Convention on Diplomatic Relations.³³⁷ The Special Rapporteur has been unable, by reference to the official record of the meeting, to form a clear idea of the meaning of the observation of the Turkish represen-

³³³ See *Yearbook of the International Law Commission, 1967*, vol. II, document A/6709/Rev.1, annex I.

³³⁴ See *Yearbook of the International Law Commission, 1965*, vol. I, 809th meeting, paras. 10-51.

³³⁵ See *Yearbook of the International Law Commission, 1967*, vol. II, document A/6709/Rev.1, annex I.

³³⁶ *Ibid.*

³³⁷ *Official Records of the General Assembly, Twentieth Session, Sixth Committee, 847th meeting, para. 24.*

tative, Mr. Bilge, whom he has asked for a more detailed explanation of his ideas. Unfortunately he has received no reply to the letter he has sent Mr. Bilge on this subject.

(10) The Netherlands Government also made the following comments on the text of article 42:

Although the Netherlands Government has no objection to this article in its present form, it wishes to endorse the original proposal of the Special Rapporteur that the provision be amplified with the words: "*and they may not do so for the profit of the sending State unless the receiving State has given its prior consent*". (Cf. commentary on article 37 in the second report by Mr. Bartoš.)

This amplification will become superfluous if the Netherlands proposal to amend article 24 is adopted by the Commission.³³⁸

(11) Accordingly, the Special Rapporteur considers that:

(a) In view of the doubts which had been expressed in the Commission, the Israel and Netherlands suggestions should be reconsidered and one of them should be adopted;

(b) The Commission's decision on this point will determine whether it is necessary to change and amplify the commentary;

(c) For drafting reasons, the words "The members and diplomatic staff of the special mission" should, in accordance with the definition contained in the proposed new introductory article, be substituted for the words "The head and members of the special mission and the members of its diplomatic staff";

(d) Subject to the existence of an agreement concluded under article 17 *bis*, the provision contained in this article should be a compulsory rule of international law.

*Article 41.*³³⁹ — *Organ of the receiving State with which official business is conducted*

All official business with the receiving State entrusted to the special mission by the sending State shall be conducted with or through the Ministry for Foreign Affairs of the receiving State or such other organ, delegation or representative as may be agreed.

Commentary

(1) This article is based on paragraph 2 of article 41 of the Vienna Convention on Diplomatic Relations. No such provision appears in the Vienna Convention on Consular Relations for the simple reason that consuls are allowed in principle to communicate direct with all the organs of the receiving State with which they have dealings in the performance of their tasks. Special missions are in a special position. As a general rule, they communicate with the Ministry of Foreign Affairs of the receiving State, but frequently the nature of their

tasks makes it necessary for them to communicate direct with the competent special organs of the receiving State in regard to the business entrusted to them. These organs are often but not always local technical organs. It is also the practice for the receiving State to designate a special delegation or representative who establishes contact with the special mission of the sending State. The question is generally settled by mutual agreement between the States concerned, or else the Ministry of Foreign Affairs of the receiving State informs the organs of the sending State with which organ or organs the special mission should get in touch. A partial solution to this problem has already been provided in the commentary on article 11 of the draft. Consequently, the article as adopted is merely an adaptation of article 41, paragraph 2, of the Vienna Convention on Diplomatic Relations.

(2) Although the range of organs of the receiving State with which the special mission may establish contact in the conduct of its business has been widened in the article as adopted, special missions are not being placed in a position analogous to that of consuls. The relations of special missions are confined to those with the organs which have been specified by agreement or to which they are referred by the Ministry of Foreign Affairs of the receiving State. It should be noted that the term "organ" also applies to liaison officers.

New suggestions by Governments

(3) In its observations, the Belgian Government expresses the opinion that the words "or such other organ, delegation or representative ..." which appear at the end of article 41 of the draft should be changed. It says:

At the end, it would be advisable to use a broader and less controversial listing, for example "such body or person as may be agreed on".³⁴⁰

(4) The Special Rapporteur does not feel able to approve the expressions proposed by the Belgian Government, for in his opinion they are not in conformity with modern ideas as to who may negotiate on behalf of a Government with the mission of another sovereign State.

(5) In its observations, the Belgian Government also makes another proposal in case the Commission fails to adopt its above-mentioned proposal. The Belgian proposal reads as follows:

If the titles of the articles are retained, the word "authority" should be substituted for "organ".³⁴¹

(6) The Special Rapporteur recalls that he has already stated his views on a similar proposal by the Belgian Government with respect to article 37 of the draft. It is not merely a question of terminology but also of conceptions of comparative constitutional law which does not regard the notions of organ and authority as equivalent.

(7) The Special Rapporteur considers that, notwithstanding these observations of the Belgian Government, neither the text nor the commentary on this article should

³³⁸ See *Yearbook of the International Law Commission, 1967*, vol. II, document A/6709/Rev.1, annex I.

³³⁹ Introduced as article 38, paragraphs 2 and 3 of Special Rapporteur's second report (A/CN.4/179). Discussed at the 809th meeting of the Commission. Drafting Committee's text, numbered 40, discussed and adopted at the 819th meeting. Commentary adopted at the 821st meeting.

³⁴⁰ See *Yearbook of the International Law Commission, 1967*, vol. II, document A/6709/Rev.1, annex I.

³⁴¹ *Ibid.*

be changed and that it is not necessary to amend the text for drafting reasons.

*Article 44.*³⁴² — *Cessation of the functions of the special mission*

1. When a special mission ceases to function, the receiving State must respect and protect its property and archives, and must allow the permanent diplomatic mission or the competent consular post of the sending State to take possession thereof.

2. The severance of diplomatic relations between the sending State and the receiving State shall not automatically have the effect of terminating special missions existing at the time of the severance of relations, but each of the two States may terminate the special mission.

3. In case of absence or breach of diplomatic or consular relations between the sending State and the receiving State and if the special mission has ceased to function,

(a) The receiving State must, even in case of armed conflict, respect and protect the property and archives of the special mission;

(b) The sending State may entrust the custody of the property and archives of the mission to a third State acceptable to the receiving State.

Commentary

(1) This article is based on article 45 of the Vienna Convention on Diplomatic Relations, but it was necessary to take into account the fact that the cessation of a special mission's functions does not always coincide with the severance of diplomatic or consular relations between the sending State and the receiving State.

(2) Paragraph 1 covers the case in which the functions of a special mission cease while diplomatic or consular relations exist between the States concerned. In this case, the diplomatic mission or consular posts of the sending State are authorized to take possession of the property and archives of the special mission; they are responsible for the protection of the property of the sending State, including that of the special mission.

(3) Paragraph 2 provides, first, that the severance of diplomatic relations between the sending State and the receiving State does not automatically have the effect of terminating special missions existing at the time of severance. This is consequential on the rule in article 1, paragraph 2, of the draft that the existence of diplomatic or consular relations between the States is not necessary for the sending and reception of special missions (see also paragraph (5) of the commentary on article 1). If the existence of diplomatic or consular relations is not necessary for the sending or reception of special missions, then, *a fortiori*, the severance of such relations does not automatically have the effect of terminating special missions.

(4) Secondly, in conformity with practice, the Commission has recognized in paragraph 2 the right of each of the States concerned to terminate by unilateral act special missions existing at the time when diplomatic relations are severed.

(5) Where diplomatic or consular relations between the two States concerned are non-existent or are severed, the property and archives of the special mission which has ceased its functions are governed, in conformity with practice, by the rules of diplomatic law relating to the severance of diplomatic relations (article 45 of the Vienna Convention on Diplomatic Relations).

New suggestions by Governments

(6) In its observations the Belgian Government discussed the substance of article 44 and particularly of its paragraph 2. This observation reads as follows:

This article deals only with the action to be taken when a special mission ceases to function. Accordingly, paragraph 2 would be better placed in article 12. In addition, the word "automatically" in that paragraph should be replaced by "*ipso facto*". Lastly the words "but each of the two States may terminate the special mission" would become superfluous.³⁴³

(7) The Special Rapporteur considers it his duty to point out that the Belgian Government, in formulating this amendment, looked at the matter from a purely juridico-technical point of view, whereas the Commission envisaged other aspects, namely that the severance of diplomatic relations does not automatically have the effect of terminating the special mission, although each of the States concerned has the right to terminate it if it wishes. For this reason, the Special Rapporteur is of the opinion that the Belgian proposal should not be adopted.

(8) The Special Rapporteur considers, however, that the Drafting Committee should take a decision concerning the Belgian Government's proposal that the word "automatically", which appears in the present text of article 44, paragraph 2, should be replaced by the expression "*ipso facto*", although he prefers the word "automatically", since it is a question of the effective consequence of a fact rather than of a juridical effect.

(9) The Government of Israel also makes some observations concerning the text of article 44. These observations are as follows:

Article 44, paragraph 1, provides for the permanent diplomatic mission or a consular post of the sending State to "take possession" of the "property and archives", but there may not exist any such diplomatic missions or consular post of the sending State in the territory of the receiving State.

Article 44, paragraph 3 (b), would also not meet the case, as there may not be any mission of a third State in the territory of the receiving State prepared to accept the custody of the "property and archives" of the stranded mission of the sending State.

It would, therefore, appear to be necessary to make express provision for the removal of the aforesaid archives from the territory of the receiving State in the cases envisaged in articles 43 and 44.³⁴⁴

³⁴² Text, numbered 43, submitted by Drafting Committee and adopted at the 819th meeting. Commentary adopted at the 821st meeting.

³⁴³ See *Yearbook of the International Law Commission, 1967, vol. II, document A/6709/Rev.1, annex I.*

³⁴⁴ *Ibid.*

(10) The Special Rapporteur thanks the Government of Israel for having drawn attention to the special situations connected with the breaking off of diplomatic or consular relations, since the draft has not taken such situations sufficiently into account, but he is not sure whether it is necessary to go into details on the subject. Perhaps the proper place for dealing with these situations would be the commentary on article 44.

(11) In its written comments the United Kingdom Government suggests that an addition should be made to the text of article 44 of the draft. Its proposal is as follows:

Article 44. It is desirable to provide a time limit to the continuing inviolability of the premises of the special mission. The addition of a reference to a reasonable period would seem to be sufficient.³⁴⁵

(12) The Special Rapporteur considers that this United Kingdom proposal deserves special attention, since it introduces into public international law a new legal institution—namely, a time-limit to the inviolability of the premises of the special mission after the cessation of its functions. During the Second World War, Hitler's doctrine was that the Reich could dispose of the premises of the permanent regular diplomatic missions of States with which it had broken off relations. Reference to this doctrine was made at both the Vienna Conferences, but proposals to mention it in article 45 of the 1961 Vienna Convention on Diplomatic Relations were definitely rejected. The United Kingdom proposal is less categorical, but it does limit the obligation to respect the inviolability to a "reasonable period". The Commission should, accordingly, deal with this proposal since, in the opinion of the Special Rapporteur, it might be an abuse for the sending State to keep the premises closed after the cessation of the functions of the special mission; it would therefore be better to take a middle course.

(13) Accordingly, the Special Rapporteur considers that:

I. (a) The Commission should study the United Kingdom amendment and, if it adopts that amendment in principle, should direct the Special Rapporteur to propose a wording;

(b) The amendment proposed by the Government of Israel is a useful suggestion which the Commission should adopt. Should the Commission adopt this suggestion, the Special Rapporteur will ask Mr. Rosenne, a member of the Commission, to help him draft correctly the addition to the text of article 44;

(c) The Belgian amendment should be sent to the Drafting Committee for preliminary consideration, and the decision on it should be left to that committee;

II. If any of the amendments referred to in subparagraphs (a), (b) and (c) is adopted, the appropriate additions will be made to the commentary;

III. It is not necessary to amend the text of this article for drafting reasons;

IV. The provision contained in this article should be construed as generally compulsory.

Article 0 (provisional number). — Expressions used

For the purposes of the present articles

(a) A "special mission" is a temporary special mission which a State proposes to send to another State, with the consent of that State, for the performance of a specific task;

(b) A "permanent diplomatic mission" is a diplomatic mission sent in accordance with the 1961 Vienna Convention on Diplomatic Relations;

(c) A "consular post" is a consular post established under the 1963 Vienna Convention on Consular Relations;

(d) The "head of a special mission" is the person charged by the sending State with the duty of acting in that capacity;

(e) A "representative" is a person charged by the sending State with the duty of acting alone as a special mission;

(f) A "delegation" is a special mission consisting of a head and other members;

(g) The "members of a special mission" are the head of the special mission and the members authorized by the sending State to represent it as plenipotentiaries;

(h) The "members and staff of the special mission" are the head and members of the special mission and the members of the staff of the special mission;

(i) The "members of the staff of the special mission" are the members of the diplomatic staff, the administrative and technical staff and the service staff of the special mission;

(j) The "members of the diplomatic staff" are the members of the staff of the special mission to whom the sending State has given diplomatic rank;

(k) The "members of the administrative and technical staff" are the members of the staff of the special mission employed in the administrative and technical service of the special mission;

(l) The "members of the service staff" are the members of the staff of the special mission employed in unskilled and domestic service within the special mission;

(m) The "private staff" are persons employed in the private service of the members and staff of the special mission;

(n) The "sending State" is the State which has sent the special mission;

(o) The "receiving State" is the State which has received on its territory a special mission from the sending State for the purpose of transacting official business with it;

(p) A "third State" is a State on the territory of which special missions perform their task or through whose territory they pass in transit;

(q) The "task of a special mission" is the task specified by mutual consent of the sending State and of the receiving State;

(r) The "premises of the special mission" are the buildings or parts of buildings and the land ancillary thereto, irrespective of ownership, used for the purposes

³⁴⁵ *Ibid.*

of the special mission, including the residence of accommodation of the members and staff of the special mission.

Commentary

The reasons which led to the preparation of this article are set out more particularly in chapter I, section 15, of this report. The comments on this text by Mr. Castrén, a member of the Commission, and by the Governments of some Member States will also be found there.

Article "X". — Legal status of the provisions

The provisions contained in these articles shall be compulsory for the States that have acceded to them, unless the provisions contained in particular articles provide expressly that they may be modified by the States concerned in their reciprocal relations by mutual agreement.

Comments by the Special Rapporteur

(1) The Special Rapporteur proposes the above provision in accordance with the Commission's decision recorded in paragraph 60 of its report on its eighteenth session, which reads as follows:

After examining the comments by Governments on this point, the Commission decided to ask the Special Rapporteur to base his draft on the view that the provisions of the draft articles on special missions could not in principle constitute rules from which the parties would be unable to derogate by mutual agreement. The Special Rapporteur was asked to submit to the Commission a draft article which would convey that view and indicate specifically which of the provisions, if any, should in his opinion be excepted from this principle.³⁴⁶

(2) The Special Rapporteur did not consider it advisable, in a provision of this kind, to list the articles which should be considered generally compulsory, from which the parties would be unable to derogate, and certain other articles which could be considered rules left to the discretion of the parties and of a purely optional nature. He considers it preferable to make a general statement, as he has done in the above text. If the Commission thinks that this provision should indicate specifically the rules which may be modified by States and the other rules which should be considered compulsory, the necessary amendment of the proposed provision cannot be made until after the Commission, in its revision of the draft articles, has taken a decision on the compulsory or optional character of each provision.

(3) The problem of the nature and legal status of the draft articles relating to special missions has been fully set out in chapter II, section 8, of this report, which should be considered as a detailed commentary on this provision.

Article "Y". — Relationship between the present articles and other international agreements

1. The provisions of the present articles shall not affect other international agreements in force as between States parties to those agreements.

2. Nothing in the present articles shall preclude States from concluding international agreements confirming or supplementing or extending or amplifying the provisions thereof.

Commentary and comments by the Special Rapporteur

(1) This article had been proposed as article 40 by the Special Rapporteur in his second report,³⁴⁷ but the Commission did not adopt it at its seventeenth session.

(2) This draft article is based on the terms of article 73 of the Vienna Convention on Consular Relations. There is no comparable provision in the Vienna Convention on Diplomatic Relations. At the Vienna Conference on Consular Relations (1963), article 73 was adopted to explain the Conference's opinion that the Vienna Convention on Consular Relations was a body of binding rules of law of general scope permitting States to conclude, within their framework, supplementary agreements, but that the provisions of that Convention were not rules of *jus dispositivum*.

(3) The Special Rapporteur is convinced that these articles, which should constitute the rules of law concerning the status of special missions, should likewise possess the quality and legal weight of a treaty of general interest. For this reason, he proceeds from the premise that the rules to be embodied in these articles should reflect the standard of public international law in this respect and that, hence, States acceding thereto cannot treat these rules as they see fit but rather that this instrument should be a law-making treaty.

(4) The Special Rapporteur shares the opinion of those of the Commission's members who consider that, except in so far as the provisions of the articles themselves allow for possible departures from these rules by mutual agreement among the States parties, these rules are not in principle rules of *jus dispositivum*. He considers that the States which accept these rules adopt them as general principles of international law and that in principle they cannot contract out of these rules.

(5) Nevertheless, even though they are general rules, fundamental rules of law, they should not debar States from elaborating, supplementing or adjusting them—in conformity with the terms of the rules—in the light of the demands of their international relations. States should be left free to supplement and adjust these rules, within and outside their framework, by international agreements, but not in a manner conflicting with the rules.

(6) On the basis of the foregoing, the Special Rapporteur proposes that the Commission should in principle adopt the view that the rules relating to the status of special missions contained in the future articles on this topic are, as a general rule, binding, subject to a certain elasticity as regards the limits laid down in article 73 of the Vienna Convention on Consular Relations. This means that these provisions, although general and binding, do not rule out the possibility of:

(a) derogating therefrom, in cases where the rules themselves provide that they are applicable unless the

³⁴⁶ Yearbook of the International Law Commission, 1966, vol. II, document A/6309/Rev.1, p. 276, para. 60.

³⁴⁷ See Yearbook of the International Law Commission, 1965, vol. II, document A/CN.4/179, pp. 141 and 142.

States settle the particular question differently by treaty (e.g., article 3; article 6, paragraph 3; article 9; article 13, paragraph 1, of the articles on special missions as already adopted). In such a case, the rules in the articles are residual rules.

(b) supplementing or adapting the provisions by bilateral or multilateral agreement. In such a case, although the rules in these articles are strict rules of law, they are not the only source for determining the relations between the States in the matter of the legal status of special missions. States are free to supplement these rules by other rules, on the condition, however, that the other rules must be in conformity with these strict rules of law. This means that, if the present articles do not refer to the possibility of derogating from a residual rule by international treaty, all the rules contained in the articles on the legal status of special missions are elastic, in the sense that the States acceding to these articles should regard them as binding rules of international law but that they may supplement or adapt them without touching on their fundamental substance, in other words the essential provisions.

(7) Consequently, if the Special Rapporteur's view as outlined in paragraph (6) is adopted as reflecting the purpose of the proposed text, the articles would consist of three kinds of provisions:

(a) Binding provisions — and, as a general rule, all are binding;

(b) Provisions replacing the rules in these articles in that the articles themselves permit them (supplement rules), in cases where the parties are authorized by the terms of the articles to lay down different rules by mutual agreement; and

(c) Additional rules, in cases where the parties by supplementary agreements, extend, supplement or adapt the existing rules, within the framework of the existing general rules, without touching on their essence, with the consequence that in such cases there would be the general rules and additional rules not conflicting with the general rules.

(8) The Commission did not adopt the Special Rapporteur's proposal during its seventeenth session, and it included in its report on that session the following decision:

Nor did the Commission accept for the time being the Special Rapporteur's proposal that the draft should contain a provision on the relationship between the articles on special missions and other international agreements (article 73 of the Vienna Convention on Consular Relations).³⁴⁸

(9) When it reverted to this question during its eighteenth session, the Commission changed its mind and took a new decision, which was recorded in paragraph 64 of its report. This decision is as follows:

In paragraph 50 of its report on the work of the first part of its seventeenth session (1965), the Commission referred to the question whether the draft articles on special missions should include a provision on the relationship between the articles and other international agreements, corresponding to article 73 of the Vienna Convention on Consular Relations. After considering

the comments by Governments and the Special Rapporteur's views on the point, the Commission asked the Special Rapporteur to submit a draft article on the subject based on the Convention on the Privileges and Immunities of the United Nations, the Vienna Convention on Diplomatic Relations and the Vienna Convention on Consular Relations.³⁴⁹

(10) This idea is discussed more particularly in chapter II, section 4, of this report, which should be considered as an integral part of this commentary.

Preamble

337. The Commission discussed, during its eighteenth session, the question of the preparation of a preamble to the instrument relating to special missions. The Commission's decision, which was recorded in paragraph 67 of its report on that session, is as follows:

Although it is not current practice for the Commission to prepare preambles to the drafts which it submits to the General Assembly, one Government, in its written comments, expressed the view that the preamble to the convention on special missions should give a definition of a special mission and emphasize the differences between special missions and permanent diplomatic missions. After discussing the matter, the Commission instructed the Special Rapporteur to draft a preamble and submit it to the Commission.³⁵⁰

338. The Special Rapporteur, proceeding in accordance with this decision, has prepared a draft preamble. A more detailed statement on this subject will be found in chapter II, section 16, of this report. That statement should also be considered as a commentary on the draft preamble itself.

339. The draft preamble is as follows:

The States parties to this Convention,

Recalling that the peoples of all States have recognized since time immemorial the special status of special missions,

Bearing in mind the Purposes and Principles of the United Nations Charter relating to the sovereign equality of States, the maintenance of international peace and security, and the development of friendly relations among nations,

Considering that international conventions on diplomatic and consular relations and on privileges and immunities contribute to the development of friendly relations among peoples irrespective of their different constitutional and social systems, and that the conclusion of such conventions at the 1961 and 1963 Vienna Conferences represents progress in the development of international law,

Endorsing the recommendations of the 1961 Vienna Convention on Diplomatic Relations relating to the importance of special missions and the idea that the rules on special missions represent a special branch of diplomatic law since special missions are essentially different in nature and functions from permanent diplomatic missions,

³⁴⁸ *Yearbook of the International Law Commission, 1965*, vol. II, p. 191, para. 50.

³⁴⁹ *Yearbook of the International Law Commission, 1966*, vol. II, p. 276, para. 64.

³⁵⁰ *Ibid.*, p. 277, para. 67.

Recognizing the need for special provisions of international law which would relate to special missions and which would govern them as an institution which is being increasingly used in international relations,

Noting that the conclusion of a special convention relating to special missions will complete the code of positive diplomatic law initiated by the conclusion of the 1961 Vienna Convention on Diplomatic Relations and the 1963 Vienna Convention on Consular Relations,

Mindful of the fact that the status, privileges and immunities to be conferred on special missions are not accorded for the benefit of persons but for the purpose of assuring the effective exercise of the functions of special missions in so far as they represent States,

Confirming that the rules of customary international law should continue to be valid for questions which are not expressly regulated by the provisions of this Convention,

Have adopted the following articles:

...

Arrangement of the articles

340. In his third report, the Special Rapporteur mentioned that several States had made suggestions concern-

ing the revision of the general arrangement of the articles in the draft.³⁵¹

341. The Commission considered this question during its eighteenth session and took a decision on the matter which is recorded in paragraph 68 of its report on that session. This decision is as follows:

The Commission had intended to rearrange the articles on special missions when they had been put into final form. Several Governments too, both in their written comments and in the discussions in the Sixth Committee of the General Assembly, suggested that the Commission should rearrange the articles when it finally adopted them. In accordance with the views of the Special Rapporteur, the Commission decided that it would be premature to undertake such a rearrangement at the present stage. However, it requested the Special Rapporteur to prepare a draft rearrangement of the articles and to submit it to the Drafting Committee of the Commission when the articles had been finally adopted.³⁵²

342. The Special Rapporteur thinks that this work should be done by the Drafting Committee after the Commission has taken a decision on all the draft articles, and that only thereafter should the Commission take a decision in plenary meeting on the rearrangement of the articles.

³⁵¹ *Ibid.*, document A/CN.4/189 and Add.1 and 2, p. 133, para. 69.

³⁵² *Ibid.*, document A/6309/Rev.1, Part II, p. 277, para. 68.

Written comments by Governments received after the stipulated time limit for their submission and prior to the opening of the nineteenth session of the International Law Commission with the Special Rapporteur's observations thereon (A/CN.4/194/Add.3 and 4)

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Preliminary note

1. Although the Special Rapporteur did not complete the draft of his fourth report on special missions until after the stipulated time limit for the submission of suggestions and comments by Governments of Member States, he nevertheless received the comments of six Governments, namely those of Canada, Chile, Gabon, Greece, Japan and the United States of America, after he had despatched the manuscript of the report to the United Nations Secretariat.

2. The Special Rapporteur has therefore decided to present the comments of the six Governments in question, together with his opinions on those comments, in this supplement to his fourth report. The comments are presented in accordance with the scheme adopted for the fourth report.

3. The Special Rapporteur wishes to point out that the number of comments submitted by Governments of Member States after the last two sessions of the General Assembly of the United Nations is fairly large and that this will enable the International Law Commission to decide with greater certainty on the final wording of the draft articles on special missions. The Commission's gratitude is due to the Governments which have contributed to its work by submitting comments on the draft articles on special missions.

I. Additional comments on chapter II of the fourth report on special missions

A. GENERAL COMMENTS

4. On the whole, the general observations of the six Governments whose comments are presented in this supplement show a positive attitude towards the draft articles prepared by the Commission. Each of the Governments had different comments to make. These are reproduced below.

(a) The Greek Government states:

The Greek Government wishes first of all to congratulate the International Law Commission on the valuable work it has done on the draft articles on special missions.

The Greek Government considers it desirable, as a matter of principle, for the question of special missions to be codified. It considers it necessary, however, to make reservations concerning, in particular, the excessive scope of the privileges and immunities granted to special missions and to their members and staff. It is of the opinion that such privileges and immunities should be granted only to the extent strictly necessary for the mission to carry out its task. It must oppose the extension to special missions, as provided in the draft articles, of procedures provided for in the Vienna Convention on Diplomatic Relations . . .

. . . On the whole, therefore, the Greek Government is of the opinion that there will be more chance of success in codifying the question of special missions if the articles are not given too wide an application and if the privileges and immunities granted are kept within the limits strictly necessary for the work of the mission.¹

(b) The comments of the Canadian Government are as follows:

While expressing general agreement with the principles and rules embodied in the present draft articles, the Canadian Government is of the view that the International Law Commission should not go too far in assimilating the status of special missions to that of permanent missions. It is opposed to the undue extension of privileges and immunities which certain of the draft articles now appear to confer. In its view, the grant of such privileges and immunities should be strictly controlled by considerations of functional necessity and should be limited to the minimum required to ensure the efficient discharge of the duties entrusted to special missions. The following comments have consequently been set out in such a way as to emphasize a somewhat conservative approach to the status to be accorded to special missions. Suggestions have been made to that end under the articles which are considered to be too liberal, with the intention that they be brought closer to Canadian views. However, with regard to so-called High Level Special Missions, it is the view of the Canadian Government that such missions should receive a more generous treatment, in respect of both privileges and immunities, than those of a more routine character.²

(c) The Government of Gabon has made the following general comments on the draft articles:

Many African States repeatedly have recourse among themselves to special missions of a political character, in particular, to transmit written or verbal messages from the head of the sending State or its Government, as well as to missions of a technical character, which, because of the growing interdependence in technical matters, tend to increase rapidly in number.

The Gabonese Government accordingly has no doubt that the codification of that topic undertaken by the experts on the International Law Commission will be useful, regardless of the kind of international legal instrument which it produces, and even if that instrument in fact is merely a concise guide-book of procedures which the developing States may use.³

(d) The general observations of the Government of the United States of America are worded as follows:

The United States Government believes that a set of definitions is a useful addition to these articles. Most of the definitions proposed by the Special Rapporteur are from the 1961 Vienna Convention on Diplomatic Relations or the 1963 Vienna Convention on Consular Relations. The definition of "Special mission" is new. It is of paramount importance since it necessarily determines the scope of the draft articles.

The United States considers that the abstract nature of the definition of "special mission" presents serious problems. The only limitations expressed in the definition are that the mission be "temporary", between States, and "for the performance of a specific task". The definition can be considered to include almost any official mission in a foreign State except a permanent diplomatic or consular establishment. As a result, any visit of a representative of one State to another on any kind of official business can be, for the purposes of the proposed convention, a special mission which throws into operation the complicated machinery of the draft articles.

The United States considers that a convention so framed would not accord with modern developments in the conduct of foreign relations. The system proposed would look back toward nineteenth century practice rather than to the conduct of foreign relations in the present half of the twentieth century and to the

¹ See *Yearbook of the International Law Commission, 1967, vol. II, document A/6709/Rev.1, annex I.*

² *Ibid.*

³ *Ibid.*

framing of a convention which should lay a basis for the conduct of foreign affairs in the twenty-first century.

The technological explosion of the past twenty years in the fields of communication and transportation has altered the world in many aspects, and the field of diplomacy has not remained untouched. The most striking development has been in the very area which is the subject of this convention. The carrying on of intercourse between States through meetings of specialists in all fields and at all levels has become a customary feature of international life. It is a most promising development from every aspect. This is an increasingly complicated world and the solution of problems on the international level requires increasingly higher levels of competence, training and experience in a broad spectrum of endeavour, and thus a continuing growth in the employment of experts.

Meetings of an expert character are generally marked by an absence of special arrangements, of concern with protocol, of fanfare and formality. The aims of the meetings are to clear away misconceptions or misunderstandings through face-to-face explanations, to work out joint areas of interest through joint discussions and to seek common goals through common endeavours. These aims have been achieved in innumerable meetings of experts and specialists in the past twenty years, and achieved without any special arrangements for privileges and immunities, for inviolability, for pouches, for servants and for deciding who sits at the head of the table.

It appears from the records of the International Law Commission that a good part of the Commission's work in this field has been devoted to modifying and adapting the provisions of the Vienna Diplomatic and Consular Conventions to Special Missions. The approach has been that there need be no basic difference made between permanent and special missions except to take into account the indefinite duration of the latter. The United States suggests that special missions, as they have developed since World War II, have substantially different work patterns, objectives, and procedures than permanent missions. Requirements developed for permanent missions could be a hindrance rather than a help to the efficient and productive conduct of foreign relations. Such requirements should be modified to take into account experiences of States with the operation of special missions and, in particular, the reasons which have led States to increasingly greater reliance upon special missions for the conduct of foreign affairs.

First and foremost is the need for expert knowledge. A glance at the current topics which are the subject of international agreements, beginning with aerospace disturbances, agricultural commodities, air services, air transport, atmospheric sampling, atomic energy, is an immediate illustration of the enormous requirements for technical knowledge which the modern practice of foreign relations calls for. For foreign relations now includes all sorts of efforts in which individual States co-operate to combat disease, to predict the weather, to increase food production, to harness hydroelectric powers, to turn salt water into fresh water. As a result, there is a constant and continuing exchange of specialist missions between co-operating States. The arrangements for these exchanges of experts and for their meetings are generally informal in character, and certainly have little in common with the elaborate procedures and requirements laid down in the draft convention.

The improvement in long-distance communication, especially by telephone, and the blanketing of the entire world with speedy and efficient air-transport systems, have changed special missions between States from elaborate expeditions into routine visits. The trend is more and more to sending the man dealing with an international problem in one State on a quick trip to talk to the man dealing with that problem in the other. The United States believes that this development is a valuable contribution to the conduct of foreign relations. Again it notes that arrangements for

missions of this nature are usually informal in character and that this method of diplomacy has flourished in the absence of any special arrangements for privileges and immunities.

Present-day experience does not demonstrate the need to make extraordinary arrangements for the ordinary flow of official visitors between one State and another. Experience does demonstrate, however, that there is a growing concern with and a mounting opposition to further extensions of privileges and immunities in most States in which there are sizable diplomatic communities. It would seem extremely likely that a convention extending privileges and immunities to another substantial class of individuals would not be warmly received. If such a convention were to come into general acceptance, its probable effects will be to undermine the valuable developments in the use of special missions discussed above. States will become less receptive to unqualified acceptance of official visits when every such visit must be treated as that of an envoy extraordinary.

The United States recognizes that there are special missions which should be treated specially. Missions which are sent for ceremonial or formal occasions are of a different nature than expert or technical missions, and this difference should be recognized.⁴

(e) The general observations of the Government of Chile are as follows:

1. For the reasons adduced in the International Law Commission it would appear that the draft articles should take the form of a separate convention, independent of the Vienna Conventions on Diplomatic and Consular Relations.

In order to emphasize this independence, specific references to the Vienna Conventions should be avoided. However, unity of form should be preserved through the use of the same terminology and of analogous definitions wherever possible.

2. The Commission was correct in preparing a draft which includes both missions carrying out political tasks and missions of a technical character.

3. The draft must be as flexible as possible. In view of the widely recognized importance of bilateral agreements on special missions, it should not be unduly rigid since this might make it difficult to adapt the provisions to specific circumstances. It should therefore not restrict too greatly the possibility of States entering into new bilateral agreements, even if the special mission in question might, under such agreements, be accorded juridical treatment in some respects less favourable than that provided for in the draft.

Hence the draft should include a minimum of rules of *jus cogens*, States being free to depart from the provisions which do not fall into that category and which would be regarded as residual. These latter would be applicable only in the absence of an express provision agreed to by the parties. The Commission's decision to delete article 40, paragraph 2, of the Rapporteur's preliminary draft⁵ is therefore correct.

Consequently, and in order to emphasize all of the foregoing, the draft should include among its final clauses a provision similar to that suggested by Mr. Rosenne at the 819th meeting on 7 July 1965 (art. 16 *bis*, paras. 1 and 2), with the stipulation that it would be applicable to the entire Convention and not just to Part II, on Facilities, Privileges and Immunities. It would thus be made clear that the draft regulates the activities of all missions, whether political or technical, and whatever their level, save as expressly provided to the contrary.⁶

⁴ *Ibid.*

⁵ *Yearbook of the International Law Commission, 1965*, vol. II, p. 141.

⁶ See *Yearbook of the International Law Commission, 1967*, vol. II, document A/6709/Rev.1, annex I.

(f) The general comments submitted by the Government of Japan read as follows:

There is at present no established international practice with respect to special missions, and the matters concerning them are left to the solution on the "case-by-case" basis. The Government of Japan sees no need, at the present stage, to formulate a set of special rules governing them, but rather considers it more practical to allow the matter to be handled as each particular case arises. (Therefore, even in case codification be attempted, rules should remain as simple as possible.)

The following comments on the International Law Commission draft are submitted on the premise that the work of codification concerning the special mission will be carried out more or less on the line of the Commission's draft. They shall not in any way affect the basic position of the Japanese Government as set forth in the preceding paragraph . . .

...

Since the institutional and procedural aspects of the special missions covered in the present part still remain fluid today, it is premature to formulate detailed rules out of them. The codification at the present stage should therefore be carried out in a concise form in which only basic principles are enumerated, so as to allow room for natural development of customary law.⁷

B. COMMENTS ON SPECIFIC POINTS

5. Observations have also been submitted on some of the specific points examined in chapter II of the fourth report on special missions.

6. *Form of the instrument.* The Gabonese Government comments as follows on this point:

As to the form which the juridical instrument on special missions should take, it would follow from the solution adopted with respect to the peremptory character of the provisions of the text that it should remain, at least for the time being, independent of the Vienna Convention of 18 April 1961, which is based on a contrary principle and which will probably have different effects in international law.

The solution of an additional protocol to that Convention should therefore be ruled out.

In that connexion, the International Law Commission's careful avoidance of the slightest reference to that Convention in its draft articles seems very well advised. Such references are found only in the commentaries.

If the Vienna Convention should be referred to in a preamble placed at the beginning of the draft articles, that reference should be aimed primarily at stressing the wide divergence which exists, provisionally at least, between the two documents, so as not to weaken the effect and peremptory character of the text referred to.

If such a reference was made, it would be even more necessary to add a provision based on article 73 of the Vienna Convention on Consular Relations, explaining that the rules laid down shall not affect other international agreements in force as between States parties to them, including the Convention on the Privileges and Immunities of the United Nations, the Vienna Convention on Diplomatic Relations, and the Vienna Convention on Consular Relations.⁸

7. The Special Rapporteur has already given a detailed commentary on this subject in chapter II of the fourth report.

⁷ *Ibid.*

⁸ *Ibid.*

8. *Relationship with other international agreements.* See the opinion of the Japanese Government under article Y below.

9. *Body competent to adopt the instruments relating to special missions.* The Gabonese Government has expressed itself indirectly on this point. It comments as follows:

Concerning the *method of adoption* of the instrument on special missions, which will depend on its juridical content, the Gabonese Government wishes simply to indicate that if the instrument should include peremptory rules in respect of privileges and immunities, it would have to be in the form of an international treaty in order to take effect on Gabonese territory, since the accession of the Republic to the proposed instrument would have to be ratified by the head of the executive branch under authority of a law.⁹

10. In the view of the Special Rapporteur, the approach taken by the Gabonese Government corresponds to the normal procedure for international treaties.

11. *Legal status of the articles relating to special missions.* The opinion of the Gabonese Government on this point is given under article X below.

12. *So-called high-level special missions.* This point has been commented on by the Governments of Canada, Gabon, Japan and the United States of America.

13. The observations of the Canadian Government are of a general nature and have been reproduced above. The more detailed observations of the Gabonese Government are as follows:

The International Law Commission rightly decided that the annexing of special rules concerning *so-called high-level special missions*¹⁰ was not essential. If the other view was adopted, the proposed provisions would have to be exhaustive and would have to deal also with the case of Vice-Presidents, Deputy Prime Ministers and Ministers of State, which would make the text even longer.

At the most, the case of the head of State who leads a national or governmental mission might be mentioned in general terms with an indication that it was, of course, a special case which entailed adjustments in accordance with the protocol in force in the receiving State for the treatment of heads of State considered as such.¹¹

14. The Japanese Government's comments on this point are as follows:

Provisions concerning the so-called "high-level" special mission also had better be dispensed with for the same reason as that stated ... (above).¹²

15. The Government of the United States of America has also given its views on the level of the special mission as follows:

The level of the mission should also be taken into account. When the mission is headed by an official of ministerial rank or when the mission is received by an official of ministerial rank, this would evidence that the mission is conducting its activities

⁹ *Ibid.*

¹⁰ See the "Draft provisions concerning so-called high-level special missions," prepared by the Special Rapporteur, *Yearbook of the International Law Commission, 1965*, vol. II, document A/CN.4/179, pp. 143 and 144.

¹¹ See *Yearbook of the International Law Commission, 1967*, vol. II, document A/6709/Rev.1, annex I.

¹² *Ibid.*

on a plane which demands special recognition. Finally, there are missions which, even though not headed by an official of ministerial rank, are dealing with matters of such gravity and importance to the States concerned, or which involve unusual considerations, that special protection should be afforded them. In such cases, however, the full range of privileges and immunities afforded by draft articles should become applicable only if the sending State requests the application specifically and the receiving State agrees.

16. The Special Rapporteur feels that this subject has been dealt with adequately in chapter II of the fourth report on special missions (see section 13).

17. *Prohibition of discrimination.* See below under article 40 *bis*.

18. *Introductory article.* See below under article 0.

19. *Question of the preamble.* The Gabonese Government comments as follows on the preamble:

The proposed text should also specify, in its preamble, that it is not intended to assimilate "special missions" to "permanent diplomatic missions", particularly in respect of privileges and immunities, the grant of which should be based entirely on functional needs.¹³

20. The Special Rapporteur has no further comments to offer on this point.

II. Additional comments on chapter III of the fourth report on special missions

PART I OF THE DRAFT ARTICLES: GENERAL RULES

Article 1. — The sending of special missions

21. With the exception of the Canadian and Greek Governments, all the Governments mentioned in the preliminary note have commented on article 1.

22. The Government of Chile submitted two comments on this article. The first is as follows:

The value of defining a special mission in terms of its specific task will appear to be doubtful, for two reasons. On the one hand, there are political missions whose tasks are general rather than "specific" and have not been defined in advance but are merely exploratory, and there are missions whose tasks are gradually broadened as negotiations proceed. On the other hand, there are missions which have a specific task but which are established permanently in the receiving State and which are therefore not covered by the rules set forth in this draft. For these reasons it would seem preferable to define the special mission solely in terms of the temporary nature of its functions. In other words, the task of a special mission may be more or less specific, general, or even undefined in advance, but in all cases the use of the term presupposes that the mission will remain in the receiving State temporarily.¹⁴

23. The Special Rapporteur considers that the criterion of the specific nature of the task should be adopted as an essential part of the concept of a special mission.

24. The second observation of the Chilean Government on article 1 is as follows:

Paragraph 2 should include a provision to the effect that special missions may be sent or received regardless of whether the Governments concerned recognize each other.¹⁵

25. The Special Rapporteur has already indicated his acceptance of this idea.

26. The observations of the United States of America on article 1 have been given above in the additional comments on chapter II of the fourth report. The Special Rapporteur regards these observations as well-founded and in the spirit of the underlying idea of article 1.

27. The United States Government has also proposed a new definition of the concept of special missions. This proposal is given under article 0. It should be considered in conjunction with article 1.

28. The observations of the Government of Gabon on article 1 are as follows:

It might be useful to specify that the sending or reception of a special mission does not imply recognition by one State of another.¹⁶

29. The Gabonese Government is also of the opinion that this article could be further condensed, but the Special Rapporteur finds nothing superfluous in it.

30. The Japanese Government has made an observation on article 1. It comments as follows:

... the International Law Commission seems to consider it possible to send and receive special missions even in the absence of recognition between the two States concerned. However, paragraph 2 of the present article might be construed to mean that at least the existence of recognition is a prerequisite to sending and reception of special missions. It seems necessary, therefore, to add complementary provisions in accord with the tenor of the Comment cited above.¹⁷

31. The Special Rapporteur has already accepted the idea expressed by the Japanese Government.

32. In conclusion, the Special Rapporteur considers, on the basis of the observations of the four Governments, that the text of article 1 as proposed in the fourth report does not require amendment, except as regards the proposal of the United States Government contained in article 0.

Article 2. — The task of a special mission

33. Note should be taken of the following observations by the Governments of Chile, Gabon, Greece, Japan and the United States of America.

34. The Government of Chile considers that:

It is of the greatest practical importance that a clear distinction should be drawn between the powers of the special mission and those of the permanent mission since this will affect the validity of the special mission's acts. It would not appear to be desirable that the draft should lay down a rigid rule, but there should be some criterion that would serve as a guideline in every case.

As permanent missions frequently co-operate in the discharge of the tasks assigned to special missions, the draft should not, as

¹⁵ *Ibid.*

¹⁶ *Ibid.*

¹⁷ The reference is to paragraph (3) of the Commentary on article 1. See *Yearbook of the International Law Commission, 1965*, vol. II, document A/6009, p. 166.

¹³ *Ibid.*

¹⁴ *Ibid.*

a general principle, exclude such participation. It could establish a flexible criterion drafted along the following lines: "The competence of the special mission, as distinct from that of the permanent mission, shall be determined by its credentials; if its credentials are silent on this point, the competence of the permanent mission shall not be understood to be excluded".¹⁸

35. The Special Rapporteur is of the opinion that the security of juridical relations between States requires that permanent missions should not be able to encroach on the powers of special missions. For the reasons stated, he does not recommend acceptance of the amendment submitted by the Government of Chile.

36. The Government of Gabon considers that article 2 could be further condensed. The Special Rapporteur finds the present wording satisfactory.

37. The Greek Government observes that article 2 should be more carefully worded in order to make it more precise. The Special Rapporteur would be glad to discuss this comment with the Commission and the Drafting Committee.

38. The Government of the United States of America gives the following opinion on article 2:

In answer to the question posed in paragraph 5 of the Commentary, the United States Government believes that a hard-and-fast rule concerning exclusion from the competence of permanent missions of the tasks entrusted to special missions would not be useful, but that a sending State should be free to specify such exclusive competence in those instances it deems such an arrangement necessary.¹⁹

39. The Special Rapporteur agrees with this view of the United States Government.

40. The Government of Japan has also commented in the following terms on the point raised by the United States:

With reference to the question raised in Comment (5),²⁰ concerning whether or not a rule on the relationship between special missions and permanent diplomatic missions with regard to their competence should be inserted in the final text of the articles, the Government of Japan is of the opinion that such a problem as concerns the division of authority and functions had better be left to a settlement between the parties concerned in each individual case, and that no such provisions are necessary.²¹

The Special Rapporteur agrees with this view.

41. In conclusion, the Special Rapporteur does not consider that the comments on article 2 call for revision of the proposed text.

Article 3. — Appointment of the head and members of the special mission or of members of its staff

42. Additional comments on the provisions of article 3 were submitted by the Governments of Gabon and the United States of America. Their observations are as follows:

¹⁸ See *Yearbook of the International Law Commission, 1967, vol. II, document A/6709/Rev.1, annex I.*

¹⁹ *Ibid.*

²⁰ Paragraph (5) of the commentary on article 2. See *Yearbook of the International Law Commission, 1965, vol. II, document A/6009, p. 167.*

²¹ See *Yearbook of the International Law Commission, 1967, vol. II, document A/6709/Rev.1, annex I.*

43. The Government of Gabon considers that this article could be further condensed. The Special Rapporteur refers the point to the Drafting Committee for decision.

44. The United States Government proposes the following amendment to article 3:

The United States agrees that the prior consent of the receiving State to the composition of a special mission should not be required. However, it is important and desirable that the sending State give advance notice of composition to the receiving State. This may be accomplished by adding the following to the end of the second sentence of article 3: "but prior notice of the composition of the mission shall be given to it".²²

45. The Special Rapporteur has no objection to the United States proposal.

Article 4. — Persons declared non grata or not acceptable

46. The Government of Canada raises the following point in connexion with article 4:

It would perhaps be desirable to establish at least some maximum duration to the period following which persons declared *personae non gratae* should have left the receiving country. It is noted that the separate question of what might happen if such a person were to stay on in the receiving country is not covered by article 4. Perhaps this should be dealt with as well.²³

47. The Special Rapporteur feels that the question raised by the Canadian Government deserves an answer in the commentary. His view is that a person declared *non grata* should leave the receiving country immediately after the notification, unless the receiving State has stipulated a time limit.

48. The Gabonese Government suggests that this article might be condensed. The Special Rapporteur is prepared to consider this suggestion with the Drafting Committee.

Article 5. — Sending the same special mission to more than one State

49. The Governments of Gabon and the United States of America have submitted comments on article 5.

50. The United States Government considers the article unnecessary. No reasons were advanced in support of the request for its deletion. The Special Rapporteur continues to regard the provision as necessary and useful.

51. The Gabonese Government believes that article 5 should be condensed. The Special Rapporteur feels that the question should be examined by the Drafting Committee.

Article 6. — Composition of the special mission

52. Of the additional comments, only those of the Governments of Gabon and Greece concern article 6.

53. The Gabonese Government requests further condensation of the article. The Special Rapporteur believes that the matter should be examined by the Drafting Committee.

²² *Ibid.*

²³ *Ibid.*

54. The Greek Government's comment also concerns drafting. It requests clarification of article 6. The Special Rapporteur hopes that the Drafting Committee will consider this point.

Article 7. — Authority to act on behalf of the special mission

55. The Governments of Chile, Gabon and the United States of America have submitted additional comments on article 7.

56. The Government of Chile comments as follows:

The term "normally" suggests a practice, to which, as such, there may be exceptions, but it can hardly be understood to enunciate a rule of law. This same idea should be expressed as follows: "Save as otherwise provided in its credentials, only the head of the mission shall be . . .", or: "Save as otherwise determined by the sending State, only the head of the mission . . ."²⁴

57. The Special Rapporteur does not think that such wording would conflict with the underlying idea of the article, and he has no objection to the adoption of one of the two amendments submitted by the Government of Chile.

58. The United States Government proposes the following amendment to article 7.

Paragraph 2 implies that the sending State does not have full liberty to change the head of the special mission. It would appear desirable to provide merely that a member of the mission may be authorized by the sending State to replace the head of the special mission. In addition, a sentence should be added at the end of paragraph 2 as follows: "The receiving State shall be notified of a change of head of mission."²⁵

59. The Special Rapporteur considers that the sending State has full liberty to change the head of the special mission, provided there is prior notification of the change to the receiving State. Accordingly, the Special Rapporteur has no objection to the amendment proposed by the United States Government.

60. As in the case of other articles, the Government of Gabon requests that article 7 be condensed. It would be desirable for the Drafting Committee to examine this point *ex officio*.

Article 8. — Notification

61. The Governments of Chile, Gabon and Japan have submitted additional comments on article 8.

62. The comments of the Government of Chile read as follows:

Notification seems to be unnecessary in the case of paragraph 1 (d) (e.g. typists, chauffeurs), unless such persons are to enjoy diplomatic privileges and immunities, in which case they should be included among the administrative and technical staff of the mission. This is the criterion reflected in the Vienna Convention on Diplomatic Relations, which requires notification only in the case of persons "entitled to privileges and immunities" (art. 10, para. 1 (d)).²⁶

²⁴ *Ibid.*

²⁵ *Ibid.*

²⁶ *Ibid.*

63. The Special Rapporteur considers that reasons bearing on daily practice and the security of the receiving State require notification in the case of all members of the staff of a special mission, regardless of their position in the mission. In any case, this rule is accepted by the Vienna Convention on Diplomatic Relations (1961). The Government of Chile has lost sight of the fact that article 10 of the Vienna Convention should be read in the light of article 1 (b), (c) and (g). The same criterion has therefore been adopted in this draft as in the Vienna Convention on Diplomatic Relations. Practice has likewise provided complete justification for this system. Consequently, the Special Rapporteur does not favour the adoption of the suggestions of the Government of Chile.

64. The Government of Gabon asks that the text of article 8 should be condensed. The Special Rapporteur hopes that this suggestion will be considered by the Drafting Committee.

65. The comments of the Government of Japan read as follows:

As regards paragraph 2 which provides for a direct notification from the special mission to the receiving State, the Government of Japan considers it doubtful whether or not such a practice may well be called "a sensible custom", as is presumed to be in Comment (8).^{27, 28}

66. The Special Rapporteur considers that the almost universal practice in this matter is very elastic and convenient. A special mission which has commenced to function is entitled to make notifications direct and is not bound to request the permanent mission to act as an intermediary. Here again, the Special Rapporteur leaves the matter for the International Law Commission to decide.

Article 9. — General rules concerning precedence

67. The Government of Chile has raised the question of alphabetical order in determining precedence. Its comment reads as follows:

The alphabetical order used in the official diplomatic list of the receiving State cannot be followed, because it would not be applicable to cases in which States do not have diplomatic or consular relations with each other. To give greater precision to the rule laid down in paragraph 1 it should suffice to add the words "in the language of the receiving State" after the words "alphabetical order of the names of the States".²⁹

68. The Special Rapporteur considers that this question has already been dealt with adequately in his fourth report. He maintains the conclusions he has already presented on this point.

69. The Government of Gabon asks that the drafting of article 9, too, should be condensed. This question must be referred to the Drafting Committee.

²⁷ Paragraph (8) of the commentary on article 8. See *Yearbook of the International Law Commission, 1965*, vol. II, document A/6009, p. 173.

²⁸ See *Yearbook of the International Law Commission, 1967* vol. II, document A/6709/Rev.1, annex I.

²⁹ *Ibid.*

Article 10. — Precedence among special ceremonial and formal missions

70. The only additional comment on article 10 is that by the Government of Gabon which requests that the drafting should be condensed. The Special Rapporteur proposes that this comment should be referred to the Drafting Committee.

Article 11. — Commencement of the functions of a special mission

71. Two Governments have made additional comments on article 11. They are the Governments of the United States and Gabon.

72. The comment of the United States Government reads as follows:

In regard to the question posed in paragraph 12 of the Commentary, the United States Government believes a rule of non-discrimination in regard to the mode of reception of special missions of the same character is unnecessary and, on balance, undesirable.³⁰

73. The Special Rapporteur points out that this question is dealt with under article 40 *bis*. The United States comment should therefore be considered when that provision is taken up.

74. Here again the Government of Gabon recommends a more condensed wording. The Special Rapporteur proposes that this question should be examined by the Drafting Committee.

Article 12. — End of the functions of a special mission

75. As it has asked in the case of other provisions, the Government of Gabon requests that article 12 should be further condensed. This will naturally be considered by the Drafting Committee.

Article 13. — Seat of the special mission

76. Three Governments, those of Chile, the United States and Gabon have commented on article 13.

77. The observations of the Government of Chile deal with the two paragraphs of article 13. With regard to paragraph 1 the Government of Chile states:

Paragraph 1. This provision seems to be self-contradictory, for it would be applied "in the absence of prior agreement", i.e. in the absence of consent, in which case it would be pointless to require again the consent which (to judge by the words "proposed by the receiving State and approved by the sending State") could not be obtained in advance.

It would be more practical to state that "save as agreed to the contrary" (whether or not such agreement is prior) "the special mission shall have its seat at the place in which it is to discharge its task"; this is, in effect, the criterion followed in paragraph 2 for missions whose tasks involve travel to various places. If this criterion should be unacceptable, it could be indicated that, save as agreed to the contrary, the mission should have its seat at the place in which the organ referred to in article 41 of the draft is established.

³⁰ *Ibid.*

The considerations set forth in paragraph (4) of the commentary underline the need to include in the draft a more specific provision than paragraph 1 as it stands.³¹

78. The Special Rapporteur considers that the provision in article 13, paragraph 1, is not self-contradictory and that the rule it states applies in all cases "in the absence of prior agreement", which should not necessarily be presumed. He does not therefore agree with the view expressed by the Government of Chile.

79. With regard to article 13, paragraph 2, the Government of Chile observes:

Paragraph 2. To facilitate official contacts between the organ referred to in article 41 and a mission whose tasks involve travel, it would be advisable to add that one of the seats should be considered the principal seat and should be decided upon in the manner indicated in article 13, paragraph 1.³²

80. The Special Rapporteur has no objection to this proposal.

81. The Government of the United States has suggested that article 13 should be deleted. Its proposal is in the following terms:

The fact that a special mission is of a temporary character runs counter to its having a seat. Moreover, this article is without effect in so far as the remainder of the text is concerned. It is suggested that the article be deleted.³³

82. The Special Rapporteur considers that special missions, even if they are of a temporary character, always have a seat. Their seat exists, even when their task requires frequent travel. In practice, a special mission is required to have a seat, and, consequently, the Special Rapporteur does not recommend adoption by the Commission of the United States Government's suggestion that the article be deleted.

83. The Government of Gabon proposes that the drafting of article 13 should be condensed. This proposal must be considered by the Drafting Committee.

Article 14. — Nationality of the head and the members of the special mission and of members of its staff

84. Article 14 has been the subject of additional comments by the Government of Chile and the Government of Gabon.

85. The Government of Chile has submitted three amendments to article 14.

86. In the first place, it has proposed that paragraphs 1 and 2 of the article should be drafted as follows:

Article 14, paragraph 1. The head and the members . . . may be of any nationality.

Paragraph 2. However, nationals of the receiving State . . .³⁴
(The rest of the article would remain unchanged.)

87. The Special Rapporteur cannot accept this amendment, which is incompatible with the system adopted by the Commission and applied in practice. The principle

³¹ *Ibid.*

³² *Ibid.*

³³ *Ibid.*

³⁴ *Ibid.*

is that special missions must be composed of nationals of the sending State.

88. Should its first amendment not be accepted, the Government of Chile proposes:

If the above amendment is not adopted and the present text of paragraph 1 is retained, this provision will be far more rigid than article 8 of the Vienna Convention on Diplomatic Relations, because the latter provides only that the diplomatic staff should in principle be of the nationality of the sending State, whereas the text under consideration extends that provision to administrative and technical staff. On this point the less rigid criterion adopted in the Convention on Diplomatic Relations should be applied.³⁵

89. The Special Rapporteur stands by the considerations set out in the commentary on article 14 in his fourth report.

90. The Chilean Government's third amendment reads as follows:

If the amendment to article 36 which is proposed below is accepted, article 14 should be amended to the same effect.³⁶

91. The Special Rapporteur will discuss this proposal under article 36.

92. The Government of Gabon requests that the drafting of article 14 should be condensed. This is a matter which will be discussed by the Drafting Committee.

Article 15. — Right of special missions to use the flag and emblem of the sending State

93. In addition to the suggestion of the Government of Gabon that article 15 should be condensed, which will be considered by the Drafting Committee, the Greek Government has asked that the privileges accorded under this article should be restricted. The Special Rapporteur considers that no restriction is desirable, even if the functional theory is taken as a basis.

Article 16. — Activities of the special mission in the territory of a third State

94. Three Governments have submitted additional comments on article 16. They are the Governments of Chile, Japan and the United States.

95. The comments of the Government of Chile relate to the commentary. They read as follows:

In order to clarify beyond all possibility of doubt the point dealt with in paragraph (6) of the commentary, a provision should be added to this article stating that the third State may at any time notify the special mission that it is withdrawing its hospitality, without stating a reason and even if the conditions which it has imposed have not been violated.³⁷

96. The Special Rapporteur agrees with this comment.

97. The Government of the United States has made a similar comment reading as follows:

The United States Government is not sure whether the third State assumes the obligations of a receiving State by expressly

consenting to permit a special mission to carry on functions in its territory. At all events, it should be provided that a third State's express consent may be conditioned in advance and withdrawn at any time.³⁸

98. The Special Rapporteur naturally endorses this comment.

99. The Government of Japan has raised the following two questions of interpretation:

The Government of Japan requests clarification as to the following two points for the purpose of interpretation.

(a) Is it not that "the third State" as referred to in the present article, once it has accorded its consent to the functions of special missions, has the rights and assumes the obligations of the "receiving State" under the present draft?

(b) If the definition of the special mission specified in article 1 of the provisional draft articles of the twelfth session of the International Law Commission is to be adopted, the special missions which are engaged in activities exclusively in the third State may not come under the category of "special missions" as defined. How can this problem be solved?³⁹

100. With regard to the question in point (a), the Special Rapporteur considers that in the hypothetical case given by the Government of Japan the third State stands on the same footing as the receiving State. With regard to point (b), the Special Rapporteur does not share the Japanese Government's concern. In his view, the fact that a special mission is working in the territory of a third State does not alter the nature of the mission. In that territory also the special mission represents the sovereign will of its State, so far as it is engaged on a temporary and limited task. The only special situation it has is vis-à-vis the third State.

101. If the Commission deems it useful, the Special Rapporteur is prepared to include these replies in the commentary.

PART II OF THE DRAFT ARTICLES: FACILITIES, PRIVILEGES AND IMMUNITIES

General considerations

102. Several States gave their views on general points relating to facilities, privileges and immunities.

103. The Canadian Government considers that a fairly restrictive wording should be adopted so that the grant of privileges and immunities to special missions is "... strictly controlled by considerations of functional necessity and ... limited to the minimum required to ensure the efficient discharge of the duties entrusted to special missions".⁴⁰

104. The Canadian Government therefore concludes in favour of the functional theory and the restriction of privileges and immunities.

105. The Government of Chile considers that, save as expressly provided to the contrary, no distinction need

³⁵ *Ibid.*

³⁶ *Ibid.*

³⁷ *Ibid.*

³⁸ *Ibid.*

³⁹ *Ibid.*

⁴⁰ *Ibid.*

be drawn between political and technical special missions.

106. The Government of Gabon comments in favour of the functional justification of special missions.

107. The Greek Government considers that privileges and immunities should be strictly functional and that a technical special mission of a limited or short-term nature should enjoy only limited privileges and immunities.

108. The Japanese Government has commented as follows:

The Government of Japan accepts, from the standpoint *de lege ferenda*, the basic position of the Commission's draft to accord to special missions, in principle, similar privileges and immunities to those due to permanent diplomatic missions, on the condition that the scope and nature of the special mission be precisely defined as suggested in the present comment on definition clause.

It also admits that it will be necessary to make somewhat detailed provisions in part II, once the fundamental line of thought is taken up, since the part deals with substantial rights and obligations of the States concerned. (This is not the case with part I. The institutional and procedural aspects dealt with in part I would not, even if left to practice alone, seriously affect the interests of the States concerned.)⁴¹

109. The Special Rapporteur does not consider that the opinions of the Governments referred to above alter the situation described in the fourth report.

Article 17. — General facilities

110. The Governments of Canada and the United States of America have expressed their views on article 17.

111. The opinion of the Government of Canada is as follows:

This article appears to be too vague. There is obviously some onus on the receiving State to assist special missions in finding accommodation, especially where there is no resident mission nearby.

It is the Canadian view that, logically, this article should follow articles 17-21 (which specify some of the facilities intended) and that it should be reworded either by referring to "all other facilities" or by specifying those other facilities.⁴²

112. The Special Rapporteur considers that article 17 should come first, because it states a principle and is not an additional provision for "all other facilities".

113. The United States Government has proposed a new wording for article 17. Its comments are as follows:

This article would be more balanced if it provided:

"The receiving State shall accord to the special mission facilities for the performance of its functions, having regard to the nature and task of the special mission."⁴³

114. The Special Rapporteur regards this proposal as dangerous because the word "*voulues*" [in the French version] gives a discretionary power to the receiving State. This position conflicts with the view that facilities are due *ex jure* from the receiving State.

⁴¹ *Ibid.*

⁴² *Ibid.*

⁴³ *Ibid.*

Article 17 bis. — Derogation by mutual agreement from the provisions of part II

115. The Government of Gabon has commented as follows on the idea expressed in article 17 *bis* of the draft:

... freedom to derogate from the rules established by the instrument on special missions, except where expressly otherwise provided, would make it possible to solve, at least provisionally, the most delicate problems raised by the proposed codification.

That applies, in particular, to the question of the *grant of privileges and immunities* (diplomatic) to the heads and members of special missions, which are increasing in number and growing more diverse and very often are only of a technical character. States should not, through codification, become involved in "inflation" in that respect.

The solution adopted by the International Law Commission, namely, to leave it to the States concerned to restrict the grant of certain privileges or immunities (excluding peremptory provisions) to a given mission or missions on the ground that those privileges or immunities are functionally justified in the cases in question, seems all the more necessary in that it is proving impossible, in an international legal instrument, to divide special missions into distinct and well-defined categories according to whether they are, for example, of a political or of a technical character.⁴⁴

116. In the view of the Special Rapporteur, this opinion is consistent with the decision of the International Law Commission.

Article 17 quater (new). — Status of the Head of State

117. The Government of Gabon has commented as follows on the question of the status of the Head of State:

At the most, the case of the head of State who leads a national or governmental mission might be mentioned in general terms with an indication that it was, of course, a special case which entailed adjustments in accordance with the protocol in force in the receiving State for the treatment of heads of State considered as such.⁴⁵

Article 18. — Accommodation of the special mission and its members

118. The Greek Government raises two points, one of form and the other substantive. Firstly, it considers that the terms used in article 18 require definition. Secondly, it maintains that the privileges and immunities granted to missions with a limited technical task must be restricted.

Article 19. — Inviolability of the premises

119. Four Governments, namely those of Canada, Chile, Greece and the United States of America, have made additional comments on article 19.

120. The observation of the Government of Canada is as follows:

This article appears to go too far in trying to uphold the inviolability of the offices of the special mission. The qualifications contained in article 31 of the Vienna Consular Convention for entry in the event of fire should be added. The relevant provisions of article 31, paragraph 2, of the 1963 Vienna Convention read as

⁴⁴ *Ibid.*

⁴⁵ *Ibid.*

follows: "Such consent may, however, be assumed in case of fire or other disaster requiring prompt protective action".⁴⁶

121. The Special Rapporteur notes that this point has already been discussed in the fourth report.

122. The Government of Chile has the following to say with regard to article 19, paragraph 1:

It should be made clear that the head of the permanent mission may authorize the local authorities to enter the premises of the special mission only when those premises are situated in a building normally occupied by the permanent mission. Such authorization should be granted only by the head of the special mission when the premises of his mission are situated in premises other than those occupied by the permanent mission. Otherwise, the special mission would, in effect, be subordinated to the permanent mission.⁴⁷

123. The Special Rapporteur thinks it is difficult to refuse the head of the permanent mission the right to authorize the legal authorities to enter the premises of the special mission, because the inviolability is guaranteed to the State and not to the special mission itself.

124. The Government of Chile proposes the following with regard to paragraph 2:

In order that the function of protection and prevention may be adequately discharged, the paragraph should state that the special mission must inform the receiving State what premises it occupies by means of suitable identification. This problem does not arise when the special mission is established in the premises of the permanent mission, but it may arise if the special mission has its offices on certain floors of a hotel or in different places in the same city. In the absence of such notification, the receiving State might be in a position to claim a lesser degree of responsibility for failure to fulfil this duty, on the ground that it was unaware of the actual circumstances.⁴⁸

125. The Special Rapporteur considers this a reasonable proposal and does not oppose its adoption.

126. The United States Government's comments illustrate the difficulties to which the rule of the inviolability of premises and property can give rise. These comments can be divided into three parts:

127. With regard to the inviolability of premises, the Government of the United States offers a commentary and makes a proposal. These are worded as follows:

The inviolability of premises raises special questions because, unless the special mission is housed in a permanent diplomatic mission, it will ordinarily be occupying hotel rooms or office space. Hotel rooms present special difficulties because of the danger of fire or similar catastrophe. The safety of other guests cannot be imperilled by the refusal of a mission to allow entry to firemen or police seeking to deal with an emergency. The same considerations apply, though with lesser force, to an office building. The suggestion that an emergency be handled by negotiations between the Foreign Office and the special mission is unrealistic.

The United States considers that a final sentence should be added to paragraph 1 of article 19 to have it correspond to article 31, paragraph 2 of the Vienna Convention on Consular Relations. The sentence would read: "The consent of the head of the special mission may, however, be assumed in case of fire or other disaster requiring prompt protective action".⁴⁹

128. The Special Rapporteur points out that this question has already been examined in the fourth report and that he has expressed his view as to the appropriate solution.

129. With regard to movable property of the special mission, the United States Government proposes the following:

The exclusion from legal process of furnishings, automobiles, and the like used by special missions raises questions if the property is rented or leased. There does not appear to be any overriding need why normal legal processes should not apply to such property so long as equivalent property is available for use.⁵⁰

130. The Special Rapporteur still believes that legal processes might create difficulties for the normal functioning of the special mission.

131. With regard to immovable property, the United States Government raises the following question:

Real estate also presents difficulties. If a hotel is being sold under a court order, how would it be possible to exclude the premises of the special mission in the hotel? This type of extraordinary exemption could make it more difficult for the special mission to acquire property for use on a short-term basis.⁵¹

132. The Special Rapporteur again stresses that legal processes might hamper the normal functioning of the special mission.

Article 20. — Inviolability of archives and documents

133. Only the Greek Government has commented on article 20 of the draft. It considers that the provision should be restricted in the case of technical or short-term special missions. The Special Rapporteur is of the opinion that no restriction should be imposed in this regard irrespective of the nature or character of the special mission involved.

Article 22. — Freedom of communication

134. The Government of Gabon suggests that, with regard to the bag of the special mission, the text be made more specific. It observes in this connexion:

In connexion with freedom of communication, it might be advisable to specify that where the sending State has a permanent diplomatic representative in the receiving State, the official documents of the special mission should whenever possible be sent in that representative's bag. In that case, the use of a supplementary bag belonging to the special mission, for which its head is responsible, should be exceptional.⁵²

135. The Special Rapporteur regards this comment as being in line with the ideas expressed on the subject by the International Law Commission.

136. The Greek Government has made two observations on article 22 of the draft:

(a) It considers that the article should provide for less extensive privileges and immunities. Its comments did not indicate the precise degree of restriction it desires.

⁴⁶ *Ibid.*

⁴⁷ *Ibid.*

⁴⁸ *Ibid.*

⁴⁹ *Ibid.*

⁵⁰ *Ibid.*

⁵¹ *Ibid.*

⁵² *Ibid.*

(b) It asks whether the privileges and immunities can be restricted, particularly in the case of technical and short-term missions. This raises a general question.

Article 23. — Exemption of the mission from taxation

137. The Greek Government stresses the strictly functional character of the privileges and immunities and doubts whether a special mission really needs all the privileges and immunities provided for in article 23 of the draft in order to do its work.

138. The Special Rapporteur considers that these observations raise the general question of the scope and extent of the privileges and immunities.

Article 24. — Personal inviolability

139. Comments on this article were submitted by the Government of Canada and the Government of Greece.

140. The Government of Canada submitted observations followed by a proposal. They read as follows:

A central problem in respect to this article is whether any of the members of a special mission should enjoy personal inviolability, which, in the Vienna context, has come to mean both special protection from *vis injusta* and immunity from *vis justa* i.e., from arrest and detention in respect of personal acts. It is considered that special protection in the first case is warranted in all cases i.e., that the international responsibility of the State is involved if it has failed to take reasonable precautions. As far as concerns the second meaning of the term, however, it would be the Canadian inclination that in the draft it should be denied to special missions, since it is equivalent to a virtual immunity from criminal jurisdiction and is thus not a necessary consequence of an immunity which Canada considers should be restricted to cover only official acts by public political agents.

Should it be considered by a majority of the Commission that there should be some safeguard from preventive arrest, although not from detention in execution of a sentence, a compromise formula could probably be based on that which was adopted in the case of consular personnel. It is expressed in article 41 of the Vienna Convention on consular relations as follows:

"Consular officers shall not be liable to arrest or detention preceding trial, except in case of grave crime and pursuant to a decision by the competent judicial authority. . . Except in the case specified in paragraph 1 of this article, consular officers shall not be committed to prison or liable to any other form of restriction on their personal freedom save in execution of a judicial decision of final effect."⁵³

141. The Special Rapporteur recalls that the International Law Commission has on several occasions discussed the question raised in the Canadian Government's observations. The Commission has always shown itself ready to guarantee the members of special missions full personal inviolability. Since this is a question of substantive law, the Special Rapporteur recommends the Commission to examine it once again so that it can confirm the opinion it has already expressed.

142. The Greek Government indicates that it is unable to support the present wording of article 24 of the draft and suggests that it should provide for less extensive privileges and immunities, but it does not give any detailed explanations on the point.

Article 25. — Inviolability of private accommodation

The Governments of Canada and Greece have submitted comments on article 25.

143. The observations of Canada are as follows:

If one starts from the view that, in principle, no member of a special mission should be assimilated to a diplomatic agent, the import of the article seems somewhat excessive. It is questionable whether article 24 would not be sufficient, given that it seems rather unrealistic to ask for the special protection of the receiving State over residences which will usually be in hotel rooms: this appears to go beyond the standard requirement that the receiving State should take reasonable precautions. Moreover, even if it is to be retained in its present form, Canada believes this inviolability of the private accommodation should be subject to the same qualification regarding fire, etc. as is mentioned under our comment on article 19.⁵⁴

144. The Special Rapporteur feels that the inviolability of the private accommodation is one of the essential requirements for the performance of the task of a special mission.

145. The Greek Government has made two observations on article 25:

(a) It has suggested that the article should provide for less extensive privileges and immunities.

(b) It has also suggested that some restriction should be introduced in the case of technical or short-term missions, even if they are responsible for negotiating and signing a treaty.

146. The Special Rapporteur again stresses that in his opinion the inviolability of the private accommodation must be guaranteed if the special mission is to accomplish its task freely.

Article 26. — Immunity from jurisdiction

147. The Governments of Canada and Greece have submitted comments on article 26.

148. The Canadian Government is of the opinion that: this article goes too far in broadening the scope of immunities enjoyed by the members and staff of special missions. Moreover, the provisions of this article seem to spell out in detail those provided by the first two sentences of article 24. Consideration should therefore be given to combining these aspects of the two articles in a single article.⁵⁵

149. The Special Rapporteur does not think the provisions of articles 24 and 26 of the draft can be combined. Article 24 is important because it provides a guarantee of *habeas corpus*, whereas article 26 deals with a different point.

150. The Greek Government considers that the wording of article 26 should provide for less extensive privileges and immunities, but gives no further details.

Article 27. — Waiver of immunity

151. The Government of Chile has submitted a proposal concerning the place of article 27 in the draft. The proposal reads as follows:

⁵³ *Ibid.*

⁵⁴ *Ibid.*

⁵⁵ *Ibid.*

This provision should follow article 36, once the status of all the persons referred to in article 36, paragraph 1, has been clarified.

152. The Special Rapporteur has proposed in his fourth report that the arrangement of the articles should be left until the full text of the draft has been adopted. That would be the appropriate stage at which to consider the proposal of the Chilean Government.

Article 28. — Exemption from social security legislation

153. The Governments of Chile and Greece have submitted additional comments on article 28.

154. The comments of the Chilean Government contain a proposal for amending the article and read as follows:

It may happen that persons who are nationals of the sending State but who are permanently resident in the receiving State are members of the diplomatic staff of the special mission. In such a case they should be covered by the provisions of paragraph 1 of this article. Paragraph 2 (a) should therefore be amended to read: "... to nationals of the receiving State or aliens domiciled there, unless the latter are members of the diplomatic staff of the mission".⁵⁶

155. The proposal of the Chilean Government raises an awkward conflict between two principles, viz.:

The principle already adopted by the Commission whereby the receiving State alone can decide whether privileges and immunities should be granted to members of special missions who are nationals or permanent residents of that State; and

The new principle proposed by the Government of Chile whereby permanent residents of the receiving State who are nationals of the sending State should benefit from the exemptions provided for in article 28 whenever they form part of the diplomatic staff of a special mission.

156. The opinion of the Special Rapporteur is that the solution adopted in the Vienna Convention on Diplomatic Relations (article 33, paragraphs 2 (a) and (b)) should be retained.

157. The Greek Government suggests that the privileges and immunities granted by article 28 should be restricted, but makes no specific concrete proposal in this regard.

Article 29. — Exemption from dues and taxes

158. Comments on this article have been submitted by the Governments of the United States of America and Greece.

159. The United States Government states:

The coverage of the final clause (beginning "and in respect") in this article is unclear. The clause should either be changed or eliminated.⁵⁷

160. The Special Rapporteur finds that the drafting in French is clear enough but that the English text should be improved and an addition made to the commentary.

161. The Greek Government suggests that the text of article 29 should not provide for such broad privileges and immunities and that additional restrictions should

be placed upon special missions with a limited technical or short-term task. This request raises the general question of the scope and extent of the privileges and immunities to be accorded to special missions.

Article 30. — Exemption from personal services and contributions

162. The Government of Canada states:

As drafted, this article appears acceptable. However the Canadian Government does not agree with paragraph 2 (b) of the commentary, which would confer on locally recruited staff the exemptions from personal services and contributions.⁵⁸

163. The Special Rapporteur believes that the Canadian Government's misgivings regarding paragraph 2 of the commentary are not justified in view of paragraph 3 of the commentary.

164. The Greek Government has expressed a wish that the immunities and privileges provided under draft article 30 should be restricted, especially for technical or short-term special missions. That is a matter to be settled in the light of the general decision taken by the Commission.

Article 31. — Exemption from customs duties and inspection

165. Comments have been made on this article by the Governments of Canada, Gabon, the United States and Greece.

166. The Canadian Government's comments are as follows:

This article provides for exemption from customs, duties and inspection of not only articles for the official use of the special mission but also of articles for the personal use of the head and members of the special mission, of the members of its diplomatic staff, or of the members of their family who accompany them.

It also provides for exemption from customs, duties and inspection of the personal baggage of the head and members of the special mission and of the members of its diplomatic staff, unless there are serious grounds for presuming that it contains articles not covered by the exemptions, or articles the import or export of which is prohibited by the law or controlled by the quarantine regulations of the receiving State. Such inspection shall be conducted only in the presence of the person concerned, of his authorized representative, or of a representative of the permanent diplomatic mission of the sending State.

It is arguable that such exemption should be removed from this article because it should remain a matter of courtesy and reciprocity.⁵⁹

167. The Special Rapporteur emphasizes that customs exemptions should be granted *ex jure* and are not a matter of courtesy and reciprocity.

168. The United States Government has expressed some reservations concerning the scope of exemption from customs duties and inspection. Its comments are as follows:

The United States Government believes that fiscal and customs privileges granted to special missions should normally be limited to those necessary to enable them to perform the "specific tasks" for which they are sent. It does not favour setting up personal privi-

⁵⁶ *Ibid.*

⁵⁷ *Ibid.*

⁵⁸ *Ibid.*

⁵⁹ *Ibid.*

leges for members of special missions. It is concerned lest the burdens imposed on the receiving State under this and related articles persuade many of the States whose revenues come largely from customs duties that they cannot afford to receive special missions. Such a development would mark a serious step backwards in the conduct of foreign relations.⁶⁰

169. The Special Rapporteur believes that the comments of the United States Government raise a matter of principle which the Commission should settle before making any amendment to article 31.

170. The comments of the Government of Gabon are based on an approach which differs from that adopted by the Commission. They are as follows:

Exemption of members of special missions from customs duties is one of the matters in which some discretion should be left, in one way or another, to the authorities of the receiving State.⁶¹

171. The Special Rapporteur reiterates that customs exemption should be granted *ex jure* and cannot be left to the discretion of the receiving State.

172. The Greek Government considers that the privileges and immunities provided under draft article 31 should not be so extensive, but does not go into details.

Article 32. — Administrative and technical staff

173. Only the United States Government has submitted comments on draft article 32. They are as follows:

The privileges and immunities provided hereunder are broader than required by the nature of the services rendered. This observation applies with even greater force to paragraph 2 of article 35, which extends such privileges to members of the families of those covered by article 32. Given the temporary character of special missions, the question arises whether privileges and immunities of the families of members of permanent missions have any necessary application to families of members of special missions.⁶²

174. The Special Rapporteur considers that the reply to the United States Government's comments is to be found in the commentary on article 32 in the fourth report, where this question has already been discussed.

Article 33. — Members of the service staff

175. The only comment on this article is that by the Greek Government, which considers that the text should be made more restrictive as regards the privileges and immunities provided under it. The Special Rapporteur does not share this view.

Article 34. — Private staff

176. The Greek Government has submitted two comments on article 34. First, it considers that the article should provide for less extensive privileges and immunities. Secondly, it raises the question whether, from a strictly functional point of view, these privileges and immunities are really necessary. The Special Rapporteur considers that the "lesser immunity" for acts performed in the course of their duties is necessary even for the class of staff to which article 34 refers.

Article 35. — Members of the family

177. The Governments of the United States and Greece have submitted comments on draft article 35.

178. The Government of the United States has expressed the same reservations concerning this article as with regard to article 32 (see above).

179. The Special Rapporteur considers, however, that certain guarantees should be given to members of the family of the persons to which article 32 refers.

180. The Government of Greece believes that article 35 should provide for less extensive privileges and immunities, but it does not make any specific proposal in that regard.

Article 36. — Nationals of the receiving State and persons permanently resident in the territory of the receiving State

181. Repeating an idea which it put forward also in connexion with article 28, the Government of Chile makes the following proposal:

We find the principle embodied in this article correct, with one reservation. Newly established States or States which have a small population and lack sufficient technicians or experts may find it imperative to include among the administrative and technical staff of special missions some of their nationals who are resident in the receiving State. In this case, we see no reason to treat them in a manner which would discriminate between them and the other members of the administrative and technical staff of the same mission who are not resident in the receiving State. Therefore, paragraph 1 should be amended to include all members of the administrative and technical staff, wherever they reside.

In return for this extension of privileges and immunities to certain persons who are residents of the receiving State, the receiving State must be given an additional safeguard. For this purpose, it should suffice to add to article 14 a provision requiring the consent of the receiving State to the inclusion among the diplomatic or administrative and technical staff of special missions of nationals of the sending State who are permanently resident in the receiving State.⁶³

182. The Special Rapporteur has already expressed his disagreement with this proposal in the section of this supplement dealing with article 14.

Article 37. — Duration of privileges and immunities

183. The only additional comments on article 37 are those of the Government of Chile, which relate more particularly to paragraph 2 of the article. They are as follows:

The exact moment at which privileges and immunities cease should be determined with the greatest possible exactitude. The phrase "on expiry of a reasonable period", which has simply been copied from article 39, paragraph 2, of the Vienna Convention on Diplomatic Relations, is extremely vague and could give rise to serious problems if the member of the mission remained in the receiving State after his functions had come to an end. In the Vienna Convention of 1961 the problem was solved by the addition in Spanish of the words "*que le haya concedido*" (granted by the receiving State*) after the words "reasonable period". Article 37

⁶⁰ *Ibid.*

⁶¹ *Ibid.*

⁶² *Ibid.*

* *Translator's note:* The corresponding words in the English text are "in which to do so".

⁶³ *Ibid.*

of the draft should include this same clarification or another to the same effect, so that the duration of the "reasonable period" may be clearly indicated.⁶⁴

184. The Special Rapporteur agrees in principle with the Chilean Government's suggestion, but he is unable to find as a substitute for the classical formula "reasonable period", an expression both more precise and at the same time broader which would cover all the cases intended.

Article 39. — Transit through the territory of a third State

185. The question of transit through the territory of a third State has aroused interest and has evoked comments from three Governments, those of Chile, the United States and Greece.

186. The Chilean Government proposes the following amendment to article 39, paragraph 4:

Any reference to the ways in which the third State may be informed of the transit of the mission should be eliminated, for any omission might be interpreted to exclude channels not expressly mentioned. The relevant passage should read: ". . . only if it has been informed in advance of the transit of the special mission, and has raised no objection to it".⁶⁵

187. The Special Rapporteur considers this amendment acceptable and useful.

188. The comments of the United States Government are as follows:

The scope and effect of this article require further consideration, particularly in light of vehicular accidents which may occur *en route*.⁶⁶

189. The Greek Government considers that the privileges and immunities provided for in article 39 should be less extensive. It does not, however, propose any specific amendment to the provision.

Article 40 bis. — Non-discrimination

190. The Government of the United States and the Government of Gabon have commented on the question of non-discrimination.

191. The Government of the United States has expressed the opinion that a rule of non-discrimination in regard to the mode of reception of special missions of the same character is unnecessary and undesirable. Its comments are to be found in the section of this supplement dealing with article 11. The United States Government has not, however, expressed any view regarding discrimination as between special missions.

192. The Government of Gabon has expressed the following view:

The question of *discrimination* raises a similar problem: although the prohibition of discrimination may prove useful, it cannot be laid down as an absolute rule in the case of special missions, having regard to their diversity and their *ad hoc* character, which at times may lead the receiving State to apply to one of them treatment adapted to the circumstances.

⁶⁴ See *Yearbook of the International Law Commission, 1967*, vol. II, document A/6709/Rev.1, annex I.

⁶⁵ *Ibid.*

⁶⁶ *Ibid.*

The only purpose of prohibiting discrimination appears to be to prevent a delegation of *one* State from being subjected, under protest, to less advantageous treatment than that accorded to similar delegations *as a whole*. There is nothing, however, to prevent two States from agreeing between themselves to apply to a *given* special mission or category of special missions, unilaterally or mutually, less advantageous or more advantageous treatment (and, in the latter case, for specific and valid reasons) than that which similar foreign missions *as a whole* enjoy (provisions such as those of article 47 of the Vienna Convention on Diplomatic Relations).⁶⁷

193. The Special Rapporteur points out that this question was settled by the General Assembly's decision approving the report of the International Law Commission on the work of its eighteenth session.

PART III OF THE DRAFT ARTICLES: MISCELLANEOUS CLAUSES

Article 41. — Organ of the receiving State with which official business is conducted

194. The Government of Canada has made a suggestion concerning the commentary on article 41. It is as follows:

While there is no objection to this article itself, Canada considers that emphasis should be placed, in the official commentary, on the need for the prior agreement of the receiving State, at least in principle, to the communication by the special mission with other of its own organs than its Foreign Ministry.⁶⁸

195. The Special Rapporteur expresses his agreement with the Canadian Government's suggestion.

196. The Government of Chile suggests that article 41 should be included in part I, immediately following the present article 11. The Special Rapporteur draws attention to the Commission's decision to consider the structural arrangement of the articles only after it has adopted all the draft provisions.

Article 42. — Professional activity

197. Comments on article 42 have been received from the Governments of Canada and Greece.

198. The Government of Canada observes:

This article as drafted is restricted to precluding activities for personal profit and does not cover members of special missions who, on behalf of the sending State, might carry on activities not consonant with the mission's terms of reference. Perhaps it would be desirable to relate such activities, on behalf of the sending State, to the provision of paragraph 1 of article 40.⁶⁹

199. The Special Rapporteur agrees with the idea put forward by the Canadian Government and leaves it to the Commission to decide whether the connexion between articles 40 and 42 should be indicated in the text of article 42 itself or in the commentary.

200. The Greek Government believes that the privileges and immunities provided for in article 42 should be limited or even dispensed with for special missions with technical tasks or of short duration, even if these missions are responsible for negotiating and signing a treaty. The Special Rapporteur has some doubts as to the

⁶⁷ *Ibid.*

⁶⁸ *Ibid.*

⁶⁹ *Ibid.*

desirability of such a distinction between special missions of different kinds.

Article 44. — Cessation of the functions of the special mission

201. The Government of Canada proposes that article 44 be amended as follows:

This article perhaps ought to be broadened to cover specifically the routine conclusion of functions due to the fulfilment of the objects of a special mission.⁷⁰

202. The Special Rapporteur leaves it to the Commission to decide whether the idea expressed in the Canadian amendment should be accepted. He points out, however, that the Commission has already decided not to make express provision for cases of cessation of functions which may be regarded as routine, and the conclusion of the Special Mission's task may be regarded as one such case.

Article "O" (provisional number). — Expressions used

203. Comments on this article have been submitted by the Governments of the United States, Gabon and Japan.

204. The Government of the United States proposes a definition of the special mission based on a concept different from that accepted by the Commission hitherto. The adoption of this proposal would therefore require the Commission to take a decision on substance first. The proposal of the United States Government reads as follows:

In its remarks on provisional article 0, the United States submits language to describe missions which should be treated specially. For such missions, the United States would support, in general, the privileges and immunities proposed in the draft articles.

The following remarks are not intended to be exhaustive, and do not suggest all the drafting changes necessary to satisfy the concerns expressed in the *General Remarks* section.

Provisional article 0:

(a) The United States proposes the following definition of "special mission" for the purposes of the draft articles:

A special mission is one:

(1) which is established by agreement between the sending State and the receiving State for a limited period to perform specifically designated tasks, and is headed or received by an official who holds the rank of Cabinet Minister or its equivalent, or a higher rank; or

(2) which is specifically agreed by the sending State and the receiving State to be a special mission within the meaning of this Convention.⁷¹

The United States Government also commented as follows on paragraphs (g) and (r) of article "0":

(g) It is not the practice of the United States to designate as plenipotentiary every official whom it sends to another State to represent it by performing a specific task. If the intention is to exclude from the coverage of the draft articles experts such as those discussed in the *General Remarks* above, it is suggested this end is better achieved by a revision of the definition of special mission. The United States doubts that such designation is general practice in most sending States.

(r) This definition appears unduly broad. It is suggested that the word "exclusively" be inserted between the words "used" and "for" in the second line of Provisional Article 0 appearing at page 33 of A/CN.4/189/Add. 1. Such amendment would make the definition, except for the final clause, correspond to article 1 (j) of the Vienna Convention on Consular Relations. In the view of the United States, the final clause should be narrowed by excluding from the definition the residence or accommodation of persons other than the head of the special mission.⁷²

205. The Government of Gabon has made the following comment on the terminology used in the draft:

On the other hand, in the preparation of the *introductory article*, which will contain valuable definitions of the expressions used in the document, an effort should be made to follow as closely as possible the terminology of the Vienna Convention of 18 April 1961.⁷³

206. The Government of Japan believes that certain definitions should be specified more clearly. Its comments are as follows:

In definition clause it is desirable to specify clearly and precisely the definition of the term "member" and the scope and nature of the term "special missions". It seems imperative, in particular, to define "special missions" clearly so as to confine them to only those which really deserve to enjoy the privileges and immunities envisaged in the present draft articles.⁷⁴

207. The Special Rapporteur notes that the Commission took account of the idea expressed by the Government of Gabon during the preparation of the draft. He expresses the hope that, with the Drafting Committee's assistance, he will be able to make the definitions as clear and precise as the Japanese Government would wish.

Article X (new). — Legal status of the provisions

208. The Government of Gabon has made the following comments on the question of the legal status of the draft provisions:

(1) *Freedom to derogate from the provisions of the proposed instrument*

The practice concerning special missions appears to be difficult to inventory and *a fortiori* difficult to codify; hence, the wisest view, and the one which seems to be accepted, is that the provisions of the draft articles on special missions, in principle, should be rules from which States are competent to derogate by agreement between themselves.

This basic principle should be clearly stated at the beginning of the document, it being understood that the future is not being prejudged and that time, experience, and court decisions may in due course modify the present situation.

(2) *The provisions from which States signing or acceding to the instrument may not derogate would therefore be exceptions, and would be mentioned as such. Such provisions might include, inter alia, the articles on:*

(a) inviolability of archives and documents of the special mission;

(b) inviolability of the premises of the special mission (unless the head of the permanent diplomatic mission of the sending State grants permission to enter them);

(c) personal inviolability limited to the performance of functions;

(d) freedom of communication.

⁷⁰ *Ibid.*

⁷¹ *Ibid.*

⁷² *Ibid.*

⁷³ *Ibid.*

⁷⁴ *Ibid.*

The provisions covering inviolability of the private accommodation of the head of the special mission and of the other members of the mission properly so-called (to the exclusion, of course, of the administrative, technical and service staff) might be added to that list, although that is not indispensable since inviolability has already been provided for the premises of the mission (which, moreover, are often combined with the private accommodation of the head and members of the mission) and for the persons concerned.

We should also remember that the inviolability of the premises of a foreign mission or of the private accommodation of its members raises the problem of the right of asylum — a problem so delicate and controversial that it was not mentioned in the Vienna Convention.

In that connexion, it might be advisable to stipulate, in any event, that not only “the premises of the special mission” but also “the private accommodation of all its staff” must not be used in any manner incompatible with the functions of the special mission as laid down in these articles or by other rules of general international law or by any special agreements in force between the sending and the receiving State (draft article 40).⁷⁶

Article “Y” (new). — Relationship between the present articles and other international agreements

209. The Government of Japan has submitted the following comment on the question of the relationship between the present articles and other international agreements:

⁷⁶ *Ibid.*

It is deemed advisable to adopt the same provisions as contained in article 73 of the Vienna Convention on Consular Relations, which provides:

“1. The provisions of the present Convention shall not affect other international agreements in force as between States parties to them.

“2. Nothing in the present Convention shall preclude States from concluding international agreements confirming or supplementing or extending or amplifying the provisions thereof.”⁷⁶

210. The Special Rapporteur agrees in principle with the Japanese Government’s suggestion.

New article: proposal by the Greek Government

211. The comments of the Greek Government include the following proposal:

There should be special regulations for cases where the State sending a special mission has an embassy in the foreign country (the place of work of the special mission being in or near the town where the embassy is situated). The comments made in paragraph 2 above concerning the articles mentioned there would also be applicable here.⁷⁷

212. The Special Rapporteur hopes that his Greek colleague will help him to a better understanding of the idea underlying this proposal so that he may be able to give an informed opinion on the desirability of its adoption.

⁷⁶ *Ibid.*

⁷⁷ *Ibid.*

Written comments by Governments received after the opening of the nineteenth session of the International Law Commission with the Special Rapporteur’s observations thereon (A/CN.4/194/Add.5)

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Preliminary note

1. After the opening of the nineteenth session of the International Law Commission and the submission to it of the two parts of the supplement to his report (A/CN.4/194/Add.3 and 4), the Special Rapporteur received the comments of the Governments of Australia, Finland and Jamaica on the draft articles on special missions. In view of the importance of the suggestions contained in those comments, the Special Rapporteur has dealt with them in the present additional supplement to the report which he is placing before the Commission for consideration. The present addition follows the plan adopted for the supplement.

I. Additional comments on chapter II of the fourth report on special missions

A. GENERAL COMMENTS

2. Observations of a general nature have been submitted by the Australian and Finnish Governments.

3. Those of the Australian Government are as follows:

. . . The Australian Government has studied with interest the draft articles on temporary missions drawn up by the International Law Commission and wishes to express its appreciation of the detailed and careful work of the Commission in drafting these articles. . . . The Australian Government, while agreeing with the desirability of codifying the modern rules of international law on this subject, feels obliged to express its concern at, and opposition to, the apparent intention not only to apply these articles to a wide range of persons, but also to accord to those persons privileges and immunities which could well go beyond the bounds of functional necessity.¹

4. The general observations of the Finnish Government read as follows:

The use of special missions is in fact the earliest form of diplomacy, the traditions of which go back to a remote past, to a time when there were no permanent missions. In international politics of today the use of special missions is again becoming more frequent as co-operation between States extends to new fields and the scope and activities of international organizations increase. Therefore it is most important that the principles of international law as regards special missions be codified, made more explicit, and completed by such new dispositions as are considered necessary. In the opinion of the Finnish Government, the draft prepared to this

end by the International Law Commission and approved in a preliminary way by the Commission at its sixteenth and seventeenth sessions is essentially to the purpose, and a final text should be drawn up on these lines as soon as possible. The Finnish Government suggests, however, that the following points be considered when giving the draft the finishing touches.

As special missions are increasingly used their character and composition are becoming variable. Prominent delegations negotiating important political matters are paralleled by special missions on an inferior level which may be diplomatic missions or working groups sent out to perform a purely technical task. This category includes delegations to conferences and the representatives of States on the mixed committees and joint commissions frequent in international co-operation of today.

The concept, if it is not to be restricted, should evidently also include single officials who will more or less regularly represent their country at meetings or discussions with organs functioning in their particular line of activity in some neighbour State.

The Commission has brought the dispositions contained in the draft to bear on temporary special missions only. This means that there would still be no general provisions to specify the status and conditions of functioning of such special missions of a permanent character as are not covered by the provisions of the Vienna Convention on Diplomatic Relations; nor would the rules suggested include State representatives on various permanent mixed committees and joint commissions. Furthermore, it is established by the International Law Commission's report on the second part of the Commission's seventeenth session and on its eighteenth session that government delegations to various congresses and conferences would not be within the scope of the draft articles proposed.

. . . The Finnish Government takes the view that it is questionable whether the above restrictions, which would leave a considerable group of special missions in a vague position as to international law, are necessary and to the purpose. On the other hand, the restrictions under reference indicate an endeavour, useful in itself, to define the concept of the special mission. For it is evident that, as the use of such missions will increase and their purposes multiply, the concept is no longer neatly outlined. Moreover, one might ask expressly whether all the dispositions contained in the International Law Commission's draft are of a nature to cover all the various categories of special missions. This refers particularly to the facilities, privileges and immunities accorded to the missions and to persons attached to these.²

B. COMMENTS ON SPECIFIC POINTS

5. In addition to their general observations, the Australian and Finnish Governments have submitted com-

¹ *Ibid.*

² *Ibid.*

ments on some of the specific points examined in chapter II of the fourth report on special missions.

6. *The concept of the special mission.* Under the heading "What constitutes a 'special mission'?", the Australian Government writes as follows:

... The draft articles do not provide any substantive definition of what constitutes a temporary "special mission" for the purpose of the articles, nor is any such substantive definition given in the draft introductory article that has been prepared by the Special Rapporteur.³ The commentaries on the draft articles indicate that the intention is to give the term a very broad interpretation indeed, covering all temporary missions sent by one State to another State to perform specific tasks, irrespective of whether that task is dominantly political or of a purely technical character. The Special Rapporteur in his first report on the subject gave as instances of different kinds of missions that would come under the proposed new régime: political, military, police, transport, water supply, economic, veterinary, humanitarian and labour recruiting.

... The Australian Government shares the concern that has been expressed by some other Governments at the wide range of persons that appear to come within the scope of the draft articles. In its view, there are many kinds of bilateral intercourse of a technical or administrative nature between States in which flexibility of procedure is of considerable importance and it would not be advantageous to apply to such cases the formal régime proposed in the draft articles.

... In view of its concern on these points, the Australian Government wishes to refer to the following comments on the scope of the draft articles made by the Special Rapporteur in addendum 2 of his third report (A/CN.4/189/Add.2):

"In the first place, no State is obliged to receive a special mission from another State without its consent. Secondly, in the Commission's draft, the task of a special mission is determined by mutual consent of the sending State and of the receiving State; on receiving a visiting foreign mission, the receiving State is entitled to make it clear that it is not considered as a special mission; and finally, the existence and extent of privileges and immunities can also be determined by mutual consent of the States concerned. It is very difficult to make reservations in the text of the article with regard to certain categories of special mission. For that reason, the Commission left it to States themselves to determine what they would regard as a special mission."

... While noting these comments, the Australian Government considers that as presently drafted, the draft articles and the commentaries do not adequately reflect the idea that States may themselves determine what they should regard as a special mission.

... The Australian Government appreciates that it is very difficult to make reservations in the text as to certain types of special missions—e.g. to make a distinction between special missions of a political nature and those of a technical nature. Nevertheless, the Australian Government believes that a further attempt should be made to clarify, and clearly limit, the range of special missions to which the draft articles are to apply.

... The lines of a practical solution may possibly be found by singling out those cases that are generally agreed as having the attributes of special missions to which the régime laid down in the draft articles should apply, and leaving the application of the draft articles to other cases to be dealt with by mutual agreement between the States concerned. The following are cases that might be considered for inclusion in the first suggested category:

- (a) Special missions led by Heads of State;
- (b) Special missions led by Heads of Government;
- (c) Special missions led by Ministers for Foreign Affairs;

- (d) Special missions led by other Cabinet Ministers;
- (e) Diplomatic ceremonial and formal missions;
- (f) Itinerant envoys.⁴

7. *Delegations to international conferences convened by States.* The Australian Government comments as follows on this point:

The Australian Government is of the opinion that the draft articles could usefully cover the situation of representatives to congresses and conferences other than congresses and conferences convened within the framework of an international organization. In this connexion it has noted that the Commission at its fifteenth session decided that, for the time being, the terms of reference of the Special Rapporteur should not cover the question of delegates to congresses and conferences. The Australian Government believes that the time is opportune to take up this matter again and notes with interest the statement of the Special Rapporteur in his third report (A/CN.4/189) that it will be necessary for the Commission to revert to this question, which will be studied jointly by two Special Rapporteurs (the Special Rapporteur on special missions and a Special Rapporteur on relations between States and international organizations).⁵

8. The Special Rapporteur hopes that by the end of the present session he will be in a position to submit conclusions on this point to the Commission jointly with the Special Rapporteur on relations between States and international organizations.

9. *Nature of the provisions relating to special missions.* The Australian Government has also expressed an opinion on this point. Its comments are as follows:

The Australian Government supports the decision of the Commission at its eighteenth session to ask the Special Rapporteur to base his draft on the view that the provisions of the draft articles could not in principle constitute rules from which parties would be unable to derogate by mutual agreement.⁶

10. The observations of the Australian Government should be seen in relation to the comments on the subject which are contained in the fourth report and the supplement thereto. The Special Rapporteur recalls that the Commission decided that it should, after adopting the draft articles in their entirety, specify which provisions are to be regarded as preemptory and which can be derogated from by the parties by mutual agreement.

11. *Relation between special missions and permanent diplomatic missions.* The Australian Government has expressed the following opinion on this point:

In the report of its seventeenth session⁷ the Commission requested views on whether a rule should be included in the final text of the articles on the relation between a special mission and the permanent diplomatic mission, and if so to what effect. The Australian Government considers that there is no need for an express rule on this point. In its view, any question of division of functions is basically for the sending State to determine and further it doubts whether the matter is likely to cause difficulties in practice.⁸

⁴ See *Yearbook of the International Law Commission, 1967*, vol. II, document A/6709/Rev.1, annex I.

⁵ *Ibid.*

⁶ *Ibid.*

⁷ *Yearbook of the International Law Commission, 1965*, vol. II, document A/6009, p. 167, para. (5) of the commentary on art. 2.

⁸ See *Yearbook of the International Law Commission, 1967*, vol. II, document A/6709/Rev.1, annex I.

³ *Yearbook of the International Law Commission, 1966*, vol. II, document A/CN.4/189/Add.1.

12. The Special Rapporteur entirely agrees with the view expressed by the Australian Government on this point.

13. *Provision prohibiting discrimination.* The Australian Government comments as follows on this provision:

Because of the diverse character of special missions the Australian Government doubts whether it would be practical to include in the final text an article prohibiting discrimination. It will, however, study with interest the proposed article on this matter to be submitted by the Special Rapporteur.⁹

14. The Special Rapporteur recalls that the question of non-discrimination is dealt with in new article 40 *bis*.

15. *So-called high-level missions.* The Finnish Government comments on this point:

The Commission, it is true, suggests that the so-called high-level special missions form a group apart and provides for this group rules that would somewhat differ from those applied to special missions in general, but even so there would hardly be adequate reasons to grant the fairly extensive facilities, privileges and immunities specified in the draft to each of the various single negotiators and delegations making up the "general group" of special missions. The Finnish Government would advocate a further consideration of the Commission's draft with a view to establishing whether special missions on an inferior level, appointed to perform tasks of a mainly technical nature, could be detached, particularly as regards facilities, privileges and immunities, from the rest of the delegations within the concept under reference.¹⁰

16. The Special Rapporteur considers that he has dealt with this question adequately in chapter II of his fourth report on special missions (see section 13). He also points out that during the discussion of article 1 at the present session the Commission expressed the desire to revert to the question of so-called high-level *special missions*.¹¹

17. *Form of the instrument.* The Finnish Government has made the following comments on this point:

The International Law Commission has not yet taken a definite view of the fact whether it should recommend that the articles concerning special missions be attached as an additional record to the 1961 Vienna Convention on Diplomatic Relations or whether a separate convention in the matter should be aimed at. The Commission, however, has prepared its recommendation to suit the second alternative. Nevertheless, the draft, particularly its part I, contains a great many dispositions which in view of an eventual convention might be considered to go too much in detail or else to be more appropriate in a "code" to serve for the guidance of the States than in an international convention binding them. In a general way, the articles contained in the draft should be cut down and the text condensed as much as possible. Furthermore, it would be useful to make clear and expressly to state in the text which articles, if any, contain items of law compulsory and binding on the States.¹²

18. In the view of the Special Rapporteur, this question was settled by the Commission at its eighteenth session and by the General Assembly which approved the Commission's report (see chapter II of the fourth report).

⁹ *Ibid.*

¹⁰ *Ibid.*

¹¹ See *Yearbook of the International Law Commission, 1967*, vol. I, 897th meeting, para. 47.

¹² See *Yearbook of the International Law Commission, 1967*, vol. II, document A/6709/Rev.1, annex I.

II. Additional comments on chapter III of the fourth report on special missions

PART I OF THE DRAFT ARTICLES: GENERAL RULES

Articles 1 to 4

19. The Finnish Government comments that articles 1 to 4 of the draft conform to general practice and seem to be to the purpose.¹³

Article 1. — The sending of special missions

20. The Australian Government's opinion on the concept of a special mission has been given above.¹⁴ The Special Rapporteur draws attention to the fact that that opinion was discussed by the Commission on 11 May 1967 in the course of the debate on article 1.¹⁵

Article 2. — The task of a special mission

21. The Jamaican Government writes concerning article 2:

A rule on the matter of overlapping authority should not be included in the articles. The question as to whether the task of a special mission is to be deemed to be excluded from the competence of the permanent diplomatic mission is one that ought to be left to the particular agreement governing that mission between the sending State and the receiving State.¹⁶

22. The Special Rapporteur has indicated on several occasions that in his view this matter might be usefully settled in the text of the draft article itself. The Commission considered, however, that it was sufficient to mention it in the commentary.

Article 5. — Sending the same special mission to more than one State

23. The Finnish Government comments:

As for article 5, which deals with the sending of the same special mission to more than one State, it would be useful to limit it to concern the simultaneous accrediting of one special mission to several countries; for the fact that the mission has previously functioned in another country is hardly relevant in this connexion. In any case, the last sentence of the article seems superfluous since it is established by article 1 of the draft that the sending of a special mission requires the consent of the receiving State.¹⁷

24. The last sentence of article 5 reads: "Each of those States might refuse to receive such a mission." The Special Rapporteur feels that the sentence is useful, since it provides safeguards to the States concerned.

Article 7. — Authority to act on behalf of the special mission

and

¹³ *Ibid.*

¹⁴ See para. 6 above.

¹⁵ See *Yearbook of the International Law Commission, 1967*, vol. I, 898th meeting, paras. 25-46.

¹⁶ See *Yearbook of the International Law Commission, 1967*, vol. II, document A/6709/Rev.1, annex I.

¹⁷ *Ibid.*

Article 8. — Notification

25. The Finnish Government makes the following proposal regarding articles 7 and 8:

It would seem appropriate to complete article 7 of the draft by adding a provision that the head of a special mission may authorize a member of the mission to perform particular acts on behalf of the mission and to issue and receive official communications. In this context, a reference may be made to article 8, paragraph 2 of which states that certain official notifications may be communicated by members of the mission's staff.¹⁸

26. The Special Rapporteur observes that he has already accepted a similar proposal by other Governments.

Article 9. — General rules concerning precedence

27. The Governments of Finland and Jamaica have criticized article 9.

28. The Finnish Government writes:

Paragraph 2 of article 9 (precedence) could perhaps be made more explicit by adding a statement that it concerns the precedence of the members of one special mission. The need to specify this arises from the fact that the previous paragraph deals with precedence among several special missions which carry out a common task.¹⁹

29. The Special Rapporteur considers that the question of the precedence of members within a single mission concerns only the sending State, that no international rule should be laid down on this point and that the head of the special mission should be left free, as the Commission has agreed, to settle the matter himself.

30. The Jamaican Government comments:

Since the draft articles are to be the basis of an international convention on special missions, the alphabetical order of the names of States should be prescribed for determining the order of precedence of special missions, and for the sake of uniformity the order should be that used by the United Nations.²⁰

31. The Special Rapporteur points out that a similar comment has already been made by several Governments.

Article 11. — Commencement of the functions of a special mission

32. The Jamaican Government comments on draft article 11:

Since any discrimination is contrary to the principles of international law, the inclusion of a rule of this nature would be unnecessary.²¹

33. The Special Rapporteur agrees with this comment.

Article 14. — Nationality of the head and the members of the special mission and of members of its staff

34. Concerning article 14 the Finnish Government writes:

Article 14, concerning the nationality of persons attached to special missions, may seem too strict. Under its paragraph 3, the receiving State may reserve the right not to approve as mem-

bers of a special mission or of its staff nationals of a third State who are not also nationals of the sending State. Both of the Vienna Conventions, it is true, contain a similar provision, which explains its presence in the article under reference.²²

35. The Finnish Government does not, however, submit any specific proposal or conclusion. The Special Rapporteur therefore considers that there is no reason to amend article 14.

PART II OF THE DRAFT ARTICLES: FACILITIES, PRIVILEGES AND IMMUNITIES*General considerations*

36. The Australian Government has made the following general comments on the question of privileges and immunities:

The wide scope of the draft articles also causes the Australian Government particular concern because of the intention to extend to all missions that come within the articles a range of privileges and immunities based on those contained in the Vienna Convention on Diplomatic Relations, which deals of course with permanent diplomatic missions. The Australian Government does not believe that the extension of this wide range of privileges and immunities to all types of special missions would be justified. It considers that the grant of privileges and immunities should be determined by functional necessity; i.e., they should be limited strictly to those required to ensure the efficient discharge of the functions of the special mission and should have regard to the temporary nature of the mission in that connexion. It is also necessary to have regard to the status of the person who is the head of the special mission. Standards of privileges and immunities that would be appropriate in the case of high level missions, whose heads hold high offices of State, should not be made automatically applicable to other cases.²³

37. The Finnish Government comments:

In part II of the draft (articles 17-44), concerned with facilities, privileges and immunities of the special missions, the system laid down by the above-mentioned Vienna Conventions is fairly closely followed. The leading principle that the functioning of the mission must be ensured is extended to special missions in addition to which some aspects of the theory of representation have been applied. In a general way the commission's recommendation grants special missions, their members and staff a juridical position equal to that of permanent missions and persons fulfilling analogous functions in these. This means that in certain instances the juridical position of the persons under reference is more efficiently ensured than that of career consuls and consular officials. In view of the character of the special missions, particularly their temporariness and the varying nature of their tasks, it has been felt that the privileges and facilities granted them and their staffs should be more extensive, or more restricted as the case may be, than those enjoyed by permanent missions and persons attached to these. This proposition seems to require further consideration, with due regard to the above-mentioned views of different types of special missions.²⁴

38. The Special Rapporteur notes that the comments of these two Governments show that they are still hesitating between the representational theory and the functional theory as regards the facilities, privileges and immunities of special missions.

¹⁸ *Ibid.*

¹⁹ *Ibid.*

²⁰ *Ibid.*

²¹ *Ibid.*

²² *Ibid.*

²³ *Ibid.*

²⁴ *Ibid.*

Article 17 bis. — Derogation by mutual agreement from the provisions of Part II

39. With regard to derogation from the provisions of Part II of the draft the Australian Government writes:

The Australian Government appreciates the proposal made by the Special Rapporteur to insert a new paragraph 2 in article 17 reading as follows:

“2. The facilities, privileges and immunities provided for in Part II of these articles shall be granted to the extent required by these articles, unless the receiving State and the sending State agree otherwise.”

The Australian Government considers, however, that this proposal would not allay the anxieties already expressed by some Governments about the extension of a wide range of privileges and immunities to all types of special missions. In the absence of agreement between both parties the receiving State would be obliged to accord the range of privileges and immunities set out in the draft — or not receive the mission at all.²⁵

Article 17 ter. — Differences between categories of special missions

40. The Australian Government's views on the question of differences between categories of special missions have already been quoted under the heading: “The concept of the special mission”.²⁶

Article 17 quater. — Status of the Head of State

41. The Jamaican Government considers that any attempt to draft special rules to govern missions at the highest level would be a retrograde step.²⁷

Article 22. — Freedom of communication

42. The Finnish Government has expressed the following opinion concerning the difference of views with regard to draft article 22:

As regards article 22 (freedom of communication), opinions have varied as to whether special missions should be entitled to use code or cipher telegrams and to designate persons not attached to the mission as *ad hoc* couriers. The affirmative conclusion suggested in the draft seems judicious. Also, the courier bags should enjoy unconditional inviolability; in this respect, the principle adopted would be that of the Vienna Convention on Diplomatic Relations, not that of the Convention on Consular Relations.²⁸

²⁵ *Ibid.*

²⁶ See para. 6 above.

²⁷ See *Yearbook of the International Law Commission, 1967*, vol. II, document A/6709/Rev.1, annex I.

²⁸ *Ibid.*

43. The Special Rapporteur makes no observation on this comment.

Article 35. — Members of the family

44. The Finnish Government comments on article 35:

The juridical position of members of the families of persons attached to special missions is specified in article 35 of the recommendation, partly in accordance with the analogous article (37) of the Vienna Convention on Diplomatic Relations. Members of the families of special mission staff would, however, be entitled to accompany the head of the family to the receiving State only if authorized by the latter to do so. This provision would seem too strict in view of the fact that some special missions will carry on their activities for a considerable period of time.²⁹

Former provisions on so-called high-level special missions

45. The Finnish Government writes on this point:

With regard to the rules proposed for so-called high-level special missions,³⁰ it is evident that the latter cannot in every respect be placed on a par with other special missions, wherefore particular rules for them are appropriate. Yet the necessity of sub-paragraph (a) of rules 2, 3 and 4 seems questionable. The fact mentioned in the sub-paragraph may be ascertained in advance by taking the matter up at the consultations preceding the sending of a high-level special mission. It appears from rules 4 and 5 that when a special mission is led by the Minister for Foreign Affairs or by a Cabinet Minister other than the head of Government he may have his personal suite, the members of which shall be treated as diplomatic staff. An analogous provision is missing from rule 3 which deals with the juridical position of the head of Government.

It would seem that the rules concerning high-level special missions might be a good deal simplified. Rules 2 to 5 could perhaps be condensed into one enumerating exceptions and specifying the category of high-level special mission to which each exception refers. Still, the most convenient way might be to complete the articles of the recommendation concerning special missions by adding particular rules for high-level special missions where needed.³¹

46. In view of the discussion in the International Law Commission at the nineteenth session and, in particular, the debate on article 1,³² the Special Rapporteur reserves the right to comment at a later stage on this suggestion by the Finnish Government.

²⁹ *Ibid.*

³⁰ See the “Draft provisions concerning so-called high-level special missions,” prepared by the Special Rapporteur, *Yearbook of the International Law Commission, 1965*, vol. II, document A/6009, pp. 192 and 193.

³¹ See *Yearbook of the International Law Commission, 1967*, vol. II, document A/6709/Rev.1, annex I.

³² See *Yearbook of the International Law Commission, 1967*, vol. I, 898th to 900th meetings.

RELATIONS BETWEEN STATES AND INTER-GOVERNMENTAL ORGANIZATIONS

[Agenda item 2]

DOCUMENTS A/CN.4/195 AND ADD.1

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

[Original text: English]
[7 April 1967*]

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Introduction*A. The basis of the present report*

1. In 1963, the Special Rapporteur presented a first report, and a working paper, on relations between States and inter-governmental organizations,¹ in which he made a preliminary study with a view to defining the scope of the subject and determining the order of future work on it. In 1964 he submitted a working paper² as a basis of discussion for the definition of the scope and mode of treatment of his topic.

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

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

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

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

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

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

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

² A/CN.4/L.104.

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

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

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

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

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

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

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

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

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

At its nineteenth session, the Commission would have before it his second report on the topic of relations between States and inter-governmental organizations; that report would contain a basic study of diplomatic law in its application to relations between States and inter-governmental organizations and a set of draft articles with commentaries relating to the status, privileges and immunities of representatives of States to international organizations. That aspect of the topic was ripe for codification in the form of a draft convention.

With regard to the status, privileges and immunities of the organizations themselves, he was taking into careful consideration the apprehensions expressed by the legal advisers of international organizations and by some members of the Commission when the topic had been discussed in 1963 and 1964; those apprehensions related to the position of the general Conventions on the privileges and immunities of the United Nations and the specialized agencies. A thorough study of that question in all its ramifications would therefore be necessary before deciding on the appropriate course of action on that second aspect.

He had therefore deemed it proper to give priority to the first aspect of the topic, namely the status, immunities and privileges of representatives of States to international organizations.⁴

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

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

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

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

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

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

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

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

A. Preliminary remarks

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

- I. First group—general principles of the juridical personality of international organizations, which would include:
 - (1) Legal capacity;
 - (2) Treaty-making capacity;
 - (3) Capacity to espouse international claims.
- II. Second group—international immunities and privileges, which would include:
 - (1) Privileges and immunities of international organizations;
 - (2) Related questions of the institution of legation in respect to international organizations; and
 - (3) Diplomatic conferences.
- III. Third group—special questions:
 - (1) The law of treaties in respect to international organizations;
 - (2) Responsibility of international organizations;
 - (3) Succession between international organizations.

13. The Special Rapporteur suggested to the Commission that:

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

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

14. The scope of the topic as interpreted by the Special Rapporteur, and in particular his suggestion that the subject of the general principles of the juridical personality of international organizations be taken up, provoked a division of views in the Commission. The preliminary

discussion which started in 1963⁵ and was completed in 1964⁶ revealed differences of interpretation and approach to both the scope of the topic and the concept of international personality of international organizations. It provided an opportunity to explore a number of basic jurisprudential questions concerning the nature of international organizations, their place in the contemporary international legal order, and the stage of growth of their legal norms.

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

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

B. Interpretation of General Assembly resolution 1289 (XIII)

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

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

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

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

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

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

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

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

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

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

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

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

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

Considering that it is desirable to survey the present state of international law, with a view to ascertaining whether new topics

susceptible of codification or conducive to progressive development have arisen, whether priority should be given to any of the topics already included in the Commission's list or whether a broader approach may be called for in the consideration of any of these topics.

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

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

C. General principles of juridical personality of international organizations

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

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

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

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

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

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

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

¹² *Ibid.*, 786th meeting, para. 22.

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

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

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

D. Diplomatic law of international organizations

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

30. The Commission did not take an explicit decision in favour of directing the Special Rapporteur to give priority to either of the two aspects of the subject of diplomatic law of international organizations, namely, the status of representatives of States to international organizations, and the status of international organizations. Some members suggested that the former be taken up first; others thought priority should be given to the latter. There was general agreement that the matter should be left to the Special Rapporteur to decide in the light of further study and considering the suggestions made by members of the Commission. Mention was made in particular of the usefulness of examining how the development of the law in the 1961 Vienna Convention on Diplomatic Relations¹⁴ and the 1963 Vienna Convention on Consular Relations¹⁵ needed to be reflected in the privileges and immunities of international organizations and the representatives accredited to them.

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

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

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

¹³ *Supra*, paragraphs 3 and 15.

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

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

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

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

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

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

36. Some members of the Commission took issue with this suggestion. They thought that regional organizations should be included in the study, pointing out that relations between States and organizations of a universal character might not differ appreciably from relations between States and smaller regional organizations. They further pointed out that if the Commission were to confine itself to the topic of the relations of organiza-

tions of a universal character with States, it would be leaving a serious gap, and that relations with States were apt to follow a very similar pattern whether the organization in question was of a universal or a regional character.

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

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

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

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

A. General remarks

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

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

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

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

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

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

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

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

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

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

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

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

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

45. A parallel development of concepts can be found in practice. In a diplomatic note by the United States Government dated 16 October 1933 it was stated that: . . . under customary international law, diplomatic privileges and immunities are only conferred upon a well-defined class of persons, namely, those who are sent by one state to another on diplomatic missions. Officials of the League of Nations are not as such considered by this Government to be entitled while in the United States to such privileges and immunities under generally accepted principles of international law, but only under special provisions of the Covenant of the League which have no force in countries not members of the League.²⁴

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

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

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

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

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

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

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

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

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

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

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

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

C. Accreditation of representatives to international organizations

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

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

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

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

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

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

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

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

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

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

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

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

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

E. *The special position of the host State*

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

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

F. *Representatives to conferences convened by international organizations*

56. Article IV, section 11 of the Convention on the Privileges and Immunities of the United Nations stipulates that delegates to "conferences convened by the United Nations" shall enjoy the same privileges and immunities that the Convention accords to representatives of Members to the principal and subsidiary organs of the United Nations. Conferences convened by international organizations, sometimes referred to as "held under the auspices of international organizations," are to be differentiated from meetings of organs of international

organizations. The former are conferences of States, and therefore have an independent status. For example, States not members of the organization convening the conference may be invited to participate. Because of this independent status the conferences may adopt their own rules of procedure. However, they are generally patterned on the rules of procedure of the General Assembly, e.g. the 1958 Conference on the Law of the Sea, and the 1961 and 1963 Conferences on Diplomatic Intercourse and Immunities and Consular Relations.

57. Special agreements are usually concluded with the host State in whose territory the conference is convened so that the General Convention may be applied even if the host State has not acceded to it. This arrangement is also necessary if the provisions of the General Convention are to apply to non-member States. The United Nations and Italy signed an agreement on 26 July 1963³¹ regarding the arrangements for the United Nations Conference on International Travel and Tourism, which provides in article VI, paragraph 1, for the application of the General Convention. Furthermore, paragraph 2 of this article specifies that representatives of non-member States attending the Conference shall enjoy the same privileges and immunities that the Convention accords to the representatives of member States.

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

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

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

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

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

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

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

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

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

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

A. General remarks

61. The practice of permanent representation to international organizations is not new. Many Members of the League of Nations had permanent delegates in Geneva.³⁵ They were usually members of the diplomatic missions accredited to Switzerland. Nevertheless, the practice had not been generally accepted of accrediting permanent delegations to the League of Nations. An early commentary on the Charter of the United Nations noted that since the new Organization had come into being, it had become common practice among Members to maintain permanent delegations at the interim Headquarters, and that in April 1948, forty-five Members had permanent delegations³⁶ (the total membership was then fifty-seven).

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

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

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

63. The provisional rules of procedure of the Security Council contain no provision bearing on the stipulation in Article 28, paragraph 1 of the Charter that each member of the Security Council shall be represented at all times at the seat of the Organization. Rule 13, in its first sentence, is limited to the provision that "Each member

of the Security Council shall be represented at the meetings of the Security Council by an accredited representative", while the remainder of rule 13 contains provisions concerning credentials. All members of the Security Council have maintained delegations to the Security Council at Headquarters, usually consisting of the head of delegation, an alternate representative and one or more advisers.³⁷

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

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

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

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

... shall, whether residing inside or outside the headquarters district, be entitled in the territory of the United States to the same privileges and immunities, subject to corresponding conditions and obligations, as it accords to diplomatic envoys accredited to it...⁴⁰

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

68. The competence of permanent missions was considered by the Interim Committee of the General Assembly at its meetings held from 5 January to 5 August 1948.⁴⁴ The Committee considered a proposal submitted by the Dominican Republic. According to this proposal, the heads of permanent delegations at the seat of the United Nations should, in that capacity, be automatically entitled to represent their countries on the Interim Committee. This, it was said, would provide for greater elasticity by making it unnecessary for each delegation to submit new credentials for each convocation of the Interim Committee. With regard to alternates and advisers, rule 10 of the rules of procedure of the Interim Committee⁴⁵ stated that they could normally be desig-

nated by the appointed representative. Consequently, special credentials would only be required when a Member of the United Nations desired to send a special envoy. It was said that such a procedure, in addition to its practical usefulness, would induce all Governments to set up permanent delegations, which would be an important contribution to the work of the United Nations.

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

70. The Committee noted from the memorandum prepared by the Secretariat on permanent delegations to the United Nations⁴⁶ that not all Members had permanent delegations in New York, that there was great variety in the functions performed by such permanent delegations as well as in the manner of accrediting the heads or chiefs thereof to the United Nations, and that permanent delegations as such had no recognized legal status under the Charter or under the rules of procedure of the various organs of the United Nations. The Committee was sympathetic to the idea contained in the Dominican proposal. Nevertheless, it considered that the whole matter of credentials, particularly in relation to the credentials and status of the heads of permanent delegations, should be studied further before it would be possible to make appropriate recommendations with regard to the Dominican proposal.

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

B. General Assembly resolution 257 A (III)

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

⁴² *Ibid.*, p. 92.

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

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

⁴⁵ A/AC.18/89.

⁴⁶ A/AC.18/SC.4/4.

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

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

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

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

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

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

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

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

74. The discussion of the Bolivian proposal in the Sixth Committee⁴⁹ gave rise to a substantial debate on a number of points. One paragraph of the draft resolution proved in particular to be controversial, i.e. operative paragraph 6, which would amend rule 24 of the rules of procedure of the General Assembly by adding a new paragraph reading:

The Credentials Committee shall, at each regular session, examine the credentials of the permanent representatives accre-

dated to the United Nations since the closing of the preceding regular session and report to the General Assembly.

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

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

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

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

⁴⁹ *Ibid.*, 124th-127th meetings.

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

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

The General Assembly,

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

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

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

Recommends

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

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

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

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

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

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

⁵¹ *Ibid.*, document A/C.6/300.

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

PART ONE — PRELIMINARY QUESTIONS

A. Title of the present group of draft articles

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

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

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

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

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

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

83. Should the Commission, however, accept the suggestion made by the Special Rapporteur concerning the scope of the present draft articles (paragraphs 8 to 10 above) and decide to give priority to the first aspect of the topic, namely the status, immunities and privileges of representatives of States to international organizations, the title of the draft articles would have to be adjusted to their limited scope. Several titles could be suggested. The title "The Legal Status, Privileges and Immunities of International Organizations" was chosen by the United Nations Secretariat for its two volumes in the *United Nations Legislative Series* published in 1959 and 1961.⁵⁶ It was also given to the two questionnaires which were prepared by the Legal Counsel of the United Nations and addressed to the legal advisers of the specialized agencies and the International Atomic Energy Agency to solicit their assistance to the Special Rapporteur by furnishing him with the necessary data and legal opinions on the problems that arose in practice concerning his topic.

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

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

by the representative of Greece in the Sixth Committee that the draft should specify that the international organizations in question were inter-governmental.⁵⁷

86. The Charter of the United Nations uses the term "international organizations" without qualification to indicate public (inter-governmental) organizations. So do Articles 66 and 67 of the Statute of the International Court of Justice. But Article 34 of the same Statute uses the term "public international organizations". Private transnational organizations, in spite of the great importance of some of them on the international plane and the role envisaged for them in the Charter of the United Nations (Article 71), are not international organizations in the proper sense. Their members are not States, and they are not created by a treaty, though some of them may be assigned certain functions by treaties. The Charter qualifies them simply as non-governmental organizations. The use of the term "international organization" is supported by the consistent practice of the International Law Commission. The provisions which use the term "international organization" as adopted by the Commission in its draft articles on the law of treaties⁵⁸ are as follows:

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

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

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

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

B. Form of the draft articles

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

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

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

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

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

⁵⁴ *Ibid.*, pp. 405-438.

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

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

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

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

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

C. Scope of the draft articles

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

89. This suggestion was the subject of a division of opinion among the members of the Commission. Several members expressed themselves in favour of the suggestion by the Special Rapporteur to exclude regional organizations at least from the initial stage of the study. Some members, however, took issue with the suggestion, pointing out that if the Commission were to confine itself to the topic of the relations of organizations of a universal character with States, it would be leaving a serious gap. A summary of these various views is presented in sub-section D of section I of this report, which contains a summary of the Commission's discussion of the first report of the Special Rapporteur at its fifteenth and sixteenth sessions in 1963 and 1964.⁶⁰

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

91. First, the formulation of the draft articles is based on the assumption that international organizations of a universal character, notwithstanding the fact that they are of varied and independent character, have nevertheless a certain measure of homogeneity which makes it possible to propose uniform or analogous rules. Regional organizations, on the other hand, vary greatly in their nature and functions. A great number of them follow the regular type of international organization, i.e. they are policy-making or deliberative organizations which are confined to the development of international policies

through adoption of resolutions and making recommendations to member Governments, and which depend wholly on Governments for the implementation of policy. European regional organizations have evolved, however, a new type of international organizations which are now generally referred to as "supra-national organizations". The most important examples of this category are the European communities which replace Governments in the exercise of the sovereign powers of legislation, adjudication or the ultimate use of sanctions in a direct way over the populations and territories of member States without having, in doing this, to pass through their respective Governments.⁶¹

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

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

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

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

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

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

⁶² *I.C.J. Reports 1949*, p. 185.

⁶⁰ *Supra*, paras. 35-37.

the European Commission of the Danube, a regional body.

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

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

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

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

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

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

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

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

96. These privileges and immunities are regulated by provisions in the Conventions on the privileges and

immunities of the United Nations and the specialized agencies, of 1946 and 1947, and by the Interim Arrangement on Privileges and Immunities of the United Nations concluded between the Secretary-General of the United Nations and the Swiss Federal Council, of 1946. It is noteworthy that among these privileges and immunities, immunity from jurisdiction is limited to words spoken or written and all acts done by members of such delegations in their capacity as representatives. This rather limited immunity from jurisdiction is in contrast with the full diplomatic immunities accorded by these same Conventions to the Secretary-General and all Assistant Secretaries-General (e.g. article V, section 19 of the Convention on the Privileges and Immunities of the United Nations). It is also in contrast with the full diplomatic immunities which the members of the permanent missions to the United Nations and the specialized agencies enjoy in accordance with the provisions of the Headquarters Agreement concluded between the United Nations and the United States on 26 June 1947 and with the decision of the Swiss Federal Council dated 31 March 1948.⁶⁴

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

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

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

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

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

Article 1. States have the right of being represented before each other through diplomatic officers.

Article 2. Diplomatic officers are classed as ordinary and extraordinary. Those who permanently represent the Government of one State before that of another are ordinary.

Those entrusted with a special mission or those who are accredited to represent the Government in international conferences and congresses or other international bodies are extraordinary.

⁶⁴ *Supra*, paragraphs 64-66.

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

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

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

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

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

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

...

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

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

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

He concludes, however, that:

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

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

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

103. The Special Rapporteur is therefore of the view that, owing to the temporary character of their task, delegations to organs of international organizations and

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

The organization and procedure of diplomatic conferences

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

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

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

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

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

The General Assembly. . .

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

...;

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

...

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

⁶⁸ Cahier, *op. cit.*, p. 402.

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

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

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

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

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

Delegations to conferences not convened by international organizations

112. There is little disagreement on the treatment of the question of the privileges and immunities of delegations to conferences convened by international organiza-

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

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

In view of the wide-spread and, today, almost universally adopted practice whereby the status of such delegations and delegates [to conferences convened by international organizations] is determined in advance either by the rules of the organization convening the conference or congress or by the letter of convocation, and whereby, in such cases, a legal relationship is created between the delegations and delegates to such meetings, on the one hand, and, simultaneously, the convening organization and the participating States on the other hand, the Special Rapporteur considers that the status of such delegations and delegates could be regulated under the legal rules governing the relations between States and international organizations, even though these delegations are essentially identical with those taking part in conferences and congresses held outside international organizations.⁷⁶

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

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

At that session [1960] the Commission had also decided not to deal with the privileges and immunities of delegates to congresses and conferences as part of the study of special missions, because the topic of diplomatic conferences was connected with that of relations between States and inter-governmental organizations. At the present session [1963], the question was raised again, with particular reference to conferences convened by States. Most of the members expressed the opinion, however, that for the time being the terms of reference of the Special Rapporteur should not cover the question of delegates to congresses and conferences.⁷⁷

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

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

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

⁷² *Supra*, paragraph 38.

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

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

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

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

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

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

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

PART TWO — DRAFT ARTICLES WITH COMMENTARIES

Section I. General provisions

Article 1. Scope of the present articles

Alternative A

The present articles relate to representatives of States to the United Nations and the specialized agencies brought into relationship

with the United Nations in accordance with the provisions of Articles 57 and 63 of the Charter of the United Nations.

Alternative B

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

Alternative C

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

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

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

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

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

Commentary

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

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

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

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

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

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

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

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

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

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

⁸⁰ *Supra*, paragraphs 88 to 94.

DOCUMENTS A/CN.4/L.118 AND ADD.1 AND 2*

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

[Original text: English/French]

[8 March, 5 May and 23 May 1967]

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Introduction

By resolution 1289 (XIII) of 5 December 1958, the General Assembly requested the International Law Commission to give consideration to the question of relations between States and inter-governmental organizations. At its fourteenth session in 1962 the Commission appointed a Special Rapporteur on the topic, who submitted a first report¹ to the Commission in 1963. At its sixteenth session in 1964, the Commission considered the first report and examined a list of questions submitted by the Special Rapporteur.

In order to assist the work of the Commission, the United Nations Secretariat has prepared the four studies listed below relating to the status, privileges and immunities of the representatives of Member States to the United Nations, the specialized agencies and the International Atomic Energy Agency, and to the status, privileges and immunities of those organizations themselves. The material relating to the specialized agencies and the International Atomic Energy Agency has been prepared on the basis of the replies of those organizations to two questionnaires sent by the United Nations Secretariat.

Part One: The representatives of Member States

- A. Summary of practice relating to the status, privileges and immunities of the representatives of Member States to the United Nations

* A few minor changes have been made in the original text of this document.

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

- B. Summary of practice relating to the status, privileges and immunities of the representatives of member States to the specialized agencies and the International Atomic Energy Agency

Part Two: The Organizations

- A. Summary of practice relating to the status, privileges and immunities of the United Nations
 B. Summary of practice relating to the status, privileges and immunities of the specialized agencies and of the International Atomic Energy Agency

These studies attempt to summarize the major features of the practice which has grown up in this sphere since these organizations were founded. Although covering a wide range of matters affecting the activities of the United Nations and its kindred organizations, the studies do not deal with the status, privileges and immunities of the International Court of Justice nor with practice relating to the status, privileges and immunities of United Nations peace-keeping forces, except where the matter involved was one in which the character of the force as such did not materially affect the issue.

The material used in the studies has been taken largely from the official records of the organizations concerned and compiled by the Office of Legal Affairs of the United Nations. The studies contained in Parts One and Two respectively have been arranged on similar lines so as to make cross-reference between them, for the purpose of comparing practice with regard to the United Nations and to the specialized agencies and the International Atomic Energy Agency, as easy as possible. Subjects are dealt with in approximately the same order as that followed in the Convention on the Privileges and Immunities of the United Nations, adopted by the General Assembly on 13 February 1946. It may be noted that, except where expressly noted in the text, the provisions of the Agreement on the Privileges and Immunities of the International Atomic Energy Agency are the same or closely similar to those contained in the Convention on the Privileges and Immunities of the Specialized Agencies, adopted by the General Assembly on 21 November 1947, and which are referred to in the studies relating to the specialized agencies. The information given covers in general the period up to 31 December 1965,

but in some cases more recent items have also been included.

All international agreements and national enactments mentioned in the studies are contained in United Nations Legislative Series, *Legislative Texts and Treaty Provisions concerning the Legal Status, Privileges and Immunities of International Organizations*, vols. I and II, except where a reference is given to another source. In the studies relating to the specialized agencies and the International Atomic Energy Agency the expression "Headquarters Agreement" is used for ease of reference to denote the principal agreement between the specialized agency concerned and the State in which its headquarters are situated. In the United Nations studies the same expression is used to refer to the Agreement between the United Nations and the United States regarding the Headquarters of the United Nations, signed on 26 June 1947; references to the "Agreement with Switzerland" or to the "1946 Agreement" are to the instrument concluded between the Secretary-General and the Swiss Federal Council in 1946, originally under the title "Interim Arrangement on Privileges and Immunities of the United Nations". The terms "ECA Agreement", "ECAFE Agreement" and "ECLA Agreement", refer to the agreement in respect of each of these regional economic commissions with its respective host country. Similarly in the case of United Nations peace-keeping forces, the expressions "UNEF Agreement", "ONUC Agreement"² and "UNFICYP Agreement"³ refer to the Status of Forces Agreements concluded by the United Nations with the respective host State regarding the particular force concerned. Lastly, it should be noted that, for the sake of uniformity and convenience, memoranda or communications prepared by the legal staff of the United Nations Secretariat are referred to as having been prepared either by the Office of Legal Affairs or by the Legal Counsel, even in respect of earlier periods in the history of the Organization when different terms were used to describe that office or the official in charge of that office.

² United Nations, *Treaty Series*, vol. 414, p. 229.

³ *Ibid.*, vol. 492, p. 57.

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LIST OF ABBREVIATIONS

ECA.	Economic Commission for Africa
ECAFE	Economic Commission for Asia and the Far East
ECE	Economic Commission for Europe
ECLA	Economic Commission for Latin America
FAO.	Food and Agriculture Organization of the United Nations
IAEA	International Atomic Energy Agency
IBRD	International Bank for Reconstruction and Development
ICAO	International Civil Aviation Organization
IDA	International Development Association
IFC	International Finance Corporation
ILO	International Labour Organisation
IMCO	Inter-Governmental Maritime Consultative Organization
IMF	International Monetary Fund
IRO	International Refugee Organization
ITU	International Telecommunication Union
ONUC.	United Nations operation in the Congo
UNEF	United Nations Emergency Force
UNESCO	United Nations Educational, Scientific and Cultural Organization
UNFICYP	United Nations Peace-Keeping Force in Cyprus
UNICEF.	United Nations Children's Fund
UNKRA	United Nations Korean Reconstruction Agency
UNMOGIP.	United Nations Military Observers Group in India and Pakistan
UNRRA	United Nations Relief and Rehabilitation Administration
UNRWA.	United Nations Relief and Works Agency for Palestine Refugees in the Near East
UNTSO	United Nations Truce Supervision Organization in Palestine
UPU	Universal Postal Union
WHO	World Health Organization
WMO	World Meteorological Organization

PART ONE: THE REPRESENTATIVES OF MEMBER STATES

A. Summary of practice relating to the status, privileges and immunities of the representatives of Member States to the United Nations

CHAPTER I. — GENERAL ASPECTS: THE POSITION OF REPRESENTATIVES IN RELATION TO THE UNITED NATIONS

Section 1. Interpretation of the term "representatives"

1. The Convention on the Privileges and Immunities of the United Nations (subsequently referred to as the "General Convention"), which was adopted by the General Assembly on 13 February 1946, defines in article IV the privileges and immunities to be accorded to the representatives of Member States. Article IV, section 16 of the General Convention provides that :

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

2. This definition is repeated in section 13 of the Agreement with Switzerland and is contained, with slight modification, in section 1 (k) of the Agreement between the United Nations and Thailand regarding ECAFE, and section 1 (i) of the Agreement between the United Nations and Ethiopia regarding ECA.

3. The number of persons who may represent a given member State before a United Nations organ varies according to the organ concerned. Normally, States may have only one representative and as many alternate representatives, advisers, etc., as they wish to choose. In the case of the General Assembly, however, Article 9, paragraph 2 of the Charter provides that:

Each Member shall have not more than five representatives in the General Assembly.

Rule 25 of the rules of procedure of the General Assembly adds that:

The delegation of a Member shall consist of not more than five representatives and five alternate representatives, and as many advisers, technical advisers, experts and persons of similar status as may be required by the delegation.

In the case of the Security Council, Economic and Social Council and Trusteeship Council, each member may have one representative.¹

4. As regards United Nations conferences, rule 1 of the rules of procedure of the 1958 United Nations Conference on the Law of the Sea provided that:

The delegation of each State participating in the Conference shall consist of accredited representatives and such alternate representatives and advisers as may be required.²

Other United Nations conferences have adopted the same rule.³

5. Questions have on occasions arisen concerning the use of different titles designating representatives and other practices involving the interpretation of the pertinent rules of procedure of United Nations organs. Thus in 1962 the Legal Counsel was called upon to advise the Secretary of the Economic and Social Council regarding the application of the Council's rules of procedure, rule 18⁴ of which provides as follows:

Each member of the Council shall be represented by an accredited representative, who may be accompanied by such alternate representatives and advisers as may be required.

6. An extract from the memorandum of the Legal Counsel is set out below.

The designation of two representatives to represent one member of the Council would not be permissible as it would run counter to the provisions of paragraph 4 of Article 61 of the Charter as well as those of rule 18 of the rules of procedure. The identity of the representative entitled to vote on behalf of a member of the Council or empowered to designate an alternate representative to do so in his place must be known to the Council at all times and all possible sources of confusion in this respect should be avoided.

The tendency of some members of the Council to designate "deputy representatives" should not be encouraged. Rule 18 does not provide for such deputies. There is furthermore no significant difference between the meaning of the expression "deputy representative" and "alternate representative", each of these terms referring to a member of the delegation who may take the place of the representative upon designation by the latter.

The situation of the representative, whether a Cabinet Minister or other, leaving the Council before the end of the session can be resolved on the basis of the last sentence of rule 19 which states: "This rule shall not, however, prevent a member from changing its representatives, alternate representatives, or advisers subsequently, subject to proper submission and examination of credentials where needed". An indication in the credentials of the delegation concerned that upon the departure of the person designated as representative another person will act as representative would be adequate in this respect.

It would be permissible in our opinion for delegations to the Council, while retaining the three designations referred to in rule 18, i.e., "representatives", "alternate representatives" and "advisers", to qualify these designations in such manner as "first alternate" or "senior alternate".

¹ Art. 23, para. 3, Art. 61, para. 4, and Art. 86, para. 2 of the Charter. In the case of the Trusteeship Council the representative is to be a "specially qualified person".

² *United Nations Conference on the Law of the Sea* (1958), *Official Records*, vol. II, p. xxxi.

³ e.g. rule 1, rules of procedure, *United Nations Conference on Diplomatic Intercourse and Immunities*, *Official Records*, vol. I, p. xxiii.

⁴ Rule 18 of the rules of procedure of the Trusteeship Council contains a similar provision.

Similarly the term "adviser" could be qualified if the delegation concerned so desires by such terms as "senior", "technical" or "special".

The rules do not refer to designations such as "chairman of delegation"; the person designated as the representative to the Council is clearly the head of his delegation.

"Secretary" or "Secretary-General of delegation" is not an expression used in rule 18. It might, however, be possible for one of the alternate representatives or advisers to be designated as performing such functions and the designation "secretary of delegation" might be included in the list *in addition* to "alternate representative" or "adviser".

"Experts" are, presumably, included in delegations only for the purpose of extending advice to representatives; they may therefore be appropriately designated as "advisers". If a delegation wishes to have experts on certain special matters listed as special advisers on such matters, this could be permitted.

"Members of delegations" is not a desirable designation.

It is preferable that all members of delegation should receive one of the three designations referred to in rule 18.

7. The problem has arisen from time to time of determining whether, when Member States were appointed to serve on certain bodies, their representatives were then to be treated as national representatives or as representatives of the United Nations as a whole, so as to require the application of United Nations privileges and immunities. This issue was raised, for example, in connexion with the establishment of the Advisory Council for Somaliland. The Committee for Italian Somaliland included the following article in the draft Trusteeship Agreement placed before the Trusteeship Council in 1950:

Article 10. Members of the Advisory Council and their staff shall enjoy in the Territory the same privileges and immunities as they would enjoy if the Convention on the Privileges and Immunities of the United Nations were applicable to the Territory.

During the discussion⁵ of this text in the Trusteeship Council it was pointed out that, since members of the Advisory Council were Member States which would appoint their representatives to the Council as sovereign entities, those representatives would enjoy the privileges and immunities traditionally accorded to members of the diplomatic corps. In support of this view it was maintained that members of the Advisory Council would retain distinctly national characteristics, and that each would therefore, in addition to being responsible to the United Nations as a member of a body set up by the General Assembly, be responsible to his own Government. The discussion resulted in the unanimous adoption by the Trusteeship Council of an amendment to insert the words "shall have full diplomatic privileges and immunities" between the words "members of the Advisory Council" and the words "and their staff" in article 10.

Section 2. Distinction between permanent and temporary representatives

(a) Position at United Nations Headquarters

8. A distinction exists under United Nations practice between so-called permanent representatives, who are

⁵ *Official Records of the Trusteeship Council, Sixth Session*, 206th meeting, pp. 16-22, paras. 21-92.

stationed at the United Nations office concerned throughout the year, and temporary representatives, who are sent for the purposes of attending particular sessions of United Nations bodies or *ad hoc* conferences convened by the United Nations. Although not contained in the General Convention, the institution of permanent representatives and of permanent missions was endorsed by the Assembly in resolution 257 A (III), adopted on 3 December 1948, in the following terms:

The General Assembly,

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

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

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

Recommends:

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

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

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

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

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

9. As indicated in paragraph 4 of the operative part of the above resolution, unless particular organs are specified, accreditation as a permanent representative does not go beyond accreditation to the Secretariat.⁶

10. The Headquarters Agreement between the United Nations and the United States (subsequently referred to as the "Headquarters Agreement"), which came into force on 21 November 1947, contains the following article dealing with resident representatives to the United Nations:

Article V, section 15

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

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

...

⁶ The question of credentials is dealt with in section 4, paras. 19-33, below.

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

11. Although it is believed that no substantive difference is involved, it may be noted that whereas in resolution 257 A (III) the General Assembly referred to "permanent missions" and to "permanent representatives", the Headquarters Agreement refers to the "principal resident representative" and "resident members" of his staff. *The effect of the distinctions between permanent representatives and other representatives under United States law is considered more fully in section 7, paras. 47-60, below.*

12. As envisaged in operative paragraph 3 of resolution 257 A (III), the duties of head of mission may be performed temporarily by someone other than the permanent representative. In the United Nations "blue book" listing members of permanent missions the designation "*chargés d'affaires, a.i.*" is used after the Secretariat has been informed of such an appointment. The appointment of a *chargé d'affaires* should be distinguished from that of an "alternate representative" or of a "deputy permanent representative". Both of these terms are used by Member States, the latter expression being frequently used to describe the person ranking immediately after the permanent representative himself.

(b) Position at the United Nations Office at Geneva

13. At the Geneva Office a similar distinction exists between permanent missions and others. Representatives at the Geneva Office are received by the Director-General of that Office, who acts on behalf of the Secretary-General.

14. By a decision of 31 March 1948, the Swiss Federal Council gave official recognition to this practice and granted permanent missions to the Geneva Office and to the specialized agencies having their headquarters in Geneva facilities analogous to those accorded to diplomatic missions at Berne. It may be noted that whereas the 1946 Agreement with Switzerland applies to "representatives", the 1948 decision refers to "delegations".

(c) Position at headquarters of economic commissions (other than ECE)

15. Neither the terms of reference of the economic commissions, nor any resolutions of the General Assembly, of the Economic and Social Council, or of the commissions themselves, provide for resident representatives at the headquarters of the economic commissions. Nevertheless, embassy or consulate staff who are present at the site may serve as liaison officers between their Governments and economic commissions on a more or less permanent basis. This practice appears to have

been especially followed in the case of ECAFE. The Agreement relating to ECA is the only headquarters agreement for an economic commission which expressly envisages resident representatives. Section 10 (b) provides that resident representatives are entitled to the same privileges and immunities as the Government of Ethiopia accords to diplomatic envoys accredited to it.

Section 3. Relationship between functions and composition of permanent missions

16. In the preamble to resolution 257 A (III) the General Assembly recognized that:

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

17. This statement has remained the basis for discussion of questions raised in relation to the composition of permanent missions, assessed in the light of the tasks those missions are called upon to perform. In a memorandum submitted to the Secretary-General in 1958, the Legal Counsel gave a general review of the issues involved, including the question whether, in certain circumstances, objections could be raised to the appointment of particular individuals or to their continuation as representatives. After referring to resolution 257 A (III), the memorandum continued:

The development of the institution of the permanent missions since the adoption of that resolution shows that the permanent missions also have functions of a diplomatic character in relation to each other, and serve as important channels of communication between Governments and the Secretary-General as well as between Governments of the Member States themselves on matters dealt with by the United Nations organs. The permanent missions perform these various functions through methods and in a manner similar to those employed by diplomatic missions, and their establishment and organization are also similar to those of diplomatic missions which States accredit to each other.

It may be recalled in this connexion that international law and practice, while ensuring to diplomatic missions the widest independence and facilities for the performance of their functions, reserve to the Government of the State to which they are accredited the full discretion with respect to the acceptance of particular individuals as members of such missions, as well as virtually an unrestricted power to demand the departure of members of a diplomatic mission. This power to have a person recalled—although unrestricted in principle—is in practice exercised in cases where the receiving State considers that the diplomatic agent has improperly exceeded his official functions.

In the case of delegations to the United Nations, no United Nations organ has been given the broad power of a receiving State vis-à-vis diplomatic agents. However, a distinction which is pertinent in this connexion has been made between the official functions of representatives and other activities in which they may engage. Article 105 of the Charter limits the privileges and immunities of representatives to those "necessary for the independent exercise of their functions in connexion with the Organization". The provisions of the Convention on the Privileges and Immunities of the United Nations are based on this concept, and Section 14 of the Convention states that the privileges and immunities listed in the Convention "are accorded to the representatives of Members not for the personal benefit of the individuals themselves, but in order to safeguard the independent

exercise of their functions in connexion with the United Nations. Consequently, a Member . . . is under the duty to waive the immunity of its representative in any case where in the opinion of the Member, the immunity . . . can be waived without prejudice to the purpose for which the immunity is accorded".

This distinction between the exercise of official functions and other activities of a member of a permanent mission is, in our opinion, of basic importance. Activities pertaining to the exercise of the functions of a permanent mission, while performed in accordance with the rules and procedures established by United Nations organs, are subject to the control and supervision only of the Government which the mission represents; no interference can take place in this respect by outside entities and the composition of a permanent mission cannot be questioned on that account. Activities undertaken by individual members of the mission which do not pertain to the functions of official representation of the Member State concerned are not, however, similarly protected and, if they constitute an abuse of the status of a representative of the United Nations, there would be warrant for intervention by the United Nations.*

In accordance with these principles, there seem to be certain situations which would clearly justify representations by the United Nations organs to a Member State in regard to the composition of its permanent mission. One such case would occur if a Member State placed on the list of its permanent mission an individual who does not actually perform any function connected with the work of the mission, but who is put on the list for the purpose of enabling him to attain entry to the host State or to enjoy the status and facilities of a representative to the United Nations.

Another such situation might arise as a result of activities of a political nature undertaken by a member of a permanent mission, particularly at United Nations Headquarters, when such activities are not exercised on behalf of the permanent mission itself or the Member State which it represents, but rather for a separate entity or group which is not part of the government of that Member State. This situation would obviously have a special gravity where the member of the permanent mission carries on activities on behalf of a party or group located in another Member State. Not only would this go beyond the function of representatives, which is the basis of the institution of the permanent missions, but it would introduce an element of disorder and confusion which would be contrary to the purposes of the permanent missions and the standards which a diplomatic corps may be expected to maintain.

With regard to the question of nationality, I believe there would be no grounds for intervention by United Nations organs in the case of the inclusion in a permanent mission of persons who have the nationality of another State, either as their only nationality or concurrently with the nationality of the State which has accredited them. There were a number of cases in the League of Nations of Members being represented by delegates who were not their nationals, and there are also similar instances in the United Nations. If a Member State objects to the position taken by one of its nationals as a representative of another State, it would have to deal with the situation within the framework of its own law and administration (or possibly through representations to the other State) rather than through the intervention of a United Nations organ. . . .

The question remains to be answered of the organs which would be entitled to act on behalf of the United Nations in cases where representations would have to be made to a Member State with respect to the activities and status of a Member of its permanent mission. It appears that the Secretary-General could assume

* It is not the object of this memorandum to consider the question of the relation between the host Government and a Member State with respect to the status granted to members of the permanent mission to the United Nations in the territory of the host State. Section 15 of the Headquarters Agreement grants to members of permanent missions the privileges and immunities of diplomatic envoys accredited to the Government of the United States "subject to the corresponding conditions and obligations."

such responsibilities in conformity with his functions and powers under Chapter XV of the Charter. Resolution 257 (III) provides that he should receive the credentials of members of the permanent missions. The same resolution entrusts him with responsibility for reporting to the General Assembly on those credentials at each regular session. Part B of that resolution instructs him to study "all questions which may arise from the institution of permanent missions" and report on this subject to the Fourth Session of the General Assembly. The Headquarters Agreement, approved by the General Assembly, also contains a recognition by the Assembly of the Secretary-General's role in connexion with the establishment and status of permanent missions; in its article V it provides for the agreement between the Secretary-General, the Government of the United States and the Government of the Member State concerned in respect of all members of permanent missions, other than principal permanent representatives, who are entitled to privileges and immunities under the Agreement.

Should consultations between the Secretary-General and a Member State concerning the status of a member of its permanent mission not achieve satisfactory results, the Secretary-General would be entitled to bring the matter, either as a question of principle or as affecting specific missions and individuals, to the attention of the General Assembly which could consider such situations as questions arising out of the application of resolution 257 (III).

18. Although no provision appears to exist specifically delimiting the size of a mission it has been generally assumed that some upper limit did exist. When negotiations were held with the United States authorities concerning the Headquarters Agreement, the United States representative, while accepting the principle of the proposed article V dealing with permanent representatives, "felt that there should be some safeguard against too extensive an application". The text thereupon suggested (which, with only slight modification, was finally adopted as article V) was considered by the Secretary-General and the Negotiating Committee to be a possible compromise.⁷

Section 4. Credentials

19. The *Repertory of Practice of United Nations Organs* and the *Repertoire of the Practice of the Security Council* give a detailed account of the practice followed with respect to the credentials of the representatives of particular Member States. The following summary, taken largely from that account, refers to the main occasions when the question of credentials has been discussed; the present rules of procedure are also cited. In accordance with diplomatic practice credentials or other evidence of powers of representation are not required in the case of a Head of State, Head of Government, or Minister of Foreign Affairs.

(a) *The General Assembly*

20. Chapter IV of the rules of procedure is as follows:

⁷ Joint Report by the Secretary-General and the Negotiating Committee on the negotiations with the authorities of the United States of America concerning the arrangements required as a result of the establishment of the seat of the United Nations in the United States of America, A/67 and A/67/Add.1, 4 September 1946. Reproduced in *Handbook on the Legal Status, Privileges and Immunities of the United Nations*, ST/LEG/2, p. 435. The relevant portion of article V is reproduced in section 7 (a), para. 49, below.

IV. CREDENTIALS

Submission of credentials

Rule 27

The credentials of representatives and the names of members of a delegation shall be submitted to the Secretary-General if possible not less than one week before the date fixed for the opening of the session. The credentials shall be issued either by the Head of the State or Government or by the Minister for Foreign Affairs.

Credentials Committee

Rule 28

A Credentials Committee shall be appointed at the beginning of each session. It shall consist of nine members, who shall be appointed by the General Assembly on the proposal of the President. The Committee shall elect its own officers. It shall examine the credentials of representatives and report without delay.

Provisional admission to a session

Rule 29

Any representative to whose admission a Member has made objection shall be seated provisionally with the same rights as other representatives, until the Credentials Committee has reported and the General Assembly has given its decision.

At the Assembly's second session⁸ in 1947 a proposal that credentials might be signed by resident representatives failed of adoption; it was agreed, however, that credentials might be signed by the Head of Government, as well as by the Head of State or Minister for Foreign Affairs. It may also be noted that in practice cablegrams are considered as provisional credentials until superseded by full credentials, submitted by Governments in accordance with rule 27 of the rules of procedure.

21. At various sessions of the Assembly there has been discussion regarding the representation of particular Member States,⁹ but no resolutions have been adopted of general application with regard to credentials. It may be noted that in resolution 1618 (XV) of 21 April 1961, the General Assembly called the attention of Member States to the necessity of complying with the requirements of rule 27.

(b) *The Security Council*

22. Chapter III of the provisional rules of procedure of the Security Council is set out below.

CHAPTER III — REPRESENTATION AND CREDENTIALS

Rule 13

Each member of the Security Council shall be represented at the meetings of the Security Council by an accredited representative. The credentials of a representative on the Security Council shall be communicated to the Secretary-General not less than twenty-four hours before he takes his seat on the Security Council. The credentials shall be issued either by the Head of the State or of the Government concerned or by its Minister of Foreign Affairs. The Head of Government or Minister of Foreign Affairs of each member of the Security Council shall be entitled to sit on the Security Council without submitting credentials.

⁸ See *Repertory of Practice of United Nations Organs*, vol. I, p. 248, paras. 17-20.

⁹ *Ibid.*, vol. I, pp. 249-251, paras. 21-34; *Supplement No. 1*, vol. I, pp. 111 and 112, paras. 9-16; *Supplement No. 2*, vol. II, pp. 7-9, paras. 9-16.

Rule 14

Any Member of the United Nations not a member of the Security Council and any State not a Member of the United Nations, if invited to participate in a meeting or meetings of the Security Council, shall submit credentials for the representative appointed by it for this purpose. The credentials of such a representative shall be communicated to the Secretary-General not less than twenty-four hours before the first meeting which he is invited to attend.

Rule 15

The credentials of representatives on the Security Council and of any representative appointed in accordance with rule 14 shall be examined by the Secretary-General who shall submit a report to the Security Council for approval.

Rule 16

Pending the approval of the credentials of a representative on the Security Council in accordance with rule 15, such representative shall be seated provisionally with the same rights as other representatives.

Rule 17

Any representative on the Security Council, to whose credentials objection has been made within the Security Council, shall continue to sit with the same rights as other representatives until the Security Council has decided the matter.

23. The third sentence of rule 13 ("the credentials shall be issued either by the Head of the State or the Government concerned or by its Minister of Foreign Affairs") was adopted by the Security Council at its 468th meeting on 28 February 1950.¹⁰ At the same meeting the Council determined not to make any amendment to rule 17. The Indian representative suggested that where the right of any person to represent a State in the Security Council had been called in question, the President should place the views of all other Member States before the Council, so that these could be taken into consideration in deciding what attitude the Council should adopt. This proposal was not endorsed, however, by a Committee of Experts which was established to consider the question.¹¹

24. An account of the discussion relating to the representation of particular States is given in the *Repertoire of the Practice of the Security Council*.¹²

(c) *The Economic and Social Council*

25. Rule 19 of the Council's rules of procedure provides:

The credentials of representatives and the names of alternate representatives and advisers shall be submitted to the Secretary-General not less than twenty-four hours before the first meeting which the representatives are to attend. The President and the Vice-Presidents shall examine the credentials and submit their report to the Council. This rule shall not, however, prevent a member from changing its representatives, alternate representatives, or advisers subsequently, subject to proper submission and examination of credentials, where needed.

At each session of the Council the credentials received by the Secretary-General have been examined by the President and the Vice-Presidents, who submit a report

on credentials to the Council. In practice, credentials are accepted from permanent missions and representatives, as well as when issued by the Head of the State, the Head of the Government, or by the Minister of Foreign Affairs.¹³

(d) *The Trusteeship Council*

26. The pertinent rules of procedure of the Trusteeship Council are set out below.

Rule 14

1. The credentials of representatives on the Trusteeship Council shall normally be communicated to the Secretary-General not less than twenty-four hours before the meeting at which the representatives will take their seats. The credentials shall be issued either by the Head of the State or by the Minister of Foreign Affairs of the respective member governments.

2. The credentials shall be examined by the Secretary-General, who shall submit a report thereon to the Trusteeship Council for approval.

Rule 15

1. Any member of the United Nations not a member of the Trusteeship Council, when invited to participate in a meeting or meetings of the Council, shall submit credentials for the representative appointed by it for this purpose in the same manner as provided in rule 14. The credentials of such a representative shall be communicated to the Secretary-General not less than twenty-four hours before the first meeting which he is to attend.

2. The credentials of representatives referred to in the paragraph immediately preceding and of any representatives appointed in accordance with rule 74 shall be examined by the Secretary-General, who shall submit a report to the Trusteeship Council for approval.

Rule 17

Pending the decision on the credentials of a representative on the Trusteeship Council, such representative shall be seated provisionally and shall enjoy the same rights as he would have if his credentials were found to be in good order.

Rule 18

Each representative on the Trusteeship Council may be accompanied by such alternates and advisers as he may require. An alternate or an adviser may act as a representative when so designated by the representative.

27. At various sessions of the Council there has been discussion regarding the representation of particular Member States.¹⁴

(e) *Subsidiary organs and United Nations conferences*

28. The position with respect to the credentials of representatives attending meetings of subsidiary organs and United Nations conferences is governed by the rules of procedure of the organ or conference concerned. Where, as is often the case, a person has been authorized to represent his Government in all United Nations organs, this authorization necessarily extends to all subsidiary organs which may be established. Where, on the other hand, the representative is specially sent from his home State to represent his Government before an *ad hoc* subsidiary organ, specific credentials are

¹⁰ See *Repertoire of the Practice of the Security Council, 1946-1951*, p. 12 *et seq.*

¹¹ *Ibid.*

¹² *Ibid.*, pp. 14-17; *Supplement 1952-1955*, pp. 4 and 5; *Supplement 1956-1958*, pp. 4-8.

¹³ For details of discussion on the representation of a Member State, see *Repertory of Practice of United Nations Organs, Supplement No. 1*, vol. II, pp. 68 and 69.

¹⁴ See *Repertory of Practice of United Nations Organs*, vol. IV, pp. 321-323; *ibid.*, Suppl. No. 1, vol. II, pp. 271 and 272.

required. In the case of the regional Economic commissions, credentials must be submitted in advance to the Executive Secretary, for examination by the Chairman and Vice-Chairman, who submit a report to the commission. At United Nations conferences, a procedure similar to that of sessions of the General Assembly is observed; credentials must be submitted to the Secretary-General, or the official acting in his stead, for examination by a credentials committee or by the Secretariat, which reports to the plenary body of the conference.

(f) *Permanent representatives*

29. The question of the credentials of permanent representatives was dealt with comprehensively in resolution 257 A (III), in which the General Assembly

Recommends:

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

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

...

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

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

30. The procedure outlined in resolution 257 A (III) has been observed since 1949. As indicated in paragraph 4 of the operative part of the resolution, accreditation as a permanent representative does not entitle the representative concerned to appear before a particular organ unless that organ has been referred to in the credentials issued on his behalf. The credentials of many permanent representatives do in fact specify that the person concerned may represent his State before all or several United Nations organs.

31. The annex to the report submitted by the Secretary-General to the General Assembly at its fourth session on permanent missions to the United Nations¹⁵ gave a standard form of credentials, as a guide to the drafting of such instruments:

Standard Form of Credentials

Whereas the Government of has set up at the seat of the United Nations a permanent mission to maintain necessary contact with the Secretariat of the Organization,

Now therefore we (*name and title*) have appointed and by these presents do confirm as permanent representative to the United Nations His Excellency (*name*) (*title*).

His Excellency is instructed to represent the Government of in the following organs: He is also authorized to designate a substitute to act temporarily on his behalf after due notice to the Secretary-General.

In faith whereof we have signed these presents at on

Signature.
(*title*)

(Head of the State, Head of the Government or Foreign Minister)

32. It was suggested that where a Government desires to accredit its permanent representative to all organs of the United Nations, the beginning of the third paragraph of this form might be altered to read:

His Excellency is instructed to represent the Government of in all organs of the United Nations.

33. Notification of the appointment of members of the staff of a permanent mission other than the representative himself is normally provided by the permanent representative. This practice is also commonly followed in the case of members of delegations, other than representatives, to sessions of the General Assembly, although notification in such cases may also be made by representatives to the Assembly.

*Section 5. Full powers and action in respect of treaties*¹⁶

34. In a letter dated 11 July 1949, sent to all Member States, the Legal Counsel described the procedures to be observed in relation to the above subject-matter. The arrangements outlined have continued in force.

Sir,

I have the honour to draw your attention to a question relating to the depository functions entrusted to the Secretary-General by various multilateral agreements open to signature of Member States. By virtue of these functions, the Secretary-General receives the signatures affixed to such instruments by the plenipotentiaries after submission of their full powers, which are subsequently preserved in the archives of the Secretariat together with the original documents. In view of some difficulties which have arisen in the past, it is suggested that the procedure set forth below, based upon the prevailing international practice, be followed.

Full powers should be issued, in accordance with the constitutional procedure of each State, either by the Head of the State, the Head of the Government or the Minister of Foreign Affairs. They should clearly specify the instrument referred to and give its exact and full title and its date.

In some exceptional cases and for reasons of urgency, if, for example there is a time-limit, cabled credentials may be accepted provisionally but the cable should also originate from the Head of the State, the Head of the Government or the Minister of Foreign Affairs and should be confirmed by a letter from the Permanent Delegation or the Plenipotentiary certifying its authenticity. The text of the cable should also state the title of the agreement referred to and whether the Plenipotentiary is authorized to sign subject to later acceptance, and should specify that ordinary credentials are being sent immediately by mail.

This is the more important now that several conventions or agreements concluded under the auspices of the United Nations have provided that States can be definitely bound by signature alone.

It is finally suggested that in order to facilitate their examination, the credentials of the representatives should be deposited with the Legal Department of the Secretariat twenty-four hours before the ceremony of signature of an international instrument.

¹⁵ *Official Records of the General Assembly, Fourth Session, Annex to the Summary Records of the Sixth Committee, p. 17.*

¹⁶ Further information as to United Nations practice may be found in *Summary of the Practice of the Secretary-General as Depository of Multilateral Agreements*, ST/LEG/7, paras. 28-36.

35. The requirement of United Nations practice that permanent representatives need full powers to enable them to sign international agreements was described as follows by the Legal Counsel in response to an inquiry made by a permanent representative in 1953:

As far as permanent representatives are concerned, their designation as such has not been considered sufficient to enable them to sign international agreements without special full powers. Resolution 257 (III) of the General Assembly of 3 December 1948 on permanent missions does not contain any provision to this effect and no reference was made to such powers during the discussions which preceded the adoption of this resolution in the Sixth Committee of the General Assembly. However, the credentials of some permanent representatives contain general authorization for them to sign the conventions and agreements concluded under the auspices of the United Nations. But, even in such cases, in order to avoid any possible misunderstanding, if an agreement provides that States can be definitely bound by signature alone, it is the general practice to request a cable from the Head of the State or Government or from the Minister for Foreign Affairs confirming that the permanent representative so authorized in his credentials can sign the agreement concerned.

In some exceptional cases and for reasons of urgency the permanent representatives have often transmitted letters to the Secretary-General specifying that they were authorized by their governments to sign a particular agreement, and indicating further that formal full powers would be forwarded at a later date. Such a procedure, however, has been followed only in respect of agreements which do not bind governments by signature alone but require further action on their part.

Under general principles of law, a plenipotentiary who has been appointed by his government to sign an agreement cannot delegate his authority.

The practice set out above applies equally to representatives of Member Governments to sessions of the General Assembly.

When a permanent representative or a plenipotentiary is authorized, in special full powers, to sign an agreement "subject if necessary, to approval" and the agreement does not provide for such approval, a clarification is required as to the meaning of the words. If the words simply mean that the Government intends to take the necessary measures for the approval of the agreement only if it is required under its terms, then no new full powers are needed; otherwise full powers should be issued without any reference to further approval.

Further, as to the deposit of formal instruments of ratification or accession from governments to agreements and conventions concluded under the auspices of the United Nations, it has not been the practice to require permanent representatives to produce full powers authorizing them to present instruments for deposit. In most cases instruments of ratification or accession are accompanied by a letter from the permanent representative informing the Secretary-General that he is acting under instructions from his Government in depositing the instrument.

Full powers would be necessary if the plenipotentiary were himself to sign the instrument deposited.

36. In speaking of "formal instruments" the above letter means those signed by the Head of State or Government or by the Minister of Foreign Affairs. In rare instances instruments of accession have been drawn up by permanent representatives and accepted, provided that the instrument in question was accompanied by full powers, executed by the Head of State or Government or by the Minister of Foreign Affairs, authorizing the representative to draw up the instrument.

37. Full powers, or a statement signed by the Head of State or Government or by the Minister of Foreign Affairs, are also required in the case of notification of state succession in respect of treaties or in the case of denunciation. Such instruments are not required, however, in the case of other notifications, for example those dealing with the extent of territorial application of a treaty, or in exercising an option granted under a treaty. Nor are full powers required when existing States Parties to the Convention on the Privileges and Immunities of the Specialized Agencies extend its provisions to additional agencies.

Section 6. Appointment of a representative to more than one organization or post; representation of more than one State by the same representative

38. Although no exact figures are available, there have been a considerable number of cases in which a person has been appointed to represent his country at more than one organization during the same period. At United Nations Headquarters, members of permanent missions have also exercised functions on behalf of their respective States at the specialized agencies in Washington, for example. At the Geneva Office the same representative has in many instances been appointed both to the various specialized agencies having their headquarters in Geneva and to the Geneva Office itself. On some occasions the representative at the Geneva Office has also represented his country at meetings and conferences held by IAEA in Vienna.

39. As is well known, there have also been a large number of cases in which a representative, whilst forming part of the diplomatic staff of his country (or even as ambassador) in State A, has been sent as the representative of his country to a United Nations conference in State B, or even to sessions of the General Assembly. Similarly, representatives have on occasions simultaneously represented their country both at United Nations organs and at regional organizations (e.g. at the Organization of American States). Lastly, a number of permanent representatives have also served as the ambassador of their country to the host State.

40. The question of representation of more than one Government or State by a single representative has been raised on several occasions in United Nations bodies. It has been the consistent position of the Secretariat and of the organs concerned that such representation is not permissible unless clearly envisaged in the rules of procedure of the particular body. The practice, which has sometimes been followed, of accrediting the official of one Government as the representative of another, has not been considered legally objectionable, provided the official concerned was not simultaneously acting as the representative of two countries. A distinction should be drawn between these cases and that in which more than one delegation may be sent by the same State (e.g. as in the case of commodity conferences).¹⁷

¹⁷ See the letter sent regarding participation of dependent territories in the United Nations Coffee Conference of 1962, *United Nations Juridical Yearbook 1962* (ST/LEG/8), p. 258.

CHAPTER II. — APPLICATION OF ARTICLE 105 OF THE CHARTER IN RELATION TO THE PRIVILEGES AND IMMUNITIES OF REPRESENTATIVES

*Section 7. Scope of privileges and immunities derived from article 105*¹⁸

41. Article 105, paragraph 2, of the Charter provides that the representatives of Member States shall

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

42. At the San Francisco Conference the Committee on Legal Problems stated that Article 105 "sets forth a rule obligatory for all members as soon as the Charter becomes operative";¹⁹ similarly, the Preparatory Commission on the United Nations reported in 1945 that Article 105 is "applicable even before the General Assembly has made the recommendations referred to in paragraph (3) of the Article or the conventions therein mentioned have been concluded".²⁰

43. As regards the nature of the privileges and immunities granted under Article 105, at the San Francisco Conference the Committee on Legal Problems declared that the terms "privileges and immunities" used in that Article "indicate in a general way all that could be considered necessary to the realization of the purposes of the Organization and to the free functioning of its organs . . . exemption from tax, immunity from jurisdiction, facilities for communication, inviolability of buildings, properties, and archives etc".²¹ The Committee stated expressly that it had seen fit to avoid the term "diplomatic" in describing the nature of the privileges and immunities conferred under Article 105, and had "preferred to substitute a more appropriate standard based . . . in the case of representatives . . . on providing for the independent exercise of their functions".

44. The General Convention is based on a similar rationale; although in several instances the facilities afforded are declared to be the same as those accorded to diplomatic envoys, there is no general assimilation of the position of representatives to that of diplomatic representatives. Article IV, section 14, states that the privileges and immunities of representatives are accorded not for the personal benefit of the individuals themselves, but in order to safeguard the independent exercise of their functions in connexion with the United Nations.

45. Thus, under the major Charter provision dealing with the privileges and immunities, and under the Convention dealing with the privileges and immunities of

the Organization (including those conferred on representatives), there is no automatic grant of diplomatic privileges and immunities. Accordingly, whilst all Member States are bound by virtue of their acceptance of the Charter to observe the obligations derived from Article 105, the enjoyment by representatives of privileges and immunities over and above those to be implied by the terms of Article 105, paragraph 2, (or under the General Convention, in the case of States Parties) has been dependent on the discretion of individual States. Furthermore, since not all host States have become Members of the United Nations (e.g., Switzerland) and not all Member States have become parties to the General Convention (e.g., the United States) the position of representatives, though fortified by the extent to which the protection afforded to them may have become part of general international law, has been heavily dependent on national legislation and on particular agreements between the United Nations and given host States.

46. It would appear that, for the most part, permanent representatives have been granted diplomatic privileges and immunities whilst temporary representatives, even if of equal or higher rank, have continued to receive privileges and immunities of a more restricted character. The following survey, though not exhaustive, gives details of the agreements, or enactments under which the representatives of Member States have been granted diplomatic privileges and immunities, and of certain problems which have arisen, in particular at United Nations Headquarters, as to the extent of control resting with the host State over the grant of such privileges. The survey is divided into the following sections: (a) Position at United Nations Headquarters; (b) Position at the United Nations Office at Geneva; (c) Meetings of United Nations organs held other than at Headquarters or at the Geneva Office; (d) Conferences held under United Nations auspices; (e) United Nations regional economic commissions; and (f) Other United Nations subsidiary bodies.

(a) *Position at United Nations Headquarters*

47. Before the Headquarters Agreement came into force representatives were covered under United States law by the International Organizations Immunities Act, which was enacted in 1945, in addition to their position under the general principles of international law and under the provisions of the Charter. The International Organizations Immunities Act, as amended in 1952, has remained in effect and applies to all representatives, whether present on a permanent or on a temporary basis. In Section 8 (c) of the Act it is expressly provided that:

No person shall, by reason of the provisions of this title, be considered as receiving diplomatic status or as receiving any of the privileges incident thereto other than such as are specifically set forth herein.

The privileges and immunities for which provision is made in the Act are those which may be summarized as being of basic functional importance.

48. After the conclusion of the Headquarters Agreement, however, and the adoption of the Joint Resolution

¹⁸ See also section 25, paras. 163-168, below, regarding the right of transit and of access to meetings, which is also derived from Article 105 of the Charter.

¹⁹ Report of the Committee on Legal Problems, *United Nations Conference on International Organization, San Francisco*, 12 June 1945, doc. 933, IV/2/42/(2), UNCIO, Docs., Vol. 13, pp. 703-705.

²⁰ Report by the Executive Committee to the Preparatory Commission of the United Nations (PC/EX/113/Rev.1, 12 November 1945), chap. V, sect. 5, para. 2.

²¹ Reference note 18, above.

authorizing the President of the United States to bring the Agreement into effect (United States Public Law 357—80th Congress), resident representatives were granted the same privileges and immunities as diplomatic envoys accredited to the United States.²²

49. The pertinent provisions of article V, section 15, of the Headquarters Agreement read as follows:

Section 15. (1) Every person designated by a Member as the principal resident representative to the United Nations of such Member or as a resident representative with the rank of ambassador or minister plenipotentiary,

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

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

50. The main issue which has arisen in the interpretation of this section has been that of determining how sub-section (2) and the last sentence of section 15 were to be interpreted, i.e., what procedures were to be followed and what part was to be played by the Secretary-General, the particular Member State and by the United States, in determining whether diplomatic privileges and immunities were to be granted to particular representatives or to classes of representatives. Upon the recommendation of the Sixth Committee, in resolution 169 (II), adopted on 31 October 1947, the General Assembly decided

to recommend to the Secretary-General and to the appropriate authorities of the United States of America to use Section 16 of the General Convention on the Privileges and Immunities of the United Nations as a guide in considering—under sub-section 2 and the last sentence of section 15 of the above-mentioned Agreement regarding the Headquarters—what classes of persons on the staff of delegations might be included in the lists to be drawn up by agreement between the Secretary-General, the Government of the United States and the Government of the Member State concerned.

51. In section 16 of the General Convention the expression “representative” is defined as including “all delegates, deputy delegates, advisers, technical experts and secretaries of delegations”.

52. The Secretariat wrote to Member States in December 1947 informing them that the Headquarters Agreement had come into effect and recalling the terms of resolution 169 (II); Member States were requested to communicate the name and rank of all persons who, in the opinion of the State concerned, came within the categories of persons covered by sub-sections (1) or (2)

of section 15. In February 1948, the United States representative transmitted to the Secretary-General a list of resident representatives and others recognized by the United States as entitled to diplomatic privileges and immunities. It was stated in a covering letter that in deciding upon the persons to be included in the list the United States Government had acted upon the information submitted by delegations and endorsed by the Secretariat, the provisions of the Headquarters Agreement, the practice in Washington, and resolution 169 (II). Privileges and immunities were extended to members of the immediate family regularly resident with the representative concerned. The United States representative declared that members of a particular delegation who were of the rank of Chancellor or below were not included in the list since it was not the practice in Washington to extend diplomatic privileges and immunities to persons of that rank. An attaché of another delegation was excluded from the list owing to his record of serious violations of New York traffic laws and the fact that he had not surrendered his driving licence, despite a mandatory notice advising him that his licence had been revoked for six months.

53. On the basis of the practice established in 1947 and 1948 the normal procedure at the present time is for missions to notify the Protocol and Liaison Section of the Secretariat of the names and ranks of persons on their staff who are entitled to privileges and immunities under section 15 (1) and (2) of the Headquarters Agreement. These particulars are then forwarded by the Secretariat to the United States Department of State via the United States Mission. Upon notification from the Department of State, the United States Mission then dispatches to the person concerned a standard letter, giving details of the privileges and immunities afforded. The opening paragraphs of that letter are reproduced below:

Under the terms of the Headquarters Agreement between the United States and the United Nations, brought into force on November 21, 1947, and on the basis of certification submitted by your Mission with the concurrence of the Secretary-General of the United Nations, you are entitled, in the territory of the United States, to the privileges and immunities of a diplomatic envoy under Section 15 of the Headquarters Agreement (United States Public Law 357—80th Congress). These privileges and immunities are also extended to the members of the families of persons so recognized who are regularly resident with them. Privileges and immunities do not apply to domestics or other members of your household staff.

There is enclosed herewith an identification card issued to you by the Department of State through the Mission as evidence of your status under the Headquarters Agreement. This card should be returned to the Mission upon your departure from your present post. If lost, it cannot be replaced.

Your name has been inscribed on the published list of persons who enjoy privileges and immunities under the terms of the Headquarters Agreement. This list will be revised regularly and will be made available to missions, local merchants, and Federal, State, and local authorities.

The United States, in accordance with the Headquarters Agreement, has made administrative arrangements regarding privileges and immunities which, *mutatis mutandis*, are identical with those granted by the United States Government to the diplomatic corps accredited to it. . . .

²² There are also a number of Executive Orders and various New York State and City laws; see United Nations Legislative Series, *Legislative Texts and Treaty Provisions concerning the Legal Status, Privileges and Immunities of International Organizations*, vol. I, p. 136 *et seq.*

54. Details are then given of the various tax exemptions afforded. From time to time the Protocol and Liaison Section of the Secretariat publishes a list of all members of permanent missions ("The blue book"); inclusion in this list does not in itself result in the granting of diplomatic privileges and immunities by the United States authorities, unlike inclusion in the list established by the Geneva Office, which carries with it the grant of diplomatic privileges and immunities by the Swiss authorities.

55. In addition to the cases mentioned by the United States representative in his initial letter of February 1948, in 1958 the United States authorities notified all missions that in future they would refuse to recognize in a consular capacity, or in any other non-diplomatic capacity, any person who was entitled to diplomatic immunity pursuant to section 15. In 1959 the United States Mission further informed missions that acceptance of regular employment in the United States by a member of a permanent mission, or by his spouse, was generally incompatible with diplomatic status. These rulings were apparently not contested. On the other hand, in a number of cases in which the United States has declined to grant diplomatic privileges and immunities on the grounds that the individuals concerned were not of the nationality of the State concerned, both the State concerned and the Secretariat have objected to the stand taken.²³ It may also be noted that in one instance where a United Nations staff member was married to a member of the permanent mission of a Member State, the United Nations declined to register the staff member concerned with the United States Mission as being entitled to diplomatic privileges and immunities on the ground that, in the circumstances, the functional status of staff member should override that of being a spouse.

56. The interpretation of section 15 (2) of the Headquarters Agreement became an issue in the Santiesteban case in 1962. On 3 October 1962, a Mr. Santiesteban Casanova arrived in the United States bearing a Cuban diplomatic passport with a G-1 visa (the visa granted to members of permanent missions). The United Nations Chief of Protocol was informed that he was a member of the Cuban Mission; the Chief of Protocol notified the United States Mission. His name was listed in the United Nations blue book. He was then arrested by the United States authorities on the grounds that he had participated, together with two other members of the Cuban Mission, in a conspiracy to commit sabotage. The United States Mission informed the Cuban Mission and the Secretary-General that Mr. Santiesteban did not possess diplomatic immunity and that he would be subject to prosecution under federal statutes. The activities of the other two members of the Cuban Mission were described as a flagrant abuse of the privileges of residence and the Cuban Mission was requested to effect their immediate departure from the United States. The Cuban Mission protested to the United Nations that the arrest was in breach of section 15 (2) of the Headquarters Agreement.

57. In discussions with the United States authorities, the United Nations contended that the wording of section 15 (2) and the arrangements which had been previously established did not support the contention, made by the United States authorities, that the agreement of all three parties involved (viz. of the Secretary-General, the United States and of the Member States) extended to requiring the consent of all three to each individual resident member of a State's mission to the United Nations. As had been shown by subsequent practice, the necessary agreement of the parties had been settled in principle by the original establishment of the diplomatic list, specifying the categories of mission staff (as opposed to lists of individuals) who were entitled to privileges and immunities under section 15. Such cases as had arisen in the past related to the eligibility of the person or persons concerned as mission staff rather than to the question of whether the United States could decline to grant diplomatic privileges to an admittedly eligible person. Moreover, any argument that the immunity in question was not available until the notification procedure had been completed would place all members of missions in an entirely exposed position in the period between their arrival and the completion of their "processing" by the United States.

58. In reply, the United States denied that any clear agreement had in fact been entered into regarding categories of staff entitled to privileges and immunities under section 15; the consent of the United States therefore remained obligatory in each individual case. It was suggested that the wording of resolution 169 (II) supported this interpretation. Furthermore, in earlier cases in which the United States had declined to grant diplomatic privileges and immunities, the United Nations had apparently accepted the position, as had the Member States concerned.

59. Whilst the matter was still being considered between the United States Mission and the United Nations, Mr. Santiesteban sought release from custody on a writ of habeas corpus, contending that he was entitled to diplomatic immunity from arrest and prosecution under the United Nations Charter, the Headquarters Agreement and international law; his petition also referred to the original jurisdiction of the Supreme Court of the United States.²⁴ By a judgement of 16 January 1963, the United States District Court, Southern District of New York, denied the writ, principally on the ground that under section 15 of the Headquarters Agreement the consent of the United States was required to the grant of diplomatic privileges and immunities to individual members of permanent missions, which had not been given in the case of Mr. Santiesteban.²⁵ This judgement was in the process of appeal to a higher court when Mr. Santiesteban was exchanged for a United States national, following direct negotiations between the two Governments concerned.

²⁴ Article III, section 2 of the Constitution of the United States gives the Supreme Court original jurisdiction in "all cases affecting Ambassadors, other public Ministers and Consuls".

²⁵ A more extensive account of the judgement is contained in *United Nations Juridical Yearbook 1963*, p. 200.

²³ See section 8, paras. 83 and 84, below.

60. Following discussions with the United States, the following note was sent by the Secretary-General to permanent missions on 31 July 1964, setting out arrangements designed to reduce or eliminate delay between the arrival of members of the staff of permanent missions and the recognition by the host Government of the privileges and immunities accorded to them under the Headquarters Agreement.

The Secretary-General of the United Nations presents his compliments to the Permanent Representative of and has the honour to refer to the granting of diplomatic privileges and immunities by the host State to resident members of the staff of Permanent Missions under Section 15 (2) of the Headquarters Agreement between the United Nations and the United States of America.

The United States authorities informed the Secretary-General that it is proposed to put into effect a new procedure to reduce or eliminate the delay which presently arises between the arrival in the United States of members of the staff of Permanent Missions and the recognition by the host Government of the privileges and immunities accorded to such members under the Headquarters Agreement. This new procedure would permit Permanent Missions, if they so wished, to submit in advance, and prior to their arrival in the United States, the names of persons appointed to serve on their Missions. The requirements for this procedure, as described to the Secretary-General by the United States Mission, would be as follows:

“Permanent Missions to the United Nations, as soon as a new member is known and in advance of his arrival, may submit his name to the United States Mission through the United Nations Office of Protocol, in the manner presently followed with respect to resident members of Missions. Photographs of the prospective Mission members, similar to those submitted in the case of resident Mission members, will be required. As soon as the United States Mission receives the request from the United Nations Protocol Office in proper form, its processing will commence. In this manner, the period between arrival and receipt of credentials can be reduced and, indeed, may be virtually eliminated in certain cases.”

The Secretary-General has indicated to the United States Mission his belief that Permanent Missions may find the foregoing procedure a useful one, if they wish to avail themselves of it. This would be without prejudice to any questions of the interpretation to be given to Section 15 (2) of the Headquarters Agreement between the United Nations and the United States of America.

(b) *Position at the United Nations Office at Geneva*

61. Under article IV of the 1946 Agreement the representatives of Member States are granted the same privileges and immunities as are afforded by article IV of the General Convention. By a decision of the Swiss Federal Council of 31 March 1948, however, members of permanent missions to the Geneva Office and to the specialized agencies in Geneva receive facilities analogous to those accorded to diplomatic missions at Berne. The text of the 1948 decision is reproduced below.

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

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

2. *Les chefs de délégations permanentes bénéficient de privilèges et immunités analogues à ceux qui sont accordés aux chefs de mis-*

sions diplomatiques à Berne, à condition toutefois qu'ils aient un titre équivalent.

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

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

(It may be noted that whereas the Agreement concluded in 1946 applies to “representatives”, the 1948 decision refers to “permanent delegations”.)

62. By a declaration of the Swiss Federal Council of 20 May 1958, paragraph 2 was amended to read as follows:

2. *Les chefs de délégations permanentes bénéficient mutatis mutandis de privilèges et immunités analogues à ceux qui sont accordés aux chefs de missions diplomatiques à Berne.*

63. Since the position of diplomatic missions at Berne is based on reciprocity, the privileges and immunities of permanent missions (other than customs privileges) may vary from one mission to another, although this appears to be decreasingly the case. Details of the position of both permanent and non-permanent representatives as regards customs privileges are contained in chapters VI and VII of the Customs Regulation adopted by the Swiss Federal Council on 23 April 1952.

(c) *Meetings of United Nations organs held other than at Headquarters or at the Geneva Office*

64. The examples given below, taken from agreements entered into with the State in whose territory the meeting was to be held, illustrate the practice which has been followed.

65. The memorandum of agreement of 30 January 1951 between the United Nations and Chile concerning the facilities, privileges and immunities to be accorded to the Economic and Social Council during its twelfth session in Santiago, provided in article XV that:

The Government shall grant the privileges and immunities, exemptions and facilities accorded to diplomatic envoys accredited to the Government, to the representatives of Member States to the Economic and Social Council regardless of whether or not the Government maintains diplomatic relations with the Governments of any such Member States.

66. The exchange of letters on 17 April 1951 between the Secretary-General and France relating to the meeting of the sixth session of the General Assembly in Paris, provides (article XVI of the letter of the French Government) for the application of the provisions of the General Convention; section III C) of article XVI provides, however, that representatives of Member States “*accrédités à la sixième session*” are accorded “*pendant la durée de leur mission, y compris le temps du voyage en territoire français, les privilèges, immunités, exemptions et facilités reconnus aux envoyés diplomatiques accrédités auprès du Gouvernement français*”.

(d) *Conferences held under United Nations auspices*

67. The examples given below illustrate the practice followed in the case of conferences held under United Nations auspices.

68. The Agreement signed on 27 February 1961 between the United Nations and Austria regarding the arrangements for the Vienna Conference on Diplomatic Inter-course and Immunities,²⁶ provides in article VI:

(1) The Convention on the Privileges and Immunities of the United Nations, to which the Republic of Austria is a party, shall be applicable with respect to the Conference.

(2) The Government will accord representatives attending the Conference . . . the same privileges and immunities as accorded to representatives to . . . the International Atomic Energy Agency, under the Headquarters Agreement between the Republic of Austria and the IAEA.

69. The Agreement between the United Nations and Austria, signed on 29 January 1963, regarding the arrangements for the Vienna Conference on Consular Relations, contains an identical provision.

70. The Agreement²⁷ of 23 August 1961 between the United Nations and Italy regarding the arrangements for the United Nations Conference on New Sources of Energy, provided in article X for the application of the General Convention.

71. The exchange of letters dated 24 July 1962 between the United Nations and the Federal Republic of Germany regarding the privileges and immunities to be accorded to those attending the United Nations Technical Conference on the International Map of the World on the Millionth Scale,²⁸ provided for the provision by the Federal Republic of Germany of privileges and immunities "no less favourable than she accords with respect to any specialized agency" under the Specialized Agencies Convention. In particular it was agreed that:

5. Representatives and Observers of States Members or non-Members of the United Nations invited to the Conference shall enjoy such other privileges, immunities and facilities in accordance with Section 11 (g) of the Convention on the Privileges and Immunities of the United Nations.

72. The Agreement signed on 26 July 1963, between the United Nations and Italy regarding arrangements for the United Nations Conference on International Travel and Tourism,²⁹ provided in article VI, paragraph 1, for the application of the General Convention. In addition, paragraph 2 of article VI specified that representatives of non-Member States attending the Conference should enjoy the same privileges and immunities as were accorded to the representatives of Member States by the Convention.

(e) *United Nations regional economic commissions*

73. Apart from ECE, which is governed by the provisions of the more general agreements between the United Nations and Switzerland considered above, the position of the economic commissions is determined by the terms of the particular agreements entered into with the various host Governments, and, where those agreements are silent, by the provisions of the General Convention. Thus, since Chile was a party to the General Convention,

the Agreement between Chile and ECLA makes no specific mention of the privileges and immunities of representatives; persons who are members of missions established by the Economic Commission, or who are invited by the Commission for official purposes, are granted functional privileges and immunities. In the Exchange of Letters between the Government of Uruguay and the Secretary-General regarding the session of the Commission held in Montevideo in May 1950, however, it was provided expressly that diplomatic privileges and immunities would be accorded to the representatives of member States. In the case of ECAFE, under article VI, section 15 of the Agreement between the United Nations and Thailand, representatives are granted the same privileges and immunities as the Government of Thailand accords to members of diplomatic missions of comparable rank. The Agreement between the United Nations and Ethiopia regarding ECA draws a distinction between resident representatives and others; the former are granted the same privileges and immunities as the Government accords to the diplomatic envoys accredited to Ethiopia (article V, section 10 (b)), while non-permanent representatives receive the same privileges and immunities "as are accorded to diplomatic envoys of comparable rank under international law".

(f) *Other United Nations subsidiary bodies*³⁰

United Nations Commission for Indonesia

74. By an exchange of letters dated 23 May 1950 between the Prime Minister of Indonesia and the principal secretary of the Commission, "the three representatives on the Commission and the personnel of their delegations" were granted "all privileges and immunities granted to the members of the Diplomatic Corps of similar rank accredited in Indonesia".

United Nations Relief and Works Agency for Palestine Refugees

75. Representatives of States serving on the Advisory Committee of UNRWA are granted diplomatic privileges and immunities under article VII of the Agreement between UNRWA and Egypt of 12 September 1950 and article I of the Agreement between UNRWA and Jordan of 14 March and 20 August 1951.

Advisory Council for Somaliland

76. Under article 10 of the Trusteeship Agreement for the Territory of Somaliland under Italian administration, approved by the General Assembly on 2 December 1950, members of the Advisory Council were granted full diplomatic privileges and immunities, and their staff "the privileges and immunities which they would enjoy if the Convention on the Privileges and Immunities of the United Nations were applicable to the Territory".

United Nations bodies in the Republic of Korea

77. In article IV, paragraph 4 of the exchange of letters of 21 September 1951, between the United Nations and the Republic of Korea, it was provided:

³⁰ The cases cited are illustrative only and are not intended to be exhaustive.

²⁶ United Nations, *Treaty Series*, vol. 394, p. 27.

²⁷ *Ibid.*, vol. 405, p. 3.

²⁸ *Ibid.*, vol. 434, p. 249.

²⁹ *Ibid.*, vol. 472, p. 173.

(1) Representatives of Member States serving on United Nations Commissions operating in Korea and the members of their delegations,

(2) Representatives of organs of the United Nations who may exercise official functions in Korea,

...

shall enjoy the privileges and immunities, exemptions and facilities as are granted to diplomatic envoys of similar rank in accordance with international law . . .

United Nations bodies in Japan

78. The Agreement signed on 25 July 1952 between the United Nations and Japan provides in article II that:

The following representatives of Member States exercising their official functions in Japan or passing through Japan to or from Korea . . .:

a. Representatives of Member States serving on any United Nations missions in Korea and the members of their delegations,

c. Representatives of organs of the United Nations

...

shall enjoy the privileges and immunities, exemptions and facilities provided for in Article IV . . . of the General Convention.

Commission on the Status of Women

79. The exchange of letters between the Secretary-General and Lebanon regarding the 1949 session of the above Commission, held at Beirut, provided that the representatives of Member States should be granted the privileges and immunities, exemptions and facilities specified in Article IV of the General Convention. A similar provision was contained in the Agreement between the United Nations and Iran, concluded on 16 February 1965,³¹ regarding the session of the Commission held in Teheran in March 1965.

Sub-Commission on Freedom of Information and of the Press

80. In the exchange of letters between the Secretary-General and the Government of Uruguay regarding the session of the Sub-Commission held in Montevideo in May 1950, it was provided that diplomatic privileges and immunities would be accorded to the representatives of Member States.

Technical Assistance Committee

81. The Agreement signed on 11 June 1964, between the United Nations and Austria concerning arrangements for the meeting of the Technical Assistance Committee³² held in Vienna, provided in article V for the application of the General Convention; in addition, representatives of non-member States were granted the same privileges as those accorded to the representatives of Member States by the Convention.

Section 8. Nationality of representatives and the grant of privileges and immunities

82. In a number of instances a host State has refused to grant diplomatic privileges and immunities to representatives on the ground that the person concerned did

not possess the nationality of the State he was representing but that of a third State.

83. In one such case which arose at United Nations Headquarters in 1957, the United States authorities based their refusal on the practice followed in Washington, whilst agreeing to grant the person concerned the privileges and immunities referred to in the International Organizations Immunities Act. The United Nations Chief of Protocol replied, reserving the position of the United Nations as regards the interpretation thus placed on section 15 (2) of the Headquarters Agreement. In another case in 1963 the United States Mission contended that, since possession of the nationality of the sending State was one of the conditions for the granting of diplomatic status in Washington, this condition also applied in respect of members of permanent missions by virtue of the wording of section 15. Referring to this point, the United Nations Chief of Protocol wrote:

We recognize, of course, that diplomatic practice authorizes the requirement by a receiving State of its consent for the appointment by a sending State to its diplomatic mission of a national of a third State. We are therefore ready to assume that the United States Government can impose the condition described in your letter in respect of diplomatic personnel to be accredited to it. Manifestly, it would be of direct significance to the United States Government whether a diplomat dealing with the Department of State has the nationality of the State which he represents. By contrast, the United Nations remains in doubt whether such a policy on the part of the host Government is a "corresponding condition" within the meaning of Section 15. It appears to us that the relationship between the obligation on the part of the United States to confer diplomatic privileges and the degree of interest which it could claim in the nationality of diplomatic personnel dealing not with the United States but only with the United Nations and with other missions of Members is too tenuous for such conditions at the United Nations Headquarters to be treated as corresponding to those in Washington.

84. In correspondence regarding a further case in 1964, the United Nations drew attention to the fact that, although under article 8 of the Vienna Convention on Diplomatic Relations³³ and Article 22 of the Vienna Convention on Consular Relations,³⁴ a receiving State might object to the appointment by the sending State of a non-national, no restriction could be placed on the immunities enjoyed once the appointment had been made. The United States was not a receiving State, nor apparently had it objected to the appointment as such of the person concerned.

85. At the Office at Geneva the Swiss Government has granted diplomatic privileges and immunities to a non-Swiss national appointed to represent a third State, but has refused to grant more than functional privileges to its own nationals appointed as the permanent representatives of other States.

86. Lastly, it may be noted that section 15 of the General Convention provides that the provisions of sections 11, 12 and 13 of the Convention are not applicable as between

³³ *United Nations Conference on Diplomatic Intercourse and Immunities, Official Records*, vol. II, p. 83.

³⁴ *United Nations Conference on Consular Relations, Official Records*, vol. II, p. 178.

³¹ United Nations, *Treaty Series*, vol. 525, p. 211.

³² *Ibid.*, vol. 500, p. 85.

a representative and the authorities of the State of which he is a national or of which he is or has been the representative.

Section 9. Commencement and duration of privileges and immunities

87. Section 11 of the General Convention and section 9 of the 1946 Agreement with Switzerland provide that representatives shall enjoy the privileges and immunities listed in those provisions "while exercising their functions and during their journey to and from the place of meeting". In 1961 the Legal Counsel 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, which is also to be found in section 13 of the Convention on the Privileges and Immunities of the Specialized Agencies.

You inquire whether the words "while exercising their functions" should be given a narrow or broad interpretation. By the former, the words could mean only "the period of time during which the representative concerned is actually doing something as a part of his functions as representative", "e.g., is present in the room or building where the meeting . . . is being held". By the latter, it could denote "the whole of the period during which he is present in the city where the . . . meeting . . . is being held".

We have not been confronted with such a question here in the United Nations, and the preparatory work on neither of the two privileges and immunities conventions throws any specific light on the point you raise. Nevertheless, I have no hesitation in believing that it was the "broad" interpretation that was intended by the authors of the Convention. This must follow from the fact that the expression "while exercising their functions" is contained in the opening paragraph and qualified each and all of the privileges and immunities provided in the sub-paragraphs, (a) through (g), that follow.

A glance at those sub-paragraphs will clearly show that the privileges and immunities provided by any of them would become meaningless if it is applicable only when the representative is "actually doing something as a part of his functions", "e.g., is present in the room or building where the meeting . . . is being held". Such an interpretation would lead to the absurd conclusion that, a representative, immediately after having performed an official function, or after having left the meeting room may, under paragraph (a) for example, be arrested, or detained, or have his personal baggage seized. By the same narrow interpretation, he may, the moment he left the meeting room, have his papers confiscated, or his right to use codes suspended, or his courier seized, or be conscripted into national service, etc. Should such a narrow interpretation prevail, the basic purpose of the Convention, which is to assure the representatives the independent exercise of their functions, would clearly be totally defeated.

The broader interpretation is also borne out by the fact that the phrase "while exercising their functions" is immediately accompanied and complemented by the phrase "and during their journey to and from the place of meeting". In other words, "while exercising" means during the entire period of presence in the State (not city) for reasons of the conference in question. This is logical because the "journey" necessarily is that to and from the State, not the conference hall. Only this interpretation avoids absurdity and only this is consistent with the immediately following reference in sub-section (a) to "personal baggage". Therefore, in accordance with the general principle that a treaty must be interpreted to effectuate its purpose and not to lead to absurdity, it seems to me, without reference to other criteria of interpretation, that only the "broad interpretation" should have been intended by the phrase in question.

88. In accordance with this interpretation it may be stated that the privileges and immunities granted to representatives under the General Convention and under the 1946 Agreement with Switzerland become operative at the moment the representative concerned leaves his own country or duty station *en route* to a meeting of a United Nations organ or to a conference convened by the United Nations. In order to secure the smooth application of the privileges and immunities it is common for Member States to inform the Secretariat of the arrival and departure of representatives and of their families. Besides recording this information for the benefit of other representatives, the United Nations notifies the host State so that, subject to adequate notice being given, arrangements can be made to enable the host authorities to receive representatives in an appropriate manner from the time of their arrival.³⁵

89. As regards permanent representatives at the Geneva Office, a practice has developed in recent years whereby information of the arrival and departure of members of permanent delegations is supplied to the Federal authorities by the Geneva Office, rather than by the diplomatic mission at Berne, as envisaged in paragraph 4 of the decision of the Federal Council of 31 March 1948. The "*carte de légitimation*", referred to in paragraph 4 of the Federal Council's decision, is given only after the Geneva Office has informed the Federal authorities that credentials have been accepted in respect of the permanent representative in question, and his name entered in the official list maintained by the Geneva Office. In the case of *B.v.M.*³⁶ the appellant, an Iranian national, argued against the decisions of two lower courts in a private suit on the grounds, *inter alia*, that he had diplomatic privileges and immunities as a member of the Permanent Mission of Iran at the Geneva Office. A certificate from the head of the Mission saying that he was so employed was produced before the Federal Tribunal. The appeal was dismissed by the Tribunal in view of the fact that previous notification of the appellant's appointment had not been given to the competent Swiss authorities nor appropriate recognition shown by those authorities to the appointment. Although the element of previous notification had been met, it will be recalled that in the *Santiesteban* case³⁷ the United States court denied the application for release from custody principally on the ground that the consent of the United States authorities had not been given to the grant of diplomatic privileges and immunities to the individual concerned.

90. The effect, if any, of the grant of diplomatic privileges and immunities following the commencement of a suit was at issue in the New York case of *Arcaya v. Paez*.³⁸ In March 1956 a Venezuelan national began an action for libel against the Venezuelan Consul in New York on the ground that he had written articles

³⁵ As regards the practice at United Nations Headquarters, see section 7 (a), para. 53, above.

³⁶ *Arrêts du Tribunal fédéral suisse*, 85, 1959, II, p. 153.

³⁷ See section 7 (a), paras. 56-59, above.

³⁸ United States District Court, Southern District of New York, 15 October 1956; Court of Appeals, Second Circuit, 17 June 1957, 145 Fed. Suppl. 464; affirmed *per curiam*, 244, F. 2d 958 (1957).

defamatory of the plaintiff's character and had caused them to be distributed in the United States. On 10 April 1956, the Venezuelan Ambassador requested the United States Secretary of State to dismiss the case because of the defendant's immunity as a Consul. The Secretary of State forwarded the request to the Court without comment. On 13 April 1956, the defendant was made Alternate Representative of Venezuela to the United Nations, with the rank of Ambassador. In a statement to the Court the State Department declared that the defendant had diplomatic privileges and immunities as a result of his appointment but that his earlier status was not affected. It was held that the jurisdiction granted to District Courts over Consuls was not ousted by the defendant's appointment as a representative but that a stay of proceedings should be ordered for so long as he held ambassadorial rank.

91. The question of the continuation of immunity after representative functions have been relinquished was involved in a case which arose concerning a staff member who had previously served as First Secretary of his country's mission to the United Nations. Whilst serving as a member of the mission he had been involved in a car accident. The lawyers acting in his defence in an action arising out of the accident contacted the United States Mission, which in turn notified the Secretariat, on the question whether the position of the person involved as a defendant was affected by his status as a staff member. The Secretariat replied that the immunity of the staff member extended only as to his official functions and that, in any case, the cause of action had arisen before he became a staff member. Thus the question was to be determined by the status of the defendant as First Secretary. The letter from the Secretariat continued:

In this connexion, however, it may be appropriate to offer the comment that the immunity from legal process in respect of all acts done by representatives of Members to the United Nations in discharging their duties continues in force, notwithstanding that the persons concerned are no longer the representatives of Members. (Cf., the express determination to this effect by the General Assembly in Section 12 of the Convention on the Privileges and Immunities of the United Nations. This provision seems to conform to the well-established rule: Harvard Draft Convention on Diplomatic Privileges and Immunities, Article 29 and Comment with citations; Havana Convention on Diplomatic Officers, 1928, Article 20.) There is, of course, the further question that a diplomatic immunity from legal process may not survive the tenure of office of the diplomatic officer as to acts which did not relate to the exercise of his functions but only to his private life during the period of his tenure. In the present case, on the other hand, Mr. . . . appears to have been driving from the United Nations Headquarters to the offices of his Mission, in each of which places he normally had official functions to perform, and it may therefore be that he was in fact driving on official duty.

92. One important occasion when considerations relating to the temporal duration of privileges and immunities was raised was in connexion with the decision of Indonesia, communicated in a letter dated 20 January 1965,³⁹

³⁹ Letter dated 20 January 1965 from the First Deputy Prime Minister and Minister for Foreign Affairs of Indonesia addressed to the Secretary-General, A/5857.

On 19 September 1966, the Ambassador of Indonesia in

"at this stage and under present circumstances to withdraw from the United Nations". The concluding paragraph of this letter read:

While our actual withdrawal from the United Nations had been already carried out in New York as of 1 January 1965, I would suggest that due to the technical winding up of the Indonesian Permanent Mission in New York and reciprocally your Office in Indonesia, officially our respective offices would be closed on 1 March 1965. I would appreciate it highly if you would be helpful in having the office of the Indonesian Mission in New York maintain its official status till 1 March 1965, which will also be the case with your United Nations office in Djakarta.

In his reply of 26 February 1965,⁴⁰ the Secretary-General declared,

As you requested, arrangements have been made for the Indonesian Mission in New York to "maintain its official status" until 1 March 1965.

93. A number of individual problems regarding members of the Indonesian Mission who, either for personal reasons or for the purposes of winding up outstanding administrative matters, wished to remain in New York for a further limited period, were the subject of discussions between the United States and Indonesian Missions.

Section 10. Restrictions placed by the host State on the privileges and immunities of representatives on the ground of reciprocity

94. As in the case of section 15 of the Headquarters Agreement, the privileges and immunities granted to permanent representatives may be expressed to be the same "and subject to corresponding conditions and obligations", as the host State accords to diplomatic envoys accredited to the host State.⁴¹ If, in such instances

Washington transmitted a message (A/6419)* to the Secretary-General from his Government, stating that it had decided "to resume full co-operation with the United Nations and to resume participation in its activities starting with the twenty-first session of the General Assembly". At the 1420th plenary meeting of the General Assembly on 28 September 1966, the President, having read this communication, declared:

"It would . . . appear that the Government of Indonesia considers that its recent absence from the Organization was based not upon a withdrawal from the United Nations but upon a cessation of co-operation. The action so far taken by the United Nations on this matter would not appear to preclude this view."

At the conclusion of the President's statement, the delegation of Indonesia was seated without objection.

* For the text of this document see *Official Records of the Security Council, Twenty-first year, Supplement for July, August and September 1966*, document S/7498.

⁴⁰ Letter dated 26 February 1965 from the Secretary-General to the First Deputy Prime Minister and Minister for Foreign Affairs of Indonesia, A/5899.

⁴¹ In the case of the United States it should be noted that section 9 of the International Organizations Immunities Act provides as follows:

"The privileges, exemptions and immunities of international organizations and of their officers and employees, and members of their families, suites, and servants, provided for in this title, shall be granted notwithstanding the fact that the similar privileges, exemptions, and immunities granted to a foreign government, its officers, or employees, may be conditioned upon the existence of reciprocity by that foreign government: *Provided*, that nothing contained in this title shall be construed as precluding the Secretary of State from withdrawing the privileges, exemptions, and immunities herein provided from

(Continued on next page.)

therefore, the host State reduces the privileges and immunities enjoyed by representatives accredited to it, it may be asserted that the privileges and immunities enjoyed by representatives to the United Nations should be similarly reduced. Thus in the instance referred to in section 16, para. 131, below, the United States authorities imposed the same restrictions on the representatives of certain Member States as regards inspection of unaccompanied baggage as were imposed on representatives of those countries accredited to Washington, in view of similar restrictions placed on United States representatives in the countries concerned. On similar grounds the United States has imposed limits on the movement of the representatives of those countries.⁴² The Member States concerned have protested at these restrictions and the matter has remained a current issue.⁴³

95. At the Geneva Office, as noted in section 7 (b) paras. 61-63, above, the fact that permanent missions are granted privileges and immunities analogous to those accorded to diplomatic missions at Berne, which in turn are based on reciprocity, has meant that some variation exists in the privileges and immunities actually enjoyed by different permanent missions, although the extent of such variation appears to be decreasing. The position in respect of customs privileges is dealt with separately in the Customs regulations adopted by the Federal Council on 23 April 1952.

96. The United Nations has not been directly involved in the correspondence and discussion between the host State and the various Member States affected regarding the restrictions referred to above. Nevertheless it has been the understanding of the Secretariat 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. This interpretation is supported by

(Continued)

persons who are nationals of any foreign country on the ground that such country is failing to accord corresponding privileges, exemptions, and immunities to citizens of the United States."

The effect of this provision in relation to the Headquarters Agreement and the Charter was referred to by the Legal Adviser of the United States Department of State in the legal opinion cited in paragraph 97 below.

⁴² It may be noted that in 1960 when the Chairman of the Council of Ministers of the Union of Soviet Socialist Republics attended the fifteenth session of the General Assembly, the United States declared that he should reside "in the closest proximity to the Headquarters of the United Nations" and that his movements, other than his arrival and departure, should be confined to Manhattan Island. The main reason given for this restriction was the need to ensure his safety. The Union of Soviet Socialist Republics denied the authority of the United States to impose these restrictions and asked the Secretary-General to take up the matter. The Secretary-General requested the United States to reconsider its position, drawing attention to the terms of Section 11 of the Headquarters Agreement and to the interest of the United Nations as a whole that heads of governments should participate in person in its deliberations. The Chairman of the Council of Ministers was eventually permitted to travel to the premises maintained on Long Island by the Mission of the Union of Soviet Socialist Republics.

⁴³ The question of reciprocity in respect of taxation on real property at United Nations Headquarters is referred to in section 18 (b), paras. 139 and 140, below.

an early official interpretation of the position by the Legal Adviser of the United States Department of State, which held it to be

clear that the Charter of the United Nations does not permit the imposition of conditions of reciprocity on the granting of privileges and immunities under article 105. Indeed the purpose of the Charter in respect of article 105 is to provide for the granting unconditionally by Member States of certain privileges and immunities to the United Nations so that it may function effectively as a world organization untrammelled in its operation by national requirements of reciprocity or national measures of retaliation among States.⁴⁴

97. The State Department Legal Adviser's opinion also notes that the Convention on the Privileges and Immunities of the United Nations "does not admit of reciprocity requirements". He continues:

The background in the negotiation of section 15 of the headquarters agreement indicates that the phrase "subject to corresponding conditions and obligations" was inserted by way of compromise to meet a desire on the part of the United States that persons covered by section 15 were not to receive privileges and immunities broader than those accorded to diplomatic envoys accredited to the President of the United States, and that, like diplomatic envoys, such persons might be found *personae non gratae* and made subject to recall. The negotiating background does not indicate that the quoted phrase was inserted for the purpose of permitting the United States to make the privileges and immunities provided for in Section 15 dependent upon reciprocity. In the case of representatives of members, and resident members of their staffs, the United States may be authorized under the headquarters agreement to bring about expulsion of personnel in cases where such action appears to be required. Except for this drastic weapon which the United States may under some circumstances use, the headquarters agreement does not provide for the cancelling of privileges and immunities.⁴⁵

He therefore concluded that even the International Organizations Immunities Act, which has an express authority on reciprocity in its section 9, is not to be interpreted as requiring the United States Secretary of State to enforce any conditions of reciprocity in conflict with the Charter and the Headquarters Agreement, but only as not precluding him from enforcing reciprocity, where otherwise authorized to do so, merely because a foreign national happens to be connected with an international organization. In addition, he acknowledged that the Headquarters Agreement established its own procedure for requiring a representative to leave the United States in case of abuse of his privileges of residence in activities outside his official capacity, beyond which there exists no grant of authority to withdraw privileges on any grounds determined by the host State.⁴⁶

⁴⁴ Letter to the Chairman of the Sub-Committee on International Organizations and International Law of the Committee on Foreign Affairs, House of Representatives, 29 April 1946; reprinted in *Structure of the United Nations and the Relations of the United States to the United Nations. Hearings before the Committee on Foreign Affairs. House of Representatives Eightieth Congress, Second Session*, p. 508.

⁴⁵ *Ibid.*, p. 511. See *Summary of practice relating to the status, privileges and immunities of the United Nations*, section 37, paras. 364-370 below concerning the inapplicability of the *persona non grata* doctrine in respect of United Nations officials; the same reasoning applies, it is submitted, in the case of representatives.

⁴⁶ The question of the departure of representatives at the request of the host State is considered in section 13, paras. 117-121, below.

CHAPTER III. — IMMUNITY IN RELATION TO THE LEGISLATIVE, JURISDICTIONAL AND OTHER ACTS OF THE HOST STATE

*Section 11. Personal inviolability and immunity from arrest*⁴⁷

98. Section 11 (a) of the General Convention and section 9 (a) of the 1946 Agreement with Switzerland provide, *inter alia*, for the immunity from personal arrest or detention of representatives.

99. In an opinion of 1 March 1948, the Attorney-General of New York gave an opinion⁴⁸ holding that privileges and immunities from arrest and conviction for crimes and traffic infractions within New York State were to be accorded to persons listed by the Department of State as being entitled to diplomatic privileges and immunities.

100. Various incidents have occurred from time to time involving the personal inviolability of representatives. In 1961 one Member State inquired whether United Nations protection could be provided for a member of its permanent mission in view of possible threats to his safety. The Secretary-General replied that it could not provide protection *qua* police protection outside the Headquarters district; it was thought that the Secretary-General might possibly assign a security officer, unarmed and not in uniform, to accompany a member of a mission or delegation if he felt such a course justified. In 1962 the permanent representative of another country complained that he had been the subject of abuse from the driver of a passing car; the United States authorities investigated the case, suspended the licence of the driver and conveyed his apologies to the representative concerned.

101. The question of the arrest of a member of the staff of a permanent mission was amongst the issues raised in the Santiesteban case.⁴⁹ The Cuban authorities protested to the United States authorities and to the Secretary-General on the grounds that the arrest was in violation of the diplomatic immunities conferred upon the diplomatic staff of permanent missions under section 15 (2) of the Headquarters Agreement. The subsequent discussion with the United States dealt mainly, however, with the question of whether or not Mr. Santiesteban already enjoyed diplomatic privileges and immunities at the time of his arrest.

102. In 1964, following an attack by a group of boys upon the First Secretary of the Mauritanian Mission, the representatives of fifty-five Member States sent a joint letter to the Secretary-General expressing their grave concern. It was stated that the First Secretary had been attacked "because he was a diplomat and because he was coloured". The signatories declared that the continued repetition of such incidents was the cause of "serious misgivings" as to the conditions

required in order for them to live normal lives and to carry out their work as diplomats. The United States Representative wrote to the Secretary-General, recalling that United States officials had already expressed regrets and apologies to the Mauritanian Mission and Government. The New York City police authorities had acted promptly on being informed of the incident and had located and arrested four boys, aged 16 to 19, who were believed to have been guilty of the attack in question. The District Attorney was prepared to prosecute if the First Secretary (who was the principal available witness) would agree to testify, so as to satisfy the requirements of local law. From statements given to the police by the arrested boys it appeared that the identity of the First Secretary had been unknown to them and that he was in fact believed, on account of language unfamiliarities, to be a member of a group with whom the arrested boys had been engaged in a dispute.

Section 12. Immunity from legal process and waiver of immunity

103. In all major agreements representatives have been granted immunity from arrest and legal process. A provision to this effect is contained in section 11 (a) of the General Convention and in section 9 (a) of the 1946 Agreement with Switzerland. A further section deals with the question of waiver. Section 14 of the General Convention provides as follows:

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.

104. Section 7 (b) of the International Organizations Immunities Act specifies that representatives

shall be immune from suit and legal process relating to acts performed by them in their official capacity and falling within their functions as such representatives . . . except insofar as such immunity may be waived by the foreign Government . . . concerned.

105. If an employee of a foreign mission, not of United States nationality, wishes to become a permanent resident of the United States (a step normally required preparatory to acquiring United States citizenship), he is required under section 247 of the Immigration and Nationality Act to file a waiver of privileges and immunities accruing to him under any United States law or executive order;⁵⁰ such a waiver includes a waiver of the exemption otherwise enjoyed from federal income taxation, but does not extend to waiver of immunity from suit and legal process for official acts under section 7 (b) of the International Organizations Immunities Act, or of privileges and im-

⁴⁷ The question of the departure of representatives at the request of the host State is considered in section 13, paras. 117-125, below.

⁴⁸ United Nations Legislative Series, *Legislative Texts and Treaty Provisions concerning the Legal Status, Privileges and Immunities of International Organizations*, vol. 1, p. 160.

⁴⁹ See section 7 (a), paras. 56-59, above.

⁵⁰ See Code of Federal Regulations, Title 26—Internal Revenue, paragraph 1.893-1, (4), (5), United Nations Legislative Series, *Legislative Texts and Treaty Provisions concerning the Legal Status, Privileges and Immunities of International Organizations*, vol. 1, p. 139; *Opinion of United States Attorney-General*, vol. 41, Op. No. 25 (1953), *ibid.*, p. 145, and *Opinion of United States Attorney-General*, vol. 41, Op. No. 27 (1954), *ibid.*, p. 147.

munities derived from treaties. Immunity from New York State income tax is also waived on acquiring permanent residence status, preparatory to becoming a United States citizen.

106. As regards immunity from legal process, the standard letter sent by the United States mission to all members of permanent missions receiving diplomatic privileges and immunities includes the following paragraph:

Immunity from Legal Process — In the event that the question of immunity from legal process arises, notification should be made to the United States Mission over the signature of the Head or Chargé d'Affaires of your Mission stating the nature of the judicial process involved, the court in which the case has arisen, and other identifying information. Notice of the immunity from judicial process will thereupon be transmitted to the appropriate judicial authorities by the United States Mission.

107. The following cases, relating to the jurisdiction of local courts, may be noted.⁵¹

(a) *Traffic offences*

(i) *Friedberg v. Santa Cruz*⁵²

108. The wife of the Ambassador and Permanent Representative of Chile to the United Nations claimed diplomatic privileges and immunities under section 15 of the Headquarters Agreement following a traffic accident. The claim failed in a lower court on the ground that the Representative and his wife had submitted to the jurisdiction of the court by appearing generally and must be deemed in any case to have waived their immunity by obtaining a New York State driving licence. On appeal it was held that jurisdiction over an ambassador was vested exclusively in the Supreme Court of the United States and that no appearance or waiver by an ambassador could establish jurisdiction elsewhere. By virtue of section 15 of the Headquarters Agreement permanent representatives with the rank of ambassador were given the same privileges and immunities as the United States afforded to envoys accredited to it. The Supreme Court thus had original and exclusive jurisdiction over the case; the lack of jurisdiction of the New York courts could not be waived. An ambassador's wife was held entitled to a similar immunity under United States law as a "domestic" of the ambassador.

(ii) *City of New Rochelle v. Page-Sharp*⁵³

109. The Third Secretary of the Australian Mission received a summons for speeding. He returned the summons through the United States Mission, claiming diplomatic privileges and immunities. His claim was upheld by virtue of the Headquarters Agreement and the recognition of his position under the Agreement given by the United States Mission. However, since it was not clear if United States diplomats in Australia were

granted immunity in respect of traffic offences, the case was adjourned to enable Mr. Page-Sharp to consider what further steps needed to be taken. The case was subsequently dismissed after the United States Mission to the United Nations indicated that it was not customary international practice to request waiver of immunity in such a case but that diplomatic action would be taken wherever necessary to prevent the recurrence of any abuse.⁵⁴

(iii) *People v. von Otter*⁵⁵

110. The defendant, the wife of the Counsellor of Legation of the Swedish Mission to the United Nations, was charged with a parking offence. She pleaded "absolute and unconditional immunity". Her claim was upheld, under the terms of section 15 of the Headquarters Agreement and in view of the recognition given to her diplomatic status by the Department of State which had issued her with an identification card.

(iv) *People v. Roy*⁵⁶

111. The defendant, the chauffeur of the Indonesian Ambassador to Canada, was served with a summons for exceeding the speed limit when driving the Ambassador from the United Nations (where he had been acting as Vice-Chairman of his country's delegation) to Canada. The Ambassador informed the Court that, pursuant to section 335 of the New York Code of Civil Procedure, the defendant would file an application and waiver, pleading guilty and waiving the right to trial in open court. The Court, having in its discretion accepted the application and waiver, found the defendant guilty. It was held that no immunity existed in respect of the acts of diplomatic envoys or their servants outside the country to which the envoy was accredited; moreover the Ambassador had not been acting as an official or on behalf of the United Nations at the time in question.

(b) *Actions in respect of premises*

(i) *Agostini v. De Antueno*⁵⁷

112. The landlord sought possession of certain premises occupied by the defendant, who was a Third Secretary at the Permanent Mission of Argentina. It was argued that under the constitution of the United States jurisdiction over realty had been reserved to state courts and that the Municipal Court therefore had jurisdiction *in rem* over realty situated in Manhattan. The Municipal Court held that it had such jurisdiction, notwithstanding the defendant's diplomatic privileges and immunities.

(ii) *De Miglio v. Paez*⁵⁸

113. In an action by the landlord to remove the defendant tenant for non-payment of rent, the defendant

⁵¹ See also the Santiesteban case, referred to in section 7 (a), paras. 56-59, above.

⁵² Supreme Court of the State of New York, Special Term, Nassau County, Part II, 5 November 1948 (84 N.Y.S. 2d. 148). Appellate Division of the Supreme Court of the State of New York, 31 January 1947, 274 App. Div., 1072, (86 N.Y.S. 2d. 369).

⁵³ City Court of New Rochelle, New York, 29 August 1949, 91 N.Y.S. 2d. 290.

⁵⁴ C. M. Crowell, *The Protection of International Personnel Abroad*, pp. 84-86.

⁵⁵ City Court of New Rochelle, New York, 30 July 1952, 114 N.Y.S. 2d. 295.

⁵⁶ Court of Special Sessions, Herkimer County, New York, 2 December 1959, 200 N.Y.S. 2d. 612.

⁵⁷ Municipal Court of the City of New York, Borough of Manhattan, Third District, 5 June 1950, 99 N.Y.S. 2d. 245.

⁵⁸ Supreme Court of the State of New York, Appellate Term, Second Dept., 16 June 1959, 189 N.Y.S. 2d. 593.

claimed diplomatic and consular immunities as Consul-General of Venezuela and as Alternate Representative to the United Nations with the rank of Ambassador. The defendant's motion to dismiss the suit on these grounds was denied and default judgement entered for the landlord when the defendant failed to appear. On appeal to the Supreme Court of the State of New York, the Court ordered that a new trial should be held. The municipal court was without jurisdiction as regards any proceeding, whether *in rem* or *in personam*, against a foreign diplomatic representative.

(iii) *Knocklong Corporation v. Kingdom of Afghanistan, A. H. Aziz*⁵⁹

114. The alleged holder of the title deed brought an action to determine title to certain real property owned by the Kingdom of Afghanistan; the property had been acquired to house the Permanent Representative of Afghanistan, who was one of the defendants in the action and also served as the office of the Permanent Mission of Afghanistan and as a repository of its records. The suggestion of the United States Attorney, based on the certification of immunity issued by the State Department, that the Permanent Representative enjoyed immunity by virtue of Section 15 of the Headquarters Agreement and that the Kingdom of Afghanistan enjoyed immunity in view of the nature of the property which was the subject of the action, was accepted by the Court.

115. An account of a suit brought by the City of New Rochelle in December 1964 to foreclose tax liens in respect of past taxes levied on the residences of the Permanent Representatives of Ghana, Indonesia and Liberia is given in section 18, para. 141, below. The State Department intervened to urge dismissal of the case on grounds of the defendant's immunity from suit.

(c) *Private suits*⁶⁰

(i) *Tsiang v. Tsiang*⁶¹

116. The Permanent Representative of China was served with process in an action for separation brought by his wife. He appeared specially and claimed diplomatic privileges and immunities. The United States Attorney for the Southern District of New York presented a "suggestion of immunity" which recorded that the Department of State had requested the Attorney-General to call the attention of the Court to the defendant's immunity from judicial process. The Court granted the motion, in view of the State Department's request and the terms of the Headquarters Agreement.

Section 13. Abuse of privileges and the departure of representatives at the request of the host State

117. Under the terms of the General Convention, in particular article IV, the privileges and immunities granted to representatives are related to the official

functions they perform. Thus no question of requiring a representative to leave a country can normally arise (nor does any case appear to have arisen) based on acts actually performed by a representative as part of his official duties as a representative. Where, however, non-official acts are performed, which amount, in the opinion of the host State, to abuse of the privileges and immunities accorded, a demand for the recall of the representative concerned may be made.

118. In the case of the United States, the International Organizations Immunities Act provides in section 8 (b)

Should the Secretary of State determine that the continued presence in the United States of any person entitled to the benefits of this title is not desirable, he shall so inform the foreign government or international organization concerned, as the case may be, and after such person shall have had a reasonable length of time, to be determined by the Secretary of State, to depart from the United States he shall cease to be entitled to such benefits.

119. The Headquarters Agreement contains the following paragraphs in article IV, section 13:

(b) Laws and regulations in force in the United States regarding the residence of aliens shall not be applied in such manner as to interfere with the privileges referred to in section 11 and, specifically, shall not be applied in such manner as to require any such person to leave the United States on account of any activities performed by him in his official capacity. In case of abuse of such privileges of residence by any such person in activities in the United Nations outside his official capacity, it is understood that the privileges referred to in section 11 shall not be construed to grant him exemption from the laws and regulations of the United States regarding the continued residence of aliens, provided that:

(1) No proceedings shall be instituted under such laws or regulations to require any such person to leave the United States except with the prior approval of the Secretary of State of the United States. Such approval shall be given only after consultation with the appropriate Member in the case of a representative of a Member (or a member of his family) or with the Secretary-General or the principal executive officer of the appropriate specialized agency in the case of any other person referred to in section 11;

(2) A representative of the Member concerned, the Secretary-General or the principal executive officer of the appropriate specialized agency, as the case may be, shall have the right to appear in any such proceedings on behalf of the person against whom they are instituted;

(3) Persons who are entitled to diplomatic privileges and immunities under section 15 or under the General Convention shall not be required to leave the United States otherwise than in accordance with the customary procedure applicable to diplomatic envoys accredited to the United States.

(c) This section does not prevent the requirement of reasonable evidence to establish that persons claiming the rights granted by section 11 come within the classes described in that section, or the reasonable application of quarantine and public health regulations.

(d) Except as provided above in this section and in the General Convention, the United States retains full control and authority over the entry of persons or property into the territory of the United States and the conditions under which persons may remain or reside there.

(e) The Secretary-General shall, at the request of the appropriate American authorities, enter into discussions with such authorities, with a view to making arrangements for registering the arrival and departure of persons who have been granted visas

⁵⁹ Nassau County Court, New York, 25 March 1959, 167 N.Y.S. 2d. 285.

⁶⁰ See also the cases of *B. v. M* and *Arcaya v. Paez* referred to in section 9, para. 90 above.

⁶¹ Supreme Court of New York County, New York (Special Term) 7 February 1949, 86 N.Y.S. 2d. 556.

valid only for transit to and from the Headquarters district and sojourn therein and in its immediate vicinity.

(f) The United Nations shall, subject to the foregoing provisions of this section, have the exclusive right to authorize or prohibit entry of persons and property into the Headquarters district and to prescribe the conditions under which persons may remain or reside there.⁶³

120. It may be recalled that in the Santiesteban case,⁶³ Mr. Santiesteban was accused of having entered into a conspiracy to commit sabotage with two members of the Cuban Mission whose prompt removal was requested by the United States.

121. In agreements with other host countries the matter has been dealt with more shortly. In the exchange of letters in 1949 between the Secretary-General and the Lebanese Foreign Minister regarding the privileges and immunities to be accorded to the 1949 session of the Commission on the Status of Women, it was provided that those attending the meeting of the Commission should not "be liable to arrest, to seizure of their personal baggage or to expulsion proceedings, unless they have abused the privileges of sojourn accorded to them hereby by engaging, in Lebanese territory, in an activity irrelevant to their functions and punishable under Lebanese law." A closely similar provision was contained in the Exchange of Letters with Uruguay in 1950 concerning the privileges and immunities to be accorded by the Government of Uruguay to the sessions of the Sub-Commission on Freedom of Information and of the Press, and of ECLA. In the Exchange of Letters with France regarding the holding of the sixth session of the General Assembly in Paris in 1951, it was agreed that expulsion proceedings could only be instigated if there was an abuse of privileges by representatives undertaking "*une activité sans rapport avec leurs fonctions ou mission*". In addition it was specified that expulsion proceedings might not be introduced before consultations had been held with the Government of the Member State concerned.

Section 14. Immigration restrictions, alien registration and national service obligations

122. Section 11 (d) of the General Convention provides that representatives shall enjoy:

(d) Exemption in respect of themselves and their spouses from immigration restrictions, alien registration or national service obligations in the state they are visiting or through which they are passing in the exercise of their functions.

123. The same rule has been contained in a number of agreements with host countries, for example in section 9 (d) of the 1946 Agreement with Switzerland and section 16 (e) of Agreement between the United Nations and Thailand relating to ECAFE.

124. In the case of United Nations Headquarters, section 13 (a) of the Headquarters Agreement provides

⁶³ The interpretation of this and related sections was considered during the discussions held following the refusal by the United States to grant entry visas to certain representatives of non-governmental organizations; see *Summary of practice relating to the status, privileges and immunities of the United Nations*, section 35, paras. 350-352, below.

⁶³ See section 7 (a), paras. 56-59, above.

that the "Laws and regulations in force in the United States regarding the entry of aliens shall not be applied in such manner as to interfere" with the transit to or from the headquarters district of representatives. It is also provided that when visas are required for persons referred to in section 11 they shall be granted without charge and as promptly as possible. Section 13 (b) specifies that the pertinent laws and regulations shall not be applied in such a manner as to require any representative to leave the United States on account of any activities performed by him in his official capacity.⁶⁴

125. In Executive Order No. 10292 amending the Selective Service Regulations, as amended by Executive Order No. 10659, representatives and members of their families are relieved from registration and from liability for military training.

Section 15. Currency or exchange restrictions

126. Article IV, section 11 (e) of the General Convention grants representatives:

The same facilities in respect of currency or exchange restrictions as are accorded to representatives of foreign Governments on temporary official missions.

127. This provision has been generally applied without serious difficulty. It may be noted in this connexion that on occasions the possibility has arisen that steps taken to freeze the assets in the United States of a particular Government might be applied against the bank account maintained in order to conduct the business of the permanent mission of the State concerned. With reference to this contingency, the Legal Counsel advised the Deputy Chef de Cabinet in 1963 as follows:

... It is our view that it is not permissible for the host Government to interfere with the legitimate activities of the permanent missions to the United Nations by preventing these missions or their personnel from using funds on deposit in this country. From the legal standpoint, this is a matter covered by paragraph 2 of article 105 of the Charter, which provides that representatives of Members shall enjoy in the territory of each Member such privileges and immunities as are necessary for the independent exercise of their functions in connexion with the Organization. It is also relevant that in resolution 257 (III) the General Assembly recognized that the presence at the seat of the Organization of permanent missions serves to assist in the realization of the purposes and principles of the United Nations. . . .⁶⁵

128. The United States did not in fact apply restrictions against the accounts maintained by the permanent missions in question.

Section 16. Personal baggage and effects

129. Section 11 (a) of the General Convention specified that representatives enjoy "immunity from seizure of their personal baggage". Section 11 (f) of the Convention provides more widely that representatives have the same immunities and facilities in respect of their personal baggage as are accorded to diplomatic envoys.

⁶⁴ See also section 7 (a), (c) and (d), International Organizations Immunities Act.

⁶⁵ *United Nations Juridical Yearbook 1963*, p. 168.

130. Identical provisions are contained in section 9 (a) and section 9 (f) of the 1946 Agreement with Switzerland. Under article 19 of the Swiss Customs Regulation of 23 April 1952, members of non-permanent delegations are expressly accorded "*une vérification de leurs bagages personnels réduite au strict minimum*". The baggage of heads of missions is not subject to inspection.

131. At United Nations Headquarters the matter is chiefly regulated by the provisions of section 15 of the Headquarters Agreement.⁶⁶ The United States Customs authorities have on occasions inspected the unaccompanied outgoing baggage and effects of the representatives of certain States on the grounds that such inspections were also made of the baggage and effects of diplomatic representatives of the countries concerned in Washington, after United States representatives to those countries had been subject to similar treatment. The invocation of the principle of reciprocity in this connexion was rejected by the States affected in the course of correspondence with the United States authorities. It is believed that the matter was eventually largely regulated following direct negotiations between the States concerned.

Section 17. Customs and excise duties

132. Section 11 of the General Convention provides that representatives may enjoy, besides the privileges and immunities expressly listed in that section,

(g) Such other privileges, immunities and facilities not inconsistent with the foregoing as diplomatic envoys enjoy, except that they shall have no right to claim exemption from customs duties on goods imported (otherwise than as part of their personal baggage) or from excise duties and sales taxes.

133. At United Nations Headquarters the United States Code of Federal Regulations, Title 19 — Customs Duties (Revised 1964) provides as follows in section 10.30 a:

(b) Pursuant to sections 2 (d) and 3 of the act,⁶⁷ property of the organizations named in paragraph (a) of this section and the baggage and effects of the alien officers and employees thereof, of aliens designated by foreign Governments to serve as their representatives in or to such organizations, or of the families, suites, and servants of such officers, employees, or representatives, shall be admitted free of duties and internal revenue taxes imposed upon or by reason of importation, but such exemption shall be granted only upon the receipt in each instance of the Department's instructions which will be issued only upon the request of the Department of State.

(c) The term "baggage and effects" as used in section 3 of the act includes all articles which were in the possession abroad, and are being imported in connexion with the arrival, of a person entitled to the benefits of the act and which are intended for his bona fide personal or household use, but does not include articles imported as an accommodation to others or for sale or other commercial use.

(d) All articles accorded free entry under the act shall be entered or withdrawn in accordance with the requirements prescribed by the Tariff Act of 1930, as amended, and the regulations thereunder.

⁶⁶ Section 3 of the International Organizations Immunities Act merely provides that the baggage and effects of the representatives of foreign Governments shall be admitted free of customs duties and of internal revenue taxes.

⁶⁷ The International Organizations Immunities Act.

(e) No invoices shall be required for articles accorded free entry under the act.

134. Section 10.30 b, paragraph (b) provides 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."⁶⁸

135. The United States Department of State informed all permanent missions in 1964 that in future members of such missions would only be allowed to purchase one duty-free car a year. This restriction was not applied, however, in the case of the head of the mission or to cars purchased for official mission use. It was stated that the same ruling was already applicable to missions in Washington.

136. In the case of Switzerland the matter is dealt with largely in the Customs Regulation of 23 April 1952. Briefly, permanent missions may import all articles for official use and belonging to the Government they represent (article 15). The heads of permanent delegations may, in accordance with the declaration of the Swiss Federal Council of 20 May 1958⁶⁹, import free of duty all articles destined for their own use or for that of their own family (article 16, paragraph 1). Other members of permanent delegations have a similar privilege except that the importation of furniture may only be made once (article 16, paragraph 2).

137. Non-permanent representatives have the right to "*franchise douanière*" only in respect of articles imported in their personal baggage (article 19 and article 21, paragraph 3). Office materials (*matériel de bureau*) may be freely imported (article 20). A special régime applies in respect of the importation of cars (chapter X) and the purchase of petrol (annex II).

Section 18. Taxation

(a) Assets of Member States

138. The General Convention contains no express provision providing for the exemption from taxation of the assets of Member States, although article IV specifies that the representatives of Member States may themselves be afforded certain privileges in respect of taxation. In the case of the Headquarters Agreement with the United States, reference is made only to resident representatives who, in section 15, are granted privileges and immunities equal to those granted to diplomatic envoys accredited to the United States Government. In the case of the United States therefore, the immunity from taxation of Member States is dependent on the terms of Article 105 of the Charter, the position under general international law and internal legislation. Under the International Organizations Immunities Act, section 4 (a),⁷⁰ income of foreign Governments received from

⁶⁸ Details of the position in respect of the various federal and state taxes in New York are given in section 18 (c), (ii), para. 147, below.

⁶⁹ See section 7 (b), para. 62, above.

⁷⁰ See also Code of Federal Regulations, Title 26 — Internal Revenue, United Nations Legislative Series, *Legislative Texts and Treaty Provisions concerning the Legal Status, Privileges and Immunities of International Organizations*, vol. I, p. 137.

United States investments and securities, and interest on bank deposits, is exempt from taxation.

(b) *Premises*

139. The main treaty provision which has been referred to in connexion with the liability to taxation of premises occupied by Member States for the purposes of their representation at United Nations Headquarters has been section 15 of the Headquarters Agreement. The relevant legislation of the State of New York at the present time is contained in an enactment which came into effect on 14 April 1960, whereby subdivision one of section 418 of the real property tax law of the State was amended to read as follows:⁷¹

Real property of a foreign government which is a member of the United Nations or of any world-wide international organization as defined in section four hundred sixteen of this chapter, the legal title to which stands in the name of such foreign government or of the principal resident representative or resident representative with the rank of ambassador or minister plenipotentiary of such foreign government to the United Nations or such other world-wide international organization, used exclusively for the purposes of maintaining offices or quarters, for such representatives, or offices for the staff of such representatives, shall be exempt from taxation, except levies made on a city-wide or borough-wide basis which are collectible with the real property tax, and special *ad valorem* levies to the extent provided in section four hundred ninety of this chapter. If a portion only of any lot or building of any such government or representative is used exclusively for the purposes herein described, then such portion only shall be exempt and the remainder shall be subject to taxation unless otherwise exempt from taxation by law. The exemption granted by this section shall apply to taxes which become due and payable after the date such property is used for the purposes herein stated, and shall continue with respect to such property as long as it remains the property of such government and is used for the purposes herein stated and no longer.

140. As enacted in 1955⁷² the exemption extended only to real property situated within twelve miles of United Nations Headquarters; in 1957 this radius was extended to fifteen miles;⁷³ in 1960, in the provision quoted above, the geographical limitation was removed entirely. The dispute which had previously existed as to the liability to taxation of premises situated further than twelve miles, and then fifteen miles, from United Nations Headquarters was accordingly ended. The question of arrears of taxation in respect of such premises has remained in issue however. The Secretary-General has used his good offices in an effort to arrive at a satisfactory solution to these problems. In the course of correspondence the United States authorities have pointed out, *inter alia*, that in Washington exemption from real property taxation is granted, not on the basis of general principles of international law, but by virtue of United States Statutes and that property lying outside the District of Columbia is exempt from taxation only if there are in existence treaties between the United

States and the government in question providing for such exemption. The United States has therefore contended that, in the absence of such treaties, States occupying premises beyond the geographical limits set by New York law had no foundation for exemption under the terms of section 15 of the Headquarters Agreement.

141. As regards the question of arrears, the only issue now outstanding, it may be noted that in December 1964, the City of New Rochelle brought a suit to foreclose tax liens of \$24,000 each for 1958 and 1959 on the residences of the Permanent Representatives of Ghana, Indonesia and Liberia, situated more than fifteen miles from Headquarters. The Westchester County Judge dismissed the case "most reluctantly", in view of the possible hardship on other persons living in the area, after the State Department had intervened on the grounds of the jurisdictional immunity of the defendants.⁷⁴ The United States Attorney did not plead that the defendants were immune from taxation; in his written submission to the Court he declared that the City of New Rochelle would be able to recover its taxes only through diplomatic channels or by allowing the tax liens to remain on the properties until such time as the foreign Governments concerned decided to sell them.

142. A question relating to the taxability of the leasehold premises, only part of which were occupied by a mission, was raised in 1964 by the Permanent Representative of a Member State. In his reply, the Legal Counsel wrote as follows:

... As you may be aware, New York State has provided by law for the exemption from taxation of real property of Members of the United Nations when it is owned by the Governments or the Resident Representatives and is used exclusively for the purposes of maintaining offices or quarters for such representatives, or offices for the staff of such representatives. The Secretary-General has supported claims for exemption of premises owned by Members of the United Nations.

I would understand from your letter, however, that in the case of your office the building is privately owned and the tax assessed against the owner. Your Mission, like other tenants in the building, has assumed under the terms of its lease the obligation to pay a portion of any increase in the New York City real estate tax which may be assessed against the owner. In these circumstances the tax exemption to which your Mission would be entitled as an owner under New York law would not appear to be relevant. There is, I understand, no tax assessed directly against the tenant. It would appear that a provision in the lease for the tenant to pay the tax for the landlord would not change the taxable status of the property under New York law.

The problem raised in this situation, so far as international law is concerned, was considered by the International Law Commission during its preparation of the text which became Article 23 of the Vienna Convention on Diplomatic Relations. The International Law Commission recognized an exemption from "national, regional and municipal dues or taxes in respect of the premises of a mission, whether owned or leased". However, in the Commentary to this Article, the Commission stated:

"The provision does not apply to the case where the owner of leased premises specifies in the lease that such taxes are to be defrayed by the mission. This liability becomes part of the consideration given for the use of the premises and usually

⁷¹ *McKinney's 1960 Session Laws of New York*, chap. 554, p. 931.

⁷² *McKinney's 1955 Session Laws of New York*, chap. 700, p. 1018.

⁷³ *McKinney's 1957 Session Laws of New York*, chap. 541, p. 581.

⁷⁴ 255 N.Y. Suppl. 2d. 178.

involves, in effect, not the payment of taxes as such, but an increase in the rental payable." (*Yearbook of the International Law Commission, 1958*, vol. II, p. 96.)

This question was again considered at the Vienna Conference on Diplomatic Relations in 1961. While there was some difference of opinion on this point, the Conference added a second paragraph to Article 23 as follows:

"2. The exemption from taxation referred to in this Article shall not apply to such dues and taxes payable under the law of the receiving State by persons contracting with the sending State or the head of the mission."

I regret that in the light of the foregoing considerations we are not in a position to make representations with respect to taxes assessed against the lessor and not directly against the Mission.

143. In the case of Switzerland, exemption from real property taxation is granted for premises owned by the sending State, or by the head of mission for the sending State, and used for official business or as the residence of the head of mission.

(c) *Representatives*

(i) *Income and fiscal taxes*

144. In the case of representatives, the rule contained in section 13 of the General Convention,⁷⁵ that periods spent on official missions should not count as "residence" for taxation purposes, appears to have been widely accepted, even where full diplomatic privileges and immunities are not granted.

145. At United Nations Headquarters, section 4 (b) of the International Organizations Immunities Act provides that wages, fees or salary received as compensation for official services by employees of a foreign Government shall be exempt from federal income tax. This exemption does not apply in the case of United States citizens (unless they are also citizens of the Philippines), and is made subject to the condition that the services must be of a similar character to those performed by United States employees in foreign countries, and that an equivalent exemption is granted to those employees. Representatives who are not United States citizens have also been granted exemption from the tax laws of the State of New York.⁷⁶

146. At the Geneva Office permanent representatives are treated in the same way as diplomatic envoys at Berne, in accordance with the decision of the Swiss Federal Council of 31 March 1948. Exemption from taxation on income and capital is granted, except that there is no exemption from taxation on income from investment in Swiss commercial companies or on other private income derived from Swiss sources. Interest on deposits in savings banks or from bonds or savings certificates is subject to an automatic deduction of a 27 per cent *impôt fédéral anticipé*. Reimbursement of this deduction may be claimed later, however, from the income tax administration. Permanent representatives

are not exempt from succession duties on estates of which they are the beneficiaries. However, real property owned by the head of mission for the purposes of official business or as his residence is exempt from succession duties.

(ii) *Articles and services*

147. As regards taxation on articles and services, a distinction exists at United Nations Headquarters between resident and non-resident representatives. The position as regards resident representatives is fully described in the following extract from the standard letter sent by the United States representative to all incoming members of permanent missions accorded diplomatic privileges and immunities.

You are not subject to Federal taxes, the legal incidence of which falls on the purchaser. No immunity is practicable for taxes, the legal incidence of which falls on the manufacturer unless purchase can be made direct from the manufacturer.

On first entry into the United States, duty-free importation of household goods and furnishings, and personal effects, accompanied or unaccompanied, may be arranged through the United Nations Transportation Section, Headquarters Building, (Plaza 4-1234, Extension 3192) under the provisions of Public Law 291 — 79th Congress.

In the case of transportation of property within the United States, the shipping papers may be accepted by a carrier as proof of exemption where they show (1) that the consignor or consignee is a person entitled to exemption as outlined above, and (2) that the transportation charges were paid directly to the carrier by such person.

The various forms attached relate to Federal and State taxes:

(1) A listing of Federal taxes on goods and service and their applicability to Diplomatic Officers.

(2) *Federal Excise Tax Exemption Certificate* — may be used for securing tax exemption from retailers' and manufacturers' excise taxes. This form, upon being properly filled out and signed, should be presented upon purchasing taxable items. The form may be duplicated by you in accordance with your needs, although the larger retail stores will probably have them available. You will doubtless find that many retail stores will make automatic adjustments to eliminate excise tax charges on your charge account.

(3) *Federal Cabaret Tax Exemption Certificate* — may be used to claim exemption from the Federal tax in places of entertainment where such tax prevails.

(4) *Exemption Certificate (Form 731)* — may be used to claim exemption from Federal tax on transportation of persons. These forms may be obtained from most transportation companies or from the Office of the Collector of Internal Revenue, Wage and Excise Section, 120 Church Street, New York, New York 10007.

(5) *Federal Tax Exemption Certificate* to the New York Telephone Company — may be filed to secure exemption from taxes on telephone service in the New York area. This has been drawn up by the New York Telephone Company and approved by the Bureau of Internal Revenue. It should be prepared and filed on the letterhead stationery of your mission when paying your monthly telephone bill.

(6) *Federal Tax Exemption Certificate* — to be filed with the New York Telephone Company to secure Federal Tax Exemption on telegraph, radio and cable communications. A certificate is required for each separate payment regardless of the period covered by, and the number of charges included in the payment.

⁷⁵ The rule is also contained in section 11 of the 1946 Agreement with Switzerland.

⁷⁶ See United Nations Legislative Series, *Legislative Texts and Treaty Provisions concerning the Legal Status, Privileges and Immunities of International Organizations*, vol. I, pp. 156 and 171.

(7) *Federal Excise Tax on Gasoline* — the Federal tax on gasoline is a manufacturers' excise tax and, therefore, exemption from it can be made only when gasoline is purchased from a station owned by a producing company. If the companies are willing to establish the necessary book-keeping procedures at certain of their stations, forms of exemption from this tax will be furnished by them. The Federal excise tax exemption and the New York State gasoline tax exemption should be requested at the same time.

(8) *New York State Sales and Use Taxes* — enclosed also is a numbered Identification Card issued to you by the Director of the New York Sales Tax Bureau which grants you exemption from payment of the New York State tax on rent for occupancy of hotel rooms, the sales and use tax on retail purchases of tangible personal property, the New York State amusement tax and the New York State gasoline tax. Also enclosed is a copy of the Certificate ST-126 (9/65). To claim exemption, copies of the Certificate may be furnished to vendors when making purchases subject to the above-mentioned taxes and to places where the New York State amusement tax applies. You are also required to exhibit the Identification Card issued to you by the Department of State. With regard to the gasoline tax, it is recommended that a credit account be opened with the gasoline company of your choice, whereupon a credit card will be issued to you. On the basis of this card you may purchase gasoline anywhere in New York from a station which sells that company's product. Upon purchasing gasoline you will present the credit card and sign a sales slip for the amount purchased each time. The sales slips will be forwarded by the stations to the company's main office and you will receive monthly billings. The gasoline company will deduct the tax from each bill.

Arrangements with the gasoline companies for monthly billings on the basis of credit cards are, of course, the personal responsibility of each Mission member. Neither the United States Mission nor the United Nations is in a position to arrange such credits or to certify to the credit status of members of Missions.

You will doubtless find it convenient to file copies of the New York State card with all the stores with which you establish charge accounts. Generally speaking, local merchants do not desire to undertake the necessary book-keeping to grant exemption from the 5 per cent State sales tax, unless the purchase is of a substantial nature or unless billing is made on a monthly basis.

Customs Clearance — For the duty-free importation of goods ordered by you after your arrival, and not for resale, which are admitted under Public Law 357-80th Congress, application should be made to the United States Mission to the United Nations for each transaction. A memorandum explaining the revised procedure for requesting Customs clearance was sent to all Missions on 14 May 1964, together with a supply of printed forms and instructions for completing the forms. . . .

In the case of non-permanent representatives, tax exemption extends only to taxes on income, as noted above, to Federal social security tax and unemployment tax, and to the tax otherwise added to hotel bills.

148. At the Geneva Office permanent representatives are treated in the same way as diplomatic envoys at Berne, in accordance with the decision of the Swiss Federal Council of 31 March 1948. All representatives are entitled to buy gasoline free of duty and are granted tax exemption in respect of driving licences and car registration fees. In addition exemption is granted from sales tax (ICHA) on duty free goods (including liquors and tobacco), and from insurance and dog tax; exemption is not granted, however, from indirect taxes incorporated in the price of goods (turnover tax). There is no exemption

from radio or television tax, either in respect of radio or television sets belonging to missions or to individual representatives. Missions and representatives are exempt from paying the employers' contribution under the Federal Law on Old Age and Survivors Insurance in respect of local employees subject to the scheme; it is understood that the employers' contribution has been paid in some instances on a voluntary basis.

Section 19. Diplomatic licence plates, parking offences and traffic regulations

149. The standard letter sent out by the United States Mission summarizes the position in respect of automobile registration and insurance as follows:

Automobile Registration — You may obtain a New York State diplomatic automobile registration and licence plate in the "DPL" series without payment by forwarding to the United States Mission (1) a completed registration application, (2) a Certificate of Insurance, FS-1, and (3) proof of ownership of the automobile to be registered. Application forms are available at the United States Mission. The FS-1 form is obtained from the insurance company. Proof of ownership is obtained from the seller.

Automobile Insurance — in 1957, the State of New York enacted a compulsory insurance law requiring that automobile accident personal liability insurance be carried by all owners of automobiles. Without proof of insurance, automobile registration cannot be effected. It is assumed by the Government of the United States that all members of Missions who own and operate automobiles carry such insurance in amounts commensurate with their status and responsibilities.

150. As noted in section 18 (c) (ii), para. 148, above, all representatives at the Geneva Office, whether permanent or not, are granted tax exemption in respect of driving licences and car registration fees.

151. The question of parking offences and traffic regulations in general has been the subject of some discussion. In 1962, the representatives of Member States of the Afro-Asian Group protested to the Secretary-General over the towing-away of cars with DPL licence plates parked in front of fire hydrants (or the possibility that cars so parked might be towed away by the New York City authorities). On that occasion, and again in 1967, when the New York City authorities started to remove DPL cars which were parked in violation of traffic regulations, discussions were held between the Secretary-General, the United States and City authorities, and, in 1967, members of the informal Committee on host country relations, designed to find a practical solution to the problems raised. It may be noted that special parking places have been allocated for missions of Member States to the United Nations.

152. In Geneva cars belonging to representatives are registered in the special 40,000 series and bear a C.D. sign. No fine is imposed on representatives for parking offences or other traffic violations.

153. The following judicial decisions, referred to in section 12 (a), paras. 108-111, above, relate to traffic offences: *Friedberg v. Santa Cruz*, *City of New Rochelle v. Page-Sharp*, *People v. von Otter*, and *People v. Roy*.

CHAPTER IV. — IMMUNITY OF PREMISES

*Section 20. Diplomatic status and location of premises*⁷⁷

154. Practice at United Nations Headquarters was summarized in the following letter sent by the Legal Counsel to the Legal Adviser of one of the specialized agencies in 1964.

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. The United States has taken the position that offices having the status of a permanent mission can only be established after a permanent representative (resident representative in the terms of the Headquarters Agreement) is appointed. Their stand in this connexion, however, has not involved questions concerning the location of the office.

General Assembly resolution 257 (III) of 3 December 1948, on the permanent missions to the United Nations, likewise deals with the personnel of the Mission (credentials of a permanent representative, communication of appointment of the staff of a permanent mission, etc.) but does not deal with the office premises.

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

155. In a circular note the Swiss Federal Authorities informed permanent missions at the Geneva Office that they had no objection in principle to one mission serving for the purposes of representing the State concerned both at Berne and at the Geneva Office, but that they would only recognize such missions as an embassy where the premises were situated in Berne. At the present time all permanent missions at the Geneva Office are located in Geneva, with the exception of two in Berne and one in Paris.

Section 21. Inviolability of mission premises and of private residences

156. The requirement that the host State should ensure, so far as reasonably possible, the inviolability of mission premises and of the private residences of representatives, has been generally recognized. United Nations records deal chiefly with the question of hostile demonstrations outside mission premises; when such demonstrations have taken place the Member State concerned has usually drawn the matter to the attention of the Secretary-General and requested his assistance in ensuring that necessary measures be taken by the United States authorities, in accordance with the Headquarters Agreement, to prevent their recurrence. Reference has also been made to Article 105 of the Charter when the demonstration or other activity (e.g., use of loudspeakers outside the mission premises) has placed difficulties in the way

of the performance of the functions of the mission. In discussions and correspondence with the United States authorities, the Secretary-General has suggested that, since under section 15 of the Headquarters Agreement resident representatives are entitled at their missions to the same privileges and immunities as the United States accords to diplomatic envoys accredited to it, consideration should be given to the adoption of a law similar to the Joint Resolution of the United States Congress (52 Stat. 30) which makes it unlawful to conduct demonstrations or other activities directed against foreign Governments within 500 feet of any building or premises in the District of Washington used by foreign government representatives. The Secretary-General has also pointed out that under section 16 (a) of the Headquarters Agreement the United States authorities are under an obligation to exercise due diligence to ensure that the tranquillity of the headquarters district is not disturbed.

157. The United States authorities have on each occasion assured the Secretary-General that the United States would discharge fully its international obligation to maintain the privileges and immunities necessary for the independent exercise of the functions of the representatives of Member States. They have also stated that, since under United States law, serious constitutional difficulties existed in adopting legislation impinging on the rights of individuals to congregate and express their political convictions, they were reluctant to consider new legislation until satisfied that acceptable alternatives did not exist. The United States authorities have also expressed the opinion that effective police protection had in fact been provided.

158. It may be noted that there have been a number of convictions for disorderly conduct, breach of the peace, resisting an officer and similar offences, following demonstrations directed against the missions of Member States of the United Nations.

Section 22. National flag

159. Although there appear to be no express provisions on the matter, in practice Member States have placed their national flag and emblem outside the premises of permanent offices and, to a lesser extent, on the residence and means of transport of the head of the mission. In Geneva the national flag is flown only on the national day and on special occasions.

CHAPTER V. — FREEDOM OF COMMUNICATION AND RIGHT OF TRANSIT AND OF ACCESS TO MEETINGS

Section 23. Freedom of communication and inviolability of correspondence, archives and documents

160. Missions to the United Nations and representatives attending conferences convened by the United Nations enjoy in general freedom of communication on the same terms as those enjoyed by diplomatic personnel present in the host State on official business in connexion with that State. The inviolability of papers and correspondence, which is specified in section 11 (b) of the General Con-

⁷⁷ Questions relating to the immunity from taxation of premises are dealt with in section 18 (b), paras. 139-143, above.

vention, appears to have been respected. United Nations records show only one case in which a complaint was received from the mission of a Member State, that coded messages sent by cable to the home Government had not been received; it is possible, however, that this failure was due to an error in transmission.

Section 24. Use of codes, diplomatic bag and courier

161. Section 11 (c) of the General Convention and section 9 (c) of the 1946 Agreement with Switzerland grant to the representatives of Member States:

The right to use codes and to receive papers or correspondence by courier or in sealed bags.

In addition the decision of the Swiss Federal Council of 31 March 1948 specifies that permanent representatives

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

Chapter XI of the Swiss Customs Regulation of 23 April 1952, provides as follows:

Correspondance officielle expédiés par valise scellée

Article 33

1. *Les organisations auxquelles s'applique le présent règlement, de même que les délégations d'États Membres ont, en Suisse, le droit d'expédier et de recevoir, dans des valises scellées, de la correspondance officielle, des dossiers ou autres documents officiels échangés entre elles, avec leurs propres bureaux situés dans d'autres pays, avec les membres de leurs conseils et avec des gouvernements ou des missions diplomatiques.*

Les Membres des conseils (conseils d'administration, conseils exécutifs, etc.) des organisations précitées ont le même droit lorsqu'ils se trouvent en Suisse dans l'exercice de leurs fonctions.

Les personnes qui accomplissent des missions pour les organisations susnommées peuvent également recevoir des valises scellées expédiées par l'une de ces organisations.

2. *Les valises doivent être plombées ou cachetées par le service compétent de l'organisation, du gouvernement, de la mission diplomatique ou de la délégation. Elles doivent être accompagnées, soit d'un courrier porteur d'une lettre de courrier (sauf-conduit), soit d'une attestation. La lettre de courrier et l'attestation doivent être établies par le service qui a apposé la fermeture, et certifier que la valise ne contient que des documents officiels.*

162. The following extract from a letter sent in 1956 by the United States Mission to the United Nations Chief of Protocol summarizes the position at United Nations Headquarters in respect of the privileges and immunities to be accorded to a courier.

Under the usage of international comity, diplomatic couriers have always enjoyed immunity only for any pouches or parcels of official documents in their custody but not for baggage or personal effects. Under a recently issued amendment to the Customs Regulations, diplomatic couriers of foreign governments are accorded the customs privileges of foreign personnel of diplomatic rank, which means that in addition to the official communications they may be carrying, their personal baggage and effects are also inviolate.

With reference to immunity, an employee of a permanent mission in transit between the office and the airport is entitled only to such immunity as he normally is accorded, that is, a duly accredited diplomatic officer on the Blue List would have diplomatic immunity in accordance with Public Law 357 and a non

diplomatic or clerical employee to such immunity as provided by Public Law 291.

A diplomatic courier who is regularly in transit between a foreign country and the United States would not have diplomatic immunity, since only his pouches, luggage or personal effects are inviolate. In other words, the exceptions accorded to him are for the documents he carries rather than for himself.

A diplomatic courier is a subordinate official without the rank of a diplomatic officer, and usually is in a transit status rather than a resident member of a diplomatic staff. Accordingly, it would be contrary to diplomatic practices and the policy of the Department to include a diplomatic courier, as such, on the diplomatic list.

Section 25. Right of transit and of access to meetings

163. The right of transit to the place of meeting is contained, expressly or by implication, in each of the agreements dealing with the privileges and immunities of the representatives of Member States. In section 11 of the General Convention and section 9 of the 1946 Agreement, the privileges and immunities accorded to representatives are expressed to extend "during their journey to and from the place of meeting", without restriction of any kind. Similar provisions are contained in other agreements with host countries.

164. The position at United Nations Headquarters is chiefly regulated by sections 11,⁷⁸ 12 and 13 (a) of the Headquarters Agreement, the relevant positions of which are as follows:

Section 11. The federal, state or local authorities of the United States shall not impose any impediments to transit to or from the headquarters district of (1) representatives of Members . . . or the families of such representatives . . . (5) other persons invited to the headquarters district by the United Nations . . . on official business. The appropriate American authorities shall afford any necessary protection to such persons while in transit to or from the headquarters district. This section does not apply to general interruptions of transportation which are to be dealt with as provided in Section 17, and does not impair the effectiveness of generally applicable laws and regulations as to the operation of means of transportation.

Section 12. The provisions of Section 11 shall be applicable irrespective of the relations existing between the Governments of the persons referred to in that section and the Government of the United States.

Section 13 (a). Laws and regulations in force in the United States regarding the entry of aliens shall not be applied in such manner as to interfere with the privileges referred to in Section 11. When visas are required for persons referred to in that section, they shall be granted without charge and as promptly as possible.

165. In 1960 a problem arose regarding the attendance of the representative of a particular State at the sixteenth session of ECAFE which had been arranged to open in Karachi on 17 February 1960. The Government of Israel informed the Secretary-General of its intention to be represented in a consultative capacity, under paragraph 9 of the Commission's terms of reference and

⁷⁸ Section 11 of the Headquarters Agreement was referred to by the Secretary-General in his communications with the United States authorities regarding the restrictions placed on the movements of the Chairman of the Council of Ministers of the Union of Soviet Socialist Republics when he attended the fifteenth session of the General Assembly in 1960; see section 10, para. 94, foot-note 42, above.

requested his assistance in obtaining the necessary visa. The Government of Pakistan indicated to the Secretary-General that it was not disposed to issue a visa to the representative of Israel for the purpose of attending the meeting. The Secretary-General therefore took steps, in consultation with the Chairman of the Commission and the Interim Committee on the Programme of Conferences of the Economic and Social Council, to change the venue of the session to one where access by all Member States was ensured. The following extract from a note to Correspondents (No. 2099), of 19 January 1960, summarizes the action taken and the grounds relied on.

Under paragraph 1 (b) of the rules of procedure of ECAFE, the Secretary-General has been given authority to alter, in special cases, the date and place of a session of ECAFE, in consultation with the Chairman of the Commission and the Council's Interim Committee on Programme of Conferences. In view of the imminence of the scheduled opening of the session, the Secretary-General considered that he could delay no longer in undertaking the prescribed consultations with a view to changing the venue of the session to the Commission's headquarters, where access by all Members of the United Nations is ensured, and to postponing the opening date, for administrative reasons. The Chairman of ECAFE and all the members of the Council's Interim Committee have concurred in the Secretary-General's proposal; the announcement of the change in the time and place of the ECAFE session was accordingly communicated to all members of ECAFE and of the United Nations on 18 January. In the Secretary-General's view, the principles which were at stake, namely the right of the United Nations to determine which States shall be represented at meetings of its organs and the right of Members of the United Nations to be present at meetings they are entitled to attend, are of crucial importance. These principles derive from the Charter itself. Furthermore, the Convention on the Privileges and Immunities of the United Nations provides that representatives of Member States to principal and subsidiary organs of the United Nations shall be exempted from immigration restrictions. In the circumstances, the Secretary-General had no choice but to take steps necessary to uphold the principles in question.

166. In 1963 the fifth session of ECA had before it a draft resolution inviting all African States to refuse to grant visas to representatives of South Africa and Portugal so as to prevent them from attending conferences and meetings. The Secretary-General sent the following cable⁷⁹ to the Executive Secretary of the Commission:

Please circulate the following message quote I have been informed that the submission of a draft resolution is under consideration by certain delegations which would invite all African States, members of the Economic Commission for Africa, to refuse to grant visas to representatives of the Republic of South Africa and Portugal to prevent them from attending conferences and meetings. I must respectfully draw attention to the fact that such resolution would invite action in violation of Article 105 of the Charter and Article IV of the Convention on the Privileges and Immunities of the United Nations. Such action would also be contrary to the established practice of the United Nations, based on the Charter principle of sovereign equality of all its Members, that all Members of the United Nations are entitled to attend meetings of its organs wherever they may be held. Any derogation from this fundamental principle and from the universally recognized practice would not only be legally unacceptable but would create a dangerous precedent which might be copied

⁷⁹ *Message from the Secretary-General of the United Nations on draft resolution E/CN.14/L.172 on Portugal and South Africa, E/CN.14/INF.13, 2 March 1963.*

by other host States. Action such as that contemplated in a draft resolution of this kind would be disruptive to the functioning of United Nations organs. Moreover consideration of such a draft resolution is without question outside the terms of reference of the Commission.

167. In 1963 the Office of Legal Affairs sent the following note⁸⁰ to the Under-Secretary for Economic and Social Affairs, asserting the right of access to United Nations meetings and offices of the representatives of all Member States.

It is a fundamental principle of the United Nations that representatives of the Members of the United Nations and officials of the Organization have the right of access to all meetings of the United Nations organs and to the offices of the United Nations to the extent necessary for the independent exercise of their functions in connexion with the Organization.

This right is recognized as included in the privileges and immunities which Article 105 of the Charter prescribes in paragraph 2 thereof:

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

It is also a corollary of the principle of sovereign equality expressed in Article 2, paragraph 1, that all Members of the United Nations are entitled to participate in the work of the Organization irrespective of the relations of their governments and the government on whose territory the United Nations meetings or activities are being held.

In implementation of these basic principles, the Convention on the Privileges and Immunities of the United Nations accords to representatives of Members to the principal and subsidiary organs of the United Nations and to conferences convened by the United Nations an exemption (in respect of them and their spouses) from immigration restrictions in the State they are visiting or through which they are passing in the exercise of their functions (Section 11. d). A similar exemption is accorded to officials of the Organization (Section 18.d). In addition, a number of "site" agreements have been entered into by the United Nations with host governments which stipulate in more detail the extent and definition of the right of access. Such agreements have been concluded, for example, with the United States in regard to the Headquarters and with the governments which act as hosts of the regional economic commissions and sub-regional offices.

The essential element in the right of access is that representatives of governments, officials of the Organization and other persons invited on official business shall not be impeded in their transit to or from the United Nations offices in connexion with meetings or other activities in which they are entitled to participate. Although this does not mean that the representatives of Member States have a right of entry to every United Nations office at any time, it clearly means that such right of access to United Nations premises must be granted to representatives of Members at least when they are entitled to attend meetings held in such premises or are invited to such premises in connexion with the official business of the Organization. This also implies that representatives of Member States and other persons having official business with the Organization should have the right to communicate freely with United Nations offices by mail, telephone or telegraph.

The Secretary-General has on several occasions emphasized the importance of compliance with the foregoing principles of access. He has noted that any derogation from these principles would be disruptive to the functioning of United Nations organs

⁸⁰ *United Nations Juridical Yearbook 1963, p. 167.*

and contrary to the clear obligations of Member States under the Charter.

168. A special problem arises when access to the country in which a United Nations meeting is to be held is only possible through another State. 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.

CHAPTER VI. — OBSERVERS OF NON-MEMBER STATES

Section 26. Permanent observers

169. Permanent observers have been sent by non-member States only to United Nations Headquarters and to the Geneva Office. The position as regards permanent observers appointed by non-Member States to United Nations Headquarters was summarized in the following memorandum,⁸¹ dated 22 August 1962, sent by the Legal Counsel to the then Acting Secretary-General. Since the preparation of that memorandum, the Holy See has appointed permanent observers, both in New York and at Geneva.

Policy of the Organization regarding Permanent Observers

1. In deciding whether or not to accord certain facilities to a Permanent Observer, it has been the policy of the Organization to make such facilities available only to those appointed by non-members of the United Nations which are full members of one or more specialized agencies and are generally recognized by Members of the United Nations.*

Legal basis for the institution of Permanent Observers

2. There are no specific provisions relating to Permanent Observers of non-member States in the United Nations Charter, in the Headquarters Agreement with the United States Government or in General Assembly resolution 257 (III) of 3 December 1948 relating to Permanent Missions of Member States. The Secretary-General referred to Permanent Observers of non-members in his report to the fourth session of the Assembly on Permanent Missions,⁸² but no specific action was taken by the Assembly either at that time or later to provide an express legal basis for the institution of Permanent Observers. It therefore rests purely on practice as so far followed.

Facilities accorded to Permanent Observers

3. Since Permanent Observers of non-member States do not have an officially recognized status, facilities which are provided them by the Secretariat are strictly confined to those which relate to their attendance at public meetings and are generally of the same nature as those extended to distinguished visitors at United Nations Headquarters. The Protocol Section arranges for their seating at such meetings in the public gallery and for the distribution to them of the relevant unrestricted documentation. A list of their names is appended, for convenience of reference, to the

* A Permanent Observer was designated by the Government of Switzerland in the summer of 1946 and the practice of designating such Observers has been followed by Switzerland since that time. Observers were subsequently appointed by certain States which later became Members of the United Nations including Austria, Finland, Italy and Japan. Certain other States, which are not Members of the Organization at the present time, maintain Permanent Observers, namely the Federal Republic of Germany (since October 1952), Monaco (since May 1956), the Republic of Korea (since February 1949), and the Republic of Viet-Nam (since March 1952).

⁸¹ *United Nations Juridical Yearbook 1962*, (ST/LEG/8), fascicle 2, p. 236.

⁸² *Official Records of the General Assembly, Fourth Session, Annex to the summary records of the Sixth Committee*, document A/939.

List of Permanent Missions to the United Nations published monthly by the Secretariat, as Permanent Observers often represent their Governments at sessions of United Nations organs at which their Governments have been invited to participate.

4. No other formal recognition or protocol assistance is extended to Permanent Observers by the Secretariat. Thus no special steps are taken to facilitate the granting of United States visas to them and their personnel, nor for facilitating the establishment of their offices in New York. Communications informing the Secretary-General of their appointment are merely acknowledged by the Secretary-General or on his behalf and they are not received by the Secretary-General for the purpose of presentation of credentials as is the case for Permanent Representatives of States Members of the Organization.

Permanent Observers and the question of privileges and immunities

5. Permanent Observers are not entitled to diplomatic privileges or immunities under the Headquarters Agreement or under other statutory provisions of the host State. Those among them who form part of the diplomatic missions of their Governments to the Government of the United States may enjoy immunities in the United States for that reason. If they are not listed in the United States diplomatic list, whatever facilities they may be given in the United States are merely gestures of courtesy by the United States authorities.

170. At the Geneva Office the Federal Republic of Germany, the Holy See, the Republic of Korea, and the Republic of San Marino maintain permanent observers, who enjoy *de facto* the same privileges and immunities as permanent representatives (except in the case of the permanent observer of San Marino, who is a Swiss citizen). In addition, Switzerland appointed in 1966 an *Observateur permanent du Département Politique Fédéral auprès de l'Office des Nations Unies à Genève*.

171. Where representatives of non-member States are specially invited to attend United Nations meetings or conferences the representatives concerned must be granted at least functional immunities and a right of entry into the host State, even if they only attend as observers. In a memorandum from the Legal Counsel to the Secretary of the Special Political Committee in 1960 it was stated that a right of transit to the Headquarters District might be claimed for observers if they could be deemed to be "persons invited to the Headquarters District by the United Nations . . . on official business", as envisaged by section 11 (5) of the Headquarters Agreement.

Section 27. Facilities afforded by the United Nations to observers

172. As noted in paragraphs 3 and 4 of the memorandum quoted in section 26 above, the facilities provided to permanent observers "are strictly confined to those which relate to their attendance at public meetings and are generally of the same nature as those extended to distinguished visitors at United Nations Headquarters". Such observers do not enjoy *ex qualitate* any special treatment with respect to communications which their Government might wish to circulate.

173. If the Government of a non-member State is invited to attend a meeting of a United Nations organ or subsidiary organ or a conference under United Nations auspices, it frequently appoints its observer to represent

it. In such a case the observer must have special credentials since he does not sit at the conference table as an observer but as the plenipotentiary of his Government. This principle is applied, for example, when the Swiss observer represents his country at the General Assembly for the election of Judges to the International Court of Justice.

Section 28. Grant of privileges and immunities to observers

174. The position as regards diplomatic privileges and immunities for permanent observers at United Nations Headquarters is summarized in paragraph 5 of the memorandum cited in section 26 above. In *Papas v. Francini*⁸³ a claim by a member of the staff of the then Italian observer to the United Nations to full diplomatic immunity was rejected since the State Department had not recognized the defendant as an official with diplomatic status. The benefits of the International Organizations Immunities Act, however, (i.e. functional privileges and immunities) are granted to persons designated by foreign Governments to serve as their representatives "in or to" international organizations; this phrase has been interpreted as applying to permanent observers.

175. The position as regards observers at the Geneva Office and in the case where the representatives of non-member States are specially invited to attend United Nations meetings even if they attend only as observers, is described in section 26 above.

B. Summary of practice relating to the status, privileges and immunities of the representatives of Member States to the specialized agencies and the International Atomic Energy Agency

CHAPTER I. — GENERAL ASPECTS: THE POSITION OF REPRESENTATIVES IN RELATION TO THE SPECIALIZED AGENCIES AND IAEA⁸⁴

Section 1. Interpretation of the term "representatives"

1. In the Convention on the Privileges and Immunities of the Specialized Agencies (subsequently referred to as the "Specialized Agencies Convention"), article I, section 1 (v), provides that for the purposes of articles V and VII, dealing respectively with the representatives of Member States and abuses of privileges,

... the expression "representatives of members" shall be deemed to include all representatives; alternates, advisers, technical experts and secretaries of delegations.⁸⁵

⁸³ Supreme Court of the State of New York, Special Term, King's County, Part V, 6 February 1953, 119 N.Y.S. 2d. 69.

⁸⁴ Owing to the particular organizational structure of the IBRD, IFC, IDA and IMF and the sources from which their privileges and immunities are derived, the account of the position of functionaries of those organizations has been placed in a separate annex at the end of this study.

⁸⁵ It may be noted that in the ICAO Headquarters Agreement with Canada, article I, section 1 (f), which reproduces the substance of the above definition, specifies that the expression "secretaries of delegations" includes "the equivalent of third secretaries of diplomatic mission but not the clerical staff".

2. The majority of specialized agencies reported that no special problems had arisen regarding the interpretation of the term "representative". FAO referred to the fact that the FAO annex to the Specialized Agencies Convention was amended in 1959 so as to extend the application of the Convention to the representatives of associate members of FAO as well as to full members; this amendment has not, however, presented any difficulties in relation to representatives.

3. In addition to the IMF and IBRD, which are dealt with in a separate annex,⁸⁶ three other specialized agencies drew attention to the fact that individual members of the executive or similar body of their institution enjoyed a special status. In the case of WHO the members of the Executive Board are persons technically qualified in the field of health, who, although designated by member States, sit as members of the Board in an individual capacity. Whilst not representatives of Governments, under paragraph 1 of annex vii to the Specialized Agencies Convention, they are granted the same privileges and immunities, together with their alternates and advisers, as the representatives of member States, and waiver of their immunity may be made only by the Executive Board. In the case of IAEA, article XV B of its Statute provides that Governors appointed to the Board of the Agency enjoy, together with their alternates and advisers, such privileges and immunities as are necessary for the independent exercise of their functions. Members of the IAEA Board of Governors remain, however, national representatives and may indeed also act as the permanent representative of the member State concerned.

4. By reason of the tripartite character of the Organization, Government, employers' and workers' delegates enjoy an equal status in organs of the ILO. If, however, at the ILO General Conference employers' and workers' delegates are in fact members of national delegations, the employers' and workers' members of the Governing Body do not represent the countries of which these persons are nationals, but are elected by employers' and workers' delegates to the Conference. By virtue of paragraph 1 of the ILO annex to the Specialized Agencies Convention, employers' and workers' members of the Governing Body are assimilated to representatives of member States, except that the waiver of the immunity of any such person may be made only by the Governing Body.

Section 2. Distinction between permanent and temporary representatives

5. The appointment of permanent representatives, as opposed to those sent to represent member States solely at conferences or *ad hoc* meetings held by the agency concerned, is widely followed by member States. In the case of specialized agencies having their headquarters in Geneva,⁸⁷ it is customary for the accreditation

⁸⁶ See para. 67 *et seq.*

⁸⁷ See also *Summary of practice relating to the status, privileges and immunities of the representatives of Member States to the United Nations*, section 2 (b), paras. 13 and 14, above.

No State has a permanent representative at any regional office of a specialized agency.

of permanent representatives to be along the following lines:

... to the European Office at the United Nations and to the Specialized Agencies with headquarters in Geneva ...

The various agencies concerned are sometimes mentioned by name. In a relatively small number of instances States have accredited a representative solely to a particular agency in Geneva; it is believed that there are no examples of this practice at the present time.

6. As regards specialized agencies having their headquarters other than in Switzerland, it may be noted that under ICAO Assembly resolution A 4-1, a State elected to the Council of ICAO "is understood to have indicated its intention ... to appoint and support full time representation at the Headquarters of the Organization". Such representation has normally been provided. In the case of IAEA, section 1 of the Headquarters Agreement with Austria provides in part that:

(j) the expression "resident representative to the IAEA" means the principal resident representative to the IAEA designated by a Member State.

(k) the expression "each Member of the resident delegation of a Member State to the IAEA" includes members of the delegation of the resident representative to the IAEA, but does not include clerical and other auxiliary personnel.

7. Some IAEA Governors act at the same time as resident representatives; in some instances plenipotentiary envoys accredited to the Republic of Austria are concurrently Governors and/or resident representatives. Similarly, the staff of Governors and resident representatives may be concurrently members of the staff of diplomatic missions in Austria.

8. In the case of FAO a distinction exists between resident and non-resident permanent representatives. The latter category normally consists of members of diplomatic missions in a neighbouring country (e.g. France or Switzerland) or of representatives accredited to the United Nations Geneva Office. Resident permanent representatives are those who are stationed in Rome and who are normally members of diplomatic missions accredited to the Government of Italy. In connexion with the appointment by a Government of a resident permanent representative who was not a member of the diplomatic corps in Rome, the Italian Government pointed out that its understanding when signing the Headquarters Agreement was that resident representatives would normally be chosen from amongst the heads or members of diplomatic missions accredited to the Italian Government, or possibly the Holy See, except in the case of countries with which Italy did not maintain diplomatic relations or where an Italian national was appointed by the sending States. This issue was submitted to the FAO Conference at its seventh session in 1953. The Conference adopted resolution No. 54 which recommended to Member States that they should

consult the Director-General in order that he may seek the views of the Italian Government

if they wished to appoint resident representatives,

who are not and may not become members of diplomatic missions accredited to the Italian Government.

Problems arising out of the application of this resolution have been satisfactorily resolved by negotiations.

9. Several agencies drew attention to the fact that, owing to the technical and operational nature of their work, they corresponded directly with the ministry or other authority of member States immediately concerned; the functions of permanent representatives in these cases therefore tended to be of a formal and occasional nature rather than of day-to-day importance.

Section 3. Attendance at different organs and meetings of the same organization

10. The question whether representatives accredited to a particular agency, or to one of its organs, are entitled to represent their State at all meetings, or before all organs, has received answers which vary to some extent from agency to agency. It would seem a general rule, however, that accreditation as a permanent representative does not give a right to participate in conferences of the organization concerned unless the representative has received separate credentials enabling him to do so.

(i) FAO

In so far as permanent representatives are accredited to the FAO as such, they may attend any FAO meeting (other than conference sessions) where their country is entitled to be represented. Some non-resident permanent representatives, however, have only been accredited to attend the FAO Council; it is presumed that such representatives might nevertheless attend meetings of other FAO bodies for which no special credentials are required. Conversely, nomination as representative to a specialized technical body of FAO would not be considered as extending to attendance at the Council or other organ of the FAO as representative or observer. Letters inviting Governments to FAO meetings usually contain a request that the names of representatives, alternates and advisers or observers be communicated to the Director-General before the meeting. Credentials are required for all representatives and other members of delegations to the FAO Conference.

(ii) IAEA

Accreditation as a resident representative does not entitle the representative concerned to participate in the proceedings of any organ to which he is not specifically accredited. Credentials are needed for each delegate to the IAEA General Conference and for each Governor; a resident representative's credentials are accepted, however, for the purposes of enabling him to attend meetings of the Board of Governors as an observer.

(iii) ICAO

ICAO practice is that a representative accredited to one organ of ICAO may attend meetings of another organ in a private capacity. Attendance at ICAO conferences is dependent upon the issue of credentials.

(iv) ILO

Accreditation to the ILO does not by itself entitle a permanent representative to participate in the work

of an organ of the organization as a delegate, nor is appointment to a particular organ valid for others. Except in the case of employers' and workers' members of the Governing Body, who are elected at the ILO General Conference for a period of three years, credentials are needed to permit a person to act as a representative at any ILO meeting.

(v) *IMCO*

Specific accreditation is required for each representative for each organ of IMCO.

(vi) *ITU*

Specific accreditation is required in all cases where accreditation is needed for the organ or conference concerned.

(vii) *UNESCO*

All States which are members of UNESCO organs with limited membership are invited to inform the organization of the name of the person appointed to represent them; in default of notification, the organization considers the permanent representatives concerned as entitled to sit. Special credentials are required in the case of representatives to the General Conference.

(viii) *UPU*

Permanent representatives are not accredited to UPU organs as such. Attendance at UPU congresses is dependent on the issue of appropriate credentials in all cases.

(ix) *WHO*

The practice of the organization has been to require specific accreditation to a particular organ. Accordingly persons appointed as permanent representatives require special credentials to enable them to attend the World Health Assembly as delegates to sessions of that body.

Section 4. Credentials

11. The detailed practice of the various agencies in respect of credentials is set out below under sub-headings.

I. Practice regarding issuance of credentials in respect of (a) permanent representatives and (b) temporary representatives

(i) *FAO*

(a) Permanent representatives, whether resident or not, are usually accredited by letter from the appropriate cabinet minister of the sending State to the Director-General of FAO. There have also been cases where the appointment was notified to FAO by the head of the diplomatic mission in Rome.

(b) Formal credentials are required for delegates attending sessions of the FAO Conference. The credentials must be issued by the Head of State, the Head of Government or the Minister for Foreign Affairs. In exceptional cases credentials have been accepted if issued by the head of the diplomatic mission in Rome who, however, cannot nominate himself as a delegate. Pursuant to Rule III — 2 of the General Rules the credentials shall be deposited with the Director-General, if possible not

later than fifteen days before the opening of the Conference session.

(ii) *IAEA*

(a) Credentials for Governors and resident representatives must be signed by the Head of State or Government, or by the Foreign Minister. The appointment of members of permanent missions is notified by the head of mission.

(b) Credentials for every delegate to each session of the General Conference, and to other IAEA meetings, must be signed by the Head of State or Government or by the Foreign Minister.

(iii) *ICAO*

(a) Credentials for representatives on the ICAO Council are usually signed by the Minister for Foreign Affairs or the Minister of Communications or Transport.

(b) In the case of a member of a temporary delegation, it is considered sufficient that his credentials be signed by the Ambassador of his State appointed to the country where the meeting is being held, or by the representative of his State on the ICAO Council if the delegation represents a State which is a member of the Council.

(iv) *ILO*

(a) In certain cases the member State merely informs the Director-General of the appointment of a permanent representative; in others a letter of credence is submitted. The Director-General replies to any communication, informing the State concerned that he has taken note of the communication. Credentials are variously issued by the Head of State, by the Ministry of Foreign Affairs, and by the Ministry of Labour.

(b) Article 3 of the ILO Constitution provides that member States shall be represented at ILO General Conferences by four representatives, of whom two shall be government delegates and the other two employers' and workers' delegates respectively. Each of the delegates may be accompanied by two advisers for each item on the agenda of the Conference. Except in the case of employers' and workers' members of the Governing Body, credentials are needed to permit any person to act as a delegate at any ILO meeting. Credentials are issued by any of the authorities referred to in (a) above or by the permanent representative of the country concerned, acting on instructions from his Government.

(v) *IMCO*

Credentials are required for each representative for each organ of IMCO. Under the rules of those organs, credentials must be issued by the Head of State or Government or by the Minister for Foreign Affairs of the member State concerned, or by an appropriate authority designated by one of the above. Delegated authority to issue credentials is commonly exercised by a chief of mission accredited to the host State.

(vi) *ITU*

(a) In the case of permanent representatives ITU accepts the credentials deposited either with the Secretary-General of the United Nations, with the Director of the United Nations Office at Geneva, or directly with ITU.

(b) Chapter 5 of the General Regulations annexed to the International Telecommunication Convention (Montreux 1965) regulates the question of credentials for conferences in some detail; the Convention came into force for States Parties on 1 January 1967. At plenipotentiary conferences delegations must be accredited by instruments signed by the Head of State or Government or by the Minister for Foreign Affairs; however, they may be provisionally accredited by the head of the diplomatic mission accredited to the Government of the country in which the conference is held. In the event that the United Nations accedes to the ITU Convention on behalf of a Trust Territory placed under its administration, any delegation sent on behalf of that Territory must be accredited by the Secretary-General of the United Nations. The same arrangements apply in the case of administrative conferences except that the Minister responsible for the particular topic may accredit a delegation.

(vii) *UNESCO*

(a) Member States inform the Director-General when a new permanent representative is appointed. The representative concerned is then received by the Director-General, to whom he presents his credentials, signed by one of the authorities listed below.

(b) In the case of temporary representatives, under article 22 of the rules of procedure of the UNESCO General Conference, credentials must be signed by the Head of State or Government or by the Minister for Foreign Affairs, or by another competent minister whom the Minister for Foreign Affairs has specified in writing to the Director-General. Credentials in respect of the representatives of associate member States must be issued by the competent authorities.

(viii) *UPU*

(a) There is no consistent practice: sometimes the UPU receives a photocopy of the letters of credence, sometimes a simple note of information from the mission concerned.

(b) As regards temporary representatives, a distinction exists between the UPU Congress and other meetings. In the former case credentials are transmitted to the UPU secretariat signed by the Head of State or Government or by the Ministry of Foreign Affairs. In the case of meetings of the UPU Executive Committee and of working parties, the representatives of the various postal administrations do not require credentials.

(ix) *WHO*

(a) In the case of permanent representatives the Director-General is informed of the appointment either directly by the Foreign Ministry of the member State concerned or through the Geneva Office of the United Nations.

(b) In the case of delegates, the rules of procedure of the World Health Assembly provide that each Member State communicate to the Director-General, if possible fifteen days before the opening date, the names of its representatives. In accordance with rule 22 (b), credentials must be issued by the Head of State, the Minister for Foreign Affairs, or by the Minister of Health or by any

other appropriate authority. In practice the term "appropriate authority" has been considered to include government departments responsible for dealing with public health, ministries of health, heads of diplomatic missions and permanent missions.

II. *Practice regarding inspection of credentials*

(i) *FAO*

In the case of permanent representatives and of representatives attending sessions of FAO bodies (other than the Conference or Council) or technical or regional meetings, the credentials or nominations are examined by the Director-General. According to the rules of procedure which have been adopted by certain commissions or similar bodies established under a convention or agreement by virtue of article XIV of the FAO Constitution, the secretary (an FAO staff member) is required to examine the credentials and to report thereon to the body concerned. In the case of the FAO Conference, credentials are examined by a credentials committee consisting of nine member nations. Pursuant to rule III-5 of the General Rules, any delegation or representative to whose admission a member nation has objected is seated provisionally until the credentials committee has reported and the Conference has given its decision.

(ii) *IAEA*

The credentials of resident representatives are inspected by the Director-General. The credentials of delegates to the General Conference are examined by a credentials committee appointed by the Conference: those of Governors are inspected by the Director-General, who submits a report thereon to the Board of Governors for approval.

(iii) *ICAO*

In accordance with rule 3 of the rules of procedure of the ICAO Council, the credentials of representatives on the Council are examined by the President of the Council, the first Vice-President, and by the Secretary-General, who submits a report to the Council. The credentials of representatives to the Assembly are examined by a credentials committee, consisting of five members representing five contracting States nominated by the President of the Assembly.

(iv) *ILO*

The credentials of delegates to the General Conference are subject to the scrutiny of the Conference and are referred to a Special Credentials Committee under Article 3, paragraph 9, of the ILO Constitution. An analogous procedure exists for regional conferences. There is no formal procedure for the examination of credentials in the Governing Body, or at other meetings of the organization.

(v) *IMCO*

Under the rules of the IMCO Council and of the Maritime Safety Committee, the Secretary-General has a duty to examine and report on credentials. In the case of the IMCO Assembly a credentials committee is established.

(vi) *ITU*

The credentials of permanent representatives are inspected by the ITU secretariat. At conferences credentials are inspected by a credentials committee.

(vii) *UNESCO*

At the UNESCO General Conference a credentials committee, consisting of nine members, is elected upon the nomination of the President. If any objection is raised regarding a representative he is permitted to sit provisionally, with the same rights as other representatives, until the General Conference has given a ruling on his status following the report of the credentials committee. In the case where notification has been sent only by cable or by an authority not previously designated by the Minister for Foreign Affairs, the representative concerned is allowed to participate, subject to the presentation at a later date of formal credentials.

(viii) *UPU*

The UPU has no procedure for verifying the letters of credence of permanent representatives. At the UPU Conference credentials are inspected by an *ad hoc* committee.

(ix) *WHO*

Credentials of representatives to the World Health Assembly are examined by a credentials committee consisting of twelve delegates appointed by the Assembly upon the recommendation of the President. The Committee meets immediately after the formal opening meeting of the Assembly and reports to it before the Assembly proceeds with its agenda.

Section 5. Full powers and action in respect of treaties

12. Full powers, issued by the Head of State or Government, or by the Minister for Foreign Affairs or other responsible authority referred to in section 4 above, are generally required to enable representatives to sign agreements drawn up under the auspices of specialized agencies. Except to a limited extent in IAEA and UNESCO, accreditation as a permanent representative is not regarded as sufficient to enable a representative to sign agreements on behalf of his Government; the limited exemption granted by IAEA in this respect is presently under review. Details of the practice of various agencies are given below.

(i) *FAO*

The principles adopted by the FAO Conference with respect to the mode of participation in conventions and agreements concluded under the auspices of FAO provide for both the traditional system (i.e. that of signature or of signature subject to ratification and accession), as well as the simplified system of acceptance by deposit of an instrument of acceptance. When the former system is applied any signature is made subject to the provisions of rule XXI-4 of the General Rules of the organization, which provides as follows:

The full powers given to a Government representative to sign a convention, agreement, supplementary convention or agree-

ment, should be issued by the authority endowed with the inherent power to bind the State, the head of the government, the minister of foreign affairs or the minister of the department concerned. Instruments of accession or of acceptance should likewise be issued by one of these authorities. When speedy action is required, signature, accession or acceptance may be effected by the delegate of the government concerned or the head of its diplomatic mission in the country where the signature, accession or acceptance is to take place, subject to the deposit with the Director-General of a written statement issued by the head of the diplomatic mission certifying that such action is being taken in accordance with full powers conferred by the government and that the necessary formal instrument will be forthcoming.

(ii) *IAEA*

Except in the case of Governors and resident representatives, it has been IAEA's practice to require full powers for all representatives who sign agreements between IAEA and member States, whether the particular agreement is binding upon signature or not. In the case of multilateral treaties concluded under IAEA auspices, however, all representatives, including Governors and resident representatives, are required to have full powers.

(iii) *ICAO*

All representatives, including representatives on the ICAO Council, must hold full powers in order to sign conventions or other agreements drawn up under the auspices of ICAO or concluded between ICAO and the Government concerned.

(iv) *ILO*

Since the instruments adopted by the International Labour Conference are not open to signature by individual States, but only to ratification, full powers are not required. However, in the case where instruments adopted under the auspices of the organization at special meetings are open to signature, either at the time or subsequently, full powers are demanded.

(v) *IMCO*

Full powers are required for the signature of instruments of a treaty nature (e.g. not final acts) drawn up at IMCO conferences.

(vi) *ITU*

Under chapter 5 of the General Regulations annexed to the International Telecommunication Convention (Montreux 1965), representatives must be furnished with full powers in order to sign the final act of ITU conferences.

(vii) *UNESCO*

Conventions adopted by the UNESCO General Conference are not open for signature so that no question of full powers arises. Full powers are required, however, in the case of international conferences convoked by the General Conference and which have as their object the adoption and signature of an international agreement. Whilst permanent representatives are not entitled to sign multilateral conventions or other agreements drawn up under UNESCO auspices without express full powers, such powers are not regarded as necessary in the case of bilateral agreements in the form of an exchange of letters between the organization and the State concerned.

(viii) *UPU*

Full powers are necessary to enable representatives to negotiate and sign the UPU acts which are adopted at each congress; sometimes the powers of certain delegates are limited to those of negotiation, only the head of the delegation having the power to sign.

(ix) *WHO*

Permanent representatives require express powers to enable them to sign agreements between the organization and the State concerned. The manner in which conventions, agreements and regulations are adopted by the World Health Assembly obviates the need for the issue of full powers to representatives to the Assembly.

Section 6. Appointment of a representative to more than one organization or post; representation of more than one State by the same representative

13. The same person has frequently been appointed as the representative of his country to more than one agency, particularly in the case of those having their headquarters in Geneva. The same representative has also served on occasion as the Ambassador of his country, either in the host or a nearby State, or as a member of a diplomatic mission.

14. In most agencies a representative may not act on behalf of any State other than the one which appointed him. Exceptions to this rule do, however, exist. Delegates to ITU conferences and UPU congresses, for example, may represent more than one member, although in the latter case a delegation may not represent more than one additional country. In ICAO, whilst the rules of procedure of the ICAO Assembly and Legal Committee provide that no person may represent more than one State, the rules of procedure of Regional Air Navigation meetings allow a person to be appointed as the representative for more than one State. In UNESCO the delegation of the USSR represented the Byelorussian SSR and the Ukrainian SSR prior to the appointment by these States of their own representatives.

CHAPTER II. — APPLICATION OF THE CONSTITUTIONAL INSTRUMENTS OF THE SPECIALIZED AGENCIES AND OF IAEA IN RELATION TO PRIVILEGES AND IMMUNITIES

Section 7. Scope of privileges and immunities derived from the constitutional instruments of specialized agencies and of IAEA

15. Article 105, paragraph 2, of the Charter of the United Nations provides that:

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 connection with the Organization.

Provisions incorporating the same principle are to be found in the constitutional instruments of most of the specialized agencies.⁸⁸

⁸⁸ Article 40, para. 2, of the ILO Constitution, article XII of the UNESCO Constitution; article 67 of the WHO Constitution; and article 27 (b) (ii) of the WMO Convention.

16. In the Specialized Agencies Convention, which follows the enumerative method used in the General Convention, the privileges and immunities granted to the representatives of member States in execution of these constitutional provisions are set out in a specific list; except in two cases the facilities afforded are not identified with those granted to diplomatic representatives. Furthermore it is expressly provided in section 16 that:

Privileges and immunities are accorded to the representatives of members, not for the personal benefit of the individuals themselves, but in order to safeguard the independent exercise of their functions in connexion with the specialized agencies.

Unless, therefore, the host State (whether a State in whose territory a specialized agency has its offices or one in which a specialized agency has convened an *ad hoc* meeting) accords privileges and immunities over and above those envisaged in the Specialized Agencies Convention so as to assimilate the position of representatives to that of diplomats, the representatives of member States are only entitled to privileges and immunities on the scale provided by the Specialized Agencies Convention or under the Constitution of the specialized agency concerned.

17. Except in the case of ICAO, where representatives on the ICAO Council other than the President are granted only the same privileges and immunities as representatives to meetings, it appears that all permanent representatives have been granted privileges and immunities on a par with those granted to diplomats. In the case of Switzerland,⁸⁹ this is provided in the Decision of the Swiss Federal Council of 31 March 1948.⁹⁰

Similar provisions are contained in the headquarters agreements concluded by other specialized agencies, other than ICAO.⁹¹

Section 8. Nationality of representatives and the grant of privileges and immunities

18. Section 17 of the Specialized Agencies Convention states that the provisions of sections 13, 14 and 15 granting representatives privileges and immunities

⁸⁹ Under agreements between Switzerland and ITU, UPU and WMO respectively, non-permanent representatives to those organizations are granted privileges and immunities analogous to those granted to non-permanent representatives to the United Nations by virtue of the 1946 Agreement between the United Nations and Switzerland; the latter Agreement provides the same privileges and immunities as are contained in the Convention on the Privileges and Immunities of the United Nations.

In the case of the ILO and WHO, agreements were entered into with Switzerland by those two organizations in 1946 and 1948 respectively, granting non-permanent representatives privileges and immunities similar in substance to those provided in the 1946 Agreement with the United Nations but expressed in different language.

The Customs Regulation of 23 April 1952 specifies the extent of immunity from customs taxes and procedures of representatives, whether permanent or temporary.

⁹⁰ See *Summary of practice relating to the status, privileges and immunities of the representatives of Member States to the United Nations*, section 7 (b), paras. 61-63, above.

⁹¹ See article XI, FAO Headquarters Agreement, article XIII, IAEA Headquarters Agreement, article 18, UNESCO Headquarters Agreement.

are not applicable in relation to the authorities of a State of which the person is a national or of which he is or has been a representative.

No case appears to exist in which a representative of a member State has sought to invoke the provisions of the Convention in relation to the State which he represented or of which he was a national.

19. Where the person appointed as a representative was a national of another State, no objection has normally been raised by the organization or by the host State to the appointment as such. In such instances, which have usually been cases of the appointment of permanent representatives, the host State has granted the individual concerned the same privileges and immunities as other representatives. Where, however, the representative so appointed was a national of the host State itself, the latter, usually acting under specific treaty provisions,⁹² has declined to grant more than functional privileges and immunities.

20. It may be noted that in the case of the ILO there have been a number of instances in which the credentials of employers' and workers' delegates to the ILO General Conference have been challenged on grounds of nationality. In one such case which arose an objection to the credentials of the workers' delegate of a member State was submitted by a trade union organization which was numerically the strongest in the country; usually, in pursuance of article 3 of the Constitution of the ILO, the delegate should have been appointed in agreement with it. However, the Government explained that it had not done so because the organization, which grouped large numbers of workers from a neighbouring country, had to be regarded as "non-national". The Credentials Committee did not accept the objection on the ground that it could not establish the facts with certainty in the time available. However, it expressed the view that to deny any representative character to an organization to which belonged a large number of workers, many of whom might be of foreign origin, but who had resided continuously in the member State for many years, was tantamount to depriving them of the right to participate in the representation of the workers of the country.

Section 9. Commencement and duration of privileges and immunities

21. Section 13 of the Specialized Agencies Convention provides that representatives enjoy the privileges and immunities listed in that section "during their journeys to and from the place of meeting".⁹³ No requirement is made that transit or host States must be notified of the journey of representatives (although normally such States are notified, if only by the presentation to the appropriate authorities of a passport or other means of

⁹² For examples of such provisions see article XI, section 24 (c), FAO Headquarters Agreement, article XVIII, section 48 (c), IAEA Headquarters Agreement, article III, sections 17 and 18, ICAO Headquarters Agreement.

⁹³ The interpretation of this phrase in conjunction with the preceding words "while exercising their functions and" is considered in *Summary of practice relating to the status, privileges and immunities of the representatives of Member States to the United Nations*, section 9, paras. 87 and 88 above.

identification by the representative himself), or that the consent of such States must be obtained as a condition for the grant of the privileges and immunities in individual cases. Where, therefore, States have adhered to the Specialized Agencies Convention or have accepted provisions worded in similar language, whether in bilateral agreements with an agency or by other means, the privileges and immunities concerned are assumed to commence at the moment the representative leaves his home State or his regular post, if stationed outside his home country.

22. As regards the duration of some of the most essential privileges, section 14 of the Specialized Agencies Convention provides as follows:

In order to secure for the representatives of members of the specialized agencies at meetings convened by them complete freedom of speech and complete 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 engaged in the discharge of such duties.

The provision has also been accepted in the majority of pertinent bilateral instruments relating to specialized agencies.

23. By contrast with the position as regards privileges and immunities under the Specialized Agencies Convention or under agreements cast in similar terms, where privileges and immunities analogous to those accorded to diplomats are concerned (chiefly in the case of permanent representatives), it would appear that the grant of such privileges and immunities has in most cases been made dependent upon notification to the host State. This summary of general practice must, however, be regarded in the light of the provisions of particular treaties and of national practice in respect of diplomatic representatives.

(i) FAO

As resident representatives are usually members of diplomatic missions in Rome the time during which they are covered by privileges and immunities is determined by the practice observed in the matter by the Italian Government. Other representatives are provided the same protection as in the Specialized Agencies Convention in article XII, section 25, of the FAO Headquarters Agreement.

(ii) IAEA

Governors and permanent representatives enjoy diplomatic privileges and immunities under article XIII of the Headquarters Agreement; as such their privileges and immunities commence upon notification by IAEA of their arrival to the host State. Under article XIV, section 33, of the Headquarters Agreement and article V, sections 12 and 13, of the IAEA Agreement on Privileges and Immunities, other representatives are granted privileges and immunities under the same temporal conditions as in the Specialized Agencies Convention.

(iii) ICAO

Section 15 of the Headquarters Agreement provides expressly that no representative shall be entitled to the privileges and immunities listed in section 12 (which correspond largely to those set out in section 13 of the

Specialized Agencies Convention) "unless and until" his name and status have been duly notified to the Secretary of State for External Affairs of the host country. In practice, the usual entry courtesies and facilities are accorded to arriving representatives before formal notification has been made.

As regards the duration of privileges and immunities, section 12 (a) of the Headquarters Agreement provides that immunity from legal process in respect of official acts shall continue even after the person concerned has ceased to be a representative.

(iv) *ILO*⁹⁴

The decision of 31 March 1948 of the Swiss Federal Council, according to which permanent representatives enjoy diplomatic status, applies if the sending State informs the Swiss authority, the Federal Political Department, of the appointment and if that authority recognizes the newly appointed official.⁹⁵

As regards delegates, there appears to be no requirement of notification to or acceptance by the host State. Only persons who have been formally designated as delegates by notification to the organization enjoy immunities as such, but there is no evidence in ILO practice to suggest that the privileges and immunities concerned run only from the date of receipt of the notification, as opposed to the date when the journey to the meeting began.

(v) *IMCO*

No specific procedures have been prescribed in implementation of the relevant provisions of the Specialized Agencies Convention, which are presumed by IMCO to be of automatic application.

(vi) *UNESCO*

In accordance with article 18 of the Headquarters Agreement the matter is regulated in respect of all representatives by the practice observed by the host State with respect to diplomatic representatives accredited to it. However, when a permanent representative submits his letter of credence to the Director-General it is the organization which requests the host State to provide him with a diplomatic card; this request constitutes an implicit notification to the host State. In a very small number of cases this request is made by the embassy of the State concerned, without the intervention of the organization.

Section 10. Restrictions placed by the host State on the privileges and immunities of representatives on the ground of reciprocity

24. There appears to be no case known to a specialized agency where the privileges and immunities granted to non-permanent representatives by the host State have been restricted on the grounds that corresponding privileges and immunities were denied or restricted to repre-

sentatives of the host State stationed in the sending State.⁹⁶ Such instances have been infrequent in the case of permanent representatives, but have nonetheless occurred, chiefly under treaty provisions whereby privileges and immunities were granted to such representatives on the same terms as the State concerned granted to diplomats accredited to it. Thus in the case of FAO, while no instances of the type described above have actually occurred, there might be some scope for considerations of reciprocity on the basis of article XI, section 24 (a) of the Headquarters Agreement, which provides that resident representatives of Member States and members of their missions shall . . . be entitled within the Italian Republic to the same privileges and immunities, subject to corresponding conditions and obligations, as the Government accords to diplomatic envoys and members of their missions of comparable rank accredited to it.

Although the provisions of the IAEA Headquarters Agreement are less explicit, the host State has applied the principle of reciprocity to certain missions to IAEA. Thus it has refused in such cases to refund payments of gasoline tax or to permit the resale of cars without payment of customs duties after the customary period of two years; in addition, visas have been issued for less than the usual one year period. The IAEA has disputed the contention of the host Government that it was entitled under the Headquarters Agreement to impose these restrictions on mission personnel accredited to IAEA, as well as on diplomatic missions accredited to the Government, since similar restrictions were imposed on the representatives of the host State stationed in the particular countries concerned.

25. A similar plea was accepted by the French Government in a case which arose in UNESCO. Although under the UNESCO Headquarters Agreement the enjoyment of privileges and immunities of representatives is not made subject to reciprocity, in one instance the French authorities declined to grant exemption from radio tax to a particular representative on the ground that diplomats were not granted a similar exemption in the sending State. Exemption was obtained nevertheless following a request from the organization drawing attention to its special legal status and the inapplicability in regard to representatives to it of a condition of reciprocity. It was argued that the pertinent provision (article 18) of the Headquarters Agreement granting representatives privileges and immunities equal to those accorded to diplomats of equivalent rank was to be construed in a most favourable sense, such that if a benefit was granted to any diplomat of the same rank, the same benefit should be granted to all corresponding representatives to UNESCO. This interpretation was apparently accepted by the French authorities in agreeing to grant the exemption.

26. Under the decision of the Swiss Federal Council of 31 March 1948, permanent missions in Switzerland are granted privileges and immunities analogous to those accorded to diplomatic missions in Berne. Since the latter are based on reciprocity, some variation has existed in

⁹⁴ Similar arrangements apply in the case of representatives to ITU, UPU, WHO and WMO respectively.

⁹⁵ Decision of the Swiss Federal Tribunal in the case of *B. v. M.*, *Arrêts du Tribunal fédéral suisse*, 85, 1959 II, p. 153. See *Summary of practice relating to the status, privileges and immunities of the representatives of Member States to the United Nations*, section 9, para. 89, above.

⁹⁶ See, however, the Order in Council of the Province of Quebec No. 172 of 26 January 1965, referred to in paragraph 27, below.

the privileges and immunities enjoyed by different permanent missions, although the extent of variation is believed to be decreasing.

27. Lastly it may be noted that in Order in Council No. 172 of 26 January 1965, of the Province of Quebec, exemption of representatives to ICAO from legislation in respect of provincial income tax, succession duties, gasoline tax, retail sales tax and car registration fees is given.

under condition that the country represented by such officials grants such privileges to representatives of the Province in such country.

CHAPTER III. — IMMUNITY IN RELATION TO THE LEGISLATIVE, JURISDICTIONAL AND OTHER ACTS OF THE HOST STATE

Section 11. Personal inviolability and immunity from arrest

28. Article V, section 13 (a), of the Specialized Agencies Convention provides that the representatives of member States shall enjoy:

“Immunity from personal arrest or detention and from seizure of their personal baggage . . .

This provision, which is also contained in the relevant headquarters agreements⁹⁷ has been generally respected. From the information supplied by the specialized agencies it appears that very few cases of the arrest of representatives have occurred⁹⁸ and that the personal inviolability of representatives has been well respected.

29. Protection to ensure personal inviolability has been made the subject of national legislation in a number of countries, usually in conjunction with provisions providing protection for diplomatic representatives to the country concerned. The Swiss Criminal Code deals with the matter specifically in article 296, which states that “a person who has publicly insulted an official representative of a foreign State to an international organization shall be punished by prison or fine.”

30. No specialized agency reported having any knowledge of restrictions having been placed on the movements of representatives.

Section 12. Immunity from legal process and waiver of immunity

31. Article V, section 13 (a), of the Specialized Agencies Convention provides that the representatives of member States enjoy “immunity from legal process of every kind” in respect of “words spoken or written and all acts done by them in their official capacity”. No instance appears to have arisen in which this immunity from legal process has not been accorded to a representative to a specialized agency. Where representatives have been granted diplomatic privileges and immunities, the immunity from process is wider in that it extends to private acts.

⁹⁷ See e.g. article XI and article XII, section 25 (a), FAO Headquarters Agreement; article XIII and article XIV, section 33 (a), IAEA Headquarters Agreement; and article III, section 12 (a), ICAO Headquarters Agreement.

⁹⁸ For one case, the arrest of a representative following a traffic accident, see section 19, para. 48, below.

The exact extent of the immunity so afforded varies from country to country; in some countries, for example, immunity from legal process does not extend to the case where diplomats are caught “*en flagrant délit*”. Limitations of this kind are, of course, inapplicable where the immunity from legal process is confined to official acts.

32. As regards the waiver of immunity, the basic principle is that contained in section 16 of the Specialized Agencies Convention, which states that:

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

33. Apart from this provision, which is repeated in a number of agreements entered into by the specialized agencies, no restriction exists on the exercise by a member State of its discretion whether or not to waive immunity. The specialized agencies reported that no case had arisen in which a member State had waived immunity from legal process in respect of an official act of a representative.⁹⁹ To the best of their knowledge, no representative had even been summoned before a court as a witness.

34. It may be noted that paragraph 1 of the ILO Annex to the Specialized Agencies Convention provides that immunity in respect of employers’ and workers’ members of the Governing Body may be waived only by the Governing Body. A similar arrangement is provided for in the case of the WHO Executive Board, under paragraph 1 of Annex VII to the Convention.

Section 13. Abuse of privileges and the departure of representatives at the request of the host State

35. Article VII of the Specialized Agencies Convention provides as follows:

Abuses of privilege

Section 24

If any State party to this Convention considers that there has been an abuse of a privilege or immunity conferred by this Convention, consultations shall be held between that State and the specialized agency concerned to determine whether any such abuse has occurred and, if so, to attempt to ensure that no repetition occurs. If such consultations fail to achieve a result satisfactory to the State and the specialized agency concerned, the question whether an abuse of a privilege or immunity has occurred shall be submitted to the International Court of Justice in accordance with section 32. If the International Court of Justice finds that such an abuse has occurred, the State party to this Convention affected by such abuse shall have the right, after notification to the specialized agency in question, to withhold from the specialized agency concerned the benefits of the privilege or immunity so abused.

Section 25

1. Representatives of members at meetings convened by specialized agencies while exercising their functions and during their

⁹⁹ See however, the case of an ICAO representative who pleaded guilty to a traffic offence, section 19, para. 48, below.

journeys to and from the place of meeting, and officials within the meaning of section 18, shall not be required by the territorial authorities to leave the country in which they are performing their functions on account of any activities by them in their official capacity. In the case, however, of abuse of privileges of residence committed by any such person in activities in that country outside his official functions, he may be required to leave by the Government of that country provided that:

2. (I) Representatives of members, or persons who are entitled to diplomatic immunity under section 21, shall not be required to leave the country otherwise than in accordance with the diplomatic procedure applicable to diplomatic envoys accredited to that country.

(II) In the case of an official to whom section 21 is not applicable, no order to leave the country shall be issued other than with the approval of the Foreign Minister of the country in question, and such approval shall be given only after consultation with the executive head of the specialized agency concerned; and, if expulsion proceedings are taken against an official, the executive head of the specialized agency shall have the right to appear in such proceedings on behalf of the person against whom they are instituted.

36. No corresponding provision is contained in the General Convention. In the absence of any cases in which article VII of the Specialized Agencies Convention, or any similar provision in a headquarters agreement, has been applied, no practice has been developed regarding its interpretation.

Section 14. Immigration restrictions, alien registration and national service obligations

37. The immunity provided in section 13 (d) of the Specialized Agencies Convention in respect of immigration restrictions, alien registration and national service obligations, has been widely acknowledged. In a few cases where difficulties have arisen over the granting of entry visas (e.g. because of administrative delays or late applications), the agency concerned has intervened upon request in order to obtain speedy action; the host authorities have then usually taken steps to hasten the procedure. Immunity from national service obligations does not normally apply when the representative is a national of the host State.

Section 15. Currency or exchange restrictions

38. In accordance with section 13 (e) of the Specialized Agencies Convention, representatives have enjoyed

the same facilities in respect of currency or exchange restrictions as are accorded to representatives of foreign Governments on temporary official missions.

39. The majority of specialized agencies stated that they were unaware of any currency or exchange restrictions which were imposed on representatives, whether permanent or temporary. IAEA indicated that, away from the host State, where no restrictions were imposed, representatives were expected to conform to any restrictions which were in force. However, some host States had issued special tourist visas to representatives to IAEA meetings, entitling them to a rate of exchange which was more favourable than that granted to diplomatic personnel.

Section 16. Personal baggage and effects

40. Under section 13 (a) of the Specialized Agencies Convention representatives are granted immunity from seizure of their personal baggage; in addition, under section 13 (f) they are accorded

the same immunities and facilities in respect of their personal baggage as are accorded to members of comparable rank of diplomatic missions.

No special problems appear to have arisen in this connexion. Most agencies reported that either no inspection was made of the personal baggage and effects of representatives or that inspection was reduced to a minimum. Where representatives were granted diplomatic privileges and immunities, the position varied somewhat according to the rank of the representative. UNESCO stated that, in the case of permanent representatives assimilated to heads of diplomatic missions, no control was exercised by the host State either upon the arrival or upon the departure of the property. Members of permanent missions of lower ranks were subject to controls, but for the most part the customs authorities accepted an inventory of household goods without carrying out an inspection and also exempted personal baggage. IAEA declared that, although there was no inspection of household goods upon arrival, these might be examined upon departure with respect to works of art bought in the host State.

Section 17. Customs and excise duties

41. Whilst in general representatives enjoy immunity from Customs and excise duties, the detailed application of this immunity in practice varies from country to country according to the extent of the immunity granted (e.g. whether or not it is analogous to that accorded to diplomats) and the system of taxation followed by the country in question.

42. The position in respect of representatives of specialized agencies having their headquarters in Switzerland is identical with that of representatives to the Geneva Office.¹⁰⁰ It may be noted, however, that at the request of the ILO the President of the General Conference and the Chairman of the Governing Body enjoy, during meetings of the organs in question, the same privileges in respect to customs and excise procedure as the heads of permanent missions, except that they may not import household effects and cars. In the case of FAO, the extent of the exemption of resident representatives depends on diplomatic status and is granted in accordance with the general rules relating to diplomatic envoys. Where the resident representative is not included in a diplomatic mission accredited to the Italian Government, customs free imports are limited, especially as regards cars, petrol and tobacco. 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

¹⁰⁰ See *Summary of practice relating to the status, privileges and immunities of the representatives of Member States to the United Nations*, section 17, paras. 136 and 137, above.

and effects free of duty at the time of taking up their appointment and may also import a car free of duty under a customs certificate without deposit.

43. In the case of ICAO the basic provisions are set out in section 12 of the Headquarters Agreement as follows:

(g) The privilege of admission of articles for their personal or family use free of duty and taxes at all times, provided that any article which was exempted from duty and taxes shall be subject thereto at the existing rates if sold or otherwise disposed of in Canada within a period of one year in the case of articles other than motor vehicles, and two years in the case of motor vehicles, from the date of acquisition and the vendor shall be liable for such duties and taxes;

(h) The privilege of exemption from excise duty imposed under the Excise Act on domestic spirits and tobacco purchased from licensed manufacturers in Canada;

(i) The privilege of exemption from excise and/or sales tax on domestic spirits, wine and tobacco products when purchased direct from licensed manufacturers for the personal use of the applicant, and on automobiles, ale, beer and stout when purchased under appropriate certificate from licensed manufacturers, provided that any article which was exempted from these taxes shall be subject thereto at the existing rates if sold or otherwise disposed of within a period of one year from the date of purchase and the vendor shall be liable for such tax.

Section 18. Taxation

44. The immunity of representatives from taxation is dealt with indirectly in the Specialized Agencies Convention, section 15 of which provides that:

Where the incidence of any form of taxation depends upon residence, periods during which the representatives of members of the specialized agencies at meetings convened by them are present in a member State for the discharge of their duties shall not be considered as periods of residence.

45. Except in the case of nationals of the host State, representatives enjoy extensive immunity from taxation. In ICAO¹⁰¹ and UNESCO all representatives, and in FAO and IAEA resident representatives, are granted the same exemptions in respect of taxation as diplomats of the same rank accredited to the host State in question. 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 (sweeping, sanitation, etc.) 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 for any secondary residence.

¹⁰¹ In section 12 (j) of the ICAO Headquarters Agreement representatives are granted the same exemption from federal income tax as the Government of Canada grants to diplomatic envoys. Section 18 of the Agreement provides that the Government shall not levy death taxes or succession duties on or in respect of property acquired in Canada for the purposes of residence. The Québec Order in Council, No. 172 of 26 January 1965, grants exemption in respect of income tax levied by the Province, succession duties, gasoline tax, retail sales tax and car registration fees.

46. Representatives are generally exempt from payment of social security contributions. Permanent missions to IAEA are exempt from paying employers' social security contributions by virtue of articles XII and XIII of the Headquarters Agreement; it is understood that in practice the employers' contribution has been paid by permanent missions on a voluntary basis.

Section 19. Diplomatic licence plates, parking offences and traffic regulations

47. The authorities of the various host countries issue special diplomatic licence plates to representatives and to permanent missions for cars used either by representatives themselves or by missions. These plates are intended to enable the police and other authorities to identify the cars of persons entitled to immunity from jurisdiction.

48. Representatives are usually not fined for parking offences or traffic violations but are merely informed of the offence by the local authorities; in serious or repeated cases a specialized agency may also be informed. After accidents have occurred administrative measures are sometimes taken in Switzerland (e.g., withdrawal of the driving licence). In one instance involving a representative to ICAO it was alleged that he had left the scene of an accident after causing damage to another car. He was arrested by the local police some distance from the place of the accident. An ICAO official contacted the police and pointed out that the arrest was illegal. The police refused to free the representative and said that they would have to consult their legal adviser on the matter. Shortly afterwards a local court released the representative pending a hearing. Meanwhile, the lawyer engaged by the representative obtained release of the representative's car which had been impounded. On his second appearance in court, the representative pleaded guilty and was sentenced.

CHAPTER IV. — IMMUNITY OF PREMISES

Section 20. Diplomatic status and location of premises

49. The diplomatic status of premises used by representatives has been generally recognized. No restrictions appear to have been imposed by any host State on the location of such premises.

50. UNESCO reported that thirty-five permanent missions occupied offices in the UNESCO building itself and thirty-six had offices elsewhere, either in the embassy of the member State in question or at the residence of the permanent representative. Representatives on the ICAO Council appear to be the only other representatives whose offices are located in the premises of the organization to which they are accredited.

Section 21. Inviolability of mission premises and of private residences

51. Recognition has been given by host States to the inviolability of the premises of permanent missions and, at least by implication, to the private residences of representatives. Few cases appear to have arisen regarding

the latter point; the 1946 Agreement between Switzerland and the International Labour Organisation and the 1948 Agreement between Switzerland and the World Health Organization both specify, however, in article 15 (a) the inviolability of the place of residence of representatives.

52. So far as the specialized agencies are aware, adequate protection has been provided by the authorities of host States to mission premises and private residences as regards disturbances caused by private citizens.

53. In 1966 a number of legal issues with respect to the inviolability of premises were raised in an incident which occurred regarding the premises of the Permanent Mission of the Republic of China to UNESCO. The facts are summarized below.¹⁰² In a communication to the Director-General of UNESCO dated 13 March 1966, the Permanent Representative of the Republic of China stated that, following a request to vacate the premises made to him on 11 March by two French officials, on 12 March a party of French policemen, together with the two officials, entered the residential quarters and offices of the Representative and ordered him and his staff, together with the members of their families who were living there, to leave the premises concerned. Upon refusal, the Representative and his staff were physically removed. Members of the Mission were not allowed to communicate with the Director-General or with anyone outside the buildings except personnel of the French Ministry of Foreign Affairs. The archives, documents, furniture and personal effects remaining in the buildings were placed under seal by the French authorities. The Permanent Representative protested to the Director-General, who informed the Ministry of Foreign Affairs on 14 March that, in the light of the information supplied, it appeared to him that the measures taken by the French authorities constituted a breach of the inviolability of premises of the Mission and of the domicile of some of its members; the measures also appeared to contravene the immunities enjoyed by members of the Mission and guarantees attaching to the Mission's status with respect to the protection of its archives and documents and its freedom of communication. The Director-General formally protested against the action which, in the light of the information available to him, he considered to be incompatible with article 18 of the Headquarters Agreement. While reserving the organization's position with regard to other measures, the Director-General requested the Minister to take the necessary steps to ensure that the Mission might as soon as possible be able to discharge its duties in a normal fashion and, for that purpose, to benefit once again from the facilities, privileges and immunities attaching to its status. He added that the restitution to the Mission of its archives and documents and of the personal belongings of its members was a matter of particular urgency.

54. In a cable dated 16 March the Minister of Foreign Affairs of the Republic of China requested the Director-General to pursue the matter further and to make strong representations to the French Government so as to

enable the Mission to exercise its functions and to enjoy the status accorded to it under the Headquarters Agreement, as it had done before 12 March.

55. In communications dated 18 March and 18 April 1966, the Permanent Representative of France declared that the buildings in question were the property of the Chinese State, "which the Embassy of the People's Republic of China is alone entitled to represent in France". The members of the Permanent Mission of the Republic of China to UNESCO had been "unable to produce any legal instrument to justify their occupation; hence they could not be considered as other than occupants without title of premises which did not therefore enjoy any immunity either under the 1954 Headquarters Agreement or under any other treaty obligation or rule of customary international law". It was also stated that "the recognition by France of the Government of the People's Republic of China brought into being an international obligation for the French Government, which could not thereafter tolerate the totally unwarranted occupation of buildings belonging to the Chinese State, against the will of that State, which is the legitimate owner. The French Government cannot be open to criticism for having put an end to this situation". The Permanent Representative of France declared that several attempts had previously been made to persuade the Mission to leave but without success. He denied that members of the Mission had been prevented on 12 March from communicating with persons outside the buildings. Alternative facilities had been offered to the Mission both previously and on 12 March, but had been refused; members had been informed that they might return to collect their property at any time. Lastly, the French Representative reaffirmed the intention of his Government to respect fully the terms of the Headquarters Agreement.

56. In a note to the French Minister of Foreign Affairs, dated 1 April, the Director-General noted with satisfaction that the French Government understood his anxiety to secure for the Mission guarantees concerning, in particular, the protection and free disposal of its archives and the personal belongings of its members, and expressed the hope that "the contacts which have now been established will make it possible in the near future to arrive at a satisfactory solution to this problem". As regards the statement of the French Permanent Representative that the Mission occupied the premises in question without title, and could not therefore enjoy any immunity with respect to them, he declared that he could not accept this conclusion. Whilst as he had previously stated, he could not take sides in a dispute concerning the ownership of the premises, he considered that, under article 18 of the Headquarters Agreement, the Head of the Mission of the Republic of China to UNESCO enjoyed the status of the head of a foreign diplomatic mission, and that the premises he occupied as offices or as residence were therefore inviolable. This opinion was in conformity with diplomatic tradition and international practice, codified in article 22 of the Vienna Convention on Diplomatic Relations, which did not make the inviolability of premises dependent on the recognition by the receiving State of a title of ownership.

¹⁰² See UNESCO Executive Board, 72nd Session, Doc. 72 EX/11 and 72/EX/11 Add., dated 13 and 20 April 1966.

57. The communications exchanged were placed by the Director-General before the UNESCO Executive Board, with a request for its judgement as to the way in which the provisions of the Headquarters Agreement were to be interpreted with respect to the measures taken on 12 March by the French authorities against the Mission of the Republic of China. The Executive Board adopted a resolution on 13 May 1966 by 12 votes to 1, with 9 abstentions, at the fifteenth meeting of its 72nd session, in which, having noted the points of view expressed in the documents placed before it, it noted "with appreciation" the attitude adopted by the Director-General "in his concern to assure the full respect of the provisions of the Headquarters Agreement" and expressed its confidence that he would safeguard the Agreement in all circumstances.¹⁰³

Section 22. National flag

58. In a number of cases the national flag of the member State is flown from the office of its mission and to a lesser extent, on the car used by the head of the mission. National flags are not flown from the offices in the UNESCO building used by permanent missions. IAEA states that resident representatives are not known to have flown a national flag from their offices unless they were at the same time accredited to the host State. On the other hand permanent representatives to UNESCO who are assimilated to head of diplomatic mission normally fly the national flag on their car when travelling on official business. In general, however, it would appear that the fact that many representatives are members of diplomatic missions and that many premises are also used for other purposes (e.g. as an embassy or consulate) has prevented any clear or uniform practice from emerging.

CHAPTER V. — FREEDOM OF COMMUNICATION AND RIGHT OF TRANSIT AND OF ACCESS TO MEETINGS

Section 23. Freedom of communication and inviolability of correspondence, archives and documents

59. Missions and representatives enjoy freedom of communication on the same terms as those enjoyed by missions and representatives accredited to the host State or, in the case where representatives are present only for the purposes of a conference or meeting, on the same terms as are afforded to diplomatic representatives attending a conference convened by the host State. There appears to be no difference in this respect between communications sent by representatives to their Government and to its missions elsewhere, and to the specialized agency concerned.

60. The inviolability of all papers and documents, referred to in section 13 (b) of the Specialized Agencies Convention, has been fully recognized.¹⁰⁴

¹⁰³ UNESCO Executive Board, 72nd Session, 2-31 May 1966, Doc. 72 EX/SR 1-36, pp. 126 and 127 and item 9.1, *Resolutions and Decisions adopted by the Executive Board at its 72nd Session*.

¹⁰⁴ See, however, the case referred to in section 21, paras. 53-57, above.

Section 24. Use of codes, diplomatic bag and courier

61. The right to use codes, a diplomatic bag and courier, as envisaged in section 13 (c) of the Specialized Agencies Convention, has been generally recognized in practice. Such a right has not been permitted, however, either in law or in fact, in the case of representatives to UNESCO. A request from a permanent delegation, headed by an ambassador, to correspond with his Government by diplomatic bag was refused by the Ministry of Foreign Affairs of the host State. The UNESCO Headquarters Agreement contains no provision dealing expressly with the matter. The Customs Regulation adopted by the Swiss Federal Council on 23 April 1952 contains a chapter setting forth the details of the use of sealed diplomatic bags by missions in Switzerland.¹⁰⁵

Section 25. Right of transit and of access to meetings

62. The right of transit to the place of meeting has been generally recognized in practice. Whilst specialized agencies do not normally assist representatives in making transit arrangements, they have occasionally helped representatives to obtain transit and entry visas by informing the authorities concerned that the visas are required to enable representatives to attend conferences or meetings called by the agency.

63. When a country in which a conference or meeting was to be held indicated that it would refuse to allow the representatives of a certain member State or States to enter (e.g. by refusing to issue an entry visa) the specialized agency concerned arranged for the meeting to be convened elsewhere, so as to enable all eligible Member States to be represented.

CHAPTER VI. — OBSERVERS OF NON-MEMBER STATES

Section 26. Permanent observers

64. Few permanent observers of non-member States appear to have been appointed to specialized agencies. The only cases reported were the Permanent Observer of the Holy See at FAO, the appointment in 1959 by the Republic of San Marino of an observer to the ILO, and some instances at UNESCO. The appointment of temporary observers by non-member States to attend meetings or conferences held by specialized agencies, on the other hand, is widespread. A number of specialized agencies have made provision for this practice vis-à-vis the organization in the pertinent rules of procedure, usually those of the General Conference.¹⁰⁶

¹⁰⁵ See *Summary of practice relating to the status, privileges and immunities of the representatives of Member States to the United Nations*, section 24, para. 161, above.

¹⁰⁶ e.g. FAO Statement of Principles relating to the Granting of Observer Status to Nations (FAO Basic Texts, vol. II, pp. 3-7); rule 30 of the permanent rules of procedure for the IAEA General Conference; article 2, paragraph 3 (e) of the Standing Orders of the International Labour Conference; and article 1, paragraph 7, of the Rules concerning the Powers, Functions and Procedure of ILO Regional Conferences.

Section 27. Facilities afforded by the specialized agencies to observers

65. In general specialized agencies accord observers of non-member States broadly the same practical facilities as are extended to representatives, e.g. by way of documentation, entry to public meetings etc.; they do so, however, as a matter of grace and not of obligation. Oral statements by observers to meetings or conferences may usually be made only upon invitation. The circulation of communications from observers of non-member States is a matter of discretion.

Section 28. Grant of privileges and immunities to observers

66. As a matter of practice observers sent by non-member States to attend conferences and meetings held by specialized agencies have usually been accorded the same privileges and immunities by the host State as the representatives of member States. Where such non-member States have been invited by an organ of a specialized agency so as to make the attendance of their observers a matter of official business, the grant of functional privileges and immunities by the host State has been obligatory in some cases under the terms of the pertinent international agreements.¹⁰⁷ In other instances, however, although privileges and immunities have usually been granted, this has been as a matter of courtesy within the discretion of the host State and the specialized agency has not intervened.

ANNEX. — SUMMARY OF THE POSITION OF THE REPRESENTATIVES OF MEMBER STATES IN RELATION TO THE IBRD, IFC AND IDA, AND THE IMF

67. The particular organizational structure of the above-mentioned specialized agencies and the sources from which their privileges and immunities are derived rendered it difficult to attempt to classify their practice in conjunction with that of the other specialized agencies. The following summary of the position, supplied by the secretariats of the IBRD, IFC and IDA, and the IMF, is therefore given separately below. In so far as the application of the United Nations Headquarters Agreement and United States legislation is referred to, practice in this respect corresponds largely to that followed in the case of representatives to the United Nations and which has been dealt with elsewhere in this study.¹⁰⁸

¹⁰⁷ Thus under Article 14 of the 1946 Agreement between Switzerland and the ILO freedom of access and sojourn is guaranteed for all persons having official business with the organization; this provision has been considered to extend to observers of non-member States invited to attend ILO meetings. Article XI, section 27 (a) of the IAEA Headquarters Agreement stipulates that, with respect *inter alia* to the representatives of non-member States who are sent as observers to meetings convened by the IAEA in accordance with rules adopted by IAEA, the host State shall take all necessary measures to facilitate their entry into and sojourn in Austria, place no impediment to their departure or to their transit to IAEA headquarters and afford them necessary protection in transit.

¹⁰⁸ See relevant sections of *Summary of practice relating to the status, privileges and immunities of the representatives of Member States to the United Nations*.

The concluding portion of the summary relating to IMF describes the practice of both IBRD and IMF regarding annual meetings and the customs and similar facilities granted to directors of those organizations.

(A) *IBRD, IFC and IDA*

I. *Organizational structure of IBRD, IFC and IDA*

68. The organizational structure of IBRD, IFC and IDA consists of:

(a) A Board of Governors composed of one Governor and one Alternate Governor appointed by each member State. Governors and Alternate Governors appointed by members of IBRD are *ex officio* Governors and Alternate Governors of the respective Boards of IFC and IDA to the extent that the member appointing them is also a member of either one or both of these organizations;

(b) Executive Directors (called in Articles of Agreement of IFC Board of Directors) composed of twenty members for IBRD and IDA and of nineteen members for IFC, five of whom are appointed by the members having the largest capital subscriptions and the remainder elected by groups of other member States. Each Executive Director appoints an Alternate. Executive Directors and their Alternates in IBRD are *ex officio* Executive Directors and Alternate Executive Directors of IFC and IDA to the extent that the member appointing them or a member electing them is also a member of either one or both of these organizations;

(c) An international staff headed by the President, who is selected by the Executive Directors.

69. The question of the extent to which Governors, Executive Directors, and their respective Alternates, may be regarded as the representatives of member States, is to be determined in the light of the factors set out below.

(a) *Governors.* Governors and Alternate Governors are subject to the pleasure of the member State appointing them, are appointed for five years and serve without compensation (other than expenses) from the organization to which they are appointed. Most members appoint as Governors and Alternate Governors their Ministers of Finance, the Heads of their Central Banks or persons holding comparable positions. Since these officials have full time responsibilities in their home countries, the Articles of Agreement have provided that the Board of Governors shall hold annual and such other meetings as may be provided by the Board or called by the Executive Directors. No such special meeting has in fact been called and meetings of the Governors have so far been limited to annual meetings, lasting approximately one week each. Under present arrangements, annual meetings are generally held in each of two succeeding years in Washington, D.C., where the principal offices of the organizations are located, and every third year in a member country other than the United States.

70. Under the circumstances, it would seem that Governors may be characterized as "representatives" of their Governments, though clearly problems arising in

connexion with the status, privileges or immunities of "permanent representatives" do not concern them.

(b) *Executive Directors.* Executive Directors are appointed or elected every two years. They function in continuous session at the principal offices of the organizations and meet as often as the business of each organization may require. Their current practice is to hold a regular meeting once a month, with frequent special meetings to handle specific items of business as they arise. It has not been necessary for the discharge of these responsibilities that all Executive Directors and Alternates serve on a full-time basis, although some do. In addition, some Executive Directors serve full-time and their Alternates part-time, while some Alternates serve full-time with the Executive Directors serving part-time. Those who sit as, or for, Executive Directors are entitled to cast the votes of the country or countries appointing or electing them.

71. While having been appointed or elected, as the case may be, by member Governments, the Executive Directors and their Alternates serve in each organization and receive salaries and other emoluments from one or more of the organizations. Executive Directors and their Alternates usually report to the Governments which have appointed or elected them. Some Directors may also perform outside duties, e.g. in other organizations, national embassies and elsewhere. It is therefore considered that, at least for present purposes, the variety of posts held by Executive Directors from time to time and the different ways in which individual Directors perform their duties make it inappropriate to treat them as being exclusively "representatives" or the opposite.

II. Sources of privileges and immunities

1. The Articles of Agreement

72. The Articles of Agreement of the three organizations contain substantially the same provisions regarding the privileges and immunities of Governors and Executive Directors. The relevant Articles of Agreement of IBRD are as follows:

Article VII

Section 1. Purposes of Article

To enable the Bank to fulfil the functions with which it is entrusted, the status, immunities and privileges set forth in this article shall be accorded to the Bank in the territories of each member.

Section 8. Immunities and privileges of officers and employees

All governors, executive directors, alternates, officers and employees of the Bank

(i) Shall be immune from legal process with respect to acts performed by them in their official capacity except when the Bank waives this immunity;

(ii) Not being local nationals, shall be accorded the same immunities from immigration restrictions, alien registration requirements and national service obligations and the same facilities as regards exchange restrictions as are accorded by members to the representatives, officials, and employees of comparable rank of other members;

(iii) Shall be granted the same treatment in respect of travelling facilities as is accorded by members to representatives, officials and employees of comparable rank of other members.

Section 9. Immunities from taxation

(b) No tax shall be levied on or in respect of salaries and emoluments paid by the Bank to executive directors, alternates, officials or employees of the Bank who are not local citizens, local subjects, or other local nationals.

Section 10. Application of Article

Each member shall take such action as is necessary in its own territories for the purpose of making effective in terms of its own law the principles set forth in this Article and shall inform the Bank of the detailed action which it has taken.

Article VI of IFC's Articles of Agreement differs from the corresponding articles of the other two organizations in one respect. Article VI, section 11 of IFC's Articles of Agreement provides expressly that IFC may, at its discretion, waive any of the privileges and immunities conferred under that article. In view of this provision, article VI, section 8 (i) of the IFC's Articles of Agreement omits the specific reference to waiver of the immunity from legal process contained in article VII, section 8 (i) of IBRD's articles and in article VIII, section 8 (i) of IDA's articles.

2. The Specialized Agencies Convention

73. A number of member States have adhered to the Convention in respect of IBRD, IFC and IDA. Pursuant to article VI, section 18, of the Convention, IBRD, IFC and IDA periodically notify the Secretary-General of the United Nations and the Governments of all countries which have acceded to the Convention in respect of each Organization, the categories of officials, to which the provisions of articles VI and VIII of the Convention shall apply. Each such list contains the names of all Executive Directors, Alternate Executive Directors and all officials of each organization.

3. United Nations Headquarters Agreement

74. The provisions of article V, section 15 (3) and (4)¹⁰⁹ of the Agreement have been occasionally applied to Executive Directors. For example, an appointed Executive Director of IBRD was accorded diplomatic privileges pursuant to his Government's designation of him under section 15 (3) as its principal resident represen-

¹⁰⁹ Article V, section 15

"(3) every person designated by a member of a specialized agency, as defined in Article 57, paragraph 2 of the Charter, as its principal permanent representative, with the rank of ambassador or minister plenipotentiary at the headquarters of such agency in the United States, and

"(4) such other principal resident representatives of members of a specialized agency and such resident members of the staffs of representatives of a specialized agency as may be agreed upon between the principal executive officer of the specialized agency, the Government of the United States and the Government of the Member concerned, "shall, whether residing inside or outside the headquarters district, be entitled in the territory of the United States to the same privileges and immunities, subject to corresponding conditions and obligations, as it accords to diplomatic envoys accredited to it. In the case of Members whose Governments are not recognized by the United States, such privileges and immunities need be extended to such representatives, or persons on the staffs of such representatives, only within the headquarters district, at their residences and offices outside the district, in transit between the district and such residences and offices, and in transit on official business to or from foreign countries."

tative with the rank of ambassador. Although IBRD acted as a channel of communications in this arrangement, there was no occasion for IBRD to acquiesce or object since the arrangement was a matter between the appointing government and the United States Government under an agreement to which IBRD was not a party.

75. On another occasion, IBRD was requested to communicate to the United States Government a request by a member Government that the Executive Director representing it be given the privileges and immunities granted to representatives under section 15 (4). IBRD complied with this request, stating that if the United States Government decided to accede to the request, IBRD would have no objection. The request was ultimately granted. Though a few cases are still under consideration by the United States Government, it is understood that, while privileges and immunities under section 15 (3) will continue to be granted, those under section 15 (4) will not be.

(B) IMF

I. Organizational structure of IMF

76. The organizational structure of IMF is prescribed by its Articles of Agreement, and may be described as follows:

(a) *Board of Governors.* All powers of IMF are vested in the Board of Governors, consisting of one Governor and one Alternate appointed by each member in such manner as it may determine. The Governors and Alternates serve as such at the pleasure of the appointing Governments and without compensation (other than expenses incurred in connexion with attendance at meetings of the Board of Governors) from IMF. While some early drafts of the Articles incorporated language that referred to representation, the Articles of Agreement as finally adopted make no reference to a representative capacity for any functionaries of IMF.

77. The Board of Governors is required by the Articles of Agreement to hold annual meetings. Under present practice these annual meetings are of approximately one week's duration and are held in each of two succeeding years in Washington, D.C., and every third year in a member country other than the United States. Special meetings of the Board of Governors also may be called but to date none has in fact been called.

(b) *Executive Directors.* Each of the five countries having the largest quotas in IMF appoints an Executive Director and the remaining fifteen Executive Directors are elected for two-year terms by the other member countries. Each Executive Director appoints an Alternate. The Executive Directors (of whom there are presently twenty) function in continuous session, meeting as often as the business of IMF may require, at IMF's headquarters in Washington, D.C. The Executive Directors, and their Alternates, report to the Governments appointing or electing them as each Executive Director and his Alternate sees fit, but at the same time they serve as officials of IMF. As such, they receive salaries and other emoluments from IMF as prescribed by it and are responsible for

the conduct of the general operations of IMF under powers delegated to them by the Board of Governors.

(c) *Managing Director and staff.* The Executive Directors select a Managing Director who may not be a Governor or Executive Director. He is the chief of the operating staff of IMF and, under the direction of the Executive Directors, conducts its ordinary business. Subject to the general control of the Executive Directors, the Managing Director is responsible for the organization, appointment and dismissal of the staff. The Managing Director and the staff, in the discharge of their functions, owe their duty entirely to IMF.

78. Questions relating to permanent representatives or member delegations to international organizations are not therefore applicable to IMF.

II. Sources of privileges and immunities

79. The following are the sources of privileges and immunities which relate expressly to IMF functionaries.

1. *The Articles of Agreement*

80. Article IX, sections 1, 8, 9 (b) and 10, of the Articles of Agreement of IMF contain the same provisions regarding privileges and immunities as are set out in the corresponding portions of the Articles of Agreement of IBRD, quoted above.

2. *The Specialized Agencies Convention*

81. A number of Member States have adhered to the Convention in respect of IMF. Pursuant to article VI, section 18, of the Convention, IMF periodically notifies the Secretary-General of the United Nations, and the Governments of all countries which have acceded to the Convention in respect of IMF, of the categories of officials to which the provisions of articles VI and VIII of the Convention shall apply. Each such list contains the names of all of IMF's Executive Directors, Alternate Executive Directors, and all officers and staff of IMF.

3. *United States Bretton Woods Agreements Act and United States International Organizations Immunities Act*

82. In accordance with article IX, section 10 of the Articles of Agreement, the privileges and immunities contained in the provisions of Article IX, sections 2 to 9 inclusive, were given full force and effect in the United States and its territories and possessions by the Bretton Woods Agreements Act, section 11.

83. The IMF was designated by the President of the United States in Executive Order 9751 of 11 July 1946, as a public international organization entitled, along with its officers and employees, to enjoy the privileges, exemptions and immunities provided for in the United States International Organizations Immunities Act.

84. Since the United States is the host country for IMF's headquarters, reference to members' domestic legislation regarding privileges and immunities to be accorded to IMF functionaries has been limited to the foregoing United States statutes.

III. Practice regarding annual meetings of IBRD and IMF and customs and similar facilities granted to IBRD and IMF Directors

(a) Annual meetings

85. When annual meetings of IBRD or IMF are held in Washington the Joint Annual Meetings secretariat notifies the United States Department of State of the arrival of Governors and Alternate Governors, giving by countries, their names, IBRD or IMF titles, their position in their home country, the date and port of arrival in the United States, with airline flight number or the name of the steamship on which they will arrive. The United States Department of State transmits this information to the United States Treasury Department which has jurisdiction over the Bureau of Customs.

86. When the annual meetings are held outside the United States, at the time preliminary arrangements are made with the host member country an assurance is obtained that the Governors, Alternate Governors, Executive Directors, Alternate Executive Directors, officers and employees of IBRD or IMF, as well as all persons in member country and observer delegations, and the spouses of the foregoing will be given such facilities as the prompt provision of visas, courtesy of the port and duty-free entry of their baggage. On one occasion abroad, when the annual meetings were held in Japan, that Government was given the same information as provided to the United States Department of State for those attending, in order to facilitate port clearance.

87. For annual meetings in Washington and abroad, for the past several years, specially designed baggage labels have been used for the accompanying baggage, and special labels for shipments when the meetings are held abroad. The United States and other host member Governments have honoured these labels and customs clearance had been expedited. In host member States enforcing exit baggage control, these labels have likewise afforded expeditious clearance. The use of these labels has met with approval of all Governments concerned.

88. In no known case has a Governor, Alternate Governor, Executive Director or Alternate Executive Director attending the annual meetings in the United States or abroad been denied any privileges and immunities to which they were entitled.

(b) Customs and similar facilities granted to IBRD and IMF Directors

89. The United States International Organizations Immunities Act is applicable to IBRD and IMF Executive Directors and Alternate Executive Directors, other than United States citizens, when they return to the United States from official travel, home leave travel, resettlement or personal vacation. Request for duty-free entry and courtesy of the port is made to the United States Department of State in these instances upon request of the traveller.

90. Household goods and personal effects of Executive Directors and Alternate Executive Directors coming to the United States on resettlement are entitled to be cleared under the International Organizations Immunities Act.

PART TWO: THE ORGANIZATIONS

A. Summary of practice relating to the status, privileges and immunities of the United Nations

CHAPTER I. — JURIDICAL PERSONALITY OF THE UNITED NATIONS

Section 1. Contractual capacity

(a) Recognition of the contractual capacity of the United Nations

1. The contractual capacity of the United Nations, which is derived from Article 104 of the Charter and granted express recognition in section 1 (a) of the General Convention, has been fully acknowledged in practice. Recognition of United Nations capacity in this sphere has been given both by State organs on which the Organization has needed to rely in connexion with the performance of its contracts and by official bodies, private firms and individuals with whom the United Nations has wished to enter into contractual relations. The United Nations has exercised its contractual capacity both through officials of the Secretariat acting on behalf of the Secretary-General, in his capacity as chief administrative officer of the Organization, and through subsidiary bodies established for particular purposes by one of the principal organs. Subsidiary organs, such as UNICEF and UNRWA, which have been entrusted by the General Assembly with a wide range of direct functions, have regularly entered into commercial contracts in their own name.

2. Such difficulties as have arisen regarding the contractual capacity of the Organization have usually followed a dispute over the execution of a particular contract. On several occasions it has been alleged by the other party that the United Nations lacked juridical personality and thus could not enforce its contractual rights before a local court. These arguments, in which the legal personality of the Organization was denied as part of a denial of its capacity to institute legal proceedings, do not appear to have been raised in any commercial dispute in which the United Nations took action as a plaintiff, although they have been presented in correspondence. In *United Nations v. B.* and *UNRRA v. Daan*¹ however, arguments denying the legal personality of the two organizations were presented by former staff members when action was brought to recover sums paid to them in error under their contracts of employment; these arguments were rejected by the courts. It may also be noted that in a dispute which arose in 1952 with a private firm with whom the United Nations had entered into a commercial contract, the firm sought to halt arbitration proceedings by means of a court order on the grounds that the Organization's immunity from suit and execution rendered its contracts unenforceable. In correspondence the Office of Legal Affairs denied this argument, relying on precedents with respect to State immunities and its acceptance of an arbitral procedure

¹ See section 4, para. 41 and footnote 24, below.

for the settlement of disputes. The request for a motion to stay arbitration was subsequently dropped by the firm concerned.

3. So far as is known, no State has placed any express limitation upon its recognition of the contractual capacity of the United Nations. The Organization may therefore use its contractual powers, subject to the limitations imposed by its own structure and the authority given by resolutions adopted by its organs, for the same purposes as any other legal entity recognized by particular municipal systems.

4. In 1958, following a dispute as to the execution of a commercial contract, UNRWA sought to enter into arbitration with the other party. The other party having declined to appoint an arbitrator, in accordance with the terms of the contract UNRWA requested the President of the Court of Arbitration of the International Chamber of Commerce to appoint one. The latter appointed Professor Henri Batiffol of the Faculty of Law of the University of Paris. The section of Professor Batiffol's award dealing with the question of the competence of the arbitrator included the following passage which is of general interest regarding the capacity of an international organization, or of its subsidiary organs, to enter into contracts and to secure their enforcement:

... *Attendu que l'UNRWA, organe des Nations Unies, tient des traités en vertu desquels elle a été constituée, et notamment de la convention sur les privilèges et immunités des Nations Unies, du 13 février 1946, la personnalité juridique, et le pouvoir de contracter; que la stipulation d'une clause compromissoire, impliquée par ce pouvoir, trouve donc son fondement juridique dans un acte relevant du droit international public et se trouve valable par application de ce droit sans qu'il soit nécessaire, à ce point de vue, de l'appuyer sur une loi nationale, comme ce serait le cas pour un contrat entre personnes privées toujours soumises, à ce jour, à l'autorité d'un État, donc à un système juridique national, que ce soit par leur nationalité ou leur domicile, la situation de leurs biens ou le lieu de leur activité;*

Attendu que si certains systèmes juridiques permettent au signataire d'une clause compromissoire de saisir le juge de droit commun soit pour surveiller la procédure arbitrale, soit même, si ce juge l'estime opportun, pour le substituer à l'arbitre, une telle substitution suppose que la cause relève d'un système national ayant prévu cette possibilité, et réglé ses conséquences; que s'agissant en l'espèce d'une cause qui ne relève pas d'un système juridique national, mais du droit international public lequel n'a pas prévu une telle possibilité, sans posséder d'ailleurs d'organisation propre à en régler les conséquences, il y a lieu d'entendre la clause compromissoire stipulée selon ses termes, lesquels excluent le recours au juge de droit commun sur les différends qu'elle vise, la solution étant d'ailleurs seule compatible avec l'immunité de juridiction des organismes internationaux;

Attendu que le refus de la société défenderesse de concourir à la désignation de l'arbitre et à l'établissement du compromis ne doit pas faire obstacle à l'exécution de la clause compromissoire; que si les systèmes juridiques nationaux répartissent différemment en cas d'inexécution d'un contrat imputable au débiteur, les rôles respectifs des dommages-intérêts et de l'exécution en nature, tous reconnaissent, à des degrés divers, le droit d'exiger cette dernière dans la mesure où elle est possible; attendu que le droit international, sur lequel est fondée la présente clause compromissoire, ne portant aucune prescription à ce sujet, il y a lieu de s'en tenir au principe général de l'effet obligatoire des contrats et de rechercher si l'exécution selon sa teneur de la clause compromissoire est possible malgré le refus de la partie défenderesse d'y concourir;

Attendu que la désignation de l'arbitre malgré l'abstention de la partie défenderesse est possible au moins quand le contrat, comme dans la présente espèce, a prévu le recours à un tiers pour cette désignation en cas de désaccord des parties; qu'il n'y a pas lieu de distinguer entre le désaccord sur la personne à désigner et le désaccord sur l'opportunité d'une désignation; que la formule de l'article 12 ('Should the parties not agree within 30 days as to the choice of the arbitrator, the appointment will be made by the President of the Court of Arbitration of the International Chamber of Commerce') admet les deux éventualités, conformément à la volonté réelle des parties, qui a été de soumettre à l'arbitrage tout différend né du contrat;

Attendu que le refus du défendeur de concourir à l'établissement du compromis peut-être suppléé par la soumission à l'arbitre du projet de compromis proposé au défendeur, l'arbitre décidant si le texte proposé définit suffisamment et correctement eu égard aux pièces produites et notamment à la correspondance des parties, l'objet du litige; que cette suppléance du contrat par un jugement, admise notamment en cas de refus d'exécuter une promesse de vente, n'est que l'exécution pure et simple, décidée par le juge, du contrat originaire, la décision rendue dans ces conditions tenant lieu de compromis;

Attendu qu'en l'espèce la partie demanderesse a demandé au Président de la Cour d'arbitrage de la Chambre de Commerce Internationale, conformément à l'article 12 des conditions générales annexées au contrat, la désignation de l'arbitre; qu'il y a été procédé; attendu que la demanderesse ayant soumis à l'arbitre désigné le projet de compromis proposé par elle à la société défenderesse, l'arbitre a estimé, au vu des pièces produites, que ce projet définissait suffisamment et correctement l'objet du litige; attendu que l'arbitre a donc été valablement saisi, et est compétent pour connaître du litige.

The arbitrator found in favour of UNRWA as regards the merits of the dispute.

(b) *Choice of law; settlement of disputes and system of arbitration*

5. Generally speaking, United Nations contracts (both those of a commercial nature and employment contracts) have not made any mention in the contract of the kind of law applicable to the agreement. In the case of employment contracts, the contract itself has formed part of a growing system of international administrative law, independent of given systems of municipal law. The references to municipal law contained in employment contracts have therefore been specific rather than general (e.g., as to social security laws) or, very occasionally, introduced for the purposes of providing a convenient yardstick for measuring compensation or separation benefits.² Clauses of the latter description have now almost ceased to be used; in any case, at no time did they amount to a choice of an actual system of municipal law to govern the entire terms of an employment contract. An internal appellate system has been established to consider disputes of a serious nature regarding employment contracts. The United Nations Administrative Tribunal has referred to the general principles of law in interpreting employment contracts, and has largely avoided reference to municipal systems.

² For the cases involving employment contracts which contained clauses of this nature, see *Hilpern v. UNRWA* and *Radicopoulos v. UNRWA*, *Judgements of United Nations Administrative Tribunal*, Nos. 1-70, Nos. 57, 63, 65 and 70. See also *Bergaveche v. United Nations Information Centre*, cited in section 7, para. 74, below.

6. In the case of commercial contracts, express reference has rarely been made to a given system of municipal law. The standard practice is for the contract to contain no choice of law clause as such; provision is made, however, for the settlement of disputes by means of arbitration when agreement could not be reached by direct negotiations. Thus in the case of contracts concluded with parties resident in the United States, reference is made to arbitration according to the procedures established by the American Arbitration Association, by the Inter-American Arbitration Association in respect of contracts with Latin American suppliers, or by the International Chamber of Commerce in remaining cases. The clause presently in use reads as follows:

Any dispute arising out of the interpretation or application of the terms of this Contract shall, unless it is settled by direct negotiations, be referred to arbitration in accordance with the rules then obtaining of the (American Arbitration Association/Inter-American Arbitration Association/International Chamber of Commerce). The parties agree to be bound by any arbitration award rendered in accordance with this section as the final adjudication of any such dispute.

No further reference is made in the contract to the legal system to be applied.

7. In 1964 the Office of Legal Affairs advised the Office of General Services regarding a proposal that the United Nations standard bid form and United Nations contracts should specify that the place of arbitration would be New York. An extract from the opinion given is reproduced below:

There would naturally be practical advantages from our point of view should arbitrations be held in New York. On the other hand, there is the consideration that a requirement to this effect might dissuade parties either not resident or not represented in New York from bidding for United Nations contracts, and such a possibility should be avoided. To provide therefore in the standard bid form that arbitration should be in New York would not seem to us to be entirely advisable.

On the other hand, when it is apparent at the time of contracting that a strong conflict of interest would exist between the United Nations and the contracting party in respect to the place of arbitration, it would be advisable to include agreement on the place of arbitration in the disputes clause. In such cases, should the United Nations consider it advisable that arbitration in the particular case should be in New York, it would be advisable to try to reach agreement on the inclusion of the words "Any arbitration hereunder shall take place in New York unless otherwise agreed by the parties" in the arbitration clause of the contract.³

8. The overwhelming majority of commercial contracts which have been entered into by the United Nations have been performed without the occurrence of any serious difficulty. The United Nations has therefore only had recourse to arbitral proceedings in a limited number of cases. The arbitral awards which have been given have been very largely based on the particular facts relating to the contract concerned and have not raised points of general legal interest regarding the status, privileges and immunities of the Organization.⁴ Very few cases regarding commercial contracts to which the United Nations was a

party have come before municipal courts; in instances in which the United Nations was the plaintiff the most frequent issue was the capacity of the Organization to institute proceedings.⁵ In one case it was held that a United Nations subsidiary organ bringing an action arising out of a contract was obliged to comply with venue requirements.⁶

Section 2. Capacity to acquire and dispose of immovable property

(a) Recognition of the capacity of the United Nations to acquire and dispose of immovable property

9. The capacity to acquire and dispose of immovable property, which is granted to the United Nations under section 1 (b) of the General Convention, has been widely recognized by both Member and non-member States. Even in the case of *Curran v. City of New York et al.*,⁷ in which the plaintiff sought to forbid the transfer of the Headquarters site to the United Nations by the City of New York, the plaintiff did not deny the capacity of the United Nations to hold the land if it was transferred. Such problems as have arisen in this context appear to have been the result of the unique status of the United Nations, which has prevented its assimilation under national law to the position of either that of a Government or to that of a private individual or corporation. The conditions under which the United Nations has acquired property have accordingly usually been determined at several levels; under the terms of an international agreement with the national Government; under the terms of supplementary legislation adopted by the local authorities; and/or under the terms of a private contract. The number of parties and instruments involved has in itself therefore sometimes been conducive to administrative difficulties.

10. As regards the adoption of legislative or other provisions affecting the exercise of the United Nations capacity to acquire immovable property, it may be noted that in the State of New York, special conditions⁸ have been laid down regarding the acquisition of land by the United Nations in the State of New York. No objection was made to these conditions since they were not regarded as inconsistent with the Charter or with the major federal legislation granting the Organization the right to acquire property under United States law. It may also be noted that, when acceding to the General Convention, Turkey submitted a reservation that purchases of land and immovables by the United Nations were "subject to the conditions applied to foreigners"; this reservation was subsequently withdrawn however. A more stringent reservation was made by Mexico when acceding to the General Convention in 1962, in the following terms:

⁵ See section 4, paras. 36-40, below.

⁶ *UNKRA v. Glass Production Methods, idem.*

⁷ See section 7 (a), para. 68, below.

⁸ See, e.g., the Act of the State of New York, February 27, 1947, (especially section 59 (j)) cited in the letter quoted in para. 12, below.

³ *United Nations Juridical Yearbook 1964*, p. 224.

⁴ See, however, the award given by Professor Batiffol, cited in para. 4, above.

The United Nations and its organs shall not be entitled to acquire immovable property in Mexican territory, in view of the property regulations laid down by the Political Constitution of the United Mexican States.

11. In general it may be said that, in exercising its capacity to acquire immovable property (in instances where such exercise is not, as in the exceptional case of Mexico, denied, the Organization will comply with the normal requirements of local law, provided that these requirements do not constitute a hindrance to the way in which the Organization exercises its functions.

12. The following extract from a letter, dated 24 March 1947, from the Office of Legal Affairs to a firm of New York lawyers, in connexion with the purchase of the Headquarters site, summarizes the basic position under both international and United States law (including that of the State of New York):

... We wish to advise you that under the laws of the United States and the State of New York, the United Nations possesses the legal capacity and authority to contract for and purchase real property for the purpose of carrying on its functions. Furthermore, we wish to advise you that the Secretary-General of the United Nations is authorized by the Charter of the United Nations and the resolution of its General Assembly to act for and on behalf of the Organization in purchasing land for use as a headquarters site.

The specific legal provisions which confer upon the United Nations, the aforesaid capacity and authority, are as follows:

(1) *Article 104 of the Charter of the United Nations* which provides as follows:

“The Organization shall enjoy in the territory of each of its Members such legal capacity as may be necessary for the exercise of its functions and the fulfilment of its purposes.”

The Charter of the United Nations, which came into force on 24 October 1945 is a treaty of the United States duly ratified by and with the advice and consent of the Senate.

(2) *Section 2 (a) of the International Organizations Immunities Act, Public Law 291—79th Congress*, which provides:

“International organizations shall, to the extent consistent with the instrument creating them, possess the capacity:

“(i) To contract;

“(ii) To acquire and dispose of real and personal property.”

The United Nations was designated as an international organization entitled to enjoy the benefits of this act by the President of the United States in Executive Order No. 9698, dated February 19, 1946.

(3) *Article IV-B of the State Law of New York as enacted by Chapter 25 of the Laws of 1947*. Section 59 (j) of this article provides as follows:

“Acquisition of land. The United Nations may take by gift, grant or devise, acquire by purchase, but not by condemnation, any land necessary, useful or convenient in carrying on the functions of such organization within the state and hold, transmit and dispose of the same.”

The authority of the Secretary-General to act for and on behalf of the United Nations in this respect derived from Article 97 of the Charter which states that “he shall be the chief administrative officer of the Organization”. Specific authority of the Secretary-General to purchase land for use as a headquarters site has been granted by the General Assembly of the United Nations in a resolution adopted at the second part of its first session on 14 December 1946. This resolution provides, *inter alia*, as follows:

“2. That the permanent headquarters of the United Nations shall be established in New York City in the area bounded by

First Avenue, East 48th Street, the East River and East 42nd Street;

“3. That the Secretary-General be authorized to take all steps necessary to acquire the land hereinabove described together with all appurtenant rights, and to receive the aforesaid gift of \$8,500,000 (U.S.), and to apply the said gift to the acquisition of the land as provided in the terms of the offer.” (Resolution 100 (1) on the Headquarters of the United Nations adopted 14 December 1946). . . .

13. In 1964 the United Nations purchased a lease and leasehold estate in New York City. A savings and loan association sought confirmation of the capacity of the United Nations to carry out the transaction. The United Nations replied as follows:

1. . . . You have requested our opinion, first, with respect to the legal capacity of the United Nations to purchase the above lease and leasehold estate and to execute the various papers incidental to the purchase, and secondly, with respect to the United Nations officials authorized to execute on behalf of the United Nations the assumption of the lease and the other papers.

2. The United Nations, under Article 104 of its Charter, enjoys in the territory of each of its Member States “such legal capacity as may be necessary for the exercise of its functions. . .”. This provision has in the United States been implemented through the International Organizations Immunities Act, which provides that “International organizations shall, to the extent consistent with the instrument creating them, possess the capacity — (i) to contract; (ii) to acquire and dispose of real and personal property; . . .” ((22) USCA, section 288a, (a)); and the United Nations has been designated in Executive Order No. 8698 as a public international organization for the purpose of this Act. New York State legislation provides that the United Nations may acquire by gift, devise or purchase any land or interest in land within the State useful in carrying on the functions of the Organization (McKinney’s *New York State Law*, section 59, *i* and *j*).

3. The property in question is to be used for office space for the United Nations Training and Research Institute which the United Nations General Assembly has, by resolution 1934 (XVIII) of 11 December 1963, requested the Secretary-General to establish. The purchase of the lease and leasehold estate and the execution of the papers required for that purpose are, therefore, valid exercises of the Organization’s powers under the Charter and within its legal capacity recognized under United States Federal and New York State legislation.

4. The Secretary-General of the United Nations is, under Article 97 of the Charter, the chief administrative officer of the Organization. Unless the Secretary-General directs otherwise, the Under-Secretary, Director of General Services, or his authorized delegate is the contracting officer; this is provided in the United Nations Financial Rules which were formulated by the Secretary-General pursuant to the Financial Regulations adopted by the General Assembly at its fifth session (General Assembly resolution 456 (V) as amended by resolutions 950 (X) and 973 B (X)). With respect to the acquisition of the leasehold, the Under-Secretary, Director of General Services, is, *ex officio*, the official authorized to execute all the necessary papers except that concerned with immunity from legal process; the Secretary-General himself is the sole official authorized to agree to such waivers.

5. It is, therefore, our opinion that all action required under the United Nations Charter, the applicable General Assembly resolutions, and the Regulations and Rules of the Organization in order to authorize the Organization’s purchase of the lease and leasehold estate and the execution of the various papers required in that connexion will have been taken by virtue of the execution by the Under-Secretary, Director of General Services, of the assumption of lease and leasehold and other agreements with the exception of the undertaking concerned with the Organization’s

immunity from legal process which will have been duly executed when signed by the Secretary-General himself.⁹

14. As regards the acquisition of immovable property by the United Nations elsewhere than at Headquarters, in resolution 79 (I) the General Assembly approved an "Agreement concerning the execution of the transfer to the United Nations of certain Assets of the League of Nations, signed on 19 July 1946", which provided for the transfer to the United Nations of rights in respect of the immovable and movable property of the League of Nations. The immovable property included such items as the Ariana site in Geneva and the buildings erected by the League on that site, ownership of other properties held by the League and the servitudes constituted in favour of the League. The movable property included the fittings, furniture, office equipment, books, the stock of supplies and all other corporal property belonging to the League of Nations. In addition, a specific agreement concerning the Ariana site was concluded between the United Nations and the Swiss Federal Council and approved by the General Assembly in resolution 98 (I).¹⁰ Under the agreement the United Nations is stated to be the owner of the buildings of the League of Nations on the Ariana site and of any other buildings it may erect there. The Organization has a transferable and exclusive right of user of the surface of the land on which these buildings are, or may be, erected, and a non-transferable and exclusive right of user over the remainder of the site. The property in the soil, however, remains with the Town of Geneva.

15. Premises occupied by the United Nations other than at Headquarters and the Geneva Office have mostly been rented or leased, or, in some cases, made available by Governments, and not owned outright.

16. Following the acquisition of immovable property, the problems encountered by the United Nations as owner or possessor have been broadly the same as those of any occupier. In the case of the Headquarters Agreement with the United States, for example, specific arrangements were made for the supply of public services. Section 17 (a) of the Agreement provides:

... The appropriate American authorities will exercise, to the extent requested by the Secretary-General, the powers which they possess to ensure that the headquarters district shall be supplied on equitable terms with the necessary public services, including electricity, water, gas, post, telephone, telegraph, transportation, drainage, collection of refuse, fire protection, snow removal, *et cetera*. In case of any interruption or threatened interruption of any such services, the appropriate American authorities will consider the needs of the United Nations as being of equal importance with the similar needs of essential agencies of the Government of the United States, and will take steps accordingly to ensure that the work of the United Nations is not prejudiced.

Similar provisions are contained in the ECAFE and ECA Agreements.¹¹

⁹ *United Nations Juridical Yearbook 1964*, p. 222.

¹⁰ *Official Records of the General Assembly, Second part of first Session, Sixth Committee, Summary records of meetings, Annex 17, document A/175*.

¹¹ Section 16, ECA Agreement, and section 24, ECAFE Agreement.

17. Steps have also been taken, in conjunction with the local authorities, to protect the amenities of the area adjacent to United Nations premises. Section 18 of the Headquarters Agreement specifies that:

... The appropriate American authorities shall take all reasonable steps to ensure that the amenities of the headquarters district are not prejudiced and the purposes for which the district is required are not obstructed by any use made of the land in the vicinity of the district. The United Nations shall on its part take all reasonable steps to ensure that the amenities of the land in the vicinity of the headquarters district are not prejudiced by any use made of the land in the headquarters district by the United Nations.

18. Pursuant to this provision, the United Nations has received special protection under local zoning laws. In Geneva, protection of the amenities of the Palais des Nations was given as the main reason for the exchange of two properties, "Le Chêne", owned by the United Nations, and "Le Bocage", which the Cantonal Government had purchased from a private owner. The Advisory Committee on Administrative and Budgetary Questions reported to the seventh session of the General Assembly as follows:

Protection of the amenities of the Palais is a matter of considerable importance to Member States. With this purpose in view, representatives of the Secretary-General recently entered into negotiations with the Cantonal authorities, who have now formally agreed that, subject to the approval of the General Assembly of the United Nations, ownership of the two properties should be exchanged without other consideration.

The proposed scheme . . . would afford a safeguard against the commercial development of any part of the properties surrounding the Palais des Nations. Such a contingency would obviously impair the amenities of the Palais and cause a serious depreciation of property values. Except where "Le Bocage" is concerned, the interest of the United Nations in this respect is already fully protected. The belt of properties immediately surrounding the Palais and its grounds is unbroken except for one strip of land which comprises, in almost the whole of its area, the latter property. Commercial development on this belt is precluded.¹²

19. As regards the disposal of immovable property, in the case of a number of its major installations the United Nations has agreed to act in consultation with the host authorities. Sections 22 to 24 of the Headquarters Agreement, for example, provide:

Section 22. (a) The United Nations shall not dispose of all or any part of the land owned by it in the headquarters district without the consent of the United States. If the United States is unwilling to consent it shall buy the land in question from the United Nations at a price to be determined as provided in paragraph (d) of this section.

(b) If the seat of the United Nations is removed from the headquarters district, all right, title and interest of the United Nations in and to real property in the headquarters district or any part of it shall, on request of either the United Nations or the United States, be assigned and conveyed to the United States. In the absence of such request, the same shall be assigned and conveyed to the sub-division of a state in which it is located or, if such sub-division shall not desire it, then to the state in which it is located. If none of the foregoing desire the same, it may be disposed of as provided in paragraph (a) of this section.

(c) If the United Nations disposes of all or any part of the headquarters district, the provisions of other sections of this

¹² *Official Records of the General Assembly, Seventh Session, Annexes, agenda item 42, document A/2262*.

agreement which apply to the headquarters district shall immediately cease to apply to the land and buildings so disposed of.

(d) The price to be paid for any conveyance under this section shall, in default of agreement, be the then fair value of the land, buildings and installations, to be determined under the procedure provided in section 21.

Section 23. The seat of the United Nations shall not be removed from the headquarters district unless the United Nations should so decide.

Section 24. This agreement shall cease to be in force if the seat of the United Nations is removed from the territory of the United States, except for such provisions as may be applicable in connexion with the orderly termination of the operations of the United Nations at its seat in the United States and the disposition of its property therein.

Balancing these provisions, section 3 of the Agreement states:

Section 3. The appropriate American authorities shall take whatever action may be necessary to assure that the United Nations shall not be dispossessed of its property in the headquarters district, except as provided in section 22 in the event that the United Nations ceases to use the same, provided that the United Nations shall reimburse the appropriate American authorities for any costs incurred, after consultation with the United Nations, in liquidating by eminent domain proceedings or otherwise any adverse claims.

20. Under article 4 of the deed transferring the site of the ECLA offices, the land would revert to the Government of Chile if the United Nations ceases to exist as a legal entity in international law or if it decides to remove its offices and services permanently from Chilean territory. In the event of such reversion, a fair price is to be paid for the buildings and installations, as determined between the Government of Chile and the United Nations. As an exception to this right of reverter, the deed provided that the ownership of the land may be transferred to an international or regional organization which is recognized by the Government of Chile, provided that the transfer is authorized by that Government.

21. Lastly, it may be noted that in a number of instances, the United Nations has occupied property the title to which was either uncertain or was in dispute between various governmental parties. Examples include the occupation of Government House, Jerusalem, and of several military bases and installations in the Republic of the Congo. These instances have turned on the special facts involved in each case, including the relevant provisions of international agreements. In general, however, it may be said that in these instances the role of the United Nations has been that of a trustee, occupying the premises concerned under a *prima facie* right to do so until the question of title has been clarified.

(b) *Acquisition and disposal of immovable property*

22. The United Nations has acquired and disposed of immovable property, or of interests in immovable property¹³ (e.g. leaseholds), on a number of occasions during its history.

¹³ For purposes of convenience all interests in immovable property have been considered as falling within the present section even if under given systems of national law the interests may be classified according to a different criterion.

23. At New York, the first premises occupied for any appreciable length of time, namely at Lake Success, were held under lease. The Interim Headquarters Agreement regarding the Lake Success site made provision for this fact in the following article:

The United Nations agrees, in view of the fact that the premises occupied by it as the temporary headquarters are under lease from persons not parties to this agreement, that passes will be provided by the Secretary-General to such persons or their duly authorized agents for the purposes of enabling them to inspect, repair and maintain the said premises in accordance with the terms of the lease.

The United Nations further agrees that this Interim Agreement shall not affect any existing arrangements with respect to payment of taxes or payments in lieu of taxes on property under lease from persons not parties to this agreement or impair the power of any municipality to impose taxes on property so leased.

Moreover, the description of the property at Lake Success which was annexed to the Agreement declared that

The foregoing description of the property has been taken from the proposed lease between the Reconstruction Finance Corporation and the United Nations. The said description is subject to such modification as may be contained in the lease as executed between the Reconstruction Finance Corporation and the United Nations.

24. The present Headquarters Agreement does not refer specifically to the terms under which the site was acquired, although provision is made regarding possible disposal.¹⁴ The Agreement reproduced below, between the City of New York and the United Nations, gives details of the transfer of a portion of the Headquarters site to the United Nations; the agreement is thus ancillary to the Headquarters Agreement between the Organization and the United States Government.

AGREEMENT made this 22nd day of August, 1947, between the CITY OF NEW YORK, a municipal corporation, having its principal office at the City Hall, Borough of Manhattan, City of New York, pursuant to the authority contained in a Resolution of the Board of Estimate adopted the 22nd day of May, 1947 (Calendar No. 202), hereinafter described as the City, and UNITED NATIONS hereinafter described as the UN.

WITNESSETH

That the City for and in consideration of the price hereinafter specified and the covenants, promises and agreements on the part of the UN herein contained and made, agrees hereby to sell and convey to the UN, subject to and upon each and all of the terms, covenants and conditions of this agreement, and the UN in consideration of the premises hereby agrees to acquire the real property situate in the City of New York, County of New York and State of New York, hereinafter described as follows:

ALL that certain lot, piece or parcel of land with the buildings and improvements thereon erected, situate, lying and being in the Borough of Manhattan, City of New York, bounded and described as follows:

BEGINNING at a point on the northerly side of East 42nd Street, distant 100 feet easterly from the corner formed by the intersection of the easterly side of 1st Avenue and the northerly side of East 42nd Street; thence northerly parallel with the easterly side of 1st Avenue 100 feet 5 inches to the centre line of the block between East 43rd Street and East 42nd Street, thence easterly along said centre line of the block 100 feet; thence southerly and again parallel with the easterly side of 1st Avenue 100 feet 5 inches to the

¹⁴ See the provisions quoted in paragraph 19 above.

northerly side of East 42nd Street; thence westerly along the northerly side of East 42nd Street 100 feet to the point or place of beginning as said streets existed on March 1, 1947.

Subject to:

(a) Any state of facts which an inspection of the premises and an accurate survey may show and any encroachments upon said premises or contiguous premises.

(b) Covenants, conditions, restrictions, reservations, easements, and rights of way, if any, contained in former instruments of record affecting said premises so far as the same may now be in force or effect.

(c) Liens, charges and encumbrance made, created or suffered by the UN, or to be paid, discharged or assumed by the UN hereunder.

(d) Restrictions and zoning laws, ordinances or regulations adopted or imposed by any governmental authority, and to any modifications or amendments thereof.

The purchase price for which the City agrees to sell and convey and the UN agrees to acquire said property is ONE MILLION FOUR HUNDRED NINETY-FOUR THOUSAND DOLLARS (\$1,494,000) which the UN covenants and agrees to pay in lawful money of the United States of America to the City in the following manner:

One-fifth thereof upon the execution and delivery of this agreement, receipt of which is hereby acknowledged, and a like sum on the first day of July of each year thereafter to and including the first day of July 1951, with the privilege to make full payment of the purchase price of any unpaid balance thereof at any time.

The UN may enter into possession of the premises herein described immediately, and may make alterations therein. The UN covenants, by reason of taking possession, that it will not commit, permit or suffer any waste of said property and agrees to keep and maintain same in good condition and repair and promptly pay all costs and charges therefor. The UN shall cause to be discharged at its own costs and expense any claims or liens that may be filed against the property by reason of such repairs, improvements or alterations.

In the event the UN defaults in its payment of any installments as set forth herein, or in the event the UN ceases to use the premises as its International Headquarters, the City shall be entitled to re-enter the premises and become repossessed thereof.

If the City becomes repossessed thereof as above provided, all sums theretofore paid by the UN to the City on account of such purchase price shall be deemed payment for use and occupation of the premises by the UN.

Upon the full payment of the purchase price, the City shall deliver to the UN a good and sufficient Bargain and Sale Deed at the Office of the Corporation Counsel, Municipal Building, Room 1263, Borough of Manhattan, City of New York, in proper statutory form for record which shall be duly executed by the Mayor or Deputy Mayor and the City Clerk so as to convey to the UN the fee simple of the said premises free and clear of all liens, encumbrances or objections except as herein stated and provided for and except such liens charges or encumbrances made, created or suffered by the UN, and subject to the exceptions mentioned in this agreement.

IN WITNESS THEREOF, the parties hereto have caused these presents to be executed the day and year first above written.

25. The majority of property transactions have not occurred, however, in New York or Geneva, but in countries in which United Nations offices and installations have been established in connexion with technical assistance and field operations, or with public information activities. In a significant number of cases the agreement under which the United Nations agreed to provide the services in question also determined, at least in outline,

the conditions under which the United Nations might occupy property. Field agencies, such as UNRWA and UNKRA, have also occupied property, erected buildings for the beneficiaries of their programmes, and executed deeds of transfer, on a wide scale. It may be noted that article IV of the Agreement between UNRWA and Jordan provides in part as follows:

The Agency agrees to pay to the Jordan Government, with effect from 1st March 1951, the sum of five hundred Jordanian Dinars per month towards all costs arising out of rents for land occupied by refugee camps and for charges of water consumed by refugees within the Hashemite Kingdom of Jordan, it being understood that the responsibility for the provision of camp sites and of water and for resolving all questions arising out of their procurement shall rest with the Government.

The Hashemite Government of Jordan agrees to bear all costs arising out of rents for land occupied by refugee camps and for charges of water consumed by refugees in excess of five hundred Jordanian Dinars per month.

26. In article II (1) of the Agreement between the United Nations and the Republic of Korea signed on 6 November 1959, the land on which the United Nations Memorial Cemetery stands is granted to the United Nations "in perpetuity and without charge".

Section 3. Capacity to acquire and dispose of movable property

(a) Recognition of the capacity of the United Nations to acquire and dispose of movable property

27. The capacity of the United Nations to acquire and dispose of movable property has been fully recognized, both by Member States (whether or not they have become parties to the General Convention) and by non-member States. Specific problems relating to the terms under which such property has been acquired or might be disposed of under national law, in particular as regards taxation, are considered in chapter II below. The legal capacity of the United Nations to own movable property or otherwise exercise legal powers in relation to movable property, has not itself been called in question.

(b) Licensing and registration of land vehicles, vessels and aircraft by the United Nations

(i) Land vehicles

28. In the majority of cases land vehicles owned and operated by the United Nations have been registered with the road licensing authorities of the host State in which the vehicles were to be used. The local authorities have frequently granted a special registration number or a special prefix (e.g. "U.N.") to designate such vehicles.

29. A number of bodies performing peace-keeping operations in the field, however, have issued their own identification marks and licences, which they have notified to the local authorities concerned. In the case of UNTSO, which appears to be the forerunner in this respect, vehicles used are not registered with the authorities of any of the States in which UNTSO operates and the licence plates, which carry the letters "UN" and a number, are issued by UNTSO itself. In the exchange of letters between the Secretary-General and the Foreign Minister of Lebanon concerning the status of the United

Nations Observation Group in Lebanon "the use of United Nations vehicle registration plates" was included in the list of "privileges and immunities necessary for the fulfilment of the functions of the Observation Group"; a similar provision was included in the exchange of letters regarding the stationing in Jordan of a United Nations subsidiary organ under the charge of a Special Representative of the Secretary-General, and in the exchange of letters between the United Nations and Saudi Arabia concerning the observation operation along the Saudi Arabia-Yemen border.¹⁵

30. Paragraph 21 of the UNEF Agreement provides in part as follows:

Service vehicles, vessels and aircraft shall carry a distinctive United Nations identification mark and licence which shall be notified by the Commander to the Egyptian authorities. Such vehicles, vessels and aircraft shall not be subject to registration and licensing under the laws and regulations of Egypt. Egyptian authorities shall accept as valid, without a test or fee, a permit or a licence for the operation of service vehicles, vessels and aircraft issued by the Commander.

Similar provisions were contained in the ONUC and UNFICYP Agreements.¹⁶

(ii) *Vessels*

31. The United Nations has on occasions operated vessels under the United Nations flag. In 1961 the Director, Legal Division, IAEA, informed the Legal Counsel of a proposal which had been made to allow inter-governmental organizations to act as licensing States under the draft Convention on the Liability of Operators of Nuclear Ships. The reply of the Legal Counsel, dated 24 May 1961, summarizes past United Nations practice¹⁷ and indicates some of the problems which would be posed by the establishment of a maritime register by the United Nations.

I was most interested to hear of the proposal made by Belgium, Denmark and India, at the recent Conference on Maritime Law held in Brussels, to add an Article to the draft Convention on Liability of Operators of Nuclear Ships which would permit an intergovernmental organization to act as a licensing State under the Convention. The proposal takes into account the principle that ships may, in certain circumstances, be navigated under the flag of an intergovernmental organization. This principle has already gained recognition in one of the most important maritime Conventions of this decade, namely the Convention on the High Seas, concluded at the First United Nations Conference on the Law of the Sea. Article 7 of that Convention provides as follows:

"The provisions of the preceding Articles [on nationality of ships] do not prejudice the question of ships employed on the official service of an intergovernmental organization flying the flag of the organization."

¹⁵ United Nations, *Treaty Series*, vol. 474, p. 155.

¹⁶ Paragraph 32, ONUC Agreement, *ibid.* vol. 414, p. 245, and paragraph 21, UNFICYP Agreement, *ibid.*, vol. 492, p. 70.

¹⁷ For more detailed information on United Nations ships see the note by the Secretariat in *United Nations Conference on the Law of the Sea* (1958), *Official Records*, vol. IV, p. 138. The consideration of the right of the United Nations to sail vessels under its own flag by the International Law Commission and during the United Nations Conference on the Law of the Sea is summarized, with detailed references, in *Repertory of Practice of United Nations Organs*, Suppl. No. 1, vol. II, pp. 418-422 and *ibid.*, Suppl. No. 2, vol. III, pp. 515-517.

It is gratifying, furthermore, to see from the proposal of Belgium, Denmark and India, that States members of the United Nations and related agencies have kept in mind the possibility of international co-operative endeavours.

In the instant case, the possible concern of the United Nations is for future developments rather than for the present. While the Organization will probably find no necessity for licensing a nuclear ship to operate under its own flag in the years which lie immediately ahead, it may prove undesirable to preclude it from doing so in the more distant future. Circumstances have in the past already given rise to several instances where the United Nations flag has been used as the sole maritime flag on vessels. During 1954 ten fishing trawlers constructed in Hong Kong by the United Nations Korean Reconstruction Agency were navigated to Pusan, in Korea, for delivery to future Korean owners under United Nations registration and flag, as practical and other considerations did not permit of their being placed upon a national register for that particular voyage. Similarly, the United Nations Emergency Force has operated a Landing Craft (Mechanized) between Gaza and Beirut under United Nations registration and flag. While these examples appear of small import in comparison with the licensing and operation of a nuclear ship, indications are not wanting that the United Nations or specialized agencies might have occasion to navigate their own vessels, under their own flags, for considerable periods of time. Thus I understand that some thought has been given to the use by UNESCO of international oceanographic vessels, for research purposes, using the United Nations flag as the maritime flag. Co-operative ventures of a similar nature may eventually become a commonplace in the work of international organizations.

The establishment of a maritime register by the United Nations involves certain problems, such as those relating to the exercise of criminal and civil jurisdiction over the crews, which have perhaps so far limited the examples in which ships have been navigated under the United Nations flag alone. However, these problems have been under active consideration and are by no means insoluble. In this respect it would be possible to conclude agreements with States, whereby they would extend their jurisdiction to vessels navigated under the United Nations flag.

32. As regards the question of jurisdiction, the International Law Commission commented in 1955¹⁸ that:

... Member States will obviously respect the protection exercised by the United Nations over a ship where the competent body has authorized the vessel to fly the United Nations flag. It must, however, not be forgotten that the legal system of the flag State applies to the vessel authorized to fly the flag. In this respect the flag of the United Nations or that of another international organization cannot be assimilated to the flag of a State. The Commission was of the opinion that the question calls for further study, and it proposes to undertake such study in due course.

33. It may also be noted that in the exchange of letters between the United Nations and the Government of Egypt regarding the clearance of the Suez Canal it was stated by the Secretary-General that "in keeping with the United Nations responsibilities, the vessels would fly the flag of the United Nations in place of their national flag."¹⁹

¹⁸ Comment on provisional article 4, Régime of the High Seas, *Yearbook of the International Law Commission*, 1955, vol. II, p. 22. See also the discussion at the 320th meeting, *Yearbook of the International Law Commission*, 1955, vol. 1, p. 224 *et seq.*

¹⁹ See also the opinion contained in the *United Nations Juridical Yearbook* 1963, p. 180, in which the Office of Legal Affairs recommended that vessels used for the purposes of a Special Fund fishery project should fly the United Nations flag in addition to their own maritime flag.

(iii) *Aircraft*

34. In answer to an inquiry made in 1960 by ICAO as to the registration and ownership of aircraft by the United Nations, the Office of Legal Affairs stated that the only aircraft which the United Nations had owned up to that date had been one which had been used for approximately a year in order to service the supply and personnel requirements of the United Nations Commission in Korea. The aircraft, which crashed in May 1951, had apparently not been registered; its only markings were the words "United Nations" on the fuselage, the letters "U.N." on the wings, and the United Nations flag, together with the letters "U.N. 99" on the rudder. It was stated that the case was an exceptional one, brought about by a particular emergency, and could not be regarded as typical of the arrangements normally made by the United Nations with respect to aircraft. On all other occasions aircraft had either been chartered or had been made available by a Government at the request of the United Nations; these aircraft had retained their national registration and marks, though in some instances, for example in the case of aircraft used by UNEF, planes had been painted white and bore the United Nations emblem. The reply of the Office of Legal Affairs continued as follows:

We have not, in the past, given any extensive consideration to possible distinctions between "public" and other aircraft used by the United Nations. We have taken the position that a United Nations aircraft, regardless of the particular operation in which it is used, is entitled to the privileges and immunities accorded to United Nations property in the Convention on the Privileges and Immunities of the United Nations.

As you surmise, there are some provisions relating to United Nations aircraft in certain special agreements governing particular United Nations operations. For example, the Agreement between the United Nations and Egypt concerning the status of UNEF provides, *inter alia*, in paragraph 21 that:

"... Service vehicles, vessels and aircraft shall carry a distinctive United Nations identification mark and licence which shall be notified by the Commander to the Egyptian authorities. Such vehicles, vessels and aircraft shall not be subject to registration and licensing under the laws and regulations of Egypt. Egyptian authorities shall accept as valid, without a test or fee, a permit or licence for the operation of service vehicles, vessels and aircraft issued by the Commander."

Paragraph 32 states that:

"The Force and its members shall enjoy together with service vehicles, vessels, aircraft and equipment, freedom of movement between Force headquarters, camps and other premises, within the area of operations, and to and from points of access to Egyptian territory agreed upon or to be agreed upon by the Egyptian Government and the Commander. . . ."

Under paragraph 33 UNEF has the right "to the use of . . . airfields without the payment of dues, tolls or charges either by way of registration or otherwise, in the area of operations and the normal points of access, except for charges that are related directly to services rendered."

The "Provisional Arrangement" between the United Nations and Lebanon, concerning the UNEF Leave Centre in Lebanon, contains, in paragraph 12, a provision similar to paragraph 21 of the Agreement just discussed. Should you wish to refer further to the Agreement and the Arrangement you will find them reproduced in volumes 260 and 266 of the United Nations Treaty Series.

It is our understanding, however, that special agreements of the above nature merely define in more detail some of the privileges to which United Nations aircraft are entitled under the Convention on Privileges and Immunities of the United Nations.

35. In response to a further inquiry, the Office of Legal Affairs notified ICAO in 1965 of certain developments which had occurred since 1960.

. . . A number of aircraft for instance were purchased by the United Nations between 1960 and 1963 for its operations in the Congo.

These aircraft were exempt from the requirements of Congolese law relating to the registration of aircraft, by reason of the Agreement between the United Nations and the Republic of the Congo concerning the status of the United Nations in the Congo. The Agreement provided in paragraph 32 that:

"United Nations vehicles, aircraft and vessels shall carry a distinctive United Nations identification mark. They shall not be subject to the registration or licensing prescribed by Congolese laws or regulations."

The United Nations accordingly did not register these aircraft in the Congo. Nor were they registered by the United Nations in any other country.

Many of these aircraft were purchased by the United Nations from Governments and, depending on national law requirements concerning the registration of government aircraft, these aircraft may or may not have been registered when purchased. However, in the case of aircraft that were in fact registered when purchased by the United Nations, I assume that their national registrations would have expired in consequence of the change in ownership.

It seems likely therefore that while these aircraft were being operated by the United Nations they were without national registration.

While in United Nations ownership, all these aircraft bore only United Nations distinguishing marks and United Nations identification numbers.

I should add that there are, as of now, only two of these aircraft that are still owned by the United Nations. Both aircraft are in the Congo but are to be sold in the near future.

Aside from the aircraft that were purchased for the Congo I am informed that the United Nations has, while acting as Executing Agency for the Special Fund, purchased three other aircraft.

The first of these was an Aero-Commander aircraft which was purchased in 1961 for the Special Fund's Mineral Survey Project in Chile. When purchased the aircraft was registered in the United States. Such registration, however, expired in consequence of the sale, and the United Nations then re-registered the aircraft in the United States. The aircraft which bears the United States registration marks "N. 4113 B" is still in Chile and in United Nations ownership.

The second was a Twin Pioneer aircraft which was purchased by the United Nations in 1962 for the Special Fund's Survey of Metallic Mineral Deposits in Mexico. When purchased the aircraft was registered in the United Kingdom. This registration, however, expired in consequence of the sale of the aircraft, and the United Nations then registered the aircraft in Mexico. The aircraft which bears the Mexican registration marks "XC-CUJ" is still in Mexico and is still owned by the United Nations, though it is to be sold shortly.

The third was a Pilatus Porter aircraft which was purchased by the United Nations in 1963 for the Special Fund's Karnali River Hydroelectric Development Project in Nepal. When purchased the aircraft was registered in Switzerland. Swiss registration, however, expired in consequence of the sale of the aircraft, and the aircraft was thereafter registered by the United Nations in Nepal. The aircraft which bears the Nepalese registration marks "GN-AAN" is still in Nepal and still in United Nations ownership.

Section 4. Legal proceedings brought by and against the United Nations

36. Section 1 (c) of the General Convention refers expressly to the capacity of the United Nations "to institute legal proceedings". This capacity has been widely recognized by judicial and other state authorities; apart from arbitrations, the United Nations has not instituted proceedings before any international tribunals, other than the International Court of Justice in the form of requests for advisory opinions.

37. United Nations practice in respect of the receipt of private law claims, and the steps taken to avoid or mitigate such claims, is also considered below.

(a) *Legal proceedings brought by the United Nations in respect of commercial contracts*

38. In *Balfour, Guthrie & Co. Ltd., et al. v. United States et al.*,²⁰ the United Nations brought an action for damages against the United States Government arising out of the loss of and damage to a cargo of milk which had been shipped on behalf of UNICEF on a United States vessel; the United Nations action was joined with that of six other shippers. The Court stated that, having regard to the terms of Article 104 of the Charter which, as a treaty ratified by the United States formed part of the law of the United States "No implemental legislation would appear to be necessary to endow the United Nations with legal capacity in the United States". The President, however, "has removed any possible doubt by designating the United Nations as one of the organizations entitled to enjoy the privileges conferred by the International Organizations Immunities Act", under section 2 (a) of that Act. These privileges included "to the extent consistent with the instrument creating them," the capacity "to institute legal proceedings."

39. In *UNKRA v. Glass Production Methods, Inc. et al.*,²¹ UNKRA brought an action against a corporation domiciled in New York and against three individuals, two of whom were residents of Connecticut. The individual defendants moved to dismiss the suit on grounds of improper venue; UNKRA contended that the International Organizations Immunities Act, which invested international organizations with the power to institute legal proceedings, was intended to afford access to the federal courts irrespective of venue requirements. The Court held that the action should be severed and, with respect to the two defendants who resided in Connecticut, transferred to the District Court there. The statute granting the privilege of instituting legal proceedings to international organizations did not alter or provide an exemption from the normal venue requirements. It was pointed out that even the United States Government

²⁰ United States District Court for the Northern District of California, 5 May 1950; 90 F. Supp. 831. See also the case of *International Refugee Organization v. Republic S.S. Corp. et al.* referred to in *Summary of practice relating to the status, privileges and immunities of the specialized agencies and of the International Atomic Energy Agency*, section 1, para. 5, below.

²¹ District Court, Southern District of New York, 3 August 1956; 143 F. Supp. 248.

when it commenced an action had to comply with the federal venue statutes; in the opinion of the Court, Congress had not intended to confer upon United Nations agencies greater privileges in this respect than were afforded to citizens of the United States, or to the United States Government itself.

40. A Canadian decision in which attention was paid to the formal requirements of the United Nations capacity to institute legal proceedings was that of *United Nations v. Canada Asiatic Lines Ltd.*²² The United Nations brought an action to recover money owed to it by the defendant. The lawyer acting on behalf of the United Nations produced a power of attorney signed by the Secretary-General, whose signature had been duly authenticated. The defendant sought to reject the power of attorney on the ground that the person who signed it, namely the Secretary-General, had no authority to bind the United Nations in respect thereof. The motion was dismissed by the Court which declared, on the basis of Canadian Order-in-Council No. 3946 and Article 104 of the Charter, "the United Nations has the legal capacity of a body corporate". The Court distinguished the cases which had been cited to it relating to companies on the grounds that, "the affairs of the United Nations are administered by the Secretariat and not by a Board of Directors as is done in the case of a company incorporated under Letters Patent." The Secretary-General was chief administrative officer of the United Nations and the institution of the present action fell within the scope of the authority of the Secretariat. The Court therefore concluded that:

The power of attorney signed by the Secretary-General of the United Nations and bearing the Seal of the United Nations makes *prima facie* proof of its contents and of the authority of its signatory. The said power of attorney is good, valid and sufficient and the defendant's action to reject is unfounded.

(b) *Legal proceedings brought by the United Nations in respect of non-commercial contracts and criminal acts*

41. In *United Nations v. B.*²³ the United Nations sought to recover before a Belgian Court an over-payment of salary made to a former UNKRA staff member after he had left the service. The defendant contended that UNKRA and the United Nations lacked legal personality and that, in any case, the United Nations had not succeeded to the rights of UNKRA. The Court held that the sum should be repaid; UNKRA and the United Nations enjoyed legal personality in Belgium and UNKRA had, by its agreement with the United Nations, transferred its rights to the latter, on behalf of UNICEF.²⁴

42. In 1960 UNICEF considered bringing legal proceedings in Mexico following the embezzlement of part of its funds. The following memorandum prepared by the Office of Legal Affairs describes the legal foundations for UNICEF's capacity to do so.

²² Superior Court of Montreal, 2 December 1952.

²³ Tribunal Civil of Brussels, 27 March 1952.

²⁴ For a similar case in Holland regarding overpayment see *UNRRA v. Daan*, Cantonal Court, Amersfoort, 16 June 1948; District Court of Utrecht, 23 February 1959; Supreme Court, 19 May 1950.

1. UNICEF is a subsidiary organ of the United Nations, established by General Assembly resolution 57 (1) of 11 December 1946. Consequently it possesses the legal capacity conferred upon the United Nations by Article 104 of the Charter which states that:

“The Organization shall enjoy in the territory of each of its Members such legal capacity as may be necessary for the exercise of its functions and the fulfilment of its purposes.”

Article 104 has always been interpreted as endowing the United Nations with the capacity to institute legal proceedings in national courts. For example, the Convention on the Privileges and Immunities of the United Nations, which details some of the constituent elements of Articles 104 and 105 of the Charter provides, in article 1, section 1, that the Organization shall “have the capacity . . . to institute legal proceedings”. National courts have always in the past recognized the capacity of the Organization and its subsidiary organs to institute legal proceedings before them even in States Members of the United Nations, which are not parties to the Convention on Privileges and Immunities.

2. While Mexico is not yet a party to the Convention on Privileges and Immunities it is, of course, bound by Article 104 of the Charter. Furthermore, on 20 May 1954 Mexico and UNICEF signed an Agreement concerning the activities of the latter in Mexico. Under Article VIII of this Agreement Mexico undertakes to grant to UNICEF and its representatives “the privileges and immunities granted to other subsidiary organizations and Specialized Agencies of the United Nations and their representatives in Mexico”. In this respect it is relevant to note that under Article III of an Agreement signed on 5 January 1955 between Mexico and the ILO, a specialized agency of the United Nations, the former recognizes that an office of the ILO in Mexico “shall possess juridical personality including the capacity to institute legal proceedings”. It has been the practice of the Organization, endorsed by the General Assembly in its adoption of the Convention on the Privileges and Immunities of the United Nations, to consider the question of juridical personality as an integral part of the question of privileges and immunities. It must be concluded, therefore, that in accordance with Article 104 of the Charter and Article VIII of the Agreement of 20 May 1954 between Mexico and UNICEF, the latter has the right to institute legal proceedings in Mexico.

43. Following a complaint for criminal fraud filed by UNICEF, in a judgement handed down on 18 February 1954, the *Tribunal Correctionnel de la Seine* found two persons guilty of fraud and, *inter alia*, ordered them to pay damages to UNICEF, in a case arising out of a contract entered into by UNICEF on behalf of UNRWA.²⁵

(c) *Claims of a private law nature made against the United Nations and the steps taken to avoid or mitigate such claims*

44. Apart from the cases it has itself instituted, the United Nations has received a number of claims of a private law nature. Claims arising out of commercial contracts have been settled by negotiation and arbitration; disputes concerning contracts of employment have been determined by means of internal appellate procedures.²⁶

²⁵ See Annual Report of the Secretary-General, *Official Records of the General Assembly, Ninth Session, Supplement No. 1 (A/2663)*, p. 106. Several cases brought by UNRWA are also noted, *ibid.*

²⁶ See section 1 (b), para. 5 and footnote 2, above. See, however, section 7, paras. 68-71, below, for a number of cases in which persons sought to bring actions against the United Nations in respect of private claims, in particular of claims arising out of contracts of employment.

Other claims of a private law nature, for example, in respect of personal injuries incurred on United Nations premises or caused by vehicles operated by the United Nations, have for the most part been met by means of insurance coverage or, in the relatively few cases where such coverage did not exist, by agreement following discussions between the United Nations and the injured party.

45. The remaining category of claims has chiefly concerned the operational programmes of the United Nations. In order to anticipate possible liability in this sphere, the United Nations has concluded a number of agreements whereby the beneficiary State has agreed to hold harmless the United Nations in respect of any claims which may arise; the procedure used thus operated both at an international level and in terms of national law. The revised model Agreement concerning the activities of UNICEF,²⁷ for example, provides as follows:

Article VI. Claims against UNICEF

1. The Government shall assume, subject to the provisions of this Article, responsibility in respect of claims resulting from the execution of Plans of Operations within the territory of

2. The Government shall accordingly defend, indemnify and hold harmless UNICEF and its employees or agents against all liabilities, suits, actions, demands, damages, costs or fees on account of death or injury to persons or property resulting from anything done or committed to be done in the execution within the territory concerned of Plans of Operations made pursuant to this Agreement, not amounting to a reckless misconduct of such employees or agents.

3. In the event of the Government making any payment in accordance with the provisions of paragraph 2 of this Article, the Government shall be entitled to exercise and enjoy the benefit of all rights and claims of UNICEF against third persons.

4. This Article shall not apply with respect to any claim against UNICEF for injuries incurred by a staff member of UNICEF.

5. UNICEF shall place at the disposal of the Government any information or other assistance required for the handling of any case to which paragraph 2 of this Article relates or for the fulfilment of the purposes of paragraph 3.

46. Similarly the model revised Standard Agreement concerning technical assistance²⁸ states in article I, paragraph 6:

6. The Government shall be responsible for dealing with claims which may be brought by third parties against the Organizations and their experts, agents or employees and shall hold harmless such Organizations and their experts, agents and employees in case of any claim or liabilities resulting from operations under this Agreement, except where it is agreed by the Government, the Executive Chairman of the Technical Assistance Board and the Organizations concerned that such claims or liabilities arise from the gross negligence or wilful misconduct of such experts, agents or employees.

47. The model Agreement concerning assistance from the Special Fund²⁹ provides in article VIII, paragraph 6, that:

²⁷ UNICEF *Field Manual*, vol. II, part IV-2, appendix A (16 August 1961).

²⁸ Technical Assistance Board/Special Fund, *Field Manual*, section D1/1 a (i) (February 1963).

²⁹ Technical Assistance Board/Special Fund, *Field Manual*, section D1/1 a (ii) (February 1963).

6. The Government shall be responsible for dealing with any claims which may be brought by third parties against the Special Fund or an Executing Agency, against the personnel of either, or against other persons performing services on behalf of either under this Agreement, and shall hold the Special Fund, the Executing Agency concerned and the above-mentioned persons harmless in case of any claims or liabilities resulting from operations under this Agreement, except where it is agreed by the Parties hereto, and the Executing Agency that such claims or liabilities arise from the gross negligence or wilful misconduct of such persons.

48. Lastly, the model Agreement for the provision of operational, executive and administrative personnel declares that:

6. The assistance rendered pursuant to the terms of this Agreement is in the exclusive interest and for the exclusive benefit of the people and Government of In recognition thereof, the Government shall bear all risks and claims resulting from, occurring in the course of, or otherwise connected with any operation covered by this Agreement. Without restricting the generality of the preceding sentence, the Government shall indemnify and hold harmless the United Nations and the officers against any and all liability suits, actions, demands, damages, costs or fees on account of death, injuries to person or property or any other losses resulting from or connected with any act or omission performed in the course of operations covered by this Agreement.

Section 5. International claims brought by and against the United Nations

(a) Capacity of the United Nations to bring claims against other subjects of international law

49. In its Advisory Opinion of 11 April 1949, on the *Reparation for Injuries Suffered in the Service of the United Nations*,³⁰ the International Court of Justice held unanimously that, having regard to the powers necessary for the exercise of its functions, the United Nations had the capacity to bring an international claim in respect of the damage it had itself incurred. The Court also held, by 11 votes to 4, that the United Nations might claim in respect of damage caused to its agents or their dependants. Lastly, the Court held, by 10 votes to 5, that a conflict between a claim brought by the United Nations and a potential claim by the national State arising out of the injury of an individual who had been acting in the service of the United Nations might normally be avoided by virtue of the fact that, in bringing a claim in respect of injury to its agent, the Organization would be seeking reparation for a breach of an obligation due to itself; if a reconciliation of such claims was necessary, however, it would depend on considerations applicable to the particular case and on agreements reached between the Organization and the national State concerned.³¹

50. Following the delivery of this opinion the Secretary-General submitted a report to the General Assembly³² in which he stated that:

In his judgement the Secretary-General, as chief administrative officer of the Organization, is the appropriate organ for the presentation and settlement of the claims here involved. The Secretary-General has acted on behalf of the Organization in the prosecution

of all other claims, and there is no apparent reason for differentiation here.

51. Having regard to the Advisory Opinion, the Secretary-General outlined a proposed procedure for dealing with claims for reparation of injuries suffered in the service of the United Nations. Under this procedure, the Secretary-General would: (a) determine whether the case appeared likely to involve the responsibilities of a State; (b) consult with the Government of the State of which the victim was a national, in order to determine whether the Government had any objection to the presentation of claims by the United Nations or desired to join in submission; and (c) negotiate with the State responsible for the injury, for the purpose of determining the facts of the case and the amount of reparations, if any. The Secretary-General would be given discretion in negotiating a settlement of the claims both with respect to the elements of damage included in any claim, and with respect to the amount of reparation to be requested or eventually accepted; but he would not be authorized to advance any claim for exemplary damages. If the claim could not be settled by negotiation, the Secretary-General might submit any differences of opinion to arbitration by a tribunal of three members, one of whom was to be named by him.

52. In resolution 365 (IV) the General Assembly authorized the Secretary-General to act in accordance with the procedure outlined above. In pursuance of this resolution the Secretary-General presented a number of international claims against the Governments of Israel, Jordan and Egypt respectively, and reported to the General Assembly regarding them.³³ The following is a succinct summary of the claims formally presented in respect of the death or injury of United Nations personnel.

(i) Claim in respect of the death of Count F. Bernadotte, United Nations Mediator

A claim for reparation of \$54,628, representing the expenses incurred by the United Nations in respect of the death of the United Nations Mediator was presented against the Government of Israel and paid in full.

(ii) Claims in respect of the death or injury of military observers

(a) *Col. A. Sérot*. Col. Sérot, a French Officer serving on the staff of the United Nations Mediator in Palestine, was killed at the same time as the Mediator in circumstances involving the responsibility of the Government of Israel. A claim in respect of \$25,000, paid by the United Nations to Col. Sérot's widow, \$233 funeral expenses, and 200,000 Fr. francs (\$575) on behalf of Col. Sérot's eighty-nine year old father, was presented against the Government of Israel and paid in full.

³⁰ See the Annual Report of the Secretary-General, *Official Records of the General Assembly, Fifth Session, Supplement No. 1 (A/1287)*, p. 124; *ibid.*, *Sixth Session, Supplement No. 1 (A/1844)*, p. 188; *ibid.*, *Seventh Session, Supplement No. 1 (A/2141)*, p. 160; *ibid.*, *Eighth Session, Supplement No. 1 (A/2404)*, p. 144; *ibid.*, *Ninth Session, Supplement No. 1 (A/2663)*, p. 101; *ibid.*, *Tenth Session, Supplement No. 1 (A/2911)*, p. 109. None of the national States of the victims raised any objection to claims being made by the United Nations, or themselves pursued claims.

³⁰ *I.C.J. Reports*, 1949, p. 174.

³¹ *Ibid.*, pp. 187 and 188.

³² *Official Records of the General Assembly, Fourth Session, Sixth Committee*, annex, A/955, p. 6.

(b) *Lt.-Col. J. Queru and Capt. P. Jeannel.* These two United Nations military observers from France were killed on 28 August 1948 at Gaza airfield by Saudi Arabian troops to which the Egyptian Army had entrusted the guarding of the airfield. A claim was presented against the Government of Egypt for \$52,874.20, with respect to their deaths. This amount consisted of \$25,000 paid by the United Nations to the beneficiary of each of the deceased and \$2,874.20 for damage to aircraft. The claim has not yet been settled.

(c) *Lt.-Col. E. Thalen.* Lt.-Col. Thalen, a Swedish military observer serving with UNTSO, suffered an injury resulting in total disability when fired upon by members of the Jordanian National Guard. A claim for \$26,518.26 in respect of the monetary damage borne by the United Nations with respect to Lt.-Col. Thalen's injuries was presented to the Government of Jordan and was paid in full. This amount consisted of \$18,000 paid by the United Nations to Lt.-Col. Thalen and \$8,518.26 in medical expenses.

(d) *Colonel Flint.* Colonel Flint, a Canadian military observer serving with UNTSO, was killed on Mt. Scopus in 1958. A claim was presented to the Government of Jordan in 1966 and remains under consideration.

(iii) *Claim in respect of a member of a UNEF contingent*

The Government of the United Arab Republic paid reparations amounting to \$21,433 to the Government of Canada, in respect of the damages incurred by the latter by reason of the death of a member of the Canadian contingent to UNEF in circumstances for which the Government of the United Arab Republic admitted responsibility.

Under regulation 40 of the UNEF Regulations, responsibility for benefits or compensation awards in respect of service-incurred death, injury or illness rests with the State from whose military services the individual soldier has come. Unlike the case of military observers or of staff members, therefore, the United Nations does not itself incur a financial loss unless the Government concerned claims reimbursement. In the case under discussion the Government of the United Arab Republic admitted responsibility and paid the amount asked by the Canadian Government through the Commander of UNEF.

(iv) *Claim in respect of a United Nations staff member*

Mr. Ole Helge Bakke, a United Nations staff member, was killed in circumstances involving the responsibility of the Government of Jordan. A claim for \$36,803.76 and 22,000 Norwegian Kroner (\$3,080) was presented against the Government of Jordan but the case has not yet been settled. The sum claimed consisted of \$25,000 paid to the widow and of funeral, administrative and excess insurance expenses. The claim for 22,000 Norwegian Kroner was made on behalf of Mr. Bakke's dependent mother.

53. In the case of certain United Nations peace-keeping operations, and to some extent in various headquarters agreements, regular machinery and procedures exist to deal with international claims arising between the

United Nations and States; none of the cases which have arisen, either in these or in other instances have been the subject of third-party settlement, whether before a court or by means of an agreed form of arbitration. In the majority of these cases, however, the element of material damage has been slight and the major issue has been the duty of protection owed to the Organization, its premises and its staff, and the obligation of the State concerned to respect the Organization's inviolability and freedom from interference. No international claims have been presented by the United Nations against subjects of international law other than States.

(b) *Claims made against the United Nations by States or by other international organizations*

54. No claims have been made against the United Nations by other international organizations in respect of a breach of international law. As regards claims made against the United Nations by States, these have been comparatively rare. Apart from cases involving car accidents, the only claims of any significance brought by States (whether on their own behalf or on behalf of their nationals) arose out of the United Nations activities in the Democratic Republic of the Congo. Belgium submitted a number of claims in respect of injuries suffered by Belgian nationals and for loss of or damage to Belgian owned property, alleged to have been caused by troops under United Nations command. These claims, together with certain United Nations counter-claims, were settled following lengthy negotiations, without recourse to third party procedures. In an exchange of letters dated 20 February 1965, between the Secretary-General and the Minister for Foreign Affairs of Belgium, the Secretary-General wrote as follows:

Sir,

A number of Belgian nationals have lodged with the United Nations claims for damage to persons and property arising from the operations of the United Nations Force in the Congo, particularly those which took place in Katanga. The claims in question have been examined by United Nations officials assigned to assemble all the information necessary for establishing the fact submitted by the claimants or their beneficiaries and any other available information.

The United Nations has agreed that the claims of Belgian nationals who may have suffered damage as a result of harmful acts committed by ONUC personnel, not arising from military necessity, should be dealt with in an equitable manner.

It has stated it would not evade responsibility where it was established that United Nations agents had in fact caused unjustifiable damage to innocent parties.

It is pointed out that under these principles, the Organization does not assume liability for damage to persons or property, which resulted solely from military operations or which, although caused by third parties, gave rise to claims against the United Nations; such cases are therefore excluded from the proposed compensation.

Consultations have taken place with the Belgian Government. The examination of the claims having now been completed, the Secretary-General, shall, without prejudice to the privileges and immunities enjoyed by the United Nations, pay to the Belgian Government one million five hundred thousand United States dollars in lump-sum and final settlement of all claims arising from the causes mentioned in the first paragraph of this letter.

The distribution to be made of the sum referred to in the preceding paragraph shall be the responsibility of the Belgian Government. Upon the entry into force of this exchange of letters, the Secretary-General shall supply to the Belgian Government all information at his disposal which might be useful in carrying out the distribution of the amount in question, including the list of individual cases in respect of which the United Nations has considered that it must bear financial responsibility, and any other information relevant to the determination of such responsibility.

Acceptance of the above-mentioned payment shall constitute lump-sum and final settlement between Belgium and the United Nations of all the matters referred to in this letter. It is understood that this settlement does not affect any claims arising from contractual relationships between the claimants and the Organization or those which are at present still handled by United Nations administrative departments, such as ordinary requisitions.

Accept, Sir, the assurances of my highest consideration.

(Signed) U THANT
Secretary-General³⁴

The Minister for Foreign Affairs of Belgium accepted the proposals made and the agreement entered into force on 17 May 1965.

55. The Acting Permanent Representative of the Soviet Union wrote to the Secretary-General on 2 August 1965³⁵ stating that Belgium had "committed aggression against the Democratic Republic of the Congo and as an aggressor has no moral or legal basis for making claims against the United Nations either on its own behalf or on behalf of its citizens". In these circumstances

... the payment of compensation by the United Nations Secretariat to the Belgian Government for the so-called losses caused to Belgian citizens in the Congo by United Nations forces cannot be regarded as other than an encouragement to aggressors, as a reward for brigandage. In accordance with the generally recognized rule of international law concerning the responsibility of the aggressor for the aggression committed by him, the Belgian Government should itself bear full moral and material responsibility for all consequences of its aggression against the Republic of the Congo.

The Permanent Mission of the USSR to the United Nations draws the Secretariat's attention to the fact that it has no right in this case to enter into any agreements on behalf of the United Nations concerning the payment of compensation without the authorization of the Security Council.

Accordingly, the Permanent Mission of the USSR to the United Nations expects the Secretary-General to take immediate steps to cancel the agreement concluded by the Secretariat concerning the payment of the above-mentioned compensation.

56. The Secretary-General replied as follows:

... The arrangement to which your letter refers was brought about in the following circumstances. In the course of the United Nations activities in the Congo, the Secretariat received a number of claims from Belgian citizens as well as from individuals of various other nationalities alleging that they had suffered injury or damage to property by acts of United Nations personnel which gave rise to liability on the part of the Organization.

It has always been the policy of the United Nations, acting through the Secretary-General, to compensate individuals who have suffered damages for which the Organization was legally liable. This policy is in keeping with generally recognized legal

principles and with the Convention on Privileges and Immunities of the United Nations. In addition, in regard to the United Nations activities in the Congo, it is reinforced by the principles set forth in the international conventions concerning the protection of the life and property of civilian population during hostilities as well as by considerations of equity and humanity which the United Nations cannot ignore.

Accordingly, the claims submitted were investigated by the competent services of ONUC and at United Nations Headquarters in order to collect all of the data relevant to determining the responsibility of the Organization. Claims of damage which were found to be solely due to military operations or military necessity were excluded. Also expressly excluded were claims for damage found to have been caused by persons other than United Nations personnel.

On this basis, all individual claims submitted by Belgian nationals, as well as those submitted by nationals of other countries, were carefully scrutinized and a list of cases was established by the Secretariat with regard to which it was concluded that compensation should be paid. Of approximately 1,400 claims submitted by Belgian nationals, the United Nations accepted 581 as entitled to compensation.

As regards the role of the Belgian Government, it was considered that there was an advantage for the Organization both on practical and legal grounds that payment to the Belgian claimants whose claim has been examined by the United Nations should be effected through the intermediary of their Governments. This procedure obviously avoided the costly and protracted proceedings that might have been necessary to deal with the 1,400 cases submitted and to settle those in which United Nations responsibility was found.

Following consultations, the Belgian Government agreed to act as an intermediary and also agreed that the payment of a lump sum amounting to \$1.5 million would constitute a final and definite settlement of the matter. At the same time, a number of financial questions which were outstanding between the United Nations and Belgium were settled. Payment was effected by off-setting the amount of \$1.5 million against unpaid ONUC assessments amounting approximately to \$3.2 million.

Similar arrangements are being discussed with the Governments of other countries, the nationals of which have similarly suffered damage giving rise to United Nations liability. About 300 unsettled claims fall within this category.

In making these arrangements, the Secretary-General has acted in his capacity of chief administrative officer of the Organization, consistently with the established practice of the United Nations under which claims addressed to the Organization by private individuals are considered and settled under the authority of the Secretary-General.³⁶

There have been a number of other claims presented by States on behalf of their nationals arising out of ONUC operations, which were settled on a broadly similar basis.

Section 6. Treaty-making capacity

(a) Treaty-making capacity of the United Nations

57. The United Nations has concluded a large number of international agreements with other subjects of international law i.e. both with States and with other international organizations. The capacity of the Organization or its organs to conclude agreements is provided in various provisions of the Charter itself. In Article 43 the Security Council is empowered to enter into agree-

³⁴ *Official Records of the Security Council, Twentieth Year, Supplement for July, August and September 1965*, document S/6597.

³⁵ *Ibid.*, document S/6589.

³⁶ See foot-note 34, above.

ments with Member States or groups of Members regarding the armed forces, assistance and facilities to be made available to the Security Council for the purpose of maintaining international peace and security; Article 43 concludes by providing that these agreements "shall be subject to ratification by the signatory States in accordance with their constitutional processes". Furthermore, as was stated by the United Nations before the International Court of Justice in the hearings of the case relating to "Reparation for Injuries suffered in the service of the United Nations", by virtue of Article 105 the Organization is a party to the General Convention, "which binds the United Nations as an Organization, on the one part, and each of its Members individually, on the other part".³⁷ Reference was also made in the United Nations statement to the agreements concluded with individual States, such as the Headquarters Agreement and the Agreement with Switzerland, and to Article 63 of the Charter whereby the United Nations may enter into agreements with the specialized agencies.³⁸ In its Advisory Opinion the International Court affirmed the possession by the United Nations of international personality by reference, *inter alia*, to its treaty-making capacity.

Practice — in particular the conclusion of conventions to which the Organization is a party — has confirmed this character of the Organization, which occupies a position in certain respects in detachment from its Members, and which is under a duty to remind them, if need be, of certain obligations. . . The "Convention on the Privileges and Immunities of the United Nations" of 1946 creates rights and duties between each of the signatories and the Organization (see, in particular, section 35).³⁹

The Court also laid down the following principle:

Under international law, the Organization must be deemed to have those powers which, though not expressly provided for in the Charter, are conferred upon it by necessary implication as being essential to the performance of its duties.⁴⁰

58. It was on this basis that Sir Humphrey Waldock, Special Rapporteur on the Law of Treaties, proposed⁴¹ that the International Law Commission should consider adopting a provision recognizing the capacity of subjects of international law other than States to conclude treaties when invested with capacity to do so by treaty or custom. The International Law Commission examined the question but finally decided that its articles relating to treaties should deal only with agreements between States. Nevertheless, as the Rapporteur noted, in its discussions the Commission

fully accepted that international organizations may possess treaty-making capacity and that international agreements concluded by international organizations possessing such capacity fall within the scope of the law of treaties.⁴²

³⁷ *I.C.J. Pleadings, Oral Arguments, Documents, 1949. Reparation for Injuries Suffered in the Service of the United Nations*, p. 71.

³⁸ *Ibid.*

³⁹ *I.C.J. Reports 1949*, pp. 174 and 179.

⁴⁰ *Ibid.*, p. 182.

⁴¹ "First Report on the Law of Treaties", A/CN.4/144, *Yearbook of the International Law Commission 1962*, vol. II, p. 35. See also the references to earlier consideration of the question by the International Law Commission at p. 30.

⁴² "First Report on the Law of Treaties" A/CN.4/144, *Yearbook of the International Law Commission 1962*, vol. II, p. 30.

59. It may be noted that the Regulations adopted by the General Assembly to give effect to Article 102 of the Charter concerning treaty registration, expressly refer to cases where the United Nations is a party to a treaty or agreement.⁴³ The United Nations *Treaty Series* accordingly contains a large number of agreements concluded by the United Nations with different States and other international organizations. Some of the major topics covered by such agreements are the following: the provision of technical assistance; the holding of *ad hoc* conferences or seminars; the establishment of permanent installations (for example, in the case of information centres or of the regional economic commissions); the operations conducted in given countries by subsidiary organs such as UNICEF and UNRWA; status-of-forces agreements with respect to United Nations peace-keeping forces and agreements with States providing troops for such forces; and the arrangement of communication and associated facilities, for example as regards the sale of stamps, the dispatch of mail, or United Nations radio operations.

60. The treaty-making capacity possessed by the Organization may only be exercised, normally by the Secretary-General on behalf of the Organization, upon the basis of authorization contained, expressly or impliedly, in the provisions of the Charter;⁴⁴ or in resolutions adopted by one of the principal organs on which Member States are represented; in the case of subsidiary organs, such as UNICEF, and UNRWA, agreements may be concluded by the body concerned on the basis of resolutions of the parent organ or by the Secretary-General or his representative, acting on their behalf. It is not possible to give a categorical answer to the question of the precise extent to which authorization from a representative organ is required (other than in cases arising directly from Charter provisions) before an international agreement may be concluded by the United Nations, or whether agreements must receive the approval of such an organ before entering into force. It may be noted that the General Assembly has adopted a number of resolutions specifically approving the terms of agreements between the United Nations and certain Governments relating to privileges and immunities.⁴⁵ In the case of "standard" agreements, e.g. those concluded by UNICEF or by the various technical assistance bodies, a general authorization has been relied on.

61. As regards procedural aspects of United Nations treaty practice, the following extract from a letter dated 22 November 1961, sent by the Office of Legal Affairs in response to an inquiry by the Special Rapporteur

⁴³ Article 4, para. 1 (a) and art. 10 (a) of the Regulations, United Nations, *Treaty Series*, vol. 76, pp. XXII and XXVI.

⁴⁴ Besides Articles 43, 63 and 105 of the Charter, these provisions include Chapter XII dealing with the International Trusteeship System and Chapter XV dealing with the powers of the Secretary-General.

⁴⁵ See "Resolutions of the General Assembly concerning the Law of Treaties" (A/CN.4/154) in *Yearbook of the International Law Commission 1963*, vol. II, pp. 9-11. The question of the conclusion of international agreements by Member States by means of United Nations resolutions is a separate issue, falling outside the scope of the present study.

of the International Law Commission on the Law of Treaties as to whether the United Nations issues anything that corresponds to credentials or full-powers, provides a general survey of the arrangements which have been adopted.

... The procedures heretofore followed in the United Nations in this regard have been rather informal. Where the Secretary-General concluded an agreement with the Government of a State on behalf of the Organization, in the implementation of a decision of one of its organs or in the performance of his regular duties, there is of course no question of credentials or full-powers since, as Chief Administrative Officer of the Organization under Article 97 of the Charter, his power of making treaties on behalf of the Organization in the performance of his functions is implied.

On occasion, the Secretary-General has been authorized by an organ of the United Nations to conclude with the Government of a State an agreement for a specific purpose. Thus, in view of the decision to establish the seat of the United Nations in the United States, the General Assembly first adopted a resolution by which it "authorizes" persons appointed by certain Governments, to negotiate with the competent authorities of the United States the arrangements required (resolution 22 B (I), 13 February 1946). Upon receipt of a report by the Secretary-General and the negotiating committee on the negotiations carried out in pursuance of the above-mentioned resolution, the General Assembly further authorized the Secretary-General "to negotiate and conclude with the appropriate authorities of the United States of America an agreement concerning the arrangements required as a result of the establishment of the permanent headquarters of the United Nations in the City of New York, such agreement to come into force only upon approval by the General Assembly" (resolution 99 (I), 14 December 1946). On the basis of this resolution, the Secretary-General signed with the Secretary of State of the United States an agreement between the United Nations and the United States on 26 June 1947 regarding the headquarters of the United Nations and submitted it to the General Assembly for approval. By a third resolution, the General Assembly approved the agreement as signed and authorized the Secretary-General to bring it into force (resolution 169 A (II), 31 October 1947).

Where an Under-Secretary of the United Nations signs an agreement on behalf of the United Nations, his authority for doing so is deemed to have derived from the Secretary-General, express or implied, in the normal courses of administration and no full-powers or any other form of specific authorization to sign such agreement have been considered necessary.

In cases of agreements negotiated and concluded overseas by a Representative of a subsidiary organ of the United Nations, such as the United Nations Special Fund, with the Government of a State the executive head of the subsidiary organ usually issues a letter stating simply that the Representative has been authorized to sign such agreement on his behalf. This letter may be addressed to the Representative or to the Government concerned, depending on the preference of the Government. There have been occasions where a telegram was sent instead of a letter when time was of the essence. In the case of Standard Agreements on Technical Assistance negotiated by a Resident Representative of the United Nations Technical Assistance Board, such Representative receives authorization, again in a similarly informal manner from the Executive Chairman of the said Board and signs such agreements on behalf of all the participating agencies on the Board, namely the United Nations, the International Atomic Energy Agency and seven specialized agencies. . .

62. When agreements have been signed on behalf of the United Nations by officials below the rank of Under-Secretary, full powers have sometimes been issued by the Secretary-General at the request of the other party.

(b) *Treaties with non-member States*

63. The United Nations has entered into a number of agreements with non-member States. Examples of such treaties include the Agreement with Switzerland concluded in 1946; the Agreement of 27 September 1951 entered into with the Republic of Korea; and the Agreement signed on 25 July 1952, between the United Nations and Japan, before that country became a Member State. Each of these Agreements concerned the privileges and immunities to be enjoyed by the United Nations in the States concerned.

(c) *Registration, or filing and recording, of agreements on the status, privileges and immunities of the United Nations*

64. The United Nations Secretariat has registered, or filed and recorded, all agreements which have been entered into by the United Nations dealing with the status, privileges and immunities of the Organization, in accordance with the Regulations to give effect to Article 102 of the Charter, adopted by the General Assembly in resolution 97 (I), as modified by resolutions 364 B (IV) and 482 (V).⁴⁶

CHAPTER II. — PRIVILEGES AND IMMUNITIES OF THE UNITED NATIONS IN RELATION TO ITS PROPERTY, FUNDS AND ASSETS

Section 7. Immunity of the United Nations from legal process

(a) *Recognition of the immunity of the United Nations from legal process*

65. As stated in section 2 of the General Convention,

The United Nations, its property and assets, wherever located and by whomsoever held, shall enjoy immunity from every form of legal process except in so far as in any particular case it has expressly waived its immunity. . .

66. Similar provisions are contained in the majority of other international agreements relating to the privileges and immunities of the United Nations.⁴⁷ Article I, section 1, of the Agreement with Switzerland expresses the privilege as one derived from international law:

The Swiss Federal Council recognizes the international personality and legal capacity of the United Nations. Consequently, according to the rules of international law, the Organization cannot be sued before the Swiss Courts without its express consent.

67. Immunity from legal process is not one of the privileges granted to the Organization under the Headquarters Agreement with the United States. Since the

⁴⁶ United Nations, *Treaty Series*, vol. 76, p. XVIII.

⁴⁷ For the economic commissions see section 7 of the ECLA Agreement and section 6 of the ECAFE Agreement. In the case of the ECA Agreement, no immunity from legal process is provided for the Commission itself, *expressis verbis*, though the Headquarters of the Commission are declared inviolable (section 2), its officials are granted immunity in respect of officials' acts (section 11a), and the Executive Secretary himself and his immediate assistants are granted diplomatic privileges and immunities (section 13); the Agreement and the General Convention are stated to be complementary, however, in so far as their provisions relate to the same subject matter (section 17).

United States is not a party to the General Convention,⁴⁸ the Organization's immunity from suit in that country has been based on national enactments.⁴⁹ Title I, section 2 (b) of the International Organizations Immunities Act provides:

International organizations, their property and their assets, wherever located, and by whomsoever held, shall enjoy the same immunity from suit and every form of judicial process as is enjoyed by foreign governments, except to the extent that such organizations may expressly waive their immunity for the purpose of any proceedings or by the terms of any contract.

68. A number of judicial decisions may be noted. In *Curran v. City of New York et al.*,⁵⁰ the plaintiff brought an action against the City of New York, the Secretary-General and others, to set aside grants of lands and easements by the City to the United Nations for its headquarters site, exemption of the site from taxation and the allocation of funds by the City for the improvement of nearby streets. The Secretary-General moved to dismiss the action against him on grounds of his immunity from suit and legal process. The United States Attorney for the Eastern District of New York informed the Court that the State Department recognized and certified the immunity of the United Nations and of the Secretary-General. The City of New York sought to dismiss the complaint on the ground that it failed to state a sufficient cause of action. The Court held that the complaint should be dismissed. As regards the Secretary-General, the Court stated:

The Department of State, the Political branch of our Government, having, without any reservation or qualification whatsoever, recognized and certified the immunity of the United Nations and the defendant Lie to judicial process, there is no longer any question for independent determination by this Court.

69. In the case of *Gregoire v. Gregoire*⁵¹ the plaintiff wife, in an action for divorce, sought an order directing the sequestration of the defendant's property within the State of New York. The only property of the defendant which might be sequestered were the benefits he was due to receive from the United Nations Provident and Pension Funds and from the United Nations (by which he had formerly been employed) in respect of accumulated leave. After citing the International Organizations Immunities Act, the Court declared that the United Nations was immune from process in respect of the action unless it had expressly waived its immunity. Since the Organization had not done so, the motion was denied.

⁴⁸ Although *nota bene*, in section 26 of the Headquarters Agreement, the Agreement is said to be complementary to the General Convention.

⁴⁹ It is the position of the United Nations that its immunity from suit forms part of general international law, and thus part of the law of the United States, even in the absence of any legislation and, moreover, that the Organization's immunity from suit is derived from Articles 105 and 104 of the Charter, a treaty to which the United States is a party and which similarly forms part of the law of the land. United States courts have preferred to rely on national legislation, however, in upholding the Organization's immunity.

⁵⁰ Supreme Court (Special Term) of Queens' County, 29 December 1947; 77 N.Y.S. 2d 266. The United Nations was not a defendant as such. It may be assumed, however, that the Secretary-General was named in his representative capacity.

⁵¹ *New York Law Journal*, 28 February 1952.

70. In *Wencak v. United Nations*⁵² the plaintiff contended that he had been injured on 1 December 1945, in an accident for which UNRRA was responsible. UNRRA having been liquidated and the United Nations having agreed in 1948 to settle claims against UNRRA, subject to certain conditions, the plaintiff brought an action against the United Nations in respect of his injury. The United Nations moved to dismiss the case on the ground that it was immune from suit under section 2 of the International Organizations Immunities Act, which had come into effect on 29 December 1945. The plaintiff argued that the statute was inapplicable since the accident had occurred before the statute became effective. The Court held that the plaintiff had had no cause of action against the United Nations on the date the injury was incurred. The United Nations, though it had undertaken to administer the liquidation of UNRRA, was in no sense the successor of the latter organization. The administration of the liquidation was not an assumption of liabilities upon succession to the assets, as in the case of business corporations. The United Nations had agreed on 27 September 1948, to settle the claims which were on the UNRRA's books for liquidation and any claims subsequently presented, if there were sufficient funds and the claim itself appeared just. The books had been closed on 31 March 1949. Thus, even assuming that the facts might disclose a cause of action against the United Nations, this had only arisen after the statute had come into force. The certification of the immunity of the Organization, which had been filed with the Court by the Attorney-General on behalf of the Department of State, had not indicated any limitation of the immunity conferred by the statute. The case was therefore dismissed.

71. In *Awad Iskandar Guirgis v. UNRWA Representative and the Director, Department of Palestine Affairs*⁵³ a former UNRWA staff member initiated proceedings, claiming compensation for the allegedly wrongful termination of his appointment. The plaintiff argued, *inter alia*, that though UNRWA officials, including the head of that body, had immunity, no immunity extended to UNRWA itself. The Court held that UNRWA, as a subsidiary organ of the United Nations, enjoyed the privileges and immunities of the General Convention and that, since immunity from suit had not been waived, the case should be dismissed.

(b) *Action taken by the United Nations when its immunity from legal process was not recognized*

72. On a number of occasions, most notably in the case of actions involving United Nations immunities brought before United States courts, the United Nations has entered an *amicus curiae* brief. The majority of these cases, however, were in the early years of the Organization's history. The established practice at the present time is to assert the immunity from suit of the United

⁵² Supreme Court of New York, Special Term, 18 January 1956.

⁵³ Cairo Court of First Instance, Department 23 — Labour Tribunal, Case No. 258 of 1958; judgement delivered on 31 December 1961. See also the case of *Bergaveche v. United Nations Information Centre*, referred to in sub-section (b), paras. 74 and 75, below.

Nations in a written communication to the Ministry of Foreign Affairs of the State concerned. When time permits this communication is sent through the Permanent Representative of the State concerned at United Nations Headquarters. In the written communication the Ministry of Foreign Affairs is requested to take the necessary steps to inform the appropriate office of government (usually the Ministry of Justice or the Attorney-General's Office) to appear or otherwise move the court to dismiss the suit on the grounds of the Organization's immunity. When a summons or notification of appearance has been received, this is returned to the Ministry of Foreign Affairs. In cases brought by former staff members, the United Nations has usually referred in its note to the Ministry of Foreign Affairs to the fact that an alternative means of recourse exists for the staff member in the internal appellate machinery maintained by the Organization for its staff.

73. In some instances local courts have taken decisions denying the immunity of the Organization or of its subsidiary organs despite the non-waiver of immunity.⁵⁴

74. The case of *Bergaveche v. United Nations Information Centre*⁵⁵ concerned an employee of the United Nations Information Centre in Buenos Aires. In 1954, when his fixed-term contract was not renewed, he brought an action before the local Labour Court for termination indemnities. The United Nations Information Centre did not submit to the jurisdiction and requested the Ministry of Foreign Relations to notify the Court of its immunity from suit. The Court dismissed the action on the grounds that under the terms of Article 105 of the Charter and of the General Convention it lacked jurisdiction.

75. In response to a fresh submission by Mr. Bergaveche, another Labour Court gave a decision on 7 February 1956, in which it assumed jurisdiction by virtue of the fact that Argentina was not a party to the General Convention. Argentina acceded to the Convention on 31 August 1956 and in April 1957 the *Ministerio Público* advised the Labour Court that the action should be dismissed since the United Nations and its agencies enjoyed immunity from suit under the Convention and the Convention had become law in Argentina. The Court therefore dismissed the action on 23 April 1957. On appeal it was argued that, since the employment of Mr. Bergaveche had ended in 1954, the Statute adopted in 1956 could not be applied retroactively to his case, or, if retroactivity was intended, this could not affect rights under labour legislation already acquired. In its

⁵⁴ A number of these cases, mostly given by courts of first instance, involved UNRWA. For a summary see Annual Report of the Secretary-General, *Official Records of the General Assembly, Ninth Session, Supplement No. 1 (A/2663)*, pp. 106 and 107, and *Repertory of Practice of United Nations Organs*, Suppl. No. 2, vol. III, pp. 518 and 519. Further information is contained in the Annual Reports of the Director of UNRWA, *Official Records of the General Assembly, Ninth Session, Supplement No. 17 (A/2717)*, Annex G, para. 11 (i); *ibid.*, *Tenth Session, Supplement No. 15, (A/2978)*, Annex G, para. 19; *ibid.*, *Eleventh Session, Supplement No. 14 (A/3212)*, Annex G, para. 19; *ibid.*, *Thirteenth Session, Supplement No. 14 (A/3931)*, Annex H, para. 26.

⁵⁵ *Camara Nacional de Apelaciones del Trabajo de la Capital Federal*, 19 March 1958.

decision of 19 March 1958, the Court held that the appellant's argument did not succeed since the statute concerned was a procedural one which was immediately applicable in the case of both pending and future proceedings.

(c) *Interpretation of the phrase "every form of legal process"*

76. These words have been broadly interpreted to include every form of legal process before national authorities, whether judicial, administrative or executive functions according to national law. The Organization's immunity from "every form of legal process" has also been regarded as extending irrespective of whether the Organization was named as defendant or was asked to provide information or to perform some ancillary role.⁵⁶ This interpretation, the essence of which is the maintenance of the freedom from interference of the United Nations, does not, however, imply that the United Nations may not itself decide to take part in such proceedings, in particular if it considers that the requirements of justice so demand,⁵⁷ but only that the determination in each case is one to be made by the United Nations itself.

77. One particular application of this principle concerns the possibility of a garnishee order being issued against the Organization in respect of the salary to be paid to a staff member who has incurred a private debt. Although the specific inviolability of the Organization's financial assets is also a defence for the Organization, its immunity "from every form of legal process" in itself prevents the issue of a garnishee order and the incurring by the United Nations of any legal obligation to participate in the proceedings themselves or to abide by any judgement given. Although Switzerland is not a party to the General Convention, the Swiss case of *In re Poncet*⁵⁸ is of interest in this connexion. Mr. Poncet instituted proceedings for the attachment of the salary of a staff member employed at the European Office of the United Nations, in order to satisfy debts incurred by the staff member. The local authorities declined to issue the appropriate order on the grounds that the garnishee, the United Nations, was not subject to local jurisdiction. On appeal to the Federal Tribunal it was held that the case must be returned to the cantonal authorities for a decision as to whether the judgement debtor herself was immune; the immunity of the garnishee, in particular the fact that notice of attachment could not be served on the United Nations, was not a bar to proceedings for attachment for debt. The Court stated:

Notice to the garnishee is not an essential condition of the validity of the attachment. Its main object is to prevent the garnishee from paying his debt to the defendant. Whether chattels or debts are involved, the execution of the attachment consists in a declaration made by the court office that a certain asset has been

⁵⁶ This position was recognized in the case of *Gregoire v. Gregoire*, referred to in sub-section (a), para. 69, above.

⁵⁷ See section 32, paras. 337 and 338, below regarding co-operation with national authorities to facilitate the proper administration of justice.

⁵⁸ Federal Tribunal, *Chambre des Poursuites et des Faillites*, 12 January 1948.

seized, and in the entry of that declaration in the record. . . It is not true that the attachment of a salary without notice to the garnishee must remain devoid of effect. In the first instance, the garnishee may have been informed of the attachment by other means. . . and it may feel bound to pay the sum in question to the court office. It is also possible that the defendant, who knows or is deemed to know that she is not entitled to dispose of the attached funds. . . will herself pay the equivalent sum. . .

78. As envisaged in the judgement, administrative arrangements have been made at the European Office and at other offices to enable creditors to receive satisfaction in accordance with relevant court orders; such arrangements have not, however, amounted to a waiver of the United Nations immunity from legal process.

79. The United Nations considers its immunity from any measure of execution under section 2 of the General Convention extends to garnishee orders.⁶⁰

Section 8. Waiver of the immunity of the United Nations from legal process

*(a) Practice relating to the waiver by the United Nations of its immunity from legal process*⁶⁰

80. Section 2 of the General Convention provides that the United Nations shall enjoy immunity from every form of legal process,

except in so far as in any particular case it has expressly waived its immunity. It is, however, understood that no waiver of immunity shall extend to any measure of execution.

81. The Agreement with Switzerland states that, in view of the recognition given by the Swiss Federal Council to the international personality and legal capacity of the Organization, it "cannot be sued before the Swiss Courts without its express consent". In the United States the question is regulated by section 2 (b) of the International Organizations Immunities Act, which grants to such organizations:

the same immunity from suit and every form of judicial process as is enjoyed by foreign governments, except to the extent that such organizations may expressly waive their immunity for the purpose of any proceedings or by the terms of any contract.

82. In an internal memorandum prepared by the Office of Legal Affairs in 1948 it was stated with reference to section 2 of the General Convention that, since the words "except in so far as in any particular case it shall have waived its immunity" must refer to the immediately preceding words ("shall enjoy immunity from every form of legal process"),

it would appear that by this Article permission is given to the United Nations to waive its immunity only in so far as legal process in any particular case is concerned, and such waiver cannot extend to any measure of execution.

83. This conclusion was said to be in accordance with a number of municipal decisions, notably those given by English and United States courts, in respect of the waiver of state immunities. The memorandum then continued:

⁶⁰ See section 8 (c), paras. 88 and 89, below.

⁶⁰ Questions relating to the service of legal process within the United Nations premises are considered under section 9 (b), paras. 118-121 (iv), below.

According to the reports of the Preparatory Commission of the United Nations, Article 2 of the General Convention was based on similar articles in the constitutions of international organizations. Some of these constitutional instruments, such as that of UNRRA, provide that the member government accord to the administration the facilities, privileges, exemptions and immunities which they accord to each other "including immunity from suit and legal process except with the consent of or so far as is provided for in any contract entered into by or on behalf of the Administration".

A similar provision is contained in Article IX, Section 3 of the Articles of the International Monetary Fund, providing for waiver of immunity for the purposes of any proceedings *or by the terms of any contract* thereby differentiating between the two forms of waiver. Apparently, it was not the intention of the Preparatory Commission or the General Assembly to extend waiver this far in so far as the United Nations was concerned, or such a provision would have been included, rather than just the words "legal process". In fact the words used in the original draft of this section were: "The Organization, its property and its assets wherever located and by whomsoever held shall enjoy immunity from every form of judicial process except to the extent that it expressly waives its immunity for the purpose of any proceedings or by the terms of any contract".

This wording was changed by the Legal Committee of the Preparatory Commission to read in the more restrictive fashion that it now stands. It must be concluded, therefore, that it was not the intention of the Preparatory Commission, or of the General Assembly, to extend the right of waiver to waiver in future by the terms of a contract.

Since permission is given by the General Convention to the United Nations to waive its immunity in any particular case in so far as legal process is concerned, it is to be supposed that the authority to carry out such a waiver is placed with the Secretary-General, since the Secretary-General is responsible for the administration of the United Nations. It would not be possible to expect the Secretary-General to ask further authority from the General Assembly in each instance that legal process is to be served upon the United Nations; also the fact that the General Assembly found it necessary to write in a limitation upon the extent of any waiver, in so far as execution is concerned, would indicate that the General Assembly intended to transfer this authority to the Secretary-General, since if it were itself the waiving authority, there would be no necessity for making a limitation for its own right of waiver. This argument might be countered by stating that it is specifically provided in the General Convention that the Secretary-General may waive immunity in so far as officials and experts of the United Nations are concerned (Sections 20, 23, 29). However, such a provision would be necessary in this instance since otherwise it might be supposed that the official or expert was entitled to waive his own immunity. In the case of the United Nations, the Secretary-General is "the chief administrative officer of the organization" and therefore such a clarification concerning the ability probably did not appear to be necessary to the Preparatory Commission or the General Assembly.

In practice, the Secretary-General has determined in all cases whether or not the immunity of the Organization should be waived.

84. In 1949 a suit was commenced by a private individual against the United Nations for damages arising out of a motor car accident in New York in which a United Nations vehicle was involved. Under the terms of the insurance policy held by the United Nations, the insurers were ready to defend the action in court. Before they could do so, however, it was necessary for the United Nations to waive its immunity. In an internal

memorandum the Office of Legal Affairs recommended that this should be done

for the purpose of allowing this particular suit to go to trial and that as a matter of policy it also be prepared to waive its immunity in any other case of a similar nature, subject to each such case being first reviewed by the Office of Legal Affairs to make sure that it has no complication such as might merit special treatment.

The memorandum then continued:

The question arises as to how this immunity may be waived. Resolution 23 (I), paragraph E, instructs the Secretary-General "to insure that the drivers of all official motor cars of the United Nations and all members of the staff who own or drive motor cars shall be properly insured against third party risk".

Under this resolution the Secretary-General has clear authority to take whatever steps he may deem necessary to implement its terms. As it is really not feasible to take out insurance without permitting the insurance carrier the right to defend any suits which might be brought against the United Nations, the Secretary-General clearly has the power to waive the immunity of the United Nations for the purpose of permitting such suits to be brought.

This memorandum is only intended to deal with the waiver of the Organization's immunity in insurance cases. The question as to under what circumstances the United Nations might be prepared to waive its immunity in other cases is complex, but as this question has no bearing on the insurance cases which are in a class by themselves, the necessity for discussing the waiver of immunity as a whole does not arise at this time.

In accordance with the conclusions reached in this memorandum, it is proposed that the Office of Legal Affairs should authorize the insurance carrier to defend this particular suit on behalf of the United Nations, thereby, of course, resulting in the United Nations waiving its immunity for this particular case and that the Office of Legal Affairs take similar action in all other insurance cases where it considers it would be within the spirit of the relevant General Assembly Resolution so to do.

The same policy has been followed in subsequent cases.

(b) *Special agreements obliging the United Nations to waive its immunity in specified circumstances*

85. The United Nations has not normally entered into agreements, either with private contractors, other international organizations, or with Governments, whereby it has agreed in advance to waive its immunity if specified events occurred.

86. In 1960 one of the specialized agencies proposed that article II of the standard Special Fund Agreement⁶¹ with executing agencies should be amended so that the executing agency would no longer be obliged, as at present, to waive the privileges and immunities of private firms employed on Special Fund projects in cases where the Special Fund requested such a waiver, but would merely "consider the possibility of waiving such immunity".

87. The Office of Legal Affairs informed the Special Fund that in its opinion this amendment was not acceptable and gave its reasons, which are of interest in the present connexion, and were as follows:

⁶¹ It may be noted that under the Special Fund Agreement both the General Convention and the Specialized Agencies Convention are declared applicable. A similar provision is contained in other agreements whereby the United Nations and the specialized agencies provide technical assistance.

It should first be observed that a private firm would only receive privileges and immunities from a Government on the basis of the Agreement between the Government and the Special Fund. Any rights and obligations deriving from the latter Agreement can obviously be waived only by the parties thereto, and it was for this reason that our earlier drafts of the standard agreement with Executing Agencies provided for waiver of such immunities by the Special Fund only. During . . . discussions with the other Specialized Agencies on these earlier drafts, they proposed that the waiver should be effected by the Executing Agency upon request of the Special Fund. We agreed to this proposal inasmuch as the Special Fund still retained an effective right to waive the immunities in question, and we did not think that any Government would object if such a waiver were nominally effected by an Executive Agency rather than by the Special Fund.

In contrast, however, the present proposal would vest in the Executive Agency the sole right to waive, and the Special Fund would lose a right belonging to it under its agreement with a Government. It is legally questionable whether the arrangement proposed. . . could be made effective as against the Government, which after all is a party directly affected by a decision whether or not to waive. In other words, the Government could simply refuse to recognize the right of the Agency to demand immunities for a private firm since the Agency would have no such right in the Special Fund — Government Agreement, and could look to the Special Fund to waive such immunities where such a waiver is called for, notwithstanding any provision to the contrary in the Special Fund — Agency agreement.

The only reason given to justify the proposal is that the Executing Agency may have information concerning the circumstance of a particular case involving waiver of immunity which the Managing Director does not have. The General Assembly has expressly and specifically placed on the Managing Director the over-all responsibility for the Special Fund [para. 21, part D, resolution 1240 (XIII)]. It seems to us only proper that any information on such an important matter should be brought to his attention and that he should have substantial control over the application of any provision in a Government agreement granting immunities to a private firm.

(c) *Interpretation of the phrase "any measure of execution"*

88. The provision that the Organization's waiver of immunity should not extend to "any measure of execution" has received relatively little interpretation in decided cases. In the understanding of the Secretariat the words are to be interpreted in their plain meaning, namely, that even in the event that the Organization does waive its immunity in a particular case, no judgement given against the Organization can be enforced by court orders or by actions taken by the executive or other authorities and directed against the Organization itself, or its property and assets. In short, the manner of compliance with any decision remains within the discretion of the United Nations, even though the United Nations may have agreed to submit to the substantive provisions of national law as regards the issue in dispute.

89. The immunity of the United Nations from any measure of execution does not render its contracts void or unenforceable.⁶² The immunity extends to cover immunity from garnishee orders.⁶³

⁶² See also section 1 (a), paras. 1-4, above.

⁶³ See also section 7 (c), paras. 77-79, above.

Section 9. Inviolability of United Nations premises and the exercise of control by the United Nations over its premises

(a) *Inviolability of United Nations premises*

90. The inviolability of United Nations premises and of areas under United Nations control (e.g. the Headquarters District in New York) has been expressly provided for in the pertinent international agreements.⁶⁴ The principle laid down, that United Nations premises may not be entered and that the United Nations must itself be permitted to control activities occurring on those premises unless it requests the local authorities to intervene, has in general been well observed.

91. In 1965, in response to an inquiry raised by a Member State, the United Nations prepared the following *aide-mémoire*, setting out the grounds for the inviolability of rented premises no less than for those owned by the Organization.

With only a very few exceptions, notably in the United States and Switzerland, all offices of the United Nations throughout the world are located in rented premises comprising either whole buildings or parts thereof. These premises enjoy inviolability either directly under the Convention on the Privileges and Immunities of the United Nations to which ninety Member States have acceded, or, where the State was not a party to the Convention, by special agreement with the Government concerned.

Article II, Section 3, of the Convention provides, *inter alia*, that "the premises of the United Nations shall be inviolable".

In those cases where the State is not a party to the Convention-agreements concerning privileges and immunities are included which incorporate all the provisions of the Convention or set forth those privileges and immunities considered essential including inviolability of premises. For example, agreements with the Republic of Korea, which is not a member of the United Nations, and with Japan, before it became a member of the United Nations, provided that the United Nations would enjoy, *inter alia*, the privileges and immunities defined in Article I, II and III of the Convention on the Privileges and Immunities of the United Nations. (See paragraph 1 of Article IV of the exchange of letters constituting an agreement between the United Nations and Korea regarding privileges and immunities to be enjoyed by the United Nations in the Republic of Korea, signed at Pusan on 21 September 1951, United Nations, *Treaty Series*, vol. 104, page 323, and Article I, paragraph (1) of the Agreement between the United Nations and Japan on privileges and immunities of the United Nations, signed at Tokyo on 25 July 1952, United Nations *Treaty Series*, vol. 135, page 305). The status of ONUC Agreement concluded with the Congo, before it became a party to the Convention on the Privileges and Immunities of the United Nations, contained a special article on premises as follows:

Premises

"24. The Government shall provide, in agreement with the United Nations accommodation service, such buildings or areas for headquarters, camps or other premises as may be necessary for the accommodation of the personnel and services of the United Nations and enable them to carry out their functions. Without prejudice to the fact that all such premises remain Congolese territory, they shall be inviolable and subject to the exclusive control and authority of the United Nations.

⁶⁴ See section 3, General Convention; section 2, Agreement with Switzerland; section 9 (a), Headquarters Agreement with the United States; section 3 (a) and 8, ECLA Agreement; section 3, ECAFE Agreement; and section 2, ECA Agreement.

This authority and control extend to the adjacent public ways to the extent necessary to regulate access to the premises. The United Nations alone may consent to the entry of any government officials to perform duties on such premises or of any other person. Every person who so desires for a lawful purpose shall be allowed free access to the premises placed under the authority of the United Nations.

"25. If the United Nations should take over premises previously occupied by private persons and thus represented a source of income, the Government shall assist the United Nations to lease them at a reasonable rental." (S/5004 and A/4986.)

TAB and the Special Fund concluded special agreements which follow a model text committing the government, where it is not already a party, to apply the provisions of the Convention on the Privileges and Immunities of the United Nations (see ST/LEG/SERIES B/10, pages 374 and 377).

In summary, the vast majority of the United Nations offices are in rented premises which are inviolable either under the Convention on the Privileges and Immunities of the United Nations or under special agreements.

Incidentally it may also be noted that the Vienna Convention on Diplomatic Relations, 1961, makes no distinction with respect to rented premises. Article 1 (i) gives the following definition:

"the premises of the mission" are the buildings or parts of buildings and the land ancillary thereto, *irrespective of ownership*, used for the purposes of the mission including the residence of the head of the mission." (italics added).

"Article 22 of the Vienna Convention provides:

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

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

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

While the Vienna Convention of course does not apply to international organizations, it is indicative of the fact that no distinction is made in the inviolability of those premises which are owned and those premises which are rented or otherwise held on a more temporary basis. In this respect it is declaratory of existing international law.

92. A number of cases in which the inviolability of United Nations premises was not respected are described briefly below; the list is not exhaustive of all incidents which might be included under this section.

93. In 1949 officials of a Member State entered a United Nations Information Centre without authorization and requested a United Nations official employed there to leave the premises for questioning.⁶⁵ The official declined to leave and remained in the premises of the Centre until the matter had been clarified. The Secretary-General protested to the Ministry of Foreign Affairs over this infringement of the inviolability of United Nations premises. The Ministry of Foreign Affairs apologized for the incident.

94. Members of the armed forces of a Member State entered premises occupied by the members of a United

⁶⁵ See also section 23 (c), paras. 264-269, below.

Nations Mixed Armistice Commission in 1952 without the consent of the United Nations; a protest was made to the Government concerned.

95. In 1954 the Secretary-General protested to a Member Government after an army officer entered the premises jointly occupied by two United Nations subsidiary organs and sealed a United Nations radio station which was installed there. In 1956 a further violation of the same premises occurred when military police entered the building without authorization and forcibly removed a United Nations official; approximately ten minutes later three detectives returned and ordered another official to follow them. The Secretary-General protested to the Permanent Representative of the State concerned over the incident. In January 1957, a subsequent incident took place when a security officer entered the premises without the consent of the official in charge and sought to take a United Nations official into custody for questioning.⁶⁶

96. The obligation imposed on host authorities to respect the inviolability of United Nations premises extends, firstly, to the possibility of direct interference through the acts of public officials. It also includes, however, the obligation of the host authorities to take reasonable steps to ensure that the inviolability of United Nations premises is respected by private individuals. This obligation, though less absolute in character than that in respect of the acts of public officials, is in turn wider in scope than the inviolability of United Nations premises *per se*; it may in general be expressed as an obligation to allow the United Nations to perform its allotted functions without improper interference or interruption which, whilst not in itself an immediate violation of United Nations premises, may nevertheless achieve an effect within those premises. *Ex hypothesi*, the obligation in respect of private acts extends to the prevention of actual attacks on or unauthorized entry into United Nations premises on the part of private individuals, where such actions could and ought reasonably to have been foreseen by the host authorities concerned. A number of host agreements refer expressly to the duty of the national authorities in this regard.⁶⁷

97. In 1956 the Legal Counsel wrote to the Secretariat official in charge of the Security and Safety Section, setting out the relevant provisions of the Headquarters Agreement and referring to the statutory and other steps taken under local law regarding picketing at United Nations Headquarters.

1. It appears that certain organizations may attempt to picket, distribute leaflets, or otherwise demonstrate on the East side of First Avenue immediately adjacent to the United Nations Headquarters District or even within the Headquarters property. I assume that the Security and Safety Section will seek an understanding with the New York City police to cope with any such situation as may arise.

2. This matter does not raise any question as to the public character of the City sidewalks, ordinary rights of peaceful picketing, or civil liberties in general. As far as concerns the area imme-

diately contiguous to the United Nations Headquarters District it relates solely to the implementation of the undertaking by the United States Government that the strictly international character and the tranquillity of the Headquarters will be preserved at all times.

3. There can be no legal doubt as to police requirements on this score. The New York City Administrative Code in Section D41-28.0. d., implementing for municipal purposes the establishment of the Headquarters in New York City and declaring as a matter of legislative determination that a public purpose and the interests of the State and City of New York were promoted thereby, authorized the board of estimate, among other things, to regulate and limit exhibits and displays contiguous to, fronting upon or surrounding the lands occupied by the United Nations. It stated that the purpose was "to insure the safe and orderly conduct of such United Nations and to protect the useful and desirable purpose of the same and to provide for the safety, convenience and comfort of officials, delegates, personnel and visitors to the same". Any violation of such regulations is a misdemeanour.

4. Likewise the Headquarters Agreement was adopted by a Joint Resolution of the United States Congress and under the US Constitution is the supreme law of the land. Section 16 (a) states:

"The appropriate American authorities shall exercise due diligence to ensure that the tranquillity of the Headquarters District is not disturbed by the unauthorized entry of groups of persons from outside or by disturbances in its immediate vicinity and shall cause to be provided on the boundaries of the Headquarters District such police protection as is required for these purposes."

It is well established in international law that picketing or other demonstrations concerning the political or social views of any foreign government constitutes a disturbance when conducted in the immediate vicinity of diplomatic territory. This is true even when the activity is otherwise of an orderly nature.

In addition, Section 18 of the Headquarters Agreement provides that:

"The appropriate American authorities shall take all reasonable steps to ensure that the amenities of the Headquarters District are not prejudiced and the purposes for which the district is required are not obstructed by any use made of the land in the vicinity of the district."

United States courts have also upheld a congressional enactment against picketing in front of embassies as in no way violating civil rights under the Constitution but merely carrying out US obligations under international law to protect the dignity of diplomatic property and to prevent any action in its immediate vicinity tending to bring a foreign government into public disrepute.

Any one of the above provisions would be sufficient in itself to authorize and support police action in prohibiting any kind of demonstration on the edge of the Headquarters District which might give offence to Member Governments and so cause harm to US foreign relations. Read together, there can be no doubt that the New York City Administrative Code implements the cited provisions of the Headquarters Agreement and authorizes action by City authorities to give full force and effect to the requirements of police protection.

In addition, if any attempt should be made to demonstrate or carry on political activities within the Headquarters District, strict application of Section 16 (b) of the Headquarters Agreement will be necessary. It provides:

"If so requested by the Secretary-General, the appropriate American authorities shall provide a sufficient number of police for the preservation of law and order in the Headquarters District, and for the removal therefrom of persons as requested under the authority of the United Nations."

⁶⁶ *Ibid.*

⁶⁷ See e.g., section 5 (a) ECAFE Agreement and section 4 (a) ECA Agreement.

The New York case of *People v. Carcel et al* (City Magistrate's Court of City of New York, Upper Manhattan Arrest Court, 30 March 1956 2 Misc. 2d 827, 150 N.Y.S. 2d 436 and Court of Appeals of New York, 3 July 1957, 3 N.Y.S. 2d 327, 165 N.Y.S. 2d 113, 114 N.E. 2d. 81) may also be noted. The defendants were arrested by the police and charged with disorderly conduct after they had refused to discontinue picketing on the eastern side of First Avenue immediately outside the main entrance of the United Nations; the police had previously requested them to picket on the other side of the street. The arrest followed a complaint by the United Nations. The defendants maintained that their arrest was in breach of their right to free speech and assemblage. The Magistrate found the defendants guilty of disorderly conduct. After citing the relevant provisions of the Headquarters Agreement and various court decisions given in respect of the restrictions placed on picketing near embassy premises in Washington, he declared:

"It is rather evident that because of the necessity of affording to the Member Nations of the United Nations such protection as will not involve the United States in any difficulty with the members of the United Nations because of the failure on the part of the United States as host to give ample protection to the members, the courts have felt it proper to approve such measures which aid towards the protection of foreign governments. . . It is indeed a duty upon the United States to take reasonable precautions to prevent the doing of things which might lead to a disruption of the proceedings of the United Nations."

The defendants' appeal was dismissed by the Court of Special Sessions of the City of New York. On further appeal to the Court of Appeals of New York, however, the convictions were reversed on the ground that the conduct of the defendants did not amount to disorderly conduct under S. 722 of the New York Penal Law; the Court held that the case did not turn upon the provisions of the Headquarters Agreement but arose solely under New York Law.

(b) *The exercise of control by the United Nations over its premises*

98. The principle that the premises of the United Nations are inviolable has as its counterpart the principle that, unless otherwise provided, the United Nations is alone competent to exercise control over its premises and activities conducted there. The following description of the way in which the United Nations has exercised the control conferred upon it in relation to premises is subdivided, so far as is practicable, under four headings:

- (i) The extent of the headquarters or other area in which United Nations premises are situated.
- (ii) The power of the United Nations to make regulations and the applicability of local law.
- (iii) The exercise of police and other official functions.
- (iv) The service of legal process within United Nations premises.

(i) *The extent of the headquarters or other area in which United Nations premises are situated*

99. When entering into an agreement with a host State regarding permanent installations, such as those in New York or Geneva or the headquarters of the economic commissions, the United Nations has sought to define, either in the Headquarters Agreement itself or in a supplementary agreement or annex, the precise limits of the area in which its premises are situated or over which it

has control. Thus in the case of the Headquarters Agreement with the United States, Annex I to that Agreement gives an exact definition of the "Headquarters District" referred to in the Agreement; it also provides that the expression "Headquarters District" may include:

(2) any other lands or buildings which may from time to time be included therein by supplemental agreement with the appropriate American authorities.

100. In 1966, following the acquisition by the United Nations of premises outside the Headquarters District, as originally defined, the United Nations and the United States entered into the Supplemental Agreement set out below.

The United States of America and the United Nations:

Considering that the office space available within the Headquarters District as defined in Annex 1 to the Agreement Regarding the Headquarters of the United Nations signed at Lake Success on 26 June 1947 is inadequate and it has become necessary for units of the Secretariat of the United Nations to be provided with other premises outside the area so delineated;

Considering that, for the purpose, the United Nations has acquired the building and long-term lease to the land known as 805-7 First Avenue (801 United Nations Plaza) and 343 East 45th Street in the Borough of Manhattan and has also acquired a five-year lease of certain office space in the Alcoa Plaza Associates Building in New York City;

Considering that it is desirable that, with respect to those premises, the United Nations, officials of the United Nations, and Representatives of the Members of the United Nations be accorded the necessary privileges and immunities as envisaged in Article 105 of the Charter of the United Nations and in the Headquarters Agreement; and

Desiring to conclude a supplemental agreement, in accordance with Section 1 (a) of the Headquarters Agreement, in order to include those premises within the Headquarters District in addition to the area defined in Annex 1 to the Headquarters Agreement;

Have agreed as follows:

Article 1

The Headquarters District, within the meaning of Section 1 (a) of the Agreement between the United States of America and the United Nations Regarding the Headquarters of the United Nations signed at Lake Success on 26 June 1947, shall include, in addition to the area defined in Annex 1 to that Agreement, the following premises:

(1) All of the office building known as 805-7 First Avenue (801 United Nations Plaza) and 343 East 45th Street, located on a parcel of land in the Borough of Manhattan, City, County and State of New York, bounded and described as follows:

"Beginning at a point formed by the inter-section of the Westerly side of First Avenue and the Northerly side of 45th Street; running thence Westerly along the Northerly side of 45th Street 100 feet; thence Northerly parallel with First Avenue and part of the way through a party wall 80 feet; thence Easterly parallel with 45th Street 20 feet; thence Southerly parallel with First Avenue 39 feet 7 inches; thence again Easterly parallel with 45th Street and part of the way through another party wall 80 feet to the Westerly side of First Avenue; thence Southerly along the Westerly side of First Avenue 40 feet 5 inches to the point or place of beginning."

Provided, however, that the foregoing shall not include those parts of the building on the street floor and basement which are sublet to the Ninth Federal Savings and Loan Association of New York City and to the Radnor Delicatessen, Inc. (with an assignment to Deli-Napoli, Inc.) until such time as the United Nations shall occupy and use those parts for offices of the Secretariat.

(2) That part of the Alcoa Plaza Associates Building located at 866 United Nations Plaza, New York City, as identified by the cross-hatching on the plan annexed hereto. Said premises shall include all offices, rooms, halls and corridors located on the third floor of said building within the space identified by said cross-hatching. These premises shall further include the remainder of the third floor from the date that the United Nations takes possession thereof. Said premises shall not, however, include any stairways and elevators giving public access to other floors.

Article II

The Secretary-General of the United Nations shall notify the Permanent Representative of the United States to the United Nations immediately should any of the premises described in Article I, or any part of such premises, cease to be used for offices by the Secretariat of the United Nations. Such premises, or such part thereof, shall cease to be a part of the Headquarters District from the date of such notification.

Article III

The Secretary-General of the United Nations shall notify the Permanent Representative of the United States to the United Nations immediately of the termination of any subleases of parts of the premises described in Article I and of the possession of such parts by the United Nations. Such parts of such premises shall become a part of the Headquarters District from the date of such occupation.

Article IV

This Supplemental Agreement shall enter into force upon its signature.

In witness whereof the respective representatives have signed this Supplemental Agreement.

Done in duplicate, in the English language, at New York this ninth day of February, 1966.

101. The United Nations notified the United States on taking possession of the remainder of the third floor of the premises (see article I (2) above). The Agreement was subsequently amended so as to include a further paragraph, extending the Headquarters District to that part of the sixth floor of 886 United Nations Plaza which is used by UNICEF.

(ii) *The power of the United Nations to make regulations and the applicability of local law*

102. Apart from declaring United Nations premises inviolable, the General Convention and the Agreement with Switzerland contain no provision dealing with the question of how United Nations control over its premises is to be exercised. The Headquarters Agreement with the United States, however, regulates the matter with some precision. Sections 7 and 8 of that Agreement provide as follows:

Section 7. (a) The Headquarters District shall be under the control and authority of the United Nations as provided in this agreement.

(b) Except as otherwise provided in this agreement or in the General Convention, the federal, state and local law of the United States shall apply within the Headquarters District.

(c) Except as otherwise provided in this agreement or in the General Convention, the federal, state and local courts of the United States shall have jurisdiction over acts done and transactions taking place in the Headquarters District as provided in applicable federal, state and local laws.

(d) The federal, state and local courts of the United States, when dealing with cases arising out of or relating to acts done or

transactions taking place in the Headquarters District, shall take into account the regulations enacted by the United Nations under section 8.

Section 8. The United Nations shall have the power to make regulations operative within the Headquarters District, for the purpose of establishing therein conditions in all respects necessary for the full execution of its functions. No federal, state or local law or regulation of the United States which is inconsistent with a regulation of the United Nations authorized by this section shall, to the extent of such inconsistency, be applicable within the Headquarters District. Any dispute, between the United Nations and the United States, as to whether a regulation of the United Nations is authorized by this section or as to whether a federal, state or local law or regulation is inconsistent with any regulation of the United Nations authorized by this section, shall be promptly settled as provided in section 21. Pending such settlement, the regulation of the United Nations shall apply, and the federal, state or local law or regulation shall be inapplicable in the Headquarters District to the extent that the United Nations claims it to be inconsistent with the regulation of the United Nations. This section shall not prevent the reasonable application of fire protection regulations of the appropriate American authorities.

103. In resolution 481 (V), adopted on 12 December 1950, the General Assembly requested the Secretary-General to present to the Assembly for approval any draft regulation "within the provisions of the Headquarters Agreement which may in his opinion be necessary for the full execution of the functions of the United Nations" and decided that,

if, in the opinion of the Secretary-General it is necessary to give immediate effect to any regulation within the provisions of the Headquarters Agreement, he shall have authority to make such regulation. The Secretary-General shall report any action so taken to the General Assembly as soon as possible.

104. In accordance with resolution 481 (V) the General Assembly adopted resolution 604 (VI) on 1 February 1952, in which it confirmed Headquarters Regulation No. 1, relating to the United Nations social security system, which had been promulgated by the Secretary-General on 26 February 1951, and approved Headquarters Regulation No. 2, a qualification for professional or other special occupational services within the United Nations, and Headquarters Regulation No. 3 on the operation of services within the Headquarters District. These regulations are reproduced below; the United Nations has not adopted any regulations since 1962.

Headquarters Regulations

For the purpose of establishing in the Headquarters District conditions in all respects necessary for the full execution of the functions of the United Nations, and in particular for the purposes specified in each regulation, the following regulations are in effect:

Regulation No. 1

United Nations Social Security System

For the purpose, in the field of staff social security, of giving immediate effect to measures necessary for avoiding multiple obligations arising from the possible application of overlapping laws and regulations:

1. A comprehensive United Nations social security system having been established for the purpose of affording protection against all reasonable risks arising out of or incurred during service with the United Nations, the provisions of the United Nations social security system shall constitute the only obligations of the United Nations in respect of such risks.

2. The provisions of the United Nations social security system shall constitute the sole provisions under which persons in the service of the United Nations shall be entitled to claim against the United Nations in respect of any risks within the purview of the United Nations social security system, and any payments made under the United Nations social security system shall constitute the sole payments which any such person shall be entitled to receive from the United Nations in respect of any such risks.

3. This regulation shall take effect on the date of its promulgation, without prejudice, however, to any elements of the United Nations social security system, or any rights or obligations thereunder, already existing at the date of this regulation.

Regulation No. 2

Qualifications for professional or other special occupational services with the United Nations

For the purpose of availing the United Nations of the professional or special occupational services of persons recruited on as wide a geographical basis as possible:

The qualifications and requirements necessary for the performance of professional or other special occupational services within the Headquarters District shall be determined by the Secretary-General; provided that, prior to authorizing medical or nursing services by any person, the Secretary-General shall ascertain that such person has been duly qualified to perform such services in his own or another country.

Regulation No. 3

Operation of services within the Headquarters District

For the purpose of ensuring uninterrupted services necessary to the proper functioning of the principal and subsidiary organs of the United Nations:

The times and hours of operation of any services and facilities or retail establishments authorized within the Headquarters District shall be in compliance with schedules fixed by the Secretary-General; no regulations, requirements or prohibitions beyond those so prescribed shall be imposed without his approval.

105. In 1951 the Attorney-General of the State of New York advised the State Liquor Authority that the Alcoholic Beverage Control Law of New York State was not applicable within the United Nations premises in New York. The major portions of his opinion were as follows:

Gentlemen:

This is in reply to your letter of September 21, 1951, requesting my opinion as to whether the Conference Building and the General Assembly Building of the United Nations Headquarters in the Borough of Manhattan, City of New York, are subject to the jurisdiction of the State of New York and to the provisions of the Alcoholic Beverage Control Law.

Although Article IV-B of the State Law (added by Chapter 25 of the Laws of 1947) authorizes the Governor, upon fulfilment of certain prescribed conditions, to execute in the name of the State a deed or release ceding jurisdiction of any land in the State acquired by the United Nations, and although the United Nations has acquired or is in possession under contract to acquire the lands constituting its Headquarters District in the Borough of Manhattan in the City of New York. . . no formal cession of jurisdiction pursuant to Article IV of the State Law has been made, nor has any application therefor been received, and since the jurisdiction of the State over lands within its territorial limits cannot be abrogated except by its consent, it must be stated as a general principle that the United Nations Headquarters District in the Borough of Manhattan is subject to the political jurisdiction of this State. However, this conclusion does not dispose of your question.

106. The opinion then refers to Articles II and VI of the United States Constitution, relating to the treaty-making power of the United States; to Articles 104 and 105 of the Charter; to the International Organizations Immunities Act, Section 2 (b) and (c); and to the General Convention, Sections 2, 3 and 7 (a), and Sections 7, 8, 9 and 26 of the Headquarters Agreement. The opinion continues:

In the light of the foregoing statement of facts, I think the conviction is inescapable that while the Headquarters District of the United Nations in the Borough of Manhattan continues to be under the general political jurisdiction of the State of New York, there has come into existence a concurrent jurisdiction of the United Nations to make regulations, operative within the district for the purpose of establishing therein conditions in all respects necessary for the full execution of its functions, and that in any case of conflict between a regulation so made and any law of this State, the regulation of the United Nations must prevail; and that the jurisdiction of the State may not be so exercised or its laws so enforced as to deny or interfere with the enjoyment by the United Nations within the Headquarters District of any privileges or immunity necessary for the unhampered exercise of its functions or fulfilment of its purposes. This limitation upon the State in the exercise of its right of sovereignty is by the consent of the State, given by its ratification on July 26, 1788, of the Constitution of the United States; for the privileges and immunities and the powers of the United Nations in the premises flow from and have their fountainhead in the multilateral treaty known as the United Nations Charter which, by express provision of the Federal Constitution, is declared to be the supreme law of the land, anything in the constitution or laws of any State to the contrary notwithstanding.

I think it is self-evident that any attempt to assert the applicability of the State Alcoholic Beverage Control Law as against the United Nations within its Headquarters District would tend to embarrass it in the exercise of its functions and would interfere with the enjoyment by it of privileges and immunities necessary for the fulfilment of its purposes; would be contrary to its Charter and to measures taken by the United States and the United Nations to give practical effect to the provisions thereof; and that, therefore, such State Law is not applicable as against the United Nations within its Headquarters District in the Borough of Manhattan.

107. The United Nations occupation of premises has raised a number of detailed problems as regards the maintenance of machinery, and indeed of the premises in general, in accordance with proper safety and health standards. In general the United Nations has declined to permit inspections or similar measures, either of the premises or of installations (e.g. of fire alarms, elevators, escalators) to be conducted by the local authorities, in particular if those authorities claimed the right to conduct such inspections at any time, but has ensured, in conjunction with the pertinent authorities, that the substantive conditions as to safety and adequacy were fully met. These conditions have been satisfied by means of inspections carried out by United Nations maintenance and security staff. This approach was followed in 1963, for example, in respect of the smoke detectors installed in the Headquarters District as part of a fire protection scheme. In a very few instances, where the United Nations considered that it could not itself inspect or otherwise ensure that the apparatus in question was in proper condition (e.g. in the case of a window-washing machine) local officials have been permitted to enter, subject to

advance notice, to survey and conduct tests of the equipment concerned.

(iii) *The exercise of police and other official functions*

108. Sections 9 and 10 of the Headquarters Agreement provide as follows:

Section 9 (a). The Headquarters District shall be inviolable. Federal, state or local officers or officials of the United States, whether administrative, judicial, military or police, shall not enter the headquarters district to perform any official duties therein except with the consent of and under conditions agreed to by the Secretary-General. The service of legal process, including the seizure of private property, may take place within the Headquarters District only with the consent of and under conditions approved by the Secretary-General. (b) Without prejudice to the provisions of the General Convention or Article IV of this Agreement, the United Nations shall prevent the Headquarters District from becoming a refuge either for persons who are avoiding arrest under the federal, state, or local law of the United States or are required by the Government of the United States for extradition to another country, or for persons who are endeavouring to avoid service of legal process.

Section 10. The United Nations may expel or exclude persons from the Headquarters District for violation of its regulations adopted under Section 8 or for other cause. Persons who violate such regulations shall be subject to other penalties or to detention under arrest only in accordance with the provisions of such laws or regulations as may be adopted by the appropriate American authorities.

109. Various arrangements have been made with the local police authorities in New York, in strict accordance with the terms of these sections, in order to deal with particular problems which have arisen. In 1949, for example, the United States Mission forwarded a request from the New York City Police authorities that police officers and other municipal authorities should be permitted to enter the Headquarters District during the construction of the present Headquarters in New York City "for the purpose of making inspections provided by law and regulation for the public safety, and for other law enforcement purposes". After a meeting with United States Mission and City officials, agreement was reached on the steps which might be taken by the local authorities. On 1 July 1949, the Secretary-General wrote to the United States representative as follows:

... It is the understanding of the Secretary-General that it is the desire of the United States Representative for certain appropriate officials to be allowed entry into the Headquarters District of the United Nations temporarily in order that the following matters may be taken care of:

- (i) Pursuit and arrest in case criminals seek refuge in the Headquarters District or crime is committed in the District, or vagrants establish themselves in the District;
- (ii) Immediate entrance in case of disaster, in order that assistance may be brought, and investigation made;
- (iii) Entrance for municipal authorities in order that appropriate inspections in connection with laws and regulations provided for the public safety may be made and the Secretary-General notified in case of violations of such laws and regulations.

The Secretary-General has the honour to inform the United States Permanent Representative at the Seat of the United Nations that he would be ready to enter into the following temporary arrangements, it being understood, however, that these arrangements are to apply only during the period of the construction of the Permanent Headquarters site and until the Secretary-Gen-

eral has notified the United States representative that suitable administrative arrangements including security precautions in the Headquarters District have been undertaken by the United Nations. It would also be understood that these temporary arrangements would apply only to that area of the Permanent Headquarters District not occupied by the United Nations, thus excluding the United Nations Manhattan Building, and that the Secretary-General would reserve the right to notify the United States representative from time to time that certain other buildings in the Permanent Headquarters site are being used for the official business of the United Nations and that, therefore, such arrangements would no longer apply to the corresponding areas of the Permanent Headquarters District:

1. Authority shall be given to the appropriate officials of the United States to enter the Headquarters area for the purpose of pursuing criminals, removing vagrants and preventing disturbances of the peace. Arrests may be made on the premises, it being understood, however, that under no circumstances shall an arrest of a United Nations official be made on the premises (or for an act which has occurred on the premises), without the prior consent of the Secretary-General, and in all cases where an arrest has been made of other persons, the Secretary-General will be notified as soon as possible.

2. If and when a disaster occurs, the Secretary-General will welcome the immediate entrance of the competent authorities in the Headquarters District for assistance in disaster relief. It is, however, requested that when it is felt appropriate for an investigation to be made of such a disaster, that the Secretary-General be immediately notified so that he may be associated through a representative with such investigation *ab initio*.

3. The Secretary-General is further prepared to give a general consent to municipal authorities to enter the Headquarters District in order to enable them to verify that precautions prescribed by local laws and regulations concerning public safety are being taken. The Secretary-General has the honour to request, however, that any information in regard to violation of such regulations shall be communicated to him as soon as possible in order that he may direct that the appropriate steps be taken. . .

The arrangements outlined went into effect upon notification from the United States Representative.

110. Since the occupation of its present Headquarters the United Nations has assumed responsibility for the maintenance of security and general police functions there through its own security staff. On comparatively rare occasions New York City police have been invited to enter the building, following the commission of acts of violence or other wrongdoing. When Heads of State or other distinguished persons visit the United Nations, United States police have been permitted to enter, not in order to perform police duties but in order that there shall be no gap in liaison between the protection provided by them and that provided by the United Nations. Responsibility thus remains with the United Nations.

111. A broader problem arose in 1952-53 in connexion with the investigations conducted by the United States of its nationals on the staff.⁶⁸ As part of those investigations, the United States authorities, acting under a Presidential Executive Order, sought the finger-prints of staff members of United States nationality and required them to complete a questionnaire; the staff members concerned were

⁶⁸ See *Repertory of Practice of United Nations Organs*, vol. V, pp. 209-210, from which the following account is taken.

also interviewed by United States officials. The Secretary-General permitted the finger-printing to be conducted in the United Nations building, the distribution of the questionnaire to be made by the Secretariat officials, and the interviews to be conducted in the offices of staff members. The Secretary-General defended his action in a statement made to the General Assembly at its 413th plenary meeting during its seventh session, chiefly on the grounds that the authorization given the United States officials was for limited purpose only and that the convenience and morale of the staff required that the matter be handled as expeditiously as possible.

112. In the course of the discussion which followed the Secretary-General's statement the view was expressed that the convenience of the staff was not a valid ground for a procedure not in keeping with the international character of the Secretariat. It was said to be inconsistent with respect for that international character for a host State to request and for the Secretary-General to permit the use of premises and facilities of the Organization to enforce the internal laws and regulations of that State. In reply to these comments, at the Assembly's 421st plenary meeting the Secretary-General reiterated the reasons he had previously given and cited precedents in support of his action as follows:

It has happened in the past, when the interests of the United Nations have required it, that national police and other officials have been admitted to United Nations premises. This was not the first time, and I think we have some of them here today too. At the first part of the first session in London, British security police were admitted to Church House for the purpose of protection, and French police were invited and admitted to the Palais de Chaillot during the third and sixth sessions of the Assembly in Paris, both for security and for investigative reasons. Any secretary-general must have some latitude or discretion in specific circumstances to admit national officials to United Nations premises when he believes that the interests of the United Nations require it.

113. In 1961 a United Nations employee was arrested outside the Headquarters District and indicted for larceny committed within United Nations Headquarters. The Office of Legal Affairs informed the judge trying the case that the United Nations had no regulation in the field of criminal law and, accordingly, had no objection under sections 7 and 8 of the Headquarters Agreement to the case being determined according to the local law. When the case was brought before the Court of General Sessions, New York County⁶⁹ the defendant objected to the proceeding on the ground that the Court lacked jurisdiction in view of his position as a United Nations employee and the fact that the alleged crime had taken place on United Nations premises. The Court found the defendant guilty. The judge referred to section 7 (b) of the International Organizations Immunities Act, under which immunity from suit and legal process was granted to United Nations officials only in respect of acts performed in their official capacity. After examining the defendant's claim based on sections 8 and 9 of the Headquarters Agreement, the judge stated:

Accordingly, it would appear from this agreement that the local law shall have jurisdiction over any acts done or transactions taking place within the Headquarters District which are in violation of such laws and the courts of the appropriate American authorities shall have jurisdiction to try and determine issues between the parties. However, such Federal, State or local laws shall, of course, not be inconsistent with any regulation that has been authorized by the United Nations. . .

For the Court to recognize the existence of a general and unrestricted immunity over suits or transactions, as proposed by defendant, would be to establish a large preferred class of people within our borders who would be immune to punishment inasmuch as the United Nations has no tribunal for the control and punishment of defendants among its personnel. It can at best expel or eject them from the Headquarters District and such persons would escape trial and punishment completely. Such a blanket immunity is contrary to our sense of justice and cannot be supported by any reference to the United Nations Charter, Acts of Congress or executive orders of the President.

114. The defendant also argued, on the basis of article III, section 9 (a) of the Headquarters Agreement, that even if he was not immune from legal process, the United Nations had to give its consent prior to the indictment and, since its consent was obtained after the indictment, such consent had no effect. The Court held that that section of the Headquarters Agreement was not applicable in the case since the defendant had been arrested outside the United Nations Headquarters.

115. At the United Nations Office at Geneva local police have been asked on specific occasions to co-operate with United Nations security guards within United Nations premises; for example, during the 1954 Geneva Conference Swiss plain clothes as well as uniformed policemen and gendarmes were in charge of security at the Palais des Nations, both within the building and outside. More recently the exercise of police functions has been raised in relation to traffic accidents occurring within United Nations grounds. In 1959 it was suggested that in the event of such accidents any immunity of the person or persons involved should be waived and the competent Swiss authorities allowed to enter the grounds in order to conduct the customary inquiry and report. Whilst there appeared little difficulty in permitting the Swiss authorities to enter the grounds, the different procedures applicable for the waiver of the various parties which might be involved (e.g., United Nations officials with and without diplomatic immunity, officials of the various specialized agencies with and without diplomatic immunity, the representatives of Member States, members of the governing bodies of various international organizations) effectively prevented any simple administrative procedure from being adopted.

116. At offices away from New York and Geneva the problems have been generally smaller in scale. In 1956 ECAFE raised a number of questions as to the exercise of police functions in the ECAFE premises in Bangkok. The Office of Legal Affairs advised that the matter was regulated by the General Convention, to which Thailand was a party, and by the ECAFE Agreement which the Government was applying pending formal ratification. The Office of Legal Affairs stated that it would be proper to allow the local police to make an investigation within ECAFE premises in the event of the possible

⁶⁹ *People of the State of New York v. Nicholas Coumatos*, 19 January 1962, 224 N.Y.S. 2d 507, Gen. Sess., 224 N.Y.S. 2d 504. See also section 23 (b), paras. 262 and 263 below.

theft of property on the premises, whether belonging to ECAFE or to staff members. The only restrictions were that the entry of police must be authorized by the Executive Secretary and that the provision of information by staff members should not extend to supplying information on their official functions or official knowledge not already having a public character, unless the Executive Secretary had first obtained permission for an appropriate waiver from the Secretary-General.

117. It may be noted that the ECAFE Agreement (which has now been ratified) includes the following provisions:

Section 4 (a). Officers or officials of the Government, whether administrative, judicial, military or police shall not enter the working site to perform any official duties therein except with the consent of and under conditions agreed to by the Executive Secretary;

(b) Without prejudice to the provisions of Article VIII, the ECAFE shall prevent the working site from being used as a refuge by persons who are avoiding arrest under any law of Thailand, or who are required by the Government for extradition to another country, or who are endeavouring to avoid service of legal process or a judicial proceeding;

Section 5 (a). The appropriate Thai authorities shall exercise due diligence to ensure that the tranquillity of the working site is not disturbed by the unauthorized entry of groups of persons from outside or by disturbances in its immediate vicinity, and shall cause to be provided on the boundaries of the working site such police protection as is required for these purposes;

(b) If so requested by the Executive Secretary, the appropriate Thai authorities shall provide a sufficient number of police for the preservation of law and order in the working site, and for the removal therefrom of persons as requested under the authority of the ECAFE.

Sections 3 and 4 of the ECA Agreement provide for similar arrangements vis-à-vis the Ethiopian authorities.

(iv) *The service of legal process within United Nations premises*

118. The service of legal process within United Nations premises, whether directed to the Organization itself or to an individual, constitutes a breach of the obligation to respect the inviolability of United Nations premises. In section 9 (a) of the Headquarters Agreement it is expressly stated that:

The service of legal process, including the seizure of private property, may take place within the Headquarters District only with the consent of and under conditions approved by the Secretary-General;

119. The United Nations has consistently refused to accept the service of legal process within its premises and, where attempts have been made (e.g. by leaving the process on the floor), it has returned the process to the local authorities. It may be noted that in the case of service of process upon the Organization, or upon an official who is protected by reason of his official position, there is, in effect, a double immunity, namely in respect of the place of service and in respect of the Organization itself or the person concerned. In the case where process is served, or attempted to be served, on a person who does not enjoy immunity in respect of the matter in question, only the first immunity applies (i.e., in respect of the place of service) so as to render the service of legal

process without effect. Where it appeared that the matter involved a purely private transaction of an official, the United Nations has on occasions given information as to the home address of the person concerned.

120. A special exception to this principle was made in the case of the branch of the Chemical Bank and Trust Co. operating in the Headquarters District. In a letter to the Bank dated 29 December 1949, the Secretary-General referred to the legality of service of legal process against accounts maintained by the Bank at its branch within the Headquarters District, and continued:

In pursuance to the authority vested in me under Section 9 (a)⁷⁰ consent is hereby given to the service of legal process against all accounts maintained by the above-referred to branches of your Bank with the exception of such of these accounts as are in the name of the United Nations itself, or as are in the name of any other international organization within the meaning of Public Law 291, or are in the name of a Government, or are in the name of any individual falling within Section 19 of the Convention on the Privileges and Immunities of the United Nations, or are in the name of any other individual or other entity entitled to the privileges and immunities, exemptions and facilities accorded to diplomatic envoys under international law.

121. The United Nations reserved the right to amend the terms of this consent at any time or to withdraw it entirely, upon written notice, if it considers the consequences were impairing, or might impair, the proper functioning of the Organization. The United Nations subsequently requested the Bank to arrange to receive service of any legal process which might be issued in respect of the accounts concerned at an office outside the Headquarters District.

Section 10. Immunity of United Nations property and assets from search and from any other form of interference

122. As provided in section 3 of the General Convention,

The property and assets of the United Nations, 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.

123. As regards the meaning of the word "search", the United Nations has interpreted this to include immunity from any actual inspection by national authorities and immunity from verification of the contents of United Nations property. Thus, in the case of United Nations food or other supplies, for example, contained in sacks, envelopes or other containers, in the opinion of the United Nations its official statement of what the contents are should be accepted by national authorities; any search of the containers would be in violation of section 3. Similarly, in the case of a United Nations means of transport (car or lorry, plane, railway truck, etc.) an official statement by the United Nations as to the contents should be accepted, without unauthorized inspection (e.g., by opening the trunk of a car).

124. Amongst other forms of governmental action which the United Nations has considered in contravention of section 3 of the General Convention, it may be

⁷⁰ *Sc. of the Headquarters Agreement.*

noted that in 1959 the United Nations protested to the Government of a Member State after it had devalued certain large denomination bank notes to one tenth of their former value. The notes, whether held by the United Nations itself or by specialized agencies or by technical assistance personnel, had been supplied by the Government as part of its contribution to the local costs of technical assistance. It was declared by the United Nations that in these circumstances the devaluation, as it applied to the United Nations, amounted to a "confiscation" falling within section 3 of the General Convention and section 5 of the Specialized Agencies Convention.⁷¹

125. The interpretation of the phrase relating to immunity "from . . . any other form of interference" has been considered in a number of contexts. On occasion it has been pointed out in correspondence that unusually burdensome requirements in respect of the documents needed for customs purposes might constitute interference. More direct forms of interference have also occurred. In 1952, for example, a United Nations plane was impounded at an airport by being refused clearance to take off. The United Nations informed the authorities of the State concerned that the incident, which it was presumed must have resulted from a misunderstanding, did not accord with section 3 of the General Convention. It was also stated that if the impounding of the aircraft was for the purpose of enforcing payments of fees (which were in dispute), it was also contrary to the intent of section 2 regarding the immunity of the United Nations from any measure of execution. In addition the refusal to grant clearance was inconsistent with the tenor of sections 25 and 26 which provided for facilities for speedy travel for persons on United Nations business. Finally, since the refusal resulted in a delay for a senior official while he was travelling on official business, the matter was sufficiently important to be covered by Article 105 of the Charter.

Section 11. United Nations name, emblem and flag

(a) United Nations name and emblem

126. At its first session in 1946 the General Assembly adopted resolution 92 (I) relating to the official seal and emblem of the United Nations.

The General Assembly,

1. *Recognizes* that it is desirable to approve a distinctive emblem of the United Nations and to authorize its use for the official seal of the Organization,

Resolves therefore that the design reproduced below⁷² shall be the emblem and distinctive sign of the United Nations and shall be used for the official seal of the Organization,

2. *Considers* that it is necessary to protect the name of the Organization, and its distinctive emblem and official seal,

Recommends therefore:

(a) That Members of the United Nations should take such legislative or other appropriate measures as are necessary to prevent the use, without authorization by the Secretary-General

⁷¹ See section 13, paras. 139 and 140, below.

⁷² The official seal and emblem were reproduced at the end of the text of the resolution.

of the United Nations, and in particular for commercial purposes by means of trade marks or commercial labels, of the emblem, the official seal and the name of the United Nations, and of abbreviations of that name through the use of its initial letters;

(b) That the prohibition should take effect as soon as practicable but in any event not later than the expiration of two years from the adoption of this resolution by the General Assembly;

(c) That each Member of the United Nations, pending the putting into effect within its territory of any such prohibition should use its best endeavours to prevent any use, without authorization by the Secretary-General of the United Nations of the emblem, name, or initials of the United Nations, and in particular for commercial purposes by means of trade marks or commercial labels.

127. After cases had been brought to the notice of the Secretary-General of the unauthorized use of the emblem and name of the United Nations, the following letter was sent to all Member States:

Sir,

I have the honour to inform you that cases have been brought to the notice of the Secretary-General of the use without his authorization of the emblem and the name of the United Nations, both in its full and in its abbreviated form, by private persons and commercial organizations in different countries, contrary to the recommendations contained in Resolution 92 (I) which was adopted by the General Assembly on 7 December 1946. Many of the violations which I have in mind are particularly flagrant in view of the fact that the emblem and name of the United Nations have been used for commercial purposes, against which abuse the resolution of the General Assembly was particularly directed.

The adoption of this resolution by the General Assembly was a clear indication that the Members of the United Nations considered it highly undesirable for the United Nations to be connected in any way with private commercial enterprise. To prevent abuses the resolution recommended that the Members of the United Nations should take such legislative or other appropriate measures as might be necessary to protect the emblem, official seal and name of the United Nations, and that pending the taking of such legislative or other appropriate measures, each Member should use its best endeavours to prevent any use, without authorization by the Secretary-General of the emblem, official seal and name of the United Nations.

I have, therefore, the honour to request you to be so good as to direct the attention of the appropriate authority of your Government to this recommendation and to inform the Secretary-General in due course of such provisional measures as your Government has been able to take to protect the interests of the United Nations in this matter.

I have the honour to be, Sir,
Your obedient Servant,

Adrian PELT
Acting Secretary-General.

128. A number of Member States have adopted legislative enactments protecting the use of the United Nations name and emblem, in accordance with this request and in furtherance of resolution 92 (I).⁷³ In the case of *People v. Wright*⁷⁴ the defendant was charged with a violation of Section 964-a of the Penal Law of the State of New York, in that he,

⁷³ See e.g. the Swiss Federal Act of 15 December 1961 concerning protection of the names and emblems of the United Nations and other intergovernmental organizations, cited in full in *United Nations Juridical Yearbook 1962*, p. 40.

⁷⁴ Court of Special Sessions of the City of New York, New York County, 22 April 1958, 12 Misc. 2d 961, 173 N.Y.S. 2d 160.

without express authority from the Secretary-General of the United Nations, and with the intent to deceive and mislead the public, unlawfully did assume, adopt and use the name of the United Nations, and abbreviation thereof, and simulation thereof which might deceive and mislead the public as to the true identity of the said defendant, and as to the official connection of the said defendant with the United Nations.

129. The defendant sought to dismiss the charge on the ground that the Section was unconstitutional. The Court held that the motion to dismiss the action should be disallowed. The statute concerned was valid under United States law without Congressional authorization and did not constitute a denial of due process or of the equal protection of law. Furthermore the fact that the Secretary-General was alone authorized to grant permission to use the name "United Nations" was not an improper delegation by the New York Legislature of its own legislative powers.

(b) *United Nations flag*

130. The United Nations flag code, as amended by the Secretary-General on 11 November 1952, is reproduced below:

Whereas by Resolution 167 (II) of 20 October 1947 the General Assembly decided that the flag of the United Nations should be the official emblem adopted by the General Assembly in Resolution 92 (I) of 7 December 1946, centred on a United Nations blue background, and authorized the Secretary-General to adopt a Flag Code, having in mind the desirability of a regulated use of the flag and the protection of its dignity;

Whereas under this authority a Flag Code was issued by the Secretary-General on 19 December 1947; and

Whereas it has become desirable to amend this Flag Code to permit display of the United Nations Flag by organizations and persons desiring to demonstrate their support of the United Nations;

The Secretary-General, by virtue of the authority vested in him, hereby rescinds the Flag Code of 19 December 1947 and adopts the following Flag Code:

1. *Design of Flag*

The flag of the United Nations shall be the official emblem of the United Nations, centred on a United Nations blue background. Such emblem shall appear in white on both sides of the flag except when otherwise prescribed by regulation. The flag shall be made in such sizes as may from time to time be prescribed by regulation.

2. *Dignity of Flag*

The flag shall not be subjected to any indignity.

3. *Flag Protocol*

(1) The flag of the United Nations shall not be subordinated to any other flag.

(2) The manner in which the flag of the United Nations may be flown, in relation to any other flag, shall be prescribed by regulation.

4. *Use of Flag by the United Nations and Specialized Agencies of the United Nations*

(1) The flag shall be flown

(a) From all buildings, offices and other property occupied by the United Nations.

(b) From any official residence when such residence has been so designated by regulation.

(2) The flag shall be used by any unit acting on behalf of the United Nations such as any committee or Commission or other

entity established by the United Nations, in such circumstances not covered in this Code as may become necessary in the interests of the United Nations.

(3) The flag may be flown from all buildings, offices and other property occupied by any Specialized Agency of the United Nations.

5. *Use of Flag Generally*

The flag may be used in accordance with this Flag Code by Governments, organizations and individuals to demonstrate support of the United Nations and to further its principles and purposes. The manner and circumstances of display shall conform, in so far as appropriate, to the laws and customs applicable to the display of the national flag of the country in which the display is made.

6. *Use of Flag in Military Operations*

The flag may be used in military operations only upon express authorization to that effect by a competent organ of the United Nations.

7. *Prohibition*

The flag shall not be used in any manner inconsistent with this Code or with any regulations made pursuant thereto. On no account shall the flag or a replica thereof be used for commercial purposes or in direct association with an article of merchandise.

8. *Mourning*

The Secretary-General will prescribe by regulation or otherwise the cases in which the flag shall be flown at half-mast as sign of mourning.

9. *Manufacture and Sale of Flag*

(1) The flag may be manufactured for sale only upon written consent of the Secretary-General.

(2) Such consent shall be subject to the following conditions:

(a) The flag shall be sold at a price to be agreed upon with the Secretary-General.

(b) It shall be the responsibility of the manufacturer to ensure that every purchaser of the flag is furnished with a copy of this Code as well as a copy of any regulations issued pursuant thereto, and that each purchaser is informed that his use of the flag is subject to the conditions contained in this Code and in the regulations made pursuant thereto.

10. *Violation*

Any violation of this Flag Code may be punished in accordance with the law of the country in which such violation takes place.

11. *Regulations*

(1) The Secretary-General may delegate his authority under this Code.

(2) The Secretary-General or his duly authorized representative is the only person empowered to make regulations under this Code. Such regulations may be made for the purposes indicated in this Code and generally for the purpose of implementing or clarifying any provision of this Code whenever the Secretary-General or his duly authorized representative considers such implementation or clarification necessary.

Secretary-General.

Regulations

131. The following is the text of the regulations which came into effect on 1 January 1967, replacing the Regulations as amended by the Secretary-General on 11 November 1952:

I. *Dimensions of flag*

(1) In pursuance to article 1 of the Flag Code the proportions of the United Nations Flag shall be:

(a) Hoist (width) of the United Nations Flag--2;
Fly (length) of the United Nations Flag--3;
or

(b) Hoist (width) of the United Nations Flag--3,
Fly (length) of the United Nations Flag--5;
or

(c) The same proportions as those of the national flag of any country in which the United Nations Flag is flown;

(2) The emblem shall in all cases be one half of the hoist of the United Nations Flag and entirely centered.

II. Flag protocol

In pursuance to article 3 (2) of the United Nations Flag Code the manner in which the United Nations Flag may be displayed is as follows:

1. General Provisions

(a) Under article 5 of the Flag Code the United Nations Flag may be displayed or otherwise used in accordance with the Flag Code by Governments, organizations and individuals to demonstrate support of the United Nations and to further its principles and purposes;

(b) The United Nations Flag may be displayed alone or with one or more other flags to demonstrate support of the United Nations and to further its principles and purposes. The Secretary-General may, however, limit such display to special occasions either generally or in particular areas. In special circumstances he may restrict the display of the United Nations Flag to official use by United Nations organs and specialized agencies;

(c) When the United Nations Flag is displayed with one or more other Flags, all flags so displayed should be displayed on the same level and should be of approximately equal size;

(d) On no account may any flag displayed with the United Nations Flag be displayed on a higher level than the United Nations Flag and on no account may any flag so displayed with the United Nations Flag be larger than the United Nations Flag;

(e) The United Nations Flag may be displayed on either side of any other flag without being deemed to be subordinated to any such flag within the meaning of article 3 (1) of the United Nations Flag Code;

(f) The United Nations Flag should normally only be displayed on buildings and on stationary flagstaffs from sunrise to sunset. The United Nations Flag may also be so displayed at night upon special occasions;

(g) The Flag should never be used as drapery of any sort, never festooned, drawn back, nor up, in folds, but always allowed to fall free.

2. Closed circle of flags

The United Nations Flag should in no case be made a part of a circle of flags. In such a circle of flags, flags other than the United Nations Flag should be displayed in the English alphabetical order of the countries represented reading clockwise. The United Nations Flag itself should always be displayed on the flagpole in the centre of the circle of flags or in an appropriate adjoining area.

3. Line, cluster or semi-circle of flags

In line, cluster or semi-circle groupings all flags other than the United Nations Flag shall be displayed in the English alphabetical order of the countries represented starting from the left. The United Nations Flag, in such cases, should either be displayed separately in an appropriate area on in the centre of the line, cluster or semi-circle or, in cases where two United Nations Flags are available, at both ends of the line, cluster or semi-circle.

4. National flag of the country in which the display takes place

(a) The national flag of the country in which the display takes place should appear in its normal position according to the English alphabetical order;

(b) When the country in which the display takes place wishes to make a special display of its national flag, such a special display can only be made where the arrangement of the flags takes the form of a line, cluster or semi-circle grouping, in which case the national flag of the country in which the display is taking place should be displayed at each end of the line of flags separated from the grouping by an interval of not less than one fifth of the total length of the line.

III. Use of flag generally

(a) In accordance with article 5 of the United Nations Flag Code the United Nations Flag may be used to demonstrate the support of the United Nations and to further its principles and purposes;

(b) It is deemed especially appropriate that the United Nations Flag should be displayed on the following occasions:

- (i) On all national and official holidays,
- (ii) On United Nations Day, 24 October,
- (iii) On the occasion of any official event, particularly in honour of the United Nations,
- (iv) On the occasion of any official event which might or is desired to be related in some way to the United Nations.

IV. Prohibitions

(a) In accordance with article 7 of the United Nations Flag Code on no account shall the United Nations Flag or a replica thereof be used for commercial purposes or in direct association with an article of merchandise;

(b) Notwithstanding anything to the contrary contained in clause (a) of this section, neither the United Nations Flag nor any replica thereof shall be stamped, printed, engraved or otherwise affixed on any stationery, books, magazines, periodicals or other publications of any nature whatsoever in a manner such as could imply that any such stationery, books, magazines, periodicals or other publications were published by or on behalf of the United Nations unless such is in fact the case or in a manner such as has the effect of advertising a commercial product;

(c) Subject to the provisions of clauses (b) and (d) of this section neither the United Nations Flag nor any replica thereof should be affixed in any manner on any article of any kind which is not strictly necessary to the display of the United Nations Flag itself. Without restricting the generality of the foregoing sentence the United Nations Flag should not be reproduced on such articles as cushions, handkerchiefs and the like, nor printed nor otherwise impressed on paper napkins or boxes, nor used as any portion of a costume or athletic uniform or other clothing of any kind, nor used on jewellery;

(d) Notwithstanding anything to the contrary contained in this section, a replica of the United Nations Flag may be manufactured in the form of a lapel button;

(e) No mark, insignia, letter, word, figure, design, picture or drawing of any nature shall ever be placed upon or attached to the United Nations Flag or placed upon any replica thereof.

V. Mourning

(a) Upon the death of a Head of State or Head of Government of a Member State, the United Nations Flag will be flown at half-mast at United Nations Headquarters, at the United Nations Office at Geneva and at United Nations offices located in that Member State;

(b) On such occasions, at Headquarters and at Geneva, the United Nations Flag will be flown at half-mast for one day immediately upon learning of the death. If, however, Flags have already been flying on that day they will not normally be lowered, but will instead be flown at half-mast on the day following the death;

(c) Should the procedure in paragraph (b) above not be practicable due to weather conditions or other reasons, the United Nations Flag may be flown at half-mast on the day of the funeral.

Under exceptional circumstances it may be flown at half-mast on both the day of the death and the day of the funeral;

(d) United Nations offices other than those covered by paragraph (a) above, in the case of the death of a national figure or a Head of State or Head of Government of a Member State, will use their discretion, taking into account the local practice, in consultation with the Protocol Office of the Ministry of Foreign Affairs and/or the Dean of the locally accredited Diplomatic Corps;

(e) The head of a specialized agency is authorized by the Secretary-General to lower the United Nations Flag flown by the agency to half-mast in cases where he wishes to follow the official mourning of the country in which the office of the agency is located. He may also lower the United Nations Flag to half-mast on any occasion when the specialized agency is in official mourning;

(f) The United Nations Flag may also be flown at half-mast on special instructions of the Secretary-General on the death of a world leader who has had a significant connexion with the United Nations;

(g) The Secretary-General may in special circumstances decide that the United Nations Flag, wherever displayed, shall be flown at half-mast during a period of official United Nations mourning;

(h) The United Nations Flag when displayed at half-mast should first be hoisted to the peak for an instant and then lowered to the half-mast position. The Flag should again be raised to the peak before it is lowered for the day;

(i) When the United Nations Flag is flown at half-mast no other flag will be displayed;

(j) Crepe streamers may be affixed to flagstaffs flying the United Nations Flag in a funeral procession only by order of the Secretary-General of the United Nations;

(k) When the United Nations Flag is used to cover a casket, it should not be lowered into the grave or allowed to touch the ground.

VI. *Manufacture of United Nations flag*

In accordance with article 9 (2) (a) of the United Nations Flag Code the Secretary-General hereby grants permission to sell the United Nations Flag without reference to the Secretary-General as to the price to be charged.

VII. *Alphabetical order*

Attached is a schedule setting out the English alphabetical order of the Members of the United Nations.

Secretary-General

Schedule of Member Nations in the English Alphabetical Order (not reproduced)

NOTE: In the event of any provision contained in this code or in any regulation made under this code being in conflict with the laws of any State governing the use of its national flag, said laws of any such State shall prevail.

The use of the United Nations flag in connexion with the operation of vessels by the United Nations is considered in section 3 (b) (ii), paras. 31-33, above.

Section 12. Inviolability of United Nations archives and documents

132. As stated in section 4 of the General Convention,

The archives of the United Nations, and in general all documents belonging to it or held by it shall be inviolable wherever located.

In the ECLA Agreement, which contains the same provisions, the term "archives" is defined in section 1 (g) as including

the records, correspondence, documents, manuscripts, photographs, cinematograph films and sound recordings, belonging to or held by ECLA.

A similar definition of the term is given in section 1 (g) of the ECAFE Agreement. The United Nations has interpreted section 4 of the General Convention as necessarily implying the inviolability of information contained in archives and documents as well as the actual archives and documents themselves.

133. Questions relating to the inviolability of United Nations documents have been raised on several occasions in connexion with judicial proceedings against United Nations staff members. In March 1949 the United States police arrested a member of the United Nations Secretariat on charges of espionage. The Permanent Representative of the Member State of which the staff member concerned was a national protested against this action on the ground that the official held the rank of a third Secretary in the Ministry of Foreign Affairs of his country and that his diplomatic immunity continued even after his appointment by the United Nations. In addition, the Permanent Representative alleged that material from United Nations files had been made known to officials of the Federal Bureau of Investigation. The Secretary-General replied stating that information regarding the status of the official had been made known solely to his attorney.

134. A somewhat different aspect arose in the case of *Keeney v. United States*,⁷⁵ where the defendant was prosecuted for a contempt of Congress following her refusal to answer, when testifying before a Senate Subcommittee, the question whether anyone in the State Department had aided her in obtaining employment with the United Nations. The main issue in the case turned on whether the defendant, as a former employee of the United Nations, was herself privileged from answering the question. The District Court held that her motion of privilege should be denied. The Court of Appeals reversed the conviction and granted a new trial on the ground that the answer sought by the Subcommittee, in so far as it depended upon data in United Nations files or upon information derived from those files, was rendered privileged by the Charter and the staff rules and could not legally be revealed by an official. One of the Judges of the Court stated that the question posed

related to "unpublished information". The United Nations does not tell the world what recommendations underlie appointments of staff members. The United Nations Administrative Manual even defines unpublished information to include the appointment... [of] or any other confidential information concerning a staff member. I think it plain that staff members would not have such unpublished and confidential information unless it had been made known to them by reason of their official position.

135. The latter quotation was from Staff Rule 7 of the United Nations (now Staff regulation 1.5), requiring staff members not to communicate unpublished information, "except in the course of their duties or by

⁷⁵ District Court, District of Columbia, 17 March 1953, 111 F. Supp. 223 and Court of Appeals, District of Columbia Circuit, 26 August 1954, 218 F.2d 843.

authorization of the Secretary-General". It was also stated that the privilege of non-disclosure as it applied to officials was "necessary for the independent exercise of their functions in connexion with the Organization".

136. As an instance where information was supplied, not amounting to access to United Nations files, reference may be made to a case which arose in 1956. A person who had previously held a United Nations short-term appointment submitted a claim to the United States authorities for unemployment insurance benefits. There was some question as to whether or not there was an overlap between the period of her employment by the United Nations and that for which the claim was being made. The United Nations informed the United States Department of Labour that though it would not grant access to United Nations files or permit the production and delivery of the entire personnel file, it would be prepared in the circumstances to produce its record of the employment of the person concerned, together with a brief qualified testimony necessary to explain it.

Section 13. Immunity from currency controls

137. The basic provisions of the General Convention are as follows:

Section 5. Without being restricted by financial controls, regulations or moratoria of any kind,

(a) The United Nations may hold funds, gold or currency of any kind and operate accounts in any currency;

(b) The United Nations shall be free to transfer its funds, gold or currency from one country to another or within any country and to convert any currency held by it into any other currency.

Section 6. In exercising its rights under Section 5 above, the United Nations shall pay due regard to any representations made by the Government of any Member in so far as it is considered that effect can be given to such representations without detriment to the interests of the United Nations.

Similar articles are contained in a number of other instruments.⁷⁶

138. Problems have arisen involving the interpretation of these provisions in various spheres of United Nations activities. One issue has concerned the payment by a Member State of contributions in a particular currency or the requirement that all goods purchased in that country should be paid for in a specified currency. In 1950, following discussion in the Administrative Committee on Co-ordination, the Office of Legal Affairs gave an opinion to the administrative and financial services of the Secretariat regarding some of the matters raised. The opinion considered in particular

... the application of the Convention on the Privileges and Immunities of the United Nations should a government, whose regulations provide that all goods exported must be paid for in dollars, require that these regulations be applied to purchases made by the United Nations.

In relation to the subject of maximum utilization of soft currencies and the methods for collecting and disbursing soft currencies, it appears that the Consultative Committee on Administrative Questions had recommended to the ACC that the plan for the

soft currencies to be collected by international organizations, to be practicable, should be limited to a few currencies, the contributing governments to agree to the convertibility of such currencies into their own soft currencies within a given area.

The relevant clauses of the Convention on the Privileges and Immunities of the United Nations are Sections 5 and 6 of Article II on Property, Funds and Assets, which read as follows: (the Sections are then cited).

The equivalent provisions of the Convention on the Privileges and Immunities of the Specialized Agencies, Sections 7 and 8 in Article III, contains similar language, substituting the term "specialized agencies" where "United Nations" appears above, and requiring due regard to the representations of any State party to the Specialized Agencies Convention.

These provisions unquestionably establish the basic privilege of the United Nations, or of any appropriate specialized agency, to transfer soft currency in which collections are made into a country within the area chosen for the use of that currency, and to operate a bank account in that soft currency regardless of whether it is the currency of the country in which the account is operated. These provisions also, of course, safeguard the ability to withdraw the selected soft currency from the country in which the account is operated, unrestricted by financial controls or regulations, in the form in which it was transferred into that country.

It naturally follows from the purposes of each of the two Conventions that a given government is strictly obligated to recognize these privileges only if it has acceded to the United Nations Convention or has agreed to apply to any given specialized agency the Specialized Agencies Convention. Nevertheless, the provisions of the Convention on the Privileges and Immunities of the United Nations would be entitled to great weight in a negotiation with a Member Government which had not yet acceded thereto, since the General Assembly in its Resolution No. 93 (I) has recommended that Members, pending their accession to the Convention, should follow, so far as possible, the provisions of the Convention in their relations with the United Nations.

It is clear, however, that the binding effect of the Conventions is in no sense a prerequisite to a negotiation which is in any case to take place, since the recommendations of the Consultative Committee on Administrative Questions contemplated "a definite agreement on the convertibility of the currencies" to be selected, this agreement to be concluded between the governments and the Secretary-General acting also on behalf of all the agencies. It is perfectly open to the Secretary-General to obtain from governments (in exchange for the benefits they would derive from soft currency contributions) their consent to currency convertibility quite apart from the terms of either Convention. Nevertheless, it is the opinion of the Legal Department that reference to the Convention can effectively be made during the negotiations in order to establish that a given government would in any case already be expected to recognize the convertibility and transferability of currencies, either by reason of the Conventions or by reason of the General Assembly's recommendation. Accordingly, so much of the prospective negotiations as concern the operation of bank accounts could be treated as merely an administrative arrangement to give effect to the broad legal obligations already established by the Conventions.

There is one proviso, as a consequence of Section 6 of the United Nations Convention and Section 7 of the Specialized Agencies Convention. Although the authority to transfer accounts and convert currencies would for the most part be unqualified as between equally soft currencies within a given area, it would be necessary to pay due regard to any representations made by a government if a right exercised under the convertibility clause of the Conventions were likely to have a substantially adverse effect on that government's balance of payments. But since the recommended negotiations would in the first place have as their very purpose the easing of such problems by the use of soft cur-

⁷⁶ Section 4 of the Agreement with Switzerland, section 10 of the ECAFE Agreement and section 11 (a) (i), ECLA Agreement.

rencies, and since the negotiations themselves would constitute the appropriate channel for any governmental representations as contemplated by the Conventions, it may be assumed that this proviso is not a practical limitation on efforts to establish convertibility. The fact that a so-called "soft" currency in one country within a given area is not necessarily soft in another country within that area would merely be a factor to which due regard would have to be paid in the course of the negotiations, and would not in itself alter the basic obligation established by the convertibility in the Convention.

Finally, in view of the proviso in the Conventions as to government representations, it is natural that the convertibility clause should never have been considered tantamount to an authorization to convert unlimited soft currency holdings into dollars. This should not, however, prevent the adoption by the negotiators, should it prove desirable, of a clause designed to retain a residual right to convert into dollars portions of soft currency accounts which for special reasons might prove not to be utilisable. That is, dollar conversion might at least be possible up to the total amounts for which the converting government would in any case be liable for its regular contributions were the soft currency plan not to be adopted.

You have then raised the further question as to the force of the Convention on the Privileges and Immunities of the United Nations should a government apply to United Nations purchases its regulations requiring exported goods to be paid for in dollars. This subject is not covered by express language in any section of the Convention, but it would be difficult to conclude that the Convention did not protect the essential privilege of the United Nations to make purchases of goods against local currency, even where such a purchase might by legal definition constitute a dollar export. The capacity of the Organization to acquire any form of movable property is fixed by Section 1; by Section 3 its property and assets wherever located are immune from any form of interference, whether by executive, administrative, judicial or legislative action. And Section 7 then makes the United Nations assets and other property exempt from prohibitions and restrictions on exports in respect of articles for its official use. As these sections, read together, clearly authorize procurement followed by export, it could hardly be thought reasonable for regulations of the type under reference to create any absolute obstacle to this form of procurement. Moreover, since by Section 5 the currency itself, with which goods might be procured, would be convertible into any other currency — subject only to any governmental representations under Section 6 to which effect can be given "without detriment to the interests of the United Nations" — it is only logical that it should be open to the United Nations to attain the identical result — no doubt subject to the same regard for representations by the government concerned — in the form of goods rather than in currency.

139. Although the arrangements envisaged in this memorandum have been generally observed, individual countries have on occasion interfered with the exercise by the United Nations of its freedom to transfer currencies and to make payments in furtherance of particular programmes undertaken by the Organization. The most serious difficulties which arose were in respect of activities undertaken under the Expanded Programme of Technical Assistance in a Member State following a number of financial decisions taken by the Government concerned in 1959. The Government sought to impose a 20 per cent tax on foreign exchange transactions made by the Technical Assistance Board, introduced a new exchange rate, froze bank deposits, and reduced the value of large denomination bank notes. The Executive Chairman of the Technical Assistance Board protested to the

Government regarding the application of these measures to the Technical Assistance programme. He pointed out the United States dollars used to buy local currency were not the product of a sale of goods or service but were part of the contributions of other Governments participating in the Expanded Programme. Moreover, once local currency had been purchased with dollars, it was not transferred out of the country. Application of the new exchange rate would reduce the value of the technical assistance services which could be provided. The Government was therefore requested to exempt technical assistance funds and transactions from the new regulations and to free the bank deposits held by the United Nations and the specialized agencies, in accordance with section 5 of the General Convention and section 7 of the Specialized Agencies Convention. The action of the Government in reducing the value of large-denomination bank notes to one-tenth of their respective face values was described as amounting to an outright confiscation of the property and assets of the United Nations and the specialized agencies, in contravention of section 3 of the General Convention and section 5 of the Specialized Agencies Convention. It was pointed out in this connexion that under the Technical Assistance Agreement which the Government had concluded earlier, the Government had undertaken to meet certain costs, including that for the provision of local personnel services and 50 per cent of the daily subsistence allowances of the technical assistance experts. These contributions were made by the Government in local currency and all large-denomination notes held, either by the organizations or by their employees, were derived from these payments. It was suggested that it could scarcely have been the Government's intention to make or to apply its regulations in such a manner as to contribute its currency at one value and then to reduce the purchasing power by 90 per cent.

140. Following this correspondence arrangements were made by the Government to exempt the United Nations from the regulations which had been introduced. In 1961, when the Government introduced a new exchange rate for tourists, the United Nations pointed out that this rate was also applicable, under the terms of the pertinent Technical Assistance Agreement, to the United Nations and its officials. The Government eventually agreed to grant this exchange rate to the United Nations in respect of the technical assistance programme conducted in the country concerned.

141. Besides enjoying immunity from currency controls as regards sums it has received, it may be noted that the United Nations may also determine the currency in which its contributions are to be paid.

142. Under the Financial Regulations and Rules of the United Nations, adopted by the General Assembly, the annual contributions of Member States may only be assessed and paid in United States dollars, except to the extent that the General Assembly may authorize the Secretary-General to accept payment in other currencies.⁷⁷

⁷⁷ Regulation 5.5 and Rule 105.2, Financial Regulations and Rules of the United Nations (ST/SGB/Financial Rules/1).

Certain States, however, have offered to make payments of their shares of the appropriations for technical assistance, as provided for in part V of the United Nations budget, in the equivalent amount of their national currencies and not, as required under Regulation 5.5 and Rule 105.2 of the Financial Regulations and Rules, in United States currency. Since the Secretary-General has not so far been able to use these currencies, he has not credited the amounts deposited in national currencies against the assessments of the States concerned. The total amount involved is about \$1.1 million a year.⁷⁸

Section 14. Direct taxes

(a) Definition of direct taxes

143. Section 7 of the General Convention provides that:

The United Nations, its assets, income and other property shall be:

(a) Exempt from all direct taxes; it is understood, however, that the United Nations will not claim exemption from taxes which are, in fact, no more than charges for public utility services.

144. The ECLA and ECAFE Agreements contain the same clause.⁷⁹ The Agreement with Switzerland supplements the provision as follows:

Section 5. The United Nations, its assets, income and other property shall be:

(a) Exempt from all direct and indirect taxes whether federal, cantonal or communal. It is understood, however, that the United Nations will not claim exemption from taxes which are, in fact, no more than charges for public utility services;

(b) Exempt from the *droit de timbre* on coupons instituted by the Swiss Federal Law of 25 June 1921, and from the *impôt anticipé* introduced by the Federal Council decree, 1 September 1943, and supplemented by the Federal Council decree of 31 October 1944. The exemption shall be effected by the repayment to the United Nations of the amount of tax levied on its assets.

145. In view of the fact that the General Convention was drawn up for uniform application in all Member States of the United Nations, the meaning to be given to the term "direct taxes" cannot depend on the particular meaning given to that expression by the fiscal laws of a particular State. Thus, whilst the terms "direct" and "indirect" taxes are interpreted differently in the various national legal systems of Member States, according to the tax system or administration adopted, the meaning to be given to those terms in relation to the application of the General Convention must be found by reference to the nature of that instrument and to the incidence of the tax in question, that is to say, according to the party upon whom the burden of payment directly falls. Moreover, in interpreting the Convention, the United Nations and its Members must be guided by the

overlying principles of the Charter, and in particular Article 105 thereof, which provides that the Organization shall enjoy such privileges and immunities as are necessary for the fulfilment of its purposes. In accordance with that provision, no Member State can hinder the working of the Organization or take any measure which might increase its financial or other burdens.⁸⁰ Under Article IV of the Convention, therefore, the Organization is relieved of the burden of all direct taxes, and is to be granted the remission or return of indirect taxes where the amount involved is important enough to make this administratively possible.

146. As regards the actual incidence of direct and indirect taxes, the Legal Counsel summarized the position as follows in the course of a statement made to the Fifth Committee in 1963.

Now, as the Committee knows, the Convention is categorical in the matter of direct taxes on the United Nations. Direct taxes may not be assessed against the United Nations, and no office of this Organization would have authority to pay them. While I would be foolish to pretend that there could never have been a slip, in some office somewhere, the fact is that we are simply not addressing ourselves to a serious practical problem if we worry about payment of direct taxes in United Nations offices around the world. Member States honour the Convention. Information Centres and other offices are expected to consult Headquarters whenever they are in doubt as to whether a given charge represents a tax against the Organization. Even in the minority of Member States not yet bound by the Convention, we know of no direct taxation of the United Nations. Indeed (even in the absence of adherence to the Convention) we would firmly oppose it as clearly prohibited by the well documented intent of the drafters of Article 105 of the Charter.

Therefore, if we do not pay direct taxes, there remains only the question of indirect taxes. Again, let me emphasize how limited is this problem. For our immediate purposes, an indirect tax is one which is not assessed directly against the purchaser but is paid by the manufacturer or vendor and then merely passed on to the purchaser as a part of the price to be paid. I remind the Committee, therefore, that the Convention does not pretend to accord to the Organization an outright exemption from such taxes. It merely states, in its section 8, that "when the United Nations is making important purchases for official use of property on which such duties and taxes have been charged or are chargeable, Members will, whenever possible, make appropriate administrative arrangements for the remission or return of the amount of duty or tax". It follows that even this question can arise, in any of our offices around the world, only when an important purchase is being made. I believe that relatively few important purchases are made by small offices such as Information Centres — for the obvious reason that they have no significant procurement function and that even if they did, reasons of economy would militate in favour of concentrated purchases at other larger and more central offices. Moreover, apart from Headquarters, the Governments which are hosts to all of our regional offices and to our major operating agencies are all either party to the Convention or have otherwise bound themselves to a provision equivalent to the section 8 of the Convention which I have just quoted.

From this review, I must conclude — again leaving aside for the moment the question of the situation at Headquarters — that I fail to see any significant savings to be made by the Organization

⁷⁸ See Report of the *Ad Hoc* Committee of Experts to Examine the Finances of the United Nations and the Specialized Agencies, *Official Records of the General Assembly, Twenty-first Session, Annexes*, agenda item 80, document A/6289 and Add.1 and 2, para. 38. See also the discussion regarding inconvertible currencies, *ibid.*, annex V.

⁷⁹ Section 10 (a), ECLA Agreement, section 8 (a), ECAFE Agreement. See also section 9 of the ECAFE Agreement.

⁸⁰ See the opinion expressed at the United Nations Conference on International Organization, San Francisco, 1945, quoted in paragraph 6 of the memorandum cited in paragraph 159, below.

out of taxes, either direct or indirect, payable at United Nations offices in general, and this for the simple reason that we do not pay direct taxes and there are refund procedures where we have made important purchases subject to indirect taxes.

On earlier occasions, when this question was raised in the Committee, it had been suggested that the Secretariat should undertake a study of the application of taxes to the Organization anywhere in the world. Since it will be evident, I am sure, from what I have said, that the only taxes payable are by definition hidden taxes — those which are stated in the price of a commodity — such a study would require a detailed review of the excise tax laws in all the host countries of the world, and that study would have to be related to the particular types of purchases that might, in one year or another, be made in any such territory in the world. Even this would not provide us with definite information about the savings to be made, because we could not obtain remission of the taxes so found until we determined that a specific purchase was “important” within the interpretation of Section 8 of the Convention. For such an enterprise it is my own professional opinion that we would have to employ expert consultants familiar with the laws and tax systems in the many countries concerned. I have not the slightest doubt that we would have to pay more by way of stipends to the experts than we could save from the remittance of the few taxes which they might discover which had escaped our notice. For again, I ask leave to repeat that such indirect taxes, even when located, would not be subject to an exemption; we could claim their refund, by special administrative arrangements, only where the purchase was substantial.

Finally, I therefore return to what I have indicated in previous exchanges with the Fifth Committee. The more substantial problem arises only in the United States of America — because it is host to the Headquarters, because significant procurement naturally takes place here, and because the United States has not yet acceded to the Convention. Even here, however, I must once more emphasize that basically we are not dealing with a question of direct taxes. By federal statute the Organization is exempt from customs duties and from income, social security, transportation and other direct taxes; by New York law it is exempted from taxation of real property, sales, income and the like. As I have had occasion to mention to the Committee in earlier sessions, the only significant financial impact results from the absence in United States law of any equivalent of Section 8 of the Convention or of administrative procedures for the remission of substantial indirect excise taxes. These can affect a number of commodities which from time to time are the object of United Nations procurement. Of course, when, for example, typewriters, required for Headquarters, are less expensive abroad — and even the United States excise tax can contribute to making them less expensive abroad — we import them. The purchase is then free of tax, because, as I said, we are exempt from United States duties on imports.

If the amount of United States excises in any given year is not usually very considerable, the principle remains important. As I have previously reported to the Committee, the Secretary-General has proposed to the United States Government two main ways of providing relief. The preference of the Organization must always be for the solution which is both the simpler one and the one more completely in accord with the frequently expressed desires of the General Assembly. I refer, of course, to accession by the United States to the Convention. The alternative which we have suggested, however, based on various United States precedents, involves a number of measures — administrative in nature but not necessarily easy of application — which would serve to put the Organization in a position not less favourable, as to excise taxes, than the missions accredited to it. We know that each alternative has received serious consideration by the United States Government, and we remain hopeful. But there is a limit to what a Secretariat can accomplish in dealing with a Member State, and I accordingly conclude by saying that we very much appreciate

the advice, interest and support which we receive from the Fifth Committee.⁸¹

147. The summary of United Nations practice given below is subdivided under the following headings:

- (i) Stamp taxes
- (ii) Transport taxes, including taxes on tickets
- (iii) Taxes on United Nations financial assets
- (iv) Taxes in respect of the occupation or construction of United Nations premises.

(i) *Stamp taxes*⁸²

148. The United Nations has distinguished, in this as in other connexions, between governmental charges for services rendered and charges which are in the nature of a tax. As a test whether a stamp affixed to a legal document represents a tax or not, the United Nations has usually looked to see whether the amount was nominal and related to a clerical function or whether it related to the value of the document, or whether it was known that the government was in fact using the particular requirement as a revenue-raising measure.

149. In 1951 the United Nations declined to pay a stamp tax on its lease of premises for an Information Centre, the tax being computed on the amount of the rent. The United Nations claim was accepted by the local authorities. In 1953 the Legal Department requested the Minister for External Relations of a Member State to give effect, in accordance with section 7 of the Convention, to the exemption to which the United Nations Technical Assistance Operations bank account was entitled, from the provisions of a tax on receipts, stamp tax on payment orders, and tax on commissions. The request was granted. In 1954 a draft lease for the premises of a United Nations subsidiary organ provided for payment by the United Nations, as tenant, of registration fees in respect of the lease, stamp duties for copies thereof, and charges for delivery and consignment. United Nations Headquarters gave instructions for re-negotiation of the clause concerned to eliminate whatever could be shown to involve an actual tax.

150. Several Governments, however, argued that stamp taxes were indirect taxes and as such did not come within the purview of the General Convention. Extracts from an exchange of correspondence in 1959 between the Legal Counsel and the Permanent Representative of a Member State regarding this issue is given below; the first extract is from the letter of the Legal Counsel.

... It is generally accepted that a direct tax is one that is assessed against the person intended to pay it. An indirect tax is, on the other hand, one that is demanded from one person in the expectation that he shall indemnify himself at the expense of another. (See, for instance, Wharton's Law Lexicon, 14th edition, page 978.) One element indicative of an indirect tax is that the tax forms part of the price to be paid. Such a tax is referred to in Section 8 of

⁸¹ Payment of taxes by the United Nations, *Official Records of the General Assembly, Eighteenth Session, Annexes*, agenda item 58, document A/C.5/1005. For further details as to the position in the United States see section 17 (a), paras. 206-208, below.

⁸² For stamp taxes in relation to United Nations financial assets, see sub-section (a) (iii), paras. 161-166, below.

the Convention, according to which the United Nations "will not, as a general rule, claim exemption" but Member States will, under certain conditions, "make appropriate administrative arrangements for the remission or return of the amount of tax or duty". In the case of the fiscal stamp taxes here under consideration, the United Nations is directly required to pay for the stamps and to affix them in prescribed amounts to letters and forms required as a part of the procedure of importation of supplies for its own use. The burden of the charges is directly borne by the United Nations. There is no other party on whom the tax could fall. Hence the fiscal stamp taxes are direct taxes within the purview of Section 7 (a) of the Convention on the Privileges and Immunities of the United Nations. . .

151. The reply of the Government concerned included the following:

. . . the recent theory in the distinction between the direct and indirect taxes is that the direct tax is imposed upon assets or at least continual sources such as property and profession; the performance of a profession, or exercising of an artisanship constitutes the basic elements that could be pursued by the Taxation Department, in other words direct tax is imposed on the wealth itself, whether gained or in the process of being gained, for example taxes on capital including income tax and different taxes on different incomes as the tax on profits, tax on non-commercial profession (as taxes on labour), but the indirect taxes are not related to quality or property or profession, that is to say not related to continual elements but imposed on specific acts or uncontinuous or casual actions as consumption or circulation, in other words the indirect taxes are imposed on transactions and movements related to wealth in its movements and utilization, for example, taxes on legal or material circulation, or taxes on action as fees of transportation or juridical fees, fees of transfer of property, fiscal stamps duties, taxes on consumer goods and customs duties.

Hence the fiscal stamp taxes are indirect taxes, and therefore the United Nations is subject to them.

The matter has remained under discussion with the authorities of the Member State in question.

152. A Member State which levied a substantial stamp tax on insurance policies, payable by the purchaser at the time that the policy was issued, imposed this tax on a United Nations subsidiary organ operating within its territory. By 1 January 1966, these taxes had amounted to over \$80,000 and were increasing at the rate of approximately \$14,000 a year. During discussions the Ministry of Foreign Affairs took the position that the organ was not entitled under section 7 (a) of the General Convention to recovery of the money already paid, but indicated that steps would be taken to relieve the organ in respect of future payments. In the course of correspondence the United Nations dealt with an argument raised regarding the meaning of the term "*impôt direct*" within the French legal system, which was in force in the State in question.

It is understood, however, that because the French text uses the term "*impôt direct*" which in the French legal system has a narrower meaning than the term "direct taxes" in the English text, it has been argued that Section 7 (a) does not cover stamp taxes. The characterization given to a tax in a particular municipal law system cannot be controlling in the application of the provisions of the Convention on the Privileges and Immunities of the United Nations which must be interpreted uniformly in respect of all Member States. Otherwise there would be inequality of treatment between Members.

The United Nations has been exempt from stamp duty on contracts and other official documents in Switzerland.

(ii) *Transport taxes, including taxes on tickets*

153. The United Nations has consistently sought exemption from taxes of this nature on the ground that they were direct taxes from which the Organization was exempt.

154. In 1947 the United States Internal Revenue Service replied to an inquiry made by the United Nations regarding the conditions under which the Revenue Service recognized exemption from transportation tax. The operative portion of the reply is given below.

. . . Inasmuch as the United Nations was designated in Executive Order 9698 as a public international organization entitled to enjoy the privileges, exemptions and immunities conferred by the International Organizations Immunities Act, amounts paid on or after December 29, 1945, for the transportation of property to or from the United Nations are exempt from the tax imposed by section 3475 of the Internal Revenue Code, as amended. Accordingly, the designation of the United Nations as consignor or as consignee of the shipping papers is sufficient to establish the right of exemption in those cases where property is shipped to or by the United Nations. However, in any case where the shipment is made to or by an official of the United Nations in connexion with its official business, and payment will be made by the United Nations through reimbursement of the official, the shipping papers must show by an appropriate reference that the shipment is made on behalf of the United Nations and, therefore, exempt from the tax. No particular form has been prescribed for this purpose, and all that is required is sufficient explanation of the transaction as will clearly show its exempt character and justify the noncollection of tax by the carrier.

155. In 1954 the Legal Counsel wrote to the Ministry of Foreign Relations of Argentina, seeking exemption from a 10 per cent tax on steamship passages between Argentina and foreign ports. Following further correspondence, the Government of Argentina acceded to this request in Decree No. 9307 of 7 September 1962.

156. A request made to the Government of a Member State by the Secretary-General in respect of a "surcharge" on tickets was denied on the ground that the additional charge arose from the fact that the foreign transportation companies operating in the State concerned calculated the fares in question according to a rate of exchange higher than the official rate. The United Nations did not therefore pursue its claim. In the case of another Member State a travel tax was imposed on transportation tickets purchased for United Nations officials of the nationality in question, together with an exit permit fee. The United Nations protested, pointing out that the fact that the persons involved were citizens could not prevail as against the terms of the General Convention. The matter remains under consideration.

157. The United Nations obtained exemption from airport terminal tax imposed on several national contingents flown from their home State for service with United Nations forces on the ground that this fee was in the nature of a direct tax on the Organization.

158. A Technical Assistance Board representative reported in 1962 that the Government of the Member

State in which he was stationed had required all Technical Assistance Board personnel to pay tolls at booths which had been set up on the roads in that country. It was stated that the tolls were a means of raising funds. The Office of Legal Affairs advised that the United Nations was exempt from such tolls as regards its own vehicles and in respect of journeys on official business undertaken by United Nations personnel.

159. The United Nations also experienced certain difficulties in 1964 in respect of a tax on circulation which the tax authorities of a Member State sought to impose on United Nations vehicles operating in that country. The Legal Counsel wrote to the Permanent Representative as follows:

1. We have the honour to bring to your urgent attention a question concerning the exemption of the United Nations from the tax on circulation with respect to the official vehicles operated by the United Nations, in connexion with operations of a United Nations organ in your country.

2. Under section 7 of the Convention on the Privileges and Immunities of the United Nations, it is provided that "The United Nations, its assets, income and other property shall be: (a) exempt from all direct taxes". The aforementioned tax on circulation, in so far as it is directly imposed on the United Nations is, within the meaning of the above-mentioned provision of the Convention, a direct tax. This view, we are gratified to learn, has also been supported by your Ministry of Foreign Affairs.

3. The United Nations organ has, however, been advised by the Customs District Office that the Head Office of Taxes and Indirect Taxation maintains that the tax on circulation (which applies to the circulation of vehicles on roads and public areas) was an indirect tax and that the United Nations could not therefore be exempt from it. In view of this, the Customs Office has informed the United Nations organ that it should make payment of the tax as soon as possible and should notify customs of the details of payment, and has indicated that the import licenses would not be renewed and the vehicles would be considered as operating illegally until the taxes are paid.

4. We are deeply grateful for the intervention of the Foreign Ministry on behalf of the United Nations in this matter. I should like to take this opportunity to present in more detail the view of the Organization, and to request your assistance in obtaining a further consideration of the question by all competent authorities of your Government so as to accord exemption to the United Nations from the "tax on circulation" with respect to the official vehicles of the United Nations.

5. The difference of opinion in this matter appears to hinge on the meaning of the expression "direct taxes" as used in section 7 (a) of the Convention on the Privileges and Immunities of the United Nations. It is true that the terms "direct" and "indirect" taxes, etc. are interpreted differently in the various national legal systems of Member States, varying according to tradition, usage or tax system or administration. It should be pointed out to the tax authorities, however, that the above-mentioned Convention was drawn up for application in all Member States of the United Nations and its terms were conceived and have to be applied uniformly in all countries in accordance with their generally-understood reference to its nature and to its incidence, that is to say, according to upon whom the burden of payment directly falls. You will understand that in respect of a Convention intended for application in all Member States, its interpretation cannot be made to depend upon the technical meaning of a term in varying tax systems of each Member. Since the tax on circulation is levied directly upon the United Nations, it is, within the meaning of the Convention, a "direct tax" and the United Nations should be accorded exemption from it. This is the consistent position and

practice of the United Nations in asserting its immunity in all States to which the provisions of the Convention apply.

6. Moreover, in interpreting the Convention, the United Nations and its Members must be guided by the overlying principles of the United Nations Charter, and in particular Article 105 which provides that the Organization shall enjoy such privileges and immunities as are necessary for the fulfilment of its purposes. The Report of the Committee of the San Francisco Conference responsible for the drafting of Article 105 pointed out that "if there is one principle certain it is that no Member State may hinder in any way the working of the Organization or *take any measure the effect of which might be to increase its burdens financial or otherwise*"* (italics added). With this principle in view, the economy of the Convention which was adopted by the General Assembly in implementation of Article 105 of the Charter is quite clear. The Organization was to be relieved of the burden of all taxes — Article 7 providing an exemption for those taxes to be paid directly by the United Nations, and Article 8 providing for remission or return of indirect taxes where the amount involved is important enough to make it administratively possible.

7. Apart from the application of the Convention, I should like to refer to the fact that a specialized agency is granted exemption by your Government in respect to that agency's official automobiles. This exemption is expressly provided for in an agreement between your Government and the specialized agency. As this was an agreement with your Government alone, it was of course possible to take notice of the particular terminology of the tax system employed in your country. Obviously this was not possible in the General Convention applicable to all Member States.

8. Since a United Nations specialized agency has been granted exemption from the tax on circulation, it is hoped that your Government will also find it possible to extend a similar exemption to the United Nations itself.

9. We shall therefore be very grateful if you would be good enough to request the Ministry of Foreign Affairs to intercede again with the competent authorities to authorize the exemption of United Nations official vehicles operating in your country from the tax on circulation.

10. Should there be any delay involved in obtaining the agreement of the tax authorities I am confident that no unilateral steps will be taken by any Government authority which would in any way impede or interfere with the operation of the United Nations vehicles, and we are certain that the Foreign Ministry will, if it deems it necessary, call this to the attention of the appropriate officials concerned. May we again express our appreciation for your assistance and that of the Ministry of Foreign Affairs in this matter.

160. Whilst the matter remained under consideration the United Nations officials in the country in question received a further request for payment of the tax on circulation. It further appeared that the local customs authorities were using the payment of the road tax as a precondition for the renewal of the "importation licences" for United Nations vehicles. The Legal Council stated that this precondition was not in accordance with section 7 (b) of the General Convention. In an internal memorandum he commented,

In virtue of this provision the right of the United Nations to import vehicles for its official use may not be denied or abridged on the ground that the Organization has failed to pay a tax which falls due subsequent to the importation of such vehicles. If, on the other hand, the road tax is imposed as a condition-precident for the importation of United Nations official vehicles, such tax would be

* Documents of the United Nations Conference on International Organization San Francisco, 1945, vol. XIII, pp. 705 and 780.

in the nature of customs duties, and the same Section 7 (b) of the Convention exempts the United Nations from such levies.

(iii) *Taxes on United Nations financial assets*

161. The exemption from direct taxes extends to cover taxes levied on financial assets and interests held by the United Nations.

162. The Agreement with Switzerland deals expressly with this aspect in section 5 (b) whereby the United Nations, its assets, income and other property are declared

(b) Exempt from the *droit de timbre* on coupons instituted by the Swiss Federal Law of 25 June 1921, and from the *impôt anticipé* introduced by the Federal Council decree, 1 September 1943, and supplemented by the Federal Council decree of 31 October 1944. The exemption shall be effected by the repayment to the United Nations of the amount of tax levied on its assets.

The reference to "coupons" includes bonds, shares, mortgages, transfers of title, certain cheques, bills of exchange, insurance premiums and similar documents.

163. In 1961 a bank in Geneva holding a United Nations interest-bearing account withheld a federal tax of 27 per cent on the interest earned. In response to a United Nations request for exemption, the Swiss Permanent Observer stated that the tax in question was the *impôt anticipé* referred to in section 5 (b) and that the bank had behaved correctly. Upon request by the United Nations to the federal authorities a reimbursement would be obtained.

164. Under the more general provisions of section 5 of the Agreement with Switzerland, the Office of Legal Affairs advised in 1959 that the High Commissioner for Refugees was exempt from paying cantonal tax on a legacy bequeathed to him for refugee purposes.

165. As regards the position in the United States, in 1960 negotiations were undertaken with the United States Permanent Representative on the exemption of the United Nations from certain customs duties and excise taxes, including the federal documentary stamp taxes upon sales and transfers by the United Nations of capital stock and certificates of indebtedness. These negotiations were undertaken in pursuance of a decision of the Fifth Committee of the General Assembly taken during the thirteenth session in 1958. With regard to the documentary stamp taxes, the position of the United Nations was given by means of the following quotation from a letter from the Secretary-General to the Permanent Representative of the United States, dated 9 September 1959.

They constitute direct taxes on the United Nations, impinging to some extent, on operations of the United Nations Joint Staff Pension Fund. . . If the United States were a party to the Convention on the Privileges and Immunities of the United Nations, the Organization would be exempt by its Section 7 (a), as it is in other States Members of the Organization. The tax constitutes a direct burden on the Organization to the advantage of a single Member. Moreover, . . . it is illogical that the members of Missions should enjoy an exemption by reason of their accreditation to the United Nations when the Organization is denied the exemption on its own official transactions.⁸⁹

166. In Canada and the United Kingdom the United Nations obtained exemption from a withholding tax

otherwise levied on cash dividends paid on securities, including securities forming part of the assets of the United Nations Joint Staff Pension Fund.

(iv) *Taxes in respect of the occupation or construction of United Nations premises*

167. A memorandum of law was prepared by the Office of Legal Affairs in 1953 setting forth the grounds for the immunity of the United Nations from real property tax in respect of its ownership and occupation of the Headquarters District. The study was drawn up following a claim by the company which had sold the land that, under the tax law of New York, the United Nations was taxable for the portion of the first year of its ownership following the date on which it had gained title.

Memorandum of Law

United Nations Immunity from Real Property Tax

1. *Question*

The United Nations owns and occupies property in the City of New York known as the United Nations Headquarters District, acquired under the authority of the Acts of 27 February 1947 (Laws of New York 1947) which among other things amended the Administrative Code of the City of New York and declared as a matter of legislative determination that a public purpose was served and that the interests of the State and City of New York were promoted by this acquisition.

The United Nations Headquarters District is exempt from real property taxation. The New York Tax Law, Section 4, subdivision 20, provides: "Real property of United Nations. . . shall be exempt from taxation and assessment. . ."

The question has been raised, however, whether the real property of the United Nations in its Headquarters District might nevertheless be taxable, despite the outright exemption under the Tax Law, for the portion of the first year of United Nations ownership following the date on which title vested. This would be on the grounds that title had not vested until after that year's taxable status date.

It is not necessary for present purposes to consider whether real property of an institution enjoying exemption under Section 4 of the Tax Law may nevertheless be taxed for the period between the date on which title vests and the first subsequent taxable status date. In so far as concerns the United Nations, its property is exempt from taxation even without the benefit of the declaration made by the legislature in Section 4, subdivision 20 of the Tax Law.

2. *Immunity from taxation is conferred by the United Nations Charter*

Paragraph 1 of Article 105 of the United Nations Charter provides:

"1. The Organization shall enjoy in the territory of each of its Members such privileges and immunities as are necessary for the fulfilment of its purposes."

It cannot be doubted that immunity from taxation is one of such "immunities as are necessary for the fulfilment of its purposes", conferred on the United Nations by Article 105 of the Charter. The necessity of immunity from taxation is too universally recognized by international law to require the citation of authorities. Without this immunity the independent functioning of the Organization would be compromised by the ability of Member Governments, or political subdivisions thereof, to impose taxes on the essential assets of the Organization. This would not only constitute enrichment of one Member Government at the expense of all others but (even as a power not exercised but only held in reserve) it would give the taxing authority a measure of indirect control over the workings of the Organization. "But if there is one certain principle", said the United Nations Conference

⁸⁹ See also section 17, paras. 206 and 207, below.

on International Organization at San Francisco in 1945, in recommending that Article 105 be included in the Charter, "it is that no Member State may hinder in any way the working of the Organization or take any measures the effect of which might be to increase its burdens, financial or other". (Report of Commission IV on Judicial Organization, UNCIO, Documents, Volume 13, p. 705).

3. *The Charter supersedes inconsistent state and local law*

The Charter of the United Nations is a multilateral treaty entered into by the United States with other nations in the execution of the federal treaty power. As a treaty "under the Authority of the United States" the Charter is "the supreme Law of the Land; . . . anything in the Constitution or Laws of any State to the contrary notwithstanding". U.S. Const., Art. 6, Cl. 2.

As a treaty of the United States the Charter supersedes and overrides inconsistent state or local policy or law without exception, even on questions normally within state or local authority, such as, for example, matters relating to local real property. *Hauenstein v. Lynham*, 100 U.S. 483, and cases there cited. The Charter provision granting the United Nations tax immunity is therefore "as much a part of the law of every State as its own local laws and Constitution". *Ibid.*

4. *Article 105 of the Charter is self-executing*

This tax immunity was conferred upon the United Nations by the operation and force of the treaty (i.e., the Charter) itself. "No special legislation in the United States was necessary to make it effective." *Bacardi Corp v. Domenech*, 311 U.S. 150, 161 and cases cited.

Moreover, the legislative history of the Charter makes it clear that the requirement of Article 105 of the Charter is directly binding upon Member Governments and their political subdivisions, from the date on which the Charter became effective, and that the essential immunities which it provides are in no way dependent upon accession by a Member State to the Convention on the Privileges and Immunities of the United Nations. The Report of the Committee (of which the United States was a member) which drafted Article 105 of the Charter, as adopted by Commission IV on Judicial Organization and subsequently by the Plenary of the United Nations Conference on International Organization at San Francisco in 1945, stated that the first paragraph of Article 105, as already quoted, "sets forth a rule obligatory for all members as soon as the Charter becomes operative. . .

"The terms *privileges* and *immunities* indicate in a general way all that could be considered necessary to the realization of the purposes of the Organization, to the free functioning of its organs and to the independent exercise of the functions and duties of their officials: exemption from tax. . .", etc. (UNCIO, Documents, Volume 13, Doc. 933 (English) IV/2/42 (2), June 12, 1945).

The judicial and executive authorities of the United States have consistently given effect to Article 105 of the Charter.

In *Curran v. City of New York*, 77 N.Y.S. 2d 206 (1947) the Court, referring to the immunities clauses of the Charter, in particular Article 105, held:

"That these provisions, in a Treaty made under the Authority of the United States, are the law of the land, needs no argument. . .

"Also that without further action by Congress or the State, the immunities 'necessary for the fulfilment of its purposes', conferred upon the United Nations by Article 105, includes immunity from taxation." *Id.* at page 212.

In *Balfour, Guthrie and Co., Ltd. v. United States* 90 F. Supp. 831 (USDC, ND, Cal. 1950) the Federal Court had before it the related question as to whether Article 104 of the Charter, conferring legal capacity on the United Nations was self-executing. It held:

"As a treaty ratified by the United States, the Charter is part of the supreme law of the land. No implemental legislation would appear to be necessary to endow the United Nations with legal capacity in the United States."

The Attorney-General of New York, in an opinion of 26 October 1951 addressed to the State Liquor Authority, found that

"the conviction is inescapable that. . . the jurisdiction of the State may not be so exercised or its laws so enforced as to deny or interfere with the enjoyment by the United Nations within the Headquarters District of any privilege or immunity necessary for the unhampered exercise of its functions or fulfilment of its purposes. This limitation upon the State in the exercise of its right of sovereignty or by the consent of the State, given by its ratification on July 26, 1788, of the Constitution of the United States; for the privileges and immunities and the powers of the United Nations in the premises flow from and have their fountainhead in the multilateral treaty known as the United Nations Charter which, by express provision of the Federal Constitution, is declared to be the supreme law of the land, anything in the Constitution or laws of any State to the contrary notwithstanding.

"I think it is self-evident that any attempt to asset the applicability of the State Alcoholic Beverage Control Law as against the United Nations within its Headquarters District would tend to embarrass it in the exercise of its functions and would interfere with the enjoyment by it of privileges and immunities necessary for the fulfilment of its purposes; would be contrary to its Charter and to measures taken by the United States and the United Nations to give practical effect to the provisions thereof; and that, therefore, such State Law is not applicable as against the United Nations within its Headquarters District in the Borough of Manhattan."

5. *Conclusion*

It must be concluded from the foregoing that the United Nations Charter, as a part of the supreme law of the land, confers upon the United Nations the immunities necessary for the fulfilment of its purposes, without the requirement of any state legislation; that these immunities include exemption from real property taxes; and that the tax exemption became operative from the effective date of the Charter, without regard to the taxable status date under ordinary local practice.

Nothing in this conclusion is, in any case, inconsistent with the express terms of Section 4, subdivision 20 of the Tax Law. Indeed, the latter must to this extent be considered to be declaratory legislation enacted to provide administrative certainty for the assistance of state and city officials. For the Attorney-General, by an opinion of 29 January 1946, advised the Governor of New York that Article 105 of the Charter would be recognized in New York even before the proposed convention was executed, and that it would not be necessary to enact state legislation to implement the federal treaty unless the Governor thought it desirable of for reasons of clarity or otherwise.

168. The United Nations is believed not to have paid real property taxes, as distinct from charges for public utilities, on any of the premises it has occupied.

169. In 1962 the Syrian Council of State (Advisory Section) gave the following opinion regarding the exemption of UNRWA from municipal construction licence fees:

The United Nations Relief and Works Agency for Palestine Refugees in the Near East (UNRWA) asked leave of the municipality of Homs to build within the municipal limits, and the municipality demanded payment of the construction licence fee payable under Act No. 151 of 8 January 1938 concerning municipal taxation. The Agency objected, citing the Convention on the Privileges and Immunities of the United Nations, applied to Syria by

Legislative Decree No. 12 of 3 August 1953, as amended by Act No. 196 of 13 June 1960. The Ministry of Municipal and Rural Affairs sought the opinion of the Council of State. The Council, in an opinion of 16 December 1962 delivered by the plenary assembly of its advisory section, held that the fee was one of the "direct taxes" referred to in Article II, Section 7 (a), of the Convention, and that the Agency was therefore exempt. The Council pointed out that this term should not be interpreted according to Syrian law only but that account must also be taken of the meaning which the United Nations had attributed to it in drafting the Convention, since otherwise the text might be interpreted differently in different States Parties. Syrian legislation itself did not always draw a very clear distinction between a *tax* and a *fee*, and the municipal construction licence fee was a *direct tax* because it was levied directly for the benefit of the public funds, and the payer could not recover it from a third person. The draftsmen of the Convention on the Privileges and Immunities of the United Nations had intended to treat fees as, in principle, identical with direct taxes; since, after stipulating in Article II, Section 7 (a), that the United Nations and its property should be "exempt from all direct taxes", they had added: "it is understood, however, that the United Nations will not claim exemption from taxes which are, in fact, no more than charges for public utility services". Even if under Syrian Law the construction licence fee was not a direct tax, the term at issue must be interpreted in accordance with international law.⁸⁴

(b) *Practice in respect of "charges for public utility services"*

170. As noted in sub-section (a) above, United Nations exemption from direct taxes does not extend to exemption from charges for public utility services. In addition to the treaty provisions referred to earlier, a number of international agreements specify that the premises of the United Nations shall be supplied "on equitable terms" with the necessary public services. In section 17 (a) of the Headquarters Agreement these services are defined as including "electricity, water, gas, post, telephone, telegraph, transportation, drainage, collection of refuse, fire protection, snow removal, *et cetera*". Section 24 of the ECAFE Agreement provides that, whilst ECAFE will be supplied "on equitable terms" with public services of this nature, the Government will be responsible for all charges in respect of their installation, maintenance and repair. No serious difficulty appears to have arisen over the interpretation of these provisions.

171. In 1958 a United Nations subsidiary organ reported that the host Government was seeking to obtain municipal taxes on premises leased to the organ. The local authorities stated that the taxes were applied towards the furnishing of municipal services, including street lighting, street cleaning, fire protection, anti-malaria measures, the removal of waste, and general services. In reply to the argument of the United Nations organ that it was exempt from the taxes since they were directly imposed and not a charge for public utilities, such as water or electricity, the local authorities declared that water and electricity were mere commodities, not public utility services, and that accordingly the non-exemption from public utility charges contained in the Convention implied that the Organization should pay for the whole of the services listed above. The Legal Counsel wrote to the Legal

Adviser of the organ concerned, examining the distinction between real property taxes (*qua* direct taxes) and public utility charges.

. . . The notion that water and electricity are not public utility services is wholly erroneous. Water and electricity are the types *par excellence* of public utility services, precisely those had in mind by the General Assembly in adopting the Convention. As you know, a public utility is a corporation, very often privately owned, though sometimes owned or controlled by a municipality or other governmental unit, but in either case impressed with a public interest which causes a close statutory supervision of the production and sale of the service or commodity in question. This supervision is ordinarily carried out by Public Utilities Commissions; I am sure it is not necessary to refer to the fact that the public utilities supervised by such governmental bodies in any of a large number of countries are principally gas and electricity, water and transport. For example, Quemner, *Dictionnaire Juridique* gives the following entry:

"Public utilities, public services corporation — services publics concédés (transports, gaz, électricité, etc.)."

I think it is clear that the Convention had specifically in mind the payment by the United Nations of water and electricity charges on the grounds that the costs as billed are no more than the *quid pro quo* for commodities or services received; since these would be payable to a private corporation like the price of any other sale made, it was logical that there should not be an exemption merely because the same service happened to be rendered by a municipality or municipally owned company.

A different situation prevails when we come to examine the other municipal services listed above. Whatever may be the advantage to the individual house-holder of the rendering of such services, it seems clear that these represent normal functions commonly thought of as falling within the responsibilities of municipal government. They are usually carried out by the municipality itself or at least paid for by the municipality out of its own budgeted funds obtained from real property taxation and not from prices charged in respect of the specific amounts of each separate service rendered. It is important to note that water and electricity services are charged for on the basis of units of measurement, such as the kilowatt hour in the latter case. The contrary is true in the case of the various services now under examination. The authorities in international law generally seem to make a distinction as to whether the services rendered by a municipality or other public agency are special ones for which a special charge is made, with definite rates payable by the individual in his character as a consumer and not as a general taxpayer according to fixed principles of real property taxation. (Thus, municipal taxation is normally by area and valuation of real property, not by the amount of street lighting furnished to a given frontage. In this manner, a leading international law case on the subject makes the distinction that "taxes and rates imposed by statute in general terms in respect of the occupation or the ownership of real property are not recoverable from diplomatic agents". In the Matter of a Reference as to the Powers of the Corporation of the City of Ottawa to Levy Rates on Foreign Legations, Supreme Court of Canada, 1943.) . . .

172. The major problem which has arisen regarding public utility charges has been in respect of United Nations use of transport facilities, in particular of airport facilities. The following extract from a note sent in 1963 by the Secretary-General to the Government of a Member State which had sought to levy fees for various airport facilities provided to United Nations aircraft, describes the legal position taken by the United Nations.

. . . In the view of the Secretariat of the United Nations, charges exacted by a Government upon aircraft for landing or parking

⁸⁴ *United Nations Juridical Yearbook 1962*, p. 291.

at its airport constitute a direct tax, in respect of which the United Nations is exempt pursuant to Section 7 (a) of the Convention on the Privileges and Immunities of the United Nations. That section provides that the United Nations shall be "exempt from all direct taxes". Such charges are levied for the mere fact of calling or stopping at an airport. They cannot be considered as "charges for public utility services" from which the United Nations, by the terms of the same Section 7 (a) of the Convention, will not claim exemption.

The term "public utility" has a restricted connotation applying to particular supplies or services rendered by a government or a corporation under government regulation for which charges are made at a fixed rate according to the amount of supplies furnished or services rendered. The "handling charges" actually levied at . . . Airport would fall into this category and, as may have been noted, the Secretariat has consistently refrained from claiming exemption from such handling charges. Similarly, the Secretariat will not claim exemption, for example, from payment of rental for hangar storage space or for electricity charges for the lighting of runways during night landing or take-off; these are in the realm of public utility charges.

The above-stated position of the Secretariat has been generally accepted by governments. For instance, in connexion with the operations of the United Nations Truce Supervision Organization, the United Nations had reached an agreement with the Government of Lebanon whereby Lebanon exempts the United Nations, in respect of its aircraft, from landing fees at the Beirut Airport while the Organization undertakes to pay storage-rental and night-lighting costs. The same principle was specifically acknowledged in the Agreement of 8 February 1957 between the United Nations and Egypt concerning the Status of the United Nations Emergency Force in Egypt. Paragraph 33 of this Agreement recognized the right of the Force to use the airfields in its area of operation "without the payment of dues, tolls or charges, . . . except for charges that are related directly to services rendered". (United Nations, *Treaty Series*, vol. 260, at pages 78-80). A similar provision may be found in the Agreement of 27 November 1961 between the United Nations and the Republic of the Congo paragraph 31 states: "*L'Organisation des Nations Unies a le droit d'utiliser les . . . aérodromes, sans acquitter de droits, de péages ou taxes, que ce soit aux fins d'enregistrement ou pour tout autre motif, à l'exception des taxes perçues directement en rémunérations de services spécifiés.*" (A/4986, page 11).

As concerns the feeling of the Government that the payments made were for actual services rendered, the Secretary-General wishes to emphasize that, both as a matter of principle and as a matter of obvious practical necessity, charges for actual services rendered must relate to services which can be specifically identified, described and itemized. Moreover, it follows that the charge would then differ for each aircraft or each landing according to some predetermined unit (such as a day, a night, the mere act of landing on the runway or parking on the apron, or the type of aircraft), then clearly the Organization is being subjected to a standard rate of assessment in the nature of a tax.

If, therefore, the Government, in the light of these criteria, should adhere to the views that the payments in question were for actual services, the Secretary-General would ask to be furnished (and the auditors would no doubt eventually require) an itemized account showing the specific services provided on each occasion, the cost of each service, and how the total was arrived at. The Secretary-General is satisfied that the submission of such a voucher would be normal practice wherever a party is billed for specific services. Thus, labour is normally charged by hours of work provided, electricity by kilowatt-hour, etc. On the other hand, if the charges have been established by fixed statutory or regulatory fee, it would seem evident that Section 7 (a) is applicable.

In the light of these considerations of legal principles and of the practice of States, the Secretary-General hopes that the Govern-

ment will be good enough to give the matter further sympathetic consideration and will be able to see its way clear to accepting the position that the United Nations should be exempt from landing fees, parking fees and user charges at airports in its territory in respect of aircraft in United Nations service."

173. Paragraph 33 of the UNFICYP Agreement⁸⁵ provides that the Force shall have the right to use airfields and other transport facilities "without the payment of dues, tolls or charges, either by way of registration or otherwise". Section 8 (b) of the ECA Agreement states that:

Aircraft operated by or for the United Nations shall be exempt from all charges, except those for actual service rendered, and from fees or taxes incidental to the landing at, parking on or taking off from any aerodrome in Ethiopia. Except as limited by the preceding sentence, nothing herein shall be construed as exempting such aircraft from full compliance with all applicable rules and regulations governing the operation of flights into, within, or out of the territory of the Empire of Ethiopia.

174. In the case of aircraft under commercial charter, the United Nations does not request exemption from landing or housing fees where, under the terms of the charter agreement, the amount of tax would not be passed on to the United Nations and any exemption would only accrue to the financial advantage of the private company. In all instances where there is a direct burden on the United Nations, however, it has claimed exemption. While the entitlement of the United Nations to this exemption has been challenged on occasions, the United Nations has not paid landing fees in any Member State.

Section 15. Customs duties

(a) *Imports and exports by the United Nations "for its official use"*

175. Under section 7 (b) of the General Convention the United Nations is declared

exempt from customs duties and prohibitions and restrictions on imports and exports in respect of articles imported or exported by the United Nations for its official use.

Section 10 (b) of the ECLA Agreement, section 8 (b) of the ECAFE Agreement and section 5 (c) of the Agreement with Switzerland provide similarly. In Switzerland a printed form has been established by the Swiss authorities on which persons specifically authorized by the United Nations certify that a particular import is for official use; this certification is accepted as conclusive by the Swiss authorities.

176. In paragraph 23 of the UNEF Agreement the Government of Egypt recognized "the right of the Force to import free of duty equipment for the Force and provisions, supplies and other goods for the exclusive use of members of the Force" and of members of the Secretariat serving with the Force. A similar provision was contained in the corresponding agreements relating to ONUC and UNFICYP.⁸⁶

⁸⁵ United Nations, *Treaty Series*, vol. 492, p. 76.

⁸⁶ Paragraph 16 (b), ONUC Agreement, United Nations, *Treaty Series*, vol. 414, p. 239, and paragraph 23, UNFICYP Agreement, *ibid.*, vol. 492, p. 70.

177. Provisions contained in two of the agreements concluded by UNRWA may also be noted. Article III of the Agreement between UNRWA and Egypt of 12 September 1950 states that:

1) *Les fournitures, approvisionnements, produits et équipements y compris les produits pétroliers destinés aux réfugiés en Palestine du Sud sous contrôle égyptien seront exemptés de tous droits de douane, taxes ou frais d'importation et d'exportation habituellement perçus par l'État ou par des administrations publiques.*

2) *Sous réserve des mesures concernant la sécurité et l'ordre public, seront exemptés de la visite et de la vérification des fournitures, approvisionnements, produits et équipements ci-dessus mentionnés.*

Cette exemption pourra être retirée si la Douane constate qu'il en est fait abus.

De plus l'Office est exempté de la nécessité d'obtenir des permis d'importation en Égypte, des permis d'entrée en Palestine du Sud ou des autorisations de change pour ce qui concerne les matières ci-dessus.

In article V of the Agreement between UNRWA and Jordan, signed on 14 March and 20 August 1951, exemption is granted in similar terms.

178. Government authorities have, in the great majority of cases, accepted without question that any goods being transported were for the official use of the Organization. Such problems as have arisen have been mostly over comestible articles such as food and drink. Thus an opinion from the Attorney-General of the State of New York was required in 1946 to enable the United Nations to import liquor, free of duty, for purposes of official hospitality. After citing Article 105 of the Charter and section 2 (d) of United States Public Law 291, the Attorney-General continued:

I am informed that, upon request from the United Nations to the Secretary of State, a shipment of liquor from Canada, consigned to United Nations in New York City, has been cleared for admittance without payment of customs duties or internal revenue taxes, but that it is being held in Warehouse pending the issuance of a release by the State Liquor Authority, and that the State Liquor Authority is unwilling to act without a ruling by me.

It appears also that the State Liquor Authority has permitted the entry of liquor imported by ambassadors for their personal use. Under the terms of Public Law 291 it appears that the United Nations is entitled to the same rights and immunities as a foreign government. If an ambassador, the representative of a foreign government, is entitled to import liquor free from State restrictions, United Nations would appear to have the same privileges.

Restricting this ruling to imports by the United Nations itself, to be used only for purposes of its own official hospitality, it is my opinion that the State Liquor Authority should recognize the rights conferred by Public Law 291 of the United States Congress, and permit the delivery of such liquor to the United Nations, upon request by the United Nations specifying the amount and nature of the shipment.

179. In 1959 the question was raised as to the right or privilege of information centre directors to import duty-free liquor for hospitality purposes. The Office of Legal Affairs advised the Office of Public Information as follows:

Under the Convention on the Privileges and Immunities of the United Nations, the directors of information centres, as officials of the United Nations, are of course not legally entitled to duty-free importation of liquor, which the General Assembly, in adopt-

ing the Convention, did not treat as necessary for the independent exercise of their functions in connexion with the Organization.

... A distinction, however, should be made between imports by the Information Centre for the official use of the Organization. Imports of liquor for official receptions, for example, should, by the terms of Section 7 (b) of the Convention on the Privileges and Immunities of the United Nations, be exempt from customs duties. This applies also to gasoline, whenever it is "for official use". As to what constitutes "official use", we believe it a matter for administrative regulation, which should conform to the restrictions prevailing at Headquarters. When the information centre imports such articles for such official use, it may itself properly request the Government for exemption from customs duties on the basis of Section 7 (b) of the Convention, and no request from Headquarters would be necessary.

180. The distinction referred to, namely that between the right of individual officials to import goods and the right of the Organization (or of officials on behalf of the Organization) to import goods, has been raised on a number of other occasions in connexion with the import of consumable articles.

181. In 1952 a host Government sought to confine the exemption from customs duties enjoyed by UNRWA to objects and materials required for administrative purposes only, as opposed to imports destined for its refugee programme in general. The opinion of the Office of Legal Affairs was given as follows, in a letter to the Legal Adviser of UNRWA.

We are not of the opinion that the contention of the Government that the provisions of Section 7 (b) of the Convention on the Privileges and Immunities of the United Nations are restricted to imports required for administrative purposes only can be legally justified. It is our view that the phrase "for its official use" in Section 7 (b) must be interpreted to include the importation of any goods, materials, foodstuffs or otherwise, which are used in and form a part of the official programme of UNRWA. The fact that such goods imported by the United Nations are thereafter distributed to individuals within the country in accordance with the purpose and aims of the programme instituted by UNRWA can hardly be regarded as negating the purposes of the exemption under this Section, when the very reason for the existence of UNRWA is to perform such functions, and not merely to consume administrative supplies.

The Government might be assisted by a reminder as to the motives of the General Assembly in recognizing the necessity of the customs exemption for the United Nations. First of all, any special charge upon the resources of the Organization or a subsidiary organ are a burden reducing its ability to carry out its international function. Secondly, all other Member States contributing to the budget of the programme will have the strongest grounds for complaint, because the payment of customs by the Agency merely constitutes an indirect payment by the other Member Governments into the treasury of a single State, which thus enriches itself not only to the detriment of the programme but from the resources of the other contributing States. Obviously, the work of UNRWA in itself provides assistance to States having refugees on their territory, and could hardly afford a basis for further payments directly to a single Government.

For this reason, any discussion with the Government on the meaning of Section 7 of the Convention must relate back to the criterion of necessity set up in Article 105 of the Charter, which the Convention merely implements. It should likewise be borne in mind that the General Assembly, in paragraph 17 of its Resolution 302 (IV), called upon the Governments concerned to accord to the UNRWA the privileges, immunities, exemptions and facilities which had been granted to its predecessor, United Nations

Relief for Palestine Refugees, together with all other privileges, immunities, exemptions and facilities necessary for the fulfilment of its functions.

182. It may be noted that, speaking before the Fifth Committee at its 982nd meeting, the Legal Counsel referred to another problem which had arisen in interpreting the meaning of the term "official use".

Now, if the United Nations sent a film or recording produced by it as a part of its public information operations to a distributing agent for distribution in a Member State, is the film so imported into the territory of that Member State for the "official use" of the United Nations. The Secretariat took the affirmative view and the Member concerned, I am glad to report, graciously agreed.⁸⁷

183. Lastly, on the grounds that the goods are not for official use, the United Nations pays duty in respect of all items imported for sale in the gift shop maintained by the United Nations in the Headquarters District.⁸⁸ The co-operative shops run at New York and Geneva for the benefit of staff and accredited representatives are also not exempt from customs or excise taxes.

(b) *Imposition of "customs duties... prohibitions and restrictions"*

184. As regards the position at United Nations Headquarters, under section 2 (d) of the United States International Organizations Immunities Act the United Nations is granted "in so far as concerns customs duties and internal revenue taxes imposed upon or by reason of importation, and the procedures in connexion therewith", the privileges, exemptions and immunities which are accorded under similar circumstances to foreign Governments. In accordance with the terms of this provision, the United Nations imports goods for official use at Headquarters without restriction and without paying customs or internal revenue taxes. As regards exports, in a few cases (chiefly certain medical supplies, narcotic drugs, and some items of technical equipment) the United Nations has to obtain a special licence from the United States Department of Commerce; such licences have been obtained without serious difficulty.⁸⁹ In 1962, however, an export restriction was introduced whereby the United Nations was required to obtain a licence from the Office of Export Control of the Bureau of International Programmes of the Department of Commerce, in respect of public information materials sent from the United States to certain countries. The United Nations protested against this requirement, pointing out that the restriction might cripple its information activities in the States concerned. Reference was made to the provisions of Article 105 of the Charter and to section 7 (b) of the General Convention. The United States authorities agreed to exempt the United Nations from the requirement that a licence be obtained in respect of the articles in question.

⁸⁷ Statement by the Legal Counsel before the Fifth Committee, document A/C.5/972. For summary see A/C.5/SR.982, paras. 1-8.

⁸⁸ See also section 17 (a), paras. 206 and 207, below.

⁸⁹ For further details of the position in relation to United States customs and excise duties see section 17 (a), paras. 206 and 207, below, in particular the list of taxes annexed to the letter from the Legal Counsel to the United States Mission of 10 April 1959.

185. The United Nations has experienced relatively little difficulty as regards the grant of exemption from "customs duties... prohibitions and restrictions", in accordance with the Convention, in the case of imports and exports made other than at Headquarters. On such occasions as problems have been presented (e.g. owing to an official embargo on goods originating from certain countries) the matter has usually been satisfactorily resolved in the United Nations favour, following representations made by the Organization to the responsible national authorities.

186. When customs duties have been paid by the importer, from whom the United Nations has then bought the goods, the United Nations has sought to obtain a refund, either directly, by means of a request to the Government concerned, or indirectly, by supplying suitable proof to the importer to enable him to do so, in cases where the Organization has bought at the duty-free price.

(c) *Sales of articles imported by the United Nations or by officials*

187. Section 7 (b) of the General Convention provides that articles granted exemption from customs duties by virtue of their importation by the United Nations "will not be sold in the country into which they were imported except under conditions agreed with the Government of that country".

188. Relatively little practice appears to have emerged under this provision. Most sales of articles imported by the United Nations have been of used office equipment or of used vehicles. The United Nations has usually made the satisfaction, by the purchaser, of any customs or similar obligation, a condition of the contract of purchase. This practice has usually been followed by operational bodies, such as UNRWA, which have on occasions disposed of sizable quantities of surplus or used articles. In Switzerland, under the *Règlement Douanier* of 23 April 1952, articles imported duty-free may not be sold within five years, except on payment of duty. Cars belonging to the Geneva Office may be sold after three years without payment of duty.

189. In 1964 the Legal Counsel advised the Legal Adviser of a United Nations subsidiary organ concerning the duty-free importation and sale on the local market of personal effects belonging to staff members. After referring to section 7 (b) the memorandum continued:

It can never have been the intention of the Convention on the Privileges and Immunities of the United Nations or of the agreement with the host country that conditions should be more severe than those for a private person in the country. Of course, a staff member should not place himself in a position of appearing to deal in imported articles even where he pays the customs, but where as in the present case there was a legitimate explanation for the importation of the article, it seems to us that you were perfectly correct in supporting the staff member's case with the host Government.

The procedure requested by the host Government, under which individual authorization of each sale would be required without reference to any objective standards, is not the type of condition which was envisaged. Such condition has not been imposed in any other country. The conditions which have been agreed are

those necessary to ensure that taxes are paid and otherwise that relevant laws and regulations are applied. Such conditions should not put the staff member in a position less favourable than that of a private person, nor should they be such as to negate the privilege of imported personal effects which is accorded by the Convention on the Privileges and Immunities of the United Nations and by the Status Agreement.

While conditions for sale must be agreed with the host country, it was not intended that such conditions should be unilaterally and arbitrarily established but that they should be negotiated with the purpose of protecting the legitimate interests of both parties, that is, to ensure the host country against the abuse of import privileges and to ensure the United Nations and its staff effective use of such privileges for the purposes that they were intended.

The question of the sale of official publications and of UNICEF greeting cards is considered in section 16 (a) paras. 192-198, below.

190. In the case of the UNEF, ONUC and UNFICYP Agreements, provision is made for the establishment of service institutes which may sell duty-free consumable goods to members of the Force concerned and to members of the Secretariat serving with the Force. Paragraph 23 of the UNFICYP Agreement⁹⁰ states that:

The Commander shall take all necessary measures to prevent any abuse of the exemption and to prevent the sale or resale of the goods to persons other than those aforesaid. Sympathetic consideration shall be given by the Commander to observations or requests of the Government concerning the operation of service institutes.

191. Paragraph 23 of the UNEF Agreement is closely similar. Paragraph 16 of the ONUC Agreement⁹¹ provided that goods imported duty-free including those for sale to persons serving with the Force might not be resold to third parties except under conditions approved by the host Government.

Section 16. Publications

(a) Interpretation of the term "publications" and problems relating to the distribution of publications

192. Under section 7 (c) of the General Convention the United Nations is declared:

Exempt from customs duties and prohibitions and restrictions on imports and exports in respect of its publications.

Similar provisions are contained in a number of other agreements.⁹²

193. The term "publications" has been widely interpreted to cover films and recording prepared by or at the request of the United Nations, as well as printed matter.⁹³ In an internal memorandum prepared by the Office of Legal Affairs in 1952 it was stated that

... the term "official use" in Section 7 (b) must be regarded as comprehending the distribution of United Nations films within Member States not only by the United Nations itself but through the various distributors which contract with the United Nations

⁹⁰ United Nations, *Treaty Series*, vol. 492, p. 70.

⁹¹ *Ibid.*, vol. 414, p. 239.

⁹² Section 5 (e) Agreement with Switzerland, section 10 (c) ECLA Agreement, section 8 (c) ECAFE Agreement.

⁹³ See e.g., the statement by the Legal Counsel before the Fifth Committee at its 982nd meeting, quoted in section 15 (a), para. 182, above.

under the film rental agreements, so long as the United Nations is carrying out an official purpose in effecting the distribution.

194. It may be noted that the Agreement on the importation of educational, scientific and cultural materials,⁹⁴ which entered into force on 21 May 1952, provides in Article 1, paragraph 1, that:

The contracting States undertake not to apply customs duties or other charges on, or in connection with, the importation of:

...

(b) Educational, scientific and cultural materials, listed in annexes B, C, D, and E to this Agreement, which are the products of another contracting State, subject to the conditions laid down in those annexes.

Annex C (iv) reads as follows:

Films, filmstrips, microfilms and sound recordings of an educational, scientific or cultural character produced by the United Nations or any of its specialized agencies.

Thus both United Nations films and those produced by specialized agencies are expressly excluded from customs duties and other charges imposed in connexion with their importation.

195. In a memorandum prepared in 1953 the Office of Legal Affairs advised the Office of Public Information regarding certain aspects of the importation of films for distribution and sale in a Member State. After restating that films were to be considered as "publications" within section 7 (c) of the General Convention and that their importation for distribution constituted an "official use", the memorandum then dealt with the fact that some of the films were to be shown under rental agreements whilst others were to be sold.

... With regard to the rental agreements, the proviso in paragraph (b) of Section 7 will have no application, since it is our understanding that the United Nations retains title to films imported under such agreements throughout their duration.

With regard to the sale agreements we have the following comments to make. Firstly, notwithstanding the fact that under such agreements a transfer of title takes place, we do not think that they are of the nature contemplated by the proviso in paragraph (b) of Section 7. Thus, the transaction which is effected by these sale agreements, the subject matter of which is the United Nations films, is clearly distinguishable from an ordinary commercial transaction. The controlling objective of the United Nations film distribution programme, which is to disseminate knowledge of United Nations activities within the territory of the country concerned, remains unchanged notwithstanding the fact that the United Nations' agent in the country is necessarily compensated for the importation of the films. In this connexion it is the purposes for which the agreement is concluded which are the essential factor. Furthermore, in our understanding the present method of importing and distributing United Nations films is the only way of getting them on to the various circuits. The fact that the films must go through the ordinary and usual commercial channels in order to gain a place on the screens does not of itself change the official United Nations character of the transaction involved in the sale agreements. For the sale proviso in the Convention plainly applies after use by the United Nations has ended, whereas the sale in this case is merely a first step in bringing about the official use. . .

196. As regards the importation "for resale" of United Nations publications, the Legal Counsel gave the following opinion in an internal memorandum prepared

⁹⁴ United Nations, *Treaty Series*, vol. 131, p. 25.

in 1959; the particular case concerned the sale of the printed volumes of the United Nations Conference on the Peaceful Uses of Atomic Energy, which had been printed outside the United States.

... As a general proposition, I do not believe that the United Nations can acquiesce in exaction of customs duties on its publications by any Member Government. Since this is true as to all of the routine publications of the Organization, it would be particularly anomalous if the proceedings of so important a conference as that on Peaceful Uses of Atomic Energy were to encounter obstacles in their world distribution, directly contrary to the purposes for which the Conference was convened, simply because the special demand for the volumes brought them to the attention of governments.

The question of resale in the case of publications has no legal significance. It was assumed from the beginning that the normal channels of distribution of the printed publications of the United Nations would be through resale by sales agents.

197. After referring to section 7, paragraphs (a) and (b), of the General Convention, the opinion continued:

I do not consider that the mere fact that the sales agent may sell at a mark-up, or that our sales price may in some way take into account the agent's commission or profit, in any way affects the assumptions on which the exemption was based. I therefore leave aside for the present the question of any mark-up reasonably related to the distribution services rendered the Organization by booksellers or other commercial channels.

In addition to our own Convention, our publications are also protected from customs duties or other charges by the numerous States parties to the UNESCO Agreement on the Importation of Educational, Scientific and Cultural Materials, which in addition provides special facilities for the importation of the books and publications of the United Nations or of any of its specialized agencies (including licences and foreign exchange) (article II (c)).

In so far as the position in the United States is concerned, section 2 (d) of the International Organizations Immunities Act accords the Organization the same exemptions in respect of customs duties as are "accorded under similar circumstances to foreign governments". I would suggest that we treat this section, as interpreted by more than a decade of official practice, as conferring upon the United Nations as importer no less an exemption than that intended by the General Assembly in section 7 (c) of the Convention.

198. One of the most regular, as well as the largest, sale of United Nations publications is the annual sale of UNICEF greeting cards. The great majority of the hundred or more countries in which these cards are now sold permit their entry and sale without imposing any duty. The following is the list of countries which imposed customs duties on UNICEF cards in 1964: Argentina, Australia, Ceylon, Chile, Denmark, Gambia, India, Japan, Kenya, New Zealand, Spain, Sweden, Tanzania and the United States. Purchase tax was paid in the United Kingdom.

199. Distinct from the question of customs and similar restrictions placed on the import of United Nations publications is that of the possibility of more direct forms of control by way of governmental censorship or licensing.⁹⁵ A Member State requested the United

Nations Information Centre situated in its territory to stop showing United Nations films until these had been cleared with the Board of Censors. Following discussions with the host authorities, the United Nations Secretariat wrote to the Permanent Mission of the State concerned in 1966, setting out the basis on which exemption was claimed from this requirement:

The United Nations is not in a position to submit its films to censorship since this would be contrary to the Charter and to the Convention on the Privileges and Immunities of the United Nations of which your country is a party. The position of the United Nations in this regard derives, in general terms, from Article 105 of the Charter and more specifically from sections 3, 4 and 7 (c) of the Convention on the Privileges and Immunities of the United Nations.

200. After citing these provisions of the Convention, the letter continued:

As you will appreciate, a demand to censor United Nations films would constitute interference as prohibited in section 3 of the Convention. As regards section 4, United Nations films are part of United Nations documentation, and censorship therefore would be in violation of this section which provides for inviolability of documentation "wherever located". United Nations films are also covered by the exemption under section 7 (c) since they are a part of United Nations publications.

Furthermore, if a government were to demand, in particular, the right to censor United Nations material and if that demand were complied with, the question would arise of a contravention of Article 100 of the Charter, under which a Member State is required to refrain from influencing the Secretariat in the discharge of its responsibilities and the latter is prohibited from receiving instructions from any authority external to the Organization.

The matter remains under discussion with the Government concerned.

201. It may be noted that in section 6 of the ECLA Agreement the freedom from censorship enjoyed in respect of correspondence and other communications is expressly extended "without limitation by reason of this enumeration, to printed matter, still and moving pictures, films and sound recordings". Section 6 (a) of the ECA Agreement and section 13 (a) of the ECAFE Agreement contain similar provisions.

(b) *United Nations copyright and patents*

202. The United Nations has obtained copyright protection, in cases where it has considered such protection desirable, through the registration of its publications and other works with the appropriate national authorities. In 1950-51 there was an exchange of correspondence with the United States Copyright Office regarding the legal capacity of the United Nations to effect copyright registration. The letter sent on behalf of the United Nations included the following passage:

With regard to the status of the United Nations and the specialized agencies under the United States Copyright Law (17 USC), there seems to be no doubt that these Organizations may be either authors or proprietors of works to copyright. They are legal entities capable of acquiring property, and may be "authors" under the definition in section 26, which includes employers in the case of works made for hire. When the United Nations or a specialized agency is "the author or proprietor of any work made the subject of copyright", it would appear to be entitled to copyright protection under the terms of the first sentence of section 9 and would not be subject to the proviso which is applicable only

⁹⁵ In 1962, the United States sought to require the United Nations to obtain a licence in respect of the export of public information materials to certain States. Following correspondence the United States acknowledged the United Nations exemption from this requirement; see section 15 (b), para. 184, above.

to citizens or subjects of foreign States or nations. The United Nations being an international person *sui generis* is not a citizen or a subject of a foreign State or Nations. Likewise the *raison d'être* for the reciprocity requirement in the proviso does not exist since the United Nations and the specialized agencies do not grant copyright protection of any kind.

While there should be no implication that the United Nations and the specialized agencies are to be considered "stateless persons", the reasoning of the Circuit Court of Appeals in *Houghton Mifflin Co. v. Stackpole Sons, Inc.* (104 F. 2d 306) does, as you suggest, apply equally to them. If, as was held by the Court in that case, a stateless person may be granted copyright protection without being subject to the reciprocity provision, then it would seem to me that *a fortiori* the requirement of reciprocity would not be applicable to the United Nations and specialized agencies.

This conclusion is further supported, as you suggest, by Public Law 291. The capacity to acquire property, which is broadly applicable to the right to copyright protection, is a privilege recognized by section 2, and under section 9 its grant is not to be conditioned upon any requirement of reciprocity which might exist in the case of foreign governments.

203. During the preparation of the Universal Copyright Convention in 1951, it was proposed that an article should be incorporated expressly permitting the United Nations to receive copyright protection in all contracting States. Although a proposal in this sense was not included in the Convention, the entry into force of the Convention in 1955, and its ratification by the United States, reduced some of the procedural and technical difficulties which the United Nations had previously experienced in connexion with copyright registration.

204. In 1956 the Office of Legal Affairs wrote to the Office of General Services setting out a number of general considerations with respect to the possible patenting of inventions developed by or for the United Nations.

... It should be noted first of all that a patent right is a property right. There are no United Nations regulations or rules in existence specifically applying to the administration of patent rights belonging to the United Nations, but the Financial Regulations and Rules include provisions dealing with the management and disposal of United Nations property in general. In the absence of any regulations or rules specifically relating to patents, those general provisions must be deemed applicable to the administration of patent right belonging to the United Nations.

Moreover, it is entirely possible that the United Nations might on future occasions wish to take out patents covering inventions belonging to it. This might be the case not only with respect to inventions which could constitute a significant source of revenue for the United Nations and which could thus reduce the contributions of member states, but also as regards inventions the exploitation of which the United Nations might wish to control for one reason or another.

The question thus arises as to whether it is necessary or desirable to adopt a general policy making inventions belonging to the United Nations generally available to the public. It will readily be seen that this may be desirable in some cases but not in others. It would thus appear that each case should be considered on its own merits.

Section 17. Excise duties and taxes on sales; important purchases

(a) Excise duties and taxes on sales forming part of the price to be paid

205. Section 8 of the General Convention provides that

While the United Nations will not, as a general rule, claim exemption from excise duties and from taxes on the sale of movable and immovable property which form part of the price to be paid, nevertheless when the United Nations is making important purchases for official use of property on which such duties and taxes have been charged or are chargeable, Members will, whenever possible, make appropriate administrative arrangements for the remission of the amount of duty or tax.

Section 6 of the Agreement with Switzerland establishes a similar rule.⁹⁶

206. In the case of the United States, the Headquarters Agreement does not deal with the exemption of the United Nations from excise duties and sales taxes. All exemptions are therefore dependent on enactments of either the federal, state or city authorities, except in so far as the terms of the Charter and of the General Convention represent obligations upon the United States under international law. In 1958 the question of the tax position of the United Nations was discussed in the Fifth Committee with particular relation to United States taxes affecting the United Nations. Both the United States representative and the Legal Counsel, speaking on behalf of the Secretary-General, made statements at the 704th meeting of the Fifth Committee during the thirteenth session of the General Assembly; in the light of those statements it was decided that further consideration should be deferred until the Secretariat and the United States Mission had had an opportunity to discuss outstanding issues. Accordingly, the Legal Counsel wrote⁹⁷ to the Legal Adviser of the United States Mission on 10 April 1959, *inter alia* listing the various taxes applicable to the United Nations.

... I should like to refer to our several discussions of the numerous questions relating to the application to the United Nations of excise taxes in the United States as raised by the Fifth Committee of the General Assembly at its 667th meeting. You will recall that, in accordance with statements which each of us made to the Committee at its 704th meeting, it was decided by the Advisory Committee and the General Assembly that consideration of these questions might best be deferred pending discussions to take place between the Secretariat and the United States Mission to the United Nations.

I have had prepared a list of various taxes affecting the United Nations in the United States, which does not purport, at least in any technical sense, to be complete but which might nevertheless serve informally as agenda items for our discussions. Accordingly, I should now like to suggest that you examine the enclosed list, make any additions or other proposals which you wish, and that we then arrange a meeting with a view to determining whether we cannot arrive at a common understanding as to the conclusions

⁹⁶ In the case of the economic commissions only the ECAFE Agreement contains a specific provision. Section 9 of that Agreement states: "The United Nations shall be exempt from excise duties, sales, and luxury taxes and all other indirect taxes when it is making important purchases for official use by the ECAFE of property on which such duties or taxes are normally chargeable. However, the ECAFE will not as a general rule claim exemption from excise duties and from taxes on the sale of movable and immovable property which form part of the price to be paid, and cannot be identified separately from the sales price."

⁹⁷ This letter, and that sent by the Secretary-General on 9 September 1959, which is quoted below, effectively reproduce the substance of the statement made by the Legal Counsel at the 704th meeting of the Fifth Committee.

which could be reported, or the possible legal measures suggested, to the General Assembly. . .

Meanwhile, the following observations may be of interest. Tax provisions are listed either because of the specific interest in their application shown by members of the Fifth Committee or because they may have application to the United Nations in ways which might have been precluded by a United States accession to the Convention on the Privileges and Immunities of the United Nations. In a number of cases certain of the existing exemptions are noted, not because they have any direct bearing on the United Nations but because of their interest in indicating the policy of the tax or the degree of scope available to United States authorities in adjusting the application of the tax.

As pointed out in my statement to the Fifth Committee, the most appropriate legal technique for modifying the incidence on the United Nations of any given tax will vary according to its nature. Subject to settlement of any anterior policy considerations, agreed action could conceivably be taken by any of a number of means: simply by United States accession to the Convention, by amendment to the Headquarters agreement, by Headquarters Regulation, by state or federal legislation, or (most conveniently perhaps, in some cases) by common understanding, official interpretation or written ruling. I take it that it will be our natural desire to seek the most effective measures appropriate to the needs of the Organization by the simplest available legal devices. In this connexion you will recall that just prior to these points being raised in the Fifth Committee, the Secretary-General had asked me to take up with your Mission the particular question of the importation of liquor by the United Nations for service in the Delegates' bars as an official use of the Organization. This would, of course, need to be done under proper safeguards and at appropriate prices, as has now been suggested by some representatives on the Fifth Committee. Under none of the taxes set out in the enclosure, however, has any attempt been made to suggest the type of action which could or should be taken; this is on the theory that the list offers agenda items and not a brief to argue points in advance of our discussions. . .

INCIDENCE OF TAXATION IN THE UNITED STATES AFFECTING THE UNITED NATIONS

I. Excise Taxes

A. Federal

1. *Manufacturers excise taxes* on articles sold by manufacturer, producer or importer (Chapter 32, Internal Revenue Code of 1954; Part II, Excise Tax Technical Changes Act of 1958, 72 Stat. 1275).

(a) Relevant examples:

Motor vehicles, parts and accessories, tires and tubes; gasoline and lubricating oils; various household-type appliances, electric light bulbs; photographic equipment, parts and accessories; business machines.

(b) Present exemptions:

- (i) Statute (Excise Tax Technical Changes Act, Section 4221): sale for export to a state or local government, or to a non-profit educational organization for its exclusive use.
- (ii) Revenue Ruling: accredited diplomatic personnel, irrespective of treaty, who purchase from the manufacturer (Rev. Rul. 296, 1953-2 CB 325).

2. *Retailers excise taxes*

(a) Application: 10 per cent, of sales price of numerous types of articles sold by United Nations Gift Centre or Souvenir Shop (Chapter 31, 1954 Internal Revenue Code; Part I, Excise Tax Technical Changes Act).

(b) Present exemptions:

- (i) As under 1 (b) (i) above, as to the vendee.

- (ii) As under 1 (b) (ii) above, for accredited diplomatic personnel on purchases from a retailer otherwise taxed.
- (iii) No exemption as to sales by United States (or by a United States agency unless a statute specifically exempts it).

3. *Alcohol*

(a) Imposed on all distilled spirits and compounds (including perfumes) and wines and wine compounds in bond or produced or imported, or beer produced and removed or imported, within the United States (1954) Internal Revenue Code Chapter 51 as amended by Excise Tax Technical Changes Act).

(b) Exemptions:

- (i) Withdrawal for use of United States (Internal Revenue Code, Section 7510, 26 CFR 225.890).
- (ii) Withdrawal for export (Excise Tax Technical Changes Act, Sections 5053, 5062, 5247; "exportation" defined: 26 CFR 252.18).
- (iii) Miscellaneous technical, manufacturing and non-beverage exemptions (see, e.g. Excise Tax Technical Change Act, Sections 5003, 5214).

4. *Occupational tax*: retail dealers in liquors and beer (Excise Tax Technical Changes Act, Section 5121: \$54 per year — including organizations selling to their members: 26 CFR 194.37).

5. *Tobacco*

(a) Imposed on tobacco (at 10¢ per pound), cigars (at 75¢ to \$20 per thousand), cigarettes (at \$3.50 — \$8.40 per thousand) etc. manufactured in or imported into the United States (Excise Tax Technical Changes Act, Section 5701, 26 CFR 270.60-62), the manufacturer or importer being liable for the taxes (Excise Tax Technical Changes Act, Section 5703), and each affixing the stamps before removal subject to tax (26 CFR 270.149 and .193, 275.138 and .182).

(b) Exemptions:

- (i) Shipment for consumption beyond the jurisdiction of the internal revenue laws of the United States (Excise Tax Technical Changes Act, Section 5704).
- (ii) Cigars and cigarettes imported by appropriate consular officers of staff for personal or official use (26 CFR 270.196, 275.185).
- (iii) Federal agencies and institutions for gratuitous distribution in the United States (26 CFR 295.50).

6. *Documentary stamp taxes*: Internal Revenue Code, Chapter 34 as amended by Excise Tax Technical Changes Act.

(a) Imposition (principally affecting Joint Staff Pension Fund):

- (i) Sales and transfers of capital stock (4 to 8¢ per \$100 of actual share value: Section 4321) and certificates of indebtedness (at 11¢ on transfer: Sections 4311 and 4331).
- (ii) Specific exemptions: fiduciaries and custodians (Section 4342), transfers by operation of law (Section 4343).
- (iii) Policies and indemnity bonds issued by foreign insurers (at 1 to 4¢ per premium dollar: Section 4371).
- (iv) Specific exemptions: policies signed or countersigned by agent of insurer in the state where insurer is authorized to do business (Section 4373).

(b) General exemptions:

- (i) Instruments issued by federal, foreign, state or local government and certain domestic associations (Section 4382).
- (ii) United States and its agencies are not liable for stamp tax on instruments to which it is a party, but tax may be assessed against any other party liable therefor (Section 4384).
- (iii) Diplomatic personnel are exempted from documentary stamp taxes as taxes the legal incidence of which would otherwise fall to them (Rev. Rul. 296, 1953-2 CE 325).

B. New York State

1. Exemption: United Nations not required to pay "excise and sales taxes imposed by the State upon the sale of tangible personal property" acquired for its official use (New York Tax Law, Section 5-e).

2. Deferred applications: exemption inoperative until U.S. shall accede to Convention on Privileges and Immunities of United Nations (Laws 1948, e.745, Section 2).

3. State taxes on such sales of tangible personal property.

(a) Gasoline tax:

(i) Imposition: on excise tax of 6¢ per gallon on sales within the State by any distributor (New York Tax Law, Section 284); payable by the distributor but borne by the purchaser (Section 289-c).

(ii) Exemption: Sales "under circumstances which preclude the collection of such tax by reason of the United States Constitution and of laws of the United States enacted pursuant thereto." (Section 284); consular officers (1938, Op. Atty. Gen. 336); state, municipalities, public bodies, federal instrumentalities (various Attorney General opinions).

(b) Cigarette tax:

(i) Imposition:

(1) "A tax on all cigarettes possessed in the State by any person for sale", whereby the "sales of cigarettes are subject to tax" and the stamp-affixing agents as "liable as taxpayers" (New York Tax Law, Section 471) at 5¢ per pack; and other tobacco products at 15 % of wholesale price.

(2) Alternative use tax "on all cigarettes used in the State by any person" (Section 471-b).

(ii) Exemption: sales to United States or "under circumstances that this State is without power to impose such tax" (Section 471).

4. State taxes otherwise exempted:

(a) *Alcoholic beverage tax* (New York Tax Law, Section 424) : subject to refund (under Section 434) to the United Nations pursuant to opinion of Counsel of State Department of Taxation and Finance dated 19 August 1952 as to alcoholic beverages sold in restricted bars and restaurants in the Headquarters District, on the ground that such sales are for official purposes and the Organization is exempt from taxes incurred in connexion with its official functions.

(b) *Alcoholic beverage retail licence fees* (New York Alcoholic Beverage Control Law, Sections 56, 66, 83): exemption established by Opinion of Attorney General of 26 October 1951 on the basis of Article 105 of the Charter.

5. Additional State tax not specifically exempted: *stock transfer tax*.

(a) Imposition: on all sales or transfers of stock, at one to 4¢ per share (New York Tax Law, Section 270).

(b) Exemptions: technical exemptions similar to the federal (Sections 270, 270-b, 270-c).

C. New York City

1. Cigarettes

(a) Imposition on sale and use in the City in terms similar to the State cigarette tax, *supra*, (New York City Administrative Code, Section D 46-2.0).

2. *Cigars and tobacco*: new: Presumably in preparation.

3. Retail liquor licensee tax

(a) Imposition: on privilege of licensee of State Liquor Authority to sell liquor, wine or beer at retail within the City, annually, at 25 % of State licence fees (Administrative Code, Section 46-2.0).

(b) Exemption: United Nations (Administrative Code, Section F 46-3.0, para. 3).

II. Customs Duties

A. *Imposition*: "Except as otherwise specially provided. . . upon all articles when imported from any foreign country into the United States" (Tariff Act of 1930, 19 USC 1001): Dutiable list being too extensive for specific examination, the following can be noted:

1. Tobacco products (Schedule 6).

2. Spirits, wine and other beverage (Schedule 8).

3. Gift Centre or Souvenir Shop merchandise in general.

B. Exemptions

1. United Nations

(a) Statute: "As concerns customs duties and internal revenue taxes imposed upon or by reason of importation" the exemptions "accorded under similar circumstances to foreign governments". (International Organizations Immunities Act, Section 2d, 22 USC 288a (d)).

(b) Regulations: The statutory "free entry privileges" are further defined as covering "property" of the Organization "upon the receipt in each instance of the Department's instructions which will be issued only upon the request of the Department of State". (19 CFR 10.30a (b)).

(c) Practice: Certification by the United Nations for the purposes of the departmental instruction required in the above regulation has always extended to alcoholic beverages under the phrase "for the official use of the United Nations", but the Organization has limited its application of this term to use in its official entertainment.

(d) Ruling: The exemption of the Organization does not include articles manufactured abroad, imported by a domestic corporation and sold to the United Nations, the former being liable for the excise tax on the sale (Special Ruling of 17 February 1955, CCH Standard Federal Tax Reporter, Supplemental Volume, paragraph 48, 274).

2. Permanent Representatives of Member States and agreed resident members of their staffs (per Headquarters Agreement, Section 15): "The privileges of importing without entry and free of duty and internal revenue tax articles for their personal or family use" (19 CFR 10.30b (b)).

3. Special merchandising situations (e.g. United Nations Gift Centre, Souvenir Shop)

(a) Exemption from customs duties or internal revenues taxes on importation does not extend to importation by an entity not itself forming part of the United Nations (e.g. United Nations Cooperative, WFUNA).

(b) United Nations has not had occasion to claim the privilege on importation by the Organization of its property if intended for resale.

207. This letter was followed by one dated 9 September 1959 from the Secretary-General to the Permanent Representative of the United States.

. . . I have the honour to refer to the 667th meeting of the Fifth Committee of the General Assembly in which a variety of questions were raised concerning the application to the United Nations or in the United Nations Headquarters District of United States excise taxes or, in certain situations, customs duties. It will be recalled that, in accordance with statements made to the Committee by the representative of the Secretary-General and the representative of the United States at the 704th meeting, it was decided that the legal, financial and policy questions involved should first be the subject of discussions between the United Nations Secretariat and the United States Mission to the United Nations, prior to

the submission of recommendations to the Advisory Committee on Administrative and Budgetary Questions and the General Assembly.

After preliminary study by both parties, all specific points raised, and the incidence in general of United States excise taxes on the United Nations, were thoroughly examined in the course of joint meetings held at the United Nations on 11 and 12 June 1959. The following brief survey will summarize the problems reviewed and the conclusions I have reached as a result of this review. It has seemed best to submit my views on all points to you in the first instance, in order that any report made to the Advisory Committee may take into account any conclusions, legal problems, or practical prospects which their consideration by your Government may permit.

A. *Manufacturers excise taxes*

1. Federal manufacturers excise taxes apply to a considerable variety of articles regularly purchased by the United Nations (Chapter 32, Internal Revenue Code of 1954; Part II, Excise Tax Technical Changes Act of 1958, 72 Stat. 1275). Examples would be motor vehicles, parts and accessories, tires and tubes; gasoline and lubricating oils; certain appliances and electric light bulbs; photographic equipment; and business machines (including rentals). As a technical matter there is no specific legislative provision for the exemption of international organizations (apart from the general abatement of the tax on all sales for export) and, since the tax is assessed against the manufacturer and thereafter forms a part of the price to be paid, it would not be automatically exempted either by regulation operative within the Headquarters District under the authority of Section 8 of the Headquarters Agreement between the United Nations and the United States of America or by United States accession to the Convention on the Privileges and Immunities of the United Nations, Section 7 of which exempts the Organization from all direct taxes.

2. On the other hand, it is my conclusion from the joint discussions that there is a strong case for urging some appropriate form of action to extend the exemption to the United Nations. The following reasons seem persuasive:

(a) In determining the details of the application of Article 105 of the Charter, as authorized by that article, the General Assembly has established the policy that, while the United Nations will not, as a general rule, claim exemption from excise and sales taxes which form part of the price to be paid, nevertheless, when it is making important purchases for official use of property on which such taxes have been charged, Members will, whenever possible, make appropriate administrative arrangements for the remission or return of the amount of the tax. This principle has been set out in Section 8 of the Convention on the Privileges and Immunities of the United Nations and has become a regular element in the customary practice of the States Parties. At the time of the adoption by the General Assembly of this Convention there already existed United States legislation which information placed before the General Assembly described as containing "95 per cent", of the substance of the Convention. Unfortunately, however, the International Organizations Immunities Act (59 Stat. 669) has no provision equivalent to Section 8 of the Convention. Considering the number and value of important purchases which the Organization must make in the country of its Headquarters, this omission is of consequence. Pending accession by the United States to the Convention, it therefore seems desirable that means be found for the host Government to be placed on the same footing in respect of the remission of excise taxes as other States Members. The United Nations attaches great importance to the principle of remission because it is an equitable one designed to equalize the procurement costs of the Organization throughout the world, and the consequent charges upon Members.

(b) Diplomatic personnel of the Permanent Missions of Member States to the United Nations who purchase from the manufacturer

are exempted from the payment of these federal excise taxes. (Rev. Rul. 296, 1953-2 CB 325). It would not seem logical for the United Nations to pay United States taxes, the financial burden of which falls on all Members, where the same purchases would not be taxed if made by a resident representative of a Member, and that by reason of his accreditation to the United Nations. (It may also be permissible to observe that the existence of the revenue ruling testifies to the power to exempt such transactions.)

B. *Retailers excise taxes*

3. These taxes are assessed against the retailer on the sales price of a variety of articles, some of which are sold by the United Nations Gift Centre or Souvenir Shop (Chapter 31, 1954 IRC; Part I, Excise Tax Technical Changes Act). Diplomatic staff of missions to the United Nations enjoy the exemption under the same ruling as that cited immediately above, but there is no exemption for sales by the United Nations. The Legal Counsel of the United Nations believes that in certain circumstances a regulation authorized by Section 8 of the Headquarters Agreement, being operative within the Headquarters District where such transactions take place, could bring about the exemption of these taxes. On the other hand, representatives of the United States have pointed out that a large majority of the purchasers are members of the American public who themselves have no claim to the exemption of a tax they would pay on a similar purchase made outside of the Headquarters District, while the diplomatic staff of missions can already obtain the exemption when purchasing here; and that a question of public relations and of competition with local merchandising might at some point arise. In reply to these considerations some representatives on the Fifth Committee have felt that an element of principle militating against tax collection on behalf of one Member State within the Headquarters District was involved.

4. I have reached the conclusion that for the present no recommendation should be made as to exemption of retailers excise taxes. This view is based not only on the difficulty of weighing the competing considerations mentioned in paragraph 3 above but also and specially because the United Nations still has under review the question whether these services in the public areas of the General Assembly building should be operated by the Organization itself or by another entity, as well as the degree of emphasis to be placed on the various functions fulfilled by these services (whether revenue, the introduction of products and handicrafts from less developed areas of the world, or other official considerations). The same conclusion and reasoning apply to customs duties on articles imported for sale by the Gift Centre or Souvenir Shop.

C. *Sale of alcoholic beverage within the Headquarters*

5. When the United Nations purchases alcoholic beverages on the United States market there has already attached to them an internal revenue tax, and no relevant exemption is provided by statute (Chapter 51, Internal Revenue Code of 1954, as amended by Excise Tax Technical Changes Act of 1958). On the other hand, when the Organization imports such supplies for its "official use", it is exempted from "customs duties and internal revenue taxes imposed upon or by reason of importation" (International Organizations Immunities Act, Section 2 (d); 19 C.F.R. 10.30). It has never been doubted that the official entertainment of the United Nations, such as a reception given by the Secretary-General, constitutes official use, and for this purpose the Organization imports alcoholic beverages free of duty, certifying, in accordance with a long-standing arrangement with the United States, that they are for official use. The question was posed in the Fifth Committee, however, as to why the United Nations was not entitled to the same benefits with regard to the alcoholic beverages which it uses in operating the bars in the Delegates' Lounges and the Delegates' Dining Room. A resale by the United Nations is, of course, involved, but this takes place in restricted facilities operated

for the convenience of delegations whose resident members are themselves entitled to customs privileges.

6. (a) I have concluded on the basis of the joint discussions that the existing arrangement could and should be extended to cover the importation by the United Nations of alcoholic beverages which it uses for the operation of these official facilities, and that the United States should therefore be asked to acquiesce in the Organization's henceforward certifying such imports as being for its official use. The following arguments and advantages give strong support to this procedure. The facilities in question were installed in the United Nations Headquarters District as an essential service to which delegations rightly consider themselves entitled, and one which greatly assists them in the convenient conduct of their work within the Headquarters. Their operation is therefore in name and in fact an official use by the United Nations. The installations are not only confined to the Headquarters District but also are within the restricted delegates area. While it is not claimed that members of the public do not have an opportunity, within relatively narrow limitations and close controls, to use these facilities, there is no question but that the great majority of purchasers of alcoholic beverages are delegates and others in official relation with the Organization. Security guards maintain a strict surveillance at all doors giving entry to the delegates area in order to prevent public access; visitors to the bar must be guests of delegates; those to the Dining Room must either be guests or specifically admitted on visits officially authorized by the United Nations. Guards also maintain a watch within the reserved areas as well as at the entrances.

(b) The recommended procedure would have the advantage of merely extending an existing arrangement — by which the United Nations already certifies to the Department of State the official use intended for the supplies it imports — to this additional branch of its operations. Because the proposal would be confined to imported supplies within Section 2 (d) of the International Organizations Immunities Act, no exemption would now be requested from the excise taxes on domestic production of alcoholic beverages, which presumably would require legislative action.

(c) The result would be conducive to the achievement of a basic principle of the General Assembly in tax matters, that of equity among the Member States. The sale of alcoholic beverages in the delegates' service facilities would continue at present prices, the more so as the Organization would neither desire to establish a competitive position disadvantageous to similar commercial facilities in the vicinity nor to increase its own security requirements by tempting members of the general public to seek an entry. The equivalent of the present United States taxes would therefore, as an incidental revenue advantage, rebound to the benefit of all Members proportionately to their contribution to the expenses of the Organization and not as, some representatives have pointed out, to the host Government alone by virtue solely of the Headquarters' happening to be on its territory.

(d) The procedure would to a considerable extent eliminate a legal anomaly, the State and federal positions having been heretofore inconsistent. On the basis of its Attorney General's opinion of 26 October 1951, firmly recognizing the official nature of these facilities, the State of New York has for many years remitted to the Organization the State taxes imposed upon the alcoholic beverages sold in the Headquarters District. For the same reason the State does not apply its licensing laws to these facilities nor New York City its sales tax on the transactions here.

(e) The result would likewise be generally consistent with the procedure at UNESCO Headquarters in Paris, where the French Government has authorized the tax-free resale of domestic alcoholic beverages in the restaurant, cafeteria and bars operated by UNESCO within its Headquarters and restricted to UNESCO and other international organization personnel, delegates and other representatives of organizations in official relation with UNESCO.

(f) The arrangement would simplify and perfect the control and audit procedures by which the United Nations at present assures that no portion of its liquor stocks departs from authorized channels. Invoices are kept at Headquarters in such form that an audit can at any time establish the amounts purchased, the amounts consumed, and the amounts on hand. As a special measure under Section 9 of the Headquarters Agreement, the entry of New York State alcoholic beverage control inspectors into the Headquarters District is invited in order that they too may verify that there is no diversion of the supplies on which the State reimburses its taxes. Heretofore, however, the Organization has had to maintain two separate stocks, that for its official functions and therefore exempted from federal duties on the one hand, and on the other hand that for resale in its Delegates' bars and restaurant. This has resulted not only in administrative complexity but also in the necessity on the part of the delegations, when giving receptions at Headquarters through the use of the United Nations' catering facilities, to deliver to the United Nations their own duty-free liquor supplies and later pick up the left-overs. The new procedure would centralize the United Nations stocks and therefore tighten controls, to the advantage both of the Organization and presumably of the host Government as well. In substituting a single bulk purchaser and a simple billing transaction for the present large number of purchasers, and eliminating the physical movement back and forth of duty-free supplies (with the present risk of losses or diversions in transit), the new procedure would offer the host Government a stricter enforcement situation without any corresponding reduction in revenue, since the present large number of Delegation purchasers enjoy the customs exemption in any case.

D. Tobacco

7. The tax position on cigars, cigarettes and tobacco is not dissimilar to that of alcoholic beverages, as stated in paragraph 5 above (Internal Revenue Code of 1954, Chapter 52, as amended by Excise Tax Technical Changes Act of 1958). A number of key factual elements do differ, however. Sales in the Headquarters District are not confined to the delegates' facilities but are in large proportion also made at the counter at the entrance to the general staff cafeteria. Thus, either the exemption would have to extend to any sales within the Headquarters District, or, if confined to the delegates' facilities, would require the Organization to maintain and control two separate stocks of tobacco products. There is also a difference in relation to the argument, very relevant in the case of alcoholic beverages, that members of Missions to the United Nations are entitled to the duty-free privilege in any case and ought also to be able to enjoy it at the Headquarters of the Organization: cigars and cigarettes are by nature portable and the delegates can carry their own duty-free supplies when they come to the Headquarters. Moreover, if no amending legislation were to be requested, the exemption would apply only to imported tobacco products and therefore the many popular domestic brands of cigarettes would in any case be excluded. I have therefore decided to refrain from making any request looking to a tobacco tax exemption in the Headquarters District at the present time.

E. Documentary stamp taxes

8. These taxes are imposed upon the sales and transfers of capital stock and certificates of indebtedness (Internal Revenue Code of 1954, Chapter 34, as amended by Excise Tax Technical Changes Act). They constitute direct taxes on the United Nations, impinging to some extent on the United Nations Treasury and to a considerable extent on the operations of the United Nations Joint Staff Pension Fund. On the basis of the joint discussions I have concluded that the transactions of the Organization should be exempted from the documentary stamp taxes. If the United States were a party to the Convention on the Privileges and Immunities of the United Nations, the Organization would be exempted by

its Section 7 (a), as it is in other States Members of the Organization. The tax constitutes a direct burden on the Organization to the advantage of a single Member. Moreover, the objection stated in paragraph 2 (b) above applies equally to these taxes: it is illogical that the members of Missions should enjoy an exemption by reason of their accreditation to the United Nations when that Organization is denied the exemption on its own official transactions.

F. Conclusion

9. I should be grateful to receive from you an indication of the action which your Government might contemplate on each of the above proposals in order that I may report to the Advisory Committee on Administrative and Budgetary Questions, which in turn will wish to report to the fourteenth session of the General Assembly in accordance with the procedure suggested in the 704th meeting of the Fifth Committee. . .

208. At the fourteenth session of the General Assembly the Legal Counsel informed the Fifth Committee of the steps taken; in 1960 and in 1962 he spoke again, noting that, although negotiations had been conducted in a spirit of mutual goodwill no substantive results had been achieved.⁹⁸ Except that the United Nations has now been accorded exemption from New York State and City tobacco tax, the position in regard to excise and similar taxes in the United States thus remains as stated in the two letters quoted above.

209. The position in other countries has, in general, been less complicated than in the United States and has usually involved the application of a single tax in respect of a particular transaction. In Switzerland all articles imported for official use are exempt from turnover taxes and statistical charges; in addition the United Nations is exempt from stamp duty on official documents and from taxes on its financial assets or on any income derived from them.

(b) Important purchases

210. The question whether particular purchases are "important" within the meaning of section 8 of the General Convention has usually been determined by reference either to the quantity of goods purchased (or on occasions, to the fact that the goods were purchased regularly, thus forming a large purchase in the aggregate) or to the large amount paid. In 1953 the Office of Legal Affairs summarized its interpretation in a memorandum sent to a United Nations subsidiary organ, in the following terms:

. . . Purchases may be said to be important when they are made on a recurring basis or involve considerable quantities of goods, commodities or materials. Moreover, any item in question may well constitute an "important" purchase where the expenditure to be made is considerable. Further, in all such cases weight is to be attached to the intent of the General Assembly in unanimously adopting the section, together with the rest of the Convention. Thus it was felt on the one hand, that the Organization should not seek exemption with regard to purchases which were both irregular and of minor importance. On the other hand, it was intended that Section 8 should protect the assets of the Organiza-

tion from such taxes whose incidence would be specially heavy and constitute an undue burden upon it.

211. A Special Fund project was required to pay customs duties and taxes on gasoline used for the operation of its vehicles and other equipment. The Office of Legal Affairs advised that:

. . . Since the vehicles, generators and pumps appear, according to the letter of the Project Manager, to be operated for the project, the gasoline imported for their operation would obviously be for the official use of the Special Fund and therefore of the United Nations. It should be exempt from customs duties and taxes levied on it. If the amount of the tax figures on the invoice separately from the price, it is a "direct tax" on the Special Fund within the meaning of Section 7 (a) of the Convention. If, on the other hand, the tax forms a part of the price to be paid, the Special Fund would be entitled to claim remission or return (or exemption) in virtue of section 8 of the Convention. Since the Project consumes a large amount of gasoline in proportion to its scope, and since the base price is estimated to total \$14,000 —, with excise taxes at \$15,000, —, there can be little doubt that the requirement that the purchases be "important" is fully met.

In Switzerland a purchase is regarded as "important" if the total purchase price is over 100 Swiss francs.

(c) Remission or return of taxes paid

212. A number of arrangements have been made, in some cases culminating in legislative or administrative enactments on the part of national authorities, to enable the United Nations to obtain the remission or return of taxes paid in accordance with section 8 of the General Convention. Thus the Canadian Order in Council, P.C. 3766 of 25 August 1948, for example, grants authority

for the refund or remission of sales and excise taxes imposed under the Excise Tax Act on goods supplied to, and services performed, in Canada for the United Nations when the charges for such goods and services are made directly to the United Nations and not to individuals.

213. In the case of the United Kingdom, the United Nations was notified in 1953 that certain government departments had been specially authorized to supply goods required by the United Nations and the specialized agencies for official use, without the addition of purchase tax to the selling price.

214. In the case of the United Nations Office at Geneva, the procedures adopted were described by the Deputy-Director of that Office as follows:

. . . The arrangement we have with the Swiss authorities is a simple one. In the first instance we pay the tax (*impôt sur le chiffre d'affaires*) where it is included in the purchase price charged in the invoice, or, shown as a separate item therein. Periodically, about once each month, we claim reimbursement of the tax from the Swiss authorities by sending them copies of all our payment vouchers where tax has been paid. If the tax has not been shown as a separate item in the invoice, but is known to be included, the Swiss authorities themselves calculate the amount of the tax. In practice, we do not claim refund of the small amount of tax included in purchases of less than 100 Swiss francs.

Of course, in the direct importation by the United Nations of supplies, etc. for its official use, we do not pay customs duties or the "*impôt sur le chiffre d'affaires*".

215. In an exchange of notes dated 26 November 1954, Lebanon undertook to reimburse UNRWA in respect

⁹⁸ The statements by the Legal Counsel were made at the 748th, 778th and 982nd meetings of the Fifth Committee, at the fourteenth, fifteenth and seventeenth sessions of the General Assembly respectively.

of all duties and taxes paid for fuels, alcohol and cement. The provision in question reads as follows:

1. *Les mesures appropriées seront adoptées par le Ministère compétent pour que soient remboursés à l'Office, selon une procédure simplifiée, tous les droits et taxes afférents à la consommation de carburants liquides, d'alcool et de ciment (Article II, Section 8 de la Convention sur les privilèges et immunités des Nations Unies). Au besoin et dans le même esprit, cette réglementation pourra être appliquée à d'autres produits dans le cadre de la Convention.*

2. *Les sommes afférentes à la consommation passée desdits produits seront remboursées à l'Office sur la base des pièces comptables nécessaires, dont la plupart ont déjà été déposées auprès des Autorités compétentes.*

216. In Presidential Decree No. 698, dated 15 May 1954, the Syrian Government also agreed to grant the United Nations exemption from taxes on inflammable materials on the basis of section 8 of the General Convention.

CHAPTER III. — PRIVILEGES AND IMMUNITIES OF THE UNITED NATIONS IN RESPECT OF COMMUNICATION FACILITIES

Section 18. Treatment equal to that accorded to Governments in respect of mails, telegrams and other communications

217. Section 9 of the General Convention declares that:

The United Nations shall enjoy in the territory of each Member for its official communications treatment not less favourable than that accorded by the Government of that Member to any other Government including its diplomatic mission in the matter of priorities, rates and taxes on mails, cables, telegrams, radiograms, telephotos, telephone and other communications; and press rates for information to the press and radio. No censorship shall be applied to the official correspondence and other official communications of the United Nations.

Similar articles are contained in other international agreements.⁹⁹

218. The provisions of section 9 have in general been well observed. It may be noted that in three Latin American countries, Bolivia, El Salvador and Mexico, the United Nations has received the benefit of special postage rates or franchise in respect of official mail posted in those countries. In Bolivia the United Nations Information Centre is allowed free postage within the country. In Mexico the matter is governed by an official decree, published in the "*Diario Oficial*" No. 19 of 24 September 1963, whereby the Mexican Government granted postal and telegraphic franchise to the organizations participating in the Technical Assistance Board programme for the duration of the Basic Agreement on Technical Assistance between Mexico and the United Nations, signed on 23 July 1963.

219. In El Salvador a similar franking privilege was given in 1961; in the official notification sent by the Director-General of Posts express mention was made of the Convention of the Postal Union of the Americas

and Spain, under which members of the diplomatic corps in El Salvador of the countries of the Union were entitled to this privilege.

220. The International Telecommunication Convention which was adopted at Atlantic City in 1947 provided that telegrams and telephone calls sent by the United Nations should be treated as though sent by a Government. The assimilation to Government telegrams and telephone calls was made in the following terms:

Article 36

Subject to the provisions of Article 45, Government telegrams shall enjoy priority over other telegrams when priority is requested for them by the sender. Government telephone calls may also be accorded priority, upon specific request and to the extent practicable, over other telephone calls.

Article 45 gives "absolute priority" to "distress calls and messages".

Annex 2, giving a definition of terms used in the Convention, includes the following clause:

Government Telegrams and Government Telephone Calls: These are telegrams or telephone calls originating with any of the authorities specified below:

...

(f) the Secretary-General of the United Nations and the Heads of the subsidiary organs of the United Nations.

221. In 1949 the Administrative Council of the ITU adopted resolution No. 142 in which it requested its Secretary-General, *inter alia*,

to keep up to date the list of the subsidiary organs of the United Nations and to forward to the Members and Associated Members of the Union a copy of this list and to advise them of any modifications therein.

Difficulties arose, however, over the question of which bodies or offices constituted subsidiary organs of the United Nations. Following a refusal to grant governmental treatment to a particular United Nations Information Centre the United Nations wrote to ITU in 1951, pointing out that Information Centres formed part of the Secretariat and were not subsidiary organs; telegrams and telephone calls made by them were therefore entitled to governmental treatment, as having been made on behalf of the Secretary-General, without being specially listed. In the Buenos Aires Convention, adopted by ITU in 1952, the earlier definitions clause was amended so as to include under "Government Telegrams and Government Telephone Calls" those sent by:

The Secretary-General of the United Nations, the Heads of the principal organs and the Heads of the subsidiary organs of the United Nations.

222. However, in the Geneva Convention of 1959 this definition was changed again to refer to telegrams and telephone calls originating with "the Secretary-General of the United Nations; Heads of the principal organs of the United Nations". Nevertheless, apart from this problem of definition, it is believed that United Nations telegrams and telephone calls (unlike those of the specialized agencies) now receive treatment at least as favourable as that given to government telegrams and telephone calls. As regards priority (the only aspect covered expressly in the Telecommunication Convention) it may be noted that, under the provisions of chapter XVII,

⁹⁹ Article III, ECLA Agreement, sections 11-13, ECAFE Agreement, sections 5 and 6, ECA Agreement. It may be noted that in section 7 of the Agreement with Switzerland the words "in conformity with the International Convention on Telecommunications" are added at the end of the first sentence.

article 62, paragraph 7, of the Telegraph Regulations, as revised at Geneva in 1959, a special priority, over and above that afforded to Government telegrams, is granted to United Nations telegrams which are sent by the Secretary-General, the Presidents of the Security Council and the General Assembly, and by certain other officials, in connexion with the application of the provisions of Chapters VI, VII and VIII of the United Nations Charter. In addition to receiving priority for its telecommunications on terms at least as favourable as those afforded to Governments, the United Nations has also been granted the benefit of the same rates as are enjoyed by Governments in respect of their intercommunications. Where, in a particular case, no government rate applies in the case of telegrams sent between two countries, the United Nations has accordingly paid the normal rate; it appears that in no case has it paid taxes in respect of its telecommunications.

223. The United Nations is not aware of any acts of censorship being applied by national authorities to its official correspondence and other communications. Questions relating to restrictions on United Nations publications are dealt with in section 16 (a), paras. 192-201, above.

Section 19. Use of codes and dispatch of correspondence by courier or in bags

224. As stated in section 10 of the General Convention, the United Nations has the right

. . . to use codes and to despatch and receive its correspondence by courier or in bags, which shall have the same immunities and privileges as diplomatic couriers and bags.

The United Nations has used codes in cases where it considered this advisable. No legal problems appear to have arisen from this usage.

225. Although the United Nations has used couriers, the dispatch of communications in bags has been much more frequent; in each case the United Nations has received full diplomatic privileges and immunities. A few incidents have occurred, however, when government officials (usually minor officials, acting in error) have opened United Nations bags. Writing to the Legal Adviser of a United Nations subsidiary organ after an incident in which customs' authorities had opened a sealed pouch which was being carried in a United Nations vehicle, the Legal Counsel summarized the legal position as follows:

As a general rule, the diplomatic bag is inviolable; it may not be subject to customs inspection or any other form of interference. Should the receiving State, on suspicion that a diplomatic bag contains improper objects, open it for inspection but its suspicion proved to be unfounded, the sending State would be within its right to complain of a violation of international law. On the other hand, if improper objects are found in the bag, it would be the sending State that is guilty of abuse of privilege and no complaint from it may lie. This, I believe, sums up the general rule as practised by States.

226. In 1962 a Member State granted permission for the establishment of a pouch service between its capital and United Nations Headquarters on the condition that, in case of doubt, the Government might open the

pouch in the presence of a United Nations official. The Government based its position on the ground that it had not signed the General Convention. The United Nations stated that it found the condition unacceptable. It also pointed out that, under the standard Technical Assistance Agreement which the Member State had concluded earlier, the State had agreed to apply the General Convention in respect of technical assistance operations for which the pouch service was required. The Government subsequently withdrew the restriction and granted the United Nations the right to use the diplomatic bag unconditionally.

227. It may be noted that in the case of the economic commissions (other than ECE) the relevant agreements expressly provide that the correspondence which may be sent by courier or in sealed bags includes "publications, documents, still and moving pictures, films and sound recordings".¹⁰⁰

Section 20. United Nations postal services

228. The United Nations has entered into special agreements with the United States¹⁰¹ and with Switzerland¹⁰² regarding the operation of postal facilities in United Nations premises situated in those countries. By and large these agreements have worked smoothly. After the Agreement with the United States had been signed on 28 March 1951, it proved necessary to examine the exact division of functions between the United States Post Office Department and the United Nations Postal Administration with particular reference to the sale and cancellation of stamps for philatelic purposes. The following memorandum was sent by the Office of Legal Affairs to the United Nations Postal Administration in September 1951.

. . . In your memorandum of 20 August 1951 you have raised the problem of the legal relationship between the United Nations Postal Administration and the United States Post Office Department which operates the United Nations Post Office Station.

Neither the Headquarters Agreement, which authorizes the United Nations to organize "its own postal service" nor the Postal Agreement itself, which recites the language in its preamble, leaves any doubt that the United Nations Postal Administration, together with the United Nations Post Office Station which forms but one operating element of the former, is a United Nations activity. It is well known that it was for the convenience of both parties that the United States Post Office Department became the agent of the United Nations to operate the United Nations Post Office Station; the Station, however, is not directly incorporated into the Post Office Department but merely provides the same services at the same rates as would any United States Post Office "having comparable operations". It could hardly be otherwise since certain essential functions normally pertaining to a national government are retained by the United Nations under the Agreement, in particular the supply of postage stamps, postmarking stamps and, of course, the Post Office Station premises.

On the other hand, it naturally does not follow that the United States Post Office Department, in carrying out the specific func-

¹⁰⁰ Section 13 (b), ECAFE Agreement, see also section 6 ECLA Agreement and section 6, ECA Agreement.

¹⁰¹ United Nations, *Treaty Series*, vol. 108, p. 231, amended in *ibid.*, vol. 149, p. 414.

¹⁰² *Ibid.*, vol. 43, p. 327.

tions assigned to it under the Agreement, is subject to detailed control or directions from the United Nations. Section 1 (i) makes clear that the United Nations Post Office Station "shall be operated by the United States Post Office Department", while Sections 5 and 6 divide between the parties the responsibility for furnishing the various services and equipment "necessary to enable the United States Post Office Department to operate the United Nations Post Office Station".

By the same token, however, it is equally clear that the United States Post Office Department has an obligation to see that its operation of the Post Office Station does not interfere with the operation by the United Nations of a function retained solely by the latter, the maintenance of a separate agency for philatelic purposes. The problem of interpretation raised by the issue of first day covers accordingly seems to derive less from the question of the extent to which the Post Office Department is acting as the agent of the United Nations than from the formula tentatively established by the Agreement for the division of revenues. Where functions which in a national administration would be performed by a single agency are here split between two separate authorities, it is natural and reasonable that every effort should be made by both parties to arrive at a co-operative result which would conform with the basic intent of the Postal Agreement. In the matter of first day covers both their preparation and the cancellation of the stamps would normally be performed by the same authority. Since first day covers represent purely philatelic sales, it follows from the plain language of the Agreement and the intent of all governments represented in the General Assembly including the United States, that the revenue from all first day covers not posted like ordinary mail matter is to be retained by the United Nations for its own use. Moreover, both the broad language of Section 3* of the Agreement and the entire documentary background of the Agreement makes clear that the postal services entitling the United States Post Office Department to reimbursement of the value of "postage on mail matter posted at the United Nations Post Office Station" did not include incidental post services but only the complete services involved in the receipt, transmission and delivery of mail matter so posted.

Applying these considerations to the problem of the act of cancellation of stamps on first day covers which are then delivered otherwise than by posting at the United Nations Post Office Station, it seems clear that this function could be performed by either party without any inconsistency with the terms of the Agreement. Since cancellation in this case is merely ancillary to the philatelic purpose of preparing and selling a first day cover, it would be normal to think that the Post Office Department would prefer to leave it to the United Nations philatelic agency to perform that labour — the more so because the revenue accrues to the United Nations. If, however, as a matter of operational preference, the Post Office Department wishes to accept the onus of carrying out the cancellation, this would not seem in any way to contradict the terms of the Agreement. By contrast, it would clearly contradict the Agreement if the Post Office Department were to ask for the operational advantage of retaining sole control of cancellation and at the same time claiming the purely philatelic

revenues from first day cover stamps so cancelled on envelopes which are not then posted.

It does not seem reasonable to suppose that the United States Government will insist on this last position when the formula for the division of revenue was made so public an element of the terms which permitted the Agreement to be concluded in its present form. The history of the preparation of the Agreement is such that the United States is clearly party to the understandings of the General Assembly as to philatelic revenue, and United States representatives were careful to emphasize the fact that the revenue formula was worked out subject to adjustment in the course of practical experience. . .

229. After discussions with the United States Post Office Department, section 3 (ii) of the Agreement was amended¹⁰³ by the deletion of the words "in response to orders received by mail".

230. Under the Agreement with Switzerland, the United Nations agrees to use exclusively Swiss postage stamps for the statutory franking of postal dispatches sent by the Geneva Office. The Swiss Postal Administration issues special postage stamps (*timbres de service*) for use by the Geneva Office, staff members and visitors. The Swiss postal authorities cede to the United Nations 50 per cent of the net proceeds obtained from the sale of stamps to private persons for philatelic purposes. United Nations stamps as such are sold solely for non-franking purposes by the United Nations Postal Administration.

231. Special postal arrangements have been made in respect of mail sent to or by United Nations peace-keeping forces. Paragraph 31 of the UNEF Agreement provides as follows:

31. The Government of Egypt recognizes the right of the Force to make arrangements through its own facilities for the processing and transport of private mail addressed to or emanating from members of the Force. The Government of Egypt will be informed of the nature of such arrangements. No interference shall take place with, and no censorship shall be applied to, the mail of the Force by the Government of Egypt. In the event postal arrangements applying to private mail of members of the Force are extended to operations involving transfer of currency, or transport of packages or parcels from Egypt, the conditions under which such operations shall be conducted in Egypt will be agreed upon between the Government of Egypt and the Commander.

An Agreement was also made with Lebanon regarding the establishment of a UNEF base post office at Beirut.

232. Provisions similar to those set out in paragraph 31 of the UNEF Agreement were included in the Agreements relating to ONUC and UNFICYP.¹⁰⁴

Section 21. United Nations radio administration

233. A number of agreements entered into by the United Nations make provision for the operation of a United Nations radio system. The Headquarters Agreement regulates the matter in some detail.

Section 4. (a) The United Nations may establish and operate in the Headquarters District:

¹⁰³ *Ibid.*, vol. 149, p. 414.

¹⁰⁴ Paragraph 35 of the ONUC Agreement, *ibid.*, vol. 414, p. 245, and paragraph 31 of the UNFICYP Agreement, *ibid.*, vol. 492, p. 74.

* "Section 3, Sale of United Nations Postage Stamps: (i) The United Nations Post Office Section shall sell only United Nations postage stamps which shall be provided by the United Nations free of charge in such quantities as may be necessary to fulfil all reasonable needs of the United Nations Post Office Station. All revenue derived from such sales of United Nations postage stamps and from other services rendered by the United Nations Post Office Station shall be retained by the United States Post Office Department as full and complete compensation for performance of its obligations under the terms of this Agreement, except, however, that the United States Post Office Department shall be reimbursed for performance of any postal services resulting from use of United Nations postage stamps sold for philatelic purposes under the provisions of paragraph (ii) of this section which are used as postage on mail matter posted at the United Nations Post Office Station by being paid an amount equal to the face value of any such stamps so used as postage.

(ii) The United Nations may maintain a separate agency for the sale of United Nations postage stamps for philatelic purposes in response to orders received by mail. Subject to the provisions of paragraph (i) of this section all revenue derived from such philatelic sales of United Nations postage stamps shall be retained by the United Nations for its own use."

(1) its own short-wave sending and receiving radio broadcasting facilities, including emergency link equipment, which may be used on the same frequencies (within the tolerance prescribed by the broadcasting service by applicable United States regulations) for radiotelegraph, radioteletype, radiotelephone, radiotelephoto, and similar services;

(2) one point-to-point circuit between the Headquarters District and the office of the United Nations in Geneva (using single sideband equipment) to be used exclusively for the exchange of broadcasting programs and inter-office communications;

(3) low power, micro-wave, low or medium frequency facilities for communication within Headquarters buildings only, or such other buildings as may temporarily be used by the United Nations;

(4) facilities for point-to-point communications to the same extent and subject to the same conditions as permitted under applicable rules and regulations for amateur operators in the United States, except that such rules and regulations shall not be applied in a manner inconsistent with the inviolability of the Headquarters District provided by section 9 (a);

(5) such other radio facilities as may be specified by supplemental agreement between the United Nations and the appropriate American authorities.

(b) The United Nations shall make arrangements for the operation of the services referred to in this section with the International Telecommunication Union, the appropriate agencies of the Government of the United States and the appropriate agencies of other affected Governments with regard to all frequencies and similar matters.

(c) The facilities provided for in this section may, to the extent necessary for efficient operation, be established and operated outside the Headquarters District. The appropriate American authorities will, on request of the United Nations, make arrangements, on such terms and in such manner as may be agreed upon by supplemental agreement, for the acquisition or use by United Nations of appropriate premises for such purposes and the inclusion of such premises in the Headquarters District.

Similar arrangements have been made with the Swiss Government.¹⁰⁵ Section 14 of the ECAFE Agreement also provides for the operation of telecommunication circuits and of radio facilities.

234. In addition to these provisions contained in general host agreements, arrangements have been made, usually on the basis of an exchange of letters, for the operation of United Nations radio stations in a number of countries around the world. In 1955 an *aide-mémoire* was prepared by the Office of Legal Affairs setting out the essential legal points which needed to be considered before telecommunication operations or negotiations could be undertaken in any given country.

Aide-mémoire of points for guidance in preparing, or in instructing United Nations representatives to negotiate agreements with national authorities for the installation of United Nations radio stations

I. Rights of the United Nations under the International Telecommunication Convention (Buenos Aires 1952)

Under Article 26 of this Convention and in accordance with the provisions of Article XVI of the UN/ITU Agreement annexed thereto, the telecommunication operating services of the UN are entitled to the rights and bound by the obligations of the Convention and the Regulations annexed to it. The ITU recognizes that

it is important that the UN shall benefit by the same rights as the members of the Union for operating telecommunication services (Article XVI). The precise arrangements for implementing Article XVI are to be dealt with separately.

The only "precise arrangement", if it can be called such, which has been made is contained in Resolution No. 26 of the Buenos Aires Telecommunication Conference (1952), in which the ITU decided that in normal circumstances the UN network should not carry the telegraph traffic of the specialized agencies in competition with existing public channels or commercial networks. Such traffic may, however, be carried, in cases of emergency, free or at normal commercial rates.

Thus, as far as the ITU is concerned, the UN has the rights of a member Administration including, as to radio, that of registering the frequencies, for protection against interference, with the International Frequency Registration Board (IFRB) of the ITU. The UN, however, from the nature of its circumstances, can only operate as an Administration on the territory of a host government (except in rare circumstances such as apply to the present station at Government House, Jerusalem), by virtue of arrangements reached with that Government. In seeking such arrangements with governments the Organization is in a position to invoke strong support for any request based upon its communication needs. Especially — though not exclusively — in political functions (such as truce supervision) it is essential that the United Nations have direct point-to-point contacts which cannot be effectively established (as regards in particular speed, location, and security) by ordinary channels. Such support includes:

(i) Article 105, paragraph 1 of the Charter providing that the "Organization shall enjoy in the territory of each of its Members such privileges and immunities as are necessary for the fulfilment of its purposes".

(ii) Resolutions 240 (III) and 460 (V) of the General Assembly approving the establishment and operation of the UN telecommunication system, including in particular the reaffirmation in the former resolution of the United Nations position as an operating agency in the field of international telecommunications, and calling upon all Member Governments to support at all international telecommunications conferences the requirements of the United Nations for frequencies and services.

(iii) The relevant provisions of the Convention on the Privileges and Immunities of the United Nations as noted under appropriate headings below.

(iv) Precedents relating to the UN network established by bilateral agreements between the UN and other host governments. At the moment the only formal agreements are contained in the Headquarters Agreement between the UN and the USA; in the Agreement for the ECAFE Headquarters in Bangkok (still subject to ratification by the Thai Government), and the exchange of letters with the Government of the Republic of Korea concerning privileges and immunities.

(v) Article 41 of the Telecommunication Convention which permits Administrations "to make special arrangements on telecommunication matters which do not concern Members and Associate Members (of the ITU) in general". Such arrangements must not be in conflict with the terms of the Convention and the Regulations as regards harmful interference to the radio services of other countries.

II. Premises and Necessary Privileges

Where technical considerations permit, it is desirable that the United Nations radio station or any part of it be established on existing UN premises. Apart from the advantages of administrative concentration, this establishes the inviolability of the station and the equipment under Section 3 of the Convention on the Privileges and Immunities of the United Nations. Where any or all of the radio equipment requires installation outsidejo estab-

¹⁰⁵ See the exchange of letters dated 22 October and 4 November 1946.

lished UN premises, it is desirable that the installation represent a separate and identifiable unit, even if no more than a radio room, in order that it may be designated as separate UN premises immune from search or entry or other governmental interference under Section 3 of the Convention. Should the Host Government not yet have acceded to the Convention, the terms of Section 3 should be expressly inserted in the Agreement with reference to the radio facilities.

In all cases the equivalent of Section 4 (c) of the Headquarters Agreement should be inserted in the local agreement, even though it is not assumed that facilities will need to be installed outside of the local UN premises. It is necessary that in the event of a needful enlargement of the facilities, the discovery of interference or like technical considerations, the Government be committed in principle to the installation of separate facilities to be operated away from UN offices, to the negotiation of the supplemental agreement necessary to that end, and to giving assistance in obtaining appropriate premises. Provision should also be made for Government guarantee of any tie-lines that may prove necessary between the UN radio facilities and the regular UN premises.

The right to exchange traffic in code or cipher is guaranteed by Section 10 of the Convention, but should be expressly inserted in any arrangement with a government not a party thereto. Similarly, Section 9 provides that no censorship may be applied to the official communications of the UN, but this requires express coverage in the case of a non-party.

III. Traffic

Under Article 1 of the Convention on the Privileges and Immunities of the United Nations the United Nations is a single international personality and it therefore operates its network as a single agency in the telecommunications field. The UN network is accordingly entitled to carry traffic emanating from or destined for *all* UN organs. Each radio station is therefore a "UN station" and the local authorities should not regard it as belonging to any single UN subsidiary organ. A representative of the UN should be instructed to make it plain that he negotiates on behalf of the Organization as a whole and as agent of the Secretary-General.

"UN traffic" includes messages concerning United Nations programmes in which the specialized agencies are participating and exchanges between the agencies (or their representatives in the fields) and the appropriate UN organs or the TAB, provided that they are paid for by the UN or TAB.

IV. Communications

Consideration should be given to the desirability or necessity of seeking the right to establish connection and exchange traffic with other stations in the UN network, including the right to act as a relay station. Governments may not, of course, be willing to concede such wide powers in all instances.

In the light of local conditions it may be advisable to secure permission to deal with traffic "forwarded" from the territory of another administration. The consent of all administrations concerned would have to be obtained.

V. Frequencies

Administrations protect their frequencies by registering them with the IFRB. The Extraordinary Administrative Radio Conference (EARC), Geneva 1951, adopted an opinion (Resolution No. 10) that "unless it is specifically stipulated otherwise by special arrangements communicated to the Union by the parties concerned", assignments of or notifications of frequencies should be communicated by the Government on whose territory the station is installed. Administrations were invited to adopt this procedure. The host government should be invited to agree that the frequencies to be used by the UN station be notified to the IFRB by the UN.

Where the local use of the frequency spectrum is heavy it may be advisable to get the host government to agree to help in a search for suitable frequencies for the UN station. It may also be necessary to provide some machinery whereby mutual interference can be reported and eliminated.

VI. Security

United Nations representatives negotiating telecommunication arrangements with a host government should be instructed to report back to the Secretary-General promptly for further instructions in the event that the Government proposes that the UN station must comply with any special security measures.

235. Paragraphs 29 and 30 of the UNEF Agreement provide as follows:

29. The Force enjoys the facilities in respect to communications provided in Article III of the Convention on the Privileges and Immunities of the United Nations. The Commander shall have authority to install and operate a radio sending and receiving station or stations to connect at appropriate points and exchange traffic with the United Nations radio network, subject to the provisions of Article 45 of the International Telecommunication Convention relating to harmful interference. The frequencies on which any such station may be operated will be duly communicated by the United Nations to the appropriate Egyptian authorities and to the International Frequency Registration Board. The right of the Commander is likewise recognized to enjoy the priorities of government telegrams and telephone calls as provided for the United Nations in Article 37 and Annex 3 of the latter Convention and in Article 83 of the Telegraph Regulations annexed thereto.

30. The Force shall also enjoy, within its area of operations, the right of unrestricted communication by radio, telephone, telegraph or any other means, and of establishing the necessary facilities for maintaining such communications within and between premises of the Force, including the laying of cables and land lines and the establishment of fixed and mobile radio sending and receiving stations. It is understood that the telegraph and telephone cables and lines herein referred to will be situated within or directly between the premises of the Force and the area of operations, and that connexion with the Egyptian system of telegraphs and telephones will be made in accordance with arrangements with the appropriate Egyptian authorities.¹⁰⁶

236. The standard text which has been designed for use in the case of agreements relating to United Nations Administrative Centres is set out below:

The United Nations shall have the authority to install and operate a radio sending and receiving station or stations to connect at appropriate points and exchange traffic with the United Nations radio network. The United Nations as a telecommunications administration will operate its telecommunications services in accordance with the International Telecommunication Convention and the Regulations annexed thereto. The frequencies used by these stations will be communicated by the United Nations to the Government and to the International Frequency Registration Board.

237. The substance of this text is used in article II, section 4, of the Agreement between the United Nations and Austria regarding the headquarters of the United Nations Industrial Development Organization.

(a) The United Nations shall for official purposes have the authority to install and operate a radio sending and receiving

¹⁰⁶ Similar provisions are contained in paragraphs 35 and 36 of the ONUC Agreement, United Nations, *Treaty Series*, vol. 414, p. 245, and paragraphs 29 and 30 of the UNFICYP Agreement, *ibid.*, vol. 492, p. 74.

station or stations to connect at appropriate points and exchange traffic with the United Nations radio network. The United Nations as a telecommunications administration will operate its telecommunications services in accordance with the International Telecommunication Convention and the Regulations annexed thereto. The frequencies used by these stations will be communicated by the United Nations to the Government and to the International Frequency Registration Board.

(b) The Government shall, upon request, grant to the UNIDO for official purposes appropriate radio and other telecommunications facilities in conformity with technical arrangements to be made with the International Telecommunication Union.¹⁰⁷

238. A different wording is used in the ECA Agreement, section 7 (a) of which provides as follows:

Section 7. (a) The ECA shall have the authority to install and operate at the Headquarters for its exclusive official use a radio sending and receiving station or stations to exchange traffic with the United Nations radio network, subject to the provisions of Article 45 of the International Telecommunications Convention relating to harmful interference. The frequencies on which any such station may be operated will be agreed between the ECA and the Imperial Telecommunications Board of Ethiopia and will be duly communicated by the ECA to the International Frequency Registration Board.

CHAPTER IV. — PRIVILEGES AND IMMUNITIES OF OFFICIALS

Section 22. Categories of officials to which the provisions of articles V and VII apply

239. Section 17 of article V of the General Convention states:

The Secretary-General will specify the categories of officials to which the provisions of this article and article VII shall apply. He shall submit these categories to the General Assembly. Thereafter these categories shall be communicated to the Governments of all Members. The names of the officials included in these categories shall from time to time be made known to the Governments of Members.¹⁰⁸

240. On the basis of a proposal made by the Secretary-General, the General Assembly adopted resolution 76 (I) on 7 December 1946. Entitled "Privileges and Immunities of the Staff of the Secretariat of the United Nations", the resolution

Approves the granting of the privileges and immunities referred to in articles V and VII of the Convention on the Privileges and Immunities of the United Nations, adopted by the General Assembly on 13 February 1946, to all members of the staff of the United Nations, with the exception of those who are recruited locally and are assigned to hourly rates.

241. The categories established in resolution 76 (I) have remained unchanged. The Secretary-General has accordingly maintained that the determination made by the General Assembly in that resolution precludes any distinction being drawn (e.g. on grounds of nationality or rank) so as to exclude a given category of staff from the

benefit of the privileges and immunities referred to in articles V and VII, except in the case of locally recruited staff employed at hourly rates. In this position the United Nations has enjoyed the understanding and co-operation of practically all Member States.¹⁰⁹

242. After the introduction of technical assistance programmes it proved necessary to draw the attention of Governments to the status of technical assistance experts and, in particular, to the fact that although called "experts" as a description of their function, they are not "experts on missions for the United Nations" within the meaning of article VI of the General Convention (which expressly envisages experts who are not officials), except possibly when employed on short-term contracts. The following circular note was sent by the Secretary-General to all interested Governments on 9 May 1951.

... I have the honour, at the request of the Technical Assistance Board, to refer to the status of the technical assistance experts who are engaged by the United Nations and by the participating specialized agencies to carry out functions under the expanded programme of technical assistance in accordance with resolution 304 (IV) of the General Assembly.

With particular reference to article V, section 17 of the Convention on the Privileges and Immunities of the United Nations, I wish to invite your attention to the fact that technical assistance experts recruited by the United Nations fall within the categories of officials heretofore specified by the Secretary-General and approved by the General Assembly in its resolution 76 (I), namely all members of the staff of the United Nations, with the exception of those who are recruited locally and are assigned to hourly rates. Thus, technical assistance experts are engaged on substantially similar terms and serve under the same conditions as other members of the staff. Upon accepting appointment they subscribe to the same oath, as required by the Staff Regulations, as other staff members. They are subject to the authority of the Organization and are responsible to it in the exercise of their functions, and they receive no instructions from any authority external to the Organization. For tax equalization purposes, the gross salary paid to them by the United Nations is subjected, under the Staff Assessment Plan, to direct assessment comparable to national income taxes, in the same manner as the gross salary of any other staff member, as required by resolutions 239 (III) and 359 (IV) of the General Assembly. It will therefore be appreciated that they are entitled to the privileges and immunities of officials of the United Nations provided for by articles V and VII of the Convention on Privileges and Immunities of the United Nations.

I am also requested by the specialized agencies participating in the technical assistance programme to specify on their behalf, in accordance with Section 18 of the Convention on the Privileges and Immunities of the Specialized Agencies, that technical assistance experts appointed by them are serving as members of their respective staffs and are therefore within the categories of officials to which the provisions of articles VI and VIII of that Convention apply.

The names of the technical assistance experts included in the categories of officials of the several participating organizations will from time to time be made known to your Government in accordance with regular practice and as provided by Section 17 of the Privileges and Immunities of the United Nations and Section 18 of the Convention on the Privileges and Immunities of the Specialized Agencies.

¹⁰⁷ United Nations Industrial Development Organization, ID/B/6/Add.1, 3 April 1967. The Agreement was signed on 13 April 1967.

¹⁰⁸ Section 14 of the Agreement with Switzerland provides that the Secretary-General shall inform the Swiss Federal Council of the names of officials in the same manner as the Governments of Member States.

¹⁰⁹ On questions relating to the attempt of certain Governments to levy taxation on locally-recruited officials, employed at other than hourly rates, see section 24 (d), paras. 289-292, below.

Finally, it is understood that short-term experts engaged under such conditions as would differentiate them from members of the staff may qualify not as officials of any of the organizations but either as experts on missions for the United Nations under article VI of the Convention on the Privileges and Immunities of the United Nations or as experts travelling on the business of the specialized agencies. In such cases these experts on missions will be so identified in the appropriate certificate to be issued under the provisions, as the case may be, of Section 26 of the Convention on the Privileges and Immunities of the United Nations or Section 29 of the Convention on the Privileges and Immunities of the Specialized Agencies.

243. Despite the dispatch of this letter, Governments have on occasions attempted to impose income tax on the salaries of technical assistance experts on the grounds that these persons were not "officials" within the scope of article V. In the revised standard Technical Assistance Agreement reference is made to "officials including technical assistance experts" and to "experts and other officials", in order to emphasize that technical assistance experts are "officials" within the ambit of both the General Convention and the Specialized Agencies Convention.

244. In accordance with the requirement contained in the last sentence of section 17, that "the names of the officials" included in the categories of officials to which articles V and VII apply "shall from time to time be made known to the Governments of Members", the Secretary-General has prepared annual lists of the United Nations officials concerned. Up to 1956 the list sent to each Member State contained only the names of those officials who were its nationals. Since 1956 the list has included the names of officials of all nationalities. This list is not identical with that furnished by the Secretary-General to the Fifth Committee for budgetary purposes each year. The Secretariat has been unable, owing to the administrative difficulties involved, to include in the lists prepared in pursuance of section 17 the names of the locally engaged employees of all field offices; the host Government or Governments concerned have been separately informed of the names of such staff. In the case of UNRWA, which employs a large locally recruited staff, special lists are prepared and sent to each of the Governments in whose territories UNRWA operates.

245. The notifications contained in the lists sent to Member States do not constitute the legal basis or condition for application of the Convention. If this were to be the case it would be impossible, for example, for an official to receive the benefit of articles V and VI if his contract began just after a list had been compiled and ended before the next one were issued, or even if he were to change duty station in the meantime. The parties to the General Convention are bound to apply its terms in all cases without any such precondition: the annual lists merely constitute an administrative device to assist in the practical application of the Convention.

Section 23. Immunity of officials in respect of official acts

246. Section 18 of the General Convention provides that officials of the United Nations shall:

(a) Be immune from legal process in respect of words spoken or written and all acts performed by them in their official capacity.

The same provision is contained in section 15 (a) of the Agreement with Switzerland and in virtually all the other agreements concluded by the United Nations relating to privileges and immunities. In the opinion of the Secretariat this provision arises directly under Article 105 of the Charter and constitutes an essential condition for the conduct of all United Nations activities.

247. Although there is a considerable overlap between the matters covered, for purposes of presentation the section is divided as follows:

- (a) General
- (b) Judicial decisions
- (c) Cases of detention or questioning of United Nations officials; testifying before public bodies
- (d) Cases arising out of driving accidents
- (e) Cases involving attempted application of Official Secrets Acts
- (f) Duration of immunity

(a) *General*¹¹⁰

248. In a memorandum dated 11 July 1963, addressed to the Deputy *Chef de Cabinet*,¹¹¹ the Legal Counsel briefly summarized the attitude taken by the Secretary-General in relation to alleged illegal acts not constituting part of official duties.

... we should like to confirm that the Secretary-General has, on a number of occasions, informed delegations that United Nations personnel do not enjoy immunity from arrest or prosecution for alleged acts which are not related to their official duties. . . . Needless to say, this position has been taken on many occasions and in a number of countries in which United Nations personnel work. For example, we are attaching a copy of a press release dated 24 June 1949, containing a statement by the Secretary-General on this point raised as a result of a case in regard to which the Secretary-General . . . considered that he could not assert immunity from arrest or interrogation where the alleged acts were not connected with the staff member's official duties. . . .

249. The press release is given below:

Statement by Secretary-General Trygve Lie on immunities

In connexion with the case of the Prague Information Center, I should like to explain a bit further the situation with respect to immunities. United Nations Secretariat personnel enjoy immunity from arrest or questioning in connexion with any of their official duties or acts written or spoken.

United Nations personnel do not enjoy immunity from arrest or interrogation for alleged acts unrelated to their official duties which are unlawful in the Member State where they are committed, or alleged to have been committed.

There has been some confusion about the immunities of United Nations personnel.

Under the Agreement between the United Nations and the United States of America regarding the Headquarters of the United Nations, in Section 15, a limited number of persons are granted the same diplomatic privileges and immunities as are granted to diplomats accredited to the United States Government.

¹¹⁰ See also section 45, para. 393, below, regarding a proposed reservation to the General Convention *inter alia* denying to nationals of the State concerned immunity in respect of official acts.

¹¹¹ *United Nations Juridical Yearbook 1963*, p. 188.

These persons have the official status of ambassadors or ministers in their own country for the main part, except for those persons who are put on the diplomatic list because they have been agreed upon by the United States Government, the United Nations and the member country concerned as entitled to such a status because they are resident members of staff and need such immunities in order to carry on necessary work for their own countries in connexion with the United Nations. These diplomatic functionaries are not put on this diplomatic list unless they hold a status at least as high as diplomatic secretary of delegation.

The privileges and immunities granted to this small number of persons are exactly similar to those granted in Washington to diplomatic representatives of foreign governments there. The same privileges and immunities are granted to American diplomats serving in foreign countries.

They were not invented especially for the United Nations since, for at least three centuries in every civilized country, ambassadors and ministers serving abroad have enjoyed diplomatic privileges and immunities under international law as a necessary facility for their work.

That refers to delegations. The Secretary-General and the eight assistant Secretaries-General have diplomatic immunity in those countries which have acceded to the Convention on Privileges and Immunities. Other Secretariat members do not have diplomatic immunity outside of performance of their official duties. If there is any infringement of any laws, traffic violations for example, a Secretariat member is in the same group — unless on official business — as the average citizen who may pass a red light or step on the gas too hard. He just pays his fine, and many already have.

250. The expression "legal process" has been interpreted by the United Nations in accordance with the standard definition as comprising the entire judicial proceedings, including the writ, mandate, summons or act by which the court assumes jurisdiction and compels the appearance of the defendant and witnesses and acts of execution, as well as other acts on the part of public authorities, such as arrest and detention in custody, in connexion with legal proceedings.

251. Following the arrest of a United Nations staff member on charges of espionage in 1963, the United Nations successfully claimed the right to visit him while he was in custody. In an internal memorandum prepared by the Office of Legal Affairs, the basis of the United Nations right to do so was expressed as follows:

1. In connexion with the recent arrest of a staff member, the question has arisen of the extent of the right of the United Nations to visit and converse with staff members held in custody or detention by the authorities of a State.

2. It is established by the advisory opinion of the International Court of Justice of 11 April 1949, on reparation for injuries suffered in the service of the United Nations (I.C.J. Reports, 1949, p. 174), that in the event of an agent of the United Nations in the performance of his duties suffering injury in circumstances involving the responsibility of a State, the United Nations has the capacity to bring an international claim against the responsible State (whether it is or not a member of the Organization), with a view to obtaining the reparation due in respect of the damage caused both to the United Nations and to the victim or to persons entitled through him. The United Nations therefore has, beyond any doubt, a right of diplomatic protection of its staff, at least within the limits of the questions put to the Court in the request for the advisory opinion.

3. The right to visit and converse with the person in respect of whom a State may possibly have violated its international obliga-

tions is a necessary consequence of a right of diplomatic protection. The State or organization having such a right of protection cannot exercise it unless there is an adequate opportunity to find out the facts of a case, and where the person concerned is in custody or detention, the only such opportunity is through access to that person. This is recognized, for example, in the Vienna Convention on Consular Relations of 24 April 1963 (A/CONF.25/12). Consuls are the usual channel through which States ascertain the facts about persons to whom they are in a position to afford diplomatic protection. Consequently the Convention provides in article 36:

"1. With a view to facilitating the exercise of consular functions relating to nationals of the sending State:

". . .

"(c) consular officers shall have the right to visit a national of the sending State who is in prison, custody or detention, to converse and correspond with him and to arrange for his legal representation. They shall also have the right to visit any national of the sending State who is in prison, custody or detention in their district in pursuance of a judgement. . .".

4. It is therefore clear that the United Nations has the right to visit and converse with one of its staff members in custody or detention whenever there is any possibility that the United Nations or the staff member in the performance of his duties may have been injured through the violation by a State of any of its obligations either toward the United Nations or toward the person concerned. During such visits and conversations the United Nations representatives must have the right to pursue any line of discussion which would clarify the questions both whether an injury has occurred, and whether it was incurred in connexion with performance of the staff member's duties. The mere fact that there is no obvious connexion between the reason given for the detention by the State and the staff member's duties is insufficient to nullify the right of the United Nations to visit. If that were so, the right of protection of the United Nations would be made entirely dependent upon the reasons given by the detaining State, and that would make the right practically ineffective.

5. Even if in fact there is no connexion between the staff member's duties and the reason for the detention, the United Nations should nevertheless be allowed to visit a staff member under detention, and to ascertain through all appropriate discussions not only whether there has been any legal injury but also whether the person is being treated with humanity and with full observance of an international standard of human rights. This is particularly true when the presence of the staff member in what is to him a foreign country is due to his employment by the United Nations. In such cases it is inappropriate to apply narrowly the test of connexion with official duty, since the person's very presence in the country is the result of, and a necessary condition for, the performance of that duty, and hence, in a sense, is connected with it. This broader scope of protection by the United Nations follows from the undesirability — stressed by the International Court of Justice in its advisory opinion on Reparations for injuries — that staff members should have to rely on protection by their own States. The Court said (*ICJ Reports, 1949, pp. 183-184*):

"In order that the agent (of the United Nations) may perform his duties satisfactorily, he must feel that this protection is assured to him by the Organization, and that he may count on it. To ensure the independence of the agent, and consequently, the independent action of the Organization itself, it is essential that in performing his duties he need not have to rely on any other protection than that of the Organization (save of course for the more direct and immediate protection due from the State in whose territory he may be). In particular, he should not have to rely on the protection of his own State. If he had to rely on that State, his independence might well be compromised, contrary to the principle applied by Article 100 of the Charter. And lastly, it is essential that — whether the agent belongs to a powerful or to a weak State; to one more affected or less affected

by the complications of international life; to one in sympathy or not in sympathy with the mission of the agent — he should know that in the performance of his duties he is under the protection of the Organization. This assurance is even more necessary when the agent is stateless.”

6. It follows from the foregoing that, when a United Nations staff member is arrested or detained by the authorities of a State, the Organization always has a right to send representatives to visit and converse with him with a view to ascertaining whether or not an injury has occurred to the United Nations or to him through non-observance by the State concerned of its international obligations, and whether or not such injury is connected with the performance of his duties. Furthermore, at least when the staff member is not a national of the detaining State, there are reasons for recognizing a broader interest of the United Nations in the matter, so that the staff member will not have to rely exclusively on the protection of his own State.¹¹²

252. It may be noted that Staff Rule 104.4, promulgated on 8 March 1954, provides as follows:

A staff member who is arrested, charged with an offence other than a minor traffic violation, or summoned before a Court as a defendant in a criminal proceeding, or convicted, fined or imprisoned for any offence other than a minor traffic violation, shall immediately report the fact to the Secretary-General.

253 In view of the various cases which have arisen involving driving accidents, it may be recalled that, in accordance with General Assembly resolution 22 (E) (I), Staff Rule 112.4 requires staff members to carry public liability and property damage insurance in an amount adequate to insure them against claims arising from injury or death to other persons, or from damage to the property of others, caused by their cars.

(b) *Judicial decisions*

(i) *Westchester County on complaint of Donnelly v. Ranollo*¹¹³

254. The defendant was charged with having driven a car at an excessive speed. He pleaded that he was immune from jurisdiction since he was driving the vehicle as a United Nations official, whilst acting as the chauffeur of the Secretary-General. The claim to immunity was based on Article 105 of the Charter and on the International Organizations Immunities Act, section 7 (b) of which provides that:

Representatives of foreign governments in or to international organizations and officers and employees of such organizations shall be immune from suit and legal process relating to acts performed by them in their official capacity and falling within their functions as such representatives, officers, or employees, except in so far as such immunity may be waived by the foreign government or international organization concerned.

255. It was held that the defendant was not entitled to immunity as a matter of law without a trial of the issue of fact. A distinction was drawn by the Court between those personnel whose activities were such as to be necessary to the actual execution of the purposes and deliberations of the United Nations and others. Since the defendant's responsibilities did not cause him to come

within the former category, he did not enjoy the immunity claimed. The Secretariat does not accept this case as properly decided, nor does it represent current United States practice.

(ii) *United States v. Coplton*¹¹⁴

256. Judith Coplton and Valentine Gubitchev were indicted on charges of violation of espionage laws. Mr. Gubitchev was a United Nations official, of USSR nationality. He claimed diplomatic immunity on the ground that he had entered the United States as Third Secretary of the Soviet delegation to the United Nations, and still retained a post with the Foreign Ministry of the USSR.

The Court rejected the arguments advanced in behalf of Mr. Gubitchev. Referring to the defendant's position as a member of the staff of the Secretariat, the Court declared:

Such status does not *per se* confer diplomatic immunity under generally accepted principles of international law. . . Nor does the defendant, by reason of such employment, possess immunity from prosecution for the offense charged by virtue of any law or treaty of the United States. . .

It seems clear that unlawful espionage is not a function of the defendant as an employee of the United Nations. Freedom from arrest for such conduct, it would seem, is not a privilege or immunity necessary for the independent exercise of the defendant's function in connexion with the United Nations.

As regards the Headquarters Agreement, the Court stated:

Suffice it to say at this point that this agreement does not, by virtue of his employment relationship to the United Nations alone, confer any immunity upon the defendant. It follows from the foregoing that the defendant's status as an employee of the United Nations conferred upon him no privilege or immunity which should constitute an obstacle to his apprehension, trial or conviction for the offense charged in the indictment.

257. The Court dismissed the defendant's claim of diplomatic immunity as a Third Secretary of the USSR Ministry of Foreign Affairs in the light of the views expressed by the Department of State:

Even if we assume that at the time of his arrest defendant was still a Third Secretary of the Soviet Ministry of Foreign Affairs it is clear that he is not thereby clothed with diplomatic immunity. The dispositive fact is that the State Department has declared to the Soviet Embassy by aide-mémoire of March 24, 1949, and aide-mémoire of April 29, 1949, that defendant does not enjoy diplomatic status. That is a political decision which courts do not review.

. . . even if we assume that he is a foreign emissary and that he entered as such, it is clear that he was not so received.

258. As regards the claim to immunity derived from the defendant's alleged position as a member of the USSR delegation to the United Nations, the Judge declared that, even assuming that he was, or had been, a member, he derived no benefit from this fact.

The State Department informs me that it has consistently drawn a distinction between representatives of a foreign government and representatives or members of an international organization. It has never recognized the latter as possessed of diplomatic status

¹¹² *Ibid.*, p. 191.

¹¹³ City Court of New Rochelle, 8 November 1946, 67 N.Y.S. 2d 31. Although spelt "Ranollo" in the report, the defendant's name was in fact "Ranallo".

¹¹⁴ District Court, Southern District, New York, 10 May 1949, 84 F. Suppl. 472.

ipso facto even if the United States is a party to the particular international organization. See 4 Hackworth, *Digest of International Law*, 419-423. The Government argues that by virtue of Article 100 of the United Nations Charter, one may not simultaneously be an employee of the United Nations and a member of one of the national delegations and that defendant's acceptance of employment in the UN Secretariat terminated any membership he may have had in the Soviet Delegation.

The judge found that he did not need to pass on this question. The defendant was not entitled to diplomatic immunities under the Headquarters Agreement since he did not satisfy the conditions of section 15 of that Agreement, being neither a principal resident representative nor "a person agreed upon by the United States, the United Nations and the Soviet Government".

259. Lastly, the Court held that the case was not one falling within the original jurisdiction of the Supreme Court since the defendant was not a "public minister" within the meaning of the term. It may be noted that the defendant Gubitchev was later permitted to return to the USSR.

(iii) *Essayan v. Jouve*¹¹⁵

260. In an action relating to the occupation of a private dwelling the defendant, a French national and a representative of the United Nations High Commissioner for Refugees, had contested the jurisdiction of the Court on the ground that, as a diplomatic agent in France of an international body, he enjoyed diplomatic immunity which he could not waive and which according to judicial authority even covered acts done by an agent as a private person. He cited in particular an agreement of 18 February 1953 between the French Government and the United Nations High Commissioner for Refugees in which the Government had granted to the High Commissioner's representatives in France the benefits and immunities conferred by the Convention on the Privileges and Immunities of the United Nations.

261. In its judgement the Court rejected this plea, pointing out that the immunity from legal process granted to representatives of the High Commissioner by article V, section 18 (a), of that Convention, which had been ratified by France, was expressly restricted to their official acts and thus clearly differed from the total immunity granted to the envoys of foreign governments by the decree of 13 Ventose, year II. The court stated further that the granting of a special immunity to United Nations officials obviously implied that they could not, simply as such, be equated with envoys of foreign governments, and that such equality of treatment was also precluded by the fact that the United Nations was constituted quite differently from a foreign government.

(iv) *People of the State of New York v. Coumatos*¹¹⁶

262. The defendant, an American citizen employed at the United Nations Headquarters as an inventory

clerk on the payroll of the United Nations, was arrested by the New York City Police outside the United Nations Headquarters and indicted for grand larceny committed in the United Nations Headquarters. He objected to the proceeding on the ground that the Court lacked jurisdiction by virtue of his position as a United Nations employee and in view of the fact that the alleged crime had taken place on the United Nations premises.

263. By a judgement of 19 January 1962, the Court of General Sessions sustained the indictment and found the defendant guilty. The Court pointed out that, while diplomatic immunity was extended to some categories of resident representatives of Member States to the United Nations under article V of the Headquarters Agreement of 26 June 1947, between the United States and the United Nations, officers and employees of the United Nations could rely on the International Organizations Immunities Act of 1945, whose provisions on immunity from suit and legal process (section 7 (b)), are limited to acts performed by them in their official capacity.

(c) *Cases of detention or questioning of United Nations officials; testifying before public bodies*

264. In 1949 the authorities of a Member State sought to interrogate an employee of a United Nations Information Centre. National officials entered the premises of the Centre and asked the employee to accompany them, which he declined to do.¹¹⁷ The Chief of Diplomatic Protocol informed the Director of the Centre that the official concerned "was suspected of contact with a group engaged in anti-state activities" and requested the delivery of the official for interrogation. With reference to this request, the Secretary-General instructed the Director,

to ask, in accordance with the general practice of United Nations, for written confirmation of the subject of the interrogation including specific assurance that the matters upon which the official will be questioned do not refer to United Nations activities or to words spoken or written and acts performed by him in his official capacity.

265. This assurance was given by the Ministry of Foreign Affairs. The Permanent Representative of the Member State subsequently informed the Legal Counsel that the official had been convicted for acts which had no connexion with his work at the United Nations Information Centre, and provided a copy of the judgement given.

266. In 1952 a subpoena was served on three United Nations officials, including the Director of the Bureau of Personnel, in connexion with the case of the *United States v. Keeney*.¹¹⁸ The Secretary-General wrote to the United States Permanent Representative, requesting the Secretary of State to inform the court that each subpoena was addressed to the officer in question in his official capacity and that the process on its face related to matters falling within their functions as United Nations officials. They therefore enjoyed immunity in respect of the acts in

¹¹⁵ Lower Court of the Seine. 1 October 1962. *Gazette du Palais*, 16-19 February 1963. (*United Nations Juridical Yearbook 1962*, p. 290).

¹¹⁶ Court of General Sessions, New York County, 19 January 1962. 224 N.Y.S. 2d 507. (*United Nations Juridical Yearbook 1962*, p. 294). See also section 9, paras. 113 and 114, above.

¹¹⁷ Regarding the violation of United Nations premises, see section 9 (a), paras. 92-95, above.

¹¹⁸ See also section 12, para 134, above and section 31, paras. 334-336, below.

question under the International Organizations Immunities Act and by virtue of Article 105 of the Charter. The officials concerned were not required to appear before the court.

267. In 1956 military police violated the premises of a United Nations subsidiary organ,¹¹⁹ arrested two United Nations officials and, after a period of confinement, expelled them from the country. The Secretary-General entered a vigorous protest to the Government of the Member State concerned regarding this action. One of the two officials was charged with lighting a match in the inner staircase of the United Nations premises at the time of an air alarm during office hours. In fact, a match had been struck, but not by either of the two officials, and, in any case, it could not be seen except by persons in the yard of the building. The second official was charged with inciting the workers against the Government, though no evidence in support of this charge was presented. Since the Government had broken off diplomatic relations with the countries of the nationality of the two officials, the United Nations had previously obtained an unconditional guarantee of the safety of all such officials from the Foreign Ministry of the State concerned. The Secretary-General accordingly sought an appropriate apology for the arrest, expulsion and indignities suffered by the United Nations officials and for the violation of United Nations premises.

268. In January 1957 a further incident occurred in the same Member State when a security officer entered United Nations premises and sought to take into custody for questioning a United Nations official. The official did not accompany the security officer; the latter stated that in view of this refusal the official would have to leave the country immediately. The Secretary-General protested to the Foreign Ministry of the State regarding this incident and sought assurances that the official concerned would have the right of unmolested entry into the country in future, in order that official functions on behalf of the United Nations might be fulfilled.

269. A United Nations aircraft carrying, amongst others, officials of a United Nations subsidiary organ, made an emergency landing in a Member State in December 1963. The authorities of the Member State forcibly separated those officials who had been recruited in an adjoining territory from the others, interrogated and searched them, and placed them in temporary imprisonment. In answer to the protest made by the United Nations, the Ministry of Foreign Affairs of the State concerned based its action on grounds of national security. The United Nations declared in reply that this ground did not affect the international obligation of the Member State to ensure the immunity of the United Nations and its officials in respect of official acts; the senior United Nations official present had fully explained the circumstances of the landing before the arrest and interrogation took place. Since that landing whilst in the course of an official journey was the result of *force majeure*, the entry of the officials was an act in an official United Nations capacity and not an act undertaken in

a private capacity. Accordingly, it had been incumbent on the Government to treat their entry as an official one and to comply scrupulously with the terms of the Convention.

(d) *Cases arising out of driving accidents*

270. In a number of cases United Nations officials have been arrested, detained in custody, or charged, following driving accidents in which they were involved. Where the journey was one taken solely for private purposes, the United Nations has not intervened unless, at the least, it appeared that the nature of the measures taken were such as to affect the independent operations of the United Nations itself. This consideration has also been of central importance in deciding whether or not immunity should be waived in cases where a criminal charge was laid against an official who was driving on official business.¹²⁰ In deciding this question the Secretary-General has needed to consider whether, in the light of the over-all factors, the exercise of punitive measures by the Government concerned might undermine the independent exercise of official functions. It must be emphasized, however, that the facts of each case have been carefully considered by the Secretary-General and the claims of the municipal court to exercise jurisdiction weighed against the interests of the Organization before final decision has been reached. The issue of the personal convenience of the individual staff member has not entered into the matter.

(e) *Cases involving attempted application of Official Secrets Acts*

271. In several cases Governments have requested that United Nations technical assistance experts serving in their countries should sign a declaration, binding themselves not to divulge any information derived from their employment, in accordance with national Official Secrets Acts. In reply the United Nations has pointed out that the proposed declaration was repugnant to section 18 (a) of the General Convention and might be interpreted as a submission to local jurisdiction. The attention of the Government has been drawn also to the provisions of Staff Regulation 1.5 under which staff members are placed under an obligation not to communicate to any person any information made known to them by reason of their official position which has not been made public except in the course of their duties or by authorization of the Secretary-General. This obligation does not cease upon separation from the Secretariat.

(f) *Duration of immunity*

272. In an internal memorandum prepared by the Office of Legal Affairs in 1952, consideration was given to the question whether the immunity from legal process of a United Nations official in respect of official acts survived after the termination of his functions. Unlike section 12, in relation to representatives, section 18 of

¹¹⁹ Regarding the violation of United Nations premises, see section 9 (a), paras. 92-95, above.

¹²⁰ Regarding the question of waiver see also section 31, paras. 334-336, below.

the General Convention is not specific on the point. The opinion was expressed that, on the functional basis of the immunities of both diplomats and officials, international officials should be immune in respect of official acts after ceasing to be officials. In the course of preparing the Specialized Agencies Convention, paragraph 22 of the Rapporteur's Final Report on the work of Sub-Committee 7 to the Sixth Committee, declared:

In connexion with Section 19 (a) which (following the General Convention) prescribes that officials shall be immune from legal process in respect of words spoken or written and all acts performed by them in their official capacity, it was agreed that, to fulfil the purpose of the provision (namely that officials should pursue their official duties, feeling confident that they are protected from all personal liability in regard thereto before municipal tribunals unless immunity is waived), it was necessary that this immunity should continue after the officials had ceased to be officials. It was thought, further, that this interpretation in fact followed from the wording of the Section as a whole and it was pointed out that paragraph (6), dealing with exemption of official salaries from taxation, required a similar interpretation if it was to receive its proper effect.

273. The conclusion reached in the memorandum was that the immunity survived by virtue of Article 105 of the Charter, the functional analogy between United Nations officials and diplomatic representatives, and the relationship between the General and Specialized Agencies Conventions.

Section 24. Exemption from taxation of salaries and emoluments

274. A number of questions have arisen during the history of the United Nations involving the interpretation of the tax laws of various Member States in the light of the circumstances affecting individual United Nations officials. Since it would not be practical to give a complete account of all such cases which often turned on the particular facts and provisions involved, the present section is divided under the following headings which deal with some of the topics which have arisen most frequently with respect to the immunity of officials from taxation.

- (a) General; Tax Equalization Fund;
- (b) Position in the United States;
- (c) Position in Switzerland;
- (d) Locally recruited staff;
- (e) National taxation in respect of United Nations pension benefits; estate or succession duties.

(a) *General; tax equalization fund*

275. Section 18 of the General Convention provides that Officials of the United Nations shall:

- ...
- (b) Be exempt from taxation on the salaries and emoluments paid to them by the United Nations.

The United Nations has interpreted this provision as requiring exemption to be given in respect of all forms of national taxation (e.g., social security contributions, as well as income tax) levied on salaries and emoluments received from the Organization.

276. In resolution 239 C (III) of 18 November 1948, the General Assembly requested that:

Members which have not acceded to the Convention on Privileges and Immunities of the United Nations or which have acceded to it with reservations as to its section 18 (b), take the necessary action, legislative or other, to exempt their nationals, employed by the United Nations from national income taxation with respect to their salaries and emoluments paid to them by the United Nations, or in any other manner to grant relief from double taxation to such nationals.

277. With a few exceptions, of which the United States is the most notable, all Member States have either acceded to the General Convention or taken the necessary action to exempt from national taxation the official income of their nationals employed by the United Nations. The inequality nevertheless produced where one or more States do not grant exemption from national taxation led the General Assembly to adopt resolution 13 (I) of 13 February 1946, in which the General Assembly resolved that:

Pending the necessary action being taken by Members to exempt from national taxation salaries and allowances paid out of the budget of the Organization, the Secretary-General is authorized to reimburse staff members who are required to pay taxation on salaries and wages received from the Organization.

In resolution 239 D (III), the General Assembly authorized the Secretary-General to reimburse the members of the staff for national income taxes paid by them in respect of salaries received during 1949, and in subsequent years the Assembly has continued this authority, although by budgetary action rather than by resolution. The Assembly also directed the Secretary-General, by paragraph 2 of resolution 239 B (III), not to include in any future personnel contracts a provision undertaking to reimburse national income taxes. Accordingly, reimbursement of taxes required to be paid by staff on their official salaries was made only from year to year.

278. In the hope of encouraging legislative measures for the relief of double taxation on official salaries, the General Assembly imposed a direct assessment on United Nations staff members comparable to national income taxes; the relevant text is contained in resolution 239 (III) as amended by resolution 359 (IV). The revenue derived from this staff assessment plan was applied as an appropriation-in-aid of the budget.

279. This scheme still left the principle of equality among Member States unachieved. As the Secretary-General, on the instructions of the General Assembly, reported:

A Member State which has not granted either tax exemption or relief from double taxation to its nationals who are staff members benefits twice: firstly from the national taxes it levies on such nationals, and secondly from the income derived from the Staff Assessment Plan. On the other hand, a Member State which has granted tax exemption or relief from double taxation to its nationals who are staff members shoulders an additional burden in contributing to the budget appropriation for reimbursement of national income tax levied by other Member States.¹²¹

¹²¹ Report of the Secretary-General on the use of income derived from the Staff Assessment Plan, *Official Records of the General Assembly, Ninth Session, Annexes*, agenda item 36, document A/C.5/584, para. 9.

280. The General Assembly accordingly adopted resolutions 973 (X) and 1099 (XI), establishing a tax equalization fund in which revenue from the staff assessment plan is now credited in sub-accounts for each Member State as a credit against, and in the proportion of, its annual contribution to the budget. Where any staff members are subject both to staff assessment and to national (including local and state) income taxation in respect of their official salaries, the Secretary-General is authorized to refund to them out of the staff assessment collected from them, the amount of the income taxes on their United Nations income. There is then charged against the credit of the Member State taxing them all amounts refunded such staff, by way of double taxation relief in respect of national income taxes. Thus, in effect, the Member State taxing the official United Nations income of any of the staff of the Organization sees its annual contribution to the Organization increase (or, at least, fail of a reduction) in the amount of the taxes so assessed. The United Nations has not yet been able to devise a method of ensuring tax equalization in the case of programmes financed by voluntary contributions however.

281. Except in the case where special agreements have been negotiated, the benefits of section 18 (b) are confined to the "categories of officials" referred to in section 17 of the General Convention. Thus amongst those excluded from the exemption given in section 18 (b) are independent contractors, technical assistance fellowship holders and teachers and students receiving fees or cash grants in connexion with UNICEF training projects, as well as locally recruited staff employed at hourly rates.

(b) *Position in the United States*

282. The United States has not acceded to the General Convention, nor has it adopted legislation granting exemption from taxation to its nationals in respect of salaries and emoluments received from the United Nations. This question constituted, indeed, one of the main reasons why the United States declined to accede to the General Convention. The Report of the Senate Committee on Foreign Relations stated:

The main issue raised in the committee hearings with respect to the general convention on privileges and immunities centred about section 18 (b) which provides that officials of the United Nations shall be immune from taxation on the salaries and emoluments paid to them by the United Nations. The committee recognize that certain inequalities in the salary scales within the United Nations would inevitably result if the nationals of different states employed as members of the Secretariat are subjected to widely divergent rates of taxation by their own governments. This might lead to difficult problems of morale within the Secretariat. On the other hand, the committee considered it undesirable to create within the United States a group of nationals not subject to the normal responsibilities of citizenship. Even though American members of the Secretariat have obligations to the United Nations, they still retain their citizenship and they derive many benefits from the United States. As such, the committee members believe they should be called upon to contribute in the form of taxes to the work of our Government as other American citizens.

While the committee agreed that there could be no objection to any arrangement which might be made within the United Nations Secretariat to equalize the tax burden imposed upon staff members, it was believed that the United States should reserve its posi-

tion with respect to section 18 (b) relating to tax immunity. The committee recommends that the terms of the resolution be revised accordingly.¹²²

283. It was chiefly owing to United States policy with respect to tax exemption that the General Assembly came to adopt the staff assessment scheme described in sub-section (a) above, and also to authorize the Secretary-General to reimburse to United States citizens the amount of the income taxes which they pay on their United Nations salaries and emoluments. As regards this reimbursement, staff members subject to federal, state or local income tax are informed by the Secretariat administration that the reimbursement is not represented as equivalent to exemption from taxation on United Nations earnings. In calculating the actual amount of reimbursement, the Organization applies the available income-splitting benefit, personal exemptions and optional standard deduction to the United Nations salary as if there were no outside income. In certain limited circumstances additional benefits available are left to be applied to actual outside income, as, for instance, itemized deductions over and above the amount of the optional standard deductions. Where, however, a United States citizen established to the satisfaction of his District Director of Internal Revenue that he has been a *bona fide* resident abroad for an uninterrupted period which includes an entire taxable year, he may exclude his foreign earnings (within specified limits) for the entire period during which he has been a *bona fide* resident abroad; his unearned income is thus taxable at the lower rate. The same result obtains in the case of presence in a foreign country or countries during at least 510 full days in any period of eighteen consecutive months. Under United Nations reimbursement procedures, the staff member is under an obligation to co-operate in lawfully minimizing his taxes, including seeking the exemption of a *bona fide* resident abroad, where applicable.

284. It may be noted that officials who are United States citizens and serving in the United States are required to pay social security contributions in accordance with Public Law 86-778, approved 13 September 1960. Under the provisions of that law United States citizens are taxed on earnings received from the United Nations as if they are self-employed. The United Nations did not formerly reimburse staff members from the tax equalization fund in respect of the social security contributions which were paid.¹²³ In 1966, however, the General Assembly approved¹²⁴ the reimbursement to the staff members concerned of the difference between the social security tax each staff member is required to pay as a United Nations employee and the amount he would have had to pay as the employee of a taxable employer.

¹²² Committee on Foreign Relations, United States Senate, Report No. 559, 80th Congress, First session, pp. 6 and 7.

¹²³ See the decision of the United Nations Administrative Tribunal in *Davidson v. the Secretary-General*, Judgement No. 88, 3 October 1963.

¹²⁴ At its 1501st plenary meeting on 20 December 1966, the General Assembly took note of the relevant decision of the Fifth Committee contained in paragraph 35 of its report. *Official Records of the General Assembly, Twenty-first Session, Annexes, agenda item 81, document A/6605.*

This approval, which was concurred in by the United States Government, came into effect on 1 January 1967 and covers reimbursements in respect of 1966 and subsequent years.

(c) *Position in Switzerland*

285. Under Swiss law responsibility for taxation is divided between the Federation, the cantons and the various communes; liability to taxation therefore depends in part on where the official lives.

286. All officials, including those of Swiss nationality, are exempt from federal, cantonal and communal taxes on the salary and indemnities they receive from the United Nations, including lump sum payments received from the United Nations Pension Fund. As regards payments received from non-United Nations sources, officials (other than Swiss nationals) may claim exemption from taxes on personal property (*biens mobiliers*) including tax on capital (*l'impôt sur la fortune*), other than taxes on Swiss shares. Dividend withholding tax (*l'impôt fédéral anticipé*) is levied on dividends and interest received from savings accounts and bonds. However reimbursement of the amount withheld may be claimed from the tax administration. There is no exemption from taxes on real property or on income derived from such property, nor from indirect taxes in general (e.g., on insurance premiums or radio and television licences), whether levied by federal, cantonal or communal authorities. In addition to the above, officials of grade P.2 and above are not required to pay a fee for a driving licence and are not subject to automobile tax.

287. In the canton of Geneva, non-Swiss staff members with taxable income have the choice between a special rate of taxation (article 32 *ter* of the *loi genevoise sur les contributions publiques*), with no deductions allowed for dependants, or the application of the normal system of taxation, which takes into account the salary paid by the United Nations but allows deductions to be made.

288. Officials of Swiss nationality are exempt from social security contributions (*assurance vieillesse et survivants*) if they are full participants in the United Nations Pension Fund, and from contributions to the unemployment fund (*caisse d'assurance contre le chômage*).

(d) *Locally recruited staff*¹²⁵

289. A number of States have sought to tax the salaries of their citizens who are employed by the United Nations and stationed in the home country. In so far as these officials, though locally recruited, have not been assigned to hourly rates, the United Nations has protested against such attempt on the grounds that the officials concerned were exempt from taxation in respect to their United Nations salary and emoluments by virtue of the terms of General Assembly resolution 76 (I) and of the General Convention. In a letter sent to the representative of one such State in 1964, the matter was summarized as follows:

¹²⁵ Other than United States or Swiss nationals who are dealt with in the two preceding sub-sections.

... The position of your Government is at variance with the consistent practice of all Member States which have acceded to the General Convention without reservation as to its provision on income tax exemption and with that of all other States which, though not a Member of the United Nations, or a Member of the United Nations but not a party to the Convention, have undertaken to apply the Convention. All these Governments have invariably recognized that staff members of the United Nations, including those who are their own nationals, are entitled to the same income tax exemptions as accorded non-nationals. Among the eighty-six States Members of the United Nations which have acceded to the Convention, only four States have made a reservation at the time of accession so as to deny income tax exemption to officials, whether internationally or locally recruited, of the United Nations who are her own nationals; these States are: Canada, Laos, Mexico and Turkey. But even among these reserving States, only Turkey has actually required their nationals on the staff of the United Nations office in her territory to pay income tax. Laos has waived the tax; Mexico has not so far actually collected the tax and is at present considering administrative measures whereby collection will be "indefinitely deferred"; while no practical difficulty has arisen in Canada, the United Nations having no office in that country.

Of the Member States which have not acceded to the Convention, all those which participate in the Technical Assistance or Special Fund programme have, as has your country, by uniform standard agreements with the United Nations assumed a legal obligation to apply the Convention in so far as concerned those programmes. Among the handful of countries which have neither acceded to the Convention nor otherwise undertaken to apply the Convention since they do not partake in Technical Assistance or the Special Fund, only the United States of America is host to a United Nations office. And the United States has co-operated with the United Nations in establishing the Tax Equalization Fund, through which she returns to the United Nations practically all the income tax she collects from her nationals on the staff of the United Nations. Your country, should she persist in her present position, would be the sole country which has, by agreements with the United Nations, assumed a legal obligation to accord income tax exemption to United Nations officials irrespective of nationality but refused to do so.

We have taken pains to explain these arrangements in order to show that immunity from income taxation on United Nations salaries and emoluments for officials of the United Nations, irrespective of nationality or rank, is a well-established principle steadfastly adhered to by the Organization and that it has in fact been universally recognized or indirectly applied. This immunity is granted United Nations officials, as are other privileges and immunities provided for in the Convention, "in the interests of the United Nations and not for the personal benefit of the individuals themselves", to quote section 20 of the Convention. Thus, if your Government, in concert with all other States, recognizes the immunity from income taxation of its nationals on the staff of the United Nations, it would do so in the interest of the Organization and not for the benefit of those nationals as individuals.

290. In a case which arose later in 1964, the Member State concerned sought to tax nationals, residents and clerical staff regardless of nationality. In a letter to the Permanent Representative, the Legal Counsel described the position as follows:

... According to information from the United Nations Technical Assistance Board Representative, the tax authorities of your country have taken the position that members of the staff in the office of the Representative who are *nationals* or *residents* are not entitled to exemption from taxation on their United Nations salaries. They have also taken the position that the immu-

nity does not extend to clerical staff regardless of nationality. The tax authorities recognize that under Section 18 (b) of the Convention on the Privileges and Immunities of the United Nations officials shall . . . (b) be exempt from taxation on the salaries and emoluments paid to them by the United Nations. They, however, expressed doubts that nationals and residents of your country, or clerical staff stationed there, could be considered as "officials of the United Nations". The question having been referred to me, I should like to submit for your consideration the correct legal position.

The Convention on the Privileges and Immunities of the United Nations provides for a procedure for the definition of the term "officials of the United Nations", and, by the definition established by that procedure, no distinction is maintained among the staff members of the United Nations as to nationality or residence. All members of the staff of the United Nations, with the exception of those who are recruited locally and are assigned to hourly rates are officials of the United Nations and enjoy the same privileges and immunities provided in the Convention, including the right to exemption from income taxation.

291. After citing section 17 of the General Convention and resolution 76 (I) and referring to the list of staff members sent to each Member Government each year, the letter continued:

From the above, it will be seen that, under the decision of the General Assembly taken in pursuance of the Convention on the Privileges and Immunities of the United Nations, all staff members in the Office of the Representative of the United Nations Technical Assistance Board in your country, irrespective of nationality or residence, are in the status of "officials of the United Nations" and, as such, are entitled to all privileges and immunities appertaining to such officials. The only exception to this rule is in the case of staff members "who are recruited locally and are assigned to hourly rates". None of the staff members in the said office of the Representative fulfil these conditions, the clerical staff not being assigned to hourly rates. All of them, therefore, are entitled to income tax exemption, including those who are nationals or residents.

292. Following representations by the United Nations, the tax authorities of the States concerned have, in the majority of cases, given appropriate recognition to the immunity from taxation provided under the terms of the General Convention. Where such recognition has not been given, the United Nations has where possible applied the provisions of the tax equalization fund so as to reduce that country's credit in the fund by the amount of any reimbursement made by the United Nations to the staff member concerned.

(e) *National taxation in respect of United Nations pension benefits; estate or succession duties*

293. Whereas section 18 (b) of the General Convention provides that United Nations official shall be exempt from taxation on the salaries and emoluments paid to them by the United Nations, no express provision was made to cover the payment of pension benefits. When the Convention was being prepared during the first part of the first session of the General Assembly, the question was briefly considered by the Sub-Committee on Privileges and Immunities. The second report of the Sub-Committee¹²⁶ contains the following statement:

¹²⁶ *Official Records of General Assembly, First part of first Session, Sixth Committee, Summary records of meetings, annex 3, document A/C.6/31.*

The Sub-Committee on privileges and immunities examined another proposal submitted by the Advisory Group of Experts on administrative and budgetary matters, made with a view to exempting all members of the staff of the Organization from taxation on retirement benefits and exempting their beneficiaries from taxation on death benefits, either in the form of a lump sum or benefits paid by the Organization to widows and orphans.

The Sub-Committee decided, without prejudice to this question being taken up and considered separately at a later stage, that a provision to this effect should not be included in the General Convention.

No subsequent action was taken by the General Assembly to afford such exemption. Consequently the United Nations has not been in a position to require Member States to grant exemption from national income tax on pensions received from the United Nations Joint Staff Pension Fund. Many countries do not, however, tax United Nations pensions. It may also be noted that the Headquarters Agreement for the United Nations Industrial Development Organization provides expressly in section 27 (d) that the officials of the organization shall be accorded.

Exemption from taxation in respect of the salaries, emoluments, indemnities and pensions paid to them by the UNIDO for services past or present or in connexion with their service with the UNIDO.¹²⁷

294. As regards estate and succession duties, in 1963 the Office of Legal Affairs advised the secretariat of the Technical Assistance Board as follows:

It has been the usual position that the estates of international organizations' staff are taxable in accordance with general rules of private international law and the provisions of any Convention for the Avoidance of Double Taxation on Estates which may exist between the country of duty station and the country of nationality or permanent residence of the staff member. While the fact of such taxability may cause an additional administrative burden to the estate of a staff member and even on occasion involve unfortunate delays, the financial position of the heirs is not ordinarily affected in any significant degree. Legislation or a convention commonly provides for taxation of the whole estate in the country of settled residence, with taxation in other countries of so much of the decedent's property as is situated within the taxing jurisdiction, the principal taxing State then giving some form of deduction or credit for estate duties paid abroad.

295. In Switzerland no succession duties or taxes on gifts are payable if the deceased or donor is an official or the dependent of an official, other than a Swiss national, above the rank of an Associate Officer (P.2). In such cases the deceased is not considered as domiciled *de jure* in Switzerland. Officials of below the rank of Associate Officer or who are of Swiss nationality are obliged to pay succession duties or taxes on gifts or property they receive. All officials are obliged to pay duties or taxes in respect of property received from a person legally domiciled in Switzerland.

Section 25. Immunity from national service obligations

296. Under section 18 (c) United Nations officials are declared "immune from national service obligations". Four Member States have made reservations or declara-

¹²⁷ United Nations Industrial Development Organization, ID/B/6/Add.1, 3 April 1967.

tions regarding the application of this provision when acceding to the General Convention. Laos and Thailand declared that their nationals should not be exempt from national service obligations by virtue of their employment as United Nations officials. In the case of Mexico, the grant of privileges and immunities to United Nations officials who are of Mexican nationality and exercising their functions in Mexican territory is confined to certain provisions of section 18, not including section 18 (c). Turkey acceded to the Convention subject to the following reservation:

The deferment, during service with the United Nations, of the second period of military service of Turkish nationals who occupy posts with the said Organization, will be arranged in accordance with the procedures provided in Military Law No. 1111, account being taken of their position as reserve officers or private soldiers, provided that they complete their previous military service as required under Article 6 of the above-mentioned law, as reserve officers or private soldiers.

297. Under appendix C to the United Nations Staff Rules, entitled "Provisional Arrangements relating to Military Service", detailed provision has been made for cases in which staff members perform military service, with the consent of the Secretary-General. The appendix is reproduced below.

(a) In accordance with section 18 (c) of the Convention on Privileges and Immunities of the United Nations, staff members who are nationals of those Member States which have acceded to that Convention shall be "immune from national service obligations" in the armed services of the country of their nationality.

(b) Any requests to Governments which have not acceded to the Convention to defer or exempt staff members from military service by reason of their employment with the United Nations shall be made by the Secretary-General and not by the staff member concerned.

(c) Staff members who have completed one year of satisfactory probationary service or who have a Permanent or Regular Appointment, may, if called by a Member Government for military service, whether for training or active duty, be placed on special leave without pay for the duration of their required military service. Other staff members, if called for military service, shall be separated from the Secretariat according to the terms of their appointments.

(d) A staff member called for military service who is placed on special leave without pay shall have the terms of his appointment maintained as they were on the last day of service before he went on leave without pay. His re-employment in the Secretariat shall be guaranteed, subject only to the normal rules governing necessary reductions in force or abolition of posts.

(e) In the interpretation of Rule 105.2 (b), the period of special leave without pay for military service shall be counted for the purpose of establishing seniority.

(f) A staff member on special leave without pay for military service shall be required to advise the Secretary-General within 90 days after his release from military service if he wishes to be restored to active duty with the Secretariat. He shall also be required to submit a certificate of completion of military service.

(g) If a staff member, after the period of required military service, elects to continue such service or if he fails to obtain a certified release therefrom, the Secretary-General will determine on the merits of the particular case whether further special leave without pay will be granted, and whether re-employment rights shall be maintained.

(h) If the staff member's absence on special leave without pay appears likely to last six months or more, the United Nations

will pay, if so requested, for transporting the staff member's wife and dependent children to his place of entitlement and for their return travel after the staff member's return to active duty with the Secretariat, provided that the expenses involved will be counted as travel expenses related to the next home leave entitlement of the staff member.

(i) The Secretary-General shall not continue his contribution to the Joint Staff Pension Fund on behalf of the staff member during the staff member's absence on special leave without pay for military service.

(j) The provisions of Rule 106.4 relating to illness, accident or death attributable to the performance of official duties on behalf of the United Nations shall not be applicable during periods of military service.

(k) The Secretary-General may, if the circumstances of the military service appear to warrant it, credit the staff member's period on special leave without pay for military service in fixing the salary step upon the staff member's return to active duty with the Secretariat.

(l) The Secretary-General may apply such of the foregoing provisions as he deems appropriate in the case of a staff member who with the advance approval of the Secretary-General volunteers for military service or requests a waiver of his immunity under Section 18 (c) of the Convention on Privileges and Immunities of the United Nations.

298. In the case of States which have acceded to the General Convention, relatively few difficulties have occurred regarding the application of section 18 (c). It is believed that scarcely any Governments which are parties to that instrument have requested the Secretary-General to permit officials of the nationality in question to perform national service. United Nations officials of a certain nationality have been required to apply for a release from military reserve service, together with certain other official formalities, such as exit permit, and income tax clearance, before leaving the country after spending their home leave there. The United Nations has sought to obtain the waiver or simplification of these requirements in respect of officials.

299. Several States have sought to apply military service provisions to locally recruited officials of United Nations subsidiary organs. Apart from a few isolated cases it is believed that such local employees have not in fact been called upon to perform full military service.

300. In 1962 a staff member informed the Office of Legal Affairs that when he left his home country in 1957, on recruitment by the United Nations to serve as an official at Headquarters, he had been required to furnish two guarantees, each of approximately \$1,200; one was to ensure his eventual return to the country and the other was to ensure that he would eventually fulfil his military service obligations. The Office of Legal Affairs gave the opinion that the first guarantee was a restriction on the movement and exclusively international character of an official of the United Nations which was inconsistent with the authority of the Secretary-General, under Articles 97, 100 and 101 of the Charter, to appoint, deploy and direct the staff of the Organization. The second guarantee was declared incompatible with section 18 (c) as constituting a form of national service obligation.

301. As regards States which have not become parties to the General Convention, under Executive Order No. 10292 amending the Selective Service Regulations,

as amended by Executive Order No. 10659, a male alien admitted other than for permanent residence in the United States is not required to register for military service provided, *inter alia*, he is a United Nations official or a member of the family of an official.

302. In the case of Switzerland, special provision was made in the annex to the Agreement with Switzerland concerning officials of Swiss nationality. The annex provides that the Secretary-General will communicate to the Swiss Federal Council a list of officials of Swiss nationality liable for military service; that the Secretary-General and the Council will agree upon the list of such officials who shall be granted dispensation in view of the office which they hold; and that, if other officials of Swiss nationality are called up, the Secretariat may ask for postponement or some other appropriate measure. In practice the preparation of a list has been dispensed with; cases are now treated separately as they arise. Swiss nationals are frequently called for short periods of two or three weeks of military service. In several instances the United Nations has successfully requested a deferment. In one case, involving a Swiss official of director rank, a general deferment (*congé pour l'étranger*) was requested and granted.

303. The Swiss authorities have contended that, under Swiss law, a military tax is payable by officials of Swiss nationality in lieu of military service. The following extract from a letter sent by the Office of Legal Affairs in 1958, in answer to a query raised by a specialized agency, broadly summarizes the United Nations position in regard to this tax. After referring to the provisions of the annex, the letter continued:

... The Swiss Government thereafter took the position that the tax in lieu of military service was payable by any Swiss national enjoying this exemption on the grounds that the Federal Constitution (Article 18) itself not only provides for universal military service but also requires the Confederation to prescribe a uniform tax on exemption from military service. The United Nations seems to some extent to have acceded to this position after discussions late in 1947. Apart from the constitutional basis for the tax, there is an argument in favour of the Swiss position in that the federal law on the tax on exemption from military service (28 June 1878, as amended) treats the tax as one by way of "compensation" for the non-performance of military service more or less regardless of the reason of the non-fulfilment. Thus, neither unavoidable absence or residence abroad nor even medical disqualification appears to confer any exemption from the tax and, apart from a few very narrow classes of exemption, the tax seems to be levied on the mere fact of non-performance of military service without consideration of the reasons.

Accordingly, the Swiss authorities are understood to have continued to assess the tax against United Nations officials exempted from service. The United Nations, however, does not reimburse the officials so taxed. This is on the grounds that the reimbursement authority of the Secretary-General extends only to income taxes, and the military exemption tax is not properly an income tax. It is assessed on a compound basis, only one element of which is calculated on income, and this is not, in our opinion, sufficient to characterize it as an income tax for reimbursement purposes. The tax consists of a personal tax of 6 francs plus a supplementary tax of 1.5 per cent on income and 1.5 per mill on net worth and expectancy.

The above is the position as we know it and to the best of our knowledge does not differ in the case of the Specialized Agencies,

a number of whom have the same provision in their agreements with Switzerland as that cited in the Annex mentioned above.

Section 26. Immunity from immigration restrictions and alien registration

304. Officials of the United Nations, together with their spouses and dependent relatives, are declared immune "from immigration restrictions and alien registration" in section 18 (*d*) of the General Convention. A similar provision is contained in many of the international agreements concluded by the United Nations dealing with the privileges and immunities of the Organization and its officials.¹²⁸ It may be noted that a number of countries issue special identity cards for United Nations personnel serving in their territory.

(a) Practice in respect of countries other than the United States

305. In Geneva, the names of all United Nations officials and their dependents living with them (together with the names of minors studying abroad) are communicated to the "*Contrôle de l'habitant*". United Nations officials and their dependents (provided the latter are not working in Switzerland) receive from the Federal Political Department an identity card, called a *carte de légitimation*, the colour of which varies according to the rank of the official. Other members of the family of the staff member do not receive a *carte de légitimation* but their passport is stamped "*dispensé du permis de séjour*", provided they do not work in Switzerland.

306. Two special cases which have occurred regarding residence visas or taxes may be noted. In 1961, the authorities of a Member State sought to impose the "*taxes de résidence*" on all locally recruited United Nations staff members serving in the country. Although the Technical Assistance Board Regional Representative protested against this imposition to the Foreign Ministry, the Ministry declined to change its position. In a memorandum to the Technical Assistance Board administration, the Office of Legal Affairs expressed the view of the United Nations as follows:

The purpose of section 18 (*d*) of the Convention is of course to ensure the freedom of the officials of the United Nations to enter and reside in any country for the exercise of their functions in connexion with the Organization. The imposition of an alien immigration fee would appear to derogate from such freedom, by making the residence of United Nations officials in the country in fact dependent upon the payment of a tax on aliens. The "*taxe de résidence*" may thus be considered to be of the nature of an "immigration restriction", the imposition of which is inconsistent with the letter and spirit of the Convention. Furthermore, the tax in question discriminates against officials in the country concerned as compared to officials in other States which do not impose such a tax. In such circumstances the Organization may feel obliged to reimburse the officials concerned in that State, the tax thus becoming, in fact, one upon the United Nations itself in a manner which would not accord with the letter and spirit of the Convention. . .

¹²⁸ See e.g., section 15 (*d*) of the Agreement with Switzerland, section 17 (*c*), ECAFE Agreement, section 11 (*f*), ECA Agreement.

307. The second case concerned "police residence" or "re-entry" visas. The following letter, which was sent by the Legal Counsel to the Permanent Representative of the State concerned in 1963, sets out the facts.

It appears that the local authorities have taken the position that staff members of foreign nationality who remain more than three months are required to obtain a form of visa from the police and, furthermore, are required to pay a fee. This visa is variously referred to as a "residence visa" or "re-entry" visa. Its text states that the alien can re-enter the country as often as he likes during a specific period. Repeated inquiries as to the nature of the visa in question elicit the fact that foreign staff members who are now being required, three months after entry, to obtain the visa, did not have to have an entry visa when they first entered the country to take up their duties there. No visa was indeed required for entering the country. It thus seems obvious that the visa that is now required, after a sojourn of three months, is one for the purpose of staying or residing in the country and not for entering it. Inasmuch as its possession is a requisite to sojourn in the country, the visa in question is therefore in the nature of a residence permit, or as it is often referred to, a "residence visa".

In so far as it concerns the United Nations, the mere requirement that a staff member assigned to your country must possess a visa or a residence permit in order to stay in that host country is in itself unobjectionable, so long as such visa or permit is no more than a friendly formality and is granted without charge or restriction. On the other hand, the fee levied for the visa appears to constitute a restriction on the right of the affected United Nations staff members to remain there for the independent exercise of their functions in connexion with the United Nations. In our considered view, its imposition would consequently appear to be inconsistent with section 18 (d) of the Convention on the Privileges and Immunities of the United Nations, which section provides: "Officials of the United Nations shall. . . (d) be immune, together with their spouses and relatives dependent on them from immigration restrictions. . .". So far as I am aware, no other State requires United Nations officials to pay any fee as a condition for remaining in its territory when on the official business of the Organization.

The authorities in question subsequently agreed to grant all United Nations officials exemption from the fee required for the special visa concerned.

308. On a number of occasions States Parties to the General Convention have taken actions which have affected the employment of United Nations officials. On one such occasion, in 1956, a Member State declined to renew the residence visa of a staff member on the ground that it was not necessary that the post be filled by an "international" official but could be occupied by a locally recruited official. The Secretary-General protested against this measure, and requested its reconsideration. The letter of the Secretary-General included the following passage:

. . . It is beyond question that any device by which a Member Government interposed its unilateral decision as to the continuance in a United Nations post of an international official would be in express contradiction to Articles 100 and 101 of the Charter. Likewise, the right of a Member Government to place its visa on the national passport or the United Nations laissez-passer of a member of the staff does not entail the exercise of any power of decision as to the acceptability of the international official; the right of entering to take up a post of duty, and the right to remain at that post for as long as the responsible authority considers necessary, are fully established by the Charter and under Section 18 (d) and 24 and 25 of the Convention on the Privileges and Immunities of the United Nations. . .

(b) *Practice in respect of the United States*

309. United Nations practice concerning the exemption from immigration restrictions and alien registration of persons (other than representatives of States) required to attend United Nations Headquarters on official business, is chiefly governed by the terms of article IV of the Headquarters Agreement and of the pertinent United States legislation.

310. Article IV, section 11, of the Headquarters Agreement provides that United States authorities shall not impose any impediments to the transit to or from the Headquarters District of any persons having business there (including, in the case of officials, their families).¹²⁹ Under section 12, the provisions of section 11 are deemed applicable irrespective of the relations between the Governments of the persons referred to in section 11 and the Government of the United States. Sections 13 and 14 provide:

Section 13. (a) Laws and regulations in force in the United States regarding the entry of aliens shall not be applied in such manner as to interfere with the privileges referred to in Section 11. When visas are required for persons referred to in that section, they shall be granted without charge and as promptly as possible.

(b) Laws and regulations in force in the United States regarding the residence of aliens shall not be applied in such manner as to interfere with the privileges referred to in Section 11 and, specifically, shall not be applied in such manner as to require any such person to leave the United States on account of any activities performed by him in his official capacity. In case of abuse of such privileges of residence by any such person in activities in the United States outside his official capacity, it is understood that the privileges referred to in Section 11 shall not be construed to grant him exemption from the laws and regulations of the United States regarding the continued residence of aliens, provided that:

(1) No proceedings shall be instituted under such laws or regulations to require any such person to leave the United States except with the prior approval of the Secretary of State of the United States. Such approval shall be given only after consultation with the appropriate Member in the case of a representative of a Member (or a member of his family) or with the Secretary-General or the principal executive officer of the appropriate specialized agency in the case of any other person referred to in Section 11;

(2) A representative of the Member concerned, the Secretary-General or the principal executive officer of the appropriate specialized agency, as the case may be, shall have the right to appear in any such proceedings on behalf of the person against whom they are instituted;

(3) Persons who are entitled to diplomatic privileges and immunities under Section 15 or under the General Convention shall not be required to leave the United States otherwise than in accordance with the customary procedure applicable to diplomatic envoys accredited to the United States.

(c) This section does not prevent the requirement of reasonable evidence to establish that persons claiming the rights granted by Section 11 come within the classes described in that section, or the reasonable application of quarantine and public health regulations.

(d) Except as provided above in this section and in the General Convention, the United States retains full control and authority over the entry of persons or property into the territory of the United States and the conditions under which persons may remain or reside there.

¹²⁹ Questions relating to the right of transit are also considered in section 35, paras. 346-355, below.

(e) The Secretary-General shall, at the request of the appropriate American authorities, enter into discussions with such authorities, with a view to making arrangements for registering the arrival and departure of persons who have been granted visas valid only for transit to and from the Headquarters District and sojourn therein and in its immediate vicinity.

(f) The United Nations shall, subject to the foregoing provisions of this section, have the exclusive right to authorize or prohibit entry of persons and property into the Headquarters District and to prescribe the conditions under which persons may remain or reside there.

Section 14. The Secretary-General and the appropriate American authorities shall, at the request of either of them, consult, as to methods of facilitating entrance into the United States, and the use of available means of transportation, by persons coming from abroad who wish to visit the Headquarters District and do not enjoy the rights referred to in this Article.

311. Following the enactment of the United States Immigration and Nationality Act of 1952, the United States Representative forwarded to the Secretary-General a copy of a letter from the United States Attorney-General to the Secretary of State concerning the legal effect to be given to the execution, by United Nations staff members amongst others, of waivers under section 247 of the Immigration and Nationality Act of 1952. It was stated that this opinion was addressed in part to the questions which had been raised by the Secretary-General in earlier correspondence. Extracts from the opinion¹³⁰ are given below.

Under section 247, the Attorney General is required to adjust the status of an alien lawfully admitted for permanent residence, and thereby enjoying immigrant status, to that of a non-immigrant in one of three specified classes under section 101 (a) of the Act (roughly, accredited foreign government official, representative to or official of an international organization, or treaty trader), if the alien at the time of entry or thereafter acquires an occupational status which, were he seeking admission to the United States, would entitle him to a non-immigrant status in one of the three classes. The Attorney General's order of adjustment terminates the alien's immigrant status.

However, as provided in section 247 (b), the alien may avoid the loss of and retain his immigrant status, even though he is in one of the three classes of occupations, if he files with the Attorney General a written waiver of "all rights, privileges, exemptions, and immunities under any law or any executive order" which would otherwise accrue to him because of his occupational status. The Attorney General's regulations (Title 8, Part 247, effective December 24, 1952, 17 F.R. 11520) and the prescribed waiver (Form I-508) follow the quoted language of the statute; and the general question is, what are the rights, privileges, exemptions and immunities surrendered by the immigrant alien who is in one of the three occupational classes and files a waiver? More specifically, as Ambassador Lodge's inquiry indicates, the chief concern, in the case of international organizations like the United Nations, is the effect of such waivers on the immunity of officials of the organization from legal process relating to acts performed by them in their official capacity, and the immunity of employees from income taxation on salaries paid by the organization.

The Congress in drafting section 247, and in the legislative history of the Immigration and Nationality Act, made no attempt

¹³⁰ See also the opinion of 5 January 1954, cited in United Nations Legislative Series, *Legislative Texts and Treaty Provisions concerning the Legal Status, Privileges and Immunities of International Organizations*, vol. I, p. 150, where the United States Attorney-General held that a waiver under section 247 (b) did not apply to rights derived from treaties.

to list the rights, privileges, exemptions, and immunities it had in mind. However, it did leave in the legislative history, an indication of the kind of rights and privileges it felt should be and would be waived by the immigrant alien employed by an international organization or a foreign diplomatic mission if he wished to retain both his immigrant status and his occupation. Based upon these references, we are in a position to offer some general advice on the effect of a waiver under section 247 (b), but must leave to future administrative or judicial rulings the precise effect of individual waivers in the variety of situations that may arise.

The bill which became the Immigration and Nationality Act (H.R. 5678, 82nd Cong.) was one of a number introduced as the result of an investigation and study of the entire immigration and naturalization system by the Senate Committee on the Judiciary, pursuant to Senate Resolution 137 of the 80th Congress. In its report on the investigation made to the 81st Congress, the Committee considered the status of the various classes of non-immigrants and made five recommendations for changes in the immigration laws relating to accredited officials of foreign governments and representatives and officials of international organizations. These recommendations, it stated, would not "in its opinion jeopardize the conduction (*sic*) of the foreign relations of the United States". S. Report 1515, 81st Cong., page 523. The fifth of these recommendations read as follows:

"5. It is also recommended that provision be made for the adjustment of the status of a lawfully admitted permanent alien resident to that of a non-immigrant admitted under the foreign government official or international-organization category where the alien acquires an occupational status which would entitle him to such non-immigrant status if he were applying for admission. The subcommittee recommends that since such persons acquire the wide privileges, exemptions and immunities applicable to such aliens under our laws, they should not have the privilege of acquiring citizenship while in that occupational status." S. Report 1515, 81st Cong., page 525.

This recommendation might have been carried out by including a provision of law depriving of their immigrant status immigrants who acquired the privileges, exemptions, and immunities attaching to their occupations. Instead, the 82nd Congress took a less severe course and, in adopting section 247, gave immigrants in those occupations a choice of retaining privileges and surrendering immigrant status or of waiving privileges and keeping immigrant status.

In so doing, both the House and Senate Committees said: "In section 247, the Attorney General is required to adjust the status of immigrants who, subsequent to entry, acquire an occupational status which would entitle them to a non-immigrant status. . . This is intended to cover the situation where aliens who have entered as immigrants obtain employment with foreign diplomatic missions or international organizations or carry on the activities of treaty traders. Normally, they would be classified as non-immigrants and because of the nature of their occupation, would be entitled to certain privileges, immunities and exemptions. The committee feels that it is undesirable to have such aliens continue in the status of lawful permanent residents and thereby become eligible for citizenship, when, because of their occupational status they are entitled to certain privileges, immunities, and exemptions which are inconsistent with an assumption of the responsibilities of citizenship under our laws. Such an adjustment shall not be required if the alien executes an effective waiver of all rights, privileges, exemptions and immunities under any law or any Executive order which would otherwise accrue to him because of his occupational status". H. Report 1365, 82nd Cong., pp. 63-64, S. Report 1137, 82nd Cong., page 26. (Italics supplied.)

In other words, the concern was that the assertion of certain privileges and exemptions by immigrants, who were employed by international organizations and foreign missions but who entered this country ostensibly with the idea of becoming citizens, was

inconsistent with their proposed assumption of the responsibilities of citizenship; accordingly, such privileges should not be available to them. At the same time, the Congress disclaimed any intention of jeopardizing conduct of the foreign relations of the United States (supra, S. Report 1515, 81st Cong., page 523), which includes not jeopardizing the lawful activities of the international organizations and foreign missions located here, who normally engage Americans as well as aliens to conduct their business. In some instances our laws, granting the necessary protections and privileges for these organizations and missions and their employees, draw no distinctions between American and alien employees, treating all alike; in other cases, the privileges granted are not available to Americans but only to the non-citizen employees. Hence it is clear that the Congress intended to deprive immigrant aliens employed in the international organizations and foreign missions of the privileges and exemptions resulting from the occupational status which would not be equally available to American citizens similarly situated. Conversely, it was not the intention of the Congress to require immigrants in these occupations to surrender privileges which American citizens similarly employed may assert. Obviously, if American citizens may lawfully exercise such privileges, the privileges would not appear to be inconsistent with the responsibilities of citizenship.

The Congress might have discriminated entirely against immigrants in favour of citizens, but it did not do so. On the contrary it sought, by the election offered under section 247, to place immigrants and citizens in the specified categories of employment on an equal footing by denying to immigrants special privileges, exemptions, and immunities not available to citizens similarly employed.

For example, section 116 (h) of the Internal Revenue Code, 26 U.S.C. 116 (h), exempts from federal income taxation the compensation of an employee of an international organization if the employee is not a citizen of the United States. Thus, under this section of the law, American citizen employees of international organizations do not enjoy exemption from federal income taxes. Hence, to the extent that the federal income tax exemptions of employees of an international organization rest upon section 116 (h) of the Internal Revenue Code, American citizen employees individually bear an obligation of citizenship (the payment of taxes) which immigrant employees, who are potential citizens, heretofore had no need to bear as individuals (disregarding any equalization of pay that the employer organization may attempt to work out). Therefore, the tax exemptions under section 116 (h) claimable by an immigrant alien in one of the specified occupations is an exemption which he waives when he files the waiver under section 247 of the Immigration and Nationality Act.

A converse example, in the matter of legal process, is section 7 (b) of the International Organizations Immunities Act, 22 U.S.C. 288d, under which officers and employees of international organizations shall be immune from suit and legal process relating to acts performed by them in their official capacity and falling within their functions as such officers or employees, subject to waiver of the immunity by the international organization. In the case of the United Nations, these privileges together with the others in the Act became effective pursuant to Executive Order No. 9698 of February 19, 1946, 11 F.R. 1809. No distinction is made in the statute between citizen and non-citizen employees of the international organization. Hence it would appear that an immigrant alien employee of the United Nations who properly claims the immunity from suit and legal process for official acts allowed under section 7 (b) asserts no greater privilege than would an American citizen employee similarly situated. Accordingly, the waiver of immunities under section 247 of the Immigration and Nationality Act by the immigrant employee of the United Nations would not appear to be a waiver of the immunity from suit and legal process to which section 7 (b) of the International Organizations Immunities Act entitles him.

Application of the foregoing principles in interpreting waivers under section 247, on a case-by-case basis as different situations arise, should accomplish the objective laid down by the Congress. It should result in placing the employee of an international organization or foreign mission, who happens to be an immigrant, in a position of parity with his fellow American employee of the same organization by allowing the immigrant employee no greater privileges in connection with the employment than an American citizen similarly employed. In maintaining his immigrant status and preparing for American citizenship, the immigrant employee of the international organization or foreign mission will not be asserting privileges which he could not obtain and assert were he an American citizen in the same employment. Whatever rights remain and accrue to him as a result of the occupational status will be consistent with his "assumption of the responsibilities of citizenship under our laws".

Section 27. Exchange facilities

312. Under section 18 (e) officials of the United Nations are

accorded the same privileges in respect of exchange facilities as are accorded to the officials of comparable ranks forming part of diplomatic missions to the Government concerned.

313. A similar provision is contained in section 15 (e) of the Agreement with Switzerland and in the ECAFE and ECA Agreements. In each of the latter two Agreements, however, an additional clause is provided similar to section 13 (g) of the ECLA Agreement, which grants:

Freedom for officials of other than Chilean nationality to maintain within the territory of the Republic of Chile or elsewhere, foreign securities, foreign currency accounts and movable and immovable property, and on termination of their employment by ECLA, the right to take their funds out of Chile, without any restrictions or limitations, in the currencies and in the amounts brought by them into Chile through authorized channels.

314. A number of field offices reported difficulty in securing full implementation of this provision, in particular when officials sought to transfer their money into other currencies on completion of their assignment. In some instances, while imposing no restriction on the amount, the consent of the host authorities had to be obtained in order to convert local currency; in others limitations were placed on the total amount which might be transferred and an official permit was required. The procedures involved were frequently complex and lengthy. In a few cases it was said that there was no possibility to transfer local currency into that of the official's own country or into freely convertible currency.

315. It may be noted that in two cases which arose and on the basis of the particular facts, section 18 (e) was interpreted as applying only vis-à-vis a State Party to the General Convention in respect of officials resident within its territory. In the first of these cases in which the national Government of a Technical Assistance Board official froze the account which he maintained there, whilst stationed in another country, the Office of Legal Affairs stated that section 18 (e) was not generally deemed applicable as between an official and his national Government. Since the action was taken as part of a general measure and not aimed solely at the official, it was difficult to make representations to the Government concerned. In a further case which occurred in 1964, the Office of Legal Affairs advised that, since section 18 (e)

generally imposed an obligation on a State Party to the General Convention only in respect of officials resident there, no steps could be taken under that paragraph to request the removal of restrictions imposed on bank accounts maintained in one country by Technical Assistance Board officials stationed in another. The position would be different where accounts held by the United Nations itself were involved.

Section 28. Repatriation facilities in time of international crisis

316. Section 18 (f) of the General Convention provides that United Nations officials shall

Be given, together with their spouses and relatives dependent on them, the same repatriation facilities in time of international crisis as diplomatic envoys.

It is believed that the United Nations has not on any occasion directly invoked this provision, or its equivalent in other agreements.¹³¹ United Nations officials have been evacuated from certain areas, however, both in the Congo, chiefly with the help of United Nations facilities and forces, and in the Middle East.

Section 29. Importation of furniture and effects

317. Under section 18 of the General Convention, reflected in parallel provisions contained in the majority of host agreements, officials of the United Nations

(g) Have the right to import free of duty their furniture and effects at the time of first taking up their post in the country in question.

318. As regards the interpretation of the "effects" which may be imported free of duty, the United Nations has consistently maintained that these include an automobile. The following extract from a letter, sent to one of the specialized agencies in 1955, sets out the United Nations position.

We have consistently taken the position that the term "effects" in the aforementioned section of the Convention includes automobiles and that a United Nations official should, therefore, have the right to import his automobile free of customs duty at the time of first taking up his post, whether at United Nations Headquarters or at any other United Nations duty station. This position is based upon logic and practical necessity. Under present-day conditions, the automobile has become so commonplace a possession among people in circumstances comparable to those of a United Nations official that, for such an official, it would no longer be considered a luxury but should be deemed to constitute a reasonable part of his personal effects. Indeed, the possession of it may facilitate the performance of his functions, wherever he is stationed.

This position of ours has been in accord with the practice of a number of States and we are not aware of any instance where a contrary interpretation had been sustained or, at any rate, where a United Nations official had been required to pay customs duty for the importation of his automobile at the time of first taking up his post. The United States, which has not yet acceded to the Convention but has, under its International Organizations Immunities Act, granted exemption from customs duties on "baggage and effects of alien officers and employees of international organ-

izations imported in connection with the arrival of the owner", has invariably extended that exemption to automobiles.

319. The majority of countries place no restriction on the type of personal belongings which may be imported duty free during the installation period. A minority require duty to be paid on certain articles (e.g., on consumer goods) or prohibit their importation altogether (e.g., firearms).

320. As regards the length of time during which staff members may import their furniture and effects, the Legal Counsel replied to an enquiry from a United Nations subsidiary organ in the following terms:

In the consistent practice of the Secretariat, the expression "at the time of first taking up their post in the country in question" in section 18 (g) of the Convention on the Privileges and Immunities of the United Nations has been interpreted as meaning during a reasonable period of time after the physical arrival of the official concerned. The length of time that is considered reasonable may well depend on the circumstances of each case, such as those arising out of air travel which necessitates the separate transfer of effects by surface means, the great distances often involved and consequently the length of time surface transport entails and, also, the inevitable changes in assignment of staff at the United Nations from one country to another, frequently at short notice, involving at times problems of housing and installation and other practical considerations. Thus we have avoided laying down a hard and fast limit on the period of duty-free importation, but have consistently based ourselves upon the rule of reasonableness.

It was stated that a period of three months would unquestionably be unreasonable. A considerable number of countries either impose no time-limit on the period when personal belongings may be imported duty free or permit additional articles to be imported free of duty even after the period of first installation has elapsed, at least in the case of certain categories of officials (for example, UNDP resident representatives).

321. Section 11 (j) of the ECA Agreement provides that officials may import their furniture and effects free of duty within twelve months of taking up their post in Ethiopia. Owing to cases where officials sought to import their furniture and effects after the expiry of this period (e.g., upon extension of a one-year contract), ECA has sometimes found it necessary to request the Ethiopian authorities to grant an extension beyond twelve months. In 1959 the Brazilian Minister of Finances published a circular granting officials of the United Nations and specialized agencies stationed in Brazil the same customs treatment as that afforded to members of diplomatic missions in Brazil. Officials of Brazilian nationality are also granted the right of duty-free importation of their furniture and effects on returning to Brazil after two years or more service with the United Nations.

322. As regards the position in the United States, the entry free of duty and internal revenue tax of the baggage and effects of United Nations staff holding G-4 visas (i.e., those recruited internationally and who are not United States citizens) is governed by section 3 of the International Organizations Immunities Act and section 10.30A of the Customs Regulations of 1943. These provisions are interpreted and applied, on the basis of "reasonableness", broadly as described below. Baggage and effects may enter free only in connexion with the

¹³¹ Section 15 (f), Agreement with Switzerland, section 13 (h), ECLA Agreement, section 17 (e), ECAFE Agreement, section 11 ECA Agreement.

staff member's own entry into the United States, which may be either upon recruitment, upon change of duty station, or following official travel, including home leave. In the case of entry upon recruitment or following a change of duty station, the staff member may be required to furnish a detailed listing of his effects and the contents of baggage. One automobile and a reasonable amount of alcoholic beverages may be imported free of duty. In other cases newly acquired effects (including alcoholic beverages) may be imported in reasonable amount provided they have been in the staff member's possession abroad, i.e., purchased or shipped from a country which was visited by the staff member. In addition one automobile may be imported free of duty provided it has been at least one year since the previous importation of an automobile. All articles imported, irrespective of the time of entry, must be intended for the *bona fide* personal or household use of the staff member and may not be imported as an accommodation to others or for sale or other commercial use.

323. At the United Nations Office at Geneva the matter is governed in detail by the *Règlement douanier*, adopted by the Federal Council on 23 April 1952; the privilege which is granted extends in some cases beyond that of the duty free importation solely of furniture and effects. Senior officials assimilated to heads of diplomatic missions in Switzerland¹³² have the right to import goods of any description from outside the country which are destined for their own use or that of their family without payment of duty. Officials of the rank immediately below this¹³³ have the right to import furniture and effects on taking up the post and to import any other goods, other than furniture, at any time, provided these are solely for their own use or for that of their family, without payment of duty. Officials in these two categories are also entitled to purchase petrol, diesel oil, liquors and tobacco free of customs duties and other taxes. Other officials have the right of duty-free importation of their furniture and effects at the time of taking up the post, together with foodstuffs and alcohol. Officials, other than those assimilated to the heads of diplomatic missions, are not permitted to dispose of the goods imported by them within a period of less than five years unless the duty has been paid. Swiss nationals have no customs privileges, other than those granted to all persons resident in Switzerland, by virtue of their United Nations employment. It may also be noted that under the *Règlement douanier* senior officials of the United Nations Office at Geneva, officials holding a *laissez-passer* on temporary mission in Switzerland, experts on mission, and officials of the International Court of Justice, are accorded "*une vérification de leurs bagages personnels réduite au strict minimum*" i.e. one-fifth of the baggage.

324. As regards the importation of cars into Switzerland the position in brief¹³⁴ is that officials granted diplomatic

status have the right to import a car for their own use, duty-free, every three years. Any official (even a Swiss national) may import a car upon taking up his duties in Geneva, however, provided he has owned the car for at least a year; in this case, the official receives the same treatment as an immigrant. Non-Swiss nationals may later import a new car, duty free, as United Nations officials, provided the importation is made within eighteen months of the importation of their furniture. As regards the conditions under which vehicles may be disposed of, in the case of officials not granted diplomatic status a car imported duty free cannot be sold before five years without paying duty. If the official leaves before the five years are up, the amount of customs duty varies according to the length of time he has owned the car.

Section 30. Diplomatic privileges and immunities of the Secretary-General and other senior officials

325. Section 19 of the General Convention provides that:

In addition to the immunities and privileges specified in section 18, the Secretary-General and all Assistant Secretaries-General shall be accorded in respect of themselves, their spouses and minor children, the privileges and immunities, exemptions and facilities accorded to diplomatic envoys, in accordance with international law.

326. This provision was repeated in section 16 of the Agreement with Switzerland. By a decision of 30 December 1947, the Swiss Federal Council further decided:

... qu'à partir du 1^{er} janvier 1948 les privilèges et immunités accordés aux collaborateurs diplomatiques des chefs des missions accrédités auprès de la Confédération suisse seront également accordés à certains fonctionnaires de rang élevé de l'Office européen des Nations Unies.

En proportion de l'effectif actuel des fonctionnaires des Nations Unies à Genève, le nombre des bénéficiaires de cette décision ne devra pas dépasser trente-cinq.

Le directeur de l'Office européen des Nations Unies établira une liste des fonctionnaires de rang élevé entrant en ligne de compte et la soumettra au département politique. La même procédure vaudra pour les désignations ultérieures.

Les hauts fonctionnaires mis au bénéfice de la section 16 de l'Arrangement provisoire du 19 avril 1946 ne seront pas compris dans cette liste, étant donné qu'ils jouissent déjà des mêmes privilèges et immunités que les chefs de missions diplomatiques accrédités auprès de la Confédération suisse.

327. The arrangements indicated in the above decision have been followed in respect of the staff of the Geneva Office, subject to an exchange of letters, dated 5 and 11 April 1963, whereby section 16 of the 1946 Agreement was changed to read as follows:

Section 16. The Secretary-General and the Assistant Secretaries-General and the officials assimilated to them, shall be accorded in respect of themselves, their spouses and minor children, the privileges and immunities, exemptions and facilities accorded to diplomatic envoys, in accordance with international law and international usage.

In addition, officials in the categories which are specified by the Secretary-General or by the person authorized by him, and which are agreed to by the Swiss Federal Council, shall be accorded the privileges and immunities, exemptions and facilities accorded to diplomatic agents who are not heads of mission.

¹³² This category comprises Under-Secretaries and above, together with a few officials of Director rank (D.2). See section 30 below.

¹³³ In effect, those holding Director (D.2), Principal Officer (D.1) and certain Senior Officer (P.5) posts.

¹³⁴ For details see *Règlement douanier*, chap. X.

The personal baggage of persons coming within the scope of the first sentence of section 16 is not subject to inspection. Other persons coming within the scope of section 16 and who enjoy customs privileges are exempt from verification of their personal baggage by the Swiss authorities, except in the case where those authorities consider they have strong grounds for suspicion. In such a case verification may be required but is reduced to a strict minimum i.e. one-fifth of the baggage.

328. Section 15 of the ECLA Agreement provides:

The Government shall accord to the Executive Secretary and other senior officials of ECLA, recognized as such by the Ministry of Foreign Affairs, to the extent permitted under its constitutional precepts, the diplomatic immunities and privileges specified in Article 105, paragraph 2, of the United Nations Charter.

For this purpose, the said officials of ECLA shall be incorporated by the Ministry of Foreign Affairs into the appropriate diplomatic categories and shall enjoy the customs exemptions provided in section 1901 of the Customs Tariff.

Section 19 of the ECAFE Agreement and section 13 of the ECA Agreement contain similar provisions.

329. The staff of many of the missions sent by the United Nations have also been granted diplomatic privileges and immunities. Thus in the exchange of letters between the Secretary-General and the French and United Kingdom representatives in 1950 regarding the privileges and immunities of the United Nations Commissioner in Libya, the Secretary-General wrote:

It is noted that the Convention on the Privileges and Immunities of the United Nations does not appear to contain any express provision specifically applicable to an office such as that of the Commissioner in Libya. Nevertheless, it is my considered opinion that, in view of the high office which the Commissioner in Libya holds as an agent of this Organization and of the important functions granted to him, it would be necessary for the independent exercise of these functions that the Commissioner in Libya enjoy the privileges and immunities, exemptions and facilities accorded to diplomatic envoys and which are accorded to the Secretary-General and the Assistant Secretaries-General of the United Nations under section 19 of the Convention on the Privileges and Immunities of the United Nations.

The French and United Kingdom Governments agreed to this request.

330. In the case of the United Nations Commission for Indonesia, the Government of Indonesia granted the Principal Secretary and the members of the Secretariat the privileges and immunities accorded to members of the Diplomatic Corps of similar rank accredited in Indonesia.

331. Other examples of missions in which diplomatic privileges and immunities were granted include the United Nations Military Observer Group in Lebanon, the subsidiary organ of the United Nations under the charge of a Special Representative of the Secretary-General stationed in Jordan; the observation operation along the Saudi Arabia-Yemen border; and the United Nations Mediator in Cyprus and his staff. In addition a number of the resident representatives of the United Nations Development Programme enjoy diplomatic privileges and immunities, together with certain members of their staff (e.g., deputy resident representatives), under arrangements made with the State concerned. A similar

situation exists as regards the staff (usually the director and deputy director) of a number of United Nations Information Centres. In Presidential Decree No. 12991 of 10 June 1963, Lebanon granted diplomatic privileges and immunities to all directors and assistant directors of UNRWA residing in Lebanon, and to all other United Nations officials in Lebanon with the rank of director or above.

332. Following the abolition of the title "Assistant Secretary-General" and its replacement by "Under-Secretary", the Office of Legal Affairs prepared an *aide-mémoire* in 1959, reproduced below, covering United Nations practice under section 19 and its application to officials having the rank of Under-Secretaries.

1. Under section 19 of the Convention on the Privileges and Immunities of the United Nations, "the Secretary-General and the Assistant Secretaries-General shall be accorded in respect of themselves, their spouses and minor children, the privileges and immunities, exemptions and facilities accorded to diplomatic envoys, in accordance with international law". As a result of the reorganization of the Secretariat, carried out with the approval of the General Assembly (resolution 886 (IX) of 17 December 1954 adopted at the Ninth Session), the rank of assistant secretaries-general, as well as that of principal directors, was abolished and, instead, a single top level immediately below the Secretary-General was created of under-secretaries and officials having the status of under-secretaries.* This top level, as conceived at the time, was to comprise under-secretaries, with or without departments, heads of offices, and deputy under-secretaries. At present, however, there are no deputy under-secretaries. A current list of the actual posts is appended hereto. The question now arises as to whether such top-level officials are entitled to the same privileges and immunities as accorded, under section 19 of the Convention, to assistant secretaries-general.

2. In the opinion of the Secretary-General, the foregoing question should be answered in the affirmative. In other words, officials having the status of under-secretaries should enjoy the privileges and immunities provided for under section 19 of the Convention on the Privileges and Immunities of the United Nations. This position was submitted by the Secretary-General in his Report to the General Assembly as a part of the scheme of the reorganization of the Secretariat. Paragraph 31 of the Report states:

"31. In presenting these new organizational arrangements, I have anticipated that the officials having the status of Under-Secretaries will be accorded the privileges specified in section 19 of the Convention on the Privileges and Immunities of the United Nations. That section, in providing that the Secretary-General and all Assistant Secretaries-General would be granted the privileges and immunities of diplomatic envoys, clearly contemplated that the highest level of officials immediately under the Secretary-General should be accorded the privileges appropriate to their functions. I trust that it will be found consistent with the intentions of that section that those who would now be the highest level of officials immediately under the Secretary-General should enjoy the privileges recognized as appropriate to that status and to the responsibility it carries."**

No objection was expressed to this view by the Fifth Committee or the Advisory Committee on Administrative and Budgetary Questions. Although the resolution adopted by the General

* The scheme was first presented by the Secretary-General to the General Assembly at its eighth session in 1953. See *Official Records of the General Assembly, Eighth Session, Annexes*, agenda item 48, document A/2554, paras. 21-24. It was further elaborated in a report by the Secretary-General to the ninth session of the General Assembly. See *Official Records of the General Assembly, Ninth Session, Annexes*, agenda item 53, document A/2731, in particular paras. 13 and 14 and 28-32.

** A/2731, *op. cit.*, para. 31.

Assembly does not specifically refer to the privileges and immunities aspect, it "approves generally the measures adopted by the Secretary-General".***

3. The principle that the officials ranking immediately below the executive head should be accorded diplomatic privileges and immunities has indeed been applied to a number of specialized agencies. This has been done, for instance, by extending the application of section 21 of the standard clauses of the Convention on the Privileges and Immunities of the Specialized Agencies — a section corresponding to section 19 of the Convention on the Privileges and Immunities of the United Nations. Thus, with respect to the International Labour Organisation, Annex I to the Specialized Agencies Convention provides:

"The privileges, immunities, exemptions and facilities referred to in Section 21 of the standard clauses shall also be accorded to any Deputy Director-General of the International Labour Office and any Assistant Director-General of the International Labour Office." (Paragraph 2 of Annex I.)

Similar provisions in Annexes II and IV to the same Convention extend diplomatic privileges to "any Deputy Director-General" of, respectively, the Food and Agriculture Organization and the United Nations Educational, Scientific and Cultural Organization (paragraph 3 of Annex II and paragraph 2 of Annex IV). Similarly, the Second Revised Annex VII to the same Convention, approved by the Tenth World Health Assembly in 1957 extends diplomatic privileges to any "Deputy Director-General" of the World Health Organization.**** It may be significant to note that the above-cited instruments have all been accepted by a number of States, including the United Kingdom.

4. It is true that, under the re-organization, officials at the level immediately below the Secretary-General are more numerous than were the assistant secretaries-general. It may be pointed out, however, that these officials all have far-reaching responsibility for the conduct of activities within their respective fields. In principle the delegation from the Secretary-General of administrative responsibility is as great as, and their functions are no less than, in the case of the assistant secretaries-general before the re-organization. The fact is that the size, the scope of the responsibilities of the United Nations as a whole, and the number of programmes (including semi-independent subsidiary organs, major regional commissions, and the like) which the Organization has found necessary to establish, have all greatly expanded since the adoption of this Convention early in 1946. Thus, in the case of the heads of the subsidiary organs such as the Commander of the United Nations Emergency Force, the Executive Director of the United Nations Children's Fund, the United Nations High Commissioner for Refugees and the Director of the United Nations Relief and Works Agency for Palestine Refugees in the Near East, to name a few, it is obvious that the magnitude and importance of their operations are such that the privileges and immunities envisaged in section 19 of the Convention may be said to be as necessary for the independent exercise of their functions as they were for the assistant secretaries-general. Indeed, their position and degree of responsibility are not dissimilar to that of an executive head of a specialized agency accorded diplomatic status by section 21 of the companion Convention. Finally, it may be noted that in another important respect the under-secretaries occupy a station comparable to that of the former assistant secretaries-general and dissimilar to that of the regular Secretariat officials. Unlike the latter they are not given permanent contracts looking toward a career service. Not only are they selected on the personal judgement of the Secretary-General but their appointments are of limited duration, designed to be generally co-terminous with the Secretary-General's own term of office. This emphasizes the degree of their functional association with the chief

administrative officer of the Organization, with the reasonable implication that their diplomatic status might be expected to be of a similar order.

5. The next question then is: can the number of officials enjoying the privileges and immunities of section 19 of the Convention be reduced by granting such privileges and immunities to some of the officials at the rank immediately below the Secretary-General, and not to others at the same level? This would involve a discrimination as among officials of the same level and the question would arise: What criteria are to be used for differentiating among these officials? They have been given the same status and voted the same salary by the General Assembly. Any attempt at dividing them into classes, as it were, could not fail to lead to invidious results. It is also to be noted that as a practical matter it will be rare for any number of these officials to sojourn at any one time in any one country, other than at the seat of the Organization.

6. In its thirteen years of existence, there has been no case where the operation of section 19 of the Convention on the Privileges and Immunities of the United Nations has given rise to difficulty with any Government. It is therefore with a view to the preservation of a principle consecrated in that Section rather than to securing any short-range advantage, that the Secretary-General has felt constrained to adhere to the position which he presented to the General Assembly and which has not given rise to objection on the part of any Member State.

333. The following is a list of the officials who held the rank of Under-Secretary in 1967:

Officials holding the rank of Under-Secretary at United Nations Headquarters

Administrator, United Nations Development Programme
Associate Administrator, United Nations Development Programme
Co-Administrator, United Nations Development Programme
Commissioner for Technical Co-operation
Executive Director, UNICEF
Executive Director, United Nations Training and Research Institute
Secretary-General's Special Representative to the Conference of the Eighteen-Nation Committee on Disarmament
Under-Secretary, Controller
Under-Secretary, Director of General Services
Under-Secretary, Director of Personnel
Under-Secretary for Conference Services
Under-Secretary for Economic and Social Affairs
Under-Secretary for General Assembly Affairs and *Chef de Cabinet* of the Secretary-General
Under-Secretary for Inter-Agency Affairs
Under-Secretary, Legal Counsel
Under-Secretary for Political and Security Council Affairs
Under-Secretary for Special Political Affairs*
Under-Secretary for Special Political Affairs*
Under-Secretary for Trusteeship and Non-Self-Governing Territories

Officials holding the rank of Under-Secretary at established offices elsewhere

Commissioner-General, UNRWA
Executive Secretary, ECA
Executive Secretary, ECAFE
Executive Secretary, ECE

*** Resolution 886 (IX), of 17 December 1954, para. 2.

**** United Nations, *Treaty Series*, vol. 275, at page 300.

* One of the Under-Secretaries for Special Political Affairs was also in charge of the Office of Public Information.

Executive Secretary, ECLA
 Executive Director, United Nations Industrial Development Organization
 Secretary-General, United Nations Conference on Trade and Development
 Under-Secretary, Director-General of the United Nations Office at Geneva
 United Nations High Commissioner for Refugees
Officials holding the rank of Under-Secretary in charge of missions or on special assignment
 Chief of Staff, UNTSO
 Chief Military Observer, UNMOGIP
 Commander, UNEF
 Commander, UNFICYP
 Special Representative of the Secretary-General in Cyprus
 United Nations Representative for India and Pakistan

*Section 31. Waiver of the privileges and immunities of officials*¹³⁵

334. Section 20 of the General Convention provides as follows:

Privileges and immunities are granted to officials in the interests of the United Nations and not for the personal benefit of the individuals themselves. The Secretary-General shall have the right and the duty to waive the immunity of any official in any case where in his opinion the immunity would impede the course of justice and can be waived without prejudice to the interests of the United Nations. In the case of the Secretary-General, the Security Council shall have the right to waive immunity.

No instance has arisen in which the Security Council has been requested to waive the immunity of the Secretary-General.

335. The position in respect of the waiver of the privileges and immunities of officials was summarized in the following internal memorandum, dated 3 November 1964, prepared by the Office of Legal Affairs.¹³⁶

With reference to the inquiry concerning section 18 (a) of the Convention on the Privileges and Immunities of the United Nations, we should like to make the following comment:

1. The immunity from legal process in respect to official acts provided under section 18 (a) of the Convention applies vis-à-vis the home country of an official as well as vis-à-vis the country in which he is serving. Therefore, a question prior to the determination of what jurisdiction may try the case is whether the Secretary-General should waive the immunity of an official in a particular case.

2. Section 20 of the Convention provides that privileges and immunities are granted to officials in the interest of the United Nations and not for the personal benefit of the individuals themselves. The Secretary-General has the right and duty to waive the immunity of any official in any case where, in his opinion, the immunity would impede the course of justice and can be waived without prejudice to the interest of the United Nations. If the Secretary-General, in a particular case, decides that immunity would impede the course of justice and could be waived without

prejudice to the interests of the Organization, then he will waive under this section.

3. Normally, in the case of automobile accidents, where a satisfactory settlement is not negotiated, a waiver will be made with respect to the civil claim and a civil action can be tried in the country where the accident occurred or where the staff member may be located. As an alternative, arrangements could be made for arbitration under section 29 (b). Such arrangements under section 29 (b) are usually made on an *ad hoc* basis permitting the choice of the most appropriate method for each case. In the past there have been few criminal cases in which the question of waiver arose and the Secretary-General's decision under section 20 has been taken in each case in the light of the particular circumstances.

336. Amongst more detailed aspects of United Nations practice in respect of waivers it may be noted that in 1955 the Office of Legal Affairs advised that a decision of the Secretary-General would be required before a United Nations official could testify in connexion with any matter of United Nations concern; it was stated that an official might, however, testify as to his name, title, job description and date of his appointment, without special waiver. In 1963 the Foreign Ministry of a Member State requested the waiver of the immunity of a member of the United Nations Field Service who was involved in a car accident whilst driving on official duty. The United Nations requested the Government to provide in support of its request, not a "bare statement" of the fact that an offence had been committed under the Penal Code, "but a motivated statement of reasoning indicating the manner in which the course of justice" might be impeded by the immunity, as well as any other facts which might help the Secretary-General to determine whether or not the waiver could be granted without prejudice to the interest of the United Nations.

Section 32. Co-operation with the authorities of Member States to facilitate the proper administration of justice

337. Section 21 of the General Convention provides that:

The United Nations shall co-operate at all times with the appropriate authorities of Members to facilitate the proper administration of justice, secure the observance of police regulations and prevent the occurrence of any abuse in connection with the privileges, immunities and facilities mentioned in this Article.

338. The United Nations has co-operated with national authorities on a number of occasions where it seemed appropriate for it to do so; some of these occasions concerned judicial actions brought against or concerning staff members, which have been considered above.¹³⁷ The obligation to ensure that justice was done has operated as a major consideration in all cases involving requests for the waiver of the immunity of officials.¹³⁸ The observance of police regulations and the prevention of abuse of any of the privileges granted to officials under article V, have been secured chiefly through administrative means e.g., by means of the United Nations staff rules and administrative instructions. To a large extent, moreover, since the official has enjoyed the privilege or immunity concerned only through the intermediary of the United Nations, the Organization has been able to

¹³⁵ On the waiver of privileges and immunities in relation to United States immigrant status, see section 26 (b), paras. 309-311, above. The issue of the waiver of the immunity of officials in respect of official acts is also considered in section 23, para. 270, above.

¹³⁶ *United Nations Juridical Yearbook 1964*, p. 263.

¹³⁷ See section 23, para. 270, above.

¹³⁸ *Ibid.*, and section 31, paras. 334-336, above.

control the manner and extent of the exercise of each privilege or immunity, and thereby prevent any abuse.

CHAPTER V. — PRIVILEGES AND IMMUNITIES OF EXPERTS ON MISSIONS FOR THE UNITED NATIONS AND OF PERSONS HAVING OFFICIAL BUSINESS WITH THE UNITED NATIONS

Section 33. Persons falling within the category of "experts on missions for the United Nations"

339. Under article VI of the General Convention certain immunities, broadly similar to those accorded to officials under article V, are granted to "Experts (other than officials coming within the scope of article V) performing missions for the United Nations".

340. United Nations action at the time of appointment is conclusive in determining whether or not a given person has been appointed as a staff member, so as to be subject to the United Nations staff rules and regulations and to enjoy the benefits of article V of the Convention, or as an expert subject to different contractual conditions and falling under article VI of the Convention as regards privileges and immunities. As noted in sections 22 and 24 above, Governments have on occasions considered that technical assistance experts (who are employed as staff members) were to be classified as experts under article VI of the Convention, and not therefore immune from taxation. In correspondence with a Member State in 1956, the Legal Counsel described the distinction between officials, falling under article V, and experts who come under article VI as follows:

. . . Owing to the similarity of the terms, it is understandable that there should arise a tendency to regard Technical Assistance experts as experts within the meaning of Article VI of the Convention on Privileges and Immunities of the United Nations, or as experts referred to in Section 29 and annexes I, II, III, IV, and VII of the Convention on the Privileges and Immunities of the Specialized Agencies. The resemblance is, however, fortuitous, and the two categories are legally and administratively quite distinct. The terms "experts on missions for the United Nations" and "experts serving on Committees or performing missions" for a Specialized Agency were intended to apply only to persons performing a mission for the United Nations or a Specialized Agency who, by reason of their status, are neither representatives of Governments nor officials of the Organization concerned but who, for the independent exercise of their functions in connection with their respective Organizations, must enjoy certain privileges and immunities. An example of such "experts on missions" would be members of certain commissions and committees of the United Nations or of the Specialized Agencies who serve in their individual capacity and not as government representatives. Another example is the United Nations military observers at present serving in Palestine and Kashmir, whose salaries are paid by their own respective Governments and to whom the United Nations pays only an allowance. In adopting Article VI of the United Nations Convention, the General Assembly had in mind peace missions in particular. It did not provide for the tax exemption of such experts (though it conferred upon them a quasi-diplomatic status not enjoyed by Secretariat officials), because they are commonly made available or even seconded by Governments, or else are designated to serve in a special status deliberately set apart from Secretariat staff. Therefore, whether a person is in the status of an "official" or in that of an "expert on mission" depends on the nature of his contractual relations, his terms of service, with the Organization concerned.

With regard to Technical Assistance experts engaged by the United Nations or by one of the Specialized Agencies, it is felt that, to enable the Executive Head concerned to exercise the responsibilities vested in him in the implementation of the Expanded Programme of Technical Assistance, it is necessary, as far as possible, to bring such experts under the authority of the Executive Head of the Organization with which they serve to a degree similar to staff members. Moreover, in view of the fact that such experts perform functions essentially similar in nature to those of staff members, it is important that there be equality of treatment between such experts and members of the staff — as well as the intended equality of treatment as, among themselves, regardless of nationality. For these reasons, Technical Assistance experts, with certain exceptions which will be explained in the next paragraph, are subject to obligations and accorded rights substantially the same as those of staff members. They subscribe to the same oath; they are similarly subject to the authority of and are responsible to their respective Executive Heads; and they receive a monthly salary, and this salary is subject to staff assessment (in Organizations in which such assessment is applied to the staff) in the same manner as other staff members. Such experts are therefore designated as being in the categories of officials and are entitled to the privileges and immunities appertaining to officials. The result is logical, since all the policies motivating the adoption by the General Assembly in the Conventions of the respective Articles on officials are thus seen to be equally applicable to those serving as Technical Assistance experts.

As an exception to the general rule stated in the preceding paragraph, a small number of technical assistance experts are engaged from time to time who are not brought under the authority of the Executive Head of the Organization with which they serve to a degree similar to staff members because circumstances which vary in every individual case render it unnecessary or inadvisable to do so. Such experts are not considered as falling in the categories of officials but rather as being in the status of "experts on missions for the United Nations" or "experts performing missions" for a Specialized Agency, as the case may be. An example might be the case of an individual whose sole responsibility is the production of a text book or a report for a fixed fee; another example might involve engagement of the services of an individual through contract with a third party such as a university or research institution, the contractual relationship being between the Executive Head and the institution on the one hand, and between the institution and the individual on the other. Such individuals are engaged under special contractual arrangements which neither confer on them the privileges of staff membership nor require of them the obligations of members of the staff. They do not subscribe to the oath of office; their remuneration is normally paid on the basis of a fixed fee which is not related to the international salary scale; and the extent of the authority of the Executive Head over such individuals and of their responsibility to him is narrow in scope and limited to the terms set forth in the contractual agreement under which they are engaged. Many of these Technical Assistance experts are engaged on relatively short-term appointments although, in principle, it is not this fact which distinguishes them from staff members, since some staff members are also engaged on short terms. . .

341. Examples of persons classified as "experts on missions for the United Nations" include UNTSO and UNMOGIP military observers, who are military officers, loaned by Government, and officers serving on the United Nations Command (The Commander's Headquarters Staff) of UNEF and UNFICYP,¹³⁹ members of the Administrative Tribunal, of the Advisory Committee

¹³⁹ UNEF Agreement, para. 25, United Nations, *Treaty Series*, vol. 260, p. 61, and UNFICYP Agreement, para. 25; *ibid.*, vol. 492, p. 72.

on Administrative and Budgetary Questions, of the International Civil Service Advisory Board, of the International Law Commission, of the Permanent Central Narcotics Board, and consultants.

Section 34. Privileges and immunities of "experts on missions for the United Nations"

342. Article VI of the General Convention provides as follows:

Section 22. Experts (other than officials coming within the scope of Article V) performing missions for the United Nations shall be accorded such privileges and immunities as are necessary for the independent exercise of their functions during the period of their missions, including the time spent on journeys in connexion with their missions. In particular they shall be accorded:

(a) Immunity from personal arrest or detention and from seizure of their personal baggage;

(b) In respect of words spoken or written and acts done by them in the course of the performance of their mission, immunity from legal process of every kind. This immunity from legal process shall continue to be accorded notwithstanding that the persons concerned are no longer employed on missions for the United Nations;

(c) Inviolability for all papers and documents;

(d) For the purpose of their communications with the United Nations, the right to use codes and to receive papers or correspondence by courier or in sealed bags;

(e) The same facilities in respect of currency or exchange restrictions as are accorded to representatives of foreign governments on temporary official missions;

(f) The same immunities and facilities in respect of their personal baggage as are accorded to diplomatic envoys.

Section 23. Privileges and Immunities are granted to experts in the interests of the United Nations and not for the personal benefit of the individuals themselves. The Secretary-General shall have the right and the duty to waive the immunity of any expert in any case where, in his opinion, the immunity would impede the course of justice and it can be waived without prejudice to the interests of the United Nations.

343. In so far as the privileges and immunities listed are similar to those accorded to officials under article V, United Nations practice in respect of the latter may be considered relevant to the interpretation of the provisions of article VI; it may be noted that experts are given an express immunity from personal arrest. The difference between the two articles which has attracted most attention, however, is that in article VI no immunity is granted from national taxation. In the case of United Nations military observers, their only emoluments from the United Nations are normally a *per diem* allowance which is regarded as a subsistence allowance during their period of duty. Members of the International Law Commission and of the Permanent Central Narcotics Board and Drug Supervisory Body, on the other hand, receive honoraria from the United Nations. The taxability of these payments is dependent on the appropriate national tax laws.

344. When acceding to the General Convention in 1962, Mexico did so subject to the reservation that experts of Mexican nationality, exercising their functions in Mexico, should enjoy the privileges of section 22 (a), (b), (c), (d) and (f) respectively, "on the understanding that the inviolability established in . . . Section 22, paragraph (c),

shall be granted only for official papers and documents".

345. It may be noted that in the case of military observers certain privileges and immunities, additional to those contained in article VI, and necessary for the performance of their functions, such as freedom of movement across armistice demarcation lines, have been established by custom, under Security Council resolutions, and by direct intentment of Article 105 of the Charter. Lastly, although article VI contains no provision for the grant of privileges and immunities to the dependants of experts on mission, such dependants have in practice been accorded certain limited privileges.

Section 35. Privileges and immunities of persons having official business with the United Nations

346. In addition to United Nations officials and "experts on missions for the United Nations", a remaining category of persons (other than the representatives of Member States) who may enjoy certain privileges and immunities are those having official business with the United Nations. Examples of persons falling within this category are those invited to appear before United Nations bodies, whether in a representative capacity (e.g. on behalf of a non-governmental organization having consultative status) or as individuals able to supply information of interest to the United Nations body concerned, Press representatives, and persons invited to participate in seminars or similar meetings held under United Nations auspices. The privileges and immunities of those attending United Nations proceedings in this way include all those necessary to enable them to perform the official business concerned, as well as the right of transit and of access.

347. A number of agreements contain provisions expressly granting such persons rights of transit to United Nations premises. Section 12 of the ECLA Agreement, for example, states that the Chilean authorities shall impose no impediment to transit to and from the Headquarters of ECLA of persons invited to the Headquarters on official business, as certified by the Executive Secretary of the Commission. The ECA and ECAFE Agreements contain a similar provision. Section 17 of the ECLA Agreement further provides that persons invited on official business (other than those of Chilean nationality) shall enjoy the same privileges and immunities as are granted to officials under section 13 of the ECLA Agreement, with the exception of the right to import furniture and effects free of duty.

348. In the case of the United States, the matter is chiefly regulated by Article IV of the Headquarters Agreement; in particular section 11 of that Article provides:

The federal, state or local authorities of the United States shall not impose any impediments to transit to or from the Headquarters District of . . . (3) representatives of the press, or of radio, film or other information agencies, who have been accredited by the United Nations (or by such a specialized agency) in its discretion after consultation with the United States, (4) representatives of non-governmental organizations recognized by the United Nations for the purpose of consultation under Article 71 of the

Charter, or (5) other persons invited to the Headquarters District by the United Nations or by such specialized agency on official business. The appropriate American authorities shall afford any necessary protection to such persons while in transit to or from the Headquarters District. This section does not apply to general interruptions of transportation which are to be dealt with as provided in Section 17, and does not impair the effectiveness of generally applicable laws and regulations as to the operation of means of transportation.

349. The application of the provisions of article IV to the representatives of non-governmental organizations have been the subject of extensive discussion both in the Economic and Social Council and in the General Assembly.¹⁴⁰ The first phase of the discussion centred on the question of access to the United Nations Headquarters of representatives of non-governmental organizations in consultative status for the purpose of attending the meetings of the General Assembly while their right of access for the purpose of attending the sessions of the Economic and Social Council was not disputed. The discussion resulted in the adoption by the General Assembly of resolution 606 (VI), the operative part of which reads as follows:

1. *Authorizes* the Secretary-General, upon the request of the Economic and Social Council or its Committee on Non-Governmental Organizations, to make arrangements to enable the representative designated by any non-governmental organization having consultative status to attend public meetings of the General Assembly whenever economic and social matters are discussed which are within the competence of the Council and of the Organization concerned;

2. *Requests* the Secretary-General to continue to give assistance to representatives of such non-governmental organizations in facilitating transit to or from sessions of the General Assembly and its Committees.

350. The question of the admission of representatives of non-governmental organizations to United Nations Headquarters arose again when the United States, in denying visas to certain representatives of non-governmental organizations, invoked section 6 of its Public Law 357, as assertedly constituting a reservation to the Headquarters Agreement. Section 6 of Public Law 357 provides that:

Nothing in the agreement shall be construed as in any way diminishing, abridging, or weakening the right of the United States to safeguard its own security and completely to control the entrance of aliens into any territory of the United States other than the Headquarters District and its immediate vicinity, as to be defined and fixed in a supplementary agreement between the Government of the United States and the United Nations in pursuance of section 13 (3) (e) of the agreement, and such areas as it is reasonably necessary to traverse in transit between the same and foreign countries. Moreover, nothing in section 14 of the agreement with respect of facilitating entrance into the United States by persons who wish to visit the Headquarters District and do not enjoy the right of entry provided in Section 11 of the agreement shall be construed to amend or suspend in any way the immigration laws of the United States or to commit the United States in any way to effect any amendment or suspension of such laws.

¹⁴⁰ The following account is taken from the *Repertory of Practice of United Nations Organs*, vol. V, pp. 343-4 and *ibid.*, suppl. No. 1, vol. II, p. 423, where detailed references may be found.

351. The Secretary-General, having conducted a series of negotiations with the representatives of the United States, submitted a progress report to the Economic and Social Council in which he enumerated the rights of the United Nations and the United States under the Headquarters Agreement as follows:

(1) It had been recognized from the outset that the Headquarters Agreement should not be permitted to serve as a cover to enable persons in the United States to engage in activities outside the scope of their official functions;

(2) Subject to the purpose of the Headquarters Agreement, the United States could grant visas only for transit to and from the Headquarters District and sojourn in its immediate vicinity; it could make any reasonable definition of the "immediate vicinity" of the Headquarters District, of the necessary routes of transit, and of the time and manner of expiration of the visa following the completion of official business; and it could carry out deportation proceedings against persons who abused the privileges of residence by engaging in activities in the United States outside their official capacity;

(3) In the case of aliens in transit to the Headquarters District "exclusively on official business of, or before the United Nations", the rights of the United States were limited by the Headquarters Agreement to those mentioned.

On 1 August 1953, the Economic and Social Council adopted resolution 509 (XVI) in which it noted the oral and written reports made by the Secretary-General and expressed the hope that any remaining questions would be satisfactorily resolved within the provisions of the Headquarters Agreement.

352. The question of access was raised again at the twenty-first session of the Economic and Social Council. A representative designated by the World Federation of Trade Unions to attend that session of the Council was refused a visa by the United States authorities. In the Committee on Non-Governmental Organizations, it was alleged that such action on the part of the United States was contrary to the Headquarters Agreement and to the principles laid down in the Secretary-General's report on the subject; reference was also made to resolution 509 (XVI). In reply the United States representative maintained that his Government was well aware of the terms of the Headquarters Agreement and had applied them. However, the Agreement, in the form approved by the United States Senate, was open to different interpretations. He explained that the United States Government had refused the visa to the representative in question on the ground of the national security of the United States and the interests of the United Nations. The Secretary-General requested consultations with the United States authorities in accordance with the arrangements agreed upon in 1953. It was announced to the Economic and Social Council on 3 May 1956 that, as a result of the consultations, the United States had authorized the issue of a visa to the representative and that negotiations were continuing to establish an effective and expeditious procedure in similar cases.

353. In 1963 the Legal Counsel was asked by the Fourth Committee to give an opinion on the question of the right of transit to the Headquarters District in connexion with the possible appearance before the Committee of Mr. Henrique Galvao. The opinion given is reproduced below:

15 November 1963

1. At its 1475th meeting, on 11 November 1963, the Fourth Committee requested an opinion as to the legal implications of the possible appearance before it of Mr. Henrique Galvao.

2. The Committee will wish to take into account the limited character of the legal status of an individual invited to the Headquarters for the purpose of appearing before a Committee of the General Assembly or other organ of the United Nations.

3. Section 11 of the Agreement between the United Nations and the United States of America regarding the Headquarters of the United Nations (General Assembly resolution 169 (II)) provides that the federal, state or local authorities of the United States shall not impose any impediments to transit to or from the Headquarters District of (among other classes of persons) persons invited to the Headquarters District by the United Nations on official business. While such a person is in transit to or from the Headquarters District, the appropriate American authorities are required to accord him any necessary protection.

4. Apart from police protection, therefore, the obligations imposed on the host Government by the Headquarters Agreement are limited to assuring the right of access to the Headquarters and an eventual right of departure. The Headquarters Agreement does not confer any diplomatic status upon an individual invited because of his status as such. He therefore cannot be said to be immune from suit or legal process during his sojourn in the United States and outside of the Headquarters District.

5. Two other provisions of the Headquarters Agreement serve to reinforce the right of access to the Headquarters. Section 13 (a) specifies that the laws and regulations in force in the United States regarding the entry of aliens shall not be applied in such manner as to interfere with the privilege of transit to the Headquarters District. This provision, however, clearly assures admission to the United States without conferring any other privilege or immunity during the sojourn. Similarly, section 13 (b) interposes certain limitations on the right of the host Government to require the departure of persons invited to the Headquarters District while they continue in their official capacity; but this plainly relates to restrictions on the power of deportation and not, conversely, on a duty to bring about departure. Moreover, section 13 (d) makes clear that, apart from the two foregoing restrictions, "the United States retains full control and authority over the entry of persons or property into the territory of the United States and the conditions under which persons may remain or reside".

6. It is thus clear that the United Nations would be in no position to offer general assurances to Mr. Galvao concerning immunity from legal process during his sojourn in the United States. It might be that individual citizens of the United States might have civil causes of action against him and could subject him to service of process. While the Federal Government might have no intention, and might lack jurisdiction, to initiate any criminal proceedings against him, it is a known fact that there are legal limitations on the powers of the Executive Branch of the United States Government to ensure against any type of proceeding by another branch of the Government, including the Judicial Branch.

7. Moreover, apart from general restrictions in the Federal Regulations on the departure of an alien from the United States when he is needed in connexion with any proceeding to be conducted by any executive, legislative, or judicial agency in the United States, the attention of the Committee has already been invited to the possibility that extradition proceedings might be instituted against Mr. Galvao during his presence in this country. By an

Extradition Convention of 1908 between Portugal and the United States* persons may be delivered up who are charged, among other crimes, with piracy or with mutiny or conspiracy by two or more members of the crew or other persons on board of a vessel on the high seas, for the purpose of rebelling against the authority of the captain of the vessel, or by fraud or violence taking possession of the vessel, or with assault on board ships upon the high seas with intent to do bodily harm, or with abduction or detention of persons for any unlawful end. The extradition is also to take place for the participation in any of such crimes as an accessory before or after the fact. The Convention contains the usual exception for any crime or offence of a political character, or for acts connected with such crimes or offences. (Articles II, III.)

8. Whenever there is an extradition convention between the United States and any foreign Government, any federal or state judge of the United States may issue a warrant for the apprehension of any person found within his jurisdiction who is properly charged with having committed within the jurisdiction of any such foreign Government any of the crimes provided for by the Convention; if, after hearing and considering the evidence of criminality, the judge deems it sufficient to sustain the charge under the convention, he must certify this conclusion to the Secretary of State of the United States in order that a warrant may be issued upon the requisition of the proper authorities of the foreign Government for the surrender of the person according to the terms of the convention.**

9. There is no precedent in the history of the Headquarters Agreement which would indicate whether an application of Federal Regulations restricting departure of an alien, by reason of proceedings against him not related to his presence in the United Nations, would constitute an impediment to transit "from the Headquarters District" within the meaning of section 11 of the Agreement. There is likewise no precedent which would indicate whether compliance by the Federal Government with the terms of an extradition treaty would conflict with the right of transit of an invitee from the Headquarters District. In this connexion it is important to note that what the United States Government has undertaken not to do, by the terms of section 11, is to "impose" any impediment to transit from the Headquarters. To the extent that the presence of Mr. Galvao in the United States might in one manner or another give rise to proceedings against him by the operation of existing law in relation to pre-existing facts (such as previous activities on his part), it could be argued that this did not constitute an action taken by the Government to impose an impediment on his departure.

10. The Legal Counsel is of course not in a position to pass upon the internal operations of United States law, much less upon the relations between the Executive and Judicial Branches of the Government. Even if it should prove possible that the Executive Branch could, in the exercise of its authority over foreign affairs, certify and allow to the Judicial Branch that the freedom of Mr. Galvao to depart without impediment should override the authority of the courts to detain him, it is not clear on what basis an advance assurance could be given him. Likewise, even if a dispute were to arise between the United Nations and the United States on such an issue, it might eventually require referral to a tribunal of arbitrators under the terms of section 21 of the Headquarters Agreement.

11. In these circumstances, it must be recognized that a situation could arise by which the Fourth Committee was deprived of the advantage of receiving oral testimony from Mr. Galvao. Should he not be prepared to attend because of the inability of the host Government to confer upon him a general immunity,

* See Treaties, Conventions, International Acts, Protocols and Agreements between the United States of America and other Powers, 1776-1909, William M. Malloy, compiler (Washington, Government Printing Office, 1910), vol. II, pp. 1469-1474.

** See United States Code, 1958 Edition (Washington, United States Government Printing Office, 1959), Vol. Four, Title 18, Sec. 3184.

it is clear that his abstention from appearing would be his own, and not the affirmative imposition of an impediment to his transit. For it might only be at the moment of his attempted departure from the United States that an arbitrable dispute could arise as to whether he was entitled to depart notwithstanding proceedings which might in the meantime have been instituted against him.

12. Two other points of law were raised in the 1475th meeting of the Committee. It was suggested that, in the event of a conflict between the obligations of the United States under its Extradition Treaty with Portugal and the Charter, the obligations under the Charter would prevail by virtue of its Article 103. The difficulty here is that such rights as inure to Mr. Galvao stem directly from the Headquarters Agreement and not from any provision of the Charter, which does not cover invitees. The question was also raised as to whether the Treaty could be invoked before the General Assembly under Article 102 of the Charter. The sanction in the second paragraph of that Article, however, relates to treaties required to be registered with the Secretariat under that Article. The Extradition Treaty in question dates from the year 1908, whereas the duty to register relates only to treaties entered into by a Member after the coming into force of the Charter. It is also true that, in the hypothetical situation dealt with above, the risk is that the Extradition Treaty would be invoked in the United States courts rather than in the General Assembly.¹⁴¹

354. In order to obtain assurance that Member States would not raise requests for extradition in respect of petitioners and others invited to United Nations Headquarters, or to regional or other major offices, the Secretary-General addressed an enquiry to all Member States; the majority of replies gave appropriate assurances. In those cases where the replies specifically referred only to United Nations Headquarters, the Secretary-General stated when acknowledging the assurance given that he was confident that the State concerned would be guided by the same principle with respect to persons invited by the United Nations to its offices other than its Headquarters, for example, the offices of the regional commissions, located in countries with which the particular State might have an extradition treaty.

355. As regards the immunity of persons giving evidence before United Nations inquiry bodies, the following paragraphs from the Report of the Commission of Investigation into the Conditions and Circumstances resulting in the Tragic Death of Mr. Dag Hammarskjöld and Members of the Party Accompanying Him may be noted:

54. The Rhodesian authorities, in discussions with the Commission indicated that the laws of the Federation relating to the attendance of witnesses could not be made applicable to the hearing of the United Nations Commission without special legislation, which could not be enacted in time for the United Nations hearings. Consequently, it would not be possible for the United Nations Commission to subpoena witnesses, administer oaths, or commit for contempt. The authorities further expressed the view that it would not be possible to treat the statements of witnesses to the United Nations Commission as "privileged".

55. With respect to the first three points no particular difficulties were envisaged. The Rhodesian authorities assured the Commission that all officials desired by the Commission would appear on request, and that assistance would be given in obtaining the voluntary appearance of witnesses. In fact, while attendance could not

be compelled, there was not a single instance in which a witness requested by the Commission did not appear, and in some cases witnesses were brought many miles to be available to the Commission.

56. The Commission was, however, concerned at the suggestion that the testimony of witnesses who appeared before it might not be privileged. In its view a witness appearing before a United Nations Commission must enjoy privilege against legal process as a result of such appearance. The view was expressed that such privilege was enjoyed under the general principles of law and in accordance with Article 105 of the Charter of the United Nations. Without prejudice to the legal position, the Rhodesian authorities gave assurances that there would be no governmental action against any person by reason of his appearance and or testimony before the United Nations Commission.¹⁴²

CHAPTER VI. — UNITED NATIONS "LAISSEZ-PASSER" AND FACILITIES FOR TRAVEL

Section 36. Issue of United Nations laissez-passer and their recognition by States as valid travel documents

356. Article VII, section 24 of the General Convention provides that "The United Nations may issue United Nations *laissez-passer* to its officials"; and that "These *laissez-passer* shall be recognized and accepted as valid travel documents by the authorities of Members", taking into account the provisions of section 25 dealing with applications for visas.

357. The United Nations has issued *laissez-passer* to officials travelling on official business (including travel on home leave, at official expense) including technical assistance experts, other than those classified as "experts on missions for the United Nations". It has declined to issue *laissez-passer* to OPEX officers, on the ground that these are servants of Governments and not officials.

358. The issue of *laissez-passer* has been carefully regulated. As regards the locally recruited staff of field missions, *laissez-passer* have been issued only after study of each individual case, solely for the purposes of official business, and subject to the condition that the document be returned to the administration after completion of the mission.

359. The position in respect of dependents was described as follows in a letter dated 13 September 1951 sent by the Office of Legal Affairs to the Legal Adviser of a permanent mission.

Section 24 of the Convention on the Privileges and Immunities of the United Nations provides that the United Nations may issue the *laissez-passer* "to its officials". For that reason it is our view that Member States parties to the Convention are required to accept it as a valid travel document only for the staff member who is technically its sole bearer and who is adequately identified by description and photograph on pages 1, 2 and 4. It would thus follow that an official could not use the *laissez-passer* as a means of obliging a Member Government to accept into its territory persons who claim to be members of his family.

As you have noted, there are nevertheless important reasons for identifying any members of his family who may accompany the bearer of the *laissez-passer*. For this purpose space is provided

¹⁴¹ *Official Records of the General Assembly, Eighteenth Session, Annexes*, agenda item 23, document A/C.4/621. See also section 38, paras. 371 and 372, below concerning the travel documents of petitioners.

¹⁴² *Official Records of the General Assembly, Seventeenth Session, Annexes*, agenda item 22, document A/5069 and Add.1.

on page 6, although a photograph is not necessarily used. In our view, however, the identification on page 6 does not itself make the *laissez-passer* a valid travel document for the family members but simply helps to identify for the convenience of Member Governments the persons most likely to be claiming the several derivative privileges under the Convention. For example, section 18 (d) and (f) specifically refer to "spouses and relatives dependent" of officials of the United Nations in creating an immunity from immigration restrictions and alien registration and providing a privilege as to repatriation facilities in time of international crisis. Customs officers may likewise be assisted in granting privileges or courtesies by thus being informed as to the members of the immediate family.

At the same time, I might draw your attention to one occasional problem that can arise from this requirement of an additional travel document covering the members of the family of the official. There will be a few cases in which a member of the family will not have been able to obtain a valid passport. In such cases it has been customary for an affidavit of identity, with a photograph and other adequate description of the bearer, and with an indication of the reasons for the inability to have obtained a passport to be carried by the individual concerned. Visas have been entered directly on this affidavit of identity, including the so-called 3 (7) visas admitting persons to the United States under the terms of the Headquarters Agreement. . . A visa would, of course, be required whether or not the issuing Government would require one if a valid passport of the nationality in question were presented.

360. The provision in the General Convention relating to the issue of *laissez-passer* was one of the obstacles to accession by the United States to the General Convention. After referring to section 24, the Committee on Foreign Relations of the United States Senate stated:

The committee was assured that this language does not authorize or require the United Nations or any Member State to issue or accept a document which is a substitute for a passport or other documentation of nationality. It provides only for a certificate attesting to the United Nations affiliation of the bearer in respect to travel and will be accepted by the United States as such a document. Article VII, in other words, would not amend or modify existing provisions of the law with respect to the requirement of issuance of passports or of other documents evidencing nationality of citizens or aliens. To make this point perfectly clear, the committee approved a second amendment to the resolution.¹⁴³

The proposed amendment was as follows:

Nothing in article VII of the said convention with respect to *laissez-passer* shall be construed as in any way amending or modifying the existing or future provisions of the United States law with respect to the requirement or issuance of passports or of other documents evidencing nationality of citizens or agents, or the requirement that aliens visiting the United States obtain visas.

361. The possibility of Member States using their control over the issue of national passports as a means of regulating the selection of their nationals for employment with the United Nations was discounted by the Secretary-General in his report on personnel policy to the General Assembly at its seventh session.¹⁴⁴ He declared that the assumption that this could be done was not in keeping with the actual legal position of the staff of the Organization. After recalling Articles 101

and 105 of the Charter and section 24 of the General Convention, the report stated:

The Secretary-General has never treated this provision as in any way exempting staff from meeting normal travel and documentary requirements of the Governments concerned. On the other hand, it is clear that Member States should not, under the provisions of the Charter, seek to interpose their passport or visa requirements in such a manner as to prevent staff from taking up their post of duty with the United Nations or from travelling from country to country on its business.

362. In the course of discussions on this subject in plenary meeting at the seventh session of the General Assembly, there was disagreement with this interpretation of the General Convention. The view was expressed that when a Member State informed the Secretary-General that a passport had been refused to a staff member, he should immediately inquire into the circumstances of such a refusal and should refrain from issuing a *laissez-passer* to the official concerned pending the results of such an inquiry.

363. Member States have recognized the *laissez-passer* as a valid travel document. No precise information is available, however, as to the extent of this recognition, or how frequently State authorities also require the production of a national passport. To some extent those questions are answered in section 39, paras. 373 and 374, below, dealing with the issue of visas.

*Section 37. Freedom of movement of United Nations personnel;*¹⁴⁵ *inapplicability of persona non grata, doctrine*

364. The United Nations has consistently maintained that its officials and others (e.g. experts on mission) travelling in order to fulfil their functions on behalf of the United Nations should be granted freedom of movement by all Member States. This right has been based on the necessary intentment of Member States in creating the Organization, on the range and nature of the responsibilities entrusted to the Organization, on the particular resolutions under which the officials concerned were dispatched, on the relevant provisions of the Charter, in particular of Article 105, and on various sections of the General Convention, including, in appropriate cases, section 24 requiring the recognition of the United Nations *laissez-passer* as a valid travel document. Member States have, on relatively rare occasions, sought to restrict this freedom of movement of United Nations personnel, either by denying their entry or, when the personnel were already present in the country, seeking to expel them on the grounds that they were *persona non grata* to the Government concerned; in a few instances travel within the country has been dependent on prior notice and approval. In cases of denial of entry, the United Nations has put forward the arguments referred to above, and also cited the provisions of article V, including section 18 (d) regarding immunity from immigration restrictions and alien registration.¹⁴⁶

¹⁴³ Committee on Foreign Relations, United States Senate, Report No. 559, 80th Congress, 1st session, p. 7.

¹⁴⁴ Report of the Secretary-General on Personnel Policy, *Official Records of the General Assembly, Seventh Session, Annexes*, agenda item 75, document A/2364.

¹⁴⁵ This subject is also dealt with in other sections, see in particular section 26. The position in respect of the United States is largely, though not exclusively, regulated by the provisions of the Headquarters Agreement, in particular article IV.

¹⁴⁶ See section 26, paras. 304-306.

Where arguments based on the *persona non grata* doctrine have been invoked, the United Nations has denied the application of the doctrine on the grounds that United Nations personnel are not sent and accredited to given States in a way which is analogous to the bilateral exchange and accreditation of diplomatic representatives following recognition on the part of two States: United Nations personnel are employed, as determined by the Secretary-General, on behalf of all Member States, for purposes chosen by those States as a result of action taken on a multilateral plane. Nevertheless, whilst upholding the independence and international character of United Nations personnel against any unilateral pressure or interference, the Secretary-General has made it clear that he will not tolerate such personnel engaging in subversive activities against any Government. These principles and the practice in implementation thereof have been set forth in several reports to the General Assembly, particularly at the seventh, eighth and twelfth sessions.¹⁴⁷ The position in respect of the freedom of movement of United Nations personnel and their right of entry into a country when travelling on official business was summarized at the seventh session as follows:

... it is clear that Member States should not, under the provisions of the Charter, seek to interpose their passport or visa requirements in such a manner as to prevent staff from taking up their post of duty with the United Nations or from travelling from country to country on its business.

365. Whilst the right of entry of United Nations personnel travelling on official business is an unqualified one, the United Nations would not, however, insist on the entry of a person with respect to whom substantial evidence of improper activities was presented. Since the right belongs to the Organization, it is for the Organization to decide whether or not to forego the exercise of this right in a particular case and, consequently, it is the Organization which must evaluate the evidence of improper activities.

366. Apart from cases of alleged improper activities on the part of individual United Nations personnel, entry has on occasions been denied on the grounds of the nationality of the individuals concerned. In 1961, for example, a Member State refused entry to United Nations and specialized agency officials of certain nationalities owing to a political dispute with the countries concerned. The Secretary-General protested to the Government in 1961, and, after a further incident in 1963, wrote again. In the second letter the Secretary-General recalled the earlier communication, and continued:

... refusal of entry to United Nations and specialized agency personnel on official business presents a serious problem with respect to operations of the Organization and interference with the performance of the functions of its officials. Such interference in the case of United Nations officials is contrary to Article 105 of the Charter and to article 24 of the Convention on the Privi-

leges and Immunities of the United Nations to which your Government is a party. As was pointed out, freedom for officials to travel is one of the most essential privileges which is necessary for the independent exercise of their functions in connexion with the Organization, and for the fulfilment of the purposes of the Organization. The United Nations cannot accept the view that privileges and immunities of international officials are in any way affected by their nationality. . .

367. The Government concerned undertook to exempt United Nations and specialized agency officials of the nationalities in question from the restrictions otherwise imposed on persons of their nationality.

368. In 1964 the Secretary-General entered into correspondence¹⁴⁸ with various Member States regarding the status of military observers serving with UNTSO. In an *aide-mémoire* dated 23 January 1964, the Secretary-General declared:

The principle of *persona non grata* which applies with respect to diplomats accredited to a Government has no application with respect to United Nations staff or military observers who are not accredited to a Government but must serve as independent and impartial international officials responsible to the United Nations. The United Nations military observers are recruited by the Secretary-General for service in pursuance of the four Armistice Agreements and the relevant Security Council resolutions from member countries of the United Nations. They are officers who are seconded by their Governments for service with the United Nations. They are responsible directly to the Chief of Staff of the United Nations Truce Supervision Organization (UNTSO) and through him to the Secretary-General, who is in turn responsible to their Governments for them.

These observers are carefully selected. At times their work is hazardous; indeed, some have given their lives in this service. As military men they would expect to be held strictly to account for any disobedience, disloyalty or dereliction of duty, and the Secretary-General would certainly insist that any observer guilty of such action should be severely dealt with. However, if any State party to any of the General Armistice Agreements were in a position to bring about the automatic recall of a military observer, the other Governments concerned would be placed in an invidious position and the functioning of UNTSO would be rendered ineffectual. Therefore, in order to fulfill the obligations and responsibilities of the Secretary-General in such matters, and particularly to ensure the independence of action of United Nations military observers, the Chief of Staff and the Secretary-General must have the right of decision in these cases following careful investigation of all relevant facts. Since they must themselves make the decision, any information which is supplied to them by Governments must be in sufficient detail to enable them to make their own judgement in the matter. Any other course would be contrary to the principles of the Charter of the United Nations and would seriously interfere with the performance of the functions of the Organization. The Secretary-General is certain that the Governments repose confidence in the Chief of Staff and in himself to act impartially in this regard. He would appreciate assurances that procedures consistent with the foregoing principles will be followed and that the competence of the Chief of Staff and himself in matters of this kind will be respected.

369. One of the Governments concerned replied to this communication in the following *aide-mémoire*, in which

¹⁴⁷ See Report of the Secretary-General on Personnel Policy, *Official Records of the General Assembly, Seventh Session, Annexes*, agenda item 75, document A/2364, (esp. paras. 4-10, 92-103 and 106-115); Report of the Secretary-General on Personnel Policy, *ibid.*, *Eighth Session, Annexes*, agenda item 51, document A/2533, part I; and *ibid.*, *Twelfth Session, Annexes*, agenda item 51, document A/C.5/726, paras. 15 and 16.

¹⁴⁸ *United Nations Juridical Yearbook 1964*, p. 261. Although dealing with military observers who are not "officials" within the meaning of the General Convention, the considerations advanced are equally applicable in the case of all United Nations personnel.

reference was made to the attempt by that Government to exclude or expel a particular military observer.

. . . The Government wishes to make it clear at the outset that its invariable policy in its international relations, has been and will continue to be guided by the established principles of international law.

One such fundamental principle is the right of a State to expel aliens from its territory. This right rests upon the same foundation, and is justified by the same reasons as the power to exclude namely: the sovereignty of the State, its right of self-preservation, and its public interest.

In a case decided by the United States Supreme Court in 1952, considering the status of an alien the Court held that, to remain in the country is not his right, but is a matter of permission and tolerance, and the Government has the power to terminate its hospitality. Such power the Court went on to say is inherent in the United States, as a sovereign State.

It is admitted that in practice though not in theory, it should usually be shown in such cases, that the foreigner's presence in the State's territory, is detrimental to the welfare of such State. The fact remains, however, that the ultimate decision in this regard rests with the authorities of the State concerned.

Although Major. . . has already completed his year's tour of duty as a United Nations military observer on. . . and though it is not denied that as such, he was an international official responsible directly to the Chief of Staff of the UNTSO and through him to the Secretary-General, the Government. . . maintains that it enjoys the right under international law to exclude or expel foreigners from its territory irrespective of any such consideration, and that its exercise of this right is not incompatible with its obligations under the Convention of the Privileges and Immunities of the United Nations or of the Armistice Agreement.

But while maintaining its ultimate competence in this matter, the. . . Government would like to assure the Secretary-General that it will exercise this right in respect of United Nations officials, only after due consideration has been given to any representations he may wish to make in this regard.

370. The Secretary-General commented as follows on the arguments which the Government put forward.

. . . The Government refers to the right of a State to expel aliens from its territory. Without entering into a discussion of the principles of international law generally applicable to aliens having a private status, it is necessary to point out that United Nations officials and military observers serving on a United Nations mission are not in a position comparable to that of such private individuals. Your country, by becoming a Member of the United Nations, assumed certain obligations under the Charter vis-à-vis the Organization. Among these is the undertaking to respect the exclusively international character of the responsibilities of the Secretary-General and the staff and the obligation to accord to the Organization such privileges and immunities as are necessary for the fulfilment of its purposes and to officials such privileges and immunities as are necessary for the independent exercise of their functions.

It of course is not denied that a United Nations official or military observer, by abusing his privileges, may place himself in a position where a Government may demand his withdrawal. But such demand can only be made for sufficient cause and the facts must be placed at the disposal of the Secretary-General, and in the case of the Truce Supervision Organization at the disposal of the Chief of Staff, in order that an independent decision can be made by the Organization.

We must therefore reiterate the principles set forth in the Secretary-General's *aide-mémoire* of 23 January 1964. We are certain that you will appreciate that any other course would impair the

international status of the military observers which is essential for the independent exercise of their functions in connexion with the Organization.¹⁴⁹

*Section 38. Travel documents of petitioners*¹⁵⁰

371. A study of the above subject was made by the Secretary-General in 1956 following a request by the Fourth Committee that he should examine "what procedures could be taken" to enable petitioners, who had been refused passports or travel documents, to appear before the Committee. The memorandum by the Secretary-General, dated 20 November 1956, is reproduced below.¹⁵¹

Travel Documents of Petitioners — Memorandum by the Secretary-General

I

1. At its 510th meeting, held on 15 November 1955, the Fourth Committee adopted the following resolution:

"The Fourth Committee,

"Considering that some petitioners who have been granted oral hearings but have been refused passports or travel documents by some Administering Powers, have appealed to the United Nations to intervene to enable them to leave the Territory in which they are situated in order to appear before the General Assembly,

"Suggests that the Secretary-General should examine what measures could be taken to enable such petitioners to appear before the Fourth Committee of the General Assembly."

2. It may be useful to recall the circumstances which led to the adoption of this resolution.

In the course of its 470th meeting, at the beginning of the tenth session of the General Assembly, the Fourth Committee was informed of the receipt of five requests for hearings emanating from organizations in Trust Territories. Three of these requests were contained in letters from the Political Section of the "Union des Populations du Cameroun", the Political Section of the Central Board of the "Union démocratique des Femmes camerounaises" and the Executive Committee of the "Jeunesse démocratique du Cameroun", respectively (A/C.4/301). At its 471st meeting, the Committee decided to grant these requests by 36 votes to 11, with 9 abstentions, after a discussion during which it was stated, *inter alia*, by various representatives who wished the hearings to take place, (i) that as the right of petitions was embodied in Article 87 of the Charter, it was the Fourth Committee's duty to examine petitions and grant requests for hearings; (ii) that the petitioners' statements were helpful to the Committee as giving it additional information on conditions in the Trust Territories; (iii) that the granting of hearings was an encouragement to politically-backward masses, and enhanced the prestige of the United Nations. Among the points made by representatives who objected to the hearings, were the following: (i) that a Visiting Mission of the Trusteeship Council was to visit shortly the Trust Territories concerned and would have the opportunity of hearing those who wished to express grievances; (ii) that the "Union des Populations du Cameroun" and affiliated organizations had been dissolved during the previous year by the French Government and that the Fourth Committee should not hear representatives

¹⁴⁹ *Ibid.*, p. 262.

¹⁵⁰ See also section 35, paras. 346-355, above concerning the privileges and immunities of persons having official business with the United Nations.

¹⁵¹ *Official Records of the General Assembly, Eleventh Session, Annexes*, agenda item 13, document A/C.4/333.

of those organizations, as such hearings would amount to an attempt to overrule a decision of a Government which under the Trusteeship Agreement had full powers of legislation and jurisdiction in the Trust Territory; (iii) that in considering requests for hearings, the Fourth Committee should be guided by the urgency of the subject matter and the consideration whether that subject matter had not already been studied by the Trusteeship Council and its subsidiary organs, which should not be bypassed.

3. At the 479th meeting of the Committee, the Chairman announced that in the absence of opposition he would circulate to the members of the Committee the texts of telegrams which had been received from the organizations concerned. In these telegrams, which were from the Cameroons under British administration, the three organizations communicated the names of their representatives and requested the United Nations to intervene with United Kingdom and United States authorities in order that these representatives might obtain passports and entry visas respectively. The "Union des Populations du Cameroun" states in its telegram that the French Government had burned the passports of the appointed representatives during the May incidents in the Trust Territory (A/C.4/306).

4. The attention of the Fourth Committee having been drawn at the 496th meeting to these telegrams, the representative of the United States informed the Committee that, if the petitioners applied for United States visas, their applications would receive the treatment that the United States Government had always given in similar cases. The representative of the United Kingdom stated that as the petitioners were not British subjects or British protected persons, they could not be granted British passports; there was nothing, however, to prevent their departure from the Cameroons under British administration at any time. Answering a question of the representative of Indonesia, who wondered whether it would be possible for the Secretariat to give to the petitioners United Nations travel documents, the Under-Secretary for Trusteeship and Information from Non-Self-Governing Territories explained that in accordance with the provisions of the Convention on Privileges and Immunities of the United Nations the *laissez-passer*, the official United Nations travel document, could be issued only to the officials of the Organization or of one of the specialized agencies on official mission outside the Headquarters area. A proposal by the representative of Liberia that further consideration of the matter should be postponed in order to give the Chairman the opportunity to explore every possibility of helping the petitioners to reach New York was then adopted.

5. At its 498th meeting, the Fourth Committee decided without objection to circulate a further telegram from the "Union des Populations du Cameroun" in which the Political Bureau of that organization quoted the reply it had received from the Commissioner for the Cameroons under British administration, to its request for passports, similar in substance to the statement made by the representative of the United Kingdom in the Fourth Committee. It further requested the General Assembly to make representations to the United Kingdom Government on the ground that the petitioners were the victims of judicial proceedings instituted for political reasons by the French Authorities and that, as they resided in the Cameroons under British administration, they should have the benefit of the status of political refugees in conformity with the Universal Declaration of Human Rights (A/C.4/306/Add.1).

6. At its 510th meeting, the Fourth Committee had before it a draft resolution submitted for its consideration by the delegation of Liberia. In presenting the draft resolution, the representative of Liberia stated, *inter alia*, that the Committee did not have the time to go fully into all the difficulties which had arisen in connexion with travel facilities for petitioners who had been granted oral hearings and that the Fourth Committee should therefore send the problem to the Secretary-General so that he could explore all possibilities and report on them to the Committee not

later than the eleventh session of the General Assembly. The representative of Liberia stated in a later intervention that the purpose of the study of the whole matter should be to enable the Committee in the future to give an answer to petitioners who approached it for assistance in similar dilemmas. The Liberian draft resolution was adopted by the Committee in the text quoted in paragraph 1 of this report by 30 votes to 8, with 6 abstentions.

II

7. Following a study of the question which, as recalled above, has been referred to the Secretary-General by the Fourth Committee's resolution of 15 November 1955 in its general aspects, the Secretary-General wishes to bring to the attention of the Committee the following considerations and conclusions.

8. Under arrangements at present in effect, upon notification by the Secretary-General to the United States authorities that a hearing has been granted to a person by the Fourth Committee of the General Assembly, the United States authorities deliver an entry visa to that person, upon application, pursuant to Section 11 and 13 (a) of the Headquarters Agreement. Section 11 provides that "the federal state or local authorities of the United States shall not impose any impediments to transit to or from the Headquarters District of . . . (5) . . . persons invited to the Headquarters District by the United Nations. . . on official business". Section 13 (a) provides that "Laws and regulations in force in the United States regarding the entry of aliens shall not be applied in such manner as to interfere with the privileges referred to in Section 11". Where visas are required for persons referred to in that Section, they shall be granted without charge and as promptly as possible. After the hearings in the General Assembly have been completed, the United States authorities are entitled to require the petitioner to leave the United States for the country of his nationality or any other country willing to receive him.

9. In accordance with United States laws and administrative practices, United States entry visas may be affixed on national passports and also on other documents issued by a competent authority, showing the bearer's origin, identity and nationality, and valid for the entry of the bearer into a foreign country. In certain cases of waiver of the above requirements, United States visa stamps are impressed on an appropriate space on the reverse side of the visa application form.

10. The further question of a general nature which requires comments, under the Fourth Committee's resolution of 15 November 1955, is therefore that of the right of a petitioner to leave the territory in which he finds himself at the time his request for a hearing is granted, and the possibility which may exist for his return to that territory or to another country. It may be noted in this connexion that while it may be assumed by analogy with the rules of procedure of the Trusteeship Council (rule 77), that persons to whom a hearing may be granted by the Fourth Committee may be inhabitants of Trust Territories or other persons, not necessarily resident in Trust Territories, the Fourth Committee's resolution refers only to administrative action with respect to travel documents which may be taken by the Administering Authorities. It may be recalled in this connexion that the relevant agreements concluded in pursuance of the provisions of the United Nations Charter under which States administering Trust Territories have accepted obligations towards the United Nations, e.g. the Convention on Privileges and Immunities of the United Nations or the Trusteeship Agreements, contain no specific provisions obliging the Administering Authorities to grant travel documents or to authorize the departure from the territories under their administration of persons to whom hearings have been granted by United Nations organs. Most of the Trusteeship Agreements recognize the Administering Authorities' full powers of legislation, administration and jurisdiction in the Trust Territories within the framework of these agreements and of the Charter; these agreements also contain the undertaking by the Admin-

istering Authorities to collaborate with the Trusteeship Council and the General Assembly and to assist these organs in the discharge of their functions, as defined in Articles 87 and 88 of the Charter. The question of the extent to which this undertaking to collaborate implies the obligation of the Administering Authority to authorize a resident of a Trust Territory to leave the Territory for the purpose of a hearing before a United Nations organ has not, however, been considered by the General Assembly and there would seem, therefore, to be no present basis on which an over-all solution may be offered.

11. It is generally accepted in present international practice that the authorities exercising governmental functions with respect to a territory determine the conditions applicable to the departure of persons resident in that territory and, in the case of non-nationals who have not acquired a permanent right of residence, fix the conditions of re-entry. Under the system of passports, exit and entry visas, which has prevailed since the end of the first World War competent governmental authorities have reserved to themselves, in this respect, wide discretionary powers seldom defined with precision in their legislation. It may also be recalled in this connexion that national authorities have often invoked as grounds for refusal of the permission to travel abroad the fact that the prospective traveller is subject to judicial proceedings or may be fleeing from his obligations to pay taxes or personal debts or to perform military service, or that while abroad he may endanger the internal security of a foreign State or of his own State.

12. A great variety of rules and practices exist in this field. Some countries permit the departure from their territories of persons who do not hold a passport or a similar travel document. Others treat such a departure — at least by their own nationals — as a punishable offence. Various procedures are utilized by governmental authorities which grant documents necessary for travel to non-nationals and in limited situations international agreements might apply as, for example, for certain groups of refugees. Although in the case of direct travel to New York the question of the nature of the travel document of the petitioner on which a United States visa has been affixed may not normally be raised by the authorities of the countries through which the petitioner would pass in transit, certain problems may possibly arise in cases where transit visas are required or where the petitioner may have reasons to interrupt his travel.

13. In the course of his study of the question submitted to him by the Fourth Committee, the Secretary-General has sought the informal views of the Governments having responsibility for the administration of Trust Territories, as to the policy they would follow with respect to the issuance of passports or similar travel documents to persons resident in Territories under their jurisdiction who may be granted hearings by the General Assembly. It results from the replies received from all Administering Authorities of Territories from which petitioners have so far appeared before the Fourth Committee, that while remaining subject to rules and conditions generally applicable to foreign travel, persons to whom a hearing has been granted would not encounter special obstacles to their leaving the Territory for the purpose of travel to the Headquarters of the United Nations for the purpose of a hearing. It may be recalled in this respect that up to the present, with the exception of the petitioners referred to in Part I of this memorandum, no petitioners from Trust Territories have failed to reach the United Nations Headquarters.

14. In the light of the above-mentioned data and considerations it appears that in the present circumstances no general measures can be suggested which would provide an effective solution to the problem raised by the Fourth Committee's resolution. In view, in particular, of the variety of situations which may be encountered, and the special factors which would have to be taken into account in each case, depending on the nationality and residence status of the petitioners, the applicable legislation

and administrative requirements, and the route and means of travel to be used, it is the opinion of the Secretary-General, based on the experience acquired by the Secretariat in the handling of similar situations in other organs of the United Nations, that it would be preferable for the present to continue to deal with individual cases which may arise, on an *ad hoc* basis, by taking up the actual issues of each case with the national authorities concerned. Any appropriate action could thus take fully into account the nature of the specific obstacles which would exist to the travel of the petitioner to the United Nations Headquarters and to his return to the territory of which he is a resident.

372. In resolution 1062 (XI), adopted on 26 February 1957, the General Assembly invited the Administering Members concerned to grant petitioners the necessary travel documents to enable them to appear before the proper United Nations organs for oral hearings and to return home.

*Section 39. Issue of visas for holders of United Nations laissez-passer*¹⁵²

373. Section 25 of the General Convention provides that:

Applications for visas (where required) from the holders of United Nations *laissez-passer*, when accompanied by a certificate that they are travelling on the business of the United Nations, shall be dealt with as speedily as possible. In addition, such persons shall be granted facilities for speedy travel.

374. All countries have issued visas for *laissez-passer* holders free of charge. In addition, a number of States, chiefly in Africa, have exempted holders of *laissez-passer* from visa requirements altogether. Most headquarters agreements and agreements relating to the holding of meetings provide specifically for the issue of visas without charge.

Section 40. United Nations certificates; family certificates

375. Section 26 of the General Convention provides that:

Similar facilities to those specified in section 25 shall be accorded to experts and other persons who, though not the holders of United Nations *laissez-passer*, have a certificate that they are travelling on the business of the United Nations.

376. The certificate referred to has been used in the case of experts on mission and others who, whilst travelling on United Nations business, could not be classified as officials. The certificate consists of a document eighteen inches by twelve inches in size giving information about the bearer and certifying that he is travelling on United Nations business; the text of Article VI of the Convention is reproduced on the back of the certificate.

377. In 1960 the Legal Office advised the Technical Assistance Board administration that the certificate issued to OPEX officials should include the following wording:

This is to certify that Mr. . . . has been assigned by agreement with the United Nations to the Government of . . . under the Programme for the Provision of Operational, Executive and Administrative Personnel authorized by Resolution 1256 (XIII) of the General Assembly of the United Nations adopted on

¹⁵² See also section 26, paras. 304-306, above on the immunity of officials from immigration restrictions and alien registration.

14 November 1958. He is proceeding under the instructions of the United Nations to . . . in transit to . . . in order to take up his assignment. By Agreement of . . . (date) concluded with the United Nations, the Government of . . . has agreed that Mr. . . . shall be granted certain privileges and immunities including the right to import free of duty furniture and effects at the time of first taking up his post in. . . .

378. It was stated that the model agreements concluded with Governments regarding OPEX officials, and the contracts between the United Nations and the officials themselves, gave the Organization sufficient standing to issue a certificate for the purpose of facilitating travel to the place of assignment.

379. The United Nations also issues family certificates in respect of the family of a United Nations official. The position is described in the following letter, sent in 1963 by the United Nations in answer to a question raised by a permanent mission.

It is quite clear that the Certificate in question is not regarded by the United Nations as an official "travel document". The Family Certificate is really intended to show that the holder or holders are dependents of a United Nations staff member. Normally, the staff member would carry a United Nations *laissez-passer* and this would serve as identification for the family as well, when a staff member and family were travelling together. When the family were travelling apart, the *laissez-passer* would, of course, have to remain in the keeping of the staff member, and the dependents would be given a Family Certificate for identification and to show their connection with the United Nations.

Dependents travelling with a Family Certificate should at all times carry their national Passport as well. Formally, when requesting visas we in this office would submit both the national Passport and the Family Certificate to the Consulate concerned and it would be entirely up to the Consulate as to whether they put the visa on the national Passport or on the Family Certificate. For our own purposes it makes no matter which course is adopted by the Consulates; we must, of course, leave it to the Embassy or Consulate concerned to do as they think best.

The "United Nations Certificate" is quite distinct from the Family Certificate and serves the purpose of identifying someone who is travelling on some special assignment connected with the United Nations although not actually a staff member of the Organization. For instance, it might occur that some technician or special adviser was engaged by the United Nations on a short-term mission which would not involve the traveller in being taken on as a regular United Nations Secretariat member. In such cases, the passenger would travel on his national passport and would be given a United Nations Certificate merely to identify him as undertaking a project for the Organization. In certain countries this Certificate has proved very helpful in enabling the holder to carry out the purposes of his assignment. But, as stated earlier, the holders of this Certificate are not regular staff members. Once again, we would leave it to the Consulate or Embassy concerned as to whether they put any necessary visas in the Passport or on the Certificate. The last-named document, like the Family Certificate, is not considered by us as an official travel document.

Section 41. Diplomatic facilities for the Secretary-General and other senior officials whilst travelling on official business

380. Section 27 of the General Convention provides that

The Secretary-General, Assistant Secretaries-General and Directors travelling on United Nations *laissez-passer* on the business of

the United Nations shall be granted the same facilities as are accorded to diplomatic envoys.

381. The main implementation of this section has lain in the issue of red-backed (as opposed to the usual blue-backed) *laissez-passer* to the Secretary-General and the officials referred to in section 27. It has not been the practice of the United Nations to submit a specific request for a "diplomatic visa" for any of the United Nations' officials, even for the Secretary-General himself.

382. In 1955 the Secretary-General wrote to the Office of General Services listing the instructions for the issue of red-backed *laissez-passer*.

"Having in view the necessity of more precise rules concerning the red-backed *laissez-passer* which has been in use since 1948, and following consultation with the heads of the Specialized Agencies, I have decided that effective from the above date, red-backed *laissez-passer* should be issued in accordance with the following instructions.

Instructions for the issuance of red-backed laissez-passer

1. Red-backed *laissez-passer* shall be issued to officials of the United Nations of the following-categories:

- (a) The Secretary-General
- (b) Under-Secretaries and officials of equivalent rank
- (c) Directors (D-2)

2. Exceptionally, red-backed *laissez-passer* may also be issued to staff members below the rank of Director (D-2) who are specially designated by the Secretary-General and fall within the following categories:

- (a) Persons on special mission having the title of Personal Representative of the Secretary-General
- (b) Persons in charge of United Nations missions in the field
- (c) Persons in charge of United Nations Offices away from Headquarters.

Red-backed *laissez-passer* issued pursuant to the present paragraph shall be withdrawn and cancelled on the completion of the assignment for which they are issued.

3. Bearers of red-backed *laissez-passer* shall have in mind that its possession does not denote that the bearer is entitled to diplomatic privileges and immunities except when such entitlement is specifically indicated by a diplomatic stamp or notation on the *laissez-passer*. It shall be understood that the purpose of red-backed *laissez-passer* not having a diplomatic stamp or notation is only to draw the attention of the Government authorities to the special position of the bearer in order that he may be accorded courtesies commensurate with his position in addition to the functional privileges and immunities and facilities of which all officials of the United Nations are entitled under the Convention on the Privileges and Immunities of the United Nations.

4. Red-backed *laissez-passer* issued to officials entitled to diplomatic privileges and immunities under section 19 of Article V of the Convention on the Privileges and Immunities of the United Nations shall have a diplomatic stamp or notation as follows:

(a) *Laissez-passer* issued to the Secretary-General shall have the following stamp or notation:

"Diplomatic"

(b) *Laissez-passer* issued to Under-Secretaries and officials of equivalent rank shall have the following stamp or notation:

"Diplomatic"

"The bearer of this *laissez-passer* is an official of the United Nations whose rank is assimilated to that of 'Assistant Secretary-General'. Under section 19 of Article V of the Convention on the Privileges and Immunities of the United Nations, an

Assistant Secretary-General is entitled to the privileges and immunities, exemptions and facilities accorded to diplomatic envoys in accordance with international law".

5. *Laissez-passer* issued to Directors (D-2) shall have the following stamp or notation:

"The bearer of this *laissez-passer* is a Director and under section 27, Article VII, of the Convention on the Privileges and Immunities of the United Nations is entitled when travelling on the business of the United Nations to the same facilities as are accorded to diplomatic envoys".

The foregoing instructions may be applied *mutatis mutandis* to comparable officials of the Specialized Agencies.

In a subsequent memorandum it was stated:

1. The following designation of the officials to whom red-backed *laissez-passer* should be issued in accordance with paragraph 2 of the Instructions for the issuance of red-backed *laissez-passer* should be annexed to the instructions:

Annex 1

In accordance with paragraph 2 of the Instructions for the issuance of red-backed *laissez-passer*, the following staff members who fall within the categories enumerated in that paragraph are hereby designated by the Secretary-General as officials to whom red-backed *laissez-passer* shall be issued:

- (1) All Resident Representatives of the Technical Assistance Board;
- (2) All Principal Secretaries of United Nations Commissions;
- (3) All Directors of United Nations Information Centres.

Section 42. Agreements with specialized agencies regarding the issue of *laissez-passer*

383. Section 28 of Article VII of the General Convention provides that

The provisions of this article may be applied to the comparable officials of specialized agencies if the agreements for relationship made under Article 63 of the Charter so provide.

Article 63, paragraph 1, of the Charter is as follows:

The Economic and Social Council may enter into agreements with any of the agencies referred to in Article 57, defining the terms on which the agency concerned shall be brought into relationship with the United Nations. Such agreements shall be subject to approval by the General Assembly.

384. In a note dated 5 November 1948, the Secretary-General informed Member States that in the Agreements which had been concluded with ITU, IBRD and WHO, special arrangements had been made so as to give officials of those agencies the right to use the United Nations *laissez-passer*. A copy of the Agreement setting out the special arrangements was enclosed with the note.

1. All members of the personnel of [the specialized agency] will be considered as officials of [the specialized agency] under the terms of these arrangements with the exception of those recruited locally and paid by the hour.

2. Requests for issuance of the *laissez-passer* shall be made by [the Director-General or the equivalent Executive Head of the specialized agency] or by such person as he shall deputize. Such requests, which will state that the official is about to travel on official duty or home leave, must be accompanied by:

(a) A form, copy of which is attached, which shall be filled in and signed by the official for whom the *laissez-passer* is required and the contents of which shall be verified and certified as correct by [the Director-General or the equivalent Executive Head of the specialized agency] or his designated representative;

(b) Two photographs of the applicant.

3. Requests for the issue of *laissez-passer* shall be addressed to the Section of Passports and Visas (Transportation Service of the United Nations, 405 East 42nd Street, New York, N.Y.). However, in cases of urgency, such requests may be addressed to the European Office of the United Nations in Geneva which may, in such cases, issue the *laissez-passer*.

4. [The Director-General or the equivalent Executive Head of the specialized agency] shall forward to the Section of Passports and Visas (Transportation Service of the United Nations) specimens of the signatures of such officials as shall have received authority to certify as correct the information given on the application form under Section 2.

5. The issue of United Nations *laissez-passer* to officials of [the specialized agency] shall also be subject to such other conditions as may apply to the issuance of the *laissez-passer* to officials of the United Nations.

The Secretary-General of the United Nations shall immediately notify these conditions to the [Director-General or the equivalent Executive Head of the specialized agency].

6. The *laissez-passer* issued to officials of [the specialized agency] shall make mention of the officials's rank. They shall contain a statement in the five official languages to the effect that the *laissez-passer* is issued to a member of a specialized agency, in accordance with Section 28 of the Convention on Privileges and Immunities of the United Nations and with the relevant section of the Agreement bringing the organization into relation with the United Nations.

7. Upon request of [the Director-General or the equivalent Executive Head of the specialized agency] or such person as he shall deputize, the Secretariat of the United Nations shall, if this arrangement is still in force, renew such *laissez-passer* issued to officials of [the specialized agency] as shall have expired.

8. The Secretariat of the United Nations shall transmit as quickly as possible the *laissez-passer* for which issue or renewal has been requested to the designated representative of [the specialized agency] who shall acknowledge the receipt thereof.

9. [The specialized agency] agrees to take all necessary administrative precautions to prevent the loss or theft of such *laissez-passer*. It shall immediately notify the Section of Passports and Visas in the event of any loss or theft of a *laissez-passer*, giving particulars of the conditions under which such loss or theft occurred.

10. Such *laissez-passer* shall, unless renewed, expire at the end of one year from the date of issuance. [The specialized agency] agrees to return immediately to the United Nations all *laissez-passer* issued to its officials:

(a) on the expiration of the validity of the *laissez-passer*, unless renewal has been authorized;

(b) if the holder ceases to be an official of [the specialized agency].

11. The present arrangement is made for a period of one year.

385. Similar special arrangements, which have now been placed on a permanent basis, have been made with each of the other specialized agencies and with IAEA. The ILO issues its own *laissez-passer*, however, under conditions closely analogous to those observed by the United Nations itself.¹⁵³ The Directors-General and certain other senior staff of the specialized agencies receive red-backed

¹⁵³ Under an administrative arrangement concluded between the Secretary-General of the United Nations and the Director-General of the ILO, 7 June and 26 July 1950, United Nations, *Treaty Series*, vol. 68, p. 213.

laissez-passer in the same way as the Secretary-General and senior officials of the United Nations.¹⁵⁴

CHAPTER VII. — SETTLEMENT OF DISPUTES

Section 43. Settlement of disputes

386. Section 29 of the General Convention states that

The United Nations shall make provision for appropriate modes of settlement of:

(a) Disputes arising out of contracts or other disputes of a private law character to which the United Nations is a party;

(b) Disputes involving any official of the United Nations who by reason of his official position enjoys immunity, if immunity has not been waived by the Secretary-General.

387. In order to provide a suitable means of settlement of any disputes of a private law character, the United Nations has regularly made provision in its contracts for recourse to arbitration.¹⁵⁵ In the case of officials, the position varies according to the facts of the case. If the dispute is of a private character, no question of the immunity of an official without diplomatic privileges is involved and the official is in the same position as any other resident in the country in question. Where the Secretary-General determines that the dispute involves the staff member in an official capacity and that the interests of the United Nations do not permit the waiver of the immunity,¹⁵⁶ the usual method of settlement has been by means of discussions and correspondence with the Government concerned, in an effort to reach agreement. In some instances, whilst not agreeing to waive the immunity of the official concerned, the Secretary-General has taken steps, by administrative means, to ensure that the particular cause of the dispute did not reoccur and, where appropriate, has also taken disciplinary action against the offender.

Section 44. Reference to the International Court of Justice of differences arising out of the interpretation of the General Convention

388. Section 30 of the General Convention provides as follows:

All differences arising out of the interpretation or application of the present convention shall be referred to the International Court of Justice, unless in any case it is agreed by the parties to have recourse to another mode of settlement. If a difference arises between the United Nations on the one hand and a Member on the other hand, a request shall be made for an advisory opinion on any legal question involved in accordance with Article 96 of the Charter and Article 65 of the Statute of the Court. The opinion given by the Court shall be accepted as decisive by the parties.

389. All differences which have so far arisen regarding the interpretation or application of the General Convention have been settled by means of negotiation and discussion. Although there have been occasional suggestions that particular disputes should be referred to the International Court of Justice, these suggestions have not been carried into effect.

¹⁵⁴ See Section 41, paras. 380-382, above.

¹⁵⁵ See section 1 (b), paras. 5-8, above.

¹⁵⁶ See generally section 31, paras. 334-336, above.

390. The following States have made reservations regarding the reference to the International Court of Justice of disputes as to the interpretation of the General Convention: Albania, Algeria, Bulgaria, Byelorussian SSR, Czechoslovakia, Hungary, Mongolia, Nepal, Romania, Ukrainian SSR, and the USSR. The United Kingdom notified the Secretary-General that it objects to the reservations made by Albania, Byelorussian SSR, Czechoslovakia, Hungary, Romania, Ukrainian SSR and the USSR. Lebanon notified the Secretary-General that it objects to the reservation of the USSR.

391. It may be noted that a number of other agreements contain provisions similar to section 30¹⁵⁷, or a reference to section 30 as the mode of settlement to be used in the event of a dispute as to the interpretation of the agreement concerned.¹⁵⁸ During its fifteenth session the Economic and Social Council considered at its 686th and 687th meetings a complaint concerning the application of the Headquarters Agreement. In the course of debate, the question was raised whether the Secretary-General would proceed automatically to apply the arbitration procedure provided for in the Headquarters Agreement¹⁵⁹ if negotiations for an amicable settlement proved fruitless, or whether he would first report to the Council or to the General Assembly. The opinion was expressed in the Council that it would be preferable, in the event of failure of the negotiations, that the Secretary-General should proceed to arbitration without further reference to the Council; the Council could be informed of the outcome of the settlement procedures in due course. No final action was taken by the Council, however.

CHAPTER VIII. — FINAL ARTICLE

Section 45. Submission of the General Convention to Member States for accession

392. In accordance with section 31, the General Convention has been submitted to every Member State for its accession. Up to 1 May 1967, ninety-five Member States had submitted instruments of accession. A relatively

¹⁵⁷ e.g., section 27, Agreement with Switzerland, section 21, Headquarters Agreement, section 21, ECA Agreement.

¹⁵⁸ e.g., section 21, ECLA Agreement, section 26, ECAFE Agreement.

¹⁵⁹ Section 21 of the Headquarters Agreement provides as follows:

“Section 21. (a) Any dispute between the United Nations and the United States concerning the interpretation or application of this agreement or of any supplemental agreement, which is not settled by negotiation or other agreed mode of settlement, shall be referred for final decision to a tribunal of three arbitrators, one to be named by the Secretary-General, one to be named by the Secretary of State of the United States, and the third to be chosen by the two, or, if they should fail to agree upon a third then by the President of the International Court of Justice.

“(b) The Secretary-General or the United States may ask the General Assembly to request of the International Court of Justice an advisory opinion on any legal question arising in the course of such proceedings. Pending the receipt of the opinion of the Court, an interim decision of the arbitral tribunal shall be observed by both parties. Thereafter, the arbitral tribunal shall render a final decision, having regard to the opinion of the Court.”

small number have made declarations or reservations (which have been noted in the appropriate sections of this survey) as to the application of the Convention.

393. In 1963 the United Nations sent the following *aide-mémoire*¹⁶⁰ to the Permanent Representative of a Member State regarding the proposed accession by the Member State concerned to the Convention, subject to a reservation denying to any United Nations official of that State's nationality any privileges or immunities under the Convention.

The first article of the Law approving accession by your country to the Convention on the Privileges and Immunities of the United Nations approves the Convention subject to the reservations set out in the second and third articles of the Law.

The third article of the Law sets forth a reservation to the effect that the proviso contained in article IV, section 15, of the Convention shall also apply in respect of articles V and VI.

Section 15 of the Convention on the Privileges and Immunities of the United Nations reads:

"The provisions of sections 11, 12 and 13 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."

Article IV of the Convention, in which not only section 15 is found but also the three sections cross-referenced therein, relates only to representatives which Member States delegate to represent them. Article V of the Convention, to which the proposed reservation seeks to apply the proviso contained in section 15, specifies the privileges and immunities of officials of the Organization and the limitations under which they are intended to be enjoyed. Article VI does the same for experts on missions for the United Nations.

As section 15 of the Convention expressly relates only to the provisions of sections 11, 12 and 13 which, being contained in article IV, have no legal relationship to articles V or VI, it will be assumed that the intent of the reservation in the third article of the Law is to state that the privileges and immunities specified in articles V and VI are not applicable as between an official (or an expert on mission for the United Nations) of your country's nationality and the Government of your country.

In the opinion of the Secretary-General, a closer examination of the true legal operation of this reservation, as so interpreted, will leave no doubt that it is incompatible with the United Nations Charter. It may therefore be that you would wish to consider the possibility of suggesting to your Government that the actual deposit of any instrument of accession intended to embody the foregoing reservation be delayed pending an urgent reconsideration of its legal consequences. In this connexion it may be borne in mind that, should an instrument containing this reservation be submitted to the Secretary-General he would be obliged to take action in two separate capacities, not merely as depositary of the Convention in question under its section 32, but also as the authority designated by section 36 for entering into negotiations with any Member Government as to any adjustments to the terms of the Convention so far as that Member is concerned.

In view of this dual responsibility the following analysis of the proposed reservation is offered for the consideration of your Government.

Numerous privileges and immunities specified in article V are not ordinarily understood to have practical application as between an official of the United Nations and his Government of nationality. Such an official will have no occasion, unless in rare circumstances, to require immunity from immigration restrictions in his own country, or privileges in respect of exchange facilities, or repatriation facilities in time of international crisis; he cannot by

definition require immunity from alien registration, and it would be exceptional for him to have reason to claim duty-free entry for his personal effects on taking up his post in the country.

The situation is quite otherwise in the matter of his official acts, and it is here that the reservation cannot be reconciled with the Charter. Section 18 (a) in article V requires that officials of the United Nations be immune from legal process in respect of words spoken or written and all acts performed by them "*in their official capacity*". (Italics supplied.) It follows that your country, in proposing the reservation quoted above, has (no doubt unintentionally) reserved the right to prosecute United Nations officials of its nationality for words spoken or written or for any acts performed by them in their official capacity, indeed for actions which are in effect the acts of the Organization itself. It would equally be the consequence of the reservation that your country would be reserving jurisdiction to its national courts to entertain private lawsuits against its citizens for acts performed by them as officials of the United Nations.

Article 105 of the Charter provides in its second paragraph that 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". Likewise, by the second paragraph of Article 100 each Member of the United Nations "undertakes to respect the exclusively international character of the responsibilities of the Secretary-General and the staff". It needs no argument to demonstrate that the reservation by a Member of the right, even in the abstract, to exercise jurisdiction over the official acts of United Nations staff, either through its courts or through other organs or authorities of the State, would be incompatible with the independent exercise and the exclusively international character of the responsibilities of such officials of the Organization. This derogation from the clear terms of the Charter would in no way be affected by the common nationality of the international official and the prosecuting authority. The Secretary-General cannot believe that the legal effect of the reservation in question, although indisputable when examined in this light, was consciously intended.

The situation is similar with regard to article VI of the Convention. Experts of your country's nationality would not normally perform their missions for the United Nations on national territory. On the other hand, the inevitable consequence of reserving article VI would be to permit the exercise over nationals of your country, who have performed or are performing official United Nations missions, of jurisdiction in respect of words spoken or written and acts done by them in the course of the performance of their mission. For example, an officer who might be seconded by your government for service abroad as a United Nations Military Observer would technically be subject on his return to inculcation or sanction for some aspects of his activity on behalf of the Organization. This is particularly evident from the fact that one of the provisions reserved states (in section 22 (b) of the Convention):

"This immunity from legal process shall continue to be accorded notwithstanding that the persons concerned are no longer employed on missions for the United Nations."

Papers and documents of the United Nations in his possession could likewise be deprived of their inviolability, while the confidential character of his communications with the United Nations could equally be overridden. In such circumstances the Organization itself could not be said to enjoy in the territory of the Member in question the privileges and immunities necessary for the fulfilment of its purposes, as required by Article 105, paragraph 1 of the Charter.

A comment may also be in order with respect to the effect on a Member Government of its reserving the application of section 18 (b). That clause provides that officials of the United Nations shall "be exempt from taxation on the salaries and emoluments paid to them by the United Nations". Officials of the Organization,

¹⁶⁰ *United Nations Juridical Yearbook 1963*, p. 188.

having been intended by the General Assembly and the Convention to be exempt from national taxation on their official salaries, are already subject to a staff assessment by the United Nations equivalent to national taxation. By resolution 973 (X), therefore, the General Assembly authorized the refund and reimbursement to the staff by the Secretary-General of the amount of any national income taxes to which they might be subjected on the same salary. At the same time, the General Assembly created by that resolution a Tax Equalization Fund and established thereby a procedure for charging against each Member State the total of any amounts which the Organization might thus be obliged to refund to the staff. It should accordingly be understood that the consequence of the reservation in question in so far as it reserves the right to tax nationals of your country on their United Nations salaries, will be to place upon the Organization the administrative burden of reimbursing the income taxes on official salaries while nevertheless increasing your government's annual contributions to the expenses of the Organization by the full amounts so reimbursed.

As article VI does not provide for tax exemption on any stipends paid to experts on missions for the United Nations, there is no tax implication for them in the proposed reservation.

In addition to the reservation stated in the third article of the Law, as examined above, the second article of the Law contains a reservation concerning the capacity of the United Nations under section 1 of the Convention to acquire immovable property. It subjects that capacity to the conditions established in the national Constitution and to any restrictions established in the Law therein provided for. According to the Constitution, the acquisition of real property by international organizations may be authorized only in accordance with conditions and restrictions established by law. The Secretariat of the United Nations has no information as to whether such a law has as yet been adopted.

It is unnecessary to re-emphasize the urgent desire of the United Nations to see an early accession by your country to the Convention on the Privileges and Immunities of the United Nations. The General Assembly itself has repeatedly stated in its resolutions on the subject that, if the United Nations is to achieve its purposes and perform its functions effectively, it is essential that the States Members should unanimously accede to the Convention at the earliest possible moment. The Secretary-General would only wish that the instrument of accession should not be subject to a reservation conflicting with the Charter, so as to avoid the necessity of placing the question before the General Assembly.

394. In a Decree Law adopted by another Member State providing for the internal implementation of the Convention, the application of the Convention to nationals of the State in question was reserved. No such reservation had been contained in the instrument of accession to the General Convention which the State had deposited earlier. Following discussions with the Permanent Representative the Legal Counsel wrote to him as follows:

You note that the preamble in your instrument of accession cited the Decree Law as the act under authority of which the accession was brought about. The difficulty is that this does not constitute a reservation. I believe we can agree that it is universally accepted that a reservation requires a formal declaration — either endorsed on the original of the treaty itself, or spread out in its full effect in a *procès-verbal*, or recorded in express terms in the instrument of accession — which sets out for the full notice of all other interested parties the precise nature and scope of the intended departure by the reserving government from the terms of the Convention. In the present case, however, even if the Secretariat had known of the intention to exclude nationals from the application of the Convention — which it did not — the other States Parties to the Convention never had an opportunity to receive notice of

the restriction. Not only is the text of an instrument of accession not circulated to other States Parties but, as was the case with the Secretariat, all would assume that the reference to the Decree in the preamble merely indicated, according to the usual formula, the governmental authority for the accession, without suggesting in any way the intended reservation. Moreover, as you note in your letter, even within your country the Decree was published in the Official Journal considerably subsequent to the actual accession.

The crux of the difficulty is therefore that no matter how important the Decree may have been for providing the purely internal authority for accession to and implementation of the Convention, it did not affect the terms and conditions of the accession, and no mere mention of the Decree in the instrument of accession would have led to a contrary conclusion. Thus, however much I may be able to agree with your explanation that without the Decree the Convention could not have been made applicable in your State, it nevertheless follows that the Decree could not by itself have altered the terms of the Convention. For neither the date of the Decree nor the possible necessity under the Constitution of some internal disposition to give domestic effect to treaty obligations can serve to overcome that principle of international law and custom under which certain formal procedures must have been followed before an acceding State can be shown to have become a party to a Convention subject to a reservation — that is, under lesser terms than those which bind the other parties. . .

The terms of the Decree Law were accordingly not accepted as constituting a reservation to the Convention.

Section 46. Entry into force of the General Convention on the date of deposit of the instrument of accession

395. Section 32 of the General Convention states that:

Accession shall be effected by deposit of an instrument with the Secretary-General of the United Nations, and the convention shall come into force as regards each Member on the date of deposit of each instrument of accession.

No special problems have arisen in this connexion.

396. It may be noted that a number of Member States have declared that they considered themselves parties to the Convention, with effect from the date of their independence, by succession to the obligations assumed on their behalf by the State previously responsible for their international relations. Accordingly no instrument of accession was deposited in these cases.

Section 47. Implementation of the General Convention under national law

397. Section 34 of the General Convention states:

It is understood that, when an instrument of accession is deposited on behalf of any Member, the Member will be in a position under its own law to give effect to the terms of this Convention.

The United Nations has relied on this provision on occasions when Member States have cited national law in explanation of why they were unable to comply with their obligations under the Convention.

Section 48. Continuation of the General Convention

398. Section 35 of the General Convention provides:

This convention shall continue in force as between the United Nations and every Member which has deposited an instrument of accession for so long as that Member remains a Member of the

United Nations, or until a revised general convention has been approved by the General Assembly and that Member has become a party to this revised convention.

399. This section was referred to expressly by the International Court of Justice in its Advisory Opinion on "Reparations for injuries suffered in the service of the United Nations", in support of the contention put forward by the United Nations Secretariat that the General Convention creates rights and duties between each of the States Parties and the Organization.¹⁶¹

400. In answer to a query raised by a specialized agency in 1963, the Legal Counsel stated that the General Convention and the Specialized Agencies Convention did not contain a denunciation clause because sections 35 and 47 (the equivalent provision of the Specialized Agencies Convention) effectively amounted to a non-denunciation clause. The basic reason for the inclusion of sections 35 and 47 lay in Article 105, paragraph 1, of the Charter, which stated that privileges were "necessary" for the independent exercise of the functions of officials and representatives; if the privileges concerned were indeed "necessary" there could be no question of permitting denunciation. Provision had, in any case, been made in the two Conventions against the occurrence of any abuse.

Section 49. Supplementary agreements

401. In accordance with section 36 of the General Convention, the Secretary-General has concluded a number of supplementary agreements, referred to in the course of this survey, "adjusting the provisions of (the) Convention" so far as any particular Member or Members are concerned, chiefly in cases where the United Nations has established a permanent office in the country in question or otherwise undertaken any major programme or mission there.

402. For the period up to 1960, agreements concluded by the United Nations relating to its privileges and immunities, whether or not falling within the scope of section 36 of the General Convention, are to be found in the United Nations *Legislative Series, Legislative Texts and Treaty Provisions concerning the Legal Status, Privileges and Immunities of International Organizations*, vol. 1, and, for the period after 1962, in the successive issues of the *United Nations Juridical Yearbook*. The following agreements concerning United Nations privileges and immunities were concluded in the period between that covered in the *United Nations Legislative Series* and the start of the *United Nations Juridical Yearbook*.

Exchange of letters between United Nations and Mexico regarding arrangements for twenty-seventh session of Economic and Social Council at Mexico City, 3 and 7 April, 1959 (United Nations, *Treaty Series*, vol. 381, p. 123).

Exchange of letters between United Nations and United Arab Republic concerning the settlement of claim between UNEF and the United Arab Republic arising out of traffic accidents, 14 October 1959 and 15 September and 17 October 1960 (United Nations, *Treaty Series*, vol. 388, p. 143).

¹⁶¹ *I.C.J. Reports 1949*, pp. 174 and 179. Cited in section 6 (a), para. 57, above.

Agreement between United Nations and Austria regarding arrangements for Vienna Conference on Diplomatic Intercourse and Immunities, 27 February 1961 (United Nations, *Treaty Series*, vol. 394, p. 27).

Agreement between United Nations and Ethiopia relating to the establishment of an International Statistical Training Centre, 14 June 1961 (United Nations, *Treaty Series*, vol. 406, p. 81).

Agreement between United Nations and Mexico relating to human rights seminar to be held in Mexico City, 18 August 1961 (United Nations, *Treaty Series*, vol. 404, p. 297).

Agreement between United Nations and Italy regarding arrangements for the United Nations Conference on New Sources of Energy, 23 August 1961 (United Nations, *Treaty Series*, vol. 405, p. 3).

Agreement between United Nations and Ghana relating to the establishment of a Statistical Training Centre, 29 August 1961 (United Nations, *Treaty Series*, vol. 406, p. 117).

Agreement between the United Nations and Congo (Leopoldville) relating to the legal status, privileges and immunities of the United Nations Organization in the Congo, 27 November 1961 (United Nations, *Treaty Series*, vol. 414, p. 229).

403. Reference may also be made to the general survey of the agreements concluded by the United Nations relating to its privileges and immunities contained in the *Repertory of Practice of United Nations Organs*, vol. V, p. 326 *et seq.*, *ibid.*, suppl. No. 1, vol. II, p. 415 *et seq.*, and *ibid.*, suppl. No. 2, vol. III, p. 512 *et seq.*

B. Summary of practice relating to the status, privileges and immunities of the specialized agencies and the International Atomic Energy Agency

CHAPTER I. — JURIDICAL PERSONALITY OF THE SPECIALIZED AGENCIES AND OF IAEA

1. The Specialized Agencies Convention provides in article II, section 3 that:

The specialized agencies shall possess juridical personality. They shall have the capacity (a) to contract, (b) to acquire and dispose of immovable and movable property, (c) to institute legal proceedings.

2. Article II, section 2 of the IAEA Agreement on Privileges and Immunities contains a similar provision. The constitutional instruments of the specialized agencies and of the IAEA also provide, expressly or by implication, for the grant of the necessary legal capacity to enable the agency concerned to fulfil its purposes.¹⁶²

Section 1. Contractual capacity

(a) *Recognition of the contractual capacity of the specialized agencies and of IAEA*

3. The capacity of the specialized agencies and of IAEA to enter into contracts has been fully recognized. No

¹⁶² Art. XV, FAO Constitution; appendix II, IMCO Convention; art. 15, IAEA Statute; art. VII, IBRD Articles of Agreement; art. 47, ICAO Convention; art. VIII, IDA Articles of Agreement; art. VI, IFC Articles of Agreement; art. 39, ILO Constitution; art. IX, IMF Articles of Agreement; No. 149 of the ITU Montreux Convention (1965); art. XII, UNESCO Constitution; art. 66, WHO Constitution; and art. 27, WMO Convention.

limits have been set in national legislation or by other acts of national authorities upon the acknowledgement given by member and non-member States to the exercise of this capacity.

(b) *Choice of law: settlement of disputes and system of arbitration*

4. As a general rule, the commercial contracts concluded by specialized agencies are silent on the issue of the choice of law. They do not require the application of a given system of municipal law nor do they expressly exclude the application of such law if this should later prove desirable, for example, for purposes of interpretation. On occasions, however, reference is made to a specific system of municipal law where, for technical reasons, recourse to a body of detailed jurisprudence may be required; examples of contracts in this category have, in particular, included some of those concluded by WHO with building and civil engineering firms. Reference to a given system of national law may also be made implicitly. Thus the lease contracts entered into by the specialized agencies in different countries have usually been cast in the standard form employed locally, which have presupposed the applicability of national law. A somewhat similar situation has prevailed where an organization has entered into a *contrat d'adhésion* drawn up by the party providing the service, such as the provision of transport facilities or of insurance coverage.

5. Although considerable variation exists, the majority of contracts entered into by specialized agencies and by IAEA for goods and services provide for the settlement of disputes by arbitration, after recourse to direct negotiation. Most contracts concluded by the ILO in Geneva include a provision whereby all disputes are to be referred to the ILO Administrative Tribunal for decision;¹⁶³ the Tribunal has not in practice been called upon to give any decisions in such cases. The specialized agencies and IAEA have rarely had recourse to court actions in order to enforce their contractual remedies. One case which may be noted, however, is that of *International Refugee Organization v. Republic S.S. Corp. et al.*,¹⁶⁴ in which the IRO brought an action against the defendant corporation and its president to recover damages for alleged fraudulent breach of contract and sought enforcement of a writ of foreign attachment against a ship owned by the corporation.

6. Except for cases in which express reference is made to a given system of municipal law, contracts of employment are governed exclusively by international administrative law, including in particular, the terms of the contract itself and of any statutory rules adopted by the organization concerned. Arrangements have been

made for the settlement of disputes arising under employment contracts by means of internal appellate machinery. One of the main issues in the case was whether the capacity to institute legal proceedings included capacity to sue in a federal court whose jurisdiction was limited to enumerated parties; it was held that the IRO, as a specialized agency, had capacity to institute proceedings in order to recover damages for breach of contract.

7. The IBRD, IDA and IFC have developed a distinct body of practice as regards those contractual transactions which constitute their major field of activity. In the case of the IBRD, the position varies according to whether the organization is acting as lender or as borrower and according to the nature of the other party.¹⁶⁵ The IBRD makes loans either directly to member Governments or with the guarantee of a member country. Loans made to member Governments and guarantee agreements are governed by international law. Loan agreements with a borrower other than a member country cannot be regarded as international agreements. They are, however, insulated from the effect of conflicting domestic law, pursuant to an express provision of the IBRD Loan Regulations. On occasion such as the taking of security for a loan, express reference is made to municipal law in so far as the validity and enforcement of the security are concerned. The IBRD agreements provide for the settlement of loan disputes by international arbitration in accordance with the provisions contained in section 7.03 of Loan Regulations No. 3¹⁶⁶ and in section 7.04 of Loan Regulations No. 4.¹⁶⁷ Section 6.03 of the IDA Development Credit Regulations No. 1¹⁶⁸ provides for the same procedure. The IDA has so far made credits available only to member Governments, under agreements governed by international law.

8. The practice of the IBRD as a borrower depends on the custom in the particular market in which the funds are raised, or bonds are issued, and the character of the lender. While IBRD bonds issued in Canada, the United Kingdom and the United States contain no stipulation of applicable law (although it may be assumed that the law of the relevant market applies), bonds issued in Europe, other than in the United Kingdom, are expressly governed by the law of the particular market. As regards the character of the lender, it may be noted that, while loans made by Switzerland to the IBRD are governed by international law, loans made to the IBRD by institutions

¹⁶³ "The Tribunal shall be competent to hear disputes arising out of contracts to which the International Labour Organisation is a party and which provide for the competence of the Tribunal in any case of dispute with regard to their execution." Article II, paragraph 4, Statute of the Administrative Tribunal of the International Labour Organisation.

¹⁶⁴ United States Court of Appeals, Fourth Circuit, 11 May 1951, Nos. 6202, 6245, 6249, 189 F. 2d 858, on appeal from United States District Court D. Maryland, Cir. No. 4479, 92 F. Supp. 674 and No. 3132, 93 F. Supp. 798.

¹⁶⁵ The practice of IBRD is more fully explained in the following works: Broches, *International Legal Aspects of the Operations of the World Bank*, p. 98; *Recueil des Cours, Académie de Droit International*, 1959, vol. III, p. 301; Sommers, Broches and Delaume, "Conflict Avoidance in International Loans and Monetary Agreements"; 21, *Law and Contemporary Problems*, 1956, p. 463; Delaume, "The Proper Law of Contracts Concluded by International Persons: a Restatement and a Forecast"; 56, *American Journal of International Law*, 1962, p. 63; Nurick, Choice of Law Clauses and International Contracts, *Proceedings of the American Society of International Law*, 1960, p. 56; and Scott, the Enforceability of Loan Agreements between the World Bank and its Member Countries, 13, *American University L.R.* 1964, p. 185.

¹⁶⁶ United Nations, *Treaty Series*, vol. 414, p. 268.

¹⁶⁷ *Ibid.*, vol. 400, p. 212.

¹⁶⁸ *Ibid.*, vol. 415, p. 68.

such as the *Deutsche Bundesbank*, although governed by municipal law, contain no express stipulation of applicable law. Similar remarks apply to jurisdictional problems incidental to loans raised by the IBRD. Thus, while loan agreements between Switzerland and the IBRD provide for the arbitral settlement of possible loan disputes, bonds issued in Europe, other than in the United Kingdom, provide for the submission of loan disputes to the jurisdiction of the local courts. Bonds issued by the IBRD in Canada, the United Kingdom and the United States contain no jurisdictional clauses.¹⁶⁹

Section 2. Capacity to acquire and dispose of immovable property

9. The capacity of specialized agencies and of IAEA to acquire and dispose of immovable property has been widely recognized; the organizations concerned have purchased, sold, rented and leased property in a number of States, usually under the terms of a special agreement. Only one case was reported when the acquisition of property was refused; UNESCO stated that, on a basis of national law, Mexico declined to permit a regional basic educational centre (forming an integral part of UNESCO) to purchase premises on Mexican territory.

10. Instances of the acquisition or use of immovable property by a number of agencies are given below.

(i) *FAO*

11. The FAO has never acquired full title, either freehold or leasehold, to immovable property. Land and buildings for use as headquarters and regional offices have generally been made available by Governments under the terms of a special agreement whereby the FAO is required to pay a nominal rent (e.g. in the case of the Headquarters Agreement, \$US1).

(ii) *IAEA*

12. IAEA has never obtained, or sought to obtain, title to immovable property either in Austria or elsewhere. However it uses such property in Austria for its temporary headquarters, under a Supplemental Agreement to the Headquarters Agreement with the Austrian Government; for its laboratory at Seibersdorf, near Vienna, under a lease contract with *Oesterreichische Studiengesellschaft für Atomenergie*, a semi-public institution; and for apartments for its staff, under lease contracts with the City of Vienna. In Italy IAEA uses land and a building, placed at its disposal, free of charge, by the Italian Government, for its International Centre for Theoretical Physics.

(iii) *ILO*

13. The ILO has acquired title to immovable property on two occasions. In 1946 the full ownership of the land and buildings then occupied by the ILO was transferred to it by the League of Nations. The transfer was made in the form usually followed in Switzerland for such transactions and was registered in the Geneva land registry

without payment of any registration charges and fees for land registry.¹⁷⁰ In 1963 the ILO purchased an adjoining piece of land from the Canton of Geneva. This acquisition was also made in the form required by Swiss law and registered; no official fees or charges were paid.¹⁷¹

(iv) *ITU*

14. The ITU has acquired a "*droit de superficie*" over the site of its headquarters building.

(v) *UNESCO*

15. The site of UNESCO headquarters was leased to the Organization, at a symbolic rent, by the French Government. The Organization was also given property outside Paris, to which it acquired full title under French law.

(vi) *UPU*

16. Between 1927 and 1963 the building occupied by the UPU was owned by the Organization. In 1963 title was transferred to the Social Security Fund of the UPU. The latter is a foundation established under article 80 *et seq.*, of the Swiss Civil Code and as such has juridical personality enabling it to own property. Under a decision of the Swiss Federal Council of 20 December 1963, the Fund has been granted the same privileges and immunities as are accorded to the UPU itself, in view of the fact that its operations are conducted on behalf of UPU staff.

Section 3. Capacity to acquire and dispose of movable property

(a) *Recognition of the capacity of the specialized agencies and of IAEA to acquire and dispose of movable property*

17. The capacity of the specialized agencies and of IAEA to acquire and dispose of movable property has been widely used, without any serious difficulty arising. The only problem which was reported concerned a specialized agency which was bequeathed a portfolio of shares, in a number of companies of different nationalities; one of the companies concerned refused to enter the organization in its register of shareholders on the ground that the conditions of nationality laid down by its board of directors were not met by the organization.

(b) *Licensing and registration of land vehicles, vessels and aircraft*

18. The specialized agencies and IAEA have licensed and registered their land vehicles with the appropriate authorities of the State where the vehicle in question was used.

19. It appears that only FAO has owned or chartered vessels or aircraft. It has happened on occasion that, by courtesy of the licensing country, a vessel was permitted to fly the United Nations flag or an aircraft to display the United Nations emblem. Applications for registration have usually been filed with the competent national

¹⁶⁹ See Delaume, "Jurisdiction of Courts and International Loans, A Study of Lenders Practice", 6, *American Journal of Comparative Law* 189 (1957). This matter is more fully discussed in chapter IV of Delaume's forthcoming book on the *Legal Aspects of Contemporary International Lending Practice*.

¹⁷⁰ ILO *Official Bulletin*, 1946, vol. XXIX, No. 1, p. 67.

¹⁷¹ *Ibid.*, 1963, vol. XLVI, No. 2, p. 289.

authorities by or on behalf of FAO. There have been cases, however, where ownership has had to be transferred temporarily to the Government or to an appropriate agency of the country concerned before the aircraft or vessel could be registered or operated, particularly where registration was limited under national law to aircraft or vessels owned by nationals or by corporations with no (or only minority) foreign capital participation.

Section 4. Legal proceedings brought by and against the specialized agencies and IAEA

20. The capacity of each of the specialized agencies and of IAEA to institute legal proceedings before national tribunals has been generally assumed. Few of the organizations concerned have in fact found it necessary to institute such proceedings.¹⁷² UNESCO reported that it had brought a successful action before the United States District Court for the District of Columbia against the seller (who was also the manufacturer) of a multitape machine which proved defective. The IBRD and IMF together instituted a proceeding before the Federal Communications Commission, an administrative regulatory agency of the United States Government, regarding the standard of treatment to be accorded to the official communications of those two organizations.¹⁷³

21. As regards the steps taken to avoid or mitigate possible claims of a private law nature, it may be noted that in the various technical assistance agreements the participating specialized agencies are granted the protection of various "hold harmless" clauses.¹⁷⁴ Such clauses do not usually cover cases of gross negligence or of wilful misconduct. In the case of IAEA, the Agency has either disclaimed liability (such disclaimer being effective only in relation to the other party) or has tried to obtain a "hold harmless" undertaking, so as to cover it against third party liability in respect of nuclear risks.

22. In *Schaffner v. International Refugee Organization*¹⁷⁵ the plaintiff sought to bring an action for damages alleged to have arisen out of the negligent operation of a motor vehicle used by IRO. The Court dismissed the action, however, on grounds of the organization's immunity from suit.

Section 5. International claims brought by and against the specialized agencies and IAEA

23. Although the specialized agencies and IAEA possess the capacity to bring claims in respect of a breach of international law against other subjects of international law, only UNESCO has formally presented such a claim. Since the case involved the injury of a staff member when in a vehicle operated by a United Nations subsidiary

¹⁷² See, however, *International Refugee Organization v. Republic S.S. Corp. et al*, referred to in section 1, para. 5, above.

¹⁷³ See section 18, para. 95, below.

¹⁷⁴ The text of several "hold harmless" clauses, applicable to specialized agencies engaged in United Nations technical assistance programmes, is contained in *Summary of practice relating to the status, privileges and immunities of the United Nations*, section 4 (c), paras. 45-48, above.

¹⁷⁵ United States Court of Appeal, Allied High Commission for Germany, 3 August 1951, Civil Case No. 11, Opinion No. 665.

organ, however, the latter eventually pursued the matter vis-à-vis the State concerned. Only one agency has itself received a claim, made by a State acting on behalf of one of its citizens.

Section 6. Treaty-making capacity

(a) *Treaty-making capacity of the specialized agencies and of IAEA*

24. The specialized agencies and IAEA have entered into a large number of treaties with both Member and non-member States, either bilaterally or jointly (e.g. in the case of United Nations technical assistance agreements).¹⁷⁶ Such treaties have fallen broadly into two categories, those relating to the establishment of headquarters and other offices and the holding of conferences or meetings on the one hand, and those relating to the provision of technical assistance or the operation of direct programmes on the other.

(b) *Registration, or filing and recording, of agreements on the status, privileges and immunities of the specialized agencies and of IAEA*

25. Although there is some variation in the practice of the various agencies, the majority of agreements entered into relating to the status, privileges and immunities of specialized agencies and of IAEA have been registered, or filed and recorded, with the United Nations Secretariat.

26. It may be noted that instruments of acceptance of the IAEA Agreement on Privileges and Immunities are deposited with the Director-General of that agency and then registered with the United Nations Secretariat.

CHAPTER II. — PRIVILEGES AND IMMUNITIES OF THE SPECIALIZED AGENCIES AND OF IAEA IN RELATION TO THEIR PROPERTY, FUNDS AND ASSETS

Section 7. Immunity of the specialized agencies and of IAEA from legal process

27. As stated in section 4 of the Specialized Agencies Convention :

The specialized agencies, their property and assets, wherever located and by whomsoever held shall enjoy immunity from every form of legal process except in so far as in any particular case they have expressly waived their immunity. It is, however, understood that no waiver of immunity shall extend to any measure of execution.

28. The majority of specialized agencies stated that their immunity from legal process had been fully recognized by the competent national authorities.¹⁷⁷ On occasions an official, acting on behalf of an agency, has been asked to appear in order to give evidence before a national court. Where in such instances the agency concerned had considered that it could not accede to the request it had asserted its immunity from legal process, including that of its officials, through the foreign ministry of the State.

¹⁷⁶ See also section 45, paras. 186 and 187, below.

¹⁷⁷ See e.g. the case of *Schaffner v. International Refugee Organization*, referred to in section 4, para. 221, above.

29. One agency reported two instances in which difficulty with respect to its immunity had been encountered. In one a technical assistance expert employed by the agency was involved in a car accident while on official duty, resulting in the death of a local government official who was a passenger in the car. The widow of the deceased attempted to bring an action in the local courts against both the agency and the expert. While court proceedings were halted at an early stage and the immunity from arrest of the agency official recognized, the Government was reluctant to recognize the provisions of the "hold harmless" clause contained in the relevant technical assistance agreement and intimated that it would pursue the widow's claim for compensation. The agency, however, in consultation with the United Nations, refused to recognize the claim and did not pay damages. The second case involved a local employee of the agency who was engaged in a Special Fund project. After his appointment had been terminated by the agency, he brought an action in the local courts for the termination benefits due under national law against a Government institute which was being established in the country in question under a Special Fund project. Notwithstanding the intervention of the Government, the court refused to recognize the immunity of the agency in respect of labour claims and issued a judgement which resulted in the sequestration of monies from a Special Fund imprest account held by the agency in order to satisfy the judgement. In all other instances in which actions have been brought arising out of employment contracts, however, the courts have upheld the immunity of the organization concerned, unless the latter should agree to waive its immunity from legal process in respect of the proceedings.¹⁷⁸

30. The IBRD, IDA and IFC do not enjoy general immunity from suit. Under the pertinent agreements¹⁷⁹ their immunity is limited to actions brought by Member States or by persons acting for or deriving claims from such States. There have been no cases in which this immunity has not been recognized. Actions by other persons may be brought only in a court of competent jurisdiction in the territory of a Member State in which IBRD, IDA or IFC, as the case may be, has an office, has appointed an agent for the purpose of accepting service or notice of process, or has issued or guaranteed securities. It may be noted that in the case of *Frank B. Redicker v. Warfield et al.*¹⁸⁰ suit was brought against the IBRD by an individual plaintiff who sought to obtain damages of approximately \$625,000 for alleged interference with the plaintiff's contractual relationships. The IBRD denied the charges contained in the complaint

¹⁷⁸ See e.g. *Vicelli v. International Refugee Organization*, 20 July 1951, Tribunal of Trieste, reported in 36 *Rivista di Diritto Internazionale*, 1953, p. 470.

¹⁷⁹ See for the IBRD, Articles of Agreement, article VII, section 3, and Specialized Agencies Convention, Annex VI, para. 1; for IDA, Articles of Agreement, article VIII, section 3, and Specialized Agencies Convention, Annex XIV, para. 1; and for IFC, Articles of Agreement, article VI, section 3 and Specialized Agencies Convention, Annex XIII, paras. 1 and 3.

¹⁸⁰ U.S. District Court, Southern District of New York, Civil No. 61-210.

and the action was discontinued, with prejudice, in 1954.

31. The words "every form of legal process" have been broadly interpreted to include all forms of legal process, whether or not exercised by a specifically judicial body.

*Section 8. Waiver of the immunity from legal process of the specialized agencies and of IAEA*¹⁸¹

32. The specialized agencies and IAEA reported that the immunity from legal process of their respective organizations had never on any occasion been formally waived. Relatively few agencies have in fact been the subject of a claim, however, so as to cause the agency concerned to decide whether or not its immunity should be waived. No specialized agency has entered into a bilateral or other agreement whereby it is obliged to waive its immunity in the event of a dispute arising as to the interpretation of the agreement. They have, however, entered into agreements in which they agreed to arbitrate any disputes which arose.

33. As noted in section 7, paragraph 30, above, IBRD, IDA and IFC do not enjoy general immunity from suit. Paragraph 3 of the IFC Annex to the Specialized Agencies Convention states:

The Corporation in its discretion may waive any of the privileges and immunities conferred under Article VI of its Articles of Agreement to such extent and upon such conditions as it may determine.

34. The immunity from "any measure of execution", contained at the end of section 4 of the Specialized Agencies Convention, has been strictly adhered to. The ILO in particular has always taken the view that no execution is possible on the salary of officials still held by the ILO, on the ground that this would constitute a "measure of execution" on ILO assets. Accordingly, in the event that an official assigns his salary to a third party in guarantee of a loan, the guarantee is unenforceable before national courts.

35. In 1963 the United Nations Office of Legal Affairs advised¹⁸² the Special Fund regarding

... the question of who should have the right to waive the privileges and immunities of a specialized agency which has been retained by another specialized agency to assist the latter in the execution of a project.

Article XI of the standard Agreement between the Special Fund and FAO and other specialized agencies acting as executing agency was intended to apply only to cases where the sub-contractor concerned is a firm or organization other than a specialized agency. Where the sub-contractor is another specialized agency, article XI would not apply and would therefore not provide a basis for the executing agency to waive the immunities of the second specialized agency.

We are of the opinion that any waiver of the privileges and immunities of a specialized agency serving as a sub-contractor should be effected by the specialized agency itself. Under section 22 of the Convention on the Privileges and Immunities of the Specialized Agencies, the right and the duty to waive the immunity of

¹⁸¹ See also the memoranda cited in *Summary of practice relating to the status, privileges and immunities of the United Nations*, sections 8 (a) and (b), paras. 82-84 and 87, above.

¹⁸² *United Nations Juridical Yearbook* 1963, p. 179.

an official rests with "each specialized agency", and the mere fact that the specialized agency concerned happens to be acting in the capacity of a sub-contractor in regard to a particular project cannot vary the terms of the Convention. A problem, however, would arise where the country recipient of Special Fund assistance is not a party to the Convention and is bound to apply its terms solely on the basis of article VIII, paragraph 2, of the standard Special Fund Agreement with governments. As you know, this provision requires that the Government apply the Convention "to each specialized agency acting as an Executing Agency"; where the specialized agency concerned is acting as a sub-contractor, it would not meet the literal requirement of the provision in question. However, this problem could be solved by a clause in the Plan of Operation stipulating that any specialized agency retained by the executing agency to assist it in the project shall be entitled to the privileges and immunities of a specialized agency acting as an executing agency as envisaged in paragraph 2 of article VIII of the Agreement between the Special Fund and the Government. In this way, a specialized agency would not be treated less favourably when acting as a sub-contractor than it would when filling the role of an executing agency.

Section 9. Inviolability of the premises of the specialized agencies and of IAEA and the exercise of control by the specialized agencies and by IAEA over their premises

36. The inviolability of the premises of the specialized agencies, which is referred to in the opening sentence of section 5 of the Specialized Agencies Convention, has been well recognized and instances of non-observance have been extremely rare. It may be noted that several agreements with host States permit the entry of local police or other authorities solely upon the request of the Agency concerned. WHO reported that, following claims made under national labour law by the locally recruited staff of one of its regional offices, various measures had been taken by the national authorities, including violation of the Organization's premises; at the time of the preparation of the present study the matters involved were the subject of discussions with the Government of the State concerned. An employee of the "UNESCO Staff Service" in the premises of UNESCO conducted local police into the basement of the building in order to arrest a subordinate member of the staff. Following a protest by UNESCO regarding this violation of its premises and the arrest, the host Government issued a directive to the responsible police unit to ensure that no repetition occurred. UNESCO issued an administrative instruction to all members of UNESCO staff, including security staff, to the employees of the Staff Service and to employees of the bank and travel agency having offices in the building, informing them that disciplinary measures would be taken against any employee at UNESCO Headquarters who did not observe the instructions already given or who otherwise acted in a matter permitting a violation of the pertinent provisions of the Headquarters Agreement to occur.

37. The right of the specialized agencies and of IAEA to exercise control over their premises has not been contested. Several agencies have issued rules and instructions regarding such matters as traffic and parking regulations, the operation of commissary facilities, the operation of a visitors service, the sale of official publications and the like.

Section 10. Immunity of the property and assets of the specialized agencies and of IAEA from search and from any other form of interference

38. Besides referring to the inviolability of premises, section 5 of the Specialized Agencies Convention provides that:

The property and assets of 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.

39. No body of practice appears to have emerged regarding the interpretation of these words. The specialized agencies and IAEA reported that the immunity in question has been observed without difficulty.¹⁸³

Section 11. Name and emblem of the specialized agencies and of IAEA: United Nations flag

40. Relatively few legal problems appear to have arisen in connexion with the use by the specialized agencies and IAEA of their own name and distinctive emblem. The specialized agencies and IAEA have flown the United Nations flag, in accordance with the United Nations flag code, outside their offices and other installations. The WHO has its own flag.

41. The FAO reported that one Government delayed the take-off of an aircraft which the Organization had chartered and which was officially authorized to bear the United Nations insignia, in pursuance of a law requiring planes carrying United Nations insignia to obtain prior approval before landing on the territory of the country in question. After detention for forty-eight hours the aircraft was allowed to proceed, following diplomatic intervention by the agency.

42. A number of specialized agencies, and the IAEA, have applied to the United International Bureaux for the Protection of Intellectual Property in order to register their name and other insignia, so that they may receive the appropriate protection provided under article 6 *ter* of the Paris Convention for the Protection of Industrial Property, as revised at Lisbon in 1958 and which came into force on 4 January 1958. As a result of this action the name and insignia of the agencies in question have been protected in several countries. In addition a number of countries have adopted (usually as a result of prior requests) national enactments protecting the name and insignia of United Nations bodies.

Section 12. Inviolability of archives and documents

43. As stated in section 6 of the Specialized Agencies Convention,

The archives of the specialized agencies, and in general all documents belonging to them or held by them, shall be inviolable wherever located.

44. Few occasions were mentioned when States had sought to take action or otherwise deny the inviolability

¹⁸³ See, however, the case reported by FAO in section 11, para. 41, below, in which a Government delayed the take-off of a plane carrying United Nations insignia.

of archives and documents. The FAO stated that on one occasion documents carried by an official were seized by customs authorities who took cognizance of, and commented on, their contents. The Government concerned subsequently apologized for the incident. Secondly, WHO stated that in 1958 an WHO official had assisted officials of the Ministry of Health of a Member State in the selection of candidates for an official post. An offer of employment was sent to one candidate but was almost immediately rescinded by the local authorities. The person who failed to get the job thereupon instituted proceedings against the Ministry of Health, which led to the WHO official being subpoenaed to testify as a witness against the Ministry. The request for the official to appear was rejected by WHO, on the grounds, *inter alia*, that the appearance of the official would of necessity require the production of the official files of the Organization.

Section 13. Immunity from currency controls

45. The relevant provisions of the Specialized Agencies Convention are as follows:

7. Without being restricted by financial controls, regulations or moratoria of any kind:

(a) The specialized agencies may hold funds, gold or currency of any kind and operate accounts in any currency;

(b) The specialized agencies may freely transfer their funds, gold or currency from one country to another or within any country and convert any currency held by them into any other currency.

8. Each specialized agency shall, in exercising its rights under section 7 above, pay due regard to any representations made by the Government of any State party to this Convention in so far as it is considered that effect can be given to such representations without detriment to the interests of the agency.¹⁸⁴

46. The privileges contained in the above-mentioned sections have not been expressly denied. It appears to be accepted as self-evident that the organizations concerned would be unable to discharge their responsibilities in all parts of the world if they were unable to hold and transfer their funds freely. Nevertheless a number of specialized agencies reported that they had encountered considerable difficulties by reason of the payments in currencies which were not easily convertible; in most cases, however, these difficulties were resolved or lessened following discussions with the State or States concerned.

47. Particular arrangements which have been entered into, or cases which have arisen, include the following:

(i) IAEA

Article IX, section 23, of the IAEA Headquarters Agreement provides as follows:

(a) Without being subject to any financial controls, regulations or moratoria of any kind, the IAEA may freely:

(i) Purchase any currencies through authorized channels and hold and dispose of them;

(ii) Operate accounts in any currency;

(iii) Purchase through authorized channels, hold and dispose of funds, securities and gold;

(iv) Transfer its funds, securities, gold and currencies to or from the Republic of Austria, to or from any other country, or within the Republic of Austria; and

(v) Raise funds through the exercise of its borrowing power or in any other manner which it deems desirable, except that with respect to the raising of funds within the Republic of Austria, the IAEA shall obtain the concurrence of the Government.

(b) The Government shall assist the IAEA to obtain the most favourable conditions as regards exchange rates, banking commissions in exchange transactions and the like.

(c) The IAEA shall, in exercising its rights under this section, pay due regard to any representations made by the Government in so far as effect can be given to such representations without prejudicing the interests of the IAEA.

48. IAEA has also concluded a supplemental agreement with Austria regarding currency exchange. Under this agreement Schilling funds acquired by IAEA through the sale of freely convertible currency may be transferred into any currency, whereas the transfer of Schilling funds of other origin into other currencies is subject to the limitations generally applicable to transfers into such currencies under the pertinent Austrian regulations.

(ii) IFC

49. Paragraph 2 of the IFC Annex to the Specialized Agencies Convention states that Section 7, paragraph (b) shall apply to the Corporation, subject to Article III, Section 5, of its Articles of Agreement. The latter provision is as follows:

Funds received by or payable to the Corporation in respect of an investment of the Corporation made in any member's territories pursuant to Section 1 of this Article shall not be free, solely by reason of any provision of this Agreement, from generally applicable foreign exchange restrictions, regulations and controls in force in the territories of that member.

(iii) ILO

50. Besides the general problem of currencies with limited convertibility, the ILO reported a number of other difficulties which had occurred. In 1950 a member State prohibited the opening of a bank account in the name of the ILO pending the grant of legal status, under national law, to the ILO office in the country in question. In 1951 another member State prevented the ILO from paying part of the salary of the ILO's national correspondent there with the proceeds in dollars or Swiss francs of the sale of ILO publications in the State concerned; a similar instance occurred in 1960 in respect of another member State. In 1954 a member State indicated that it could not grant the ILO the right to transfer funds freely as the matter was not dependent on the country concerned but on the then occupying powers. No difficulty arose in practice in this instance, however. In 1957 the same member State informed the ILO that, in its opinion, the relevant provisions of the Specialized Agencies Convention were to be interpreted as meaning that its currency (which in general was freely convertible) could be exchanged without limit so far as other freely convertible currencies were concerned but that currencies with limited convertibility could only be exchanged for such of the currency of the member State in question as

¹⁸⁴ See the opinion cited in *Summary of practice relating to the status, privileges and immunities of the United Nations*, section 13, para. 138, above, referring to the interpretation of these provisions.

had limited convertibility; this interpretation was accepted by the ILO.

(iv) *IMCO*

51. IMCO stated that the central bank of the host State had on one occasion ruled that the Organization could not deal in a particular money market in that State as a means of converting one currency into another.

(v) *WHO*

52. In the host Agreement entered into between Egypt and WHO by means of an exchange of notes, dated 25 March 1951, it was agreed that, while the Organization might "hold gold and, through normal channels, receive and transfer it to and from Egypt", it might not transfer from Egypt more gold than it had brought it. Since the WHO does not hold any of its financial assets in the form of gold, this provision has not been applied.

*Section 14. Direct taxes*¹⁸⁵

53. Section 9 of the Specialized Agencies Convention provides that:

The specialized agencies, their assets, income and other property shall be:

(a) Exempt from all direct taxes; it is understood, however, that the specialized agencies will not claim exemption from taxes which are, in fact, no more than charges for public utility services.

54. The specialized agencies reported that they had not experienced any serious difficulty in the interpretation of this provision. Although on occasions States have attempted to levy direct taxes, such attempts have been discontinued following the submission of an explanatory memorandum or other communication by the agency concerned. It may be noted that agencies in Switzerland are exempt, *inter alia*, from stamp duty on contracts and from *impôt anticipé*, *impôt sur les coupons* and *droit d'émission* on securities.

55. Under section 19 (a) of its Headquarters Agreement FAO has been specifically exempted, *inter alia*, from the tax on movable property, land income tax, capital levy and local surtaxes. Under section 22 (a) of the IAEA Headquarters Agreement, IAEA is declared exempt from all forms of national taxation. In practice, IAEA has only claimed exemption from indirect taxes if the exemption concerned was administratively feasible.

56. The specialized agencies pay "charges for public utility services", as envisaged in the Convention, except where the cost of those services has been voluntarily assumed by a host country. The FAO reported that the question of the rate of charges for public utilities had arisen in connexion with the telephone services provided at its Headquarters.¹⁸⁶ Initially the Organization had been required to pay the same telephone rates as private subscribers, despite the fact that under article VI, section 11, of its Headquarters Agreement it was to be afforded the same treatment as that accorded to other Governments, including the diplomatic missions of such

Governments, in respect of communications. After lengthy discussions with the telephone company and the intervention of the Italian Government, it has been established that the telephone rates chargeable to the Organization should be equivalent to those charged to Ministries of the Italian Government pursuant to article V, section 10 (a) of the Headquarters Agreement, which relates to the provision of public services. The Italian authorities have, however, insisted on the payment of turnover tax with respect to public services such as telephone, electricity, gas and water, on the ground that the tax was also paid in respect of those services by diplomatic missions in Rome.

57. IAEA sought to obtain exemption from the Vienna airport service charge, but was informed that this did not constitute a tax but a charge levied by the company operating the airport for the use of the airport facilities. IAEA did not therefore take any further steps in the matter.

Section 15. Customs duties

(a) *Imports and exports by the specialized agencies and by IAEA "for their official use"*

58. Under section 9 (b) of the Specialized Agencies Convention, specialized agencies are declared

Exempt from customs duties and prohibitions and restrictions on imports and exports in respect of articles imported or exported by the specialized agencies for their official use; . . .

59. The majority of specialized agencies reported that problems have rarely arisen in determining whether or not a given article was being imported or exported "for their official use". Where difficulties have occurred they have usually been resolved by contacting the appropriate officials. In the case of imports into Switzerland, a special form has been established by the Swiss authorities on which persons specifically authorized by the various organizations having offices there may certify that a particular import is for official use.

60. Several organizations indicated some of the more particular problems which had presented themselves over the question of whether particular imports were for official use. The IMCO stated that it had encountered difficulty in importing wines, spirits and tobacco for purposes of official hospitality, since the customs authorities of the host State had denied that such articles could be for official use. After representations by the organization, however, this ruling had been amended. The ILO reported that in 1952 and 1955 a member State claimed that articles sent to the ILO branch office there for the purposes of an exhibition were subject to customs duty, on the grounds that importation of articles for the purposes of display at an exhibition could not be considered importation for official use. In 1961 another member State detained a package of documents sent from another member State, with which the detaining State no longer maintained diplomatic relations, but finally agreed to release them once it had been shown that the documents concerned were being imported by the ILO for official purposes.

61. UNESCO stated that when, in 1961, it had wished to import certain kitchen equipment for use in its head-

¹⁸⁵ See also section 17, paras. 67-74, below as regards excise duties and taxes on sales.

¹⁸⁶ See section 18, paras. 75-97, below, regarding Government treatment in respect of communications.

quarters the customs authorities of the host State had declared that the articles concerned could not be imported duty free since their use was not connected with the purposes of a cultural organization. The organization contested this ruling, pointing out that similar equipment had been imported duty-free when the headquarters building had been constructed and that the maintenance of kitchen facilities, for the benefit of representatives and officials, contributed to the efficacy of the work of the organization. The Ministry of Foreign Affairs of the host State stated, however, that, in its opinion, article 15 of the Headquarters Agreement (which corresponds to section 9 of the Specialized Agencies Convention) did not entitle the organization to determine of its own accord that all articles it wished to import were automatically to be considered as being for official use; the determination of this question was to be made by the organization and the host State acting together. Owing to its pressing need of the equipment UNESCO paid the customs duties, together with the storage fees which had accrued, but informed the Ministry that it maintained its interpretation and that it reserved its rights in the matter, including that of proceeding under article 29 of the Headquarters Agreement, which provides for the arbitration of disputes. Following a demand from its auditors for an explanation of what had occurred the organization again approached the Ministry of Foreign Affairs, which stated that, after a fresh examination of the case, it had decided to authorize the admission of the material concerned as a special exception. Duties and taxes subsequently levied by the French customs authorities have been reimbursed to the organization.

(b) *Imposition of "customs duties . . . prohibitions and restrictions"*

62. Customs duties, prohibitions and restrictions have not been imposed on any goods imported or exported by the specialized agencies or by IAEA, except to the extent noted in sub-section (a) above. The question of the refund of customs duties therefore arises comparatively rarely, normally only in the case where duty has been paid by an importer from whom the organization has then bought the goods. To avoid the administrative problems involved in obtaining a refund in such cases the specialized agencies have usually sought to import goods in their own name. Where this has not been possible, suitable proof has been supplied to the importer to enable him to obtain a refund; efforts to obtain a refund in such circumstances have not always been successful however.

(c) *Sales of articles imported by the specialized agencies and by IAEA*

63. Section 9 (b) of the Specialized Agencies Convention further provides that articles imported for official use, free from customs duties and other restrictions, "will not be sold in the country into which they were imported except under conditions agreed to with the Government of that country".

64. The majority of specialized agencies have entered into appropriate arrangements with the authorities of the State concerned. In Switzerland the *Règlement*

douanier of 23 April 1952 applies, under which articles imported by agencies may be sold free of customs duty only after five years. IAEA has entered into a standing arrangement with Austria allowing the customs-free disposal of goods two years after their importation. In the case where agencies maintain staff commissaries with customs privileges¹⁸⁷ detailed agreements have been made with the competent host authorities, in some cases including such matters as ceilings on the annual tax-free imports allowed in respect of individual staff members and restrictions on the benefits permitted to local employees.

Section 16. Publications

65. Section 9 (c) of the Specialized Agencies Convention grants the specialized agencies exemption from duties, prohibitions and restrictions on imports and exports of their publications. The term "publications" has been interpreted to cover films, records, radio transcription discs and recording tapes, as well as books, periodicals and other printed material published by the organization concerned. In general no restrictions have been imposed on the import or export of such articles, although occasionally completion of a customs clearance certificate or the obtaining of a licence has been required. Whilst specialized agencies have complied with routine procedures to enable their publications to be cleared through customs, they have protested against the imposition of any system of licensing which appeared to go beyond this.

66. The ILO reported various occasions on which its privileges in respect of publications had been called in question or had otherwise given rise to discussion. In 1953 a member State granted exemption from customs and sales taxes on "official supplies", including books sent to the ILO national correspondent, but claimed such taxes on items sent to third parties. In 1960 another member State levied customs duties on ILO publications addressed directly to one of its nationals. In 1959 a third member State claimed that the ILO should deposit with the customs authorities the value of books and publications imported for sale through the ILO sales agents; exemption from this requirement was finally obtained, however. As regards import controls more generally, two member States stated in 1955 that all imports into their respective countries had to take place through the state import monopoly and could not be imported and sold directly through the ILO Branch Office there. The ILO agreed to use such official channels.

Section 17. Excise duties and taxes on sales; important purchases

(a) *Excise duties and taxes on sales forming part of the price to be paid*

67. Section 10 of the Specialized Agencies Convention provides that:

¹⁸⁷ FAO and IAEA maintain such commissaries under the terms of their respective headquarters agreements; see art. XIII, section 27 (j) (ii), FAO Headquarters Agreement and art. XV, section 38 (j) (iii) IAEA Headquarters Agreement. UNESCO also operates a similar service for the members of its staff.

While the specialized agencies will not, as a general rule, claim exemption from excise duties and from taxes on the sale of movable and immovable property which form part of the price to be paid, nevertheless when the specialized agencies are making important purchases for official use of property on which such duties and taxes have been charged or are chargeable, States parties to this Convention will, whenever possible, make appropriate administrative arrangements for the remission or return of the amount of the duty or tax.

68. The terms "excise duties and . . . taxes" have been interpreted in a broad sense. In Switzerland, where practice has been most developed, all articles imported for official use are exempt, not only from customs duties, but also from turnover taxes (*impôt sur les chiffres d'affaires*) and statistical charges, which are normally levied at the frontier.

69. In addition to the exemptions granted to FAO under section 20 (a) of its Headquarters Agreement,¹⁸⁸ section 20 (b) provides as follows:

Regarding indirect taxes, levies and duties on operations and transactions, FAO shall enjoy the same exemptions and facilities as are granted to Italian governmental administrations. In particular, but without limitation by reason of this enumeration, FAO shall be exempt from the registration tax (*imposta di registro*); the general receipts tax (*imposta generale sull'entrata*) on wholesale purchases, on contractual services and on tenders for contractual supplies (*prestazioni d'opera, appalti*), on leases of lands and buildings; from the mortgage tax; and from the consumption taxes on electric power for lighting, on gas for lighting and heating, and on building materials.

70. While FAO is exempt under this provision from payment of turnover tax (IGE),¹⁸⁹ the organization has found that, in the case of purchases made or services procured in Italy, its suppliers are required to pay IGE. After FAO had placed a large printing order with an Italian firm it argued that it was not receiving the true benefit of exemption from the tax since the tax fell on its supplier and was incorporated in the invoice payable by the organization. The organization has continued to seek the exemption of its suppliers from this tax through the Ministry of Foreign Affairs.

(b) Important purchases

71. The question of what constitutes an important purchase for the purpose of the section has not received a standard and uniform interpretation. In Switzerland it has been agreed that, for a purchase to count as important, the cost must amount to at least 100 Swiss francs. Similarly, in the Republic of the Congo (Brazzaville) the amount involved may not be less than CFA 10,000 (approximately \$41). In an exchange of letters regarding the interpretation of the host agreement between WHO and Denmark, the expression "minor purchases" was defined as meaning those costing less than 200 Danish Kroner (approximately \$28); purchases over that figure are accordingly classified as important, within the meaning of section 10 of the Convention. In the case of IAEA, the Headquarters Supplemental Agreement on Turnover

Taxes provides that no refund will be made on turnover tax paid on minor purchases; minor purchases are defined as being those totalling less than AS 20,000 (approximately \$800). For running accounts the final balance at the end of each six months accounting period is considered the total sum paid.

72. It may be noted that the UNESCO Headquarters Agreement does not contain the condition that purchases be "important"; accordingly, the organization is exempt from indirect tax in France irrespective of the importance of the purchase.

(c) Remission or return of taxes paid

73. In the case of Switzerland administrative arrangements have been made to enable the organizations operating there to obtain reimbursement. The organization concerned pays the duties and taxes concerned to its supplier and then claims reimbursement, on the basis of appropriate statements and receipts, from the Swiss federal authorities, at regular intervals. A similar scheme operates in the United Kingdom in respect of payments of purchase tax made by IMCO.

74. In France, on the other hand, the supplier is permitted to deduct indirect taxes on sales at the time of purchase, upon written declaration by UNESCO that it is the purchaser; this arrangement, which has been defined in an exchange of letters between UNESCO and the host State, has worked satisfactorily.¹⁹⁰

CHAPTER III. — PRIVILEGES AND IMMUNITIES OF THE SPECIALIZED AGENCIES AND OF IAEA IN RESPECT OF COMMUNICATION FACILITIES

Section 18. Treatment equal to that accorded to Governments in respect of mails, telegrams and other communications

75. Article IV, section 11, of the Specialized Agencies Convention declares that:

Each specialized agency shall enjoy, in the territory of each State party to this Convention in respect of that agency, for its official communications, treatment not less favourable than that accorded by the Government of such State to any other Government, including the latter's diplomatic mission in the matter of priorities, rates and taxes on mails, cables, telegrams, radiograms, telephotos, telephone and other communications, and Press rates for information to the Press and radio.

76. With one major exception, the standard of treatment accorded to specialized agencies under section 11 has been fully afforded.¹⁹¹ The exception exists in the case of telecommunication privileges since, under the various

¹⁹⁰ While the taxes in question are considered "indirect taxes" within the French fiscal system, see the discussion in *Summary of practice relating to the status, privileges and immunities of the United Nations*, section 14 (especially paragraphs 145 and 146) above, regarding the interpretation of the terms "direct" and "indirect taxes" for the purposes of the General Convention; the same considerations apply with regard to the interpretation of the Specialized Agencies Convention.

¹⁹¹ See section 14, para. 56, above regarding the payment of turnover tax by FAO on telephone charges.

¹⁸⁸ See section 14, para. 55, above.

¹⁸⁹ Except as regards turnover tax on public utilities; see section 14, para. 56, above.

International Telecommunication Conventions, priorities, rates and taxes equal to those afforded to Governments have not been given to all of the specialized agencies.

77. The International Telecommunication Convention of Atlantic City, 1947, which was adopted at approximately the same time as the Specialized Agencies Convention was adopted by the General Assembly, provided that priority should be given to United Nations telegrams and telephone calls, but did not provide it for those of the specialized agencies.¹⁹² In view of the fact that the Atlantic City Convention did not provide governmental treatment for communications of the specialized agencies, at its second session in January 1948, the Administrative Council of ITU adopted a resolution recommending to the Secretary-General of the United Nations, as well as to ITU member States, that the Specialized Agencies Convention should be interpreted in the light of the Atlantic City Convention. There followed a series of exchanges between the Secretaries-General of ITU and the United Nations.¹⁹³ By a letter dated 30 August 1948, the Secretary-General of the United Nations informed the Secretary-General of ITU that the Specialized Agencies Convention had become applicable to ICAO and WHO and expressed the opinion that States Parties to the Convention would have the duty to apply the provisions of section 11 to those agencies. The Secretary-General of the United Nations also pointed out that, prior to its adoption by the General Assembly, the draft text of the Specialized Agencies Convention had been communicated to the International Telecommunications Conference at Atlantic City and that the competent authorities of ITU had been invited to be represented at the meeting of the Sub-Committee of the Sixth Committee which drew up this Convention in order to participate in its work.

78. On 7 January 1949, the Secretary-General of ITU, by a letter to the Secretary-General of the United Nations, stated that, at its third session in September-October 1948, the Administrative Council of ITU had adopted a resolution requesting him to ask if the United Nations would contemplate modifying the terms of section 11; in lieu of this, the Secretary-General of the United Nations was asked to consider suspending the provision until the matter could be considered by the next conference of ITU, to be held in Buenos Aires in 1952. In his reply, the Secretary-General of the United Nations stated that the Specialized Agencies Convention had already come into effect for some member States in respect of a number of agencies. He also informed ITU that there were no provisions in the Convention for the suspension of any of its clauses and that, as regards revision, this would be possible only if, in accordance with section 48, one-third of the States Parties requested the Secretary-General to call a conference for this purpose.

¹⁹² For the text of the pertinent provisions (article 36 and Annex 2) of the Atlantic City Convention, see *Summary of practice relating to the status, privileges and immunities of the United Nations*, section 18, para. 220, above.

¹⁹³ See *Official Records of the General Assembly, Fourth Session, Sixth Committee*, annex, pp. 26-28.

79. At its fourth session, held from 15 August to 30 October 1949, the Administrative Council of ITU adopted resolution No. 142, in which it decided:

1. To request the Secretary-General to keep up to date the list of the subsidiary organs of the United Nations and to forward to the Members and Associated Members of the Union a copy of this list and to advise them of any modifications therein;

2. To request the Secretary-General to bring the terms of the above-mentioned opinion to the attention of the Members and Associate Members of the Union with the recommendation that, subject to any decisions reached by the appropriate authorities on the question of conflict of obligations, such Members and Associate Members shall, either by appropriate reservations to article IV, section 11, of the Convention on Privileges and Immunities of Specialized Agencies or by any other appropriate means, limit to the Heads of the subsidiary organs of the United Nations the Government telecommunication privileges provided for in the Atlantic City Convention;

3. To request the Secretary-General to suggest to the Members and Associate Members of the Union who are Members of the United Nations to place this matter on the agenda of the forthcoming General Assembly of the United Nations with a view to proposing that the United Nations consider the calling of a special Conference for the purpose of abrogating article IV, section 11, of the Convention on Privileges and Immunities of Specialized Agencies;

4. To request the Secretary-General to recall to the Administrations present at the Paris Telegraph and Telephone Conference, 1949, the recommendation of the Conference that such Administrations recommend to their respective Governments that their representatives at the United Nations support the proposal of the Union that article IV, section 11, be abrogated;

5. To request the Secretary-General to place this question on the agenda of the last session of the Administrative Council before the Plenipotentiary Conference, Buenos Aires, 1952, in the event that this question has not been resolved to the satisfaction of the Union before that date.

80. In his report dated 7 September 1949, on the privileges and immunities of the United Nations,¹⁹⁴ the Secretary-General of the United Nations referred to the discrepancy between the two Conventions. He summarized the correspondence between the Secretary-General of ITU and himself but did not offer any recommendation of his own. At the 211th meeting of the Sixth Committee on 29 November 1949, the Assistant Secretary-General in charge of the Legal Department presented the report and pointed to the divergent provisions in the ITU Convention of 1947 and those in the Specialized Agencies Convention. He said that, "it was for the Committee to decide what action to take on the report of the Secretary-General". No member of the Committee, however, adverted to the question. The Committee merely adopted a draft resolution proposed by the representative of Argentina to "take note of the Secretary-General's report".¹⁹⁵

81. In accord with the decisions of the Administrative Council of ITU, the United Kingdom made the following declaration in a letter addressed to the Secretary-General

¹⁹⁴ *Official Records of the General Assembly, Fourth Session, Sixth Committee, Annex to summary records of meetings*, agenda item 54, document A/940 and Add.1 and 2.

¹⁹⁵ *Ibid.*, 211th meeting.

of the United Nations by which it transmitted its instrument of accession to the Specialized Agencies Convention (but not in the instrument of accession itself):

I have to invite your attention to the fact that it is not possible for any Government fully to comply with the requirements of section 11 of that Convention in so far as it requires the specialized agency to enjoy in the territory of a State party to the Convention treatment not less favourable than that accorded by the Government of that State to any other Government in the matter of priorities and rates on telecommunications, unless and until all other Governments collaborate in according this treatment to the Agency in question. It is understood that this matter is being discussed in the International Telecommunications Union.

82. This declaration of the United Kingdom, which was received by the Secretary-General on 16 August 1949, was repeated, in essence, in connexion with the subsequent notifications made by the United Kingdom making the Convention applicable to additional specialized agencies, on 17 December 1954 and 4 November 1959.

83. The example set by the United Kingdom was followed by the Federal Republic of Germany, Gabon and New Zealand, on their respective accessions to the Convention on 10 October 1957, 9 September 1958 and 25 November 1960, respectively. Three other countries made declarations substantially to the same effect subsequent to their accessions, namely, Pakistan on 15 September 1961, 13 March 1962 and 17 July 1962; Norway on 20 September 1951, and Ivory Coast on 28 December 1961. In addition, Australia and the Malagasy Republic sent to the Secretary-General on 20 November and 27 August 1962, respectively, instruments of accession to the Convention containing reservations to section 11. Because of these (and other) reservations, the instruments of accession were not accepted for definitive deposit. On 3 January 1966, the Malagasy Republic withdrew its reservations but retained a declaration that it would not be able to comply fully with the provisions of article IV, section 11, of the Convention; its instrument of accession was thereupon accepted.

84. Whilst eight States Parties to the Specialized Agencies Conventions had therefore made declarations regarding the application of article IV, section 11, as of 1 April 1966, fifty-one States Parties had acceded to the Convention without making such a declaration. It would appear that even in the case where States Parties have not made a declaration, specialized agencies have not in practice usually received the same treatment in respect of their telecommunications as those States have accorded to other Governments.

85. When, after protracted consideration at successive meetings, ITU decided to make the Specialized Agencies Convention applicable to itself in accordance with section 37 of the Convention, it approved and transmitted to the Secretary-General the final text of an annex to the Convention in respect of ITU in which it renounced for itself the telecommunication privileges provided under the Convention. The text of the ITU annex, which was received on 18 January 1951, is as follows:

The standard clauses shall apply without modification, except that the International Telecommunication Union shall not claim for itself the enjoyment of privileged treatment with regard to

the "Facilities in respect of communications" provided in article IV, section 11.

86. The position of the specialized agencies in regard to their telecommunication privileges was the subject of consultations between them and the United Nations. During these consultations emphasis was laid on the recognition of the governmental status of the specialized agencies accorded by the General Assembly under section 11 of the Specialized Agencies Convention. The Secretary-General of ITU reserved his position on the question. For the Buenos Aires Conference of ITU, held from 3 October to 22 December 1952, the executive heads of the specialized agencies agreed to a statement which was then transmitted by the Secretary-General of the United Nations to ITU, with the request that it be brought to the attention of the members of ITU at the Conference. This statement pointed out the reasons why arrangements to facilitate the conduct of governmental and United Nations official business should also be applied in respect of such business carried on through the specialized agencies and proposed that the definition of government telegrams and telephone calls should include those originated by the executive heads of the specialized agencies. In respect of facilities and rates, the statement drew attention to the problem of special rates granted in respect of government telegrams and to the anomaly involved in having governments pay higher rates for telegrams chargeable to specialized agencies budgets than are paid by them for telegrams chargeable directly to their individual budgets or the United Nations budget. This statement of the Secretary-General of the United Nations was reported at a joint meeting of the Administrative Committee on Co-ordination and the Advisory Committee on Administrative and Budgetary Questions on 10 October 1952. The Advisory Committee took note of the statement and agreed that it was in conformity with the General Assembly's decision that no distinction should be made between the status of the United Nations in this field and that of the specialized agencies, as shown by the virtual identity of the relevant provisions in the two Conventions on Privileges and Immunities.

87. The Buenos Aires Convention, however, adopted by the Conference on 22 December 1952, provides as follows:

Article 37. — Priority of Government Telegrams and Telephone Calls

Subject to the provisions of articles 36 and 46, Government telegrams shall enjoy priority over other telegrams when priority is requested for them by the sender. Government telephone calls may also be accorded priority upon specific request and to the extent possible, over other telephone calls.

[NOTE: Article 36 provides for "absolute priority" of telecommunications concerning safety of life; while Article 56 provides for "absolute priority" for distress calls and messages.]

88. Annex 3 of the Convention defined "Government telegrams and Government telephone calls" as including those originating from

the Secretary-General of the United Nations, the Heads of the principal organs and the Heads of the subsidiary organs of the United Nations.

89. In resolution No. 26, adopted by the Conference, it was suggested that specialized agencies traffic should, in an emergency, be carried over the United Nations point-to-point network. In a further Resolution, No. 27, the Conference resolved

... that if a specialized agency wishing to obtain special privileges for its telecommunications informs the Administrative Council, justifying the particular cases in which special treatment is necessary, the Administrative Council;

(a) Shall inform Members and Associate Members of the Union of the requests which, in their opinion, should be accepted;

(b) Shall take a final decision on these requests, bearing in mind the opinion of the majority of Members and Associate Members.

90. A further resolution, No. 28, read as follows:

The Plenipotentiary Conference of the International Telecommunication Union, Buenos Aires,

Considering,

1. The seeming conflict between the definition of Government Telegrams and Government Telephone Calls contained in Annex 2 of the International Telecommunication Convention, Atlantic City, 1947, and the provisions of article IV, section 11 of the Convention on the Privileges and Immunities of the Specialized Agencies;

2. That the International Telegraph and Telephone Conference, Paris, 1949, recommended to the Administrative Council that the Secretary-General of the Union be instructed to communicate to the Secretary-General of the United Nations the proposal that the United Nations should consider the revision of article IV, section 11 of the Convention on the Privileges and Immunities of the Specialized Agencies;

3. That as a result of this recommendation, the proposal was put on the Agenda of the Fourth Session of the General Assembly of the United Nations, and that the Sixth Committee of that Assembly merely took note of the situation;

4. That the Plenipotentiary Conference of Buenos Aires has decided not to include, in Annex 3 of the Buenos Aires Convention, the Heads of the specialized agencies among the authorities entitled to send government telegrams or to request government telephone calls;

Recognizing that it is desirable that the United Nations be asked to reconsider this problem;

Instructs the Secretary-General of the Union to request the Secretary-General of the United Nations to place before the Eighth Session of the General Assembly of the United Nations the opinion of this Conference that article IV, section 11 of the Convention on the Privileges and Immunities of the Specialized Agencies should be revised in view of the decision taken.

91. Resolution No. 28 of ITU, quoted above, was transmitted by the Secretary-General of ITU, by letter of 26 March 1953, to the Secretary-General of the United Nations, with the request that the latter "place before the eighth session of the General Assembly of the United Nations the opinion of the Plenipotentiary Council that section 11 of the Convention on the Privileges and Immunities of Specialized Agencies should be revised". The decision of the ITU Conference was accordingly reported to the General Assembly at its eighth session, in the form of a paragraph in the Annual Report of the Secretary-General on the work of the Organization.¹⁹⁶ In his report, the Secretary-General

stated that, in communicating the opinion of ITU to the General Assembly, he would call attention to the fact that the Administrative Committee on Co-ordination, at its sixteenth session, had arranged for consultations to take place between officials of specialized agencies and officials of ITU, which it was hoped might open the way to some practical solution of the problem. In the deliberations of the General Assembly, however, no allusion was made to this possibility.

92. The Buenos Aires Convention of 1952 was subsequently superseded by the International Telecommunication Convention of Geneva, 1959. In this Convention priority of government telegrams and telephone calls was provided for in article 39, which is substantially the same as article 37 of the Buenos Aires Convention. The definition in annex 3 of the term "government telegrams and government telephone calls" includes telegrams and telephone calls originating with "the Secretary-General of the United Nations; Heads of the principal organs of the United Nations". In resolution No. 31, adopted at the Geneva Conference, the Union confirmed its earlier decision not to include in annex 3 the heads of the specialized agencies among the authorities entitled to send government telegrams or to request government telephone calls and again expressed the hope that the United Nations would reconsider the problem and make the necessary amendment to section 11. Thus, except in certain extreme cases (e.g. urgent epidemiological telegrams of WHO, under article 62 of the Telegraph Regulations, or where strikes prevented the dispatch of ordinary cables so that the procedure envisaged in resolution 27 of the Buenos Aires Convention might be applied) the specialized agencies have not enjoyed the privilege of priority for their telecommunications, nor the advantage of government rates. The possibility, moreover, that the traffic of the specialized agency might be carried over the United Nations point-to-point network has not proved of practical assistance when emergencies have arisen.

93. In view of these considerations, and the fact that the amount of priority traffic was unlikely to be heavy, the specialized agencies requested the International Telecommunications Conference which met at Montreux in September and October 1965 to permit the heads of the various specialized agencies and their duly authorized representatives to originate telegrams and telephone calls on the same terms of priority as Governments. The Conference declined to do so, however, and instructed the ITU Administrative Council to take the necessary steps to seek an amendment to section 11 of the Specialized Agencies Convention.

94. The facilities to be accorded to the communications of the IBRD, IDA, IFC and IMF are set forth in their respective Articles of Agreement in closely similar terms. Article VII, section 7, of the Articles of Agreement of the IBRD, for example, provides that:

The official communications of the Bank shall be accorded by each member the same treatment that it accords to the official communications of other members.

95. Since all States becoming members are obliged to accept these provisions, which form part of the constitu-

¹⁹⁶ *Official Records of the General Assembly, Eighth Session, Supplement No. 1, document A/2404, p. 111.*

tions of the agencies in question, the latter have enjoyed the privilege of government treatment in respect of their telecommunications. In 1949, however, the United States cable companies sought to revise their tariff charges so as to require IBRD and IMF to pay at normal commercial rates; previously IBRD and IMF had paid the same rates as applied to the messages of the representatives of foreign Governments sent from the United States to their own countries. The IBRD and IMF thereupon filed a joint complaint before the United States Federal Communications Commission,¹⁹⁷ alleging that the revised tariffs were in breach of the relevant provisions of their respective Articles of Agreement.

96. The Commission agreed that, under the terms of the Articles of Agreement and the United States Bretton Woods Act (59 Stat. 512), the United States was under an obligation to accord to international telegrams of IBRD and IMF the same treatment as regards rates as it afforded to other Governments which were members of the two organizations. The basic question which arose for decision, therefore, was whether the "treatment" referred to in the Articles of Agreement was confined to matters such as priorities and freedom from censorship, as the cable companies contended, or also related to the question of rates. The Executive Directors of IBRD and IMF had previously given a unanimous ruling that the term "treatment" should be interpreted in the wider sense. The Commission held that, under the Articles of Agreement, an interpretation so given by the Executive Directors was final. It rejected an assertion made on behalf of the cable companies that the interpretation was *ultra vires* because the question arose solely between the companies and IBRD and IMF, and did not arise as between member States, or between the member State and the organizations. The Commission distinguished the position as provided for under the International Telecommunication Convention signed at Atlantic City in 1947 and the Telegraph Regulations annexed thereto, pointing out that the latter instruments, though they did not allow, did not specifically prohibit, the granting of equal treatment. No indication had been given, moreover, of any intention to abrogate the communications privileges otherwise enjoyed by IBRD and IMF. The government treatment of the telecommunications of IBRD, IMF, and the other agencies whose constitutions contain the same provisions, has not subsequently been challenged.

97. Lastly, it may be noted that, in article IV, section 10, of the IAEA Agreement on Privileges and Immunities, communication facilities are only given on the same terms as those enjoyed by Governments to the extent to which such action is "compatible with any international conventions, regulations and arrangements" to which the State concerned is a party. A similar provision is contained in article VI, section 13, of the IAEA host

Agreement with Austria and in article 10 of the UNESCO host Agreement with France.

Section 19. Use of codes and dispatch of correspondence by courier or in bags

98. Section 12 of the Specialized Agencies Convention provides as follows:

No censorship shall be applied to the official correspondence and other official communications of the specialized agencies.

The specialized agencies shall have the right to use codes and to dispatch and receive correspondence by courier or in sealed bags, which shall have the same immunities and privileges as diplomatic couriers and bags.

Nothing in this section shall be construed to preclude the adoption of appropriate security precautions to be determined by agreement between a State party to this Convention and a specialized agency.¹⁹⁸

99. The majority of specialized agencies do not use codes or dispatch correspondence by courier or in sealed bags. Those that do so stated that they had not experienced any serious difficulties in securing appropriate recognition of their rights in this regard.

100. No security arrangements have been entered into in pursuance of this section. Several instances were reported when States had censored or attempted to censor official correspondence and other communications; these cases were relatively rare, however, and the practice had apparently been discontinued after the agency concerned had protested.

Section 20. Postal services provided by the specialized agencies and by IAEA

101. None of the specialized agencies, nor IAEA, have provided postal services in the same way as the United Nations. In the agreements entered into in 1946 and 1948 between Switzerland and the ILO and WHO, however, provision is made for the issue of special stamps (*timbres de service*) by the Swiss federal authorities for those organizations, within the limits authorized by the Conventions of UPU. Stamps have also been issued for the other specialized agencies having their headquarters in Switzerland.

Section 21. Radio communications of the specialized agencies and of IAEA

102. None of the specialized agencies, nor IAEA, have operated an independent radio system in the same way as the United Nations. As mentioned in section 18 above, messages originating from the specialized agencies have in special circumstances been carried on the United Nations point-to-point network.

¹⁹⁷ *In the matter of International Bank for Reconstruction and Development and International Monetary Fund v. All America Cables and Radio Inc., and Other Cable Companies*, Federal Communications Commission, 23 March 1953. The case is fully discussed in Gold, *The Fund Agreement in the Courts*, at pp. 20-27 and pp. 55-59.

¹⁹⁸ It may be noted that the corresponding provision, section 10, of the Convention on the Privileges and Immunities of the United Nations, does not contain a paragraph regarding the adoption of security precautions, while the prohibition of censorship is included in section 9.

CHAPTER IV. — PRIVILEGES AND IMMUNITIES OF OFFICIALS

Section 22. Categories of officials to which the provisions of articles VI and VIII apply

103. Section 18 of article VI of the Specialized Agencies Convention states:

Each specialized agency will specify the categories of officials to which the provisions of this article and of article VIII shall apply. It shall communicate them to the Governments of all States parties to this Convention in respect of that agency and to the Secretary-General of the United Nations. The names of the officials included in these categories shall from time to time be made known to the above-mentioned Governments.

104. Section 17 of the IAEA Agreement on Privileges and Immunities contains a similar provision whereby IAEA undertakes to inform States parties to the Agreement of the names of IAEA officials to whom articles VI and IX of the Agreement apply.

105. In applying section 18 the specialized agencies have followed the same criteria as are contained in resolution 76 (I) of the United Nations General Assembly whereby the privileges and immunities concerned are granted to all officials "with the exception of those who are recruited locally and are assigned to hourly rates". In some cases this has been confirmed by a resolution of the General Conference of the agency. Officials employed by the specialized agencies under the title of "technical assistance experts" have accordingly been entitled to the privileges and immunities set out in articles VI and VIII. Several agencies reported that difficulties had arisen, however, in respect of these officials whose title caused them to be confused by States with "experts on mission". Following explanatory memoranda from the organization and from the United Nations, the necessary privileges and immunities have normally been granted.

106. Under an exchange of notes between Austria and IAEA it was agreed that the term "members of the staff" of IAEA, as envisaged in the host Agreement, should be considered to include officials of the United Nations and of the specialized agencies attached on a continuing basis to the staff of IAEA. Thus, FAO officials employed in the FAO-IAEA Joint Division of Agriculture, and the liaison officers of other United Nations organizations stationed at IAEA headquarters, enjoy the same status in Austria as IAEA staff members.

107. The lists of officials to whom the provisions of articles VI and VIII of the Specialized Agencies Convention apply (or, in the case of IAEA, of articles VI and IX of the IAEA Agreement on Privileges and Immunities) are normally prepared and sent to the various States Parties on an annual basis. Though some variation exists in the details given, mention is usually made of the name of each official, his function, nationality, and current duty station. In addition special lists are prepared and communicated to the host State; such lists are kept up to date throughout the year by periodical additions and deletions, according to the movements of staff. In some instances special lists are prepared according to nationality and sent to the Government concerned.

Section 23. Immunity of officials in respect of official acts

108. Section 19 of the Specialized Agencies Convention provides that officials of the specialized agencies shall:

(a) Be immune from legal process in respect of words spoken or written and all acts performed by them in their official capacity.

109. The specialized agencies have considered that the adjudication of whether or not an official was acting on official business in any given case has rested with them. They have not had recourse to specific systems of national law in making such a determination. The specialized agencies have maintained that, while it would not be desirable for them to claim immunity in circumstances where such a claim would not be justified, nevertheless it was essential to the independent conduct of their operations that they should be given a prior opportunity to claim immunity, if appropriate, where the person concerned was, in their opinion, acting in the exercise of his official duties.

110. The specialized agencies reported that relatively few cases had occurred in which the immunity of officials from legal process had not been recognized; the majority of incidents involving violation of the immunity in respect of official acts had taken place away from the headquarters of the various organizations.

111. As regards the extent of the immunity afforded, it may be noted that in a case which arose in 1965, a member State contended that the immunity from legal process granted under section 19 (a) did not extend to immunity from compliance with a summons addressed to two officials of a specialized agency, to appear as a witness in criminal proceedings brought against a third party. The specialized agency concerned declared that it was unable to accept the restrictive interpretation of section 19 (a) which this opinion implied; in its view the immunity from legal process enjoyed by officials extended not only to all forms of legal process relating directly or indirectly to acts performed by them, but also to their giving any information relating to the business of the organization. This applied irrespective of whether the proceedings were brought against an official himself or a third party. The specialized agency had no doubt that the evidence required from the two officials in the case in question related to the official information of the organization or to the performance of their official duties, and that they accordingly enjoyed immunity from legal process until their immunity had been waived by the organization. Having regard to the second sentence of section 22 of the Specialized Agencies Convention,¹⁹⁹ the Director-General of the organization decided, after examining the circumstances of the case, to waive the immunity by which the two officials were covered.

112. The WHO has prepared a circular for use by its regional offices, giving them instructions on how to handle cases where legal proceedings are initiated against a staff member. Under this instruction all officials who

¹⁹⁹ See section 31, paras. 141-144, below relating to the waiver of the privileges and immunities of officials, where further information is also given regarding the furnishing of evidence by officials.

are made the subject of legal proceedings in any form, whether as the result of a criminal prosecution, civil suit or a subpoena as a witness, are required to report the fact immediately. Where the official concerned enjoys diplomatic privileges and immunities, no legal proceedings can be commenced unless WHO has waived the immunity. In the case of officials to whom section 19 of the Specialized Agencies Convention applies, each case must be reviewed by the organization in order to determine the official or private character of the act. The decision reached is then to be communicated in writing to the Ministry of Foreign Affairs, which, in turn, is required to notify the judicial authorities of the State concerned. In the event of a difference of opinion between the State and the organization regarding the latter's findings, recourse should, if necessary, be had to international arbitration. The payment of fines for minor traffic offences and the like are excluded from this procedure. The duration of the immunity of staff members in respect of their official acts is deemed to extend beyond the period of their employment.²⁰⁰

Section 24. Exemption from taxation of salaries and emoluments

113. Under section 19 (b) of the Specialized Agencies Convention officials of the specialized agencies:

Enjoy the same exemptions from taxation in respect of the salaries and emoluments paid to them by the specialized agencies and on the same conditions as are enjoyed by officials of the United Nations.

114. The instrument of accession to the Convention tendered for deposit by Canada was accompanied by the following reservation:

Exemption from liability for any taxes or duties imposed by any law in Canada should not extend to a Canadian citizen residing or ordinarily resident in Canada.

The Administrative Committee on Co-ordination requested the Secretary-General in 1966 to pursue the matter with the Canadian Government.²⁰¹

115. The IAEA Agreement on Privileges and Immunities contains the same provision in section 18 (a) (ii). Two States, the Republic of Korea and Pakistan, have made reservations regarding the application of this clause to their nationals; the Federal Republic of Germany reserved the right to tax its nationals in so far as this right had not been renounced by double taxation treaties.

116. The immunity in question has been generally observed with no major differences emerging in the treatment accorded to United Nations officials on the one hand and to specialized agency officials on the other.²⁰² States which have not ratified the Specialized Agencies

Convention or which have not signed bilateral agreements with the various agencies, have applied their national law. In view of the fact, however, that in most countries liability to taxation is linked with residence or domicile, officials stationed outside their home country have often enjoyed a *de facto* exemption in respect of their salaries and emoluments, even though the State concerned has not agreed to grant exemption.

117. Where income tax has been levied the organization concerned has normally reimbursed the staff member accordingly, to avoid placing otherwise comparable staff members in an unequal position. The administrative procedures regarding such reimbursements have been strictly interpreted; the specialized agencies have accepted an obligation to make reimbursement only where the terms of appointment of the official so provide. The ILO regulates the matter as follows:

(a) In the case of ILO national correspondents and the staff of ILO branch offices, who are normally of local nationality, their emoluments are fixed in such a manner as to include an amount covering the payment of taxes;

(b) As regards other staff members, provided their contracts expressly declare that the salaries are tax exempt, taxes paid on ILO income are reimbursed as follows:

(i) In the case of an official employed during the entire taxation year, the amount of reimbursement does not exceed the minimum tax payable by that official on such income alone, account being taken of all exemptions and deductions to which the official is entitled by the relevant laws and regulations of the country concerned, but no account being taken of any income received from sources other than the organization or of any higher rate of tax which may be levied by reason of such other income;

(ii) In the case of an official employed for less than the entire taxation year the amount of reimbursement is, if he received no income from sources other than the organization, the minimum tax payable in terms of (i) above; if he received such other income, the amount of reimbursement is whichever is the lesser of:

a proportion, corresponding to the ratio of the period of his employment to the full taxation year, of the minimum tax payable in terms of (i) above; or

a proportion of the total tax;

a proportion of the total tax paid by the official determined by the formula;

$$\frac{\text{ILO income subject to tax} \times \text{total tax}}{\text{total income subject to tax}}$$

(iii) An official who, by reason of the subsequent exclusion from his total taxable income of salaries and emoluments received from the organization, recovers any income tax previously paid by him, is required to refund to the organization such portion of the amount recovered as had been previously reimbursed or advanced to him by the organization;

(iv) Officials are responsible for complying with any income tax laws applicable to them: penalties, interest

²⁰⁰ See *Summary of practice relating to the status, privileges and immunities of the United Nations*, section 23 (f), paras. 272 and 273, above.

²⁰¹ On the question of reservations to the Specialized Agencies Convention see generally section 46, paras. 188-191, below.

²⁰² See, in particular as regards the position in the United States and Switzerland, *Summary of practice relating to the status, privileges and immunities of the United Nations*, section 24, paras. 282-288, above.

or other charges resulting from non-compliance with such laws are not reimbursable by the organization.

118. As regards contributions to social security schemes, in the case of agencies having their headquarters in France or Switzerland, staff having the nationality of the host State are obliged to participate in national social security schemes unless they can show that the organization provides them with equivalent protection; full participation in the United Nations Joint Staff Pension Fund is so regarded. In the case of IAEA the matter is regulated by two supplementary agreements to the host Agreement; broadly speaking, Austrian nationals who are full participants in the United Nations Pension Fund are excluded from the state pension scheme and, as regards health insurance, are given a choice between remaining in the state system or joining a contractual insurance scheme approved by IAEA.

Section 25. Immunity from national service obligations

119. Whereas section 18 (c) of the Convention on the Privileges and Immunities of the United Nations provides solely that United Nations officials are "immune from national service obligations", more elaborate arrangements are made in section 20 of the Specialized Agencies Convention, which states as follows:

The officials of the specialized agencies shall be exempt from national service obligations, provided that, in relation to the States of which they are nationals, such exemption shall be confined to officials of the specialized agencies whose names have, by reason of their duties, been placed upon a list compiled by the executive head of the specialized agency and approved by the State concerned.

Should other officials of specialized agencies be called up for national service, the State concerned shall, at the request of the specialized agency concerned, grant such temporary deferments in the call-up of such officials as may be necessary to avoid interruption in the continuation of essential work.

120. The majority of specialized agencies have not attempted to compile the list referred to in the opening paragraph; very few officials appear to have been actually called up for military service. The only clear practice which has emerged relates to Swiss nationals, where the position is as stated in section 25, paragraphs 302 and 303, of the *Summary of practice relating to the status, privileges and immunities of the Nations*. Total exemption from military service is granted to a small number of Swiss officials; the special tax payable in such cases is not reimbursable by the specialized agencies.

121. In accordance with article XIII, section 27 (g) of the Headquarters Agreement, the Italian Government has granted temporary deferments of military service to Italian staff members of FAO, at the request of the organization.

Section 26. Immunity from immigration restrictions and alien registration

122. Under section 19 (c) of the Specialized Agencies Convention officials are declared

... immune, together with their spouses and relatives dependent on them, from immigration restrictions and alien registration.

123. The specialized agencies reported that this provision had been generally well observed; it was pointed out that in several countries immunity from alien registration was given automatically to holders of United Nations *laissez-passer* and their dependents.

124. The IAEA stated that, although no system of alien registration or immigration restrictions exists in Austria, the lessee or lessor of premises is obliged to register with the local police station on taking up residence in Austria, or on changing residence; this requirement applies to all persons living in Austria and is not restricted to non-Austrian nationals. The IAEA concurred in the view of the Austrian Government that such police registration does not constitute alien registration within the meaning of section 38 (f) of the host Agreement.

Section 27. Exchange facilities

125. Section 19 (d) of the Specialized Agencies Convention provides that officials shall

Be accorded the same privileges in respect of exchange facilities as are accorded to officials of comparable rank of diplomatic missions.

126. The majority of specialized agencies reported that no special problems had arisen in the application of this provision. The ILO stated, however, that officials employed at its headquarters and living in France were required to transfer 50 per cent of their salaries through the French clearing office at the official rate of exchange. This was accepted by the organization on the ground that the officials had elected for their own convenience to live in France.

127. UNESCO reported that it often occurs that officials or experts stationed away from headquarters cannot transfer their funds upon termination of service, or upon transfer or return to headquarters, without it having been established that members of diplomatic missions in the State in question were not subject to any such restriction.

Section 28. Repatriation facilities in time of international crisis

128. The provision in section 19 (e) of the Specialized Agencies Convention that officials should

Be given, together with their spouses and relatives dependent on them, the same repatriation facilities in time of international crises as officials of comparable rank of diplomatic missions.

has rarely, if ever, been applied. No specialized agency has entered into standing arrangements with any member State regarding repatriation. The only occasions of repatriation which were mentioned were the repatriation of all but a skeleton staff of the WHO office at Alexandria in October 1956, and of the dependents of various agency officials in the Congo, where evacuation was arranged through ONUC.

Section 29. Importation of furniture and effects

129. Section 19 (f) of the Specialized Agencies Convention provides that officials

Have the right to import free of duty their furniture and effects at the time of first taking up their post in the country in question.

The experience of the specialized agencies in this regard has been closely similar to that of the United Nations.²⁰³ Apparently only the United Kingdom does not include a car amongst the "effects" which an official may import duty-free, although several other countries subject the importation of cars to the terms of a "temporary admission" procedure. The period of time after entry of an official allowed for importation varies from approximately six to eighteen months, according to the customs regulations of the country concerned and the facts of the particular case.

Section 30. Diplomatic privileges and immunities of the Executive Head and other senior officials of the specialized agencies and of IAEA

130. Section 21 of the Specialized Agencies Convention provides that:

In addition to the immunities and privileges specified in sections 19 and 20, the executive head of each specialized agency, including any official acting on his behalf during his absence from duty, shall be accorded in respect of himself, his spouse and minor children, the privileges and immunities, exemptions and facilities accorded to diplomatic envoys, in accordance with international law.

131. The specialized agencies reported that the diplomatic privileges and immunities referred to in section 21 had been fully accorded without difficulty. A number of specialized agencies also stated that certain additional officials had been granted diplomatic privileges and immunities. The position in respect of these organizations is summarized below.

(i) *FAO*

132. In the FAO Annex to the Specialized Agencies Convention the provisions of section 21 are extended to the Deputy Director-General of the organization. At the thirteenth session of the FAO Conference, held in December 1965, it was decided to extend this provision to cover Assistant Directors-General also. In addition, in section 29 of the FAO Headquarters Agreement it is provided that:

(iii) The Deputy Director-General, Special Assistants to the Director-General, Regional Representatives, senior members of the Office of the Director-General, Directors and Deputy Directors of Divisions and such additional senior officers as may be designated by the Director-General on the grounds of the responsibilities of their positions in FAO, shall be accorded privileges and immunities, exemptions and facilities not less than those accorded to members of the diplomatic corps.

In the Agreements relating to the establishment of FAO regional offices provision is made for the FAO staff concerned to receive various diplomatic privileges, ranging, according to the rank of official, from full diplomatic privileges and immunities in the case of officials holding Directors' posts, to extended customs privileges in the case of lesser officials.

²⁰³ In particular as regards practice in Switzerland, see *Summary of practice relating to the status, privileges and immunities of the United Nations*, section 29, paras. 323 and 324, above.

(ii) *IAEA*

133. Section 20 of the IAEA Agreement on Privileges and Immunities, which corresponds to section 21 of the Specialized Agencies Convention, extends to "Deputy Director-General or official of equivalent rank of the Agency" as well as to the Director-General himself. The United Kingdom made a specific reservation to section 20 as regards its application by that country with respect to its nationals.

134. By virtue of section 39 of the Headquarters Agreement, all IAEA staff of the rank of Senior Officer (P.5) or above, other than those who are Austrian nationals, enjoy diplomatic privileges. The Austrian commentary to the Agreement states that the rank of Senior Officer corresponds to that of Counsellor of Legation in the diplomatic service. The Italian Government has accorded diplomatic status to the Director of the International Centre for Theoretical Physics at Trieste.

(iii) *IBRD, IDA, IFC, IMF*

135. The above-mentioned organizations stated that some of their officials, in particular some resident representatives, had been granted diplomatic privileges as a matter of courtesy.

(iv) *ICAO*

136. Under paragraph 1 of the ICAO Annex to the Specialized Agencies Convention, the provisions of section 21 are also accorded to the President of the Council of the organization. The host agreement concluded with Egypt in 1953 provides that the President of the ICAO Council, the Secretary-General, the Assistant Secretaries-General, and the Director and Deputy Directors of the Middle East Office, and their spouses and minor children, are accorded "the privileges and immunities, exemptions and facilities accorded to diplomatic envoys in accordance with international law and usage". Section 11 of the agreement entered into with Mexico on 20 December 1956 contains a similar provision, with the omission of the words "to diplomatic envoys". In an exchange of notes of the same date it was stated that "... it should be made clear that section 11 is to be construed as meaning that, while equality of status with diplomatic envoys is not necessarily implied thereby" the prerogatives in question "shall be similar to those ordinarily accorded to diplomatic envoys in accordance with international law and usage".

(v) *ILO*

137. Under paragraph 2 of the ILO Annex to the Specialized Agencies Convention the provisions of section 21 are extended to all Deputy and Assistant Directors-General of the organization.

(vi) *IMCO*

138. Paragraph 1 of the IMCO Annex to the Specialized Agencies Convention provides as follows:

The privileges and immunities, exemptions and facilities referred to in Article VI, Section 21 of the standard clauses, shall be accorded to the Secretary-General of the Organization and to the Secretary of the Maritime Safety Committee, provided that the provisions of this paragraph shall not require the Member in whose territory the Organization has its Headquarters to apply

Article VI, Section 21 of the standard clauses to any person who is its national.

(vii) *UNESCO*

139. Under paragraph 2 of the UNESCO Annex to the Specialized Agencies Convention the benefits of section 21 are given to the Deputy Director-General. Under article 19 and annex B of the Headquarters Agreement, diplomatic privileges and immunities are effectively extended to officials of the rank of Senior Officer (P.5) or above; officials of French nationality may not plead such immunity, however, in cases brought before French tribunals arising out of non-official acts.

(viii) *WHO*

140. Under paragraph 4 of the WHO Annex, the provisions of section 21 of the Specialized Agencies Convention are extended to Deputy and Assistant Directors-General and to Regional Directors. In certain regional offices officials of a Director's status, such as Deputy Regional Directors, enjoy diplomatic privileges under the pertinent host agreement. The organization also claims diplomatic privileges for its Representatives, in those countries to which such Representatives are assigned, under the provisions of article V, paragraph 2, of the WHO Basic Agreement. This provision states as follows:

Staff of the Organization, including advisers engaged by it as members of the staff assigned to carry out the purposes of this Agreement, shall be deemed to be officials within the meaning of the above Convention. This Convention shall also apply to any WHO representative appointed to . . . who shall be afforded the treatment provided for under Section 21 of the said Convention.

*Section 31. Waiver of the privileges and immunities of officials*²⁰⁴

141. Section 22 of the Specialized Agencies Convention provides that:

Privileges and immunities are granted to officials in the interests of the specialized agencies only and not for the personal benefit of the individuals themselves. Each specialized agency shall have the right and the duty to waive the immunity of any official in any case where, in its opinion, the immunity would impede the course of justice and can be waived without prejudice to the interests of the specialized agency.

142. The specialized agencies reported that they had received few or no requests to waive the immunity of any of their officials. Most of such requests as had been received related to private matters (e.g., traffic accidents), in which the official had been involved without any question of official responsibility; accordingly, after determination by the agency of the private nature of the case, the requests received had been granted.

143. Only one agency stated that it had received a request for waiver of immunity in respect of an act performed by an official during the course of his official duties. A private pharmaceutical concern wished to learn the name of the person who had made a particular statement in an agency publication regarding the use of a certain product. The agency concerned declined to make the information available on the ground that the

statement referred to represented the collectivity of views expressed by a technical discussion group and that the request impliedly involved a request for waiver of immunity for the purposes of bringing a legal action against the speaker, in violation of the provisions of the Convention and of the Constitution of the agency granting immunity in respect of statements expressed in the course of official meetings.

144. Where proceedings have been instituted against third persons and officials have been requested to appear as witnesses,²⁰⁵ agencies have generally preferred to allow the official to make a written deposition rather than to extend the waiver of immunity to appearance in court, in particular where the official was required to give evidence regarding actions performed by him in an official capacity. The practice has varied, however, according to the duties performed by the official, the need to ensure that the interests of the organization would not be adversely affected, the nature of the case being tried and the obligation to co-operate with the local authorities to facilitate the proper administration of justice.

Section 32. Co-operation with the authorities of Member States to facilitate the proper administration of justice

145. Section 23 of the Specialized Agencies Convention requires that:

Each specialized agency shall co-operate at all times with the appropriate authorities of member States to facilitate the proper administration of justice, secure the observance of police regulations and prevent the occurrence of any abuses in connexion with the privileges, immunities and facilities mentioned in this article.

146. The specialized agencies and IAEA have taken the necessary steps to comply with this provision. When complaints have been received from local police authorities (chiefly as regards traffic offences) the matter in question has been drawn to the attention of the official or officials concerned and, if necessary, disciplinary measures have been taken against them. The organizations have also sought through administrative action to ensure that officials pay their recognized debts. A more difficult case has been when the authorities of a member State have sought to direct that payment of monies owed to a supplier should be paid to another party, e.g., to the State revenue authorities, or to a private party under a court judgement. Whilst maintaining its own immunity from jurisdiction, the organizations concerned have tried to ensure that the object of such requests was in fact obtained.

CHAPTER V. — PRIVILEGES AND IMMUNITIES OF EXPERTS ON MISSIONS FOR THE SPECIALIZED AGENCIES AND IAEA AND OF PERSONS HAVING OFFICIAL BUSINESS WITH THE SPECIALIZED AGENCIES AND IAEA

Section 33. Persons falling within the category of experts on missions for the specialized agencies and IAEA

147. Under article VI of the Convention on the Privileges and Immunities of the United Nations certain immunities,

²⁰⁴ See also section 8, paras. 32-35, above.

²⁰⁵ See also section 23, para. 111, above.

broadly similar to those accorded to officials, are granted to "Experts... performing missions for the United Nations". The Specialized Agencies Convention does not contain an equivalent article; the only reference to "experts" in the text of the Convention is in article VIII, section 29, whereby States Parties are asked to grant travel facilities to "experts and other persons" who are travelling "on the business of a specialized agency". However, the provisions of article VI of the United Nations Convention are contained in the annexes to the Specialized Agencies Convention in respect of FAO, ICAO, the ILO, IMCO, UNESCO and WHO.

148. The designation "expert" has been relatively infrequently used. One agency summarized its practice, which may be taken as representative, as being to include in this category "generally speaking, all persons appointed in an advisory or consultative capacity to the organization or to a Government for temporary periods, and who are not considered as staff members". In the case of IAEA the range of persons to be considered as experts receives some definition from the terms of article VII, section 23, of the IAEA Agreement on Privileges and Immunities. This states that the privileges and immunities enumerated in the article are to be accorded to

Experts (other than officials coming within the scope of Article VI) serving on committees of the Agency or performing missions for the Agency, including missions as inspectors under Article XII of the Statute of the Agency and as project examiners under Article XI thereof.

In practice, staff members, and not experts within the meaning of this section, have been designated as IAEA inspectors.

Section 34. Privileges and immunities of experts on missions for the specialized agencies and IAEA

149. The relevant provisions of the various annexes and of article VII of the IAEA Agreement on Privileges and Immunities are almost identical; with minor variations the experts in question are given immunity from arrest and from seizure of their personal baggage; immunity from legal process in respect of acts done by them in performance of their official duties; inviolability for papers and documents; and diplomatic facilities in respect of currency and exchange restrictions. In so far as these privileges and immunities are similar to some of those accorded to officials under article VI of the Convention, the practice of the specialized agencies in respect to the latter may be considered equally applicable. No major differences of interpretation appear to have developed in the case of these common privileges and immunities, as applied to officials on the one hand and to experts on the other.

Section 35. Privileges and immunities of persons having official business with the specialized agencies and IAEA

150. Besides officials, experts on missions, and the representatives of member States, persons having official business with a specialized agency or with the IAEA may also enjoy privileges and immunities. Persons falling

within this category include those invited to give evidence before specialized agency bodies or to supply information to such bodies, radio and press representatives, and participants in seminars and similar meetings organized by specialized agencies.

151. A number of agreements make provision for such persons; some of the main examples are listed below. Article V, section 27, of the ICAO Headquarters Agreement states:

The Government of Canada shall permit and facilitate the entry into Canada of:

(a) Representatives of the press, or of radio, film or other information agencies who have been accredited to the Organization after consultation with the Government of Canada.

Article IX, section 27, of the Agreement between Egypt and ICAO provides that the Egyptian Government shall take "all measures required to facilitate the entry into, residence in, and departure from Egypt of all persons having official business with the Organization".

152. Under article X, section 23, of the FAO Headquarters Agreement "persons invited to the headquarters seat by FAO on official business" and whose names are communicated to the host Government by the Director-General, are granted transit facilities by the Italian Government, which also undertakes to afford them any necessary protection in transit. Furthermore, under article XIV of the same Agreement, the same privileges and immunities as are granted to experts on missions are granted to "representatives of official organizations or bodies invited by FAO".²⁰⁶

153. In the case of UNESCO, article 9 of the Headquarters Agreement provides that the French authorities will permit persons having official business at UNESCO headquarters to enter and remain in France, without charge for a visa. Persons falling in this category include:

(e) *Les membres du conseil de direction et les fonctionnaires des organisations non gouvernementales admises par l'Organisation au bénéfice d'arrangements consultatifs et dont les bureaux sont établis au siège.*

(g) *Toutes personnes invitées, pour affaires officielles, par la Conférence générale, le Conseil exécutif ou le Directeur général de l'Organisation,*

as well as press and similar public information representatives and representatives of non-governmental organizations in consultative status, other than those referred to in clause (e) above. These persons may not be required to leave France except in the event of an abuse of privileges in respect of activities falling outside their official functions or business, nor may any act be taken against them which might cause them to leave France without the consent of the French Foreign Minister, acting in consultation with the Director-General of UNESCO. Article 14 of the Agreements between Switzerland and the ILO, WHO and WMO provides for liberty of access and residence of all persons, irrespective of nationality, invited by those organizations.

²⁰⁶ See also art. X, section 20, of the Agreement between FAO and Chile; art. VIII, section 19, of the Agreement between FAO and Egypt; and art. XII, section 23, of the Agreement between FAO and Thailand.

154. In accordance with article XVI of the IAEA Headquarters Agreement, the representatives of organizations with which IAEA has established official relations in accordance with its Statute, or which are invited by the IAEA Board of Governors or General Conference for purposes of official business, are granted the same privileges and immunities, including those of transit and residence, as experts or members of IAEA missions.

155. The specialized agencies reported that relatively few difficulties had arisen in this connexion. On occasion, agencies have intervened with the competent authorities, however, in order to speed up the granting of visas so as to enable the persons concerned to perform their official functions.

CHAPTER VI. — UNITED NATIONS LAISSEZ-PASSER AND FACILITIES FOR TRAVEL

Section 36. Issue of United Nations laissez-passer and their recognition by States as valid travel documents

156. Article VIII, section 26, of the Specialized Agencies Convention provides that:

Officials of the specialized agencies shall be entitled to use the United Nations *laissez-passer* in conformity with administrative arrangements to be concluded between the Secretary-General of the United Nations and the competent authorities of the specialized agencies, to which agencies special powers to issue *laissez-passer* may be delegated. The Secretary-General of the United Nations shall notify each State party to this Convention of each administrative arrangement so concluded.

Section 27 continues:

States parties to this Convention shall recognize and accept the United Nations *laissez-passer* issued to officials of the specialized agencies as valid travel documents.

157. Agreements have been concluded with each of the specialized agencies²⁰⁷ and with IAEA²⁰⁸ regarding the issue of United Nations *laissez-passer* by the United Nations, following an official request by a specialized agency or by IAEA that one be issued in respect of a particular staff member. The only body, other than the United Nations itself, which has issued *laissez-passer* has been the ILO, in pursuance of an agreement entered into between the two organizations in 1950;²⁰⁹ section 26 expressly refers to the delegation to specialized agencies of the power to issue United Nations *laissez-passer*. The conditions under which the ILO issues its *laissez-passer* are closely analogous to those observed by the United Nations. The Directors-General and certain other senior staff of the specialized agencies and the IAEA, like the Secretary-General and senior officials of the United Nations, receive red-backed *laissez-passer*.

158. Although States have recognized the *laissez-passer* as a valid travel document, in a number of countries the authorities have also demanded production of a national

passport before permitting entry. One agency has protested against this practice, especially since, in the cases in question, the *laissez-passer* which were presented contained an entry visa. It may also be noted that, since a number of States, particularly in Europe, have concluded agreements permitting the entry of each other's nationals without a visa, production of the *laissez-passer* is often less helpful than a national passport. In general, the specialized agencies considered that the *laissez-passer* was most useful in instances where, owing to strained or otherwise distant relations between the two countries concerned, production of a national passport alone was likely to result in delays or difficulties, but that, where this was not the case, use of the national passport was frequently more convenient.

Section 37. Freedom of movement of personnel; inapplicability of persona non grata doctrine

159. Although the specialized agencies and IAEA have had less occasion than the United Nations to assert the right of their officials and others (e.g., experts on mission) to be granted freedom of movement by all member States, cases have arisen in which it has been necessary for them to do so. In 1961, and again in 1963, following protests by the specialized agency concerned, the Secretary-General of the United Nations protested to the Government of a Member State which had refused to allow certain specialized agency and United Nations officials to enter the country on grounds of their nationality.²¹⁰

160. The *persona non grata* doctrine is inapplicable to the officials of a specialized agency or of the IAEA since they, no less than United Nations personnel, must serve as independent and impartial international officials, and not as diplomats accredited to a particular Government. Section 25 of the Specialized Agencies Convention states that:

Officials within the meaning of section 18, shall not be required by the territorial authorities to leave the country in which they are performing their functions on account of any activities by them in their official capacity.

The section continues:

In the case, however, of abuse of privileges of residence committed by any such person in activities in that country outside his official functions, he may be required to leave by the Government of that country provided that:

2 (I) . . . persons who are entitled to diplomatic immunity under section 21, shall not be required to leave the country otherwise than in accordance with the diplomatic procedure applicable to diplomatic envoys accredited to that country.

(II) In the case of an official to whom section 21 is not applicable, no order to leave the country shall be issued other than with the approval of the Foreign Minister of the country in question, and such approval shall be given only after consultation with the executive head of the specialized agency concerned; and, if expulsion proceedings are taken against an official, the executive head of the specialized agency shall have the right to appear in such proceedings on behalf of the person against whom they are instituted.

²⁰⁷ For an example of the standard agreement, see *Summary of practice relating to the status, privileges and immunities of the United Nations*, section 42, para. 384, above.

²⁰⁸ United Nations, *Treaty Series*, vol. 281, p. 369.

²⁰⁹ *Ibid.*, vol. 68, p. 213.

²¹⁰ See *Summary of practice relating to the status, privileges and immunities of the United Nations*, section 37, paras. 366 and 367, above.

161. Two specialized agencies reported that occasions had arisen when expulsion proceedings had been taken against members of their staff—in each instance technical assistance or advisory staff—in violation of section 25. One of the agencies stated that in the majority of cases the action had been taken on extraneous political grounds and was without any justification. Except where there was a manifestly improper motivation, the agency had contented itself with asking the staff member concerned to make a protest and thereafter reassigned him to another post. The other agency declared that two of its officials had been expelled as a result of action taken by the police authorities of the State concerned, without consulting the Ministry of Foreign Affairs or the agency. After the agency had protested, the decision to expel the officials had been rescinded.

Section 38. Issue of visas for holders of United Nations laissez-passer

162. Section 28 of the Specialized Agencies Convention states that:

Applications for visas, where required, from officials of specialized agencies holding United Nations *laissez-passer*, when accompanied by a certificate that they are travelling on the business of a specialized agency, shall be dealt with as speedily as possible. In addition, such persons shall be granted facilities for speedy travel.

163. The specialized agencies reported that, though this provision had been generally observed, the term “as speedily as possible” had been subject to a wide interpretation and often varied according to the nationality of the holder of the *laissez-passer*. One agency stated that the second sentence had not been observed.

164. Usually the necessary visas are issued without charge. On the other hand a number of countries impose a charge on visas being sought on national passports for duty travel, notwithstanding the fact that the holders of such passports possess a certificate indicating that they are travelling on official business. Lastly, the renewal of the validity of passports is subject to taxes in practically all countries (exemption is granted in certain cases, however, e.g., the Netherlands and the United Kingdom).

Section 39. Certificates issued by the specialized agencies and by IAEA

165. Section 29 of the Specialized Agencies Convention provides that:

Similar facilities to those specified in section 28 shall be accorded to experts and other persons who, though not the holders of United Nations *laissez-passer*, have a certificate that they are travelling on the business of a specialized agency.

166. The persons who have held a certificate stating that they were travelling on official business have usually been consultants or others engaged on a mission or contract of relatively short duration and who were not staff members of the organization.²¹¹ Different opinions were expressed as to the effectiveness of these documents; whereas some agencies considered that adequate recogni-

tion had been given to them, others considered them of only limited help in difficult cases.

167. Besides these certificates the specialized agencies have also issued “family certificates” to the dependents of staff members, usually those stationed away from headquarters, so as to enable them to show their connexion with the organization when travelling separately from the staff member. These family certificates have been similar in form to those used by the United Nations.

168. Lastly, it may be noted that the ILO has issued special identity cards to its national correspondents for use in their countries, in addition to the *laissez-passer* used for international travel. As the name suggests, these identity cards are primarily designed to provide proof that the holder is an official representative of the ILO, and not to assist travel as such.

Section 40. Diplomatic facilities for the executive heads and other senior officials of the specialized agencies and of IAEA whilst travelling on official business

169. Section 30 of the Specialized Agencies Convention provides that:

The executive heads, assistant executive heads, heads of departments and other officials of a rank not lower than head of department of the specialized agencies, travelling on United Nations *laissez-passer* on the business of the specialized agencies, shall be granted the same facilities for travel as are accorded to officials of comparable rank in diplomatic missions.

170. No special problems have arisen over the interpretation and application of this section. One specialized agency referred to the production of the national passport, together with the *laissez-passer*, as being contrary to the spirit of this provision in the case of officials entitled to the benefits of section 30.

CHAPTER VII. — SETTLEMENT OF DISPUTES

Section 41. Settlement of disputes

171. Section 31 of the Specialized Agencies Convention states that:

Each specialized agency shall make provision for appropriate modes of settlement of:

(a) Disputes arising out of contracts or other disputes of private character to which the specialized agency is a party;

(b) Disputes involving any official of a specialized agency who by reason of his official position enjoys immunity if immunity has not been waived in accordance with the provisions of section 22.

172. In order to provide an appropriate mode of settlement of disputes arising out of their commercial contracts the majority of specialized agencies have made provision for recourse to arbitration.²¹² Relatively few serious disputes have arisen, however, and most even of these have been settled by means of negotiations between the parties.

²¹² See section 1, para. 5, above. The practice in respect of IBRD, IDA and IFC differs in a number of important respects in the case of the non-commercial contracts with which those agencies are chiefly concerned; see section 1, paras. 7 and 8, above and section 43, para. 180, below.

²¹¹ See section 33, paras. 147-149, above.

173. One organization referred to two cases of a private nature in which it has been engaged. In one of these, the father of a staff member injured himself by falling down the staircase after visiting his son's office. A local lawyer advised that, assuming national law to apply, it was doubtful if the organization was liable to pay damages; the organization therefore declined to pay the sum demanded by the injured man. Eventually the parties agreed that the dispute should be submitted to arbitration and determined according to local law. The arbitrator found in favour of the injured man and awarded damages against the organization of just over a third of the original demand; the organization was also ordered to pay the costs of the arbitration. The second case involved a dispute between the organization and the contractor who had undertaken the construction of the headquarters building. The organization requested two government ministers of the host country to recommend two senior national officials who could examine the contractor's claim. Having examined the matter, the two officials dismissed three of the nine counts on the basis of which the claim was made and concluded that a sum, equal to approximately 14 per cent of that originally claimed, was due to the contractor. The Director-General of the organization accepted their conclusions and offered the contractor the sum which the officials considered should be paid, in accordance with market conditions. The contractor eventually accepted this sum, plus accrued interest.

174. As regards disputes involving officials, since very few, if any, requests for waiver have been refused, no formal procedure of settlement has been established.

Section 42. Settlement of disputes regarding alleged abuses of privileges

175. Section 24 of the Specialized Agencies Convention provides as follows:

If any State party to this Convention considers that there has been an abuse of a privilege or immunity conferred by this Convention, consultations shall be held between that State and the specialized agency concerned to determine whether any such abuse has occurred and, if so, to attempt to ensure that no repetition occurs. If such consultations fail to achieve a result satisfactory to the State and the specialized agency concerned, the question whether an abuse of a privilege or immunity has occurred shall be submitted to the International Court of Justice in accordance with section 32. If the International Court of Justice finds that such an abuse has occurred, the State party to this Convention affected by such abuse shall have the right, after notification to the specialized agency in question, to withhold from the specialized agency concerned the benefits of the privilege or immunity so abused.

176. The specialized agencies reported that no cases had arisen under this section and that, so far as they knew, recourse to it had not been seriously considered, either by an agency or by a State. One agency expressed the view that the reference to the International Court of Justice of the question whether or not an abuse of privilege had occurred was an unduly complicated means of dealing with possible abuses; it was suggested that recourse to arbitration might be more suitable. No similar provision exists in the Convention on the Privileges and Immunities of the United Nations.

177. The instruments of accession tendered for deposit by the Governments of Czechoslovakia, Byelorussian SSR, Ukrainian SSR and USSR were accompanied by reservations to the effect that these Governments did not consider themselves bound by sections 24 and 32, concerning the compulsory jurisdiction of the International Court of Justice.

Section 43. Reference to the International Court of Justice of differences arising out of the interpretation of the Specialized Agencies Convention

178. Section 32 of the Specialized Agencies Convention provides as follows:

All differences arising out of the interpretation or application of the present Convention shall be referred to the International Court of Justice unless in any case it is agreed by the parties to have recourse to another mode of settlement. If a difference arises between one of the specialized agencies on the one hand, and a member on the other hand, a request shall be made for an advisory opinion on any legal question involved in accordance with Article 96 of the Charter and Article 65 of the Statute of the Court and the relevant provisions of the agreements concluded between the United Nations and the specialized agency concerned. The opinion given by the Court shall be accepted as decisive by the parties.

179. The specialized agencies stated that they had no practice with regard to this section. They had not given consideration to applying section 32 in any particular case. It may be noted that several headquarters agreements provide for the settlement of disputes regarding points of interpretation by means of arbitration if negotiations do not lead to a settlement.

180. In the case of IBRD, IDA, IFC and IMF, a provision in their respective annexes to the Specialized Agencies Convention states that section 32 shall only apply to differences "arising out of the interpretation or application of privileges and immunities" which are derived from the Convention, "and are not included in those which (the organization) can claim under its Articles of Agreement or otherwise". The interpretation of the Articles of Agreement of these organizations can be made only by their respective Executive Directors, under conditions determined in the articles themselves.

181. As noted in section 42, paragraph 177, above, the instruments of accession tendered for deposit by the Governments of Czechoslovakia, Byelorussian SSR, Ukrainian SSR and USSR were accompanied by reservations regarding section 32 of the Specialized Agencies Convention.

CHAPTER VIII. — ANNEXES AND FINAL PROVISIONS

Section 44. Annexes to the Specialized Agencies Convention

182. Article X of the Specialized Agencies Convention makes provision for the modification of the standard clauses of the Convention in relation to each specialized agency by means of separate annexes. The particular modifications introduced have been referred to in the appropriate sections of this survey.

183. Sections 33-38 and section 40 of article X state as follows:

Section 33

In their application to each specialized agency, the standard clauses shall operate subject to any modifications set forth in the final (or revised) text of the annex relating to that agency, as provided in sections 36 and 38.

Section 34

The provisions of the Convention in relation to any specialized agency must be interpreted in the light of the functions with which that agency is entrusted by its constitutional instrument.

Section 35

Draft annexes 1 to 9 are recommended to the specialized agencies named therein. In the case of any specialized agency not mentioned by name in section 1, the Secretary-General of the United Nations shall transmit to the agency a draft annex recommended by the Economic and Social Council.

Section 36

The final text of each annex shall be that approved by the specialized agency in question in accordance with its constitutional procedure. A copy of the annex as approved by each specialized agency shall be transmitted by the agency in question to the Secretary-General of the United Nations and shall thereupon replace the draft referred to in section 35.

Section 37

The present Convention becomes applicable to each specialized agency when it has transmitted to the Secretary-General of the United Nations the final text of the relevant annex and has informed him that it accepts the standard clauses, as modified by this annex, and undertakes to give effect to sections 8, 18, 22, 23, 24, 31, 32, 42 and 45 (subject to any modification of section 32 which may be found necessary in order to make the final text of the annex consonant with the constitutional instrument of the agency) and any provisions of the annex placing obligations on the agency. The Secretary-General shall communicate to all Members of the United Nations and to other States members of the specialized agencies certified copies of all annexes transmitted to him under this section and of revised annexes transmitted under section 38.

Section 38

If, after the transmission of a final annex under section 36, any specialized agency approves any amendments thereto in accordance with its constitutional procedure, a revised annex shall be transmitted by it to the Secretary-General of the United Nations.

Section 40

It is understood that the standard clauses, as modified by the final text of an annex sent by a specialized agency to the Secretary-General of the United Nations under section 36 (or any revised annex sent under section 38), will be consistent with the provisions of the constitutional instrument then in force of the agency in question, and that if any amendment to that instrument is necessary for the purpose of making the constitutional instrument so consistent, such amendment will have been brought into force in accordance with the constitutional procedure of that agency before the final (or revised) annex is transmitted.

The Convention shall not itself operate so as to abrogate, or derogate from, any provisions of the constitutional instrument of any specialized agency, or any rights or obligations which the agency may otherwise have, acquire, or assume.

184. The annexes which have been concluded under these provisions fall into three groups.

(i) *Annexes relating to ITU, UPU and WMO*

These annexes provide that the standard clauses shall apply without modification except that, in the case of ITU, that agency,

... shall not claim for itself the enjoyment of privileged treatment with regard to the "Facilities in respect of communications" provided in Article IV, Section 11.²¹³

(ii) *Annexes relating to FAO, ICAO, ILO, IMCO, UNESCO and WHO*

With some variation, these annexes provide that article V and article VII, section 25, paragraphs 1 and 2 (I), shall extend to various members of the governing bodies of the above-mentioned agencies,²¹⁴ that the privileges and immunities referred to in section 21 shall also be accorded to certain senior officials of the agency;²¹⁵ and that experts (other than officials coming within the scope of article VI) shall receive the privileges and immunities listed in the particular annex.²¹⁶

The annexes relating to FAO and WHO have been revised; it was stated that no problems had arisen in this connexion.

(iii) *Annexes relating to IBRD, IDA, IFC and IMF*

These annexes provide that:

(1) Section 32 shall only apply to differences arising out of the interpretation or application of privileges and immunities derived solely from the Convention and which are not included in the privileges and immunities that these agencies can claim under their Articles of Agreement or otherwise;²¹⁷

(2) that the provisions of the Convention, or of the annexes, shall not affect in any way the Articles of Agreement of these agencies or impair or limit any rights conferred under those articles, or under any national enactment of a member State, or otherwise;

(3) that, in the case of IBRD, IDA and IFC, action may be brought against them in certain specified circumstances;²¹⁸

(4) that, in the case of IFC, section 7, paragraph (b), of the standard clauses shall apply, subject to article III, section 5, of its Articles of Agreement,²¹⁹ and that the corporation in its discretion may waive any of the privileges and immunities conferred under article VI of its Articles of Agreement to such extent and upon such conditions as it may determine.²²⁰

Section 45. Supplemental agreements

185. Section 39 of the Specialized Agencies Convention provides as follows:

The provisions of this Convention shall in no way limit or prejudice the privileges and immunities which have been, or may hereafter be, accorded by any State to any specialized agency by reason of the location in the territory of that State of its head-

²¹³ See section 18, para. 85, above.

²¹⁴ In the case of WHO these provisions also apply to the representatives of associate members. No such provision is contained in the ICAO annex.

²¹⁵ See section 30, paras. 132-140, above.

²¹⁶ See section 33, paras. 147-149, above.

²¹⁷ See section 43, paras. 178 and 179.

²¹⁸ See section 7, para. 30, above.

²¹⁹ See section 13, para. 49, above.

²²⁰ See section 8, para. 33, above.

quarters or regional offices. This Convention shall not be deemed to prevent the conclusion between any State party thereto and any specialized agency of supplemental agreements adjusting the provisions of this Convention or extending or curtailing the privileges and immunities thereby granted.

186. As envisaged in that section, the specialized agencies have concluded a number of supplemental agreements with States, adjusting, extending or curtailing the privileges and immunities granted under the Convention.

187. For the period up to 1960, the majority of agreements concluded by the specialized agencies and by IAEA relating to their privileges and immunities are to be found in the United Nations *Legislative Series, Legislative Texts and Treaty Provisions concerning the Legal Status, Privileges and Immunities of International Organizations*, vol. II. When in 1962 it was decided that a *United Nations Juridical Yearbook* should be published, the specialized agencies and IAEA were invited to submit relevant material, including agreements relating to their privileges and immunities, for publication in the *Yearbook*. Accordingly, agreements relating to the privileges and immunities of the specialized agencies and of IAEA are to be found, expressly or by reference, in successive issues of the *Yearbook* beginning in 1962. Besides a large number of standard agreements, the following agreements concerning the status, privileges and immunities of the specialized agencies and of IAEA were concluded in the period between that covered in the *Legislative Series* and the start of the *Juridical Yearbook*, and were registered, or filed and recorded, with the United Nations Secretariat:

Agreement for the establishment of a Latin-American Forest Research and Training Institute in Venezuela under the auspices of the FAO. Approved by the Conference of the FAO at its tenth session, 18 November 1959, United Nations, *Treaty Series*, vol. 390, p. 227.

Agreement between IAEA, the Government of Monaco and the Oceanographic Institute concerning research on the effects of radioactivity in the sea. 8 and 10 March 1961. United Nations, *Treaty Series*, vol. 396, p. 255.

Agreement between UNESCO and Thailand regarding the Asia Regional Office of UNESCO. 25 August and 6 September 1961. United Nations, *Treaty Series*, vol. 410, p. 125.

Section 46. Accession to the Specialized Agencies Convention by Member States of the United Nations and by Member States of the specialized agencies

188. Sections 41 to 45 of article XI of the Specialized Agencies Convention provide as follows:

Section 41

Accession to this Convention by a Member of the United Nations and (subject to section 42) by any State member of a specialized agency shall be effected by deposit with the Secretary-General of the United Nations of an instrument of accession which shall take effect on the date of its deposit.

Section 42

Each specialized agency concerned shall communicate the text of this Convention together with the relevant annexes to those of

its members which are not Members of the United Nations and shall invite them to accede thereto in respect of that agency by depositing an instrument of accession to this Convention in respect thereof either with the Secretary-General of the United Nations or with the executive head of the specialized agency.

Section 43

Each State party to this Convention shall indicate in its instrument of accession the specialized agency or agencies in respect of which it undertakes to apply the provisions of this Convention. Each State party to this Convention may by a subsequent written notification to the Secretary-General of the United Nations undertake to apply the provisions of this Convention to one or more further specialized agencies. This notification shall take effect on the date of its receipt by the Secretary-General.

Section 44

This Convention shall enter into force for each State party to this Convention in respect of a specialized agency when it has become applicable to that agency in accordance with section 37 and the State party has undertaken to apply the provisions of the Convention to that agency in accordance with section 43.

Section 45

The Secretary-General of the United Nations shall inform all Members of the United Nations, as well as all members of the specialized agencies, and executive heads of the specialized agencies, of the deposit of each instrument of accession received under section 41 and of subsequent notifications received under section 43. The executive head of a specialized agency shall inform the Secretary-General of the United Nations and the members of the agency concerned of the deposit of any instrument of accession deposited with him under section 42.

189. As of 15 May 1967, sixty-two States were Parties to the Convention in respect of one or more of the specialized agencies. Eight States made declarations regarding the application of section 11.²²¹ The instruments of accession tendered for deposit by four States were accompanied by reservations regarding the application of sections 24 and 32.²²² It is the position of the specialized agencies that no reservation may be accepted which varies the application of specific immunities, other procedures being provided for agreed variations in the annexes to the Convention.

190. No serious difficulties have arisen in the application of article XI of the Specialized Agencies Convention. It may be noted that a number of States which are either not parties to the Convention or have not extended its application to all agencies, have nevertheless agreed, usually under a bilateral agreement, to apply the provisions of the Conventions to agencies operating in their territory. These agreements have mostly dealt with the provision of technical assistance,²²³ but have also related to the establishment of field or regional offices and to the

²²¹ See section 18, para. 83, above.

²²² See section 42, para. 177 and section 43, para. 181, above. In addition, the instrument of accession tendered for deposit by Canada was accompanied by a reservation regarding the application of section 19 (b) of the Specialized Agencies Convention; see section 24, para. 114, above.

²²³ Article V of the revised standard Agreement for technical assistance provides as follows:

"1. The Government, in so far as it is not already bound to do so, shall apply to the Organizations, their property,

(Continued on next page.)

holding of conferences in the territory of the State concerned.

191. The IAEA Agreement on Privileges and Immunities, which is open to all member States of the Agency, had twenty-six States Parties as on 1 February 1966. It may be noted that article XV of the Statute of IAEA contains an obligation on member States to grant the

necessary legal capacity, privileges and immunities to the agency, as defined in a separate agreement or agreements. Member States are therefore already bound by the terms of the Statute, even if they do not submit an instrument of acceptance to the Agreement on Privileges and Immunities, to accord to the agency the legal capacity, privileges and immunities it requires in order to fulfil its functions.

(Continued).

funds and assets, and to their officials, including technical assistance experts,

“(a) in respect of the United Nations, the Convention on the Privileges and Immunities of the United Nations;

“(b) in respect of the specialized agencies, the Convention on the Privileges and Immunities of the Specialized Agencies; and

“(c) in respect of the International Atomic Energy Agency,

the Agreement on the Privileges and Immunities of the International Atomic Energy Agency.

“2. The Government shall take all practical measures to facilitate the activities of the Organizations under this Agreement and to assist experts and other officials of the Organizations in obtaining such services and facilities as may be required to carry on these activities. When carrying out their responsibilities under this Agreement, the Organizations, their experts and other officials shall have the benefit of the most favourable legal rate of conversion of currency.”

STATE RESPONSIBILITY

[Agenda item 3]

DOCUMENT A/CN.4/196

Note by Mr. Roberto Ago, Special Rapporteur

[Original text: French]

[15 June 1967]

1. The International Law Commission considered the problems of the international responsibility of States for the first time at its sixth session, in pursuance of an invitation formulated by the General Assembly in resolution 799 (VIII) of 7 December 1953. From its eighth to its thirteenth session, the Commission received successive reports from the Special Rapporteur, Mr. F. V. García Amador.¹ Nevertheless, the brief general discussions to which those reports gave rise did not enable the Commission to reach agreement in principle on the scope of the topic to be dealt with, or on the criteria to be followed for its consideration. In the face of these difficulties and in pursuance of its decision at its fourteenth session to include the international responsibility of States among the three major topics to be dealt with as a matter of priority, the Commission decided to approach the problem from a new angle and to explore the possibility of determining by common agreement the general criteria which should govern an attempt to codify the topic. To that end, at its 637th meeting, held on 7 May 1962, it set up a Sub-Committee on State Responsibility, composed 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.²

2. The Sub-Committee met in June 1962 and again at Geneva in January 1963. The results of its work are set out

in a report (A/CN.4/152)³ submitted by its Chairman to the Commission at its fifteenth session, in the following terms:

... The terms of reference of the Sub-Committee, as laid down by the Commission at its 668th meeting on 26 June 1962,⁴ were as follows:

“(1) The Sub-Committee will meet at Geneva between the Commission’s current session and its next session from 7 to 16 January 1963;

“(2) Its work will be devoted primarily to the general aspects of State responsibility;

“(3) The members of the Sub-Committee will prepare for it specific memoranda relating to the main aspects of the subject, these memoranda to be submitted to the Secretariat not later than 1 December 1962 so that they may be reproduced and circulated before the meeting of the Sub-Committee in January 1963;

“(4) The Chairman of the Sub-Committee will prepare a report on the results of its work to be submitted to the Commission at its next session.”

2. The Sub-Committee held seven meetings ending on 16 January 1963. 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).

3. The Sub-Committee held a general discussion of 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 Rapporteur on that topic.

¹ *Yearbook of the International Law Commission, 1956*, vol. II, document A/CN.4/96; *Yearbook of the International Law Commission, 1957*, vol. II, document A/CN.4/106; *Yearbook of the International Law Commission, 1958*, vol. II, document A/CN.4/111; *Yearbook of the International Law Commission, 1959*, vol. II, document A/CN.4/119; *Yearbook of the International Law Commission, 1960*, vol. II, document A/CN.4/125; *Yearbook of the International Law Commission, 1961*, vol. II, document A/CN.4/134 and Add.1.

² *Yearbook of the International Law Commission, 1962*, vol. II, document A/5209, p. 189, para. 47.

³ *Yearbook of the International Law Commission, 1963*, vol. II, annex I, p. 227.

⁴ *Yearbook of the International Law Commission, 1962*, vol. II, document A/5209, p. 191, para. 68.

4. Some members of the Sub-Committee expressed the view that it would be desirable to begin the study of the very vast subject of the international responsibility of the State by considering a well-defined sector such as that of responsibility for injuries to the person or property of aliens. Other members, on the other hand, argued that it was desirable to carry out a general study of the subject, taking care not to confuse the definition of the rules relating to responsibility with that of the rules of international law—and in particular those relating to the treatment of aliens—the breach of which can give rise to responsibility. Some of the members in this second group stressed in particular that, in the study of the topic of responsibility, new developments of international law in other fields, notably that of the maintenance of peace, ought also to be taken into account.

5. In the end, 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.

6. Having reached this general conclusion, the Sub-Committee discussed in detail an outline programme of work submitted by Mr. Ago. After this debate, it decided unanimously to recommend to the Commission the following indications on the main points to be considered as to the general aspects of the international responsibility of the State; these indications may serve as a guide to the work of a future special rapporteur to be appointed by the Commission.

*Preliminary point: Definition of the concept of the international responsibility of the State.*⁵

First point: Origin of international responsibility

(1) *International wrongful act:* the breach by a State of a legal obligation imposed upon it by a rule of international law whatever its origin and in whatever sphere.

(2) *Determination of the component parts of the international wrongful act:*

(a) *Objective element:* act or omission objectively conflicting with an international legal obligation of the State.⁶ Problem of the abuse of right. Cases where the act or omission itself suffices to constitute the objective element of the wrongful act and cases where there must also be an extraneous event caused by the conduct.

(b) *Subjective element:* imputability to a subject of international law of conduct contrary to an international obligation. Questions relating to imputation. Imputation of the wrongful act and of responsibility. Problem of indirect responsibility.

Questions relating to the requirement that the act or omission contrary to an international obligation should emanate from a State organ. System of law applicable for determining the status of organ. Legislative, administrative and judicial organs. Organs acting *ultra vires*.

State responsibility in respect of acts of private persons. Question of the real origin of international responsibility in such cases.

⁵ The Sub-Committee suggested that the question of the responsibility of other subjects of international law, such as international organizations, should be left aside.

⁶ The question of possible responsibility based on "risk", in cases where a State's conduct does not constitute a breach of an international obligation, may be studied in this connexion.

Must there be fault on the part of the organ whose conduct is the subject of a complaint? Objective responsibility and responsibility related to fault *lato sensu*. Problems of the degree of fault.⁷

(3) *The various kinds of violations of international obligations.* Questions relating to the practical scope of the distinctions which can be made.

International wrongful acts arising from conduct alone and those arising from events. The causal relationship between conduct and event. Practical consequences of the distinction.

International wrongful acts and omissions. Possible consequences of the distinction, particularly with regard to *restitutio in integrum*.

Simple and complex, non-recurring and continuous international wrongful acts. Importance of these distinctions for the determination of the *tempus commissi delicti* and for the question of the exhaustion of local remedies.

Problems of participation in the international wrongful act.

(4) *Circumstances in which an act is not wrongful*

Consent of the injured party. Problem of presumed consent;

Legitimate sanction against the author of an international wrongful act;

Self-defence;

State of necessity.

Second point: The forms of international responsibility

(1) *The duty to make reparation*, and the right to apply sanctions to a State committing a wrongful act, as consequences of responsibility. Question of the penalty in international law. Relationship between consequences giving rise to reparation and those giving rise to punitive action. Possible distinction between international wrongful acts involving merely a duty to make reparation and those involving the application of sanctions. Possible basis for such a distinction.

(2) *Reparation.* Its forms. *Restitutio in integrum* and reparation by equivalent or compensation. Extent of reparation. Reparation of indirect damage. Satisfaction and its forms.

(3) *Sanction.* Individual sanctions provided for in general international law. Reprisals and their possible role as a sanction for an international wrongful act. Collective sanctions.

3. The report quoted above was considered by the Commission at its fifteenth session in the course of the 686th meeting.⁸ In introducing the report, the Chairman of the Sub-Committee drew attention to the conclusions set out and the programme of work proposed in the report.

4. All the members of the Commission who took part in the discussion expressed agreement with the general conclusions of the report, *viz.*: (1) that, in an attempt to codify the topic of State responsibility, priority should be given to the definitions of the general rules governing the international responsibility of the State, and (2) that in defining these general rules the experience and material gathered in certain special sectors, specially that of responsibility for injuries to the persons or property of aliens, should not be overlooked and that careful attention should be paid to the possible repercussions which developments in international law may have had on responsibility.

⁷ It would be desirable to consider whether or not the study should include the very important questions which may arise in connexion with the proof of the events giving rise to responsibility.

⁸ See *Yearbook of the International Law Commission, 1963, vol. II, document A/5509, pp. 223 and 224, paras. 51-55.*

5. Some members of the Commission felt that the emphasis should be placed in particular on the study of State responsibility in the maintenance of peace, in the light of the changes which have occurred in recent times in international law. Other members considered that none of the fields of responsibility should be neglected and that the precedents existing in all the fields in which the principle of State responsibility had been applied should be studied.

6. 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. Thus, during the discussion, doubts or reservations were expressed with regard to the solution to be given to certain problems arising in connexion with some of the questions listed. In this connexion, it was pointed out that these questions were intended solely to serve as an *aide-mémoire* for the Special Rapporteur when he came to study the substance of particular aspects of the definition of the general rules governing the international responsibility of States, and that the Special Rapporteur would not be obliged to pursue one solution in preference to another in that respect. The Sub-Committee's suggestion that the study of the responsibility of other subjects of international law, such as international organizations, should be left aside also met with the general approval of the members of the Commission.

7. After having unanimously approved the report of the Sub-Committee on State Responsibility, the Commission appointed Mr. Ago as Special Rapporteur for the topic of State responsibility. It was understood that the Secretariat would prepare certain working papers on the question.

8. Progress in the Commission's work on State responsibility was described in chapter IV of its report on the work of its fifteenth session. The General Assembly noted it with approval at its eighteenth session and recommended that the Commission should continue its work on the topic, taking into account the views and considerations expressed in its resolutions 1765 (XVII) of 20 November 1962 and 1902 (XVIII) of 18 November 1963.

9. Since the term of office of members of the Commission elected in 1962 has expired and since the election by the General Assembly in 1966 resulted in a new membership of the Commission, the Special Rapporteur, who was appointed by the Commission at its fifteenth session, ventures to hope that the new Commission will consider afresh the report the Commission approved at its fifteenth session and will kindly let him know whether it intends to confirm his appointment and to repeat, if that is thought necessary, the instructions it gave him at that time, so that he may have the assurance that in continuing his work he enjoys the full confidence of his colleagues.

CO-OPERATION WITH OTHER BODIES

[Agenda item 5]

DOCUMENT A/CN.4/197

Report on the eighth session of the Asian-African Legal Consultative Committee (Bangkok, 8-17 August 1966)
by Mr. Mustafa Kamil Yasseen, Observer for the Commission

[Original text: French/English]

[7 August 1967]

1. In accordance with the decision taken by the International Law Commission at its eighteenth session, I had the pleasure of attending, as an observer, the eighth session of the Asian-African Legal Consultative Committee, which was held at Bangkok from 8 to 17 August 1966.

2. The session was attended by delegations from Ceylon, Ghana, India, Indonesia, Iraq, Japan and Pakistan; observers for the Congo (Kinshasa), Iran, Malaysia, the Philippines, the League of Arab States, the International Law Commission, the Office of the United Nations High Commissioner for Refugees and the International Law Association of the USSR were also present.

3. The Prime Minister of Thailand addressed the Committee at the opening meeting. He stressed the role which the countries of Asia and Africa were called upon to play in the formulation of international law and wished the Committee and all those taking part in the session "success in their united efforts in pursuit of a worthy cause, namely, to defend and uphold the rule of law as opposed to the rule of force".

4. The head of the delegation of Thailand (Mr. Sanya Dharmasakti) and the head of the delegation of Indonesia (Mr. F. Latumeten) were elected President and Vice-President respectively.

The secretariat for the session was directed by Mr. Ben San, Secretary of the Committee.

5. At its first meeting, the Committee adopted the following agenda:

I. ADMINISTRATIVE AND ORGANIZATIONAL MATTERS

1. Adoption of the agenda
2. Election of the President and Vice-President
3. Admission of observers to the session
4. Consideration of the Secretary's report
5. Consideration of the Committee's programme of work for 1967

6. Immunities and privileges of the Committee
7. Date and place of the ninth session

II. MATTERS ARISING OUT OF THE WORK DONE BY THE INTERNATIONAL LAW COMMISSION UNDER ARTICLE 3 (a) OF THE STATUTES

1. Consideration of the report on the work done by the International Law Commission at its seventeenth session
2. Law of treaties

III. MATTERS REFERRED TO THE COMMITTEE BY THE GOVERNMENTS OF THE PARTICIPATING COUNTRIES UNDER ARTICLE 3 (b) OF THE STATUTES

1. The rights of refugees (referred by the Government of the United Arab Republic)
2. Codification of the principles of peaceful co-existence (referred by the Government of India)
3. Status of aliens (referred by the Government of Japan)
 - (a) Diplomatic protection of aliens by their home States; and
 - (b) Responsibility of States arising out of maltreatment of aliens
4. Law of outer space (referred by the Government of India)

IV. MATTERS OF COMMON CONCERN TAKEN UP BY THE COMMITTEE UNDER ARTICLE 3 (c) OF THE STATUTES

1. Relief against double taxation (referred by the Government of India)
2. Participation in general multilateral treaties concluded under the auspices of the League of Nations (taken up by the Committee at the sixth session)

V. Any other matter that may be permitted by the President.

6. The Committee decided that items 4, 5 and 6 of part I of the agenda would be referred to an Administrative Sub-Committee consisting of one member of each delegation for consideration and report.

It was also decided to refer item 2 of part III to a Sub-Committee, after a general discussion.

With regard to item 1 of part IV (Relief against double taxation), the Committee noted that the Sub-Committee appointed at the seventh session had not submitted any recommendation and decided to refer the item to a Sub-Committee of the present session.

The Committee also decided to defer consideration of item 3 (b) of part III (Responsibility of States arising out of maltreatment of aliens).

It was decided that the items on the agenda would be considered in the following order:

(1) General discussion of item 2 of part III (Codification of the principles of peaceful co-existence);

(2) Consideration of item 1 of part III (The rights of refugees);

(3) Consideration of the report of the Sub-Committee on item 1 of part IV;

(4) General discussion on matters arising out of the work done by the International Law Commission: items 1 and 2 of part II (Report of the Commission and Law of treaties) and item 2 of part IV (Participation in general multilateral treaties concluded under the auspices of the League of Nations);

(5) Item 3 (a) of part III (Diplomatic protection of aliens by their home States).

7. Later, at the fourth meeting, the representative of Ghana proposed "that the Committee should consider under article 3 (c) of its Statutes the effect of the recent judgement of the International Court of Justice on South-West Africa". He said that "if the Committee was pleased to take up the suggestion there could be a general discussion at this session and thereafter [the question could] be referred to the Secretariat for preparation of a brief for fuller consideration at the next session of the Committee".

That proposal was adopted.

The main items considered by the Committee will now be briefly reviewed.

8. *Codification of the principles of peaceful co-existence*

This item was referred to the Committee by the Government of India. It was first taken up at the seventh session, held at Baghdad, when the Committee decided to request the Secretariat to collect material on the subject and to draw up a report for submission to the Committee at its eighth session.

At this session, the Committee continued its discussion of the item and several members made general statements; it was decided to entrust the detailed consideration of the item to a Sub-Committee.

In view of the lack of time, and because the same subject has been studied by a Special Committee whose report is to be discussed at the twenty-first session of the General Assembly of the United Nations, the Sub-Committee concluded, after considering the item, that

it would be advisable to wait until the subject had been further discussed by the United Nations and to undertake more studies on the development of State practice in the matter. It recommended that the subject should be considered again at the ninth session.

The Committee endorsed the Sub-Committee's views; it decided to request the secretariat to continue its study of the subject and, in the light of the discussion that had taken place in the Committee, to revise the draft it had prepared and submit the revised text to the Committee at its ninth session.

9. *The rights of refugees*

This item was referred to the Committee by the Government of the United Arab Republic; it was examined at the sixth and seventh sessions, and the Committee also devoted most of this session to it.

The Committee first heard the representative of the United Nations High Commissioner for Refugees and, after a general discussion, examined the articles provisionally adopted at the seventh session. It adopted nine articles, dealing with the definition of the term "refugee", loss of status as a refugee, asylum to a refugee, the right of return, the right to compensation, the minimum standard of treatment, obligations, and expulsion and deportation. These articles are reproduced in annex B.

It was stressed during the discussion that the aim was not to draw up a regional convention, but to recommend certain general principles which the Committee considered "appropriate with regard to the rights relating to treatment of refugees; it was up to each government to decide whether it would accept the recommendation of the Committee and, if so, in what manner the recommendation would be given effect".

10. *Questions arising out of the recent judgement of the International Court of Justice on South-West Africa*

This item was briefly discussed and some members made general statements on it. The representative of Ghana spoke of a more equitable geographical distribution of seats on the International Court of Justice and of the need to terminate the mandate and entrust the administration of South-West Africa to the United Nations. The Committee decided "to direct that the subject be placed on the agenda of the next session as a priority item and that the Secretariat be requested to study the questions raised in the course of discussion in the Committee at this session and to prepare a detailed brief on the subject for consideration by the Committee at its ninth session".

11. *Matters arising out of the work done by the International Law Commission*

The discussion dealt mainly with the law of treaties and more particularly with the fate of the International Law Commission's draft on that topic.

At the request of the President of the Committee, I made a statement on behalf of the International Law Commission, in which I stressed the importance of the co-operation between the two bodies in the progressive development and codification of international law and asked the Committee to make a thorough study of the

draft on the Law of Treaties, so that its member States could clearly define their positions on it. My statement is reproduced in annex C.

All the members expressed their desire that the co-operation between the Committee and the International Law Commission should be continued and strengthened in the interests of a better understanding of the contemporary world.

The Committee's interest in the work of the International Law Commission is not adventitious, for it is called upon by article 3 (a) of its own Statutes "to examine questions that are under consideration by the International Law Commission and to arrange for the views of the Committee to be placed before the said Commission; to consider the reports of the Commission and to make recommendations thereon to the governments of the participating countries".

With regard to this item of its agenda, the Committee decided

to take up at its next session, for consideration, the draft Articles on the subject adopted by the Commission, with a view to formulating proposals and suggestions from the Asian-African viewpoint for consideration by the Governments of the participating countries;

. . . to appoint Mr. Sompong Sucharitkul as Special Rapporteur, with the request that he prepare a report on the specific points arising out of the International Law Commission's draft on the

subject which require consideration from the Asian-African viewpoint;

. . . to request the Governments of the participating countries to send their comments on the draft articles to the Rapporteur through the Secretariat of the Committee, before the end of December 1966;

[to request] the Rapporteur to complete his report by the end of March 1967 and to transmit the same to the Secretariat of the Committee;

[to direct] the Secretariat to send the report of the Rapporteur to the Governments of the participating countries for their views and to place the same before the Committee at its next session, together with the comments and observations that may be received from the Governments of the participating countries;

. . . to give priority to this subject at its ninth session.

12. In conclusion, I must express my admiration for all the preparatory studies made by the Secretary and his staff, for the very high standard of the discussions which took place and for the valuable work produced during the session in the form of reports and resolutions.

Lastly, I have particular pleasure in expressing to the President and members of the Committee and its secretariat my deep gratitude for the warm welcome they gave me, and to His Excellency Mr. T. Khoman, the Minister for Foreign Affairs of Thailand and a former member of the International Law Commission, my sincere thanks for his kindness and civility to me and to the International Law Commission.

ANNEXES

ANNEX A

List of heads of delegations and observers at the eighth session of the Asian-African Legal Consultative Committee

[not reproduced]

ANNEX B

Principles concerning treatment of refugees as adopted by the Asian-African Legal Consultative Committee at its eighth session

Article I—Definition of the term "refugee"

A refugee is a person who, owing to persecution or well-founded fear of persecution for reasons of race, colour, religion, political belief or membership of a particular social group:

(a) leaves the State of which he is a national, or the country of his nationality, or, if he has no nationality, the State or country of which he is a habitual resident; or,

(b) being outside such State or country, is unable or unwilling to return to it or to avail himself of its protection.

Exceptions:

(1) A person having more than one nationality shall not be a refugee if he is in a position to avail himself of the protection of any State or country of which he is a national.

(2) A person who, prior to his admission into the country of refuge, has committed a crime against peace, a war crime, or a crime against humanity or a serious non-political crime or has

committed acts contrary to the purposes and principles of the United Nations shall not be a refugee.

Explanation: The dependants of a refugee shall be deemed to be refugees.

Explanation: The expression "leaves" includes voluntary as well as involuntary leaving.

NOTES:

(i) The delegation of Ghana reserved its position on this article.

(ii) The delegations of Iraq, Pakistan and the United Arab Republic expressed the view that, in their opinion, the definition of the term "refugee" includes a person who is obliged to leave the State of which he is a national under the pressure of an illegal act or as a result of invasion of such State, wholly or partially, by an alien with a view to occupying the State.

(iii) The delegations of Ceylon and Japan expressed the view that in their opinion the expression "persecution" means something more than discrimination or unfair treatment but includes such conduct as shocks the conscience of civilized nations.

(iv) The delegations of Japan and Thailand expressed the view that the word "and" should be substituted for the word "or" in the last line of paragraph (a).

(v) In exception (2) the words "prior to his admission into the country of refuge" were inserted by way of amendment to the original text of the draft article on the proposal of the delegation of Ceylon and accepted by the delegations of India,

Indonesia, Japan and Pakistan. The delegations of Iraq and Thailand did not accept the amendment.

(vi) The delegation of Japan proposed insertion of the following additional paragraph in the article in relation to the proposal under note (iv)

“A person who was outside of the State of which he is a national or the country of his nationality, or if he has no nationality, the State or the country of which he is a habitual resident, at the time of the events which caused him to have a well-founded fear of above-mentioned persecution and is unable or unwilling to return to it or to avail himself of its protection shall be considered refugee.”

The delegations of Ceylon, India, Indonesia, Iraq and Pakistan were of the view that this additional paragraph was unnecessary. The delegation of Thailand reserved its position on this paragraph.

Article II—Loss of status as refugee

1. A refugee shall lose his status as refugee if—
 - (i) he voluntarily returns permanently to the State of which he was a national or the country of his nationality, to the State or the country of which he was a habitual resident; or
 - (ii) he has voluntarily re-availed himself of the protection of the State or country of his nationality; or
 - (iii) he voluntarily acquires the nationality of another State or country and is entitled to the protection of that State or country.
2. A refugee shall lose his status as a refugee if he does not return to the State of which he is a national, or to the country of his nationality, or, if he has no nationality, to the State or country of which he was a habitual resident, or if he fails to avail himself of the protection of such State or country after the circumstances in which he became a refugee have ceased to exist.

Explanation: It would be for the State of asylum of the refugee to decide whether the circumstances in which he became a refugee have ceased to exist.

NOTES:

(i) The delegations of Iraq and the United Arab Republic reserved their position on paragraph 1 (iii).

(ii) The delegation of Thailand wished it to be recorded that the loss of status as a refugee under paragraph 1 (ii) will take place only when the refugee has successfully re-availed himself of the protection of the State of his nationality because the right of protection was that of his country and not that of the individual.

Article III—Asylum to a refugee

1. A State has the sovereign right to grant or refuse asylum in its territory to a refugee.
2. The exercise of the right to grant such asylum to a refugee shall be respected by all other States and shall not be regarded as an unfriendly act.
3. No one seeking asylum in accordance with these Principles should, except for overriding reasons of national security or safeguarding the populations, be subjected to measures such as rejection at the frontier, return or expulsion which would result in compelling him to return to or remain in a territory if there is a well-founded fear of persecution endangering his life, physical integrity or liberty in that territory.
4. In cases where a State decides to apply any of the above-mentioned measures to a person seeking asylum, it should grant provisional asylum under such conditions as it may deem appropriate, to enable the person thus endangered to seek asylum in another country.

Article IV—Right of return

A refugee shall have the right to return if he so chooses to the State of which he is a national or to the country of his nationality and in this event it shall be the duty of such State or country to receive him.

Article V—Right to compensation

1. A refugee shall have the right to receive compensation from the State or the country which he left or to which he was unable to return.
2. The compensation referred to in paragraph 1 shall be for such loss as bodily injury, deprivation of personal liberty in denial of human rights, death of dependants of the refugee or of the person whose dependant the refugee was, and destruction of or damage to property and assets, caused by the authorities of the State or country, public officials or mob violence.

NOTES:

(i) The delegations of Pakistan and the United Arab Republic were of the view that the word “also” should be inserted before the words “such loss” in paragraph 2.

(ii) The delegations of India and Japan expressed the view that the words “deprivation of personal liberty in denial of human rights”, should be omitted.

(iii) The delegations of Ceylon, Japan and Thailand suggested that the words “in the circumstances in which the State would incur state responsibility for such treatment to aliens under international law” should be added at the end of paragraph 2.

(iv) The delegations of Ceylon, Japan, Pakistan and Thailand expressed the view that compensation should be payable also in respect of the denial of the refugee’s right to return to the State of which he is a national.

(v) The delegation of Ceylon was opposed to the inclusion of the words “or country” in this Article.

(vi) The delegations of Ceylon, Ghana, India and Indonesia were of the view that in order to clarify the position the words “arising out of events which gave rise to the refugee leaving such State or country” should be added to paragraph 2 of this Article after the words “mob violence”.

Article VI—Minimum standard of treatment

1. A State shall accord to refugees treatment in no way less favourable than that generally accorded to aliens in similar circumstances.
2. The standard of treatment referred to in the preceding clause shall include the rights relating to aliens contained in the Final Report of the Committee on the Status of Aliens, annexed to these Principles, to the extent that they are applicable to refugees.
3. A refugee shall not be denied any rights on the ground that he does not fulfil requirements which by their nature a refugee is incapable of fulfilling.
4. A refugee shall not be denied any rights on the ground that there is no reciprocity in regard to the grant of such rights between the receiving State and the State or country of nationality of the refugee or, if he is stateless, the State or country of his former habitual residence.

NOTES:

(i) The delegations of Iraq and Pakistan were of the view that a refugee should generally be granted the standard of treatment applicable to the nationals of the country of asylum.

(ii) The delegation of Indonesia reserved its position on paragraph 3 of the article.

(iii) The delegations of Indonesia and Thailand reserved their position on paragraph 4 of the article.

Article VII—Obligations

A refugee shall not engage in subversive activities endangering the national security of the country of refuge, or in activities inconsistent with or against the principles and purposes of the United Nations.

NOTES:

(i) The delegations of India, Japan and Thailand were of the view that the words "or any other country" should be added after the words "the country of refuge" in this article. The other delegations were of the view that such addition was not necessary.

(ii) The delegation of Iraq was of the view that the inclusion of the words "or in activities inconsistent with or against the principles and purposes of the United Nations" was inappropriate as in this article what was being dealt with was the right and obligation of the refugee and not that of the State.

Article VIII—Expulsion and deportation

1. Save in the national or public interest or on the ground of violation of the conditions of asylum, the State shall not expel a refugee.

2. Before expelling a refugee, the State shall allow him a reasonable period within which to seek admission into another State. The State shall, however, have the right to apply during the period such internal measures as it may deem necessary.

3. A refugee shall not be deported or returned to a State or country where his life or liberty would be threatened for reasons of race, colour, religion, political belief or membership of a particular social group.

NOTES:

(i) The delegations of Ceylon, Ghana and Japan did not accept the text of paragraph 1. In the views of these delegations the text of this paragraph should read as follows:

"A State shall not expel or deport a refugee save on ground of national security or public order, or a violation of any of the vital or fundamental conditions of asylum".

(ii) The delegations of Ceylon and Ghana were of the view that in paragraph 2 the words "as generally applicable to aliens under such circumstances" should be added at the end of the paragraph after the word "necessary".

Article IX

Nothing in these articles shall be deemed to impair any higher rights and benefits granted or which may hereafter be granted by a State to refugees.

ANNEX C

Statement by Mr. Mustafa Kamil Yasseen, Chairman of the International Law Commission, Observer, 16 August 1966

Mr. Chairman:

First of all, I should like to thank you and the other members of the Asian-African Legal Consultative Committee, both on behalf of the International Law Commission and on my own behalf, for the warm welcome I have received. I take it as a tribute to the importance which is attached, both by your Committee and by the International Law Commission, to the regular contacts which have been established between the two bodies.

These contacts and the co-operation which they aim to develop can do much toward promoting the codification and progressive development of international law, which is the purpose of the

International Law Commission, and they also serve the interests of the Governments participating in the Asian-African Committee. One of the functions of the Committee, as stated in article 3 of its Statute, is to "examine questions that are under consideration by the International Law Commission and to arrange for the views of the Committee to be placed before the said Commission". To this provision the Committee at its Fifth Session at Rangoon in 1962 added the following function: "to consider the reports of the Commission and to make recommendations thereon to the Governments of the participating countries." The work of codification and progressive development in the framework of the United Nations must take full account of the interests and positions of States in all parts of the world, and those of the States in Asia and Africa, which constitute more than half the membership of the United Nations, have particular weight in this connexion. The study of the Commission's drafts by the Asian-African Committee will promote wider knowledge and understanding of them, and will enable Governments of Asia and Africa to take their positions in the light of that knowledge and understanding. The Committee, which is composed of experts in international law, can thus assist Governments in order to enable them to point out any gaps which may exist in the Commission's drafts, and also any portions of them which may be inconsistent with the interests and positions of those Governments.

This role of the Asian-African Committee in this regard takes on added importance in view of the results of the eighteenth session of the International Law Commission, which took place in Geneva from 4 May to 19 July 1966. At that session the Commission finally adopted a set of seventy-five draft articles on the law of treaties,^a and will submit them to the United Nations General Assembly at its next session. The law of treaties is a topic on which the Commission has been working since its first session in 1949, and to which it has devoted about twice as many meetings as to any other topic. The law of treaties is not only the most difficult topic which the Commission has ever dealt with, but also the most important, in view of the increasing tendency for more and more areas of international relations to be governed by treaty law rather than by customary law.

Furthermore, the Commission has unanimously recommended that the General Assembly should convoke an international conference of plenipotentiaries to study the Commission's draft articles on the law of treaties and to conclude a convention on the subject.^b The Commission has explained in its reports the reasons that led it to recommend the conclusion of a convention rather than the drawing up of an expository code. These reasons were as follows:

"First, an expository code, however well formulated, cannot in the nature of things be so effective as a convention for consolidating the law; and consolidation of the law of treaties is of particular importance at the present time when so many new States have recently become members of the international community. Secondly, the codification of the law of treaties through a multilateral convention would give all the new States the opportunity to participate directly in the formulation of the law if they so wished; and their participation in the work of codification appears to the Commission to be extremely desirable in order that the law of treaties may be placed upon the widest and most secure foundations."^c

The effort to codify and progressively develop the law of treaties presents an important challenge and opportunity to Governments, particularly to those of newly independent States—which are

^a *Yearbook of the International Law Commission, 1966*, vol. II, document A/6309/Rev.1, part II, pp. 177-187.

^b *Ibid.*, p. 177, para. 36.

^c *Yearbook of the International Law Commission, 1962*, vol. II, p. 160, para. 17.

numerous in Asia and Africa—who can thereby participate in the clarification and partial reshaping of a major branch of international law. If this effort succeeds, international treaty law will be placed upon a new and firmer footing. On the other hand, should it fail, not only will States be left subject to an ancient and obscure customary law which many of them had no part in creating, but also the whole effort at codification and progressive development of international law, with all its opportunities for adapting the law to the needs of the modern world, will have suffered a severe reverse.

I wish therefore to make an appeal to the Asian-African Legal Consultative Committee to carry out as soon as possible a thorough study of the Commission's draft articles on the law of treaties with the aim of giving Governments the benefit of its views, and thereby assisting them to formulate their positions in the General Assembly and in any conference which it may decide to convoke. By doing so the Committee will be rendering an important service to its participating Governments, to the cause of the codification and progressive development of international law, and to the International Law Commission.

DOCUMENT A/CN.4/198

Report on the work of the seventh session of the European Committee on Legal Co-operation (Strasbourg, 10-14 April 1967)
by Mr. Mustafa Kamil Yasseen, Observer for the Commission

[Original text: French]

[14 August 1967]

1. In virtue of the working relations between the International Law Commission and the European Committee on Legal Co-operation, the Commission was invited, through the United Nations Legal Counsel, to send an observer to the Committee's seventh session, to be held at Strasbourg from 10 to 14 April 1967, in order to attend the meetings dealing with matters relating to the work of the International Law Commission. As Chairman of the Commission, I had the pleasure of accepting that invitation.

2. The agenda for the seventh session included two items related to the International Law Commission's work, namely, item 5 (b), Privileges and immunities of international organizations, and item 9 (c), Work of the International Law Commission of the United Nations in the field of the law of treaties.

I. PRIVILEGES AND IMMUNITIES OF INTERNATIONAL ORGANIZATIONS

3. A Sub-Committee of Experts on the privileges and immunities of international organizations and persons connected with them held its second session from 20-24 February 1966 under the chairmanship of Mr. Vincent Evans (United Kingdom). It resumed its comparative study of the privileges, immunities and facilities accorded to the United Nations, the Council of Europe, the European Launcher Development Organization and the European Space Research Organization, particularly their financial and fiscal privileges, and agreed that, at its next session, its preliminary conclusions should be given a second reading. It also considered that at its third session it should also examine the following questions:

(1) The status of the various categories of representatives attending meetings of the Council of Europe.

(2) The application of social security laws to the staff of international organizations.

(3) The application to international organizations of the labour laws of the State where they have their seat.

4. In view of, *inter alia*, the International Law Commission's programme of work, the Sub-Committee

considered that it should complete its study by 1968 at the latest.

5. In this connexion, I pointed out that the question of "Relations between States and inter-governmental organizations" was on the International Law Commission's agenda. The Commission had discussed certain aspects of that question on the basis of a report submitted in 1965 by its Special Rapporteur. The privileges and immunities of international organizations certainly formed one of those aspects, and the Commission might begin to discuss them in the near future. The work of the Committee on Legal Co-operation in that field could be very useful, the work already accomplished by the Sub-Committee was of undoubted value, and the comparative study which had already been started threw light on certain points and on the desirability of certain rules. I assured the Committee that when the International Law Commission came to take up that item it would not fail to take due account of the views of the Committee on Legal Co-operation, and in that connexion, I expressed my gratification that, in view of the International Law Commission's programme of work, the Sub-Committee had decided to complete its study by 1968 at the latest.

II. WORK OF THE INTERNATIONAL LAW COMMISSION ON THE LAW OF TREATIES

6. After noting that the International Law Commission had completed its work on the law of treaties and that the General Assembly of the United Nations had adopted resolution 2166 (XXI) of 5 December, 1966 convening an international conference of plenipotentiaries to study the Commission's draft articles on the Law of Treaties, the Committee on Legal Co-operation concluded that it was desirable that the Council of Europe should organize an *ad hoc* meeting in January 1968, in preparation for the above mentioned international conference.

7. The meeting would discuss the broad lines of the International Law Commission's draft, in particular in the light of the written observations submitted by the governments of Council of Europe member States. It would provide an opportunity for member States to get to know each other's views. Since, in the opinion of the

Committee on Legal Co-operation, it would be inappropriate for the meeting to come to formal conclusions, the final position adopted by each State at the United Nations conference would be in no way affected.

8. To ensure the success of the *ad hoc* meeting, it was decided that governments should, if possible, send to it the head or—at least—one of the principal members of their delegations to the international conference. One delegation stressed the importance of not leaving non-member States with the impression that the purpose of the meeting was to further special European interests.

9. The Committee on Legal Co-operation consequently recommended that the Committee of Ministers authorize the convening of a three-day *ad hoc* meeting early in 1968. An expert from each of the member States, as well as from Finland and Spain, would be invited to attend.

10. I described the work that the International Law Commission had done on the law of treaties and empha-

sized how important and helpful was the decision of the Council of Europe to organize a meeting of that kind which would help to clarify the views of member States of the Council with regard to the Commission's draft. The European delegations will certainly approach the question in a constructive spirit. They will certainly not endeavour to secure the acceptance of the views of one particular group of States, but rather to co-operate, on the basis of the draft, in reaching a compromise which can be accepted by all States.

11. In conclusion, I wish to thank the European Committee on Legal Co-operation for its kindness and particularly Professor R. Monaco, the retiring Chairman, and Mr. H. Blin, the Chairman elect. I also extend my warm thanks to Mr. P. Smithers, the Secretary-General of the Council of Europe, to Mr. P. Modinos, the Deputy Secretary-General, and to Mr. H. Golsong, Director of Legal Affairs, for their kindness.

Mustafa Kamil Yasseen

ORGANIZATION OF FUTURE WORK

[Agenda item 6]

DOCUMENT A/CN.4/L.119

Working paper prepared by the Secretariat

[Original text: English]

[27 April 1967]

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Introduction

1. The beginning of a new five-year term of office of the members of the International Law Commission and the recent completion of its work on one major topic may make it desirable for the Commission to review its programme of work, to which it may wish to add one or more new topics, and the organization of its future work. The purpose of this note is to facilitate such a review. The note has been kept as brief as possible, and for further information about the various topics mentioned, members may consult other relevant documents of the Commission. Among the most useful are:

(i) *Survey of International Law in relation to the Work of Codification of the International Law Commission*¹

(ii) *Future work in the field of the codification and progressive development of international law: Working paper*²

2. The note will first briefly mention the topics of international law which are currently under study by the Commission with the assistance of its Special Rapporteurs. In this connexion it will be recalled that the Commission at its eighteenth session (1966) decided "that a Special Rapporteur who is re-elected as a member should continue his work on his topic, if not yet finally disposed of by the Commission, unless and until the Commission as newly constituted decides otherwise".³ In accordance with this decision, the Commission has received reports from Special Rapporteurs at its nineteenth session. The only Special Rapporteur who was not re-elected to the Commission at the last election was Mr. Manfred Lachs, the Special Rapporteur on succession of States and Governments, who is now a member of the International Court of Justice.

3. The Commission in recent years has worked concurrently on five topics of international law, with a Special Rapporteur on each. The completion of the Commission's work on the law of treaties at the eighteenth session

¹ Document A/CN.4/1/Rev.1; United Nations publication, Sales No.: 1948.V.I(1).

² *Yearbook of the International Law Commission, 1962*, vol. II, document A/CN.4/145, pp. 84-100.

³ *Yearbook of the International Law Commission, 1966*, vol. II, document A/6309/Rev.1, part II, p. 277, para. 73.

means that there are now only four topics under current study, and one of those four, special missions, is near completion. The Commission may consequently wish to consider at its present session whether to take up the study of one or two additional topics. To facilitate the Commission's examination of its future programme, this note will refer to two topics which the General Assembly has requested the Commission to examine and which in 1962 were placed on the Commission's programme, but on which no Special Rapporteurs have yet been appointed. The provisional list of topics for codification drawn up by the Commission at its first session (1949)⁴ will then be set out, with brief notes as to the extent to which the Commission and codification conferences have dealt with them. Finally, the note will list certain topics which have been suggested in the past for study by the Commission, but have not been placed on its programme of work.

4. When the Commission has established the list of topics on which it will work, it may wish in accordance with its past practice, to decide upon priorities among the various topics, and possibly also upon tentative dates for the completion of study of each of them.

I. Topics of international law currently under study by the International Law Commission

5. As the Special Rapporteurs on these topics have given or will no doubt wish to give the Commission all necessary explanations on these topics, it will be appropriate only to list them here, with indications of the latest documents furnishing a basis for their consideration.

(i) *Special missions*

Fourth report of Mr. Milan Bartoš, Special Rapporteur (A/CN.4/194 and Add.1-5).

(ii) *Relations between States and inter-governmental organizations*

Second report of Mr. Abdullah El-Erian, Special Rapporteur (A/CN.4/195 and Add.1).

(iii) *State responsibility*

Mr. Roberto Ago is Special Rapporteur. The Commission's report on the work of its fifteenth session (1963)⁵ summarizes the latest decisions and expressions of views of the Commission, and the report of a sub-committee on the topic is given in annex I to that report.

(iv) *Succession of States and Governments*

There is now no Special Rapporteur on this topic. The Commission's report on the work of its fifteenth session⁶ summarizes the latest decisions and expressions of views of the Commission, and the report of a sub-committee on the topic is given in annex II to that report.

⁴ *Yearbook of the International Law Commission, 1949*, report of the Commission to the General Assembly, p. 281, para. 16.

⁵ *Yearbook of the International Law Commission, 1963*, vol. II, document A/5509, pp. 223 and 224, paras. 51-55.

⁶ *Ibid.*, pp. 224 and 225, paras. 56-61.

II. Topics which the Commission has placed on its programme of work, but on which no Special Rapporteur has yet been appointed

A. *Right of asylum*

6. This topic was included in the provisional list for codification drawn up by the Commission in 1949. The General Assembly at its fourteenth session adopted resolution 1400 (XIV) of 21 November 1959, which reads as follows:

The General Assembly,

Considering that it is desirable to standardize the application of the principles and rules relating to the right of asylum,

Recalling that the International Law Commission at its first session included the right of asylum in the provisional list of topics of international law selected for codification,

Requests the International Law Commission, as soon as it considers it advisable, to undertake the codification of the principles and rules of international law relating to the right of asylum.

7. The Commission at its twelfth session (1960) "took note of the resolution and decided to defer further consideration of this question to a future session".⁷ At its fourteenth session (1962) the Commission decided to include the topic in its programme, but without setting any date for the start of consideration.⁸ Meanwhile, work on the right of asylum was proceeding in other organs of the United Nations. The Commission on Human Rights, which had been considering a draft declaration on the right of asylum since 1957, completed the draft in 1960,⁹ and that draft was transmitted to the General Assembly by the Economic and Social Council in its resolution 772 E (XXX) of 25 July 1960. The General Assembly, at its seventeenth session (1962), referred the draft to the Third Committee, which adopted the text of a preamble and of one article¹⁰ but was unable to complete the draft because of the pressure of other work. At the eighteenth session of the Assembly (1963) the Third Committee was unable to deal with the item, and the Committee did not meet during the nineteenth session (1964).

8. At its twentieth session (1965) the General Assembly referred the item on the draft declaration on the right of asylum to the Sixth Committee instead of to the Third Committee. The Sixth Committee, with the assistance of a working group, considered certain procedural aspects of the item, and prepared a draft resolution which was adopted by the General Assembly as resolution 2100 (XX) of 20 December 1965, by which it was decided to take up the item again at the twenty-first session.

9. At the twenty-first session of the Assembly (1966), the item was again referred to the Sixth Committee,

⁷ *Yearbook of the International Law Commission, 1960*, vol II, document A/4425, p. 180, para. 39.

⁸ *Yearbook of the International Law Commission, 1962*, vol. II, document A/5209, p. 190, para. 60.

⁹ *Official Records of the Economic and Social Council, Thirtieth Session, Supplement No. 8*, chap. VI. Also *Official Records of the General Assembly, Twentieth Session, Annexes*, agenda item 63, documents A/5926 and A/C.6/L.581.

¹⁰ *Official Records of the General Assembly, Seventeenth Session, Annexes*, agenda item 46, document A/5359.

which again appointed a working group to consider it. The working group prepared a complete text entitled "Draft declaration on territorial asylum"¹¹ The General Assembly, by resolution 2203 (XXI) of 16 December 1966, decided to transmit that draft to Member States for their further consideration, and to place an item entitled "Draft declaration on territorial asylum" on the provisional agenda of its twenty-second session, with a view to the final adoption of a declaration on the subject.

B. Juridical régime of historic waters, including historic bays

10. The first United Nations Conference on the Law of the Sea (1958) adopted, in paragraph 6 of article 7 of the Convention on the Territorial Sea and Contiguous Zone, a provision to the effect that its rules on bays "shall not apply to so-called 'historic' bays".¹² The Conference on 27 April 1958 also adopted a resolution requesting the General Assembly to arrange for the study of the juridical régime of historic waters, including historic bays.¹³ The General Assembly thereafter adopted resolution 1453 (XIV) of 7 December 1959, reading as follows:

The General Assembly,

Recalling that, by a resolution adopted on 27 April 1958, the United Nations Conference on the Law of the Sea requested the General Assembly to arrange for the study of the juridical régime of historic waters, including historic bays, and for the communication of the results of the study to all States Members of the United Nations,

Requests the International Law Commission, as soon as it considers it advisable, to undertake the study of the question of the juridical régime of historic waters, including historic bays, and to make such recommendations regarding the matter as the Commission deems appropriate.

11. The Commission, at its twelfth session (1960), requested the Secretariat to undertake a study of the topic, and deferred further consideration to a future session.¹⁴ A study prepared by the Secretariat was published in 1962.¹⁵ Also in 1962, the Commission, at its fifteenth session, decided to include the topic in its programme, but without setting any date for the start of consideration.¹⁶

III. Provisional list of topics for codification drawn up by the Commission in 1949

12. The list of topics of international law provisionally selected for codification by the Commission in 1949¹⁷ is given hereunder, with brief notes indicating the extent

¹¹ *Ibid.*, Twenty-first Session, Annexes, agenda item 85, document A/6570, annex, para. 1.

¹² *United Nations Conference on the Law of the Sea (1958)*, Official Records, vol. II, p. 133.

¹³ *Ibid.*, Annexes, document A/CONF.13/L.56, resolution VII.

¹⁴ *Yearbook of the International Law Commission, 1960*, vol. II, document A/4425, p. 180, para. 40.

¹⁵ *Yearbook of the International Law Commission, 1962*, vol. II, document A/CN.4/143, pp. 1-25.

¹⁶ *Ibid.*, document A/5209, p. 190, para. 60.

¹⁷ *Yearbook of the International Law Commission, 1949*, report of the Commission to the General Assembly, p. 281, para. 16.

to which they have been dealt with by the Commission and by codification conferences which considered drafts prepared by it.

(i) Recognition of States and Governments

Article 11 of the draft declaration on rights and duties of States, adopted by the Commission at its first session (1949), refers to a duty of States to refrain from recognizing any territorial acquisition made by illegal means by another State, but the Commission "concluded that the whole matter of recognition was too delicate and too fraught with political implications to be dealt with in a brief paragraph in this draft Declaration . . .".¹⁸

(ii) Succession of States and Governments

See paragraph 5 (iv) above.

(iii) Jurisdictional immunities of States and their property

The immunities of State-owned ships and warships are referred to in the Convention on the Territorial Sea and the Contiguous Zone¹⁹ and the Convention on the High Seas,²⁰ both adopted at the first United Nations Conference on the Law of the Sea (1958). The immunities of State property used in connexion with diplomatic missions are regulated in the Vienna Convention on Diplomatic Relations (1961)²¹ and those of such property used in connexion with consular posts in the Vienna Convention on Consular Relations (1963).²² The draft articles on special missions (A/CN.4/194 and addenda) also contain provisions on the immunity of State property, and so presumably will the draft articles on relations between States and inter-governmental organizations. One main aspect of the topic which has not yet been touched on by the Commission is the immunities, if any, of State-owned property used for commercial purposes.

(iv) Jurisdiction with regard to crimes committed outside national territory

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

(v) Régime of the high seas

The first United Nations Conference on the Law of the Sea (1958) adopted the Convention on the High Seas.

¹⁸ *Ibid.*, p. 289, para. 50.

¹⁹ *United Nations Conference on the Law of the Sea (1958)*, Official Records, vol. II, Annexes, document A/CONF.13/L.52.

²⁰ *Ibid.*, document A/CONF.13/L.53.

²¹ *United Nations Conference on Diplomatic Intercourse and Immunities*, Official Records, vol. II, Annexes, document A/CONF.20/13 and Cor.1.

²² *United Nations Conference on Consular Relations*, Official Records, vol. II, Annexes, document A/CONF.25/12.

(vi) *Régime of territorial waters*

The first United Nations Conference on the Law of the Sea (1958) adopted the Convention on the Territorial Sea and the Contiguous Zone. The questions of the breadth of the territorial sea and fishery limits were considered at the Second United Nations Conference on the Law of the Sea (1960)²³ but the Conference did not adopt any decisions on those questions. The topic of the juridical régime of historic waters, including historic bays (see above, para. 10) is also connected with this topic.

(vii) *Nationality, including statelessness*

A United Nations Conference on the Elimination or Reduction of Future Statelessness, which met in 1959 and 1961, adopted the Convention on the Reduction of Statelessness (A/CONF.9/15), which has not yet come into force. It may also be mentioned that the nationality of married women, a topic which the Commission was requested to study by Economic and Social Council resolution 304 D (XI) of 17 July 1950, is the subject of a Convention on the Nationality of Married Women, not based on a draft by the Commission, which was adopted by the General Assembly in its resolution 1040 (XI) of 29 January 1957, and which is now in force.

(viii) *Treatment of aliens*

The Commission at its seventh session (1955) appointed Mr. F. V. García Amador as Special Rapporteur on State responsibility, a topic which he conceived as closely related to the topic of treatment of aliens. From the eighth (1956) to the thirteenth (1961) session of the Commission Mr. García Amador submitted a series of six reports on international responsibility²⁴ which were mainly devoted to the development and explanation of a draft on the responsibility of a State for injuries caused in its territory to the person or property of aliens. The Commission, which was occupied with other work, was unable to give full consideration to these reports. Mr. Roberto Ago was subsequently appointed Special Rapporteur on State responsibility. The Commission, after considering at its fifteenth session (1963) a report of a sub-committee on that topic (A/CN.4/152)²⁵ agreed "(1) that, in an attempt to codify the topic of State responsibility, priority should be given to the definitions of the general rules governing the international responsi-

bility of the State, and (2) that in defining these general rules the experience and material gathered in certain special sectors, especially that of responsibility for injuries to the persons or property of aliens, should not be overlooked . . ."²⁶

(ix) *Right of asylum*

See paragraphs 6-9 above.

(x) *Law of treaties*

The Commission adopted a set of draft articles at its eighteenth session (1966).²⁷

(xi) *Diplomatic intercourse and immunities*

The United Nations Conference on Diplomatic Intercourse and Immunities (1961) adopted the Vienna Convention on Diplomatic Relations. The topics of Special missions (see para. 5 (i) above) and Relations between States and inter-governmental organizations (see para. 5 (ii) above) also constitute parts of this topic.

(xii) *Consular intercourse and immunities*

The United Nations Conference on Consular Relations (1963) adopted the Vienna Convention on Consular Relations.

(xiii) *State responsibility*

See paragraph 5 (iii) above.

(xiv) *Arbitral procedure*

The Commission at its fifth session (1953) adopted a draft convention on arbitral procedure²⁸ which was the subject of General Assembly resolution 989 (X) of 14 December 1955. At its tenth session (1958) the Commission adopted a set of Model Rules on Arbitral Procedure,²⁹ which were the subject of General Assembly resolution 1262 (XIII) of 14 November 1958.

IV. Topics suggested for study by the Commission, which have not yet been placed on its programme of work

A. Topics suggested in 1949, but not included by the Commission in its provisional list for codification

13. The provisional list of topics for codification referred to in the preceding paragraph was drawn up after consideration of a memorandum by the Secretary-General entitled "Survey of International Law in relation to the Work of Codification of the International Law Commission" (see paragraph 1 of the Introduction to this working paper). That memorandum suggested certain topics which after discussion by the Commission were not selected by it, and those topics, concerning which

²³ *Second United Nations Conference on the Law of the Sea (1960), Official Records Committee, of the Whole 2nd-28th meetings, and Plenary Meetings, 3rd, 5th, 6th, 9th, 11th, 12th, 13th and 14th meetings.*

²⁴ *Yearbook of the International Law Commission, 1956, vol. II, document A/CN.4/96, pp. 173-231; Yearbook of the International Law Commission, 1967, vol. II, document A/CN.4/106, pp. 104-130; Yearbook of the International Law Commission, 1958, vol. II, document A/CN.4/111, pp. 47-73; Yearbook of the International Law Commission, 1959, vol. II, document A/CN.4/119, pp. 1-36; Yearbook of the International Law Commission, 1960, vol. II, document A/CN.4/125, pp. 41-68; Yearbook of the International Law Commission, 1961, vol. II, document A/CN.4/134 and Add.1, pp. 1-54.*

²⁵ *Yearbook of the International Law Commission, 1963, vol. II, document A/5509, annex I, p. 227.*

²⁶ *Ibid.*, document A/5509, p. 224, para. 52.

²⁷ *Yearbook of the International Law Commission, 1966, vol. II, document A/6309/Rev.1, part II, pp. 177-187.*

²⁸ *Yearbook of the International Law Commission, 1953, vol. II, document A/2456, pp. 208-212, para. 57.*

²⁹ *Yearbook of the International Law Commission, 1958, vol. II, document A/3859, pp. 83-86, para. 22.*

the memorandum makes full explanations, were the following.³⁰

- (i) Subjects of international law
- (ii) Sources of international law
- (iii) Obligations of international law in relation to the law of States
- (iv) Fundamental rights and duties of States³¹
- (v) Domestic jurisdiction
- (vi) Recognition of acts of foreign States
- (vii) Obligations of territorial jurisdiction
- (viii) Territorial domain of States
- (ix) Pacific settlement of international disputes³²
- (x) Extradition

B. Topics suggested by Governments in response to General Assembly resolution 1505 (XV) and in the Sixth Committee at the fifteenth and sixteenth sessions

14. The General Assembly, by resolution 1505 (XV) of 12 December 1960, decided to place on the provisional agenda of its sixteenth session an item entitled "Future work in the field of codification and progressive development of international law", and also asked for the views and suggestions of Member States thereon. Various suggestions were made by Member States in written form, and other suggestions were made orally in the debates of the Sixth Committee at the fifteenth and sixteenth sessions. The General Assembly, by resolution 1686 (XVI) of 18 December 1961, requested the

³⁰ The Commission also discussed the topic of the laws of war, which had not been suggested in the memorandum: the topic was not included in the list (*Yearbook of the International Law Commission, 1949*, report of the Commission to the General Assembly, p. 281, para. 18).

³¹ The Commission at its first session (1949) adopted a draft declaration on the rights and duties of States on the basis of a draft referred to it by General Assembly resolution 178 (II) of 21 November 1947 (*ibid.*, part II, pp. 287 and 288). The General Assembly, by its resolution 596 (VI) of 7 December 1951, postponed further consideration of the draft declaration.

³² Without attempting to recall all the various efforts of the United Nations on this topic, it may be mentioned that an item entitled "Peaceful settlement of disputes" has been discussed at the past two sessions of the General Assembly (twentieth session, agenda item 99 and twenty-first session, agenda item 36—*Official Records of the General Assembly, Twentieth Session, Special Political Committee*, 489th to 492nd meetings; and *ibid.*, *Plenary Meetings*, 1403rd meeting; *ibid.*, *Twenty-first Session, Special Political Committee*, 547th and 548th meetings and *ibid.*, *Plenary Meetings*, 1498th meeting) but no resolution on it has been adopted. Also, one of the principles considered by the Special Committee on Principles of International Law concerning Friendly Relations and Co-operation among States, which will meet again in 1967, is "the principle that States shall settle their international disputes by peaceful means in such a manner that international peace and security are not endangered" (*ibid.*, *Twenty-first Session, Annexes*, agenda item 87, document A/6230).

International Law Commission to consider its future programme of work in the light of all the suggestions. The Secretariat prepared a working paper³³ summarizing what had been suggested. The Commission considered the matter at its fourteenth session (1962) and decided to include in its programme of work four items (special missions, relations between States and inter-governmental organizations, the right of asylum, and the juridical régime of historic waters, including historic bays) which had been referred to it by earlier General Assembly resolutions. As to other topics, however, the Commission observed:

"The Commission considered that many of the topics proposed by Governments deserved study with a view to codification. In drawing up its future programme of work, however, it is obliged to take account of its resources . . . The Commission . . . considers it inadvisable for the time being to add anything further to the already long list of topics on its agenda."³⁴

15. The list of new topics suggested by Governments, as given in the Secretariat's working paper, is as follows:

- (i) Law of space³⁵
- (ii) Law of international organizations³⁶
- (iii) Human rights and defence of democracy³⁷
- (iv) Independence and sovereignty of States
- (v) Enforcement of international law
- (vi) Utilization of international rivers³⁸
- (vii) Economic and trade relations³⁹

³³ *Yearbook of the International Law Commission, 1962*, vol. II, document A/CN.4/145, p. 84.

³⁴ *Ibid.*, document A/5209, p. 190, para. 61.

³⁵ This topic is being studied by the General Assembly's Committee on the Peaceful Uses of Outer Space. At its twenty-first session the General Assembly adopted resolution 2222 (XXI) of 19 December 1966, relating to the Treaty on Principles Governing the Activities of States in the Exploration and Use of Outer Space, including the Moon and Other Celestial Bodies.

³⁶ Under this heading were grouped various suggestions relating not only in general to the status of international organizations and their relations with States but also to their responsibility, the law of treaties respecting them, and the entrance of new members in the international community.

³⁷ The General Assembly, by resolution 2200 A (XXI) of 19 December 1966, adopted the International Covenant on Economic, Social and Cultural Rights, the International Covenant on Civil and Political Rights and the Optional Protocol to the International Covenant on Civil and Political Rights.

³⁸ In accordance with General Assembly resolution 1401 (XIV) of 21 November 1959, the Secretary-General submitted a report (A/5409) on legal problems relating to the utilization and use of international rivers. A collection of legislative texts and treaty provisions concerning the utilization of international rivers for other purposes than navigation has been printed in the *United Nations Legislative Series* ST/LEG.SER.B/12 (United Nations publication, Sales No.: 63.V.4).

³⁹ The General Assembly by resolution 2205 (XXI) of 17 December 1966, decided to establish the United Nations Commission on International Trade Law.

REPORT OF THE COMMISSION TO THE GENERAL ASSEMBLY

DOCUMENTS A/6709/REV.1 AND REV.1/CORR.1

Report of the International Law Commission on the work of its nineteenth session 8 May-14 July 1967

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CHAPTER I

Organization of the session

1. The International Law Commission, established in pursuance of General Assembly resolution 174 (II) of 21 November 1947 and in accordance with its Statute annexed thereto, as subsequently amended, held its nineteenth session at the United Nations Office at Geneva from 8 May to 14 July 1967. The work of the Commission during that session is described in this report. Chapter II of the report, on special missions, contains a description of the Commission's work on that topic, together with fifty draft articles and commentaries thereon, as finally approved by the Commission. Chapter III relates to the organization of the Commission's future work and to a number of administrative and other questions.

A. MEMBERSHIP AND ATTENDANCE

2. The Commission consists of the following members:

Mr. Roberto AGO (Italy)
 Mr. Fernando ALBÓNICO (Chile)
 Mr. Gilberto AMADO (Brazil)
 Mr. Milan BARTOŠ (Yugoslavia)
 Mr. Mohammed BEDJAOUI (Algeria)
 Mr. Jorge CASTAÑEDA (Mexico)
 Mr. Erik CASTREN (Finland)
 Mr. Abdullah EL-ERIAN (United Arab Republic)
 Mr. Taslim O. ELIAS (Nigeria)
 Mr. Constantin Th. EUSTATHIADES (Greece)
 Mr. Louis IGNACIO-PINTO (Dahomey)
 Mr. Eduardo JIMÉNEZ DE ARÉCHAGA (Uruguay)
 Mr. Richard D. KEARNEY (United States of America)
 Mr. NAGENDRA SINGH (India)
 Mr. Alfred RAMANGASOAVINA (Madagascar)
 Mr. Paul REUTER (France)
 Mr. Shabtai ROSENNE (Israel)
 Mr. José María RUDA (Argentina)
 Mr. Abdul Hakim TABIBI (Afghanistan)
 Mr. Arnold J. P. TAMMES (Netherlands)
 Mr. Senjin TSURUOKA (Japan)
 Mr. Nikolai USHAKOV (Union of Soviet Socialist Republics)
 Mr. Endre USTOR (Hungary)
 Sir Humphrey WALDOCK (United Kingdom of Great Britain and Northern Ireland)
 Mr. Mustafa Kamil YASSEEN (Iraq).

3. Except for Mr. Gilberto Amado, Mr. Taslim O. Elias and Mr. José María Ruda, who were unable to be present, all members attended the nineteenth session.

B. OFFICERS

4. At its 895th meeting, held on 8 May 1967, the Commission elected the following officers:

Chairman: Sir Humphrey Waldock
First Vice-Chairman: Mr. José María Ruda
Second Vice-Chairman: Mr. Endre Ustor
Rapporteur: Mr. Abdullah El-Erian.

5. At its 908th meeting, held on 26 May 1967, the Commission appointed a Drafting Committee composed as follows:

Chairman: Mr. José María Ruda (in whose absence the Committee was presided over by Mr. Roberto Ago or Mr. Endre Ustor)

Members: Mr. Roberto Ago; Mr. Fernando Albónico; Mr. Milan Bartoš; Mr. Abdullah El-Erian; Mr. Richard D. Kearney; Mr. Alfred Ramangasoavina; Mr. Paul Reuter; Mr. Shabtai Rosenne; Mr. Nikolai Ushakov; Mr. Endre Ustor; and Mr. Mustafa Kamil Yasseen.

Mr. Albónico was replaced in his absence by Mr. Jorge Castañeda or Mr. Eduardo Jiménez de Aréchaga.

6. Mr. Constantin A. Stavropoulos, Legal Counsel, attended the 941st meeting, held on 14 July 1967, and represented the Secretary-General on that occasion. 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.

C. AGENDA

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

1. Special missions
2. Relations between States and inter-governmental organizations
3. State responsibility
4. Succession of States and Governments
5. Co-operation with other bodies
6. Organization of future work
7. Date and place of the twentieth session
8. Other business

8. In the course of the session, the Commission held forty-seven public meetings. In addition, the Drafting

Committee held eleven meetings. The Commission considered all the items on its agenda except item 2—Relations between States and inter-governmental organizations—which it was unable to discuss because Mr. Abdullah El-Erian, the Special Rapporteur on that topic, was obliged to leave Geneva.

CHAPTER II

Special missions

A. HISTORICAL BACKGROUND

9. At its tenth session, in 1958, the International Law Commission adopted a set of draft articles on diplomatic intercourse and immunities. The Commission observed, however, that the draft dealt only with permanent diplomatic missions. Diplomatic relations between States also assumed other forms that might be placed under the heading of “*ad hoc* diplomacy”, covering itinerant envoys, diplomatic conferences and special missions sent to a State for limited purposes. The Commission considered that these forms of diplomacy should also be studied, in order to bring out the rules of law governing them, and requested the Special Rapporteur to make a study of the question and to submit his report at a future session.¹ The Commission decided at its eleventh session (1959) to place the question of *ad hoc* diplomacy as a special topic on the agenda for its twelfth session (1960).

10. Mr. A. E. F. Sandström was appointed Special Rapporteur. He submitted his report² to the twelfth session, and on the basis of this report the Commission took decisions and drew up recommendations on the rules concerning special missions.³ The Commission's draft was very brief. It was based on the idea that the rules on diplomatic intercourse and immunities in general prepared by the Commission should, on the whole, be applied to special missions by analogy. The Commission expressed the opinion that this brief draft should be referred to the Conference on Diplomatic Intercourse and Immunities convened at Vienna in the spring of 1961. But it stressed that it had not been able to give this draft the thorough study it would normally have done. For that reason, the Commission regarded its draft as only a preliminary survey, carried out in order to put forward certain ideas and suggestions which should be taken into account at the Vienna Conference.⁴

11. At its 943rd plenary meeting on 12 December 1960, the General Assembly decided, on the recommendation of the Sixth Committee, that these draft articles should be referred to the Vienna Conference with the recommendation that the Conference should consider them together with the draft articles on diplomatic intercourse and

immunities.⁵ The Vienna Conference placed this question on its agenda and appointed a special Sub-Committee to study it.⁶

12. The Sub-Committee noted that the draft articles did little more than indicate which of the rules on permanent missions applied to special missions and which did not. The Sub-Committee took the view that the draft articles were unsuitable for inclusion in the final convention without long and detailed study, which could take place only after a set of rules on permanent missions had been finally adopted. The Sub-Committee therefore recommended that the Conference should refer this question back to the General Assembly so that the Assembly could recommend the International Law Commission to make a further study of the topic, i.e., to continue to study the topic in the light of the Vienna Convention on Diplomatic Relations which was then drawn up. At its fourth plenary meeting, on 10 April 1961, the Conference adopted the Sub-Committee's recommendations.⁷

13. Consequently, the matter was again submitted to the General Assembly. On 18 December 1961, the General Assembly, on the recommendation of the Sixth Committee, adopted resolution 1687 (XVI), in which it requested the International Law Commission to study the subject further and to report thereon to the General Assembly.

14. In pursuance of that resolution, the question was referred back to the International Law Commission, which decided, at its 669th meeting, on 27 June 1962, to place it on the agenda for its fifteenth session. The Commission also requested the Secretariat to prepare a working paper on the subject.

15. During its fifteenth session (1963), at the 712th meeting, the Commission appointed Mr. Milan Bartoš as Special Rapporteur for the topic of special missions.

16. On that occasion, the Commission took the following decision:

With regard to the approach to the codification of the topic, the Commission decided that the Special Rapporteur should prepare a draft of articles. These articles should be based on the provisions of the Vienna Convention on Diplomatic Relations, 1961, but the Special Rapporteur should keep in mind that special missions are, both by virtue of their functions and by their nature, an institution distinct from permanent missions. In addition, the Commission thought that the time was not yet ripe for deciding whether the draft articles on special missions should be in the form of an additional protocol to the Vienna Convention, 1961, or should be embodied in a separate convention or in any other appropriate form, and that the Commission should await the Special Rapporteur's recommendations on that subject.⁸

17. In addition, the Commission considered again whether the topic of special missions should also cover the status of government delegates to congresses and

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

² *Yearbook of the International Law Commission, 1960*, vol. II, p. 108.

³ *Ibid.*, pp. 179 and 180.

⁴ *Ibid.*, p. 179.

⁵ Resolution 1504 (XV).

⁶ The Sub-Committee was composed of the representatives of Ecuador, Iraq, Italy, Japan, Senegal, the USSR, the United Kingdom, the United States of America and Yugoslavia.

⁷ *Yearbook of the International Law Commission, 1963*, vol. II, p. 157, paras. 44-45.

⁸ *Ibid.*, p. 225, para. 64.

conferences. In this connexion, at its fifteenth session, the Commission inserted the following paragraph in its annual report to the General Assembly:

With regard to the scope of the topic, the members agreed that the topic of special missions should also cover itinerant envoys, in accordance with its decision at its 1960 session.⁹ At that session the Commission had also decided¹⁰ not to deal with the privileges and immunities of delegates to congresses and conferences as part of the study of special missions, because the topic of diplomatic conferences was connected with that of relations between States and inter-governmental organizations. At the present session, the question was raised again, with particular reference to conferences convened by States. Most of the members expressed the opinion, however, that for the time being the terms of reference of the Special Rapporteur should not cover the question of delegates to congresses and conferences.¹¹

18. The Special Rapporteur submitted his report,¹² which was placed on the agenda for the Commission's sixteenth session (1964).

19. The Commission considered the report twice. First, at the 723rd, 724th and 725th meetings, it engaged in a general discussion and gave the Special Rapporteur general instructions for continuing his study and submitting the continuation of his report at the following session. Secondly, at the 757th, 758th, 760th-763rd and 768th-770th meetings, it examined a number of draft articles and adopted sixteen articles subject to their being supplemented, if necessary, during its seventeenth session. These articles were submitted to the General Assembly and to the Governments of Member States for information.

20. Owing to the circumstances prevailing at the time of its regular session in 1964, the General Assembly did not discuss the report and consequently did not express its opinion to the Commission. Hence, the Commission had to resume its work on the topic at the point it had reached at its sixteenth session in 1964. The Special Rapporteur expressed the hope that the reports on this topic submitted at the 1964 and 1965 sessions would be consolidated in a single report.

21. The topic of special missions was placed on the agenda for the first part of the Commission's seventeenth session (1965) at which the Special Rapporteur submitted his second report.¹³ The Commission considered that report at its 804th-809th, 817th, 819th and 820th meetings.

22. The Commission considered all the articles proposed in the Special Rapporteur's second report. It adopted 28 articles of the draft, which follow on from the 16 articles adopted at the sixteenth session. The Commission requested that the General Assembly should consider all the articles adopted at the sixteenth and the first part of the seventeenth sessions as a single draft.¹⁴

⁹ *Yearbook of the International Law Commission, 1960*, vol. I, 565th meeting, para. 26.

¹⁰ *Ibid.*, para. 25.

¹¹ *Yearbook of the International Law Commission, 1963*, vol. II, p. 225, para. 63.

¹² *Yearbook of the International Law Commission, 1964*, vol. II, p. 67.

¹³ *Yearbook of the International Law Commission, 1965*, vol. II, p. 109.

¹⁴ *Ibid.*, p. 165, para. 42.

23. In preparing the draft articles, the Commission has sought to codify the modern rules of international law concerning special missions, and the articles formulated by the Commission contain elements of progressive development as well as of codification of the law.

24. In conformity with articles 16 and 21 of its Statute, the Commission decided to communicate its draft articles on special missions to Governments through the Secretary-General, inviting their comments. The Governments were asked to submit their comments by 1 May 1966.

25. The Commission decided to submit to the General Assembly and to the Governments of Member States, in addition to the draft articles in chapter III, section B, of its report on the work of the first part of its seventeenth session, certain other decisions, suggestions and observations set forth in section C of that chapter, on which the Commission requested any comments likely to facilitate its subsequent work on special missions.¹⁵ In conformity with a decision taken by the Commission, the draft articles on special missions were transmitted by the Secretary-General to the Governments of Member States for comment.

26. In 1965, the General Assembly discussed the draft articles at its twentieth session and, on the proposal of the Sixth Committee, recommended, in its resolution 2045 (XX), of 8 December 1965, that the International Law Commission should continue the work of codification and progressive development of international law relating to special missions, taking into account the views expressed on the draft in the General Assembly and the comments which might be submitted by Governments.

27. At its eighteenth session (1966), the Special Rapporteur submitted a third report¹⁶ to the Commission, which also had before it the comments received from Governments on the draft articles on special missions.¹⁷ However, as it had decided to complete the study of its draft on the law of treaties, the Commission was able to devote only a limited amount of time to the draft articles on special missions during that session. It did, however, consider, at its 877th, 878th and 881st to 883rd meetings, certain questions of a general nature affecting special missions, which had arisen out of the comments by the Governments of Member States and the views expressed by their representatives in the Sixth Committee at the twentieth session of the General Assembly.

28. The general questions considered by the Commission were: the nature of the provisions relating to special missions; the distinction between the different kinds of special missions; the question of introducing into the

¹⁵ Draft provisions concerning so-called high-level special missions prepared by the Special Rapporteur, but not discussed by the Commission, were annexed to chapter III of the report of the Commission on the work of the first part of its seventeenth session (*Yearbook of the International Law Commission, 1965*, vol. II, p. 192).

¹⁶ *Yearbook of the International Law Commission, 1966*, vol. II, documents A/CN.4/189 and Add.1 and 2.

¹⁷ A/CN.4/188 and Add.1-4. The second part of this document reproduces extracts from the summary records of the meetings of the Sixth Committee containing the views expressed on the draft articles on special missions.

draft articles a provision prohibiting discrimination; reciprocity in the application of the rules on special missions; the relationship of those rules with other international agreements; the form of the instrument relating to special missions; the adoption of the instrument relating to special missions; the drafting of a preamble and an introductory article; the arrangement of the articles of the draft; and the question of drafting provisions concerning the legal status of so-called high-level special missions.

29. The Commission took certain decisions of principle concerning the questions mentioned above and invited the Special Rapporteur to take into consideration in continuing his work, a number of recommendations and directives. The report of the Commission on its eighteenth session records those recommendations and directives.¹⁸ Furthermore, as the Commission did not have time to consider the comments of Governments on the draft articles, and as only a small number of Governments had communicated their comments, the Commission asked the Secretary-General again to request Member States to forward their comments on the subject before 1 March 1967.¹⁹

30. In 1966, during its twenty-first session, the General Assembly considered the Commission's report and certain representatives in the Sixth Committee expressed views on the chapter on special missions. In its resolution 2167 (XXI), of 5 December 1966, the General Assembly requested the International Law Commission to continue its work of codification and progressive development of the international law relating to special missions and to present a final draft on the topic in its report on the work of its nineteenth session, taking into account the views expressed by representatives of Member States at the twenty-first session of the General Assembly and any comments which might be submitted by Governments.

31. At its eighteenth session, the International Law Commission asked Mr. Milan Bartoš, the Special Rapporteur, whose term of office as member of the Commission was to expire on 31 December 1966, to continue his work on the rules concerning special missions if he was re-elected a member of the Commission. As he was in fact re-elected by the General Assembly, on 10 November 1966, the Special Rapporteur continued his work.

32. At its nineteenth session (1967), the Commission had before it the Special Rapporteur's fourth report²⁰ and the written comments received from Governments in response to the renewed request made at its eighteenth session.²¹ At its 897th to 910th and 912th to 927th meetings, the Commission re-examined the whole draft on the basis of the fourth report submitted by the

Special Rapporteur, taking into account the written comments received from Governments and the views expressed in the Sixth Committee of the General Assembly. The Commission settled certain questions of terminology, revised the draft articles, fixed their order and recast the commentaries. It also adopted a draft preamble for a convention on special missions, which is annexed to this chapter of the report. When it had concluded its work, the Commission adopted the final text in English, French and Spanish of its draft articles on special missions, which, in conformity with its Statute, it submits to the General Assembly in section D of this chapter of its report, together with the recommendation in section B below.

B. RECOMMENDATION OF THE COMMISSION

33. At the 941st meeting on 14 July 1967, the Commission decided, in conformity with article 23 of its Statute, to recommend to the General Assembly that appropriate measures be taken for the conclusion of a convention on special missions.

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

C. RESOLUTION ADOPTED BY THE COMMISSION

35. The Commission, at its 940th meeting on 13 July 1967, after adopting the text of the articles on special missions, unanimously adopted the following resolution:

The International Law Commission

Having adopted the draft articles on special missions,

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

D. DRAFT ARTICLES ON SPECIAL MISSIONS WITH COMMENTARIES

Part I.—Sending and conduct of special missions

Article 1. 22—Use of terms

For the purposes of the present articles:

(a) A "special mission" is a mission of a representative and temporary character sent by one State to another State to deal with that State on specific questions or to perform in relation to the latter State a specific task;

¹⁸ *Yearbook of the International Law Commission, 1966*, vol. II, document A/6309/Rev.1, part II, chapter III, section 13, paras. 57-70.

¹⁹ *Ibid.*, section C, para. 71.

²⁰ See p. 1 above. (A/CN.4/194 and Add.1-5.)

²¹ A/CN.4/193 and Add.1-5. These written comments, together with those previously received from Governments (A/CN.4/188 and Add.1-4), are reproduced in the annex to this report.

²² Proposed by the Special Rapporteur as an introductory article, or article O, in his fourth report. See p. 38 above. (A/CN.4/194 and Add.1-5.)

(b) A "permanent diplomatic mission" is a diplomatic mission sent by one State to another State and having the characteristics specified in the Vienna Convention on Diplomatic Relations;

(c) A "consular post" is any consulate-general, consulate, vice-consulate or consular agency;

(d) The "head of a special mission" is the person charged by the sending State with the duty of acting in that capacity;

(e) A "representative of the sending State in the special mission" is any person on whom the sending State has conferred that capacity;

(f) The "members of a special mission" are the head of the special mission, the representatives of the sending State in the special mission and the members of the staff of the special mission;

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

(h) The "members of the diplomatic staff" are the members of the staff of the special mission who have diplomatic status;

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

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

(k) The "private staff" are persons employed exclusively in the private service of the members of the special mission.

Commentary

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

Sub-paragraph (a)

(2) Sub-paragraph (a) of article 1 defines the subject of the draft: special missions. It lays down the necessary minimum conditions which a mission must fulfil in order to be regarded as a special mission in the sense used in the draft.

(3) Under the terms of sub-paragraph (a) of article 1, a special mission must possess the following characteristics:

(i) It must be sent by a State to another State. Special missions in the sense in which the term is used in the draft cannot be considered to include missions sent by political movements to establish contact with a particular State, or missions sent by States to establish contact with a political movement. Consequently, the Commission did not consider that it should deal in its draft with the question of missions sent to, or received by, insurgent movements or parties to a civil war;

(ii) It must represent the sending State. In the Commission's view this is an essential distinguishing characteristic of special missions in the sense used in the draft,

by which a special mission can be distinguished from other official missions or visits;

(iii) It must not have the character of a mission responsible for maintaining general diplomatic relations between States and its task must be specified. In practice, some special missions are given very extensive tasks, including the examination and even the laying down of the general lines to be followed in relations between the States concerned. But the task of a special mission is specified in every case and thereby differs from the functions of a permanent diplomatic mission, which acts as general representative of the sending State (article 3, paragraph 1 (a) of the Vienna Convention on Diplomatic Relations);

(iv) Unlike a regular diplomatic mission, a special mission must be of a temporary nature, which may manifest itself in the assignment either of a limited duration or of a specific task. The mission usually ends either on the expiry of its term or on the completion of its task (see article 20). Consequently, a permanent specialized mission which has a specific sphere of competence and may exist side by side with the regular permanent diplomatic mission is not a special mission and does not possess the characteristics of a special mission. Examples of permanent specialized missions are permanent missions for assistance or for economic and industrial co-operation, immigration missions and trade missions or delegations of a diplomatic nature.

Sub-paragraph (b)

(4) In the absence of a definition of permanent diplomatic missions in the 1961 Vienna Convention, sub-paragraph (b) describes them as missions sent by one State to another State and having the characteristics specified in that Convention.

Sub-paragraph (e)

(5) Among the conditions laid down in sub-paragraph (a) of article 1 which a mission must fulfil in order to be regarded as a special mission is the necessity of representing the sending State. It follows that at least one member of every special mission must be a "representative of the sending State in the special mission", an expression defined in sub-paragraph (e) of article 1.

Sub-paragraphs (c), (d), (f), (g), (h), (i), (j) and (k)

(6) Sub-paragraph (c) of article 1 is drafted in the same terms as article 1 (a) of the Vienna Convention on Consular Relations. Sub-paragraphs (d), (f), (g), (h), (i), (j) and (k) are based, with a few changes in terminology, on the definitions in sub-paragraphs (a), (b), (c), (d), (f), (g) and (h) of article 1 of the Vienna Convention on Diplomatic Relations.

Article 2.²³—Sending of special missions

A State may, for the performance of a specific task, send a special mission to another State with the consent of the latter.

²³ Article 1, paragraph 1, of the draft adopted by the Commission in 1965. This draft will be found in the Commission's report on the work of its seventeenth session (*Yearbook of the International Law Commission, 1965, vol. II, p. 165*).

Commentary

(1) Article 2 makes it clear that a State is under no obligation to receive a special mission from another State unless it has undertaken in advance to do so. Here, the draft follows the principle stated in article 2 of the Vienna Convention on Diplomatic Relations.

(2) In practice, there are differences in the form given to the consent required for the sending of a mission, according to whether it is a permanent diplomatic mission or a special mission. For a permanent diplomatic mission the consent is formal, whereas for special missions it takes extremely diverse forms, ranging from a formal treaty to tacit consent.

Article 3. ²⁴—*Field of activity of a special mission*

The field of activity of a special mission shall be determined by the mutual consent of the sending and the receiving State.

Commentary

(1) Article 3 of the Vienna Convention on Diplomatic Relations enumerates the principal functions of permanent diplomatic missions. In view of the diversity of special missions, the Commission did not consider it possible to enumerate their functions. It has simply stated in article 3 that their field of activity is determined by the mutual consent of the sending and the receiving State. This field determined the limits of the special mission's activities, and sometimes also the means it must use to perform its task.

(2) The field of activity of a special mission is sometimes fixed by a prior treaty. This is so, for instance, in the case of commissions appointed to draw up trading plans for a specific period under a trade treaty. But such cases must be regarded as exceptional; for the field of activity is usually determined by an informal *ad hoc* agreement.

(3) A number of Governments raised the question of a possible conflict of competence between a special mission and the permanent diplomatic mission of the sending State accredited to the receiving State. The Commission considered that this was a matter for the sending State, which alone was competent to settle such a conflict.

Article 4. ²⁵—*Sending of the same special mission to two or more States*

A State may send the same special mission to two or more States after having consulted all of them beforehand. Any of those States may refuse to receive that special mission.

Commentary

(1) This article deals with a situation similar to that referred to in article 5 of the Vienna Convention on Diplomatic Relations.

(2) In 1960, the International Law Commission scarcely considered this question, and it has been given scant attention in the literature. At that time, the majority of the Commission thought it need not be taken into consideration, for according to Mr. Sandström, the first Special Rapporteur, it did not arise in practice.²⁶ In a memorandum, dated 15 June 1960, Mr. Jiménez de Aréchaga pointed out, however, that the same special mission is quite frequently sent to neighbouring States when there has been a change of government in the sending State, or on ceremonial occasions.²⁷ Subsequent studies of the practice have provided other instances of special missions being sent to several States.

(3) These studies have also brought to light certain special problems raised by the sending of special missions to several States.

(i) The sending of the same special mission, with the same membership and the same task, to several States, which are usually adjacent or situated in the same geographical region, has given rise to certain difficulties in practice. In the case of political missions (for example, goodwill missions), there have been several instances of States refusing to enter into contact with the special mission in question because it was also being sent to other States with which they did not enjoy good relations. Thus it is not only a question of relations between the sending State and the State receiving the mission, but also of relations between the States to which the special mission is being sent. The question that arises in this case is mainly a political one; for from the legal standpoint it comes down to the essential condition that, where special missions are sent, simultaneously or successively, to more than one State, the consent of each of those States is required;

(ii) Although the rule is that a special mission is sent separately to each of the States with which the sending State wishes to make contact, whether this is done simultaneously or successively, there are certain exceptions in practice;

(iii) It sometimes happens in practice that a special mission of the kind referred to in paragraph 3 (i) above, which has been accepted in principle by all the States concerned, is requested by one of these States not to enter into relations with it because of the mission's activities during its contacts with the representatives of a State previously visited. Such a situation arises, in particular, when a State learns that a special mission has granted a previously visited State certain advantages contrary to its own interests, and consequently takes the view that, the matter to be negotiated having been prejudged, a visit by the special mission would be pointless. This example shows what awkward situations can arise as a result of sending the same special mission to several States.

(4) The Commission considered that the sending State is required to give prior notice to all the States concerned of its intention to send a special mission to them. This

²⁴ Article 2 of the draft adopted by the Commission in 1965.

²⁵ Article 5 of the draft adopted by the Commission in 1965.

²⁶ *Yearbook of the International Law Commission, 1960*, vol. II, p. 109, para. 12.

²⁷ *Ibid.*, p. 116, para. 8.

prior notice is necessary in order to inform the States concerned in good time not only of the task of the mission, but also of its itinerary, so that they can decide, in full knowledge of the facts, whether they wish to receive the mission and, if so, on what conditions.

Article 5.—Sending of a joint special mission by two or more States

Two or more States may send a joint special mission to another State unless that State, which shall be consulted beforehand, objects thereto.

Commentary

(1) The draft articles approved by the Commission at its seventeenth session contained no provision on joint special missions. Article 5 was inserted in the present draft as the result of a proposal made by a government, and supported by a number of developing countries which believe that the institution of joint missions has certain advantages for them.

(2) Article 5 is based on the provisions of article 6 of the Vienna Convention on Diplomatic Relations.

(3) Under the terms of article 5, States intending to send a joint special mission to another State must all consult that State beforehand. It is not enough to consult it before sending the mission; the consultation must take place sufficiently far in advance to give the future receiving State time to object if it so desires. The future receiving State can either refuse outright to receive a joint special mission or object to a particular State participating in the mission.

(4) If the future receiving State agrees to receive the joint special mission, the sending States are obliged to appoint the members of the mission jointly and to comply with the provisions of article 8 of this draft concerning the obligation to inform the receiving State in advance.

(5) One government proposed that the draft article should also deal with joint special missions consisting of representatives of States and representatives of international organizations. The Commission took the view that that was a matter which belonged essentially to the topic of relations between States and inter-governmental organizations and should be dealt with in that context.

Article 6.²⁸—Sending of special missions by two or more States in order to deal with a question of common interest

Two or more States may each send a special mission at the same time to another State in order to deal, with the agreement of all of them, with a question of common interest.

Commentary

(1) There is no provision corresponding to this article in the Vienna Convention on Diplomatic Relations.

²⁸ Proposed by the Drafting Committee as article 5 *ter* at the Commission's nineteenth session.

(2) Cases occur in practice in which three or more States wish to deal jointly with a question of common interest. After choosing the State in whose territory the question is to be discussed, each of them sends a special mission for that purpose to the chosen State, which thus becomes the receiving State. These missions work jointly with the representatives of the receiving State.

Article 7.²⁹—Non-existence of diplomatic or consular relations and non-recognition

1. The existence of diplomatic or consular relations is not necessary for the sending or reception of a special mission.

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

Commentary

(1) The sending and reception of special missions may—and most frequently does—occur between States which maintain regular diplomatic or consular relations with each other, but the existence of such relations is not an essential prerequisite. The Commission wishes to stress in this connexion that experience shows that special missions can be particularly useful where no diplomatic relations exist.

(2) The question was raised whether special missions can be used between States which do not recognize each other. The Commission considered that non-recognition was not a bar to the sending of a special mission, and it dealt with this point in paragraph 2 of article 7. The Commission did not, however, decide the question whether the sending or reception of a special mission prejudices the solution of the problem of recognition, as that problem lies outside the scope of the topic of special missions.

Article 8.³⁰—Appointment of the members of the special mission

Subject to the provisions of articles 10 and 12, the sending State may freely appoint the members of the special mission after having informed the receiving State of its size and of the persons it intends to appoint.

Commentary

(1) The Commission has based article 8 on article 7 of the Vienna Convention on Diplomatic Relations, but there are two important differences between these provisions. In the first place, the rule laid down in article 8 applies to all the members of the special mission, including the head of the special mission if there is one, whereas article 4 of the Vienna Convention requires the *agrément* of the receiving State for the appointment of the head of a permanent diplomatic mission. Secondly, article 8, unlike article 7 of the Vienna Convention, requires the sending State, before appointing the members

²⁹ Article 1, paragraph 2, of the draft adopted by the Commission in 1965.

³⁰ Article 3 of the draft adopted by the Commission in 1965.

of the mission, to inform the receiving State of the size of the mission and of the identity of the persons it intends to appoint.

(2) The Commission notes that, in State practice, consent to the sending and receiving of a special mission does not generally imply acceptance of its members. Hence, the Commission does not share the view that a clause concerning acceptance of the persons forming the special mission should be included in the agreement by which the receiving State accepts the mission; it considers that consent to receive a special mission and acceptance of the persons forming it are two distinct matters. Nevertheless, in order to facilitate friendly relations between States, the Commission inserted in article 8 the obligation to provide prior information, so as to give the receiving State an opportunity of raising objections concerning the identity and the number of the members of the special mission.

(3) The solution adopted by the Commission, which requires no *agrément* or prior consent for the appointment of the members and staff of the special mission, in no way infringes the sovereign rights of the receiving State. These rights are fully safeguarded by the opportunity given to that State to raise objections, after receiving the information provided for in article 8, to the size of the special mission and to the persons selected to serve on it. The Commission did not include any express provision on the right of the receiving State to raise such objections, for it considered that this right necessarily derives both from the terms of article 8 and from the legal principles underlying the draft articles. The sovereign rights of the receiving State are further safeguarded by the provisions of article 12, under which it may at any time declare that a member of a special mission is *persona non grata* or not acceptable.

(4) In practice there are several ways in which the receiving State can limit the sending State's freedom of choice. The following examples may be quoted:

(i) The receiving State can refuse an entry visa to a member of a special mission;

(ii) It can express its wishes with regard to the level of the delegation;

(iii) The agreement on the sending and receiving of a special mission sometimes specifies the persons who will form it, either by designating them by name or, more frequently, by stating the rank or qualifications they must have. When the persons composing the special mission have been designated by name in the agreement, the sending State cannot change the composition of the mission without the prior consent of the State to which it is being sent. In practice all that is done is to send notice of any proposed change in good time and, in the absence of any reply, the other party is presumed to have accepted the notice without reservation;

(iv) In certain admittedly infrequent cases, the freedom of choice of the sending State is expressly limited by a prior agreement between the two States, stipulating that the appointment of the members of the special mission shall be subject to the consent of the receiving State. This practice is primarily followed where important

and delicate contacts are to be established through the special mission, and in particular where it is to be composed of important political personages.

(5) The Commission also took note of the practice whereby certain States require prior consent for the appointment of military, naval or air attachés to a special mission, by analogy with the final provision of article 7 of the Vienna Convention on Diplomatic Relations. The Commission considered, however, that this practice is not a general custom.

*Article 9.*³¹—*Composition of the special mission*

1. A special mission consists of one or more representatives of the sending State from among whom the sending State may appoint a head. It may also include diplomatic staff, administrative and technical staff and service staff.

2. Members of a permanent diplomatic mission accredited to the receiving State may be included in the composition of the special mission while retaining their privileges and immunities as members of the diplomatic mission.

Commentary

(1) Paragraph 1 of article 9 is based on article 1 of the Vienna Convention on Diplomatic Relations. Paragraph 2 deals with a situation which frequently arises in practice in connexion with special missions and which has sometimes given rise to difficulties of interpretation.

(2) Every special mission must include at least one representative of the sending State, that is to say, a person to whom that State has assigned the task of being its representative in the special mission. If the special mission comprises two or more representatives, the sending State may appoint one of them to be head of the mission. The person appointed is sometimes called the "Chairman of the Delegation", "First Delegate", or the like.

(3) In practice, the sending State often appoints a head of the special mission and a deputy head. The Commission considers that the composition of the special mission and the titles of its members are matters within the exclusive competence of the sending State and that they are not governed by any international rule unless the parties have agreed on such a rule. Consequently, the Commission did not think it necessary to include a rule on the subject in article 9.

(4) Whether a special mission is composed of a single representative or of several representatives, it may be accompanied by whatever staff it considers necessary to carry out its task. In referring to such staff, the Commission has adopted the terminology used in article 1 (c) of the Vienna Convention on Diplomatic Relations.

(5) In recent practice sending States have often appointed members of their permanent diplomatic mission to the receiving State as members of a special mission. The

³¹ Article 6 of the draft adopted by the Commission in 1965.

question arose whether these two functions are incompatible and whether a member of a diplomatic mission can retain the privileges and immunities which that status confers on him while serving on a special mission. Opinions differ on this point. After considering the matter, the Commission came to the conclusion that the two functions are not incompatible and can be performed simultaneously by a member of the permanent diplomatic mission without losing the privileges and immunities he enjoys as such.

(6) The problem of limiting the size of the mission, which is dealt with in article 11 of the Vienna Convention on Diplomatic Relations, also arose with regard to special missions. In view of the obligation of the sending State, under the terms of article 8, to inform the receiving State in advance of the number of persons it intends to appoint to the special mission, the Commission decided that there was no need to include in the present draft the rules stated in article 11 of the Vienna Convention.

Article 10.³²—*Nationality of the members of the special mission*

1. The representatives of the sending State in the special mission and the members of its diplomatic staff should in principle be of the nationality of the sending State.

2. Nationals of the receiving State may not be appointed to a special mission except with the consent of that State, which may be withdrawn at any time.

3. The receiving State may reserve the right provided for in paragraph 2 with regard to nationals of a third State who are not also nationals of the sending State.

Commentary

(1) This article corresponds to article 8 of the Vienna Convention on Diplomatic Relations.

(2) In 1960 the Commission did not consider it necessary to express an opinion on the general question whether the rules concerning the nationality of diplomatic agents serving on permanent missions also applied to the members of special missions. It merely decided that the principle stated in article 7 of its 1958 draft on diplomatic intercourse and immunities³³ does not necessarily apply to the members of special missions.³⁴

(3) The question which has arisen most frequently in practice is that of the employment by the sending State, in its special missions, of nationals of the receiving States. Most writers consider that there are no legal obstacles to such employment, but stress that the problem has been dealt with differently by different countries at various times. The Commission took the view that nationals of the receiving State may not be members of a special mission without that State's consent.

(4) Another question which has arisen in practice is whether the members of a special mission can have the nationality of a third State. In 1960 the Commission

expressed no opinion on this subject. In 1964 it adopted a rule for special missions modelled on article 8, paragraph 3 of the Vienna Convention on Diplomatic Relations.³⁵ Under this rule the receiving State may reserve the right to make its consent a condition for the employment in a special mission of nationals of a third State who are not also nationals of the sending State.

(5) Several governments asked the Commission to assimilate aliens having their permanent residence in the receiving State to nationals of that State. The Commission decided that this should only be done so far as the system of privileges and immunities is concerned (article 40).

(6) The Commission also considered the question of the employment in special missions of persons having the status of refugees or stateless persons. It concluded that, as in cases coming under the two Vienna Conventions, this matter should be settled according to the relevant rules of international law.

(7) Like the Vienna Convention on Diplomatic Relations, the French version of this draft uses the term "*ressortissant*". Several members of the Commission criticized this term and stated that they preferred the term "national", which is used in the English and Spanish versions of the draft. The Commission considered, however, that in this case the terminology of the Vienna Convention should be retained.

Article 11.³⁶—*Notifications*

1. The Ministry of Foreign Affairs, or such other organ of the receiving State as may be agreed, shall be notified of:

(a) The composition of the special mission and any subsequent changes therein;

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

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

(d) The engagement and discharge of persons residing in the receiving State as members of the mission or as private staff;

(e) The appointment of the head of the special mission or, if there is none, of the representative referred to in paragraph 1 of article 14, and of any substitute for them;

(f) The site of the premises occupied by the special mission and any information that may be necessary to identify them.

2. Whenever possible, notification of arrival and final departure must be given in advance.

Commentary

(1) Article 11 is modelled on article 10 of the Vienna Convention on Diplomatic Relations, with the changes required by the particular nature of special missions.

³² Article 14 of the draft adopted by the Commission in 1965.

³³ *Yearbook of the International Law Commission, 1958*, vol. II, p. 91.

³⁴ *Ibid.*, 1960, vol. II, p. 179, article 2.

³⁵ *Ibid.*, 1964, vol. II, p. 224, article 14, para. 3.

³⁶ Article 8 of the draft adopted by the Commission in 1965.

(2) The question to what extent the sending State is obliged to notify the receiving State of the composition of the mission and the arrival and departure of its head, its members and its staff, arises with regard to special missions just as it does with regard to permanent diplomatic missions. As early as 1960, the International Law Commission took the position that in this matter the general rules on notification relating to permanent diplomatic missions are valid for special missions.³⁷

(3) The notifications referred to in this article should not be confused with the prior notice provided for in article 3. They are usually sent to the Ministry of Foreign Affairs of the receiving State. Nevertheless, in order to take account of the fact that in several States certain branches of foreign relations are handled by departments other than that of foreign affairs, the Commission has specified in article 11 that these notifications may be sent to such other organ as may be agreed.

(4) In many cases, notice of the departure of the special mission is not given, as the members of the mission merely communicate verbally and informally to the persons with whom they are in contact in the receiving State, the date and hour of their departure and the means of transport they intend to use. The Commission nevertheless considers that even after the special mission has completed its task, official and regular notification of the final departure of its members must be given.

(5) The local recruitment of staff required for special missions is in practice limited to the recruitment of auxiliary staff who are not qualified diplomats or experts, and persons performing certain strictly technical or service duties. A rule frequently observed in practice is that the receiving State must ensure the possibility of such recruitment, which is often essential for the performance of the special mission's functions. In 1960 the Commission inclined to the view that this rule conferred a genuine privilege on the special mission. In the light of the two Vienna Conventions, however, the Commission changed its opinion and in 1965 adopted the principle stated in article 10, paragraph 2 of this draft. It accordingly considers that the receiving State is entitled to be informed of local recruitment by special missions and that they are obliged to inform it regularly of the engagement and discharge of local staff, although all such engagements, like the special mission itself, are of limited duration.

Article 12.³⁸—*Persons declared non grata or not acceptable*

1. The receiving State may, at any time and without having to explain its decision, notify the sending State that any representative of the sending State in the special mission or any member of its diplomatic staff is *persona non grata* or that any other member of the staff of the mission is not acceptable. In any such case, the sending State shall, as appropriate, either recall the person concerned or terminate his functions with the mission. A

³⁷ *Yearbook of the International Law Commission, 1960*, vol. II, p. 179, article 2.

³⁸ Article 4 of the draft adopted by the Commission in 1965.

person may be declared *non grata* or not acceptable before arriving in the territory of the receiving State.

2. If the sending State refuses or fails within a reasonable period to carry out its obligations under paragraph 1 of this article, the receiving State may refuse to recognize the person concerned as a member of the special mission.

Commentary

(1) The text of article 12 follows article 9 of the Vienna Convention on Diplomatic Relations.

(2) Even when the receiving State has raised no objection to the membership of the special mission, it unquestionably has the right to declare any member of the mission *persona non grata* or not acceptable at any time. It is not obliged to state its reasons for this decision.

(3) It must be added that in fact a person is very seldom declared *non grata* or not acceptable after the receiving State has accepted him, but the Commission is convinced that even then, the receiving State is entitled to make such a declaration.

(4) Even apart from such cases, it is rather rare for a member of a special mission to be declared *persona non grata* or not acceptable, for special missions are of short duration and generally have a limited field of activity; nevertheless several instances have occurred in practice.

(5) Although the Commission did not find it necessary to mention the matter expressly in the text of the article, it considers it advisable to point out that, in accordance with a well-established practice, the procedure of declaring persons *non grata* does not apply to such persons as a Head of State, Head of Government or Minister for Foreign Affairs, when they participate in a special mission.

Article 13.³⁹—*Commencement of the functions of a special mission*

1. The functions of a special mission shall commence as soon as the mission enters into official contact with the Ministry of Foreign Affairs or with such other organ of the receiving State as may be agreed.

2. The commencement of the functions of a special mission shall not depend upon representation of the mission by the permanent diplomatic mission of the sending State or upon the submission of letters of credence or full powers.

Commentary

(1) There are certain rules of international law governing the commencement of the functions of a permanent diplomatic mission, though the matter was not dealt with in the 1961 Vienna Convention. The Commission noted, however, that in practice these rules are not applied to the commencement of the functions of special missions.

(2) In modern practice the functions of a special mission, unlike those of a permanent diplomatic mission, commence as soon as it makes official contact with a competent organ of the receiving State. This organ is usually

³⁹ Article 11 of the draft adopted by the Commission in 1965.

the Ministry of Foreign Affairs, but the parties may choose another; it may, indeed, be necessary to do so if, in the receiving State, certain branches of foreign relations are handled by departments other than the Ministry of Foreign Affairs.

(3) The ceremonial reception of a special mission and the ceremony of presenting its full powers are no longer considered obligatory in practice. It is customary, however, to make an introductory visit or, if the parties already know each other, a visit establishing the first contact. The custom that the head of the special mission is accompanied on the introductory visit by the head or by some member of the permanent diplomatic mission accredited to the receiving State, if he was of lower rank than the head of the permanent mission, is obsolescent.

(4) The problem of the commencement of the functions of a special mission is not so important for those members of the mission who are also members of the permanent diplomatic mission of the sending State accredited to the receiving State. They keep their status as members of the permanent diplomatic mission for the period during which they are members of the special mission.

(5) Certain States have sometimes been accused of discriminating between the special missions of other States as regards their reception and the commencement of their functions. The Commission considers that discrimination in this respect would be contrary to the general principles governing international relations and would come within the scope of the provisions of article 50 of this draft.

(6) It should be noted that the commencement of the functions of a special mission does not necessarily coincide with the entry into force of the régime of privileges and immunities of its members for, so far as the receiving State is concerned, this régime enters into force as soon as the person in question arrives in its territory, or, in the case of a person who is already there, as soon as he is appointed to the special mission (article 44).

Article 14.⁴⁰—*Authority to act on behalf of the special mission*

1. The head of the special mission or, if the sending State has not appointed a head, one of the representatives of the sending State designated by the latter, is authorized to act on behalf of the special mission and to address communications to the receiving State. The receiving State shall address communications concerning the special mission to the head of the mission or, if there is none, to the representative referred to above, either direct or through the permanent diplomatic mission.

2. A member of the special mission may be authorized by the sending State, by the head of the special mission or, if there is none, by the representative referred to in paragraph 1 above, either to substitute for the head of the special mission or for the aforesaid representative, or to perform particular acts on behalf of the mission.

Commentary

(1) The text of article 14 is not derived direct from the Vienna Convention on Diplomatic Relations, but is based on contemporary international practice.

(2) The main legal question here is that of the rules concerning authority to act on behalf of the special mission.

(3) Normally, only the head of a special mission is authorized to act on its behalf and to address communications to the receiving State. If the sending State does not appoint a head, it designates one of its representatives on the special mission to act on behalf of the mission. The legal status of this representative is similar to that of a head of special mission.

(4) In default of a head, or in the absence of the head or of the representative designated by the sending State to act on behalf of the special mission, a member of the mission may be authorized either to act as deputy for the head or representative in question or to perform specified acts on behalf of the mission. The necessary authorization is given by the sending State, by the head of the special mission or by the representative designated to act on behalf of the mission.

(5) In practice, a special mission sometimes arrives in the receiving State without its head or a deputy, and contact has to be established and business transacted before they arrive. It may also happen that both the head and his deputy absent themselves during a special mission. In both of these cases, a member of the mission temporarily assumes the duties of head of the special mission. Some States assimilate this member to a *chargé d'affaires ad interim*. But as this practice is not universal, the Commission has not adopted any rule on it.

(6) Even when the head of the special mission or the representative designated to act on its behalf are present, one or more members of the mission are often authorized to perform certain specified acts on its behalf. This is a very common practice, since in most cases special missions divide up the work assigned to them among their members. The legal validity of acts thus performed depends on the scope of the authority given to those who perform them.

(7) The receiving State addresses communications concerning the special mission either direct to the head of the mission, or to the representative designated to act on its behalf, or indirectly through the permanent diplomatic mission of the sending State accredited to the receiving State.

Article 15.⁴¹—*Organ of the receiving State with which official business is conducted*

All official business with the receiving State entrusted to the special mission by the sending State shall be conducted with or through the Ministry of Foreign Affairs or with such other organ of the receiving State as may be agreed.

⁴⁰ Article 7 of the draft adopted by the Commission in 1965.

⁴¹ Article 41 of the draft adopted by the Commission in 1965.

Commentary

This article reproduces, with the necessary drafting changes, the provisions of article 41, paragraph 2, of the Vienna Convention on Diplomatic Relations. The word "ministry" in the expression "such other ministry as may be agreed" has, however, been replaced by the word "organ", in order to take account of the practice and laws of a number of States which entrust certain branches of their foreign relations to departments other than the Ministry of Foreign Affairs.

Article 16.⁴² — Rules concerning precedence

1. Where two or more special missions meet on the territory of the receiving State or of a third State, precedence among the missions shall be determined, in the absence of a special agreement, according to the alphabetical order of the names of the States used by the protocol of the State on whose territory the missions are meeting.

2. Precedence among two or more special missions which meet on a ceremonial or formal occasion shall be governed by the protocol in force in the receiving State.

3. Precedence among the members of the same special mission shall be that which is notified to the receiving State or to the third State on whose territory two or more special missions are meeting.

Commentary

(1) The question of precedence arises only when two or more special missions are together on the territory of a receiving State or of a third State.

(2) In relations between a single special mission and the representatives of the receiving State there is no question of precedence and the rules of courtesy suffice to solve any problems which arise. The Commission has therefore not dealt with the matter in its draft articles.

(3) The Commission considers that it is impossible to take the Vienna Convention on Diplomatic Relations as a basis for determining precedence between special missions meeting on the territory of a receiving State or of a third State.

(4) It must not be forgotten that many heads of special missions do not have diplomatic rank, although some of them are eminent persons such as cabinet ministers, who, under the rules of precedence of their own States, rank above ambassadors. In this connexion, the Commission considers that it is wrong to maintain that the head of a special mission of a diplomatic or political character is always, in practice, a person holding diplomatic rank.

(5) The Commission considered that even where heads of mission hold diplomatic rank, it would not be right to base the order of precedence on that rank. It noted in this connexion that in the practice which has grown up since the establishment of the United Nations, missions are not classified according to the rank of their heads, except in the case of ceremonial missions.

⁴² Articles 9 and 10 of the draft adopted by the Commission in 1965.

(6) All heads of mission, whether or not they hold diplomatic rank and whatever their position in the internal hierarchy of their countries, alike represent States that are recognized by the United Nations Charter as having the right to sovereign equality. In order to ensure respect for this right, the Commission decided that, in the absence of a special agreement, precedence among special missions should be determined by the alphabetical order of the names of the sending States. As there is no universally recognized alphabetical order, the Commission chose the alphabetical order used by the protocol of the State on whose territory the missions meet.

(7) The Vienna Convention on Diplomatic Relations confines itself to provisions concerning permanent diplomatic missions and does not deal with missions which meet on ceremonial or formal occasions, although they continued to exist in practice even after the establishment of permanent resident diplomacy, and still exist today.

(8) The Commission noted that the customs governing precedence among special missions which meet on ceremonial or formal occasions vary from State to State. Instead of selecting some of these different customs, the Commission adopted the rule, which is everywhere observed in practice, that it is for the receiving State to determine precedence among special missions of this kind.

(9) In 1965, the Commission devoted a separate article (article 10) to precedence among missions which meet on ceremonial or formal occasions. In 1967, it decided that all the provisions of the draft articles dealing with precedence should be placed in a single article.

(10) The Commission did not go into the question of precedence among members of the same special mission, for it believes that this is a matter for the sending State alone. In practice, the sending State communicates to the receiving State or, where applicable, the third State, a list showing the order of precedence of the members of its special mission.

(11) The Commission also believes that there are no rules of law of universal application for determining precedence, either among the members of special missions from different States or between them and the members of permanent diplomatic missions or officials of the receiving State.

Article 17.⁴³—Seat of the special mission

1. A special mission shall have its seat in the locality agreed by the States concerned.

2. In the absence of agreement, the special mission shall have its seat in the locality where the Ministry of Foreign Affairs of the receiving State is situated.

3. If the special mission's functions are performed in different localities, the special mission may have more than one seat; one of such seats may be chosen as its principal seat.

⁴³ Article 13 of the draft adopted by the Commission in 1965.

Commentary

(1) The provisions of this article differ substantially from those of the corresponding article (article 12) of the Vienna Convention on Diplomatic Relations. For whereas a permanent diplomatic mission performs its essential functions in the capital of the State to which it is accredited, a special mission often has to work at some other place and will in many cases have its seat there. Furthermore, the work of a special mission often obliges it to move frequently or to divide up into groups or sections, and it may then have several seats.

(2) Very little has been written on the question of the seat of a special mission, and in 1960 the Commission did not find it necessary to deal with the matter. It considered that the rules applicable to permanent missions were not relevant to special missions and that no specific rules on the subject were needed.⁴⁴ Some members of the Commission, however, drew attention to the fact that the absence of such rules might encourage special missions to choose their seat at will, without consulting the receiving State, and to claim the right to open offices in any part of that State's territory.

(3) Article 17 of this draft provides that a special mission shall have its seat in the locality agreed upon by the sending State and the receiving State. In practice, this agreement is often verbal and sometimes even tacit. The special mission generally establishes its offices near the place where it is to perform its functions. If that place is the capital of the receiving State and there are regular diplomatic relations between the two States, the special mission is usually lodged in the premises of the sending State's permanent diplomatic mission, which, unless otherwise indicated, thus becomes its official address for notifications. This customary practice is not, however, obligatory, and a special mission lodged in the capital city of the receiving State may have a seat other than the embassy of the sending State.

(4) If no seat has been agreed upon, the practice of certain receiving States is to propose a suitable locality for the seat of the special mission, taking account of all the circumstances which may affect the efficiency of its work. Opinion is divided on whether the sending State is bound to accept the choice of the receiving State. Some have maintained that an affirmative reply to this question would conflict with the principle of the sovereign equality of States. In 1964, the Commission suggested a compromise, namely, that the receiving State should have the right to propose the locality, but that to become effective that choice must be approved by the sending State.⁴⁵ This solution had the disadvantages of not specifying what would happen if the sending State refused to accept the locality offered by the receiving State. In 1965, the Commission left this question in abeyance.

(5) In 1967, the Commission adopted the solution embodied in article 17, paragraph 2. This paragraph establishes the presumption that the seat of the special

mission will be in the locality where the Ministry of Foreign Affairs of the receiving State is situated unless — and until — the parties agree otherwise.

(6) The Commission did not draw up any rule for determining which should be the main seat when a special mission has more than one seat. Usage varies in practice. One opinion expressed was that the main seat should always be in the locality in which the Ministry of Foreign Affairs of the receiving State is situated, or in some other locality agreed upon, and that the other seats are established only to facilitate the mission's work. The Commission preferred to leave it to the parties to settle this question by agreement.

*Article 18.*⁴⁶—*Activities of special missions on the territory of a third State*

1. Special missions from two or more States may meet on the territory of a third State only after obtaining the express consent of that State, which retains the right to withdraw it.

2. In giving its consent, the third State may impose conditions which shall be observed by the sending States.

3. The third State shall assume in respect of the sending State the rights and obligations of a receiving State only to the extent that it so indicates.

Commentary

(1) A provision corresponding to this article is to be found, not in the Convention on Diplomatic Relations, but in article 7 of the Convention on Consular Relations, entitled "Exercise of consular functions in a third State".

(2) The meeting of special missions of different States on the territory of a third State is already a long-standing practice and has been useful especially in cases of armed conflict between the States concerned. The Commission did not consider this practice in 1960 and there is little reference to it in the literature. Only a few writers mention it, mainly in connexion with cases in which the first contacts have been made through the third State.

(3) No matter whether the third State is asked to mediate, to provide its good offices or merely to offer hospitality, it is undoubtedly entitled to be informed in advance of the intention to use its territory for a meeting of special missions, so that it may object if it sees fit to do so. Such a meeting can, indeed, only take place with its consent. Practice does not require the consent to be formal, but the Commission took the view that, in order to avoid any possibility of misunderstanding, it should be express.

(4) The Commission regards as correct the practice of some third States of laying down special conditions which must be satisfied by parties sending special missions, in addition to a general obligation to abstain from any action harmful to the interests of the third State.

(5) Contacts between a special mission of one State and the permanent diplomatic mission of another State

⁴⁴ *Yearbook of the International Law Commission, 1960*, vol. II, p. 179, article 2.

⁴⁵ *Yearbook of the International Law Commission, 1964*, vol. II, p. 223, article 13.

⁴⁶ Article 16 of the draft adopted by the Commission in 1965.

accredited to a third State must be assimilated to relations between the special missions of two States on the territory of a third State. Such contacts frequently occur in practice and some writers describe them as exceptional means of diplomatic communication. They are especially useful where States do not maintain diplomatic relations or are engaged in armed conflict (for instance, when the possibility of an armistice is being explored).

(6) The third State has the right, at any time and without being obliged to give any reason, to withdraw its consent from special missions meeting on its territory and to prohibit them from engaging in any activity. In such cases, the sending States are obliged to recall their special missions immediately, and the missions are required to cease all activities as soon as they learn that hospitality has been withdrawn. The exercise of this right by the third State does not mean that diplomatic relations with the sending States are broken off or that the members of the special missions are declared *persona non grata*; it merely means that the consent previously given has been revoked. In 1965, the Commission held that this right was clearly established by the term "consent" used in its draft and that it was therefore unnecessary to make an express reference to it. In 1967, however, at the request of several governments, the Commission specified in the text of article 18 of the present draft that the third State retains the right to withdraw its consent.

(7) Several governments wished to know whether the third State should be placed on the same footing as a receiving State as regards rights and obligations. The Commission has answered this question in paragraph 3 of article 18, which provides that the third State shall assume in respect of the sending States the rights and obligations of a receiving State only to the extent that it so indicates.

(8) The Commission believes that, whatever the attitude adopted by the third State, the sending States are under an obligation to communicate to it all the notifications and all the information which a receiving State is entitled to receive, so that it may be kept fully informed of the activities of foreign special missions on its territory.

Article 19.⁴⁷—*Right of special missions to use the flag and emblem of the sending State*

1. A special mission shall have the right to use the flag and emblem of the sending State on the premises occupied by the mission, and on its means of transport when used on official business.

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

Commentary

(1) Paragraph 1 of this article is based on article 20 of the Vienna Convention on Diplomatic Relations and

paragraph 2 on article 29, paragraph 3 of the Vienna Convention on Consular Relations.

(2) There are two differences of substance between paragraph 1 of this article and article 20 of the Vienna Convention on Diplomatic Relations: both of them are due to the difference in nature between special missions and permanent diplomatic missions.

(i) The first difference relates to the residence of the head of the special mission. Unlike article 20 of the Vienna Convention, paragraph 1 of this article does not confer the right to display the flag and emblem of the sending State on the residence. If the head of the special mission considers that the task or nature of the mission makes it necessary for his residence to display these distinguishing signs, he must rely on the courtesy of the receiving State;

(ii) The second difference relates to the means of transport. Paragraph 1 of article 19 restricts the right to display the flag and emblem of the sending State on the mission's means of transport to occasions when the vehicles are being used on official business. This restriction is not imposed by the Convention on Diplomatic Relations but it is imposed by the Convention on Consular Relations. On the other hand, paragraph 1 of article 19 grants this right for all the special mission's means of transport, not, like article 20 of the Convention on Diplomatic Relations, only for that of the head of the mission. The Commission took the view that the task of certain special missions, such as those concerned with frontier demarcation, might in fact make it necessary for the flag and emblem of the sending State to be displayed on all means of transport used on official business, irrespective of the rank of the member of the mission using it.

(3) The Commission thought it useful to add to article 19 a provision similar to article 29, paragraph 3 of the Convention on Consular Relations. This paragraph provides that in the exercise of the right to use the national flag and coat of arms, regard shall be had to the laws, regulations and usages of the receiving State. By including this provision, the Commission has sought to give greater flexibility to a rule which it should be possible to apply to a very wide variety of special missions and to prevent certain abuses, to the danger of which several governments have drawn attention.

Article 20.⁴⁸—*End of the functions of a special mission*

1. The functions of a special mission shall come to an end, *inter alia*, upon:

- (a) The agreement of the States concerned;
- (b) The completion of the task of the special mission;
- (c) The expiry of the duration assigned for the special mission, unless it is expressly extended;
- (d) Notification by the sending State that it is terminating or recalling the special mission;
- (e) Notification by the receiving State that it considers the special mission terminated.

⁴⁷ Article 15 of the draft adopted by the Commission in 1965.

⁴⁸ Article 12 and article 44, para. 2 of the draft adopted by the Commission in 1965.

2. The severance of diplomatic or consular relations between the sending State and the receiving State shall not of itself have the effect of terminating special missions existing at the time of such severance.

Commentary

(1) The Vienna Convention on Diplomatic Relations contains provisions relating to the end of the functions of diplomatic agents (article 43), to the breaking off of diplomatic relations and to the recall of permanent missions (article 45). It does not, however, state any rule expressly concerning the end of the functions of these missions.

(2) In 1960, the Commission decided that, in addition to the modes of termination of the functions of a diplomatic agent given in article 41 of its 1958 draft on diplomatic intercourse and immunities, the functions of a special mission come to an end when the tasks entrusted to it have been carried out.⁴⁹ In 1967 the Commission completed and revised the list of reasons for termination of the functions of special missions.

(3) The Commission considers that it is for the States concerned to note that a special mission has ceased to exist or to decide that it should be brought to an end. This decision may be taken by mutual agreement or by the unilateral will of one of these States. In the latter case, the State which takes the decision unilaterally must notify the other States concerned.

(4) The question was raised whether the expiry of the duration assigned for a special mission automatically brought it to an end. This is a question which has caused difficulties in practice and sometimes even disputes, certain States having maintained that a special mission continued to exist in law as long as it carried on any activity, even after the expiry of the duration assigned for it. The Commission recognizes that the duration assigned for a special mission may be extended by the mutual consent of the sending State and the receiving State, but it considers that such an extension must be express.

(5) In the report he submitted in 1960, Mr. Sandström, the Special Rapporteur at that time, took the view that it was desirable also to consider the functions of a special mission ended when the transactions which had been its aim had been brought to an end or interrupted.⁵⁰ Any resumption of the negotiations would then be regarded as the commencement of the functions of another special mission. Some governments and some writers take the same view as Mr. Sandström. The Commission recognizes that the functions of a special mission are ended, for all practical purposes, by the interruption or suspension *sine die* of negotiations and all other activities. It considers, however, that it is for the sending State and the receiving State to decide whether they deem it necessary in such cases to bring the mission to an end by application of the provisions of article 20, paragraph 1 (d) or (e).

(6) Article 7 of this draft provides that the existence of diplomatic or consular relations is not necessary for the sending or reception of a special mission. In consequence, article 20, paragraph 2 specifies that the severance of these relations shall not of itself have the effect of terminating special missions existing at the time of such severance.

Part II.—Facilities, privileges and immunities

General considerations

(1) Before the Second World War, the question whether the facilities, privileges and immunities of special missions have a basis in law or whether they are accorded merely as a matter of courtesy was discussed in the literature and raised in practice. Since the War, the view that there is a legal basis has prevailed. It is now generally recognized that States are under an obligation to accord the facilities, privileges and immunities in question to special missions and their members. Such is also the opinion expressed by the Commission on several occasions between 1958 and 1965⁵¹ and confirmed by it in 1967.

(2) In 1958 and in 1960 several members of the Commission held that every special mission is entitled to the facilities, privileges and immunities accorded to permanent diplomatic missions and, in addition, to any further facilities, privileges and immunities necessary for the performance of the particular task entrusted to it.

(3) Other members of the Commission and some governments maintained that, on the contrary, the facilities, privileges and immunities of special missions should be less extensive than those accorded to permanent diplomatic missions and that they must be limited to what is strictly necessary for the performance of a special mission's task. Those who held this opinion were opposed to the Commission's taking the Vienna Convention on Diplomatic Relations as the basis for its draft on special missions.

(4) In 1967, the Commission decided that every special mission should be granted everything that is essential for the regular performance of its functions, having regard to its nature and task. The Commission concluded that under those conditions, there were grounds for granting special missions, subject to some restrictions, privileges and immunities similar to those accorded to permanent diplomatic missions.

(5) The Commission took the Vienna Convention on Diplomatic Relations as the basis for the provisions of its draft relating to facilities, privileges and immunities. It has departed from that Convention only on particular points for which a different solution was required.

⁴⁹ *Yearbook of the International Law Commission, 1960*, vol. II, p. 180, article 3, para. 2.

⁵⁰ *Ibid.*, p. 113, article 15.

⁵¹ See the draft articles adopted by the Commission in 1965, and *Yearbook of the International Law Commission, 1960*, vol. II, pp. 179 and 180, draft articles on special missions; *Yearbook of the International Law Commission, 1963*, vol. II, p. 225, paras. 62-65; *Yearbook of the International Law Commission, 1964*, vol. II, pp. 210 *et seq.*, draft articles on special missions.

Article 21.⁵²—*Status of the Head of State and persons of high rank*

1. The Head of the sending State, when he leads a special mission, shall enjoy in the receiving State or in a third State, in addition to what is granted by these articles, the facilities, privileges and immunities accorded by international law to Heads of State on an official visit.

2. The Head of the Government, the Minister for Foreign Affairs and other persons of high rank, when they take part in a special mission of the sending State, shall enjoy, in the receiving State or in a third State, in addition to what is granted by these articles, the facilities, privileges and immunities accorded by international law.

Commentary

(1) The Commission considered on several occasions whether there should not be a special régime for so-called “high-level” missions, i.e., missions whose members include persons of high rank such as a Head of State, a Head of Government or a Minister for Foreign Affairs. After a careful study of the matter, the Commission concluded that the rank of the head or members of a special mission does not give the mission any special status. In international law, however, rank may confer on the person holding it exceptional facilities, privileges and immunities which he retains on becoming a member of a special mission.

(2) Consequently, the Commission specified in paragraph 1 of article 21 that, when the Head of the sending State leads a special mission, he shall enjoy in the receiving State or in a third State all the facilities, privileges and immunities accorded by international law to a Head of State on an official visit, in addition to those conferred on him by the other articles of the draft.

(3) Paragraph 2 lays down a similar rule for occasions when the Head of a Government, the Minister for Foreign Affairs or “other persons of high rank” lead a special mission or are members of it. The Commission did not specify the titles and ranks which these “other persons” must hold in order to enjoy additional facilities, privileges and immunities, since such titles and ranks would vary from one State to another according to the constitutional law and protocol in force.

Article 22.⁵³—*General Facilities*

The receiving State shall accord to the special mission the facilities required for the performance of its functions, having regard to the nature and task of the special mission.

Commentary

(1) Article 22 is based on article 25 of the Vienna Convention on Diplomatic Relations.

(2) Article 22 states the receiving State’s obligation to accord to the special mission the facilities required for the performance of its functions, having regard to its nature and task. The reference in the text of article 22

to the nature and task of the mission — a reference which does not appear in article 25 of the Vienna Convention — makes the extent of the sending State’s obligation depend on the individual characteristics of special missions.

(3) The Commission believes that many of the difficulties which have arisen in practice have been due to the tendency of certain special missions to consider the receiving State obliged to provide them with all the facilities normally accorded to permanent diplomatic missions. In fact, the receiving State cannot be required to provide a special mission with facilities which are not in keeping with the characteristics of the mission.

Article 23.⁵⁴—*Accommodation of the special mission and its members*

The receiving State shall assist the special mission if it so requests in procuring the necessary premises and obtaining suitable accommodation for its members.

Commentary

(1) This article is based on article 21 of the Vienna Convention on Diplomatic Relations.

(2) The essential difference between article 23 of the present draft and article 21 of the Vienna Convention is due to the temporary nature of special missions. In view of this temporary nature the Commission considered that it is not necessary to grant the sending State — as article 21 does in the case of permanent missions — the right to acquire the premises necessary for the special mission. It is sufficient for the receiving State to assist the special mission to procure the necessary premises by means other than acquisition.

(3) The receiving State must take into account the fact that a special mission may be obliged by the nature of its task to have several seats and to move quickly as and when necessary. Where this is so, the receiving State is obliged to provide the mission and its members with additional assistance.

(4) As article 23 of the draft expressly provides, the receiving State is not required to furnish assistance in obtaining premises and accommodation *ex officio*, but only if the special mission so requests.

(5) The Commission wishes to make it clear that article 23 in no way obliges the receiving State to defray any of the expenses incurred by a special mission for its premises or by its members for their accommodation.

Article 24.⁵⁵—*Exemption of the premises of the special mission from taxation*

1. The sending State and the members of the special mission acting on behalf of the mission shall be exempt from all national, regional or municipal dues and taxes in respect of the premises occupied by the special mission, other than such as represent payment for specific services rendered.

⁵² Proposed as article 17 *quater* by the Special Rapporteur in his fourth report. See p. 75 above (A/CN.4/194 and Add.1-5).

⁵³ Article 17 of the draft adopted by the Commission in 1965.

⁵⁴ Article 18 of the draft adopted by the Commission in 1965.

⁵⁵ Article 23 of the draft adopted by the Commission in 1965.

2. The exemption from taxation referred to in this article shall not apply to such dues and taxes payable under the law of the receiving State by persons contracting with the sending State or with a member of the special mission.

Commentary

(1) This article reproduces, with the necessary drafting changes, the provisions of article 23 of the Vienna Convention on Diplomatic Relations.

(2) As the legal content of the two articles is the same, the Commission has only one comment to make on the question of exemption from taxation.

(3) Article 28 of the Vienna Convention provides that the fees and charges levied by a permanent diplomatic mission in the course of its official duties shall be exempt from all dues and taxes. The Commission considered that such a provision would be superfluous in the case of special missions because they are not, as a rule, permitted to levy any fees or charges on the territory of the receiving State. Consequently, no rule corresponding to article 28 has been included in the draft.

Article 25.⁵⁶—Inviolability of the premises

1. The premises of the special mission shall be inviolable. The agents of the receiving State may not enter the premises of the special mission, except with the consent of the head of the special mission or, if appropriate, of the head of the permanent diplomatic mission of the sending State accredited to the receiving State. Such consent may be assumed in case of fire or other disaster requiring prompt protective action.

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

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

Commentary

(1) The last sentence of paragraph 1 of this article reproduces, with the necessary drafting changes, the last sentence of article 31, paragraph 2 of the Vienna Convention on Consular Relations. The other provisions of article 25 are based on article 22 of the Vienna Convention on Diplomatic Relations.

(2) The offices of special missions are quite often established in premises which already enjoy the privilege of inviolability. This is so if they are in the building occupied by the permanent diplomatic mission of the sending State. But if the special mission occupies premises of its own they must, of course, enjoy inviolability.

(3) The Commission discussed the — no doubt rather exceptional — case of a dispute between the head of the special mission and the authorities of the receiving State concerning access by those authorities to the

premises of the special mission. Article 25 provides that in such a situation the receiving State may apply to the head of the permanent diplomatic mission, as the general and political representative of the sending State, for permission to enter the premises occupied by the special mission.

(4) The last sentence of paragraph 1 of article 25 provides that the necessary consent to enter the premises protected by inviolability may be assumed in case of fire or other disaster requiring prompt protective action. The Commission added this provision to the draft on the proposal of certain governments, although it was opposed by several members of the Commission as they considered that it might lead to abuses.

Article 26.⁵⁷—Inviolability of archives and documents

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

Commentary

(1) This article is identical with article 24 of the Vienna Convention on Diplomatic Relations.

(2) Because of the controversies which have arisen in practice, the Commission considers it necessary to lay particular stress on the inviolability of documents carried on the persons or in the baggage of members of a special mission, especially when the mission is travelling or has no premises of its own. The inviolability of these documents is clearly established by the concluding words of article 26.

Article 27.⁵⁸—Freedom of movement

Subject to its laws and regulations concerning zones entry into which is prohibited or regulated for reasons of national security, the receiving State shall ensure to all members of the special mission such freedom of movement and travel on its territory as is necessary for the performance of the functions of the special mission.

Commentary

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

(2) The only difference of substance between these two articles is the addition to article 27 of the words "as is necessary for the performance of the functions of the special mission". The Commission wished to take account of the fact that, as special missions only have specific and temporary tasks, they do not need freedom of movement and travel as wide as that accorded to permanent diplomatic missions.

Article 28.⁵⁹—Freedom of communication

1. The receiving State shall permit and protect free communication on the part of the special mission for all official purposes. In communicating with the Government

⁵⁷ Article 20 of the draft adopted by the Commission in 1965.

⁵⁸ Article 21 of the draft adopted by the Commission in 1965.

⁵⁹ Article 22 of the draft adopted by the Commission in 1965.

⁵⁶ Article 19 of the draft adopted by the Commission in 1965.

of the sending State, its diplomatic missions, its consular posts and its other special missions, or with sections of the same mission, wherever situated, the special mission may employ all appropriate means, including couriers and messages in code or cipher. However, the special mission may install and use a wireless transmitter only with the consent of the receiving State.

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

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

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

5. The courier of the special 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 receiving 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 special mission may designate couriers *ad hoc* of the special 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 special mission's bag in his charge.

7. The bag of the special 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 special mission. By arrangement with the appropriate authorities, the special 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) There are two differences of substance between these two articles:

(i) The words "[with] its other special missions, or with sections of the same mission", have been added in paragraph 1 of article 28, because a special mission frequently needs to communicate with other special missions of the same sending State or with sections of the same mission which are elsewhere;

(ii) Paragraph 7 of article 28 provides that the bag of the special mission may be entrusted not only to the captain of a commercial aircraft, as provided for the diplomatic bag, in article 27 of the Convention on Diplomatic Relations, but also to the captain of a merchant ship. This additional provision is taken from article 35 of the Convention on Consular Relations.

(3) As to terminology, the Commission had a choice between two sets of expressions to designate the bag and courier of a special mission. It could have referred

to them as "the diplomatic bag of the special mission" and "the diplomatic courier of the special mission" or, more simply, as "the bag of the special mission" and "the courier of the special mission". The Commission chose the second alternative in order to prevent any possibility of confusion with the bag and courier of the permanent diplomatic mission.

(4) The Commission wishes to stress that by the expression "diplomatic missions", used in the second sentence of paragraph 1, it means either a permanent diplomatic mission, or a mission to an international organization, or a specialized diplomatic mission of a permanent character.

Article 29.⁶⁰—*Personal inviolability*

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

Commentary

(1) This article reproduces, with the necessary drafting changes, the provisions of article 29 of the Vienna Convention on Diplomatic Relations.

(2) The Commission considered that, except in certain exceptional situations such as that contemplated in article 40, personal inviolability should, by its very nature, be deemed to be indivisible. The Commission therefore decided to follow article 29 of the Vienna Convention on Diplomatic Relations, which makes no distinction between proceedings instituted against a person enjoying inviolability on account of acts committed by him in the exercise of his official functions and proceedings instituted against him on account of acts committed in his private capacity.

Article 30.⁶¹—*Inviolability of the private accommodation*

1. The private accommodation of the representatives of the sending State in the special mission and of the members of its diplomatic staff shall enjoy the same inviolability and protection as the premises of the special mission.

2. Their papers, correspondence and, except as provided in paragraph 4 of article 31, their property, shall likewise enjoy inviolability.

Commentary

(1) This article reproduces, without any change of substance, the provisions of article 30 of the Vienna Convention on Diplomatic Relations.

(2) As regards drafting, in view of the temporary character of special missions the Commission has replaced the word "residence", used in article 30 of the Vienna Convention, by the word "accommodation".

⁶⁰ Article 24 of the draft adopted by the Commission in 1965.

⁶¹ Article 25 of the draft adopted by the Commission in 1965.

(3) Draft article 30 makes no distinction as to the nature of the private accommodation. It applies equally to rooms in hotels and rooms in other buildings open to the public, to private houses and to rented apartments. The Commission considers it necessary to emphasize this point because receiving States have sometimes claimed that persons living in a hotel or in some other building open to the public are not entitled to invoke the inviolability of private accommodation.

*Article 31*⁶²—*Immunity from jurisdiction*

1. The representatives of the sending State in the special mission and the members of its diplomatic staff shall enjoy immunity from the criminal jurisdiction of the receiving State.

2. They shall also enjoy immunity from the civil and administrative jurisdiction of the receiving State, except in the case of:

(a) A real action relating to private immovable property situated in the territory of the receiving State, unless the person in question holds it on behalf of the sending State for the purposes of the 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 receiving 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.

3. The representatives of the sending State in the special mission and the members of its diplomatic staff are not obliged to give evidence as witnesses.

4. No measures of execution may be taken in respect of a representative of the sending State in the special mission or a member of its diplomatic staff except in the cases coming under sub paragraphs (a), (b), (c) and (d) of paragraph 2 of this article, and provided that the measures concerned can be taken without infringing the inviolability of his person or his accommodation.

5. The immunity from jurisdiction of the representatives of the sending State in the special mission and of the members of its diplomatic staff does not exempt them from the jurisdiction of the sending State.

Commentary

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

(2) During the discussion in the Commission, several members maintained that, in the case of special missions, immunity from civil and administrative jurisdiction should be limited to acts performed in the exercise of official functions. The Commission decided, however, to follow the Vienna Convention on Diplomatic Relations

in this matter with one exception, which is provided for in paragraph 2 (d) of article 31 of this draft.

(3) The provisions of paragraph 2 (d), which do not appear in article 31 of the Vienna Convention, were included in the draft at the request of several governments. Their effect is to except from immunity from civil and administrative jurisdiction any action for damages arising out of an accident caused by a vehicle used outside official functions.

*Article 32*⁶³—*Exemption from social security legislation*

1. Subject to the provisions of paragraph 2 of this article, representatives of the sending State in the special mission and members of its diplomatic staff shall with respect to services rendered for the sending State be exempt from social security provisions which may be in force in the receiving 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 a representative of the sending State in the special mission or of a member of its diplomatic staff, on condition:

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

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

3. Representatives of the sending State in the special mission and members of its diplomatic staff 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 receiving State impose upon employers.

4. The exemption provided for in paragraphs 1 and 2 of this article does not exclude voluntary participation in the social security system of the receiving State where such participation is permitted by that State.

5. The provisions of the present article do not affect bilateral and multilateral agreements on social security which have been previously concluded and do not preclude the subsequent conclusion of such agreements.

Commentary

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

(2) As regards terminology, the Commission decided to substitute 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. Article 32 of the draft applies not only to servants in the strict sense of the term, but also to other persons in the private employ of members of the special mission such as children's tutors and nurses.

*Article 33*⁶⁴ — *Exemption from dues and taxes*

The representatives of the sending State in the special mission and the members of its diplomatic staff shall be

⁶² Article 26 of the draft adopted by the Commission in 1965.

⁶³ Article 28 of the draft adopted by the Commission in 1965.

⁶⁴ Article 29 of the draft adopted by the Commission in 1965.

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 receiving State, unless the person concerned holds it on behalf of the sending State for the purposes of the mission;

(c) Estate, succession or inheritance duties levied by the receiving State, subject to the provisions of article 45;

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

(e) Charges levied for specific services rendered;

(f) Registration, court or record fees, mortgage dues and stamp duty, with respect to immovable property, subject to the provisions of article 24.

Commentary

(1) This article reproduces, without any substantive change, the provisions of article 34 of the Vienna Convention on Diplomatic Relations.

(2) In their comments, some governments held that the Commission should adopt, in its draft on special missions, rules on tax exemption less liberal than those laid down for permanent diplomatic missions in article 34 of the Vienna Convention. The Special Rapporteur himself considered that the tax exemption granted to representatives of the sending State in a special mission and to members of the diplomatic staff of the mission should apply only to salaries and emoluments received in respect of functions performed in the mission. After studying the question thoroughly, however, the Commission decided to place special missions on the same footing as permanent diplomatic missions in this respect.

Article 34.⁶⁵—Exemption from personal services

The receiving State shall exempt the representatives of the sending State in the special mission and the members of its diplomatic staff from all personal services, from all public service of any kind whatsoever, and from military obligations such as those connected with requisitioning, military contributions and billeting.

Commentary

The provisions of this article are identical in substance with those of article 35 of the Vienna Convention on Diplomatic Relations. The Commission considers that they call for no comment.

Article 35.⁶⁶—Exemptions from customs duties and inspection

1. Within the limits of such laws and regulations as it may adopt, the receiving State shall permit entry of and grant exemption from all customs duties, taxes, and

related charges other than charges for storage, cartage and similar services, on:

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

(b) Articles for the personal use of the representatives of the sending State in the special mission and the members of its diplomatic staff or of the members of their family who accompany them.

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

Commentary

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

(2) In paragraph 1 (b), the Commission has used the expression: “[members of their family] who accompany them” instead of the corresponding expression in article 36 of the Vienna Convention: “[members of his family] forming part of his household”. It considered that, in view of the characteristics of special missions, it should be possible for members to be accompanied by persons of their family who do not normally form part of their household.

(3) The Commission did not insert in paragraph 1(b) a clause corresponding to that in article 36 of the Vienna Convention, which specifies that exemption from customs duties covers articles intended for the establishment of a diplomatic agent. Such a clause would hardly be justified in a draft dealing with special missions, whose members generally spend too short a time in the receiving State to warrant establishment.

(4) In practice, special missions have sometimes claimed, for themselves or for their members, exemption from the payment of customs duties on consumer goods such as alcoholic beverages and cigarettes. Several governments asked the Commission expressly to exclude such goods from the scope of article 35. The Commission noted, however, that these goods are subject to complicated customs regulations which vary from State to State and that there does not appear to be any universal legal rule on the subject. It therefore refrained from dealing with the matter in the text of article 35, as it considered that the reservation at the beginning of the article gives the receiving State enough latitude for a solution taking into account both its own interests and the nature of the special mission concerned.

Article 36.⁶⁷—Administrative and technical staff

Members of the administrative and technical staff of the special mission shall enjoy the privileges and immunities specified in articles 29 to 34, except that the immunity

⁶⁵ Article 30 of the draft adopted by the Commission in 1965.

⁶⁶ Article 31 of the draft adopted by the Commission in 1965.

⁶⁷ Article 32 of the draft adopted by the Commission in 1965.

from civil and administrative jurisdiction of the receiving State specified in paragraph 2 of article 31 shall not extend to acts performed outside the course of their duties. They shall also enjoy the privileges mentioned in paragraph 1 of article 35 in respect of articles imported at the time of their first entry into the receiving State.

Commentary

(1) With three exceptions, this article reproduces the provisions of article 37, paragraph 2 of the Vienna Convention on Diplomatic Relations, with the necessary drafting changes.

(2) The first exception relates to the clause concerning members of the families of administrative and technical staff in article 37, paragraph 2 of the Vienna Convention. This clause was omitted from article 36 of the draft because the Commission has devoted a separate article to members of the family (article 39).

(3) The second exception relates to the clause in article 37, paragraph 2 of the Vienna Convention, excluding from the scope of that article persons who are nationals of or permanently resident in the receiving State. Here, too, no corresponding clause has been inserted in article 36 of the draft, because the Commission has devoted a separate article to persons who are nationals of or permanently resident in the receiving State (article 40).

(4) The third exception relates to the expression "articles imported at the time of first installation", which appears at the end of article 37, paragraph 2, of the Vienna Convention. For the reasons stated in the commentary on article 35, the Commission has replaced this expression by the words "articles imported at the time of their first entry into the receiving State".

*Article 37.*⁶⁸—*Members of the service staff*

Members of the service staff of the special mission shall enjoy immunity from the jurisdiction of the receiving State in respect of acts performed in the course of their duties, exemption from dues and taxes on the emoluments they receive by reason of their employment, and exemption from social security legislation as provided in article 32.

Commentary

This article reproduces, with the necessary drafting changes, the provisions of article 37, paragraph 3 of the Vienna Convention on Diplomatic Relations, except for the clause excluding persons who are nationals of or permanently resident in the receiving State. The reasons for the omission of this clause are explained in the commentary on article 36.

*Article 38.*⁶⁹—*Private staff*

Private staff of the members of the special mission shall be exempt from dues and taxes on the emoluments they receive by reason of their employment. In all other respects,

they may enjoy privileges and immunities only to the extent admitted by the receiving State. However, the receiving 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 special mission.

Commentary

(1) With two exceptions, this article reproduces, with the necessary drafting changes, the provisions of article 37, paragraph 4 of the Vienna Convention on Diplomatic Relations.

(2) The first exception relates to the expression "private servants", for which the Commission has substituted the expression "private staff", for the reasons stated in the commentary on article 32 of this draft.

(3) The second exception is the omission, for the reasons stated in the commentary on article 36, of the clause excluding persons who are nationals of or permanently resident in the receiving State.

*Article 39.*⁷⁰—*Members of the family*

1. The members of the families of representatives of the sending State in the special mission and of members of its diplomatic staff shall, if they are not nationals of or permanently resident in the receiving State, enjoy the privileges and immunities specified in articles 29 to 35.

2. Members of the families of the administrative and technical staff of the special mission shall, if they are not nationals of or permanently resident in the receiving State, enjoy the privileges and immunities specified in article 36.

Commentary

As stated above, the Commission wished to place together in a separate article, in so far as that was possible, the provisions of the draft relating to members of the family. Article 39 accordingly reproduces, with the necessary drafting changes, the appropriate provisions of article 37, paragraphs 1 and 2 of the Vienna Convention on Diplomatic Relations. The omission of the expression "forming part of his household" is explained in the commentary on article 35.

*Article 40.*⁷¹—*Nationals of the receiving State and persons permanently resident in the receiving State*

1. Except in so far as additional privileges and immunities may be granted by the receiving State, the representatives of the sending State in the special mission and the members of its diplomatic staff 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 special mission and private staff who are nationals of or permanently resident in the receiving State shall enjoy privileges and immunities only to the extent granted to them by the receiving State. However, the receiving State must exercise its jurisdiction

⁶⁸ Article 33 of the draft adopted by the Commission in 1965.

⁶⁹ Article 34 of the draft adopted by the Commission in 1965.

⁷⁰ Article 35 of the draft adopted by the Commission in 1965.

⁷¹ Article 36 of the draft adopted by the Commission in 1965.

over those persons in such a manner as not to interfere unduly with the performance of the functions of the special mission.

Commentary

(1) This article reproduces, with the necessary drafting changes, article 38 of the Vienna Convention on Diplomatic Relations. Here, too, the expression "private servants" has been replaced by "private staff".

(2) Although the Commission considers that, in principle, personal inviolability should be indivisible, it has inserted in article 40 of its draft a clause corresponding to that in article 38, paragraph 1 of the Vienna Convention, which limits the inviolability of persons who are nationals of or permanently resident in the receiving State to official acts performed in the exercise of their functions.

Article 41.⁷²—Waiver of immunity

1. The sending State may waive the immunity from jurisdiction of its representatives in the special mission, of the members of its diplomatic staff, and of other persons enjoying immunity under articles 36 to 40.

2. Waiver must always be express.

3. The initiation of proceedings by one of the persons referred to in paragraph 1 of this article shall preclude him from invoking immunity from jurisdiction in respect of any counter-claim directly connected with the principal claim.

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

Commentary

This article reproduces, with the necessary drafting changes, the provisions of article 32 of the Vienna Convention on Diplomatic Relations. It calls for no comment by the Commission.

Article 42.⁷³—Settlement of civil claims

The sending State shall waive the immunity of any of the persons mentioned in paragraph 1 of article 41 in respect of civil claims in the receiving State when this can be done without impeding the performance of the functions of the special mission, and when immunity is not waived, the sending State shall use its best endeavours to bring about a just settlement of the claims.

Commentary

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. The Commission embodied this principle in an article of its draft because 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.

Article 43.⁷⁴—Transit through the territory of a third State

1. If a representative of the sending State in the special mission or a member of its diplomatic staff passes through or is in the territory of a third State, while proceeding to take up his functions or returning to the sending State, the third State shall accord him inviolability and such other immunities as may be required to ensure his transit or return. The same shall apply in the case of any members of his family enjoying privileges or immunities who are accompanying the person referred to in this paragraph, 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 transit of members of the administrative and technical or service staff of the special mission, or of members of their families, through their territories.

3. Third States shall accord to official correspondence and other official communications in transit, including messages in code or cipher, the same freedom and protection as is accorded by the receiving State. Subject to the provisions of paragraph 4, they shall accord to the couriers and bags of the special mission in transit the same inviolability and protection as the receiving State is bound to accord.

4. The third State shall be bound to comply with the obligations with respect to the persons mentioned in the foregoing three paragraphs only if it has been informed in advance, either in the visa application or by notification, of the transit of those persons as members of the special mission, and has raised no objection to it.

5. The obligation of third States under paragraphs 1, 2 and 3 of this article shall also apply to the persons mentioned respectively in these paragraphs, and to the official communications and the bags of the special mission, when the use of the territory of the third State is due to *force majeure*.

Commentary

(1) The provisions of paragraphs 1, 2, 3 and 5 of this article are taken from article 40 of the Vienna Convention on Diplomatic Relations.

(2) The provisions of paragraph 4 are not in the Vienna Convention. They make the existence of the obligations of a third State with respect to persons in transit subject to two conditions: the first is that the third State shall have been informed in advance of the transit; the second is that it shall have raised no objection. By including the second condition, the Commission wished to show that a third State is not obliged to give its consent to the transit of special missions and their members through its territory.

⁷² Article 27 of the draft adopted by the Commission in 1965.

⁷³ Proposed by the Drafting Committee during the nineteenth session as article 27 *bis*.

⁷⁴ Article 39 of the draft adopted by the Commission in 1965.

*Article 44.*⁷⁵—*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 receiving State for the purpose of performing his functions in the special mission, or, if already in its territory, from the moment when his appointment is notified to the Ministry of Foreign Affairs or such other organ of the receiving State as may be agreed.

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, but shall subsist until that time, even in the case of armed conflict. However, with respect to acts performed by such a person in the exercise of his functions as a member of the special mission, immunity shall continue to subsist.

3. In the event of the death of a member of the special 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.

Commentary

This article reproduces, with the necessary drafting changes, the provisions of the first three paragraphs of article 39 of the Vienna Convention on Diplomatic Relations. The Commission has placed the provisions of article 39, paragraph 4 of the Vienna Convention in a separate article in the draft — article 45 — as they deal with another question, namely, that of the treatment of the property of a person enjoying privileges and immunities in the event of that person's death.

*Article 45.*⁷⁶—*Property of a member of the special mission or of a member of his family in the event of death*

1. In the event of the death of a member of the special mission or of a member of his family, if the deceased was not a national of or permanently resident in the receiving State, the receiving State shall permit the withdrawal of the movable property of the deceased, with the exception of any property acquired in the country the export of which was prohibited at the time of his death.

2. Estate, succession and inheritance duties shall not be levied on movable property which is in the receiving State solely because of the presence there of the deceased as a member of the special mission or as one of the family of a member of the mission.

Commentary

As explained in the commentary on article 44, the source of article 45 is the provisions of article 39, paragraph 4 of the Vienna Convention on Diplomatic

Relations. For the sake of clarity, the Commission has divided these provisions into two separate paragraphs.

*Article 46.*⁷⁷—*Right to leave the territory of the receiving State*

1. The receiving State must, even in the case of armed conflict, grant facilities to enable persons enjoying privileges and immunities, other than nationals of the receiving State, and members of the families of such persons irrespective of their nationality, to leave at the earliest possible moment. In particular it must, in case of need, place at their disposal the necessary means of transport for themselves and their property.

2. The receiving State is required to grant the sending State facilities for removing the archives of the special mission from the territory of the receiving State.

Commentary

(1) Paragraph 1 of this article reproduces, with the necessary drafting changes, the provisions of article 44 of the Vienna Convention on Diplomatic Relations.

(2) Paragraph 2 contains a provision which is not in the Vienna Convention and which the Commission inserted in the draft on the proposal of several Governments.

*Article 47.*⁷⁸—*Consequences of the cessation of the functions of the special mission*

1. When the functions of a special mission come to an end, the receiving State must respect and protect the premises of the special mission so long as they are allocated to it, as well as the property and archives of the special mission. The sending State must withdraw that property and those archives within a reasonable time.

2. In case of absence or breach of diplomatic or consular relations between the sending State and the receiving State and if the functions of the special mission have come to an end, the sending State, even if there is an armed conflict, may entrust the custody of the property and archives of the special mission to a third State acceptable to the receiving State.

Commentary

(1) This article corresponds to article 45 of the Vienna Convention on Diplomatic Relations. There are, however, several substantive differences between the two articles.

(2) Whereas article 45 of the Vienna Convention necessarily contemplates only the case of recall of a permanent diplomatic mission or breach of diplomatic relations, article 47, paragraph 1, of the draft covers both the existence and the absence or breach of diplomatic relations between the sending State and the receiving State. It specifies two obligations when the functions of a special mission come to an end. The first devolves on the receiving State and the second on the sending State. The receiving State is required to respect and protect the premises

⁷⁵ Article 37 and article 38, para. 1 of the draft adopted by the Commission in 1965.

⁷⁶ Article 38, paras. 2 and 3, of the draft adopted by the Commission in 1965.

⁷⁷ Article 43 of the draft adopted by the Commission in 1965.

⁷⁸ Article 44, paras. 1 and 3, of the draft adopted by the Commission in 1965.

of the special mission so long as they are allocated to it, as well as the property and archives of the special mission. The sending State is required to withdraw that property and those archives within a reasonable time after the functions of the special mission have come to an end.

(3) Paragraph 2 of article 47 deals with the case of absence or breach of diplomatic or consular relations between the sending State and the receiving State. It provides that if the functions of the special mission come to an end in these circumstances, the sending State, even if there is an armed conflict, may entrust the custody of the property and archives of the special mission to a third State acceptable to the receiving State.

Part III.—General provisions

Article 48.⁷⁹—Obligation to respect the laws and regulations of the receiving State

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

2. The premises of the special mission must not be used in any manner incompatible with the functions of the special mission, as envisaged in the present articles or in other rules of general international law or in any special agreements in force between the sending and the receiving States.

Commentary

(1) This article is based on the provisions of article 41, paragraphs 1 and 3, of the Vienna Convention on Diplomatic Relations.

(2) The words "laid down" in the expression "the functions of the mission as laid down in the present Convention" in article 41, paragraph 3 of the Vienna Convention, have been replaced by the word "envisaged" in the corresponding expression in article 48, paragraph 2 of the draft. For the draft does not lay down the functions of special missions, but leaves the field of activity of each mission to be determined by the mutual consent of the sending and receiving States (article 3).

(3) The question of asylum in the premises of the special mission is not dealt with in the draft. In order to avoid any misunderstanding, the Commission wishes to point out that among the special agreements referred to in article 48, paragraph 2, there are certain treaties governing the right to grant asylum in mission premises, which are valid as between the parties that concluded them.

Article 49.⁸⁰—Professional activity

The representatives of the sending State in the special mission and the members of its diplomatic staff shall not practise for personal profit any professional or commercial activity in the receiving State.

⁷⁹ Article 40 of the draft adopted by the Commission in 1965.

⁸⁰ Article 42 of the draft adopted by the Commission in 1965.

Commentary

(1) This article reproduces, with the necessary drafting changes, the provisions of article 42 of the Vienna Convention on Diplomatic Relations.

(2) 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.

Article 50.⁸¹—Non-discrimination

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

2. However, discrimination shall not be regarded as taking place:

(a) Where the receiving State applies any of the provisions of the present articles restrictively because of a restrictive application of that provision to its special mission in the sending State;

(b) Where by custom or agreement States extend to each other more favourable treatment than is required by the provision of the present articles;

(c) Where States agree among themselves to reduce reciprocally the extent of facilities, privileges and immunities for their special missions, although such a limitation has not been agreed with other States.

Commentary

(1) Paragraphs 1 and 2 (a) and (b) of this article reproduce, with the necessary drafting changes, the provisions of article 72 of the Vienna Convention on Consular Relations.

(2) Paragraph 2 (c) contains a provision which is not in the Vienna Convention on Consular Relations. Under the terms of this provision it is not regarded as discrimination if two or more States agree among themselves to reduce reciprocally the extent of the facilities, privileges and immunities of their special missions, although such a limitation has not been agreed on with other States. The Commission wishes to stress that agreements limiting the extent of facilities, privileges and immunities, concluded in accordance with this sub-paragraph, can produce effects only as between the parties thereto.

ANNEX

*Draft preamble for a Convention on special missions
The States parties to the present Convention,*

Recalling that the need to accord a particular status to special missions of States has always been recognized,

⁸¹ Proposed by the Special Rapporteur as article 40 *bis* in his fourth report. See p. 103 above (A/CN.4/194 and Add.1-5).

Having in mind the Purposes and Principles of the Charter of the United Nations concerning the sovereign equality of States, the maintenance of international peace and security and the development of friendly relations and co-operation among States,

Recalling the resolution of the United Nations Conference on Diplomatic Intercourse and Immunities (1961) relating to the importance of special missions,

Believing that the Vienna Conventions on Diplomatic and Consular Relations have contributed to the fostering of friendly relations among nations, irrespective of their differing constitutional and social systems, and that they should be completed by a convention on special missions and their privileges and immunities,

Realizing that the purpose of such privileges and immunities is not to benefit individuals but to ensure the efficient performance of the functions of special missions as representing States,

Affirming that the rules of customary international law should continue to govern questions not expressly regulated by the provisions of the present Convention,
Have agreed as follows

CHAPTER III

Other decisions and conclusions of the Commission

A. ORGANIZATION OF FUTURE WORK

36. The Commission discussed this item at its 917th, 928th, 929th, 938th and 939th meetings. At its 928th meeting it received an oral report from the two officers of the current session then present in Geneva (Sir Humphrey Waldock, Chairman, and Mr. Endre Ustor, Second Vice-Chairman) and four former Chairmen of the Commission (Mr. Roberto Ago, Mr. Milan Bartoš, Mr. Eduardo Jiménez de Aréchaga and Mr. Mustafa Kamil Yasseen), who had been asked to consider the matter.

37. It was noted that after the completion of the draft articles on special missions, the following three topics already taken up by the Commission remained on its programme of work:

1. Succession of States and Governments;
2. State responsibility;
3. Relations between States and inter-governmental organizations.

The Commission considered how and when these three topics could best be dealt with, as well as various suggestions by members of additional topics for inclusion in the programme of work.

1. *Succession of States and Governments*

38. As the former Special Rapporteur on this topic, Mr. Manfred Lachs, was elected to the International Court of Justice during the last regular session of the General Assembly, the Commission considered new arrangements for dealing with the topic. In doing so

it took account of the broad outline of the subject laid down in the report of a Sub-Committee of the Commission in 1963,⁸² which was agreed to by the Commission in the same year.⁸³ That outline divided the topic into three main headings, as follows:

- (a) Succession in respect of treaties;
- (b) Succession in respect of rights and duties resulting from sources other than treaties;
- (c) Succession in respect of membership of international organizations.

In connexion with this outline, the Commission considered a suggestion by Mr. Lachs that the topic should be divided among more than one Special Rapporteur, in order to advance its study more rapidly.

39. This suggestion won the support of the Commission. It had already decided in 1963 to give priority to succession in respect of treaties, and that aspect of the topic had, in its opinion, become more urgent in view of the convocation by the General Assembly, in its resolution 2166 (XXI) of 5 December 1966, of a Conference on the Law of Treaties in 1968 and 1969, and of views expressed in the Sixth Committee at the last session of the General Assembly. The Commission therefore decided to advance the work on that aspect as rapidly as possible at its twentieth session in 1968. Sir Humphrey Waldock, the Commission's former Special Rapporteur on the law of treaties, was appointed Special Rapporteur to deal with succession in respect of treaties.

40. 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 entrusted that aspect to Mr. Mohammed Bedjaoui as Special Rapporteur, and requested him 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.

41. The third aspect of the topic, succession in respect of membership of international organizations, was considered to be related both to succession in respect of treaties and to relations between States and inter-governmental organizations. It was therefore left aside for the time being, without being assigned to a Special Rapporteur.

2. *State responsibility*

42. Mr. Roberto Ago, Special Rapporteur on State responsibility, submitted a note on this topic (A/CN.4/196) to the Commission, which discussed it at its 935th meeting. The Commission confirmed the instructions given to the Special Rapporteur at the fifteenth session in 1963 as set forth in his paper. The Commission noted with satisfaction that Mr. Ago will submit a substantive report on the topic at the twenty-first session of the Commission.

⁸² *Yearbook of the International Law Commission, 1963*, vol. II, p. 261, para. 13.

⁸³ *Ibid.*, p. 224, para. 60.

3. *Relations between States and inter-governmental organizations*

43. Mr. Abdullah El-Erian, Special Rapporteur on relations between States and inter-governmental organizations, submitted a report on this topic (A/CN.4/195 and Add.1) to the Commission at its nineteenth session, but the Commission was unable to discuss it owing to the pressure of other work and to the unavoidable absence of Mr. El-Erian. That report, together with the report which Mr. El-Erian intends to submit at the next session, will contain a full set of draft articles on the privileges and immunities of representatives of States to inter-governmental organizations, and both reports will be submitted for discussion in 1968.

4. *Additional topics suggested for inclusion in the programme of work*

44. Apart from expressing their views in regard to the method of treatment of topics on the present programme of work, several members suggested additional topics for consideration by the Commission in the future when its other work might permit.

45. The Commission considered in the first place two topics which the General Assembly had requested it to take up as soon as it considered advisable, and which had been included in its programme of work, though no Special Rapporteur had ever been appointed to deal with them. These were the right of asylum, referred to the Commission by General Assembly resolution 1400 (XIV) of 21 November 1959, and historic waters, including historic bays, referred by General Assembly resolution 1453 (XIV) of 7 December 1959. Most members doubted whether the time had yet come to proceed actively with either of these topics. Both were of considerable scope and raised some political problems, and to undertake either of them at the present time might seriously delay the completion of work on the important topics already under study, on which several resolutions of the General Assembly had recommended that the Commission should continue its work.

46. Among the other topics mentioned were the effect of unilateral acts; the use of international rivers; and international bays and international straits. The possibility was also mentioned that the Commission might return to some of the topics it dealt with in its early years, such as the draft Declaration on the Rights and Duties of States, and the question of international criminal jurisdiction and related matters. Other members thought that the Commission should envisage work on questions of international legal procedure, such as model rules for conciliation, arrangements to enable international organizations to be parties to cases before the International Court of Justice, or drawing up the statute of a new United Nations body for fact-finding in order to assist the General Assembly in its consideration of that question.

47. While some members felt that several of these topics, and in particular unilateral acts and international rivers, were suitable for work by the Commission in

the future, it was believed that their wide scope precluded their being taken up at the present time, when the Commission was preparing to deal with the major topics of State succession and State responsibility. The most that could be done would be to add to the programme a topic of limited scope, which could be taken up when, during a session, the broader topics had temporarily to be laid aside to allow time for the work of a Special Rapporteur or of the Drafting Committee.

48. It was recalled that, in dealing with the law of treaties, the Commission had laid aside one aspect of that topic — the “most-favoured-nation” clause — which it had not considered indispensable to deal with in its codification of the general law of treaties, although, as was said in its report on the work of its eighteenth session, “it felt that such clauses might at some future time appropriately form the subject of a special study”.⁸⁴ The Commission noted that several representatives in the Sixth Committee at the twenty-first session of the General Assembly had urged that the Commission should deal with this aspect.⁸⁵ In view of the more manageable scope of the topic, of the interest expressed in it, and of the fact that clarification of its legal aspects might be of assistance to the United Nations Commission on International Trade Law (UNCITRAL), which will begin its work in 1968, the Commission unanimously decided to place on its programme the topic of most-favoured-nation clauses in the law of treaties. It also unanimously decided to appoint Mr. Endre Ustor as Special Rapporteur on that topic.

5. *Review of the Commission's programme and methods of work*

49. The Commission, having in mind that next year it will hold its twentieth session, considered that that session would be an appropriate time for a general review of the topics which had been suggested for codification and progressive development, of the relation between its work and that of other United Nations organs engaged in development of the law, and of its procedures and methods of work under its Statute. It therefore unanimously decided to place on the provisional agenda for its twentieth session an item on review of the Commission's programme and methods of work.

B. DATE AND PLACE OF THE TWENTIETH SESSION

50. In view of the fact that the dates of the first session of the United Nations Conference on the Law of Treaties have been tentatively set at 26 March to 24 May 1968, the Commission decided to hold its next session for ten weeks from 27 May to 2 August 1968, at the United Nations Office at Geneva. If, however, other dates are finally set for the Conference, the Commission would prefer to begin its session earlier in May.

⁸⁴ See *Yearbook of the International Law Commission, 1966*, vol. II, document A/6309/Rev.1, part II, para. 32.

⁸⁵ See *Official Records of the General Assembly, Twenty-first Session, Annexes*, agenda item 84, A/6516, para. 47.

C. CO-OPERATION WITH OTHER BODIES

1. *Asian-African Legal Consultative Committee*

51. Mr. Mustafa Kamil Yasseen reported orally at the 932nd meeting, and later in writing (A/CN.4/197), on his attendance as an observer on behalf of the Commission at the Asian-African Legal Consultative Committee during its eighth session, held in Bangkok from 8 to 17 August 1966.

52. The Asian-African Legal Consultative Committee was represented before the Commission by Mr. J. H. Rizvi, who addressed the Commission at its 932nd meeting. He commented on the importance of the Commission's draft articles on special missions for Asian and African countries, on the use of the expression "special mission", and on the work of the Committee at its last session, at which a final draft on the rights of refugees had been adopted, including the right of asylum, the right to compensation and the right of repatriation. He stated that at its next session the Committee would examine a report on the draft articles on the law of treaties adopted by the Commission.

53. 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 Karachi during the second half of December 1967 or during January 1968. In view of the agenda for that session, the Commission requested its Chairman, Sir Humphrey Waldock, to attend the session, or, if he were unable to do so, to appoint another member of the Commission for the purpose.

2. *European Committee on Legal Co-operation*

54. Mr. Milan Bartoš reported orally at the 898th meeting on his attendance as an observer on behalf of the Commission at meetings of the European Committee on Legal Co-operation at Strasbourg between 14 and 18 November 1966. Mr. Mustafa Kamil Yasseen also reported (A/CN.4/198) on his attendance at meetings of the Committee, also held at Strasbourg, between 10 and 14 April 1967.

55. The European Committee on Legal Co-operation was represented by Mr. H. Golsong, who addressed the Commission at its 898th meeting. He referred to the work of the Committee on a European Convention on Consular Functions, to be opened for signature later in 1967, intended to supplement the Vienna Convention on Consular Relations of 1963. He stated that the Committee was continuing work on the immunity of States from jurisdiction and on the privileges and immunities of international organizations; on the latter topic he hoped to be able to present the results of the Committee's work to the Commission in 1968 for consideration in connexion with the latter's work on relations between States and inter-governmental organizations.

56. 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 4 to 8 December 1967. In view of the agenda for

that session, the Commission requested its Chairman, Sir Humphrey Waldock, 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*

57. The Inter-American Juridical Committee was represented by Mr. José Joaquín Caicedo Castilla, who addressed the Commission at its 911th meeting.

58. Mr. Caicedo Castilla referred in his statement to a Protocol adopted by the Third Special Inter-American Conference held at Buenos Aires in April 1967, which would amend the 1948 Charter of the Organization of American States. While under the Charter as amended the Inter-American Juridical Committee will be increased from nine to eleven members and will be the main legal organ of the Organization, the Inter-American Council of Jurists, to which the Commission has in the past sent observers, will no longer exist. Mr. Caicedo Castilla, as Observer for the Juridical Committee, said that it was desirable to strengthen the co-operation between the Commission and inter-American juridical organs, and invited the Commission to be represented by an observer at the next session of the Committee, to be held at Rio de Janeiro from 10 July to 9 October 1967. The Commission recalled article 26, paragraph 4 of its Statute, which recognizes the advisability of consultation by the Commission with inter-governmental organizations whose task is the codification of international law, such as those of the American States, and decided in principle to send observers to future sessions of the Juridical Committee when items related to those on the programme of the Commission are under discussion. It also requested its secretariat to explore with the secretariat of the Juridical Committee the various means of establishing closer co-operation. The Commission regretted, however, that in view of the dates of the Committee's session in 1967 and of the fact that the items on its agenda for that session are unrelated to the present programme of the Commission, it would be unable to send an observer this year.

D. REPRESENTATION AT THE TWENTY-SECOND SESSION OF THE GENERAL ASSEMBLY

59. The Commission decided that it would be represented at the twenty-second session of the General Assembly by its Chairman, Sir Humphrey Waldock.

E. PREPARATIONS FOR THE CONFERENCE ON THE LAW OF TREATIES

60. At the 939th meeting, the Secretary of the Commission made a report on the programme of the Office of Legal Affairs in regard to publications of interest to the Commission. In this connexion the Commission recalls that by General Assembly resolution 2166 (XXI) of 5 December 1966 the Secretary-General is requested to present all relevant documentation to the forthcoming Conference on the Law of Treaties. The Commission

recommends that as part of such documentation the Secretary-General should publish revised editions of the *Handbook of Final Clauses* (ST/LEG/6) and the *Summary of Practice of the Secretary-General as Depositary of Multilateral Conventions* (ST/LEG/7). These documents, which were last published in 1957 and 1959, respectively, furnish summaries of practice which will be of use not only to the Conference on the Law of Treaties but also to future United Nations conferences engaged in drafting multilateral conventions. It would be desirable, if feasible, to publish those documents before the discussion of the law of treaties by the General Assembly at its twenty-second session.

F. SEMINAR ON INTERNATIONAL LAW

61. In pursuance of General Assembly resolutions 2045 (XX) of 8 December 1965 and 2167 (XXI) of 5 December 1966, the United Nations Office at Geneva organized a third session of the seminar on International Law for advanced students of the subject and young government officials responsible in their respective countries for dealing with questions of international law, to take place during the nineteenth session of the Commission. The Seminar, which held eleven meetings between 22 May and 9 June 1967, was attended by twenty-three students, all from different countries. Participants also attended meetings of the Commission during that period. They heard lectures by eight members of the Commission (Mr. Ago, Mr. Bartoš, Mr. Reuter, Mr. Tammes, Mr. Tsuruoka, Mr. Ustor, Mr. Yasseen and Sir Humphrey Waldoock), two members of the Secretariat (Mr. G. Wattles and Mr. P. Raton) and Professor Virally of Geneva University. Lectures were given on various subjects, such as the problem of codification and development of international law in general, in the United Nations, in the Commission or in the

General Assembly. The codification of the law of treaties and the draft convention prepared by the Commission on that subject were also discussed. Other topics included the question of special missions and recent problems of the law of the sea. Two lectures were devoted to two subjects dealt with by the Sixth Committee of the General Assembly: the question of methods of fact finding and that of International Trade Law and UNCITRAL.

62. The Seminar was held without cost to the United Nations, which undertook no responsibility for the travel or living expenses of the participants. However, the Governments of Denmark, the Federal Republic of Germany, Israel, Norway and Sweden offered scholarships for participants from developing countries. Eight candidates were chosen to be beneficiaries of the scholarships. The Government of Finland also offered a scholarship, but the conditions under which it was to be granted could not be met at the present session.

63. Due consideration was given to remarks made by members of the International Law Commission at preceding sessions and by representatives in the Sixth Committee of the General Assembly, and to parts of General Assembly resolutions 2045 (XX) and 2167 (XXI) calling for the participation of a reasonable number of nationals from developing countries. The scholarships granted by the countries mentioned in the preceding paragraph made it possible this year to further the aim of admitting a larger number of nationals from developing countries. It is hoped that scholarships will also be granted next year.

64. On behalf of the Commission, the Chairman expressed appreciation of the way in which the Seminar was organized, the high level of the debates in the Seminar and the results achieved. The Commission recommended that further Seminars should be held in conjunction with its sessions.

ANNEXES

ANNEX I

Comments^a by Governments^b on the draft articles on special missions adopted by the Commission in 1965^c

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1. Australia

Transmitted by a note verbale of 24 April 1967 from the Permanent Representative to the United Nations

[Original: English]

^a Originally circulated as documents A/CN.4/188 and A/CN.4/188/Add.1-4; A/CN.4/193 and A/CN.4/193/Add.1-5.

^b See General Assembly resolution 2045 (XX).

^c *Yearbook of the International Law Commission, 1965*, vol. II, document A/CN.4/179, chapter III, section B.

1. The Australian Government has studied with interest the draft articles on temporary missions drawn up by the International

Law Commission and wishes to express its appreciation of the detailed and careful work of the Commission in drafting these articles.

2. The Australian Government, while agreeing with the desirability of codifying the modern rules of international law on this subject, feels obliged to express its concern at, and opposition to, the apparent intention not only to apply these articles to a wide range of persons, but also to accord to those persons privileges and immunities which could well go beyond the bounds of functional necessity. At this stage the Australian Government wishes to make the following general comments directed to these two points and to several other aspects of the draft.

WHAT CONSTITUTES A "SPECIAL MISSION"?

3. The draft articles do not provide any substantive definition of what constitutes a temporary "special mission" for the purpose of the articles, nor is any such substantive definition given in the draft introductory article that has been prepared by the Special Rapporteur.^d The commentaries on the draft articles indicate that the intention is to give the term a very broad interpretation indeed, covering all temporary missions sent by one State to perform specific tasks, irrespective of whether that task is dominantly political or of a purely technical character. The Special Rapporteur in his first report on the subject^e gave as instances of different kinds of missions that would come under the proposed new régime: political, military, police, transport, water supply, economic, veterinary, humanitarian and labour recruiting.

4. The Australian Government shares the concern that has been expressed by some other Governments at the wide range of persons that appear to come within the scope of the draft articles. In its view there are many kinds of bilateral intercourse of a technical or administrative nature between States in which flexibility of procedure is of considerable importance and it would not be advantageous to apply to such cases the formal régime proposed in the draft articles.

5. In view of its concern on these points, the Australian Government wishes to refer to the following comments on the scope of the draft articles made by the Special Rapporteur in addendum 2 of his third report (A/CN.4/189/Add.2):

"In the first place, no State is obliged to receive a special mission from another State without its consent. Secondly, in the Commission's draft, the task of a special mission is determined by mutual consent of the sending State and of the receiving State; on receiving a visiting foreign mission, the receiving State is entitled to make it clear that it is not considered as a special mission; and finally, the existence and extent of privileges and immunities can also be determined by mutual consent of the States concerned. It is very difficult to make reservations in the text of the article with regard to certain categories of special mission. For that reason, the Commission left it to States themselves to determine what they would regard as a special mission."

6. While noting these comments, the Australian Government considers that as presently drafted, the draft articles and the commentaries do not adequately reflect the idea that States may themselves determine what they should regard as a special mission.

7. The Australian Government appreciates that it is very difficult to make reservations in the text as to certain types of special missions — e.g. to make a distinction between special missions of a political nature and those of a technical nature. Nevertheless,

the Australian Government believes that a further attempt should be made to clarify, and clearly limit, the range of special missions to which the draft articles are to apply.

8. The lines of a practical solution may possibly be found by singling out those cases that are generally agreed as having the attributes of special missions to which the régime laid down in the draft articles should apply, and leaving the application of the draft articles to other cases to be dealt with by mutual agreement between the States concerned. The following are cases that might be considered for inclusion in the first suggested category:

- (a) Special missions led by Heads of State;
- (b) Special missions led by Heads of Government;
- (c) Special missions led by Ministers for Foreign Affairs;
- (d) Special missions led by other Cabinet Ministers;
- (e) Diplomatic ceremonial and formal missions;
- (f) Itinerant envoys.

PRIVILEGES AND IMMUNITIES

9. The wide scope of the draft articles also causes the Australian Government particular concern because of the intention to extend to all missions that come within the articles a range of privileges and immunities based on those contained in the Vienna Convention on Diplomatic Relations, which deals of course with permanent diplomatic missions. The Australian Government does not believe that the extension of this wide range of privileges and immunities to all types of special missions would be justified. It considers that the grant of privileges and immunities should be determined by functional necessity; i.e., they should be limited strictly to those required to ensure the efficient discharge of the functions of the special mission and should have regard to the temporary nature of the mission in that connexion. It is also necessary to have regard to the status of the person who is the head of the special mission. Standards of privileges and immunities that would be appropriate in the case of high level missions, whose heads hold high offices of State, should not be made automatically applicable to other cases.

10. The Australian Government appreciates the proposal made by the Special Rapporteur to insert a new paragraph 2 in article 17 reading as follows:

"2. The facilities, privileges and immunities provided for in Part II of these articles shall be granted to the extent required by these articles, unless the receiving State and the sending State agree otherwise."

The Australian Government considers, however, that this proposal would not allay the anxieties already expressed by some Governments about the extension of a wide range of privileges and immunities to all types of special missions. In the absence of agreement between both parties the receiving State would be obliged to accord the range of privileges and immunities set out in the draft — or not receive the mission at all.

DELEGATIONS TO INTERNATIONAL CONFERENCES CONVENED BY STATES

11. The Australian Government is of the opinion that the draft articles could usefully cover the situation of representatives to congresses and conferences other than congresses and conferences convened within the framework of an international organization. In this connexion it has noted that the Commission at its fifteenth session decided that, for the time being, the terms of reference of the Special Rapporteur should not cover the question of delegates to congresses and conferences. The Australian Government believes that the time is opportune to take up this matter again and notes with interest the statement of the Special Rapporteur in his third report (A/CN.4/189) that it will be necessary for the Commission to revert to this question, which will be studied jointly by two Special Rapporteurs (the Special Rapporteur on

^d *Yearbook of the International Law Commission, 1966*, vol. II, (document A/CN.4/189/Add.1).

^e *Yearbook of the International Law Commission, 1964*, vol. II, pp. 83-84, para. 86.

special missions and a Special Rapporteur on relations between States and international organizations).

NATURE OF THE PROVISIONS RELATING TO SPECIAL MISSIONS

12. The Australian Government supports the decision of the Commission at its eighteenth session to ask the Special Rapporteur to base his draft on the view that the provisions of the draft articles could not in principle constitute rules from which parties would be unable to derogate by mutual agreement.

RELATION BETWEEN SPECIAL MISSION AND PERMANENT DIPLOMATIC MISSION

13. In the report of its seventeenth session,¹ the Commission requested views on whether a rule should be included in the final text of the articles on the relation between a special mission and the permanent diplomatic mission, and if so to what effect. The Australian Government considers that there is no need for an express rule on this point. In its view, any question of division of functions is basically for the sending State to determine and further it doubts whether the matter is likely to cause difficulties in practice.

PROVISION PROHIBITING DISCRIMINATION

14. Because of the diverse character of special missions the Australian Government doubts whether it would be practical to include in the final text an article prohibiting discrimination. It will, however, study with interest the proposed article on this matter to be submitted by the Special Rapporteur.

2. Austria

Transmitted by a note verbale of 2 June 1966 from the Permanent Representative to the United Nations

[Original: German]

In the opinion of the Austrian Government, the draft articles on special missions prepared by the International Law Commission constitute a useful contribution to the progressive development of international law, especially so as the increasingly close relations between States make it desirable to define and delimit the rights of the numerous organs of which States make use in their relations with one another.

However, in the opinion of the Austrian Government, the privileges and immunities of such non-diplomatic officials should be codified in such a way that the rights of these officials do not go beyond what is unavoidably necessary for the functioning of special missions, since, even in the case of diplomats and consuls, the principle holds that they enjoy privileges not in their personal interest, but only to facilitate their work.

Moreover, in the further elaboration of the draft articles, care should be taken that their provisions impair the position of traditional diplomacy as little as possible.

Accordingly, it is essential that the relationship between permanent representative authorities (diplomatic missions and consulates) and special missions should be expressly regulated, so as to avoid overlapping and conflicts in the matter of privileges. This would appear to be especially necessary in dealing with the immunities granted under article 26 *et seq.*

A noticeable feature in the Commission's draft is that, unlike the Vienna Convention on Diplomatic Relations and the Vienna Convention on Consular Relations, it contains no definitions of the various categories of members of special missions; in addition, it would seem necessary to define the possible tasks

and functions of special missions more specifically than has so far been done in the introduction to the draft articles.

The following observations relate to individual articles.

Article 9

Paragraph 1. It would seem desirable to render the provision more precise by showing in what language the alphabetical order is to be determined, especially as no unambiguous conclusions on this point can be drawn from the commentary.

Article 19

Paragraph 1. This paragraph states that the agents of the receiving State may be allowed access to the premises (including grounds) of the special mission both by the head of the special mission and by the head of the permanent diplomatic mission. This suggests the conclusion that, by analogy, the question raised in paragraph (5) of the commentary to article 2 as to the relationship between the permanent diplomatic mission and the special mission should be settled by recognizing the continuing competence of the former.

Article 32

Article 36, paragraph 2 of the Vienna Convention on Diplomatic Relations contains a limitation in time of the customs exemptions granted to members of the administrative and technical staff. The omission of this limitation in the present draft articles would place the administrative and technical staff of a special mission in a substantially more favourable position than the corresponding staff members of a permanent mission.

In article 32, moreover, instead of referring to article 31 as a whole, reference should be made to article 31, paragraph 1 (b), since it can hardly be intended to grant to administrative and technical staff the same rights as are granted to diplomats in article 31, paragraph 2, which would be going beyond the corresponding provision in the Vienna Convention on Diplomatic Relations. Accordingly, in article 32 of the draft either the same time-limitation to "articles imported at the time of first installation" should be inserted and, in addition, the reference limited to "article 31, paragraph 1 (b)", or the reference to article 31 should be omitted altogether.

Article 35

Paragraph 2. This paragraph should, in the manner already explained in connexion with article 32, and in the light of the wording ultimately adopted for that article, be limited to the privilege set forth in article 31, paragraph 1 (b) and to articles imported at the time of first installation, unless this paragraph is omitted altogether.

3. Belgium

Transmitted by a letter of 25 April 1966 from the Permanent Representative to the United Nations

[Original: French]

The Belgian Government wishes first of all to congratulate the International Law Commission of the United Nations on the considerable amount of work it has done on special missions. The draft convention it has transmitted indubitably signifies an appreciable progress in the efforts to codify and develop international law.

A. GENERAL COMMENTS

1. The Belgian authorities are of the opinion that the privileges and immunities provided for in the draft convention should be granted for strictly functional reasons and restrictively. To treat special missions in the same way as permanent diplomatic

¹ *Yearbook of the International Law Commission, 1965*, vol. II, p. 167, para. (5) of the commentary on article 2.

missions seems excessive. There would therefore seem grounds for considering the possibility of regulating privileges and immunities in the first place by bilateral agreement and of making provision in the present draft only for the strict minimum required for the performance of the special mission's functions.

2. With regard to the scope of the draft convention, Belgium is of the opinion that it should cover the situation of representatives to congresses and conferences, with the sole exception of congresses and conferences convened within the framework of an international organization whose statutes incorporate provisions on this subject (*specialia derogant generalibus*).

3. In the case of so-called high level missions,⁸ the question arises whether an attempt to define their limits in an instrument may not lead to serious omissions.

In practice, moreover, the rules to be applied to such missions are always established by agreement and in respect of the particular case. That being so, it may be asked whether the rules of protocol in force in each State do not amply suffice.

4. The draft suffers greatly from the absence of a definitions article, which makes the drafting imprecise and clumsy. The Belgian authorities have no wish to press for any particular wording, but, solely for the purpose of making their comments, they have adopted the following definition as a working hypothesis: "The term 'special mission' shall be deemed to mean a temporary official delegation sent by one State to another State for the performance of a specific task."

Moreover, the classification of the categories of persons likely to be included in a special mission is open to criticism and gives rise to ambiguities which appear throughout the text.

This question of the internal organization of special missions will be taken up again in detail under article 6 of the draft.

B. COMMENTS ON THE ARTICLES

Article 1

Paragraph 1. The words "for the performance of specific tasks" and "temporary" should be deleted because they denote characteristics of a special mission which should be stated in the definitions.

The word "consent" does not seem to correspond with the facts of international life. It connotes tolerance rather than approval, whereas what happens in practice is that a proposal is made which is followed by an invitation.

Paragraph 2. Belgium endorses the Commission's opinion that special missions may be sent between States or Governments which do not recognize each other, but wishes to make it clear that this in no way prejudices subsequent recognition.

Article 2

With regard to paragraph 5 of the commentary on this article, Belgium does not believe that the division of competence between a special mission and a permanent diplomatic mission is likely to give rise to difficulties, at any rate for the receiving State, for it is for the sending State to determine the methods of contact among its various missions and to intervene should there be any overlapping of authority. Moreover, it will frequently be the case that a member of the diplomatic mission will be attached to a special mission; he may even lead it as its *ad hoc* head.

Article 4

Paragraph 2. To make the alternative stated at the end of the first sentence clearer, it would be advisable to add the words

⁸ See the "Draft provisions concerning so-called high-level special missions, prepared by the Special Rapporteur", *Yearbook of the International Law Commission, 1965*, vol. II, p. 192.

"as appropriate", as in article 9, paragraph 2 of the Vienna Convention on Diplomatic Relations.

Article 5

This article is unilateral; the converse situation is also conceivable, i.e., the sending of the same mission by two or more States. Belgium therefore proposes the addition of a new article, which might be drafted as follows:

"*Article 5 bis.* A special mission may be sent by two or more States. In that case, the sending States shall give the receiving State prior notice of the sending of that mission. Any State may refuse to receive such a mission."

Article 6

Paragraph 1. In order to prevent any confusion with diplomatic terminology, the word "delegate" should be substituted for the word "representative". What should be made quite explicit in the definition of a special mission is its official character, i.e., the fact that it is composed of persons designated by a State to negotiate on its behalf. Consequently, it seems excessive to confer on them automatically a representative character, as that term is construed in diplomacy and politics.

The expression "other members" causes many ambiguities in the articles of the present draft. In the Vienna Convention on Diplomatic Relations, the term "members of the mission" is entirely general and means the head of the mission and the members of the staff, the latter being subdivided into members of the diplomatic staff, members of the administrative and technical staff, and members of the service staff.

The introduction into the present project of a new specific concept without giving it a specific name considerably impairs the intelligibility of the text.

Paragraph 2. A similar confusion is caused by the use of the term "diplomatic staff". If these words apply to advisers and experts, as stated in paragraph 5 of the commentary on the article, there is no reason for not saying so explicitly. Besides, it is to be presumed that the "other members" also enjoy diplomatic status.

Article 7

In order to make the article correspond better with the idea expressed in paragraph 2 of the commentary, it would be better to say "unless otherwise agreed" and to delete the word "normally".

Article 8

Paragraph 1. It should be noted that the difficulties caused by the vagueness of the terminology are particularly marked in sub-paragraph (d).

As to the substance, it should be specified that there must be prior notification, which would avoid having to resort where necessary to the *non grata* procedure, which is always unpleasant for all parties concerned. The text of this paragraph should therefore read as follows: "The sending State shall notify the receiving State in advance. . ."

Paragraph 2. In this context, the notifications to be made when the special mission has already commenced its functions would concern only persons subsequently called upon to participate in the special mission's work, which would be more in line with the usual practice.

Article 9

Paragraph 1. Belgium is of the opinion that the choice of the language determining the alphabetical order should be made in accordance with the rules of protocol of the receiving State. The end of the paragraph should therefore read ". . . in conformity with the protocol in force in the receiving State."

New paragraph. It is considered that it would be useful to lead up to the exception which is stated in the following article; there should accordingly be a new paragraph 3 stipulating that "the present article shall not affect the provisions of article 10 relating to special ceremonial and formal missions".

Article 10

This article is ambiguous. It refers to special missions which meet on a ceremonial occasion; but, taken literally, it seems to refer to special missions of all kinds.

It would be both clearer and simpler to state that "precedence among special ceremonial and formal missions shall be governed by the protocol in force in the receiving State".

In that case, Belgium would not wish this article to be regulated by a detailed text such as proposed in paragraph 4 of the commentary.

Article 11

The usefulness of the first sentence of the article is open to question, as the commencement of privileges and immunities is governed by article 37. Furthermore, the present wording may lead to confusion in connexion with protocol, which is precisely where letters of credence may be required.

Lastly, a diplomatic mission should not be qualified as regular, but as permanent. The article might therefore be drafted as follows:

"Where no other provision is made by the protocol in force in the receiving State for special ceremonial and formal missions, the exercise of the function of a special mission shall not depend upon presentation of the special mission by the permanent diplomatic mission or upon the submission of letters of credence of full powers."

Article 12

Sub-paragraphs (a) and (b) should be amalgamated and the word "*rappel*" should be used rather than the word "*révocation*", which seems too strong.

Reference should also be made to the comment on article 44, paragraph 2.

Article 13

Paragraph 1. The need for the proviso "in the absence of prior agreement" is not readily apparent; for in any case the procedure contemplated consists of a proposal followed by its approval. It should also be noted that in practice the seat of a special mission is always determined by mutual consent.

Article 15

Belgium is of the opinion that the solution adopted in article 20 of the Vienna Convention on Diplomatic Relations should prevail and that the emblem should be used only on the means of transport of the head of the mission.

Article 16

From the point of view of substance, a fundamental question arises, namely, whether the convention will apply in this case or whether on the contrary this article forms a separate entity.

In other words, is the situation with which it deals regulated solely by the terms of the conditions imposed by the host State or is the host State bound by the fact of its consent to apply the articles of the convention, and in particular those which concern privileges and immunities? In the latter case, to what extent can the conditions imposed by the third State derogate from the provisions of the convention?

From the point of view of drafting, it would be desirable to specify that the consent must be prior and may be withdrawn at any time. The text might therefore be amended to read as follows:

"1. Special missions may not perform their functions on the territory of a third State without its prior consent.

"2. The third State may impose conditions which must be observed by the sending State.

"3. The third State may at any time and without having to explain its decision, withdraw its consent."

GENERAL REMARKS ON THE FIRST SIXTEEN ARTICLES

The Belgian Government is of the opinion that it would be more practical to regroup these articles in accordance with the following arrangement:

First would come the articles on the sending of a mission: article 5 would become article 2; article 5 *bis* would become article 3; article 16 would become article 4.

Then the task of a special mission: article 2 would become article 5.

Next would come the provisions dealing with the composition of the mission: article 6 will thus keep its number; article 3 (Appointment) would become article 7; article 8 (Notification) would retain its number; article 4 (Persons declared *non grata*) would become article 9; article 7 (on official communications) would become article 10.

In the case of two articles relating to precedence, article 9 would become article 11 and article 10 would become article 12. Article 11 (Commencement of the functions of a mission) would become article 13, and article 12 (End of the functions) would become article 14; article 13 (Seat of the special mission) would become article 15; article 14 (Nationality of the members of the special mission) would become article 16.

Lastly, article 15 on the right to use the emblem of the sending State would become article 17.

Article 19

Paragraph 3. The words "by the organs of the receiving State" might be deleted; they do not appear either in article 22 of the Vienna Convention on Diplomatic Relations or in article 31 of the Vienna Convention on Consular Relations. Furthermore, the term used should be "measure of execution".

Article 22

Paragraph 1. I. With regard to wireless communications, the article provides that the special mission shall be entitled to send messages in code or cipher. But article 18 of the Telegraph Regulations annexed to the 1959 Geneva International Telecommunication Convention states:

"The sender of a telegram in secret language must produce the code from which the text or part of the text or the signature of the telegram is compiled if the office of origin or the Administration to which this office belongs asks him for it. This provision should not apply to Government telegrams."^h

The only way to reconcile the provisions of this paragraph relating to secret messages with the provisions of the international Conventions relating to the telegraph service would be for special missions to transmit such messages as Government telegrams.

However, annex 3 of the Geneva International Telecommunication Convention gives a complete list of the persons authorized to send Government telegrams and it refers only to diplomatic or consular agents.

In short, in the present state of international conventional law, special missions would have to be authorized by their diplomatic or consular posts to hand in Government telegrams bearing the seal or stamp of the authority sending them.

^h International Telecommunication Union, Telegraph Regulations (Geneva Revision, 1958).

If there is no such post the problem remains unsolved. This question might well be raised when the time comes to revise the International Telecommunication Convention.

II. With regard to wireless transmitters, it would be desirable to amend the last sentence of the present paragraph to read as follows:

“However, the special mission may install and use a wireless transmitter or any means of communication to be connected to the public network only with the consent of the receiving State.”

There are separate wireless telephone devices which can be linked to the public telephone network: if these devices are not in conformity with those approved by the competent technical services, they may cause disturbance in the network.

Paragraph 2. With regard to the postal service, it should be borne in mind that the Universal Postal Convention¹ does not make provision for any special treatment of diplomatic bags from the point of view of rates. Some postal unions covering a limited area consent to carry such bags post-free, but this is solely because special reciprocal arrangements have been made; all proposals so far submitted for including a provision for their carriage post-free in the Universal Convention have been rejected.

As Belgium does not participate in an arrangement for the post-free carriage of diplomatic bags, this mail is subject to the ordinary postal rates.

Article 23

The Belgian view is that which it upheld in connexion with article 23 of the Vienna Convention on Diplomatic Relations, namely that the head of the mission is exempt from dues and taxes in respect of the premises of the mission only if he has acquired them in his capacity as head of the special mission and with a view to the performance of the functions of the mission. Accordingly, the words “in his capacity as such” should be inserted after “head of the special mission”.

Article 24

The Belgian Government is of the opinion that members of missions should be granted only a personal inviolability limited to the performance of their functions.

Article 25

Paragraph 2. It would be as well to introduce, as in article 30 of the Vienna Convention on Diplomatic Relations, a proviso regarding measures of execution on property in cases where immunity from civil and administrative jurisdiction does not apply, and accordingly to begin the paragraph with the words: “Except as provided in article 26, paragraph 4. . .”

Article 31

Paragraph 1. With regard to sub-paragraph (b), the word “articles” is too vague and is inadequate. The Belgian Government is prepared to grant exemption from customs duties solely in the case of personal effects and baggage.

Article 33

No reference is made to article 28 concerning social security. The following should therefore be added: “as well as the provisions of article 28 on social security”.

GENERAL REMARK: ARTICLES 31, 32, 33, 34

There is no reason to refer in the body of these articles to nationality and permanent residence or, as in article 31, to the

family. These situations are regulated in articles 35 and 36 of the draft convention.

Article 35

Paragraph 1. The paragraph refers to articles 24 to 31, including article 29; but it is hard to see how a member of the family can enjoy tax exemption on income attaching to functions with the special mission.

Paragraph 2. This paragraph refers to article 32, which itself refers back to the same articles; the comment on paragraph 1 therefore applies equally to this paragraph.

The drafting of this paragraph does not seem adequate; it would be clearer to word it: “Members of the families of the administrative and technical staff of the special mission who are authorized to accompany it shall enjoy the privileges and immunities referred to in article 32 except when they are nationals of or permanently resident in the receiving State.”

An anomaly, which in fact exists in article 37, paragraph 1 of the Vienna Convention on Diplomatic Relations, but was corrected in article 71, paragraph 2 of the Vienna Convention on Consular Relations, should be pointed out. If a member of the mission is a national or permanent resident of the receiving State, he loses his immunities; taking the text literally, the members of his family who are not either nationals or permanent residents would enjoy the immunities.

Article 36

Paragraph 1. The word “quo” in the eighth line of the French text should be placed before the words “de l'immunité”. This drafting error, which appeared in article 38, paragraph 1 of the Vienna Convention on Diplomatic Relations, was in fact corrected in article 71, paragraph 1 of the Vienna Convention on Consular Relations.

Article 37

Paragraph 1. The word “organ” in the seventh line should be replaced by some more neutral word such as “authority”.

Paragraph 2. In the fifth line of the French text “qu'il” should read “qui lui”.

Article 39

Paragraph 4. It would be better to say “soit dans la demande de visa”, as that wording would bring out better the obligation to inform at the time that the visa application is made.

Article 41

At the end, it would be advisable to use a broader and less controversial listing, for example “such body or person as may be agreed”.

If the titles of the articles are retained, the word “authority” should be substituted for “organ”.

Article 42

The prohibition against practising any professional or commercial activity would be better rendered by the expression “shall not carry on”, as in article 57 of the Vienna Convention on Consular Relations of 24 April 1963.

In addition, the article should be supplemented by provisions similar to those in paragraph 2 of the aforesaid article 57.

Article 44

This article deals only with the action to be taken when a special mission ceases to function.

Accordingly, paragraph 2 would be better placed in article 12. In addition, the word “automatically” in that paragraph should be replaced by “*ipso facto*”. Lastly, the words “but each of the two States may terminate the special mission” would become superfluous.

¹ United Nations, *Treaty Series*, vol. 364, p. 3.

C. COMMENTS ON THE OTHER DECISIONS⁸, SUGGESTIONS
AND OBSERVATIONS OF THE COMMISSION

With regard to the matters raised in paragraphs 46 to 50 of the observations by the International Law Commission,¹ the Belgian Government wishes to submit the following comments:

(1) The Belgian Government agrees with the Commission that no provision on non-discrimination should be included in the draft, as special missions are so diverse.

(2) As to the question whether the draft should contain a provision on the relationship between it and other international agreements, two points should be singled out:

(a) If the status of special missions to conferences and congresses convened both by States and by international organizations is eventually covered by this draft convention, the convention should stipulate that it does not prejudice agreements relating to international organizations in so far as they regulate the problems contemplated in the draft;

(b) More generally, the Belgian Government has no objection to the inclusion in the draft of an article similar to article 73 of the Vienna Convention on Consular Relations.

(3) The Belgian Government believes that there should be a provision on reciprocity in the application of this draft.

(4) Lastly, it is hard to conceive that a special mission should receive better treatment than the permanent diplomatic mission of the same nationality established in the receiving State. Privileges and immunities should be granted to a special mission only to the extent to which they are applied in favour of the permanent diplomatic mission of the same nationality, unless otherwise mutually agreed between the States concerned.

4. Canada

Transmitted by a letter of 6 March 1967 from the Permanent Representative to the United Nations

[Original: English]

The Canadian Government wishes first of all to congratulate the International Law Commission of the United Nations on the work it has done on special missions. The draft convention which it has produced so far indubitably signifies an appreciable progress in efforts to codify and develop international law.

The comments of the Canadian Government follow below. They are divided into two parts: A, remarks of a general character; B, observations on particular articles of the draft.

A. GENERAL REMARKS

While expressing general agreement with the principles and rules embodied in the present draft articles, the Canadian Government is of the view that the International Law Commission should not go too far in assimilating the status of special missions to that of permanent missions. It is opposed to the undue extension of privileges and immunities which certain of the draft articles now appear to confer. In its view, the grant of such privileges and immunities should be strictly controlled by considerations of functional necessity and should be limited to the minimum required to ensure the efficient discharge of the duties entrusted to special missions. The following comments have consequently been set out in such a way as to emphasize a somewhat conservative approach to the status to be accorded to special missions. Suggestions have been made to that end under the articles which are considered to be too liberal, with the intention that they be brought closer to Canadian views. However, with regard to so-called High-Level Special Missions, it is the view of the Cana-

dian Government that such missions should receive a more generous treatment, in respect of both privileges and immunities, than those of a more routine character.

B. OBSERVATIONS ON PARTICULAR ARTICLES IN THE DRAFT

Article 4

It would perhaps be desirable to establish at least some maximum duration to the period following which persons declared *personae non gratae* should have left the receiving country. It is noted that the separate question of what might happen if such a person were to stay on in the receiving country is not covered by article 4. Perhaps this should be dealt with as well.

Article 17

This article appears to be too vague. There is obviously some onus on the receiving State to assist special missions in finding accommodation, especially where there is no resident mission nearby.

It is the Canadian view that, logically, this article should follow articles 17-21 (which specify some of the facilities intended) and that it should be reworded either by referring to "all other facilities" or by specifying those other facilities.

Article 19

This article appears to go too far in trying to uphold the inviolability of the offices of the special mission. The qualifications contained in article 31 of the Vienna Consular Convention for entry in the event of fire should be added. The relevant provisions of article 31, paragraph 2, of the 1963 Vienna Convention read as follows: "Such consent may, however, be assumed in case of fire or other disaster requiring prompt protective action".

Article 24

A central problem in respect to this article is whether any of the members of a special mission should enjoy personal inviolability, which, in the Vienna context, has come to mean both special protection from *vis injusta* and immunity from *vis justa*, i.e., from arrest and detention in respect of personal acts. It is considered that special protection in the first case is warranted in all cases, i.e., that the international responsibility of the State is involved if it has failed to take reasonable precautions. As far as concerns the second meaning of the term, however, it would be the Canadian inclination that in the draft it should be denied to special missions, since it is equivalent to a virtual immunity from criminal jurisdiction and is thus not a necessary consequence of an immunity which Canada considers should be restricted to cover only official acts by public political agents.

Should it be considered by a majority of the Commission that there should be some safeguard from preventive arrest, although not from detention in execution of a sentence, a compromise formula could probably be based on that which was adopted in the case of consular personnel. It is expressed in article 41 of the Vienna Convention on consular relations as follows:

"Consular officers shall not be liable to arrest or detention preceding trial, except in case of grave crime and pursuant to a decision by the competent judicial authority. . . Except in the case specified in paragraph 1 of this article, consular officers shall not be committed to prison or liable to any other form of restriction on their personal freedom save in execution of a judicial decision of final effect."

Article 25

If one starts from the view that, in principle, no member of a special mission should be assimilated to a diplomatic agent, the

¹ *Yearbook of the International Law Commission, 1965*, vol. II, p. 191.

import of the article seems somewhat excessive. It is questionable whether article 24 would not be sufficient, given that it seems rather unrealistic to ask for the special protection of the receiving State over residences which will usually be in hotel rooms: this appears to go beyond the standard requirement that the receiving State should take reasonable precautions. Moreover, even if it is to be retained in its present form, Canada believes this inviolability of the private accommodation should be subject to the same qualification regarding fire, etc. as is mentioned under our comment on article 19.

Article 26

The Canadian Government is of the opinion that this article goes too far in broadening the scope of immunities enjoyed by the members and staff of special missions. Moreover, the provisions of this article seem to spell out in detail those provided by the first two sentences of article 24. Consideration should therefore be given to combining these aspects of the two articles in a single article.

Article 30

As drafted, this article appears acceptable. However the Canadian Government does not agree with paragraph 2 (b) of the commentary, which would confer on locally recruited staff the exemptions from personal services and contributions.

Article 31

This article provides for exemption from customs duties and inspection of not only articles for the official use of the special mission but also of articles for the personal use of the head and members of the special mission, of the members of its diplomatic staff, or of the members of their family who accompany them.

It also provides for exemption from customs duties and inspection of the personal baggage of the head and members of the special mission and of the members of its diplomatic staff, unless there are serious grounds for presuming that it contains articles not covered by the exemptions, or articles the import or export of which is prohibited by the law or controlled by the quarantine regulations of the receiving State. Such inspection shall be conducted only in the presence of the person concerned, of his authorized representative, or of a representative of the permanent diplomatic mission of the sending State.

It is arguable that such exemption should be removed from this article because it should remain a matter of courtesy and reciprocity.

Article 41

While there is no objection to this article itself, Canada considers that emphasis should be placed in the official commentary, on the need for the prior agreement of the receiving State, at least in principle, to the communication by the special mission with other of its own organs than its Foreign Ministry.

Article 42

This article as drafted is restricted to precluding activities for personal profit and does not cover members of special missions who, on behalf of the sending State, might carry on activities not consonant with the mission's terms of reference. Perhaps it would be desirable to relate such activities, on behalf of the sending State, to the provision of paragraph 1 of article 40.

Article 44

This article perhaps ought to be broadened to cover specifically the routine conclusion of functions due to the fulfilment of the objects of a special mission.

5. Chile

Transmitted by a letter of 27 March 1967 from the Permanent Representative to the United Nations

[Original: Spanish]

A. GENERAL

1. For the reasons adduced in the International Law Commission it would appear that the draft articles should take the form of a separate convention, independent of the Vienna Conventions on Diplomatic and Consular Relations.

In order to emphasize this independence, specific references to the Vienna Conventions should be avoided. However, unity of form should be preserved through the use of the same terminology and of analogous definitions wherever possible.

2. The Commission was correct in preparing a draft which includes both missions carrying out political tasks and missions of a technical character.

3. The draft must be as flexible as possible. In view of the widely recognized importance of bilateral agreements on special missions, it should not be unduly rigid since this might make it difficult to adapt the provisions to specific circumstances. It should therefore not restrict too greatly the possibility of States entering into new bilateral agreements, even if the special mission in question might, under such agreements, be accorded juridical treatment in some respects less favourable than that provided for in the draft.

Hence the draft should include a minimum of rules of *jus cogens*, States being free to depart from the provisions which do not fall into that category and which would be regarded as residual. These latter would be applicable only in the absence of an express provision agreed to by the parties. The Commission's decision to delete article 40, paragraph 2, of the Rapporteur's preliminary draft^{*} is therefore correct.

Consequently, and in order to emphasize all of the foregoing, the draft should include among its final clauses a provision similar to that suggested by Mr. Rosenne at the 819th meeting on 7 July 1965 (art. 16 *bis*, paras. 1 and 2), with the stipulation that it would be applicable to the entire Convention and not just to Part II, on Facilities, Privileges and Immunities. It would thus be made clear that the draft regulates the activities of all special missions whether political or technical, and whatever their level, save as expressly provided to the contrary.

B. THE ARTICLES

Article 1

(a) The value of defining a special mission in terms of its specific task will appear to be doubtful, for two reasons. On the one hand, there are political missions whose tasks are general rather than "specific" and have not been defined in advance but are merely exploratory, and there are missions whose tasks are gradually broadened as negotiations proceed. On the other hand, there are missions which have a specific task which are established permanently in the receiving State and which are therefore not covered by the rules set forth in this draft. For these reasons it would seem preferable to define the special mission solely in terms of the temporary nature of its functions. In other words, the task of a special mission may be more or less specific, general, or even undefined in advance, but in all cases the use of the term presupposes that the mission will remain in the receiving State temporarily;

(b) Paragraph 2 should include a provision to the effect that special missions may be sent or received regardless of whether the Governments concerned recognize each other.

^{*} *Yearbook of the International Law Commission, 1965, vol. II, p. 141.*

Article 2

It is of the greatest practical importance that a clear distinction should be drawn between the powers of the special mission and those of the permanent mission since this will affect the validity of the special mission's acts. It would not appear to be desirable that the draft should lay down a rigid rule, but there should be some criterion that would serve as a guideline in every case.

As permanent missions frequently co-operate in the discharge of the tasks assigned to special missions, the draft should not, as a general principle, exclude such participation. It could establish a flexible criterion drafted along the following lines: "The competence of the special mission, as distinct from that of the permanent mission, shall be determined by its credentials; if its credentials are silent on this point, the competence of the permanent mission shall not be understood to be excluded."

Article 7

The term "normally" suggests a practice, to which, as such, there may be exceptions, but it can hardly be understood to enunciate a rule of law. This same idea should be expressed as follows: "Save as otherwise provided in its credentials, only the head of the mission shall be . . .", or: "Save as otherwise determined by the sending State, only the head of the mission. . ."

Article 8

Notification seems to be unnecessary in the case of paragraph 1 (d) (e.g., typists, chauffeurs), unless such persons are to enjoy diplomatic privileges and immunities, in which case they should be included among the administrative and technical staff of the mission. This is the criterion reflected in the Vienna Convention on Diplomatic Relations, which requires notification only in the case of persons "entitled to privileges and immunities" (art. 10, para. 1 (d)).

Article 9

Paragraph 1. The alphabetical order used in the official diplomatic list of the receiving State cannot be followed, because it would not be applicable to cases in which States do not have diplomatic or consular relations with each other. To give greater precision to the rule laid down in paragraph 1 it should suffice to add the words "in the language of the receiving State" after the words "alphabetical order of the names of the States".

Article 13

Paragraph 1. This provision seems to be self-contradictory, for it would be applied "in the absence of prior agreement", i.e., in the absence of consent, in which case it would be pointless to require again the consent which (to judge by the words "proposed by the receiving State and approved by the sending State") could not be obtained in advance.

It would be more practical to state that "save as agreed to the contrary," (whether or not such agreement is prior) "the special mission shall have its seat at the place in which it is to discharge its task"; this is, in effect, the criterion followed in paragraph 2 for missions whose tasks involve travel to various places. If this criterion should be unacceptable, it could be indicated that, save as agreed to the contrary, the mission should have its seat at the place in which the organ referred to in article 41 of the draft is established.

The considerations set forth in paragraph (4) of the commentary underline the need to include in the draft a more specific provision than paragraph 1 as it stands.

Paragraph 2. To facilitate official contacts between the organ referred to in article 41 and a mission whose tasks involve travel, it would be advisable to add that one of the seats should be con-

sidered the principal seat and should be decided upon in the manner indicated in article 13, paragraph 1.

Article 14

Paragraph 1 calls for the following observations:

(a) The words "should in principle be of . . .", which are also used in article 8 of the Vienna Convention on Diplomatic Relations, are vague and do not clearly enunciate a rule of law but simply state what is desirable. The same idea could be expressed more accurately as follows:

"Article 14, paragraph 1. The head and the members. . . may be of any nationality.

"Paragraph 2. However, nationals of the receiving State. . ."; (The rest of the article would remain unchanged.)

(b) If the above amendment is not adopted and the present text of paragraph 1 is retained, this provision will be far more rigid than article 8 of the Vienna Convention on Diplomatic Relations, because the latter provides only that the diplomatic staff should in principle be of the nationality of the sending State, whereas the text under consideration extends that provision to administrative and technical staff. On this point the less rigid criterion adopted in the Convention on Diplomatic Relations should be applied;

(c) If the amendment to article 36 which is proposed below is accepted, article 14 should be amended to the same effect.

Article 16

In order to clarify beyond all possibility of doubt the point dealt with in paragraph (6) of the commentary, a provision should be added to this article stating that the third State may at any time notify the special mission that it is withdrawing its hospitality, without stating a reason and even if the conditions which it has imposed have not been violated.

Article 19

Paragraph 1. It should be made clear that the head of the permanent mission may authorize the local authorities to enter the premises of the special mission only when those premises are situated in a building normally occupied by the permanent mission. Such authorization should be granted only by the head of the special mission when the premises of his mission are situated in premises other than those occupied by the permanent mission. Otherwise, the special mission would, in effect, be subordinated to the permanent mission.

Paragraph 2. In order that the function of protection and prevention may be adequately discharged, the paragraph should state that the special mission must inform the receiving State what premises it occupies by means of suitable identification. This problem does not arise when the special mission is established in the premises of the permanent mission, but it may arise if the special mission has its offices on certain floors of a hotel or in different places in the same city. In the absence of such notification, the receiving State might be in a position to claim a lesser degree of responsibility for failure to fulfil this duty, on the ground that it was unaware of the actual circumstances.

Article 27

This provision should follow article 36, once the status of all the persons referred to in article 36, paragraph 1, has been clarified.

Article 28

Paragraph 2. It may happen that persons who are nationals of the sending State but who are permanently resident in the receiving State are members of the diplomatic staff of the special mission. In such a case they should be covered by the provisions of paragraph 1 of this article. Paragraph 2 (a) should therefore

be amended to read: "... to nationals or of the receiving State or aliens domiciled there, unless the latter are members of the diplomatic staff of the mission."

Article 36

We find the principle embodied in this article correct, with one reservation. Newly established States or States which have a small population and lack sufficient technicians or experts may find it imperative to include among the administrative and technical staff of special missions some of their nationals who are resident in the receiving State. In this case, we see no reason to treat them in a manner which would discriminate between them and the other members of the administrative and technical staff of the same mission who are not resident in the receiving State. Therefore, paragraph 1 should be amended to include all members of the administrative and technical staff, wherever they reside.

In return for this extension of privileges and immunities to certain persons who are residents of the receiving State, the receiving State must be given an additional safeguard. For this purpose, it should suffice to add to article 14 a provision requiring the consent of the receiving State to the inclusion among the diplomatic or administrative and technical staff of special missions of nationals of the sending State who are permanently resident in the receiving State.

Article 37

Paragraph 2. The exact moment at which privileges and immunities cease should be determined with the greatest possible exactitude. The phrase "on expiry of a reasonable period", which has simply been copied from article 39, paragraph 2, of the Vienna Convention on Diplomatic Relations, is extremely vague and could give rise to serious problems if the member of the mission remained in the receiving State after his functions had come to an end. In the Vienna Convention of 1961 the problem was solved by the addition in Spanish of the words "*que le haya concedido*" [the corresponding words in the English text are "in which to do so"] after the words "reasonable period". Article 37 of the draft should include this same clarification or another to the same effect, so that the duration of the "reasonable period" may be clearly indicated.

Article 39

Paragraph 4. Any reference to the ways in which the third State may be informed of the transit of the mission should be eliminated, for any omission might be interpreted to exclude channels not expressly mentioned. The relevant passage should read: "... only if it has been informed in advance of the transit of the special mission, and has raised no objection to it".

Article 41

In view of its content, this article should be included in part I (General Rules), immediately following article 11.

We have no observations to make on the remaining articles.

6. Czechoslovakia

Transmitted by a note verbale of 29 April 1966 from the Permanent Representative to the United Nations

[Original: English]

1. The Government of the Czechoslovak Socialist Republic shares the views expressed by a number of members of the International Law Commission and likewise contained in the report of the Special Rapporteur, namely that the term special missions covers a great number of State organs for international relations which are entrusted with tasks of most diverse character. It also shares the view that the tasks and legal status of special missions (except delegations to international conferences and congresses

as well as delegations and representatives of international organizations) should be regulated within the general codification of diplomatic law by one convention. At the same time, however, it is of the opinion that in view of the fundamental difference in the character of the individual special missions it would be necessary to differentiate their legal status according to the functions assumed by them with the agreement of the participating States. (To characterize the individual categories of special missions would be undoubtedly very difficult and moreover they might be outdated by the relatively rapid development.) Proceeding from this fact the Government of the Czechoslovak Socialist Republic is inclined to believe that in the case of special missions of predominantly technical and administrative character privileges and immunities of more limited character emanating from the theory of functional necessity would correspond better to the state of international law and to the needs of States. Therefore, it suggests that it might be purposeful that the Commission when definitively formulating the draft convention should proceed, e.g., from a division of special missions at least into two categories. The first category might include special missions of political character and the second one special missions of predominantly technical and administrative character. The formulation of provisions concerning special missions of political character should proceed from the Vienna Convention on Diplomatic Relations. However, special missions of predominantly technical and administrative character should be granted only such privileges and immunities which are necessary for expeditious and efficient performance of their tasks.

2. The Government of the Czechoslovak Socialist Republic agrees that the status of special missions at the so-called high level¹ should be regulated in harmony with the prevailing customs and usages. In view of the fact that the proposed regulation is almost identical for all the four categories of special missions of this kind, it seems useful to embody the identical provisions contained in draft rules 2-5 in a general rule covering all the four categories and to stipulate exceptions for the individual categories in a special rule whereby the draft would be substantially shorter. The Government of the Czechoslovak Socialist Republic holds that the draft rules will be further elaborated.

The Government of the Czechoslovak Socialist Republic has been following the International Law Commission's activities in the field of the codification and progressive development of international law concerning special missions which is to be embodied in an international convention and appreciates its present results in this field. In view of the fact that the first version of the draft articles is being considered and that the draft is not so far complete the Government of the Czechoslovak Socialist Republic will submit possible further observations and proposals at an appropriate time.

7. Finland

Transmitted by a note verbale of 2 May 1967 from the Permanent Representative to the United Nations

[Original: English]

The use of special missions is in fact the earliest form of diplomacy the traditions of which go back to a remote past, to a time when there were no permanent missions. In international politics of today the use of special missions is again becoming more frequent as co-operation between States extends to new fields and the scope and activities of international organizations increase. Therefore it is most important that the principles of international law as regards special missions be codified, made more explicit, and completed by such new dispositions as are considered necessary. In the opinion of the Finnish Government, the draft prepared

¹ See foot-note g above.

to this end by the International Law Commission and approved in a preliminary way by the Commission at its sixteenth and seventeenth sessions is essentially to the purpose, and a final text should be drawn up on these lines as soon as possible. The Finnish Government suggest, however, that the following points be considered when giving the draft the finishing touches.

As special missions are increasingly used their character and composition are becoming variable. Prominent delegations negotiating important political matters are paralleled by special missions on an inferior level which may be diplomatic missions or working groups sent out to perform a purely technical task. This category includes delegations to conferences and the representatives of States on the mixed committees and joint commissions frequent in international co-operation of today.

The concept, if it is not to be restricted, should evidently also include single officials who will more or less regularly represent their country at meetings or discussions with organs functioning in their particular line of activity in some neighbour State.

The Commission has brought the dispositions contained in the draft to bear on temporary special missions only. This means that there would still be no general provisions to specify the status and conditions of functioning of such special missions of a permanent character as are not covered by the provisions of the Vienna Convention on Diplomatic Relations; nor would the rules suggested include State representatives on various permanent mixed committees and joint commissions. Furthermore, it is established by the International Law Commission's report on the second part of the Commission's seventeenth session and on its eighteenth session that government delegations to various congresses and conferences would not be within the scope of the draft articles proposed.

The Finnish Government take the view that it is questionable whether the above restrictions, which would leave a considerable group of special missions in a vague position as to international law, are necessary and to the purpose. On the other hand, the restrictions under reference indicate an endeavour, useful in itself, to define the concept of the special mission. For it is evident that, as the use of such missions will increase and their purposes multiply, the concept is no longer neatly outlined. Moreover, one might ask expressly whether all the dispositions contained in the International Law Commission's draft are of a nature to cover all the various categories of special missions. This refers particularly to the facilities, privileges and immunities accorded to the missions and to persons attached to these. The Commission, it is true, suggests that the so-called high-level special missions form a group apart and provides for this group rules that would somewhat differ from those applied to special missions in general, but even so there would hardly be adequate reasons to grant the fairly extensive facilities, privileges and immunities specified in the draft to each of the various single negotiators and delegations making up the "general group" of special missions. The Finnish Government would advocate a further consideration of the Commission's draft with a view to establishing whether special missions on an inferior level, appointed to perform tasks of a mainly technical nature, could be detached, particularly as regards facilities, privileges and immunities, from the rest of the delegations within the concept under reference.

The International Law Commission has not yet taken a definite view of the fact whether it should recommend that the articles concerning special missions be attached as an additional record to the 1961 Vienna Convention on Diplomatic Relations or whether a separate convention in the matter should be aimed at. The Commission, however, has prepared its recommendation to suit the second alternative. Nevertheless, the draft, particularly its part I, contains a great many dispositions which in view of an eventual convention might be considered to go too much in detail or else to be more appropriate in a "code" to serve for the guidance of the States than in an international convention binding them.

In a general way, the articles contained in the draft should be cut down and the text condensed as much as possible. Furthermore, it would be useful to make clear and expressly to state in the text which articles, if any, contain items of law compulsory and binding on the States.

In addition to these general considerations, the Finnish Government will comment only on those articles of the draft which seem to require modification and amplification.

Articles 1 to 4 of the draft, which conform to general practice, seem to be to the purpose. Nevertheless, it would certainly be appropriate to insert at the beginning of the draft (as the International Law Commission seems to have intended to do) a special introductory article in which the main concepts are defined. As for article 5, which deals with the sending of the same special mission to more than one State, it would be useful to limit it to concern the simultaneous accrediting of one special mission to several countries; for the fact that the mission has previously functioned in another country is hardly relevant in this connexion. In any case, the last sentence of the article seems superfluous since it is established by article 1 of the draft that the sending of a special mission requires the consent of the receiving State.

It would seem appropriate to complete article 7 of the draft by adding a provision that the head of a special mission may authorize a member of the mission to perform particular acts on behalf of the mission and to issue and receive official communications. In this context, a reference may be made to article 8, paragraph 2 of which states that certain official notifications may be communicated by members of the mission's staff.

Paragraph 2 of article 9 (precedence) could perhaps be made more explicit by adding a statement that it concerns the precedence of the members of one special mission. The need to specify this arises from the fact that the previous paragraph deals with precedence among several special missions which carry out a common task.

Article 14, concerning the nationality of persons attached to special missions, may seem too strict. Under its paragraph 3, the receiving State may reserve the right not to approve as members of a special mission or of its staff nationals of a third State who are not also nationals of the sending State. Both of the Vienna Conventions, it is true, contain a similar provision, which explains its presence in the article under reference.

In part II of the draft (articles 17-44), concerned with facilities, privileges and immunities of the special missions, the system laid down by the above-mentioned Vienna Conventions is fairly closely followed. The leading principle that the functioning of the mission must be ensured is extended to special missions in addition to which some aspects of the theory of representation have been applied. In a general way the Commission's recommendation grants special missions, their members and staff a juridical position equal to that of permanent missions and persons fulfilling analogous functions in these. This means that in certain instances the juridical position of the persons under reference is more efficiently ensured than that of career consuls and consular officials. In view of the character of the special missions, particularly their temporariness and the varying nature of their tasks, it has been felt that the privileges and facilities granted them and their staffs should be more extensive, or more restricted as the case may be, than those enjoyed by permanent missions and persons attached to these. This proposition seems to require further consideration, with due regard to the above-mentioned views of different types of special missions.

As regards article 22 (freedom of communication), opinions have varied as to whether special missions should be entitled to use code or cipher telegrams and to designate persons not attached to the mission as *ad hoc* couriers. The affirmative conclusion suggested in the draft seems judicious. Also, the courier bags should enjoy unconditional inviolability; in this respect, the

principle adopted would be that of the Vienna Convention on Diplomatic Relations, not that of the Convention on Consular Relations.

The juridical position of members of the families of persons attached to special missions is specified in article 35 of the recommendation, partly in accordance with the analogous article (37) of the Vienna Convention on Diplomatic Relations. Members of the families of special mission staff would, however, be entitled to accompany the head of the family to the receiving State only if authorized by the latter to do so. This provision would seem too strict in view of the fact that some special missions will carry on their activities for a considerable period of time.

With regard to the rules proposed for so-called high-level special missions,^m it is evident that the latter cannot in every respect be placed on a par with other special missions, wherefore particular rules for them are appropriate. Yet the necessity of sub-paragraph (a) of rules 2, 3 and 4 seems questionable. The fact mentioned in the sub-paragraph may be ascertained in advance by taking the matter up at the consultations preceding the sending of a high-level special mission. It appears from rules 4 and 5 that when a special mission is led by the Minister for Foreign Affairs or by a Cabinet Minister other than the head of Government he may have his personal suite, the members of which shall be treated as diplomatic staff. An analogous provision is missing from rule 3 which deals with the juridical position of the head of Government.

It would seem that the rules concerning high-level special missions might be a good deal simplified. Rules 2 to 5 could perhaps be condensed into one enumerating exceptions and specifying the category of high-level special mission to which each exception refers. Still, the most convenient way might be to complete the articles of the recommendation concerning special missions by adding particular rules for high-level special missions where needed.

8. Gabon

Transmitted by a letter of 8 March 1967 from the Minister for Foreign Affairs

[Original: French]

A. GENERAL REMARKS

Many African States repeatedly have recourse among themselves to special missions of a political character, in particular, to transmit written or verbal messages from the head of the sending State or its Government, as well as to missions of a technical character, which, because of the growing interdependence in technical matters, tend to increase rapidly in number.

The Gabonese Government accordingly has no doubt that the codification of that topic undertaken by the experts on the International Law Commission will be useful, regardless of the kind of international legal instrument which it produces, and even if that instrument in fact is merely a concise guide-book of procedures which the developing States may use.

(1) *Freedom to derogate from the provisions of the proposed instrument.* The practice concerning special missions appears to be difficult to inventory and *a fortiori* difficult to codify; hence, the wisest view, and the one which seems to be accepted, is that provisions of the draft articles on special missions, in principle, should be rules from which States are competent to derogate by agreement between themselves.

This basic principle should be clearly stated at the beginning of the document, it being understood that the future is not being prejudged and that time, experience, and court decisions may in due course modify the present situation.

^m See foot-note g above.

(2) *The provisions* from which States signing or acceding to the instrument may not derogate would therefore be exceptions, and would be mentioned as such. Such provisions might include, *inter alia*, the articles on:

(a) Inviolability of archives and documents of the special mission;

(b) Inviolability of the premises of the special mission (unless the head of the permanent diplomatic mission of the sending State grants permission to enter them);

(c) Personal inviolability limited to the performance of functions;

(d) Freedom of communication.

The provisions covering inviolability of the private accommodation of the head of the special mission and of the other members of the mission properly so-called (to the exclusion, of course, of the administrative, technical and service staff) might be added to that list, although that is not indispensable since inviolability has already been provided for the premises of the mission (which, moreover, are often combined with the private accommodation of the head and members of the mission) and for the persons concerned.

We should also remember that the inviolability of the premises of a foreign mission or of the private accommodation of its members raises the problem of the right of asylum—a problem so delicate and controversial that it was not mentioned in the Vienna Convention.

In that connexion, it might be advisable to stipulate, in any event, that not only “the premises of the special mission” but also “the private accommodation of all its staff” must not be used in any manner incompatible with the functions of the special mission as laid down in these articles or by other rules of general international law or by any special agreements in force between the sending and the receiving State (draft article 40).

(3) On the other hand, freedom to derogate from the rules established by the instrument on special missions, except where expressly otherwise provided, would make it possible to solve, at least provisionally, the most delicate problems raised by the proposed codification.

That applies, in particular, to the question of *the grant of privileges and immunities* (diplomatic) to the heads and members of special missions, which are increasing in number and growing more diverse and very often are only of a technical character. States should not, through codification, become involved in “inflation” in that respect.

The solution adopted by the International Law Commission, namely, to leave it to the States concerned to restrict the grant of certain privileges or immunities (excluding peremptory provisions) to a given mission or missions on the ground that those privileges or immunities are functionally justified in the cases in question, seems all the more necessary in that it is proving impossible, in an international legal instrument, to divide special missions into distinct and well-defined categories according to whether they are, for example, of a political or of a technical character.

The proposed text should also specify, in its preamble, that it is not intended to assimilate “special missions” to “permanent diplomatic missions”, particularly in respect of privileges and immunities, the grant of which should be based entirely on functional needs.

(4) The question of *discrimination* raises a similar problem: although the prohibition of discrimination may prove useful, it cannot be laid down as an absolute rule in the case of special missions, having regard to their diversity and their *ad hoc* character which at times may lead the receiving State to apply to one of them treatment adapted to the circumstances.

The only purpose of prohibiting discrimination appears to be to prevent a delegation of one State from being subjected, under

protest, to less advantageous treatment than that accorded to similar delegations *as a whole*. There is nothing, however, to prevent two States from agreeing between themselves to apply to a *given* special mission or category of special missions, unilaterally or mutually, less advantageous or more advantageous treatment (and, in the latter case, for specific and valid reasons) than that which similar foreign missions *as a whole* enjoy (provisions such as those of article 47 of the Vienna Convention on Diplomatic Relations).

(5) As to the form which the juridical instrument on special missions should take, it would follow from the solution adopted with respect to the peremptory character of the provisions of the text that it should remain, at least for the time being, independent of the Vienna Convention of 18 April 1961, which is based on a contrary principle and which will probably have different effects in international law.

The solution of an additional protocol to that Convention should therefore be ruled out.

In that connexion, the International Law Commission's careful avoidance of the slightest reference to that Convention in its draft articles seems very well-advised. Such references are found only in the commentaries.

If the Vienna Convention should be referred to in a preamble placed at the beginning of the draft articles, that reference should be aimed primarily at stressing the wide divergence which exists, provisionally at least, between the two documents, so as not to weaken the effect and peremptory nature of the text referred to.

If such a reference was made, it would be even more necessary to add a provision based on article 73 of the Vienna Convention on Consular Relations, explaining that the rules laid down shall not affect other international agreements in force as between States parties to them, including the Convention on the Privileges and Immunities of the United Nations, the Vienna Convention on Diplomatic Relations, and the Vienna Convention on Consular Relations.

(6) On the other hand, in the preparation of the introductory article, which will contain valuable definitions of the expressions used in the document, an effort should be made to follow as closely as possible the terminology of the Vienna Convention of 18 April 1961.

(7) Concerning the *method of adoption* of the instrument on special missions, which will depend on its juridical content, the Gabonese Government wishes simply to indicate that if the instrument should include peremptory rules in respect of privileges and immunities, it would have to be in the form of an international treaty in order to take effect on Gabonese territory, since the accession of the Republic to the proposed instrument would have to be ratified by the head of the executive branch under authority of a law.

(8) The International Law Commission rightly decided that the annexing of special rules concerning *so-called high-level special missions*ⁿ was not essential. If the other view was adopted, the proposed provisions would have to be exhaustive and would have to deal also with the case of Vice-Presidents, Deputy Prime Ministers and Ministers of State, which would make the text even longer.

At the most, the case of the head of State who leads a national or governmental mission might be mentioned in general terms with an indication that it was, of course, a special case which entailed adjustments in accordance with the protocol in force in the receiving State for the treatment of heads of State considered as such.

(9) It seems that draft articles 1 to 16 (part I) dealing with the organization and functioning of special missions could be further condensed, whereas the articles dealing with facilities, privileges

and immunities (part II)—a subject in which precision was essential—could not.

B. OBSERVATIONS CONCERNING PARTICULAR DRAFT ARTICLES

Article 1

It might be useful to specify that the sending or reception of a special mission does not imply recognition by one State of another.

Article 6

The clause providing that in the absence of an express agreement as to size of a special mission, the receiving State may require that the size of the staff be kept within limits considered by it to be reasonable and normal, having regard to the tasks and to the needs of the special mission, seems entirely adequate.

Article 15

Authorization to display the flag and emblem of the sending State on "the means of transport of the mission", and not just on the means of transport of the head of the mission as is provided for permanent diplomatic missions, might lead to abuses.

Article 22

In connexion with freedom of communication, it might be advisable to specify that where the sending State has a permanent diplomatic representative in the receiving State, the official documents of the special mission should whenever possible be sent in that representative's bag. In that case, the use of a supplementary bag belonging to the special mission, for which its head is responsible, should be exceptional.

Article 31

Exemption of members of special missions from customs duties is one of the matters in which some discretion should be left, in one way or another, to the authorities of the receiving State.

9. Greece

Transmitted by letter of 3 April 1967 from the Deputy Permanent Representative to the United Nations

[Original: French]

The Greek Government wishes first of all to congratulate the International Law Commission on the valuable work it has done on the draft articles on special missions.

The Greek Government considers it desirable, as a matter of principle, for the question of special missions to be codified. It considers it necessary, however, to make reservations concerning, in particular, the excessive scope of the privileges and immunities granted to special missions and to their members and staff. It is of the opinion that such privileges and immunities should be granted only to the extent strictly necessary for the mission to carry out its task. It must oppose the extension to special missions, as provided in the draft articles of procedures provided for in the Vienna Convention on Diplomatic Relations.

Accordingly, and more specifically, the Greek Government submits the following comments:

1. It is unable to support the wording of articles 19, 22, 24, 25, 26, 29, 31, 33, 34, 35 and 39, which, in various respects, should provide for less extensive privileges and immunities than they now do.

2. Certain terms should be defined quite clearly, particularly such terms as "special mission", "members of a special mission" and "member of the staff of a mission". This is necessary in order that the field of application of the draft articles should be clear. Articles 1, 2 and 6, among others, should be clarified

ⁿ See foot-note g above.

in this regard. Thus, for example, the rank, purpose and duration of the special mission should be taken into consideration. In view of the strictly functional nature of the privileges and immunities, it is questionable whether a special mission with a limited technical task or a short-term special mission responsible for negotiating and signing a treaty really needs, in order to do its work, the privileges and immunities provided for in many of the draft articles (article 15, 18, 19, 20, 22, 23, 25, 28, 29, 30, 34, 42).

3. There should be special regulations for cases where the State sending a special mission has an embassy in the foreign country (the place of work of the special mission being in or near the town where the embassy is situated). The comments made in paragraph 2 above concerning the articles mentioned there would also be applicable here.

On the whole, therefore, the Greek Government is of the opinion that there will be more chance of success in codifying the question of special missions if the articles are not given too wide an application and if the privileges and immunities granted are kept within the limits strictly necessary for the work of the mission.

10. Guatemala

Transmitted by a letter of 16 May 1967 from the Permanent Representative to the United Nations

[Original: Spanish]

GENERAL COMMENTS

According to international practice, formal rules applicable to special missions have been laid down in each specific case, with due regard for their characteristics and the purposes they are designed to achieve. It would be somewhat difficult to draw up a set of rules governing every instance in which a special mission is sent. The International Law Commission itself recognized this difficulty and did not discuss the draft provisions concerning so-called high-level special missions.

We feel that a draft Convention such as that proposed should contain provisions which facilitate the operation of special missions and provide them solely and exclusively with the immunities and privileges strictly necessary for the fulfilment of their functions. In particular, it must be borne in mind that the time available to such special missions is generally limited and that they do not need permanent offices to carry out their responsibilities. They may use the premises of regular diplomatic missions, when they exist, and their members do not need to rent housing or to import furniture and other household effects. They will require a series of privileges which relate not to their personal convenience but rather to their legal status in the receiving State.

The draft articles do not contain a definition of a special mission. In studying a draft for the publication of a new law on diplomatic procedure in the Republic of Guatemala, the Legal Department of the Ministry of Foreign Affairs proposed the following definition of a special mission: "A special mission means the representation of an accredited State in a special and temporary manner". The phrase "for the performance of specific tasks", used in draft article 1 of the text adopted by the Commission, could be added to this proposed definition.

We suggest to the International Law Commission that the draft articles should include a definition of a special mission in the terms proposed above or in other terms which fulfil the same purpose.

COMMENTS ON SPECIFIC ARTICLES

Article 1

If it is agreed to include in the Convention a definition of a special mission, mention of "the performance of specific tasks" should be deleted. It is also suggested that the word

"acceptance" should be substituted for the word "consent". We offer no comments on article 1, paragraph 2, because we agree that the existence of diplomatic or consular relations is not a prerequisite for the sending and reception of special missions. However, the paragraph might state in addition that the acceptance of a special mission as between States which do not have diplomatic relations or whose diplomatic relations have been broken off does not imply the establishment or re-establishment of diplomatic relations.

Article 5

This article concerns the sending of the same special mission by one State to more than one State. The case may arise in which two or more States send the same special mission to another State. It is therefore suggested that the article should be divided into two paragraphs which make this difference clear and which establish the right of the receiving State to receive a mission appointed by two or more States.

Article 7

We suggest that in paragraph 1 the word "normally" should be deleted.

Article 8

It is suggested that paragraph 1 (a) should be worded as follows: "The composition of the special mission and of its staff, prior to its dispatch, and any subsequent changes."

Article 9

It is suggested that the words "in the language of the receiving State" should be added at the end of paragraph 1.

Article 11

We agree with the comments made by the Commission on the principle of non-discrimination but we feel that the text could be improved since it is a little confusing and uses unusual terminology. For example, it calls the permanent diplomatic mission a "regular" diplomatic mission.

Article 16

We suggest that a third paragraph should be added in order to make clear that the third State has the right to withdraw its authorization from missions at any time to enable them to fulfil another task on its own territory, without having to give explanations of its decision.

Article 17

This article as now drafted gives the impression that the expenses of the special mission must be borne by the receiving State. If this is the intention it should be made clear; otherwise, the article should be redrafted.

Article 19

The rights established in article 19, paragraph 3, are more extensive than those established in the Vienna Convention on Diplomatic Relations because the article also includes property as distinct from means of transport, the logical assumption being that such means of transport will not remain permanently on the premises of the mission.

Article 20

This article lays down that the archives and documents of the special mission shall be inviolable at any time and wherever they may be. However, instead of referring to the place where they are, the article should refer to the person or body guarding them or having custody of them, since it implies the existence of someone who can affirm that the archives and documents belong to a special mission.

Article 22

We suggest that in this article account should be taken of the international agreements at present in force. Paragraph 1 should mention the International Telecommunication Convention of Geneva of 1950 and its relevant regulations.⁹ The following paragraphs, which concern the official correspondence and the bag of the special mission, should take into account the provisions of the Convention concerning the Universal Postal Union.^p

Article 39

The obligation of a third State would exist only if such a third State is a party to the Convention. Transit authorization is not sufficient to make this article compulsory for a third State which is not a party to the Convention. Moreover, in allowing a special mission to pass through its territory, a third State which is not a party to the Convention may impose the conditions to which such an authorization is subject.

11. Israel

Transmitted by a note verbale of 24 April 1966 from the Ministry for Foreign Affairs

[Original: English]

1. In presenting these observations, the Ministry for Foreign Affairs wishes first to pay particular tribute to the outstanding work done by Professor Milan Bartoš, the Special Rapporteur, in drawing up his two Reports and in contributing so much to the Commission's work on the topic of Special Missions.

The Ministry for Foreign Affairs would also like to express its hope that the Commission will succeed in completing this topic before the expiration of the term of office of its present members.

2. The question of the final form in which the draft articles are to be couched will undoubtedly require careful consideration. An international convention on the lines of the 1961 Vienna Convention on Diplomatic Relations and the 1963 Vienna Convention on Consular Relations would be an achievement well worth striving for, yet it is felt that it may eventually prove difficult to achieve the codification of this topic by means of a convention drawn up in a conference of plenipotentiaries. It would therefore appear desirable for the Commission to explore any other possibilities that may suggest themselves.

3. It is hoped that it may be found possible, dealing as they do with a closely related subject, to bring the draft articles even more closely into line with the 1961 Vienna Convention (and, where appropriate, with the 1963 Vienna Convention), both with regard to the language used and the arrangement of articles.

4. With this object in mind, it would be most helpful if an article containing definitions of terms frequently used could be drawn up and embodied in the draft, giving those terms the same meanings as employed in the 1961 Vienna Convention, and, whenever possible, by making use of cross-references to the said Convention.

The definitions would probably include such terms as: special missions, head of special mission, members of special mission, staff (diplomatic, administrative and technical, service, personal), premises, etc.

5. It is believed that the draft articles would gain by being shortened, and that this could be achieved by such cross-references and by combining some articles.

Article 4

6. It is suggested to insert the words "as appropriate", between commas, after the word "shall" appearing in the first line of

⁹ International Telecommunication Union, *Telegraph Regulations* (Geneva Revision, 1958).

^p United Nations, *Treaty Series*, vol. 364, p. 3.

paragraph 2, so as to make it more adaptable to various situations that may arise, and indeed the expression "as appropriate" is made use of in the corresponding passage in article 9, paragraph 1, of the 1961 Vienna Convention.

Article 6

7. This article distinguishes between "a delegation" and "the staff" (see, for example, paragraph (5) of the Commentary to that article). Paragraph 3 of the article provides for the limiting of the size of the staff, but keeps silent about the size of the delegation. Article 11 of the 1961 Vienna Convention provides for the possibility of limiting the size of "the mission", which in the present article would mean "the delegation", and it would appear that a similar provision would be desirable in the present article. Paragraph 3 would then read:

"In the absence of an express agreement as to the size of a special mission and its staff, the receiving State may require that the size of the special mission and its staff be kept within limits . . . etc."

Article 7

8. It would appear that this article could usefully be made to incorporate article 41.

Article 8

9. With regard to the expression "any person" used in paragraph (c) it may perhaps be desirable to include an explanation in the Commentary, such as given by the Special Rapporteur in paragraph 14 of the Summary Record of the 762nd meeting of the Commission.^q

Articles 9 and 10

10. There would seem to be no necessity for applying different criteria in article 9, paragraph 1 and article 10, and it is therefore suggested to combine them as follows:

"Except as otherwise agreed, where two or more special missions meet in order to carry out a common task, or on a ceremonial or formal occasion, precedence among their respective members and staff shall be determined by the alphabetical order of the names of the States concerned."

Article 12

11. It is observed that it may be preferable to group this article together with articles 43 and 44 towards the end of the draft.

Article 13

12. The phrase "in the absence of prior agreement" is used preceding the residual rule, whereas the expression "except as otherwise agreed" is used in article 9, and the expression "unless otherwise agreed" in articles 21 and 26. It is suggested that the same terminology be employed to express the residual rule throughout the draft.

Article 16

13. Although the right of the "third State" concerned to withdraw its consent appears to be implied in the wording of paragraph 1, it may be preferable to accord such an important eventuality a separate paragraph (on the lines of paragraph (8) of the Commentary to that article), which could at the same time provide for an express agreement to the contrary:

"3. Unless otherwise agreed between the third State and the sending States concerned, the third State may at any time, and without being obliged to give any reason, withdraw its hospitality for special missions in its territory and prohibit them from engaging in any activity. In such a case, the sending States shall recall their respective special missions immediately, and the missions themselves shall cease their activities as soon

^q *Yearbook of the International Law Commission, 1964*, vol. I, p. 253.

as they are informed by the third State that hospitality has been withdrawn."

With regard to paragraph 2, it is suggested to use the expression "the sending States", as obviously there must be more than one "sending State".

Article 19

14. It would appear desirable, from a practical point of view, to add to paragraph 1 a provision similar to the last sentence of article 31, paragraph 2, of the 1963 Vienna Convention: "Such consent may, however, be assumed in case of fire or other disaster requiring prompt protective action."

Consideration may, perhaps, be given to drawing a distinction between the case of a special mission residing in a town where the sending State has a permanent mission and that of a special mission in a town where there is no such permanent mission, and allowing the aforesaid proposition only in the former case.

Articles 23 to 32 inclusive

15. These articles, which deal mainly with questions of exemptions and immunities, mention alternately "the staff" of the special missions in some places, and the "diplomatic staff" in others, without this distinction being always really justified, especially in view of the provisions of article 32. It is therefore suggested to use the term "staff" throughout the aforesaid articles and to adjust article 32 accordingly.

Article 39

16. Attention is drawn to the use, in paragraph 1, of the expression "in a foreign State"; and it is suggested that it may perhaps be preferable in the context to say "in another State", in view of the fact that except for a person's "own country" (which expression is also used in that paragraph) every other country is a "foreign State", including the "third State" (likewise mentioned in that paragraph).

In respect of paragraph 4, it is suggested to delete the phrase "either in the visa application or by notification" and to substitute the word "notified" for the word "informed", in the third line of that paragraph.

Article 42

17. It is submitted that the wording of the second paragraph of the Commentary is not very clear.

As to the substance of that article, it is suggested that the Commission may wish to reconsider the proposal to include a provision enabling members of a special mission, in particular instances, to engage in some professional or other activity whilst in the receiving State, e.g., by substituting a comma for the full-stop at the end of that article, and adding thereto: "without the express prior permission of that State".

Articles 43 and 44

18. (a) Article 43 speaks of "persons enjoying privileges and immunities" and "members of the families of such persons", instead of referring to "members of the special mission, its staff, families, etc.", which would seem to be more in keeping with the language employed elsewhere in the draft articles;

(b) Article 43 requires the receiving State to place at the disposal of the persons mentioned therein means of transport "for themselves and their property". Article 44, however, which deals with a very similar situation, likewise necessitating the withdrawal of the special mission and all that goes with it, speaks of "its property and archives", but makes no effective provision for the removal of such "property and archives" from the territory of the receiving State;

(c) Article 44, paragraph 1, provides for the permanent diplomatic mission or a consular post of the sending State to "take possession" of the "property and archives", but there may not

exist any such diplomatic mission or consular post of the sending State in the territory of the receiving State;

(d) Article 44, paragraph 3 (b), would also not meet the case, as there may not be any mission of a third State in the territory of the receiving State prepared to accept the custody of the "property and archives" of the stranded mission of the sending State.

It would, therefore, appear to be necessary to make express provision for the removal of the aforesaid archives from the territory of the receiving State in the cases envisaged in articles 43 and 44.

CHAPTER III, SECTION C, OF THE REPORT

19. (a) *Paragraph 48.* Whilst expressing full appreciation of the work done by the Special Rapporteur in preparing the draft provisions "concerning so-called high-level special missions",^r it is felt that there is no particular necessity to include this subject in the articles on Special Missions.

(b) *Paragraph 50.* The question of the relationship between the articles on special missions and other international agreements is undoubtedly of great importance, and it is hoped that it will be given further consideration by the Commission in due course.

12. Jamaica

Transmitted by a note verbale of 3 May 1967 from the Chargé d'Affaires a.i. to the United Nations

[Original: English]

Article 2

A rule on the matter of overlapping authority should not be included in the articles. The question as to whether the task of a special mission is to be deemed to be excluded from the competence of the permanent diplomatic mission is one that ought to be left to the particular agreement governing that mission between the sending State and the receiving State.

Article 9

Since the draft articles are to be the basis of an international convention on special missions, the alphabetical order of the names of States should be prescribed for determining the order of precedence of special missions, and for the sake of uniformity the order should be that used by the United Nations.

Article 11

Since any discrimination is contrary to the principles of international law, the inclusion of a rule of this would be unnecessary.

SECTION C^s

Because missions led by Heads of State, Heads of Government, Ministers of Foreign Affairs and Cabinet Ministers are perforce conducted at the level of highest consideration, any attempt to draft rules of law to govern such missions would be a retrograde step.

13. Japan

Transmitted by a letter of 27 July 1966 from the Deputy Permanent Representative to the United Nations

[Original: English]

GENERAL REMARKS

1. There is at present no established international practice with respect to special missions, and the matters concerning

^r See foot-note g above.

Ibid.

them are left to the solution on the "case-by-case" basis. The Government of Japan sees no need, at the present stage, to formulate a set of special rules governing them, but rather considers it more practical to allow the matter to be handled as each particular case arises. (Therefore, even in case codification be attempted, rules should remain as simple as possible.)

2. The following comments on the International Law Commission draft are submitted on the premise that the work of codification concerning the special mission will be carried out more or less on the line of the Commission's draft. They shall not in any way affect the basic position of the Japanese Government as set forth in paragraph 1 above.

3. Provisions concerning the so-called "high-level" special missions also had better be dispensed with for the same reason as that stated in paragraph 1.

COMMENTS ON THE DRAFT OF THE INTERNATIONAL LAW
COMMISSION

Definition clause

1. In definition clause it is desirable to specify clearly and precisely the definition of the term "member" and the scope and nature of the term "special missions". It seems imperative, in particular, to define "special missions" clearly so as to confine them to only those which really deserve to enjoy the privileges and immunities envisaged in the present draft articles.

Basic position regarding part I

2. Since the institutional and procedural aspects of the special missions covered in the present part still remain fluid today, it is premature to formulate detailed rules out of them. The codification at the present stage should therefore be carried out in a concise form in which only basic principles are enumerated, so as to allow room for natural development of customary law.

Article 1

3. According to Comment (3)* the International Law Commission seems to consider it possible to send and receive special missions even in the absence of recognition between the two States concerned. However, paragraph 2 of the present article might be construed to mean that at least the existence of recognition is a prerequisite to sending and reception of special missions. It seems necessary, therefore, to add complementary provisions in accord with the tenor of the Comment cited above.

Article 2

4. With reference to the question raised in Comment (5), concerning whether or not a rule on the relationship between special missions and permanent diplomatic missions with regard to their competence should be inserted in the final text of the articles, the Government of Japan is of the opinion that such a problem as concerns the division of authority and functions had better be left to a settlement between the parties concerned in each individual case, and that no such provisions are necessary.

Article 8

5. As regards paragraph 2 which provides for a direct notification from the special mission to the receiving State, the Government of Japan considers it doubtful whether or not such a practice may well be called "a sensible custom", as it is presumed to be in Comment (8).

* "Comment", here and hereafter, signifies comments on each draft article appearing in the report of the International Law Commission on the work of its seventeenth session (A/6009). [Note of the Government].

Article 16

6. The Government of Japan requests clarification as to the following two points for the purpose of interpretation:

(a) Is it not that "the third State" as referred to in the present article, once it has accorded its consent to the functions of special missions, has the rights and assumes the obligations of the "receiving State" under the present draft?

(b) If the definition of the special mission specified in article 1 of the provisional draft articles of the twelfth session of the International Law Commission is to be adopted, the special missions which are engaged in activities exclusively in the third State may not come under the category of "special missions" as defined. How can this problem be solved?

Basic position regarding part II

7. The Government of Japan accepts, from the standpoint *de lege ferenda*, the basic position of the Commission's draft to accord to special missions, in principle, similar privileges and immunities to those due to permanent diplomatic missions, on the condition that the scope and nature of the special mission be precisely defined as suggested in the present comment on definition clause.

It also admits that it will be necessary to make somewhat detailed provisions in part II, once the fundamental line of thought is taken up, since the part deals with substantial rights and obligations of the States concerned. (This is not the case with part I. The institutional and procedural aspects dealt with in part I would not, even if left to practice alone, seriously affect the interests of the States concerned.)

Relationship to other international agreements

8. It is deemed advisable to adopt the same provisions as contained in article 73 of the Vienna Convention on Consular Relations, which provides:

"1. The provisions of the present Convention shall not affect other international agreements in force as between States parties to them.

"2. Nothing in the present Convention shall preclude States from concluding international agreements confirming or supplementing or extending or amplifying the provisions thereof."

14. Malawi

Transmitted by a note verbale of 20 January 1966 from the Permanent Mission to the United Nations

[Original: English]

The Permanent Mission of Malawi has the honour to inform the Secretary-General that the draft provisions on special missions have been studied with interest by the Government of Malawi and appear to be unexceptionable. The Government of Malawi has no comments or suggestions to make but looks forward to receiving news of the Commission's future work regarding this convention.

15. Malta

Transmitted by a note verbale of 13 May 1966 from the Permanent Representative to the United Nations

[Original: English]

SECTION B OF CHAPTER III: DRAFT ARTICLES ON SPECIAL MISSIONS

Article 2

The question of overlapping authority resulting from the parallel existence of permanent diplomatic missions and special

missions, is of considerable importance and it is felt that a rule on the matter should be included in the final text of the articles. The absence of any such rule could leave open to question the validity of acts performed by the special mission and this is most undesirable. The competence or authority of a mission is a fundamental issue which unless regulated could undermine the essential quality of a mission, namely its authority to function.

As to the nature of the rule that ought to be included in the final text, it is agreed that certain powers are retained by the permanent mission notwithstanding that a special mission is functioning. These functions, however, relate to matters touching the special mission itself: its powers, including their limits and their revocation, certain changes in the composition of the mission, particularly those affecting the head of mission, and the recalling of the special mission. On the other hand, once the sending State has deemed it necessary or expedient to send a special mission, it is to be presumed, in the absence of an express statement to the contrary, that the task of that mission is temporarily excluded from the competence of the permanent diplomatic mission.

Article 11

The question as to whether an appropriate rule should be included to deal with non-discrimination between special missions by the receiving State, appears to be limited in this article to discrimination "in the reception of special missions and the way they are permitted to begin to function even among special missions of the same character"; while the broader question of non-discrimination is referred to in paragraph 49 of the Report (page 38).

It is felt that a special provision in article 11 to deal with non-discrimination is not appropriate since the scope of any such provision would be either too limited or, if extended to cover non-discrimination in general, out of place. On the other hand it is felt that a new article corresponding to article 47 of the Vienna Convention on Diplomatic Relations and article 72 of the Vienna Convention on Consular Relations should be included in the final text. The fact that the nature and tasks of special missions are so diverse should not justify discrimination as between States in the application of the rules contained in the articles.

SECTION C OF CHAPTER III

Regarding paragraph 48 of the Report, it appears that a distinction should be made between the normal special missions and those headed by a distinguished person. The articles as drafted do call for slight modifications when the mission is led by persons holding certain high offices, and these are reflected in the draft provisions prepared by the Special Rapporteur. It is therefore felt that special rules should be drafted and included in the final text.

Paragraph 49 has been commented upon above but there are no comments to offer on paragraph 50 especially if the comments on paragraph 49 are accepted.

DRAFT PROVISIONS CONCERNING SO-CALLED HIGH-LEVEL SPECIAL MISSIONS PREPARED BY THE SPECIAL RAPPOURTEUR †

It is not understood why paragraph (c) of Rule 2, which is extended to a special mission led by a Minister for Foreign Affairs (paragraph (c) of Rule 4) or by a Cabinet Minister (paragraph (a) of Rule 5) is not also extended to the case of a special mission led by a head of Government.

If it is accepted that a special mission led by any of the distinguished persons mentioned in the draft provisions in question is a high level special mission (and the inclusion of special rules to govern these missions implies such an acceptance), then paragraph (d) of Rule 2 should, *mutatis mutandis*, be applied

to the other high-level special missions. This is further justified by the rule, which has been proposed in respect of all such missions, that the level of the mission changes as soon as the head of mission leaves the territory of the receiving State.

16. Netherlands

Transmitted by a letter of 13 December 1966 from the Deputy Permanent Representative to the United Nations

[Original: English]

GENERAL REMARKS

Subjects not covered

1. In its comments of March 1958 on the International Law Commission's 1957 draft for "articles concerning diplomatic intercourse and immunities" the Netherlands Government made some remarks (see p. 124 of the *Yearbook of the International Law Commission, 1958*, vol. II) on the application of the articles in time of war, the functioning of the principle of reciprocity, the possibility of taking reprisals and the administration of emergency law. The same remarks are applicable to the draft articles concerning special missions.

Terms and definitions

2. The Netherlands Government has taken note of the Commission's intention (see para. 46 on p. 38 of report A/6009) to give in an introductory article definitions of some of the terms used in the draft. It seems unnecessary to define terms such as "head of the special mission", which speak for themselves, or "members of the administrative and technical staff", which are used in this draft in the same sense in which they are used in the Vienna Convention on Diplomatic Relations of 1961. Some terms, however, are used in senses differing from those in which they are used in the Vienna Convention. This stands to reason, because the difference in types of missions (some special missions may consist of a number of officials of equal rank, while the permanent diplomatic mission is headed by a single official) must inevitably lead to their terminologies differing in some respects. In such cases definitions would indeed seem desirable.

Sometimes a term is used in different senses in the various articles of the draft. There should be greater consistency of terminology.

Examples:

"*Members of the special mission*": the term "members of the mission" in the Vienna Convention (art. 1, para. (b)) is used to denote "the head of the mission and the members of the staff". The term is only used in this all-embracing sense in articles 21 and 37 (2) of the present draft. In articles 4 (1), 6 (1) and 18 the term includes the head of mission but not the members of the staff. In other articles the term denotes neither the head of mission nor the members of the staff.

"*(Members of) the staff of the special mission*": as already observed, the members of the staff and the members of the mission are referred to separately almost everywhere in the draft, in contrast with the Vienna Convention (art. 1, para. (c)) in which the word "staff" is used to denote all the members of the mission except the head. Once, however, the term is used in the same sense in the draft as it is in the Vienna Convention: article 23 (1). "Staff" is used in a third sense in article 6 (3), where it is used as a synonym for "mission" (cf. paras. 6 and 7 of the Commission's commentary), thus including the head. It is not clear in which sense the term "staff" is used in article 6 (2); paragraph 5 of the Commission's commentary is ambiguous on this point: it states that the special mission, even if it consists of more than one member, "may be accompanied by" a staff,

† *Ibid.*

though it expressly refers to the definition of "staff" in the Vienna Convention.

"*Members of the diplomatic staff*": the staff/mission division is consistently maintained with respect to diplomatic staff, so the latter is always referred to in the articles concerning diplomatic staff as a group *distinct from* the members of the mission (see art. 24 ff.). It is not clear what function and status within the entire special mission the International Law Commission intends to accord *diplomatic* staff. It should be noted that members of the mission (mission in the restricted sense, as used in the draft) can also have diplomatic ranks (compare paras. 3 and 4 of the Commission's commentary on art. 9), but that all the members of the diplomatic staff do not necessarily have diplomatic ranks (see end of para. 5 of the Commission's commentary on art. 6).

"*Premises of the special mission*": the corresponding term in the Vienna Convention (art. 1, para. (i)) also covers the official residence of the head of mission. Under article 15 of the present draft the term does not cover the official residence. The fact that this term is used in the restricted sense both in article 19 and in article 40 (2) is acceptable.

"*Private staff*": this term, which does not occur in the Vienna Convention, is used in the present draft in article 34 and article 36 (2). The use of this term is confusing, because it creates the impression that it indicates part of the mission's staff. It should be replaced by the term "private servants", in conformity with article 8, paragraph 1 (d).

"*All persons belonging to special missions*": this term, which does not occur in the Vienna Convention, is used in the present draft in article 40 (1).

Scope and legal status of the regulation

3. Although the far-reaching privileges and immunities (codified in the Vienna Convention of 1961) that are extended to permanent diplomatic missions can be explained as being a result of the inclination to respect what history has made conventional, this cannot be said of "*ad hoc* diplomatic missions". This and the fact that such a variety of inter-governmental activities are covered by the term "special mission"* are arguments in favour of the narrowest regulation possible. Where necessary the Government concerned can always make additional arrangements for each of certain special missions separately, or bilaterally, or regionally in the relations between certain States.

Another argument in favour of narrow regulations is the frequency of special missions.

Next, the Netherlands Government would point out the danger inherent in the creation of precedents. If the present arrangement is raised to the level of that in force for permanent diplomatic missions before adequate assurance has been obtained that each of the rules is a *sine qua non* for the independent discharging of duties, the status of government representatives at international conferences and the status of officers of international organizations might be determined too readily by the same regulations.

Finally, the difference in function between special missions from countries with centrally planned economies and from countries with market economies should be borne in mind. Not only is the number of cases in which the study of commercial possibilities or the establishment of commercial relations figure among the duties of government representatives greater in countries with centrally planned economies than in countries with market economies, but views on the duties of governmental commercial missions in countries where all commerce is a state activity differ

from those in countries where commerce is left primarily to private enterprises. To grant privileges and immunities to commercial missions acting on behalf of a State would mean favouring these States more than those that usually leave the sending of commercial missions to trade and industry.

4. Against the arguments in favour of limitations is the fact that in some regions, particularly in the newly independent countries, privileges and immunities for government representatives are valued more highly than in countries with long-standing diplomatic traditions. Some newly independent countries look upon such privileges and immunities not only as means of facilitating the discharge of duties but also as symbols of their recently acquired independence.

Moreover, missions to territories lacking stable governmental control might need additional safeguards to enable them to discharge their duties smoothly and without interruption.

Therefore, the Netherlands Government would not wish to narrow down the regulations by leaving out any rule that cannot be applicable to all categories of special mission. Many of the rules drafted by the International Law Commission, although not applicable under all circumstances, may without doubt be of great value in some situations and constitute a contribution towards the progressive development of international law.

It would be much better if restriction could be secured by giving States greater liberty to depart from the drafted rules whenever it is desirable to do so.

The Special Rapporteur's idea (see para. 26 of the Second Report by M. Bartoš)^u was that it should be apparent from the text of each of the articles from which rules the parties would be free to derogate. There is evidence of the same idea in expressions such as "except as otherwise agreed" in articles 6 (3), 9 (1), 13 (1), 21 and 41, and in the wording of the articles, e.g., "normally" in article 7, "in principle" and "the receiving State may reserve" in article 14; see also the second sentence in article 34.

Therefore the Netherlands Government suggests that the rules* that will apply to each mission be made narrower than is proposed by the Commission (*jus cogens*) and that on the other hand more liberty be given than is given in the Commission's draft (*jus dispositivum*):

To suspend some rules by mutual consent (i.e., "unless otherwise agreed...") or

To supplement the rules by mutual consent by the simple method of declaring additional rules already drawn up incidentally applicable ("at the request of the sending States, and provided the receiving State does not object...").

Apart from this, additional agreements of greater scope may naturally be entered into, but it is not necessary specifically to provide for this in the present draft.

It is this train of thought that has prompted the Netherlands Government's comments on each article. This arrangement is also better suited to the progressive development of this chapter of international law, much of the substance of which has yet to be moulded and refined in accordance with the dictates of practical experience gained by States.

ARTICLES

Articles 1 and 2

5. These articles do not indicate clearly under what circumstances a mission has the status of "special mission". Although the rules governing special missions cannot be meant to apply to every conceivable group of travelling government representatives, articles 1 and 2 create the impression that every mission charged

* Cf. the categories enumerated in paragraphs 79 to 117 of the first report by the Special Rapporteur, *Yearbook of the International Law Commission, 1964*, vol. II, pp. 83-88. [Note of the Government.]

^u *Yearbook of the International Law Commission, 1965*, vol. II, p. 113.

with a specific duty and accepted by the receiving State (or possibly accepted tacitly only, as is implied in para. 4 (c) of the Commission's commentary on art. 1) is a "special mission". This imprecision might result in a receiving State that did not wish to object to the announced visit of some mission being caught unawares by the sending State demanding for the mission the status, including the privileges and immunities, of a special mission after the mission's arrival.

The Netherlands Government believes that a mission should only be a special mission if both sending State and receiving State desire to accord it the status of special mission. Accordingly, the Netherlands Government proposes that article 2 be amended to read:

"The task of a special mission *and its status as such* shall be determined by mutual consent... etc."

6. With reference to the question in paragraph 5 of the Commission's commentary on article 2, the Netherlands Government can see no need for any rule delimiting the special mission's and the permanent mission's competencies. In practice it might be a good thing if Governments were at liberty to consult one another through different channels.

Articles 3 and 4

7. The Netherlands Government believes that, in view of the variety of activities that can be included under the term "special mission", the receiving State should be given the opportunity, except if otherwise agreed, to state before a mission's arrival that a certain person is not acceptable as a member of the mission. The present article 3 does not offer this opportunity, and the present article 4, particularly in view of paragraph 2, only makes it possible for a person to be declared *non grata* after he has arrived in the receiving State.

In the opinion of the Netherlands Government the proposed clause need only apply to the members of a mission and not to the members of a mission's staff.

The contingency could be provided for either by wording paragraph 2 of article 4 more broadly or by deleting the paragraph entirely, or by reversing the provision of article 3:

"Except as otherwise agreed, the sending State *must make certain that the agreement of the receiving State has been given for the persons it proposes to designate as head and members of the special mission.*"

Article 5

8. There is no objection to this article, although it is doubtful whether there is any need for it.

Article 6

9. See comments made on the second example under 2 above.

Articles 9 and 10

10. The Netherlands Government believes that the whole matter of precedence had better be left to the protocol in force in the receiving State, as is done in article 10 for ceremonial missions. There is no need for an internationally applicable precedence regulation, except for multilateral conferences that are not convened by a receiving State. In fact, such conferences are outside the scope of the present articles. Therefore it is suggested that articles 9 and 10 be combined, leaving out paragraph 1 of article 9 and making article 10 applicable to all special missions.

Article 11

11. With reference to the question in para. 12 of the Commission's commentary: it is doubtful whether there is any need for a clause on non-discrimination between special missions.

Article 13

12. The Netherlands Government believes that cases in which no prior agreement is sought and reached as to the location of a special mission's seat are less rare in practice than the International Law Commission states in para. 4 of its commentary. It is not at all customary to consult the receiving State in advance on the matter of the location of a special mission's seat, nor for the receiving State to make or await suggestions on the subject, particularly when the special mission has duties primarily of a political nature that can be discharged within a relatively short period (varying from a few hours to a few days), which is very often the case. It is more customary for this kind of special mission to be housed by the permanent mission of the sending State or to find accommodation themselves, in or in the immediate vicinity of the locality of the seat of Government of the receiving State. In such cases the special mission's address is either care of the permanent mission or an address given beforehand by or on behalf of the sending State to the receiving State, whichever the sending State opts for. As a rule the receiving State will raise no objections against the choice of seat, although it is entitled to do so in exceptional cases.

Even in countries where in these days the movement of foreigners in general and of foreign diplomats in particular is still severely restricted, the receiving State need not necessarily interfere in matters concerning the location of the seat, provided a locality is chosen near that of the Government.

The Netherlands Government proposes that article 13, paragraph 1 be amended to read:

"1. In the absence of prior agreement, a special mission shall have its seat at the place *chosen* by the *sending State, provided the receiving State does not object*".

Article 15

13. Although in general there need not be any objection to using the flag in the manner laid down in this article, this article does not seem acceptable as a *jus cogens* rule in view of the diversity of the activities included under the term "special mission". The two States concerned should be free in each case to deviate from this article by mutual agreement. Therefore it is suggested that the article open with the words: "*Except as otherwise agreed*".

14. The words "*when used on official business*" should be added to the phrase "and on the means of transport of the mission", in conformity with article 29, paragraph 2, of the 1963 Vienna Convention on Consular Relations. If it appears desirable in a certain contingency to display flag and emblem on vehicles even when the vehicles are not in official use, some agreement can always be reached on the matter.

Article 17

15. The last phrase, "having regard to the nature and task of the special mission" has little or no effect on the general obligations of the receiving State described in the main clause of this article. In point of fact, the receiving State is also obliged "to have regard to the nature and task" of the permanent diplomatic or consular mission under the terms of article 25 of the 1961 Vienna Convention on Diplomatic Relations or under the terms of article 28 of the 1963 Vienna Convention on Consular Relations, even though the aforesaid phrase is not included in these two articles.

The fact that the functions discharged by special missions as distinct from those discharged by permanent diplomatic and consular missions are not necessarily in the interests of both the sending State and the receiving State prompts the placing in the present draft article of a somewhat different obligation on the receiving State with respect to special missions. Although maximum obligations, i.e., to provide full facilities, devolve upon the receiving State as regards permanent missions, the

receiving State need only give a special mission the minimum of aid it requires to enable it to discharge its mission. The States concerned can always come to some agreement for each special case.

The Netherlands Government suggests that article 17 be amended to read:

"The receiving State shall accord to the special mission such facilities as may be necessary for the performance of its functions."

Article 18

16. When comparing the present article with article 21 of the 1961 Vienna Convention, we see that no mention is made in the present article of aid in the acquisition of land or buildings, an omission of which the Netherlands Government approves. On the other hand, the present article is more categorical: assistance in obtaining accommodation for members of the staff is made obligatory under all circumstances, whereas in the second paragraph of article 21 of the Vienna Convention only "where necessary". The Netherlands Government sees no reason for this extension. The term "special mission" covers so many different situations that no general rule can be laid down to the effect that the receiving State should help any and every kind of special mission. The various diplomatic missions all have comparable functions, all of which are in the interests of both the sending State and the receiving State, but the functions of the special missions vary considerably and occasionally a special mission will fulfil a mission that is only in the interest of the sending State. Therefore it is suggested that paragraph 18 open with the words: "*Where necessary...*".

17. According to paragraph 14 of the commentary, the last phrase in article 18 refers to special missions whose functions necessitate their having office premises or living accommodation in different or changing localities. This point might be made clearer by replacing "if necessary" by: "...and, if the situation should so require, ensure that such premises...".

Article 19

18. *Paragraph 1.* It was not without some hesitation that the Netherlands Government concluded that the provision in the first sentence of this paragraph should be accepted. It assumes that the term "premises" does not as a matter of course include the residence of the mission's head or the dwellings occupied by the members of the staff. (Cf. the comment on the fourth example in section 2 of the present document and the end of paragraph 3 of the Commission's commentary.)

Here again the difficulty lies in the great diversity of special missions. Some of them may require a certain degree of inviolability for their office premises to enable them to discharge their duties without let or hindrance; other missions only need the personal inviolability of their members (article 24) and the inviolability of their documents (article 20). The matter is complicated by the fact that, as the Netherlands Government sees it, the minimum of inviolability cannot be determined by rules of *jus dispositivum*, to be settled by the States concerned in each particular case.

Therefore the Netherlands Government approves of the first sentence, but with the specifications and restrictions given in sections 19 and 20 below.

19. By analogy with article 31, paragraph 2 of the 1963 Vienna Convention on Consular Relations the following clause should be added to this paragraph:

"The consent of the head of the special mission may, however, be assumed in case of fire or other disaster requiring prompt protective action."

This addition would seem to be required in view of the frequency with which special missions find accommodation in buildings, such as hotels, where other people live and work.

20. *New paragraph.* Also for the reason given in the preceding section it would seem advisable to have a new paragraph after paragraph 1, viz., the second sentence of article 19, paragraph 1 of the second report by M. Bartoš:

"2. *Paragraph 1 shall apply even if the special mission is accommodated in a hotel or other public building, provided that the premises used by the special mission are identifiable.*"

21. *Paragraph 2.* No comment.

22. *Paragraph 3.* The immunity from search of the mission's means of transport is taken from article 22, paragraph 3 of the Vienna Convention on Diplomatic Relations, but because of its unspecific wording it might also be interpreted so widely in that context as to give far greater immunity than was ever intended. It would be hazardous to give a more detailed description in the draft article of the circumstances under which a means of transport should be "immune from search", since it would foster the placing of a wide interpretation on the corresponding article 22, paragraph 3 of the Vienna Convention. Therefore it is proposed that the word "search" be deleted from paragraph 3 of the draft article. In so far as this word refers to the premises, the furnishings and other objects on the premises such immunity is already given by paragraph 1. In so far as "search" refers to other objects used for the work of the special mission, but located outside the premises (and this is an amplification that goes beyond article 22 of the Vienna Convention), such immunity would seem of no practical importance in view of the immunity of persons (article 24) and of documents (article 20).

Article 22

23. The following introductory clause should be inserted in article 22 and subsequent paragraphs renumbered:

"1. *Unless otherwise agreed, special missions shall have freedom of communication to the extent provided in this article.*"

Article 23

24. It is not clear from the first paragraph why, in addition to the sending State and the head of the special mission, the members of its staff should also be mentioned here; this phrase does not appear in article 23 of the Vienna Convention on Diplomatic Relations. No explanation of this seemingly superfluous addition is given in either the Commission's report or in the reports by M. Bartoš.

25. In the opinion of the Netherlands Government there is virtually no need for the exemption from taxation mentioned in article 23 for any of the special missions in view of their temporary character. This exemption, which to the diplomatic missions is a traditional privilege rather than a necessity, is not required for the due performance of the functions of temporary missions. The granting and registering of the exemption causes the receiving State more trouble than it is worth. Therefore it is suggested that article 23 be deleted.

Article 24

26. This article extends to the members of special missions (and to the members of their diplomatic staffs) the envoy's personal inviolability that has typified diplomatic relations from time immemorial. It is undeniable that personal inviolability is essential if a mission is to perform its functions without let or hindrance, and it should outweigh any interests involving the legal order within the receiving State, at least as regards permanent missions and some special missions. However, these considerations do not apply to all special missions.

Accordingly, the Netherlands Government would join the minority referred to in paragraph 2 of the Commission's commentary and propose that personal inviolability be restricted to acts performed in the fulfilment of the mission's duties. A second paragraph stipulating that "*at the request of the sending State,*

and provided the receiving State does not object, personal inviolability shall be extended to include all deeds" might be added to article 24 modified in the manner described.

If this proposal is accepted, a new article should be inserted after article 24 governing, for cases for which extended personal inviolability has not been agreed upon, arrest and detention for deeds falling outside the scope of the performance of functions proper, in the same way as is done in articles 40, 41 and 42 of the 1963 Vienna Convention for consular officers.

Article 25

27. The *first* paragraph of this article should be deleted. The States concerned can enter upon additional agreements to cover any special cases of private residences or accommodation needing protection.

28. The *second* paragraph is superfluous in view of the provisions of articles 20 and 22. Therefore this paragraph can be deleted, too.

Article 26

29. *Paragraphs 1 and 4.* If the proposal put forward in section 26 is accepted, paragraphs 1 and 4 of article 26 will have to be restricted in the same way as article 24 in so far as immunity from criminal jurisdiction is concerned.

30. *Paragraph 2.* Apart from the question whether complete or limited immunity from criminal jurisdiction should be granted, it might be considered to what extent members of special missions should be withdrawn from the civil and administrative jurisdiction of the receiving State. The Netherlands Government believes that the legal order, particularly the legal protection of third persons who come into contact with members of the special mission, demands that the liability under civil law of members of a special mission be affected as little as possible by immunity. The opposing interest, viz. the undisturbed performance of the mission's functions, is hardly affected by civil and administrative jurisdiction. It is unnecessary to allow intrusion upon the legal order of the receiving State to the same extent as is required when ensuring personal immunity from criminal jurisdiction. The Netherlands Government subscribes to the view held by the minority and described in paragraph 2 of the Commission's commentary, and therefore suggests replacing paragraph 2 by a rule analogous to the one in article 43 of the 1963 Vienna Convention on Consular Relations.

Article 28

31. The deletion of article 28 is proposed for the reasons given in section 25 for article 23.

Article 30

32. With reference to paragraphs 2 and 3 of the Commission's commentary the Netherlands Government states that it endorses the view that there is no need to supplement this article as proposed by the Special Rapporteur.

Article 32

33. No comments, except for the necessity of formal adaptation to article 26 if the proposal to change this article is adopted.

If the proposal to change article 26, paragraph 2 is not adopted, article 32 should be amended in such a manner that liability for damage resulting from road accidents falls outside the scope of the immunity.

Article 33

34. Liability for damage resulting from road accidents should be excluded from the immunity.

Article 34

35. For the use of the term "private staff" see comment on the fifth example in section 2.

Article 35

36. This article is worded in such a manner that the permission of the receiving State would seem to be required whenever the head or members of the special mission or its diplomatic staff wish to bring members of their families with them. Even though circumstances are conceivable in which the receiving State would advise against bringing members of families or would even feel obliged to forbid it, it does not seem right to make it a general rule that the bringing of members of one's family shall be subject to the granting of permission. It is proposed that, by and large, matters concerning the presence and the status of members of families be omitted from the rules governing special missions. Only if the sending State desired that special status be accorded to the members of the families would the receiving State's permission be required. Therefore the words: "who are authorized by the receiving State to accompany them" should be deleted from article 35, paragraph 1 instead, the following words should be added, at the end of the clause:

"... in articles 24 to 31, in so far as these privileges and immunities are granted to them by the receiving State".

Paragraph 2 should be amended accordingly.

37. If the proposal to amend article 26, paragraph 2 is rejected, article 35 should be amended in such a way that damage resulting from road accidents is not included in the immunity.

Article 36

38. In view of the opinion expressed in paragraph 4 of the Commission's commentary the Netherlands Government believes that article 36 can be dispensed with entirely.

Article 39

39. The last few words of paragraph 4, viz., "and has raised no objection to it", make paragraphs 1, 2 and 3 meaningless. The Netherlands Government is of the opinion that the third State is only entitled to object to the transit of special missions in exceptional cases and after stating its reasons for doing so. There would have to be an objective criterion by which to judge the justifiability of refusals to allow special missions to pass, and that criterion would have to be set down in the present article. Since it is impossible to establish such a criterion, it would be better to dispense with the article altogether.

Article 42

40. Although the Netherlands Government has no objection to this article in its present form, it wishes to endorse the original proposal of the Special Rapporteur that the provision be amplified with the words: "and they may not do so for the profit of the sending State unless the receiving State has given its prior consent." (Cf. commentary on article 37 in the second report by M. Bartoš.)^v

This amplification will become superfluous if the proposal put forward in section 26 to amend article 24 is adopted by the International Law Commission.

HIGH-LEVEL SPECIAL MISSIONS^w

41. *Purpose of the regulation.* The proposed rules are an amplification of the articles on special missions; the articles themselves will always be applicable, in so far as the additional rules do not constitute departures therefrom (see Rule 1).

As the Netherlands Government sees it, the scope of the articles governing special missions is restricted to ensure that they will also be applicable to low-level special missions; con-

^v *Yearbook of the International Law Commission, 1965, vol. II, p. 140.*

^w See foot-note g above.

sequently, there is indeed a need for a special set of rules for high-level missions.

42. *Heads of State.* The position of a head of State travelling abroad can be disregarded in this regulation, because it has been regulated from time immemorial under the terms of international law. It would therefore seem wrong to lay down special rules for the head of State as head of a special mission, because, as opposed to any other high officer of State, he remains primarily head of State, whether he is on a state visit (which also comes under the heading "special missions", see article 10) or is on holiday abroad.

It is suggested that Rules 2 and 6 be deleted and that instead it be stipulated that a head of State in charge of a special mission is entitled to his special privileges as head of State.

43. *Ministers.* The differences between the rules proposed by the Special Rapporteur for the Prime Minister (head of Government) (Rule 3), the Minister for Foreign Affairs (Rule 4) and other Cabinet Ministers (Rule 5) are very slight. Assuming that the rules will only be applicable to each of these high officers if the sending State and the receiving State wish to regard a mission headed by one of these officers as a "special mission", the Netherlands Government sees no reason for making these distinctions.

44. *Officers of State not covered.* Attention is drawn to the report of the Sixth Committee of the twentieth session of the General Assembly of the United Nations (A/6090, para. 73), in which it is pointed out that no rules have been proposed with regard to the Vice-President of a State, the Deputy Prime Minister, etc.

17. Pakistan

Transmitted by a letter of 21 February 1967 from the Acting Permanent Representative to the United Nations

[Original: English]

INTRODUCTORY ARTICLE

1. It is desirable to have an introductory article containing the definition of the expressions used in several Draft Articles on Special Missions. The Special Rapporteur has submitted the Introductory Article provisionally numbered as Article "0" defining the various expressions used. If the Commission adopts this Article, the text of a number of Articles would be shortened because the repetition of descriptive definitions would be avoided.

Article 7

2. Ordinarily, only the Head of Specialized Missions is authorized by virtue of his functions to act on behalf of the Special Missions whereas paragraph 2 of Article 7 seems to provide for the possibility of authorizing some other person as well. This could be spelt out more precisely by the addition of paragraph 3 to Article 7 in the following terms:

"3. Any member of the Special Mission may be authorized to perform particular acts on behalf of the Mission."

Article 17

3. Since Special Missions should be accorded facilities, privileges and immunities on the basis of the nature of their functions and tasks, it would be advantageous to insert paragraph 2 as under in Article 17 to clarify the position as well as to allay the anxieties expressed by certain Governments in their comments:

"2. The facilities, privileges and immunities provided for in Part II of these Articles, shall be granted to the extent required by these Articles, unless the receiving State and the sending State agree otherwise."

DRAFT PROVISIONS CONCERNING THE SO-CALLED HIGH-LEVEL SPECIAL MISSIONS *

4. At its sixteenth session, the International Law Commission decided to ask its Special Rapporteur to submit at its succeeding session an article dealing with the legal status of the so-called high-level Special Missions, in particular, Special Missions led by Heads of State, Heads of Governments, Ministers of Foreign Affairs and Cabinet Ministers. The Rapporteur prepared the draft annexed to the report of the Commission's seventeenth session, submitted to the General Assembly at its twentieth session. It is comprised of six rules which are to be appended to the Articles on Special Missions as exceptions thereto whenever the Special Missions are led by Heads of States, Heads of Governments, Ministers of Foreign Affairs and Cabinet Ministers. Inasmuch as these rules seem to pertain to the question of international status of the Heads of States, etc., it is open to doubt whether there is any particular need to include these rules in the Articles on Special Missions.

5. The Draft Articles on Special Missions as finally adopted by the International Law Commission should form the basis of a separate Convention on Special Missions, which would be originally linked with the two Vienna Conventions on Diplomatic Relations (1961) and Consular Relations (1963) without being made an appendix to either of them.

18. Sweden

Transmitted by a letter of 2 May 1966 from the Minister for Foreign Affairs

[Original: English]

The comments of the Swedish Government follow below. They are divided into three parts: (A) remarks of a general character; (B) observations on particular articles of the draft; (C) comments regarding the suggestions, etc. contained in section C of chapter III of the Commission's report.

A. GENERAL REMARKS

1. During the discussion of the Commission's report in the Sixth Committee at the Twentieth session of the General Assembly, the Swedish delegate, in a speech on 8 October 1965, drew attention to the problem of granting immunities and privileges to a great number of people. He pointed out that this problem arises in connexion with special missions, and he continued:

"While the great quantity of these missions makes a codification desirable, it also makes it difficult, for immunities and privileges granted to a few may not meet insurmountable obstacles, but the same immunities and privileges given to many may cause a real problem.

"Now, as Professor Bartoš demonstrated in his first report on the subject, a great many different kinds of special missions would come under the new régime: political, military, police, transport, water-supply, economic, veterinary, humanitarian, labour-recruiting and others. Consequently, a great many persons would be immune from jurisdiction, would enjoy exemption from customs control and duties, etc. This group of persons would be further widened at a later stage, when rules in the same vein were introduced for delegates to conferences convened by Governments or international organizations. Yet, we know that in many countries the public and parliaments complain already of the present extent of immunity and privileges. A wide extension would surely meet some resistance. Of course, to the extent such widening is functionally indispensable, we must try to achieve its acceptance and persuade the opponents it will meet. However, it would

* See foot-note g above.

seem highly desirable that the Commission sought some means of reducing the circle of missions which would fall under the special régime or else of limiting the privileges and immunities granted. It is appreciated that there are great difficulties in distinguishing between missions. Diplomatic or non-diplomatic status cannot alone be decisive; a mission consisting of a minister of defense and generals sent to negotiate military cooperation may have as great a functional need to be under the special régime as a diplomatic delegation sent to negotiate a new trade agreement. Yet, it may possibly be said that special missions, which by definition are *temporary*, generally have a somewhat more limited need at least for privileges than do permanent missions. In a great many cases the express agreement to send and receive a special mission may also be a guarantee that the receiving State will in all ways spontaneously facilitate the task of the mission, a guarantee that does not necessarily exist for permanent missions."

The Swedish Government is of the opinion that great care should be taken in order to limit the privileges and immunities as much as possible, both with respect to the extent of the privileges and immunities and with respect to the categories of persons who shall enjoy them. This should be observed especially if it is the intention that a considerable part of the provisions regarding privileges and immunities shall be peremptory.

2. The question to what extent the articles of the draft should be peremptory or *jus cogens* was also discussed by the Swedish delegate on the occasion referred to above. He said in that respect:

"My next point on the draft on special missions derives not from the report of the Commission, but from the second report by Professor Bartoš, from which^y [in paragraph 26] it appears that States would be free to derogate from such articles only as expressly allow it. The others would be peremptory, *jus cogens*. In the draft articles submitted to us, some are found, indeed which expressly allow States to derogate, e.g., article 3. However, article 15, which provides that a special mission shall have the right to display its flag and emblem on its premises, on the residence of its head of mission, and on its means of transport, contains no clause expressly allowing two States to derogate from it by agreement in the case of some particular mission. Yet, it would be hard to see why they should be precluded from so doing. The same argument could be adduced with respect to several other articles. Indeed, I wonder if it would not be wiser to accept as basic presumption that States are free to derogate from the rules, by express agreement between themselves, unless the contrary appears."

The Swedish Government considers that as the sending of a special mission in each case depends on an agreement between the sending and the receiving States, it would be natural to let the two States decide not only on the sending and task of the mission but also, in the last resort, on the status of the mission. The status needed by a mission may vary according to the task it shall carry out and already from that point of view flexibility should be allowed. Furthermore, supposing that for some reason the receiving State would be willing to accord to a special mission only a very limited amount of privileges and supposing that the sending State in that case would prefer to accept such very limited privileges for its mission rather than not sending the mission at all, why should the States not be permitted to derogate from the régime laid down in the instrument which in due time may result from the draft? In other words, the ambition to provide through peremptory rules, an effective status for special missions may result in no mission being sent at all. It seems that the sending and the receiving States could be trusted to regulate freely if they so

wish, the status and conditions of work to be accorded to the mission. The purpose of the draft regulation should rather be to provide subsidiary rules which could be applied whenever the sending and receiving States have omitted to settle the matter by agreement.

B. OBSERVATIONS ON PARTICULAR ARTICLES

Article 1

In its commentary to article 1, the Commission says:

"The question whether special missions can be used between States or Governments which do not recognize each other was also raised. The Commission considered that, even in those cases, special missions could be helpful in improving relations between States, but it did not consider it necessary to add a clause to that effect to article 1."^z

The Commission's view that special missions can be helpful in improving relations between States or Governments which do not recognize each other is certainly correct. Special missions are sometimes used to remove obstacles to recognition. It is, however, obvious that special missions can be used for these purposes only if it is clear that the mere sending of a special mission does not imply recognition. If it could be successfully argued that a State by sending to or receiving from a State or Government a special mission had recognized that State or Government, a special mission would no longer be a useful instrument for *preparing the way* to recognition. It might be useful further to investigate this problem and, if it is found warranted, include in article 1 a clause stating that sending or receiving a special mission does not in itself imply recognition.

The Commission also states:

"In the case of insurrection or civil war, however, any such movements which have been recognized as belligerents and have become subjects of international law have the capacity to send and receive special missions. The same concept will be found in the Vienna Convention on Diplomatic Relations (article 3, paragraph 1 (a))."^{aa}

First, if also belligerents have the capacity to send and receive special missions, the term "States" in the text of article 1 is hardly adequate. Secondly, the meaning of the reference to article 3 of the Vienna Convention on Diplomatic Relations is not apparent. Thirdly, supposing that States A and B are both parties to the future instrument on special missions, supposing further that there is an insurrection in State A, that State B recognizes the insurgents as belligerents, and that State A protests against that recognition as an intervention in its internal affairs, supposing finally that State B sends a special mission to the insurgents, would State A be obliged to consider the mission as a special mission under the instrument? If so, is State A to be considered as a third State in relation to the special mission? How would in that case article 16 be applied? If the insurgents were defeated and the mission captured by State A on its territory what is the mission's status? The questions could be multiplied; it therefore seems that, if insurgents recognized as belligerents are to be covered by article 1, the matter should be further explored and that more precise provisions thereon should be drafted. The short reference in the commentary is not sufficient to clarify and settle the question.

Article 3

Should the principle be accepted that all the rules concerning the status of the special mission would be applicable unless the parties agree otherwise, the phrase "except as otherwise

^y Yearbook of the International Law Commission, 1965, vol. II, p. 113.

^z Yearbook of the International Law Commission, 1965, vol. II, p. 166.

^{aa} *Ibid.*, p. 165.

agreed" in this and corresponding phrases in some other articles would have to be replaced by a more general provision.

The second phrase of the article seems to be superfluous.

Article 5

The article seems to be superfluous as article 1, paragraph 1, sufficiently covers the case. If State A wants to send a special mission to State B whose relations with State C are difficult, State A would certainly in some way or other consult the authorities in State B before sending the mission on to State C. A special rule to that effect is unnecessary and could in any case be easily evaded, e.g., if State A so wishes, it could postpone telling State B about its intention to send the mission to State C until the mission has accomplished its task in State B.

Article 7

The phrase "normally" is a descriptive term and hardly appropriate here. The text should be rephrased. How, would depend upon whether or not the principle of the subsidiary character of the rules is accepted or not.

Article 14

The term "should in principle" is too vague. Paragraph 1 of the article could well be omitted.

If the articles of the draft are given only a subsidiary character, paragraph 3 could also be omitted.

Article 21

Should the principle of the subsidiary character of the articles be accepted the phrase "unless otherwise agreed" can be omitted.

If, on the other hand, the articles are in principle to constitute *jus cogens* the text should at least be reworded along these lines: "In the absence of an agreement on the matter between the sending and the receiving State, the receiving State shall, subject to its laws, etc., ensure, etc.". As now phrased the text seems to assume that the parties might agree not to accord such freedom of movement to the mission as is necessary for the performance of its functions.

Article 31

In view of the fact that there is a special article (article 35) dealing with the families should not, in paragraph 1 (b), the words "or of the members of their family who accompany them" be omitted? Cf. commentary (2) (a) to article 32. There also seems to be a discrepancy between the expression "who accompany them" in article 31, paragraph 1, and the expression "who are authorized by the receiving State to accompany them" in article 35 paragraph 1.

Article 36

The commentary should be revised. As it now stands, it is confusing, in particular because the phrase "This idea is set forth in art. 14 etc." is not exact. As appears from paragraph (3) only part of the idea was incorporated in article 14.

C. COMMENTS ON "OTHER DECISIONS, SUGGESTIONS AND OBSERVATIONS BY THE COMMISSION"

1. The Commission would like to know the opinion of Governments on the question whether "special rules of law should or should not be drafted for so-called 'high-level' special missions, whose heads hold high office in their States".^{bb} In the opinion of the Swedish Government such special rules should not be included in the draft on special missions. If the head of a "high level" mission is entitled to a special status, that

would not be because he is the head of a special mission but because of his position as Head of State, Head of Government, Member of Government, etc. The rules envisaged therefore do not really pertain to the matter of special missions but to the question of the international status of Heads of State, etc.

2. The Swedish Government agrees with the stand taken by the Commission that a provision on non-discrimination would be out of place with respect to special missions.

3. The question whether the draft "should contain a provision on the relationship between the articles on special missions and other international agreements" is closely connected with the problem whether the articles should have a subsidiary dispositive character or whether some of them should be *jus cogens*. Whatever course the Commission decides to follow in this respect the character of the articles should be clearly defined in the draft.

19. Ukrainian Soviet Socialist Republic

Transmitted by a note verbale of 7 July 1966 from the Permanent Mission to the United Nations

[Original: Russian]

The Government of the Ukrainian SSR recognizes the value and usefulness of the draft articles on special missions drawn up by the International Law Commission and regards them as an important step forward in the codification and progressive development of the principles and rules of international law.

As regards the specific content and wording of the individual articles, the competent organs of the Ukrainian SSR consider that the following changes and additions should be made:

1. *Article 1.* Replace paragraph 2 by the following:

"Neither diplomatic and consular relations nor recognition is necessary for the sending and reception of special missions."

2. *Article 5.* Delete.

3. *Article 6.* Delete paragraph 3.

Other comments and additions may be submitted after further consideration of the draft articles on special missions.

20. Union of Soviet Socialist Republics

Transmitted by a note verbale of 3 June 1966 from the Permanent Mission to the United Nations

[Original: Russian]

1. In view of modern international practice, article 1, paragraph 2, of the draft should be worded as follows:

"Neither diplomatic and consular relations nor recognition is necessary for the sending and reception of special missions."

2. In view of the tasks which are usually given to special missions, it is unnecessary to include in the draft provisions relating to the possibility of sending the same special mission to more than one State (article 5) and to the size of the staff of a special mission (article 6, paragraph 3). These provisions should therefore be deleted from the draft.

21. United Kingdom of Great Britain and Northern Ireland

Transmitted by a letter of 26 May 1966 from the Deputy Permanent Representative to the United Nations

[Original: English]

1. The United Kingdom Government have studied with interest the set of 44 draft articles proposed by the International Law Commission as the basis for an international agreement on the status, functions and privileges of Special Missions and wish to express their great appreciation of the care and attention

^{bb} See foot-note g above.

which the Commission has devoted to the examination of this topic.

2. While expressing their general agreement with the principles and rules embodied in the draft articles, and with the desirability of codifying international law and practice on this aspect of diplomacy, the United Kingdom Government feel bound to record their opposition to the undue extension of privileges and immunities which certain articles appear to confer. In their view the grant of such privileges and immunities should be strictly controlled by considerations of functional necessity and should be limited to the minimum required to ensure the efficient discharge of the duties entrusted to Special Missions. The draft articles follow closely the corresponding provisions of the Vienna Convention on Diplomatic Relations and it is the view of the United Kingdom Government that such extensive privileges in the case of Special Missions cannot be justified on functional grounds.

3. The United Kingdom Government consider that it would be highly desirable to include a "definitions" article on the lines of Article 1 of the Vienna Convention on Diplomatic Relations, in which certain of the terms used in the draft Articles should be precisely defined. In their view it is of particular importance to define the term "Special Mission" with precision so that the scope of the draft articles may be made clear. The terms "head and members of the Special Mission", "members of its staff", "permanently resident in the receiving State" and "premises of the Special Mission", in particular, are among those used in the draft articles which should be precisely defined. It seems, for example, unclear whether "members [of the Special Mission]" as used in article 6 (1) does or does not include some or all of the staffs referred to in article 6 (2). A definition of the term "premises of the Special Mission" should exclude living accommodation of all staff.

4. The United Kingdom Government wishes to offer in addition the following comments on certain of the draft articles individually:

Article 1

In paragraph 1 the word "express" should be inserted before "consent" in order to eliminate reliance upon alleged tacit or informal consent as a basis for invoking the special treatment provided for in the draft articles.

In paragraph 2 (d) of the commentary the question of permanent specialised missions is discussed. It is made clear that the Special Missions to be covered by the draft articles are temporary in character. Although permanent specialised missions may in some cases be staffed by members of the staff of the diplomatic Missions of the country concerned and occupy "premises of the mission" in a manner bringing them within the scope of the Vienna Convention on Diplomatic Relations, there will be other cases to which that Convention will not be applicable since the purposes of the permanent specialised mission will not be "purposes of the mission". In some cases a permanent mission is accredited to an international organisation and its status is regulated by an international agreement governing the privileges and immunities of the organisation. The United Kingdom Government believe that permanent missions which do not fall into either of these categories should be brought within the scope of the present draft articles. It appears desirable to regulate their status by international agreement and there seems no reason to do this by a separate code of rules. It is further suggested that the application of the rules laid down in these draft articles to permanent specialised missions might be made subject in each case to the express consent of the receiving State.

With regard to paragraph 7 of the commentary, the United Kingdom Government suggest that a provision should be added to the article to make clear that where members of the regular permanent diplomatic mission act also in connexion with a special mission, their position as members of the permanent mission should determine their status.

Article 2

It appears desirable to limit in some way the purposes for which a special mission qualifying for the treatment contemplated in the draft articles may be constituted—otherwise there is a danger that the provisions of an eventual Convention could be invoked in any case of a visit to one State by a person or group of persons from another on official or quasi-official business, whatever its nature. There may be cases in which the receiving State wishes to permit a mission to come without necessarily according it the full privileges and immunities laid down in the draft articles but as the articles are at present drafted this might be very difficult.

With reference to paragraph 5 of the commentary, the United Kingdom Government see no need for a rule of the exclusion of the tasks or functions of a Special Mission from the competence of the permanent diplomatic mission. The matter seems to be entirely one between the sending State and its two missions and the receiving State should be entitled to presume that either the permanent or the special mission (within the scope of its task) has authority to perform any acts which it purports to perform. If difficulties are likely to arise, they can be dealt with by an *ad hoc* arrangement on the subject.

Article 11

The United Kingdom Government considers with reference to paragraph 12 of the commentary on this article, that it would not be necessary or appropriate to add to this article a reference to the principle of non-discrimination. They support fully the views of the Commission on this question.

Article 17

This article suggests that, for instance, the sending State may have all expenses of its Special Mission defrayed by the receiving State, which is not the case, unless by virtue of a special agreement. Some clarification appears to be desirable.

Article 19

The United Kingdom Government observes that this article accords the property of Special Missions a wider protection than is given to diplomatic missions by the Vienna Convention in that property not on the premises of the mission other than means of transport is covered by the article. The United Kingdom Government doubts whether this distinction is justifiable on functional grounds.

Article 22

It should be made clear that the word "free" as used in paragraph 1, has the sense of "unrestricted".

The United Kingdom Government considers that the bag facilities of Special Missions should be restricted to the minimum and that where the sending State has a permanent diplomatic mission in the receiving State official documents etc. for the use of the Special Mission should be imported in the bag of the permanent mission. In this way the onus of ensuring that improper use is not made of the bag would rest with the Head of the permanent mission who, unlike the Head of the Special Mission, has a continuing duty to the receiving State in this respect. There appears to be nothing contrary to this in paragraph 4 of Article 27 of the Vienna Convention.

Article 23

The expression "taxes in respect of the premises of the Special Mission" in paragraph 1 does not clearly cover capital gains tax on the disposal of the premises. The United Kingdom authorities would not seek to tax a gain accruing to the sending State under these circumstances and they accordingly suggest the addition of the words "including taxes on capital gains

arising on disposal" after the words "premises of the special mission".

Articles 24, 25, 26

The scale of immunity and inviolability prescribed in these articles, based on the corresponding provisions of the Vienna Convention on Diplomatic Relations, appears excessive, and inappropriate to the character and functions of Special Missions. While noting the Commission's basic hypothesis that Special Missions should be equated, so far as practicable, with permanent missions, the United Kingdom Government would prefer a restriction of immunity and inviolability to official documents and official acts.

Article 26

There seems to be room for doubt whether the expression "professional or commercial activity" in paragraph 2 (c) is wide enough to cover, for instance, disputes about the ownership of, or liability for calls, etc., on shares in a company registered in the receiving State. The expression has in the case of the Vienna Convention on Diplomatic Relations given rise to difficulty and its scope should be made more clear.

The commentary on this article implies that the phrase "unless otherwise agreed" in paragraph 2 does not contemplate the possibility of excluding all immunity from civil and administrative jurisdiction but only of limiting immunity to official acts. This should be made clear in the text.

Article 29

The article as it stands does not fully carry out the intention of the Commission expressed in paragraph 2 of the commentary, to accord a narrower scale of exemption than is accorded to permanent missions by Article 34 of the Vienna Convention on Diplomatic Relations. Omission of the exceptions has had in some respects the contrary effect—for example, relief appears due from taxes normally included in the price of goods or services.

Moreover, unlike Article 34 of the Vienna Convention on which it is said to be based, the article might be construed as exempting from stamp duty cheques, receipts, etc., given by the head, members and diplomatic staff of a special mission in the course of their duties. It will not be construed in the United Kingdom as having any effect in relation to duties chargeable under the Stamp Act 1891, as amended, on cheques and other instruments issued by the head, members or diplomatic staff of a special mission.

In the matter of income tax, because of the exclusion under Article 36 of United Kingdom Citizens and permanent residents in the United Kingdom from any exemption from United Kingdom tax under this Article, it is only in exceptional cases that United Kingdom law would impose any liability to income tax. In such exceptional cases, the expression "income attaching to their functions with the special mission" is too wide. There is no objection to the exemption of emoluments or fees paid by the sending State or, so long as the mission is for the governmental purposes of the sending State, of emoluments or fees paid by other sources in the sending State. Article 42, however, does not appear to exclude the possibility of members of a special mission deriving income from the sale of goods in the receiving State, or the provision of services, or any other activity of a profit-making nature, if the activity attaches to their functions with the mission. A mission sent to promote the export trade of the sending State or to organise a fair or exhibition on behalf of the sending State might claim that the sale of large quantities of goods was within its functions. Income derived from such activities should not be exempt from tax in the receiving State.

Article 31

The United Kingdom Government would be reluctant to extend full diplomatic Customs privilege to members of special

missions: it appears that they would not be alone in disallowing relief from customs duty on articles for the personal use of members of a special mission and they consider that the personal relief provision in the article should be made optional. This would conform more closely with international usage.

Paragraph 2 of the commentary is difficult to understand: it appears to be at variance with the terms of the article.

Article 32

According to paragraph 2 (b) of the commentary, the Commission did not intend the grant of "first installation" Customs privilege to administrative and technical staffs but the article as it stands confers on these staffs full diplomatic Customs privilege, contrary to intention.

Since nationals of, and permanent residents in, the receiving State are excluded from privileges and immunities by article 36, the repetition of the exclusion in this article seems unnecessary and, as it is not repeated in articles 28, 29 and 30, confusing.

Article 33

The formulation of the Commission is preferred to the suggestions of the Rapporteur that service staffs of special missions should be accorded a level of immunity higher than that given in the case of permanent diplomatic missions.

Article 34

The United Kingdom Government oppose the exemption of private servants from income tax on their emoluments.

A private servant who is not himself permanently resident in the United Kingdom would be liable to United Kingdom tax on his emoluments for his services in the United Kingdom if he were in the United Kingdom for six months or more in any one income tax year. In such circumstances it is unlikely that the private servant would be liable to taxation on his emoluments in the sending State: if the receiving State were required to exempt him, he would be free of all taxation. By contrast, the staff of the special mission will normally be taxed by the sending State. If, exceptionally, the sending State should tax the private servant's emoluments, he would qualify for double taxation relief in the United Kingdom.

Article 35

The comment on article 31 above applies equally to families. The provision which appears to accord full diplomatic Customs privilege to families of administrative and technical staff is presumably an error consequent upon that apparently existing in article 32, to which attention has already been drawn.

Article 38

If the possibility of profit-making special missions is to remain (see comment on article 29) the United Kingdom Government would prefer not to give exemption from estate duty to the personnel of such a mission.

Article 39

As drafted this article obliges the third State to grant immunities where it permits transit. The United Kingdom Government would prefer that third States should instead be entitled to permit transit without also granting immunities to a Special Mission.

Article 44

It is desirable to provide a time limit to the continuing inviolability of the premises of the special mission. The addition of a reference to "a reasonable period" would seem to be sufficient.

SECTION C

Paragraph 49. It is agreed that there would be no point in including non-discrimination provisions in draft articles of this character.

Paragraph 50. The United Kingdom Government believe that there would be advantage in adding to the draft articles a provision dealing with their relationship to other international agreements.

22. United States of America

Transmitted by a note verbale of 13 March 1967 from the Permanent Representative to the United Nations

[Original: English]

The United States Government has studied the draft articles on special missions with great interest and wishes to express its appreciation of the thorough study which the International Law Commission has made of this subject. The concern which the United States Government has about certain aspects of the draft articles as they now appear springs from the difficulties inherent in dealing with a subject that covers such a varied sphere of activities.

GENERAL REMARKS

The United States Government believes that a set of definitions is a useful addition to these articles. Most of the definitions proposed by the Special Rapporteur are from the 1961 Vienna Convention on Diplomatic Relations or the 1963 Vienna Convention on Consular Relations. The definition of "special mission" is new. It is of paramount importance since it necessarily determines the scope of the draft articles.

The United States considers that the abstract nature of the definition of "special mission" presents serious problems. The only limitations expressed in the definition are that the mission be "temporary", between States, and "for the performance of a specific task". The definition can be considered to include almost any official mission in a foreign State except a permanent diplomatic or consular establishment. As a result, any visit of a representative of one State to another on any kind of official business can be, for the purposes of the proposed convention, a special mission which throws into operation the complicated machinery of the draft articles.

The United States considers that a convention so framed would not accord with modern developments in the conduct of foreign relations. The system proposed would look back toward nineteenth century practice rather than to the conduct of foreign relations in the present half of the twentieth century and to the framing of a convention which should lay a basis for the conduct of foreign affairs in the twenty-first century.

The technological explosion of the past twenty years in the fields of communication and transportation has altered the world in many aspects, and the field of diplomacy has not remained untouched. The most striking development has been in the very area which is the subject of this convention. The carrying on of intercourse between States through meetings of specialists in all fields and at all levels has become a customary feature of international life. It is a most promising development from every aspect. This is an increasingly complicated world and the solution of problems on the international level requires increasingly higher levels of competence, training and experience in a broad spectrum of endeavour, and thus a continuing growth in the employment of experts.

Meetings of an expert character are generally marked by an absence of special arrangements, of concern with protocol, of

fanfare and formality. The aims of the meetings are to clear away misconceptions or misunderstandings through face-to-face explanations, to work out joint areas of interest through joint discussions and to seek common goals through common endeavours. These aims have been achieved in innumerable meetings of experts and specialists in the past twenty years, and achieved without any special arrangements for privileges and immunities, for inviolability, for pouches, for servants and for deciding who sits at the head of the table.

It appears from the records of the International Law Commission that a good part of the Commission's work in this field has been devoted to modifying and adapting the provisions of the Vienna Diplomatic and Consular Conventions to Special Missions. The approach has been that there need be no basic difference made between permanent and special missions except to take into account the indefinite duration of the latter. The United States suggests that special missions, as they have developed since World War II, have substantially different work patterns, objectives, and procedures than permanent missions. Requirements developed for permanent missions could be a hindrance rather than a help to the efficient and productive conduct of foreign relations. Such requirements should be modified to take into account experiences of States with the operation of special missions and, in particular, the reasons which have led States to increasingly greater reliance upon special missions for the conduct of foreign affairs.

First and foremost is the need for expert knowledge. A glance at the current topics which are the subject of international agreements, beginning with aerospace disturbances, agricultural commodities, air services, air transport, atmospheric sampling, atomic energy, is an immediate illustration of the enormous requirements for technical knowledge which the modern practice of foreign relations calls for. For foreign relations now includes all sorts of efforts in which individual States co-operate to combat disease, to predict the weather, to increase food production, to harness hydroelectric powers, to turn salt water into fresh water. As a result, there is a constant and continuing exchange of specialist missions between co-operating States. The arrangements for these exchanges of experts and for their meetings are generally informal in character, and certainly have little in common with the elaborate procedures and requirements laid down in the draft convention.

The improvement in long-distance communication, especially by telephone, and the blanketing of the entire world with speedy and efficient air-transport systems, have changed special missions between States from elaborate expeditions into routine visits. The trend is more and more to sending the man dealing with an international problem in one State on a quick trip to talk to the man dealing with that problem in the other. The United States believes that this development is a valuable contribution to the conduct of foreign relations. Again it notes that arrangements for missions of this nature are usually informal in character and that this method of diplomacy has flourished in the absence of any special arrangements for privileges and immunities.

Present-day experience does not demonstrate the need to make extraordinary arrangements for the ordinary flow of official visitors between one State and another. Experience does demonstrate, however, that there is a growing concern with and a mounting opposition to further extensions of privileges and immunities in most States in which there are sizable diplomatic communities. It would seem extremely likely that a convention extending privileges and immunities to another substantial class of individuals would not be warmly received. If such a convention were to come into general acceptance, its probable effects will be to undermine the valuable developments in the use of special missions discussed above. States will become less receptive to unqualified acceptance of official visits when every such visit must be treated as that of an envoy extraordinary.

The United States recognizes that there are special missions which should be treated specially. Missions which are sent for ceremonial or formal occasions are of a different nature than expert or technical missions, and this difference should be recognized.

The level of the mission should also be taken into account. When the mission is headed by an official of ministerial rank or when the mission is received by an official of ministerial rank, this would evidence that the mission is conducting its activities on a plane which demands special recognition. Finally, there are missions which, even though not headed by an official of ministerial rank, are dealing with matters of such gravity and importance to the States concerned, or which involve unusual considerations, that special protection should be afforded them. In such cases, however, the full range of privileges and immunities afforded by draft articles should become applicable only if the sending State requests the application specifically and the receiving State agrees.

In its remarks on Provisional Article 0, the United States submits language to describe missions which should be treated specially. For such missions, the United States would support, in general, the privileges and immunities proposed in the draft articles.

REMARKS ON SPECIFIC ARTICLES

The following remarks are not intended to be exhaustive, and do not suggest all the drafting changes necessary to satisfy the concerns expressed in the *General remarks* section.

Provisional Article 0

(a) The United States proposes the following definition of "special mission" for the purposes of the draft articles:

A special mission is one:

(1) Which is established by agreement between the sending State and the receiving State for a limited period to perform specifically designated tasks, and is headed or received by an official who holds the rank of Cabinet Minister or its equivalent, or a higher rank; or

(2) Which is specifically agreed by the sending State and the receiving State to be a special mission within the meaning of this Convention.

(g) It is not the practice of the United States to designate as plenipotentiary every official whom it sends to another State to represent it by performing a specific task. If the intention is to exclude from the coverage of the draft articles experts such as those discussed in the *General remarks* above, it is suggested this end is better achieved by a revision of the definition of special mission. The United States doubts that such designation is general practice in most sending States.

(r) This definition appears unduly broad. It is suggested that the word "exclusively" be inserted between the words "used" and "for" in the second line of Provisional Article 0 appearing at page 33 of A/CN.4/189/Add.1. Such amendment would make the definition, except for the final clause, correspond to Article 1 (j) of the Vienna Convention on Consular Relations. In the view of the United States, the final clause should be narrowed by excluding from the definition the residence or accommodation of persons other than the head of the special mission.

Article 2

In answer to the question posed in paragraph 5 of the Commentary, the United States Government believes that a hard-and-fast rule concerning exclusion from the competence of permanent missions of the tasks entrusted to special missions would not be useful, but that a sending State should be free to specify such exclusive competence in those instances it deems such an arrangement necessary.

Article 3

The United States agrees that the prior consent of the receiving State to the composition of a special mission should not be required. However, it is important and desirable that the sending State give advance notice of composition to the receiving State. This may be accomplished by adding the following to the end of the second sentence of Article 3: "but prior notice of the composition of the mission shall be given to it".

Article 5

This Article does not appear to be necessary.

Article 7

Paragraph 2 implies that the sending State does not have full liberty to change the head of the special mission. It would appear desirable to provide merely that a member of the mission may be authorized by the sending State to replace the head of the special mission. In addition, a sentence should be added at the end of paragraph 2 as follows: "The receiving State shall be notified of a change of head of mission."

Article 11

In regard to the question posed in paragraph 12 of the Commentary, the United States Government believes a rule of nondiscrimination in regard to the mode of reception of special missions of the same character is unnecessary and, on balance, undesirable.

Article 13

The fact that a special mission is of a temporary character runs counter to its having a seat. Moreover, this Article is without effect in so far as the remainder of the text is concerned. It is suggested that the Article be deleted.

Article 16

The United States Government is not sure whether the third State assumes the obligations of a receiving State by expressly consenting to permit a special mission to carry on functions in its territory. At all events, it should be provided that a third State's express consent may be conditioned in advance and withdrawn at any time.

Article 17

This Article would be more balanced if it provided:

"The receiving State shall accord to the special mission facilities for the performance of its functions, having regard to the nature and task of the special mission."

Article 19

The inviolability of premises raises special questions because, unless the special mission is housed in a permanent diplomatic mission, it will ordinarily be occupying hotel rooms or office space. Hotel rooms present special difficulties because of the danger of fire or similar catastrophe. The safety of other guests cannot be imperilled by the refusal of a mission to allow entry to firemen or police seeking to deal with an emergency. The same considerations apply, though with lesser force, to an office building. The suggestion that an emergency be handled by negotiations between the Foreign Office and the special mission is unrealistic.

The United States considers that a final sentence should be added to paragraph 1 of Article 19 to have it correspond to Article 31, paragraph 2 of the Vienna Convention on Consular Relations. The sentence would read: "The consent of the head of the special mission may, however, be assumed in case of fire or other disaster requiring prompt protective action."

The exclusion from legal process of furnishings, automobiles, and the like used by special missions raises questions if the

property is rented or leased. There does not appear to be any overriding need why normal legal processes should not apply to such property so long as equivalent property is available for use.

Real estate also presents difficulties. If a hotel is being sold under a court order, how would it be possible to exclude the premises of the special mission in the hotel? This type of extraordinary exemption could make it more difficult for the special mission to acquire property for use on a short-term basis.

Article 29

The coverage of the final clause (beginning "and in respect") in this article is unclear. The clause should either be changed or eliminated.

Article 31

The United States Government believes that fiscal and customs privileges granted to special missions should normally be limited to those necessary to enable them to perform the "specific tasks" for which they are sent. It does not favour setting up personal privileges for members of special missions. It is concerned lest the burdens imposed on the receiving State under this and related articles persuade many of the States whose revenues come largely from customs duties that they cannot afford to receive special missions. Such a development would mark a serious step backwards in the conduct of foreign relations.

Article 32

The privileges and immunities provided hereunder are broader than required by the nature of the services rendered. This observation applies with even greater force to paragraph 2 of Article 35, which extends such privileges to members of the families of those covered by Article 32. Given the temporary character of special missions, the question arises whether privileges and immunities of the families of members of permanent missions have any necessary application to families of members of special missions.

Article 39

The scope and effect of this article require further consideration, particularly in light of vehicular accidents which may occur *en route*.

23. Upper Volta

Transmitted by a letter of 23 February 1966 from the Secretary of State for Foreign Affairs

[Original: French]

The Government of the Republic of the Upper Volta wishes first of all to thank the International Law Commission for kindly associating it with the Commission's work on special missions by inviting it to submit its comments on:

(a) The draft articles in section B of chapter III of the Commission's report; and

(b) Section C of chapter III of that report.

The draft articles on special missions, like the other decisions, suggestions and observations by the International Law Commission mentioned in section C, are of definite value and should be taken into consideration by States, for today, when relations between States are complex and regularly maintained at several levels, the special mission, because of its dynamic function, at any level, is seen to be the instrument of active diplomacy.

The Government of the Republic of the Upper Volta accordingly welcomes the opportunity of expressing its views and submitting its comments on the rules of law and other provisions with which special missions are required to comply. The Government of

the Republic of the Upper Volta has the honour to submit the following comments to the International Law Commission:

(a) The first point on which the Government of the Upper Volta would like to state its view is mentioned in paragraph (5) of the commentary on article 2. The problem here concerns the parallel existence of permanent and special missions and their respective areas of competence, and, in this context, the question of the validity of acts performed by special missions is raised.

Special missions differ by nature from permanent missions, as is made clear, incidentally, in article 1 and its commentary:

(i) In the first place, States send special missions for specific tasks; their tasks are not of a general nature like those of a permanent mission;

(ii) Special missions are of a temporary nature.

We mention these few facts concerning the nature of special missions in order to stress the difference, which we consider to be fundamental, between them and permanent missions; it is these individual features of special missions that determine the position of the Upper Volta Government with regard to the respective areas of competence of special missions and permanent missions. The Government of the Upper Volta therefore considers that since a special mission is established for a specific task and since it is temporary, it should be able to act independently of the permanent mission and the tasks entrusted to it by the States concerned ought to be regarded as being outside the competence of the permanent diplomatic mission.

(b) Article 11:

The problem raised in paragraph (12) of the commentary on article 11—that of the discrimination to which some special missions may be subjected in practice in comparison with others—is of great importance at the present time.

Such discrimination is contrary to the sovereign equality of States and to the principles which should guide States in their daily relations with each other; the differences in treatment in the reception of special missions and the way in which they are permitted to begin to function may prejudice the chances of success of the mission itself which should be able to develop in an atmosphere of calm and confidence.

The Government of the Upper Volta considers that a provision on non-discrimination should be included in this article.

(c) Article 12, paragraph (4) of the commentary:

The Government of the Upper Volta would like to support the proposal, mentioned in the commentary on this article, which was submitted in 1960 by the Commission's Special Rapporteur, Mr. Sandström.^{cc}

It is desirable to consider that when negotiations between the special mission and the local authorities are interrupted the mission loses its purpose, and that consequently the interruption of negotiations marks the end of the functions of a special mission.

(d) Article 13:

The Upper Volta considers that the compromise suggested by the Commission, namely that the sending State should have a part in choosing the seat of the special mission, might impair the sovereign authority of the receiving State over its own territory. The Government of the Upper Volta is of the opinion that the receiving State is competent to choose the seat of the mission, without the participation of the sending State, provided that the locality chosen by the receiving State is suitable in the light of all the circumstances which might affect the special mission's efficient functioning.

(e) On the question whether special rules of law should or should not be drafted for so-called "high-level" special missions,

^{cc} *Yearbook of the International Law Commission, 1960, vol. II, p. 115, art. 4.*

whose heads hold high office in their States,^{dd} the Government of Upper Volta submits the following comments:

It is true that in practice no distinction is made, with respect to legal status, between special missions led by a high official of the sending State and other special missions. The draft provisions concerning these so-called high-level special missions, which have been submitted to Governments for their comments, are therefore likely to draw the attention of Governments to this state of affairs in relations between States.

In rule 2, paragraph (f), concerning the end of the functions of a special mission which is led by a head of State, the interruption of the negotiations which are the purpose of the special mission should also be considered as bringing the mission's functions to an end. The views expressed in paragraph (i) of rule 12 relating to the freedom of movement of a head of State also apply in this case. For reasons of security, it is necessary that there should be an agreement between the sending State and the receiving State limiting the freedom of movement of the head of State.

In practice, however, the situation is often different. Many heads of State, for personal reasons, like to have great freedom of movement in order to be in touch with the mass of the people. Others even like to refuse all protection in certain situations. These are cases which bring up the problem of the security of special missions led by a head of State. The Government of the Upper Volta would like to see specific provisions on this subject included in the draft.

24. Yugoslavia

Transmitted by a letter of 9 April 1966 from the Legal Adviser of the Ministry for Foreign Affairs

[Original: French]

A. GENERAL OBSERVATIONS

The Government of the Socialist Federal Republic of Yugoslavia considers that the rules on special missions should be embodied in a separate international convention in the same manner as the Vienna Convention on Diplomatic Relations, 1961, and the Vienna Convention on Consular Relations, 1963.

The convention should be adopted at a special meeting of State plenipotentiaries which might be held at the time of a session of the General Assembly of the United Nations. The convention could thus be adopted either before or after the session.

B. SPECIFIC OBSERVATIONS

1. The Government of the Socialist Federal Republic of Yugoslavia considers that the preamble to the convention should give a definition of a special mission and emphasize the differences between special missions and permanent diplomatic missions.

2. The Government of the Socialist Federal Republic of Yugoslavia agrees with the International Law Commission's proposal that an article defining the terms used in the Convention should be inserted as article 1 of the future convention.

3. In the opinion of the Government of the Socialist Federal Republic of Yugoslavia, it should be stated, in article 2 of the convention, as an addition to the text already adopted, that a special mission cannot accomplish the task entrusted to it nor can it exceed its powers except by prior agreement with the receiving State. This would avoid any overlapping of the competence of special missions with that of permanent diplomatic missions.

The Government of the Socialist Federal Republic of Yugoslavia considers that some wording should be added to the commentary on that article, stating that the task of a special mission should not be specified in those cases where the special mission's field of activity is known and this should be considered as a definition of its task. An example of that would be the sending and receiving of experts in hydro-technology who are sent and received when two neighbouring countries are threatened by floods in areas liable to flooding.

4. In the opinion of the Government of the Socialist Federal Republic of Yugoslavia, consideration should be given to the possibility of adding to article 4 a provision stating that the receiving State may not declare a person *persona non grata* if that State, by prior agreement with the sending State, had already signified its acceptance of that person as head of the mission, assuming that States agree, at the level of ministers for foreign affairs, to send and receive missions and that, between the agreement and the appointment of the special mission, no change of ministers took place.

5. The Government of the Socialist Federal Republic of Yugoslavia considers that, in view of the fact that there is some inconsistency between the provisions of article 7 and the commentary on that article, the words "and a member of his diplomatic staff" should be inserted after the word "mission" at the beginning of article 7, paragraph 2.

6. In the opinion of the Government of the Socialist Federal Republic of Yugoslavia, the commentary on article 8 should be made consistent with the provisions of that article. Whereas article 8, paragraph 1, sub-paragraph (d), provides for the receiving State to be notified of the members of the mission, the private servants of the head or of a member of the mission or of a member of the mission's staff who are recruited from among the nationals of that State or from among aliens domiciled in its territory, it is stated in paragraph (7) of the commentary that such recruitment is in practice limited to auxiliary staff without diplomatic rank. Since some States allow the recruitment of staff with diplomatic rank, the Government of the Socialist Federal Republic of Yugoslavia considers that the following should be inserted in paragraph (7) of the commentary: "In some countries such recruitment is in practice limited to auxiliary staff without diplomatic rank".

7. As regards precedence and the alphabetical order to be applied under draft article 9, the Government of the Socialist Federal Republic of Yugoslavia considers that the alphabetical order to be adopted should be the one in use in the receiving State, or, in the absence thereof, the method used by the United Nations.

8. In the opinion of the Government of the Socialist Federal Republic of Yugoslavia, consideration should be given to the possibility of guaranteeing, in article 22, the immunity of couriers *ad hoc* during their return journey also, if it immediately follows the delivery of the bag to the special mission.

9. The Government of the Socialist Federal Republic of Yugoslavia considers as justified the proposal for the inclusion of a provision forbidding discrimination, as in article 47 of the Vienna Convention on Diplomatic Relations and article 72 of the Vienna Convention on Consular Relations.

10. The Government of the Socialist Federal Republic of Yugoslavia also considers that there should be special provisions applicable to special missions led by heads of State or heads of Government but not to those led by Ministers for Foreign Affairs and Cabinet Ministers.^{ee} The Yugoslav Government takes the view, however, that such provisions should be included in the body of the convention and not in an annex and should therefore be drafted more concisely.

^{dd} See foot-note g above.

^{ee} *Ibid.*

ANNEX II

Table of references showing the correspondence between, on the one hand, the articles of the draft on special missions adopted by the Commission in 1965^a and the additional articles proposed by the Special Rapporteur in his fourth report,^b and, on the other hand, the articles of the final draft adopted by the Commission in 1967

<i>Articles of the 1965 draft</i>	<i>Additional articles</i>	<i>Articles of the 1967 final draft</i>	<i>Articles of the 1965 draft</i>	<i>Additional articles</i>	<i>Articles of the 1967 final draft</i>
—	Introductory ^c	1	—	17 <i>ter</i>	Deleted
1, para. 1	—	2	—	17 <i>quater</i>	21
1, para. 2	—	7, para. 1	18	—	23
2	—	3	19	—	25
3	—	8	20	—	26
4	—	12	21	—	27
5	—	4	22	—	28
—	5 <i>bis</i>	5	23	—	24
6	—	9	24	—	29
7	—	14	25	—	30
8	—	11	26	—	31
9	—	16, paras. 1 and 3	27	—	41
10	—	16, para. 2	28	—	32
11	—	13	29	—	33
12	—	20, para. 1	30	—	34
13	—	17	31	—	35
14	—	10	32	—	36
15	—	19	33	—	37
16	—	18	34	—	38
17	—	22	35	—	39
—	17 <i>bis</i>	Deleted	36	—	40
			37	—	44, paras. 1 and 2
			38	—	44, para. 3 and 45
			39	—	43
			40	—	48
			—	40 <i>bis</i>	50
			41	—	15
			42	—	49
			43	—	46
			44, paras. 1 and 3	—	47
			44, para. 2	—	20, para. 2
			—	X	Deleted
				Y	Deleted

^a Yearbook of the International Law Commission, 1965, vol. II, document A/6009.

^b A/CN.4/194 and Add.1 and 2.

^c Also called article 0.

CHECK LIST OF DOCUMENTS REFERRED TO IN THIS VOLUME

<i>Document</i>	<i>Title</i>	<i>Observations and references</i>
A/3859	Report of the International Law Commission covering the work of its tenth session, 28 April - 4 July 1958	<i>Official Records of the General Assembly, Thirteenth Session, Supplement No. 9</i> ; also published in <i>Yearbook of the International Law Commission, 1958</i> , vol. II.
A/4425	Report of the International Law Commission covering the work of its twelfth session, 25 April - 1 July 1960	<i>Ibid.</i> , <i>Fifteenth Session, Supplement No. 9</i> ; also published in <i>Yearbook of the International Law Commission, 1960</i> , vol. II.
A/5209	Report of the International Law Commission covering the work of its fourteenth session, 24 April - 29 June 1962	<i>Ibid.</i> , <i>Seventeenth Session, Supplement No. 9</i> ; also published in <i>Yearbook of the International Law Commission, 1962</i> , vol. II.
A/5509	Report of the International Law Commission covering the work of its fifteenth session, 6 May - 12 July 1963	<i>Ibid.</i> , <i>Eighteenth Session, Supplement No. 9</i> ; also published in <i>Yearbook of the International Law Commission, 1963</i> , vol. II.
A/5809	Report of the International Law Commission covering the work of its sixteenth session, 11 May - 24 July 1964	<i>Ibid.</i> , <i>Nineteenth Session, Supplement No. 9</i> ; also published in <i>Yearbook of the International Law Commission, 1964</i> , vol. II.
A/6009	Report of the International Law Commission on the work of the first part of its seventeenth session, 3 May - 9 July 1965	<i>Ibid.</i> , <i>Twentieth Session, Supplement No. 9</i> ; also published in <i>Yearbook of the International Law Commission, 1965</i> , vol. II.
A/6309/Rev.1	Reports of the International Law Commission on the second part of its seventeenth session and on its eighteenth session	<i>Ibid.</i> , <i>Twenty-first Session, Supplement No. 9</i> ; also published in <i>Yearbook of the International Law Commission, 1966</i> , vol. II.
A/CN.4/1/Rev.1	Survey of international law in relation to the work of codification of the International Law Commission (memorandum submitted by the Secretary-General)	United Nations publication, Sales No.: 1948.V.1(1).
A/CN.4/96	State responsibility: International responsibility: report by Mr. F. V. García Amador, Special Rapporteur	<i>Yearbook of the International Law Commission, 1956</i> , vol. II.
A/CN.4/106	State responsibility: International responsibility: second report by Mr. F. V. García Amador, Special Rapporteur	<i>Yearbook of the International Law Commission, 1957</i> , vol. II.
A/CN.4/111	State responsibility: International responsibility: third report by Mr. F. V. García Amador, Special Rapporteur	<i>Yearbook of the International Law Commission, 1958</i> , vol. II.
A/CN.4/119	State responsibility: International responsibility: fourth report by Mr. F. V. García Amador, Special Rapporteur	<i>Yearbook of the International Law Commission, 1959</i> , vol. II.
A/CN.4/125	State responsibility: International responsibility: fifth report by Mr. F. V. García Amador, Special Rapporteur	<i>Yearbook of the International Law Commission, 1960</i> , vol. II.
A/CN.4/134 and Add.1	State responsibility: International responsibility: sixth report by Mr. F. V. García Amador, Special Rapporteur	<i>Yearbook of the International Law Commission, 1961</i> , vol. II.

<i>Document</i>	<i>Title</i>	<i>Observations and references</i>
A/CN.4/143	Juridical régime of historic waters, including historic bays: study prepared by the Secretariat	<i>Yearbook of the International Law Commission, 1962, vol. II.</i>
A/CN.4/144 and Add.1	First report on the law of treaties, with addendum, by Sir Humphrey Waldock, Special Rapporteur	<i>Ibid.</i>
A/CN.4/145	Working paper prepared by the Secretariat concerning future work in the field of the codification and progressive development of international law	<i>Ibid.</i>
A/CN.4/152	Report by Mr. Roberto Ago, Chairman of the Sub-Committee on State Responsibility (approved by the Sub-Committee)	<i>Yearbook of the International Law Commission, 1963, vol. II.</i> See annex I to document A/5509.
A/CN.4/154	Resolutions of the General Assembly concerning the law of treaties: memorandum prepared by the Secretariat	<i>Yearbook of the International Law Commission, 1963, vol. II.</i>
A/CN.4/155	Special missions: working paper prepared by the Secretariat	<i>Ibid.</i>
A/CN.4/161 and Add.1	Relations between States and inter-governmental organizations: first report by Mr. Abdullah El-Erian, Special Rapporteur	<i>Ibid.</i>
A/CN.4/166	Special missions: report by Mr. Milan Bartoš, Special Rapporteur	<i>Yearbook of the International Law Commission, 1964, vol. II.</i>
A/CN.4/179	Special missions: second report by Mr. Milan Bartoš, Special Rapporteur	<i>Yearbook of the International Law Commission, 1965, vol. II.</i>
A/CN.4/188 and Add.1-4	Special missions: Comments by Governments on the draft articles on special missions adopted by the Commission in 1965	Printed in this volume; see annex I to document A/6709/Rev.1 and Rev.1/Corr.1, p. 371.
A/CN.4/189 and Add.1 and 2	Special missions: third report by Mr. Milan Bartoš, Special Rapporteur	<i>Yearbook of the International Law Commission, 1966, vol. II.</i>
A/CN.4/193 and Add.1-5	Special missions: comments by Governments on the draft articles on special missions adopted by the Commission in 1965	Printed in this volume; see annex I to document A/6709/Rev.1 and Rev.1/Corr.1, p. 371.
A/CN.4/194 and Add.1-5	Fourth report on special missions by Mr. Milan Bartoš, Special Rapporteur	Printed in this volume, p. 1.
A/CN.4/195 and Add.1	Second report on relations between States and inter-governmental organizations, by Mr. Abdullah El-Erian, Special Rapporteur	Printed in this volume, p. 133.
A/CN.4/196	State responsibility: note by Mr. Roberto Ago, Special Rapporteur	Printed in this volume, p. 325.
A/CN.4/L.103	Scope and order of future work on the subject of relations between States and inter-governmental organizations: working paper by Mr. Abdullah El-Erian, Special Rapporteur	<i>Yearbook of the International Law Commission, 1963, vol. II.</i>
A/CN.4/L.104	Relations between States and inter-governmental organizations: suggested list of questions as a basis of discussion for the definition of the scope and mode of treatment: working paper prepared by Mr. Abdullah El-Erian, Special Rapporteur	See chapter V of the Commission's report on its 16th session (A/5809) for the substance of this paper.
A/CN.4/L.118 and Add.1 and 2	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	Printed in this volume, p. 154.

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NOT REPRODUCED IN THIS VOLUME**

<i>Document</i>	<i>Title</i>	<i>Observations and references</i>
A/CN.4/192	Provisional agenda	Printed in vol. I.
A/CN.4/199	Report of the International Law Commission on the work of its nineteenth session	Same as document A/6709/Rev.1 and Rev.1/Corr.1, printed in this volume, p. 343.
A/CN.4/L.120 and Add.1-10	Draft articles on special missions: articles 1 to 44 and text of preamble adopted by the Drafting Committee	Mimeographed.
A/CN.4/L.121	Special missions: article 23 <i>bis</i> : proposal by Mr. Jiménez de Aréchaga	Mimeographed.
A/CN.4/L.122 and Add.1 and 2	Special missions: draft articles 1 to 15 adopted by the Drafting Committee on second reading	Mimeographed.
A/CN.4/L.123	Special missions: articles 1 to 11 adopted by the Drafting Committee on third reading	Mimeographed.
A/CN.4/L.124 and Add.1-11	Draft report of the International Law Commission on the work of its nineteenth session.	Mimeographed.
A/CN.4/L.125 and Add.1	Special missions: modifications proposed by the Drafting Committee to the text of articles 6, 16, 27, 32 and 39 which had been referred back to the Committee by the Commission.	Mimeographed.

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