

Draft Articles on Special Missions with commentaries

1967

Text adopted by the International Law Commission at its nineteenth session, in 1967, and submitted to the General Assembly as a part of the Commission's report covering the work of that session (at para. 35). The report, which also contains commentaries on the draft articles, appears in *Yearbook of the International Law Commission, 1967*, vol. II.



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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.