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Summary record of the 760th meeting

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760th MEETING

Tuesday, 7 July 1964, at 10 a.m.

Chairman: Mr. Roberto AGO

Welcome to the Legal Counsel

1. The CHAIRMAN welcomed the Legal Counsel of the United Nations and said that he had informed him of the Commission's decisions regarding the organization of its future sessions.

2. Mr. STAVROPOULOS, Legal Counsel, thanked the Chairman for his words of welcome and said that the valuable work of the Commission was being followed with great interest at United Nations Headquarters.

3. He had been glad to learn of the Commission's decision to change its programme. The Commission had acted wisely in adopting its decisions on an *ad hoc* basis and he felt confident that the outcome would be satisfactory.

Law of Treaties

(resumed from the previous meeting)

[Item 3 of the agenda]

ARTICLES PROPOSED BY THE DRAFTING COMMITTEE

4. The CHAIRMAN invited the Commission to resume its consideration of the articles proposed by the Drafting Committee.

ARTICLE 65 A (the effect of severance of diplomatic relations on the application of treaties)

5. Sir Humphrey WALDOCK, Special Rapporteur, said that the Drafting Committee had adopted the following revised title and text for article 65 A:

> "*The effect of severance of diplomatic relations on the application of treaties*
>
> "1. The severance of diplomatic relations between parties to a treaty does not affect the legal relations between them established by the treaty.
>
> "2. However, such severance of diplomatic relations may be invoked as a ground for suspending the operation of the treaty if it results in the disappearance of the means necessary for the application of the treaty.
>
> "3. Under the conditions specified in article 46, if the disappearance of such means relates to particular clauses of the treaty, the severance of diplomatic relations may be invoked as a ground for suspending the operation of those clauses only."

6. In his previous and much shorter draft in document A/CN.4/167/Add.2 the question with which article 65A was concerned had been covered by means of a cross-reference to article 43, on supervening impossibility of performance. The Drafting Committee had considered, however, that article 43 was not well adapted for dealing with the particular point and that it would be best, at least at the present stage, to spell out the rule. At a later state of its work, when it reviewed the articles on second reading, the Commission could consider whether article 65A should be more directly related to article 43.

7. The CHAIRMAN, speaking as a member of the Commission, said that the Drafting Committee's redraft of article 65A spoke only of the case where the application of a treaty had become impossible because its performance presupposed the existence of diplomatic relations. It did not cover the case where the application of the treaty was impossible because of the atmosphere created by the severance of diplomatic relations.

8. From the drafting point of view, he thought that the expression "*défaut des moyens nécessaires*" was not perhaps entirely satisfactory in the French text of paragraph 2.

9. Mr. YASSEEN said that although the Drafting Committee's text was more complete than the Special Rapporteur's original text, it still dealt with only one part of the question and disregarded cases where the application of a treaty had to be suspended, not because of the disappearance of the diplomatic organ, but because of the abnormal state of relations between two countries which was reflected in the severance of diplomatic relations.

10. In paragraph 2, he suggested that the word "means" might be replaced by the word "organs".

11. Mr. BARTOŠ suggested that the words "means necessary" should be replaced by the words "appropriate channels", which would indicate more accurately that relations could continue through other States or through an international organization.

12. Mr. AMADO expressed support for Mr. Bartoš's suggestion, fort the object was to ensure the application of the treaty.

13. The CHAIRMAN, speaking as a member of the Commission, said that he preferred the word "channels" to the word "organs"; for example, in the case of a request for extradition, the "organ" was the Ministry of Justice, and the diplomatic mission was the channel through which the request was transmitted.

14. Sir Humphrey WALDOCK, Special Rapporteur, said that there had been some discussion in the Drafting Committee on the possibility of referring to "organs" or "channels". In English, the term "means" adequately rendered the intended idea.

15. He did not favour the adjective "appropriate" or "proper" before the proposed word "channels". In order to meet the point raised by Mr. Bartoš he suggested that the words "means necessary" should be

replaced by " necessary channels " in paragraph 2 of article 65A. The adjective " necessary " was the appropriate one to use in connexion with the problem of impossibility of performance. In paragraph 3, the word " means " would be replaced by " channels ".

Article 65 A, with those amendments, was adopted unanimously.

16. Mr. YASSEEN said that he had voted for article 65A because, although containing a gap, it nevertheless dealt with one part of the subject; he hoped that the conference to which the Commission's draft would be submitted would fill the gap.

17. The CHAIRMAN said that, even if the members of the Commission were not completely satisfied with an article, they should cast a positive vote whenever possible in order to give more weight to the text prepared by the Commission.

18. Sir Humphrey WALDOCK, Special Rapporteur, pointed out that the Commission was adopting only a preliminary draft; when the articles were discussed again, Mr. Yasseen would have the opportunity to suggest improvements not only to article 65A but to article 43 on supervening impossibility of performance.

Special Missions

(A/CN.4/166)

(resumed from the 758th meeting)

[Item 4 of the agenda]

Draft articles on special missions

Article 3 (Appointment of the head and members of the special mission)

19. The CHAIRMAN invited the Commission to consider article 3 in the Special Rapporteur's first report (A/CN.4/166).

20. Mr. BARTOŠ, Special Rapporteur, said that the idea underlying article 3 was that, by contrast with the appointment of the head and members of a permanent mission, that of the head and members of a special mission was not subject to *agrément*. However, in the light of practice provision had to be made for exceptions, for, firstly, the *agrément* was necessary if the States had agreed in advance that they would agree on the choice of the persons who would serve on a special mission; and, secondly, independently of the possibility of declaring a person *persona non grata*, the receiving State might — often for objective reasons — dislike the choice of a particular person as a member of a special mission. That principle and those exceptions were laid down in paragraph 1 of the article.

21. Paragraph 2 mentioned some of the matters which might be regulated in the prior agreement between the two States. It often happened in practice that the choice of the head or members of a special mission was restricted because those persons were required to possess certain technical or other qualifications and the receiving State asked that they should be of a certain rank in order that the negotiations could be conducted at the appropriate level.

22. Mr. TABIBI said he was in full agreement with the provisions of article 3. However, he could not accept certain passages of the commentary. In the first place, he doubted the wisdom of retaining paragraph (3), which referred to the views of Mr. Jiménez de Aréchaga; he did not believe there was any room in the commentary for the expression of the personal views of a member of the Commission.

23. He also disagreed with paragraph (7) of the commentary. It would be ill-advised even to mention the possibility of a consultation on the selection of the person appointed to a special mission; any suggestion to that effect would be tantamount to an encroachment on the sovereign rights of the sending State. The position of the receiving State was fully safeguarded, because its consent would have to be obtained either in the form of a memorandum giving recognition to the special mission or in the form of a visa on the passport of each of its members.

24. Mr. de LUNA said he approved the principle by which the Special Rapporteur had been guided, and that he did not share Mr. Tabibi's misgivings. The practice was indeed as set forth in article 3, and it did not seem that the sovereign rights of States would be infringed through its application. However, since the possibility of declaring a member of the mission *persona non grata* was dealt with in article 4, the phrase in brackets at the end of article 3, paragraph 1, should be deleted for it related to a question that came within the terms of article 4. Moreover, by reason of its position in the article, the phrase gave the impression that, beore a State could declare a member of a special mission *persona non grata*, the other State must first have requested the *agrément* for the appointment of the mission's members. But that was not what happened in practice; as soon as a State received notification of the membership of the special mission, it was entitled to declare a member of that mission *persona non grata*.

25. Mr. CASTRÉN associated himself with Mr. de Luna's proposal that the bracketed phrase at the end of paragraph 1 should be deleted; the receiving State did not always have advance notice of the special mission's membership, and the sending State was not bound to notify the other State, in advance, of the names of all the special mission's members. If such notification on the part of the sending State was required, then the receiving State would of course be entitled to object to the choice of the persons appointed, but such an arrangement would come close to the system of *agrément*, which the Special Rapporteur had specifically wanted to avoid. Preferably, the provision should be so worded that the receiving State would be free to safeguard its interests in that respect by exercising the right to declare a particular member of the special mission *persona non grata*, as was provided in the Vienna Convention on Diplomatic Relations. Accor-

dingly, the provisions of article 4 of the Special Rapporteur's draft should be expanded on the model of that Convention.

26. Besides, States were at liberty to agree, in any form they jointly chose, that the *agrément* was necessary either in a specific case or more generally. To express that idea, the last part of article 3, paragraph 1, should be redrafted in broader terms, such as " unless it is otherwise provided ", no reference being made to a prior special agreement.

27. Paragraph 2 should be similarly redrafted in broader language, the words " the prior agreement may provide " being replaced by the words " The sending State and the receiving State may agree ". In addition, he thought the remainder of the sentence gave the receiving State too much power with regard to the mission's membership. It might be sufficient to say that it could be agreed that the head or certain members of the mission should belong to a specified category of State representatives or officials. However, he was not convinced that the paragraph was necessary. Was it desirable to specify in an international convention everything that the States could do by common accord, or would it not rather be preferable merely to specify what they were entitled to do even without the prior consent of other States, what they should do in a particular situation, and what they were forbidden to do?

28. Mr. ROSENNE said that he was in general agreement with the Special Rapporteur's view that the *agrément* was not necessary in the case of special missions. He had not been convinced by the arguments put forward by Mr. Jiménez de Aréchaga in paragraph 7 of his memorandum[1] in support of the view that the *agrément* should be required. Such a requirement could lead to complications, for instance, in the technically possible case (contemplated in paragraph (5) of the Special Rapporteur's commentary to article 1) of a mission appointed by the receiving State. Another reason for not requiring *agrément* was that a special mission could be designated to operate in the territory of a third State (the case covered in the Special Rapporteur's article 14).

29. He thought that the legitimate interests of the territorial State (or the receiving State) were quite adequately covered by the provisions of article 4. That being said, he doubted the necessity for retaining article 3 in its present form. Paragraph 1 of the article embodied a purely negative proposition and paragraph 2 merely stated that it was possible for States to make certain agreements, something which States were always free to do so long as they were not proposing to contravene peremptory rules of international law.

30. In his view, there was a very direct relationship between the consent given by a State to receive a special mission and the notification and composition of the mission. He therefore suggested that the whole problem dealt with in article 3 should be covered by means of a small insertion in article 2, which would make that article cover not only the assignment of a special mission, but both the assignment and the composition of a special mission; in that manner, it would be made clear that the composition of the special mission should be notified to the receiving State. Any further details on the subject would be covered by the provisions of article 6. Difficulties would arise if article 3 were retained with its emphasis on the purely negative proposition that the *agrément* was not required.

31. Mr. BRIGGS said that he agreed with the proposition in article 3 that *agrément* was not necessary. However, he thought the word " normally " in paragraph 1 should be omitted. There was nothing in the commentary to indicate that any State other than the sending State was qualified to appoint the head of the special mission and its members.

32. He suggested that paragraph 1 should be reworded along the following lines:

> " In the absence of any prior agreement to the contrary, a sending State is free to appoint the head of the special mission and its members, and it is unnecessary to request *agrément* for their appointments ".

33. He added that he was not at all certain that paragraph 2 was necessary.

34. Mr. TUNKIN said that in his view article 3 was acceptable as a whole. However, he supported Mr. Briggs's suggestion for the deletion of the word " normally " in paragraph 1, because that word weakened too much the rule set forth. That rule was that the *agrément* was not necessary, but that a prior agreement could provide what would be the level of the mission, who would be its head, and what persons would be members of it. If the word " normally " was deleted and if the clause was introduced by some such words as " except as previously otherwise agreed ", the entire passage following the word " appointments " could be omitted.

35. Paragraph 2 was not necessary, for its substance was already contained in paragraph 1, either in the wording used by the Special Rapporteur or in that which he had just proposed. In any case, it was almost impossible to specify everything that States could do by mutual agreement.

36. Mr. PESSOU considered that the receiving State should have advance knowledge of the membership of the special mission. Elementary courtesy required the sending State to notify it of the names of the persons who where to serve on the mission. The idea of notification should, therefore, be retained.

37. Mr. TSURUOKA said that, so far as substance was concerned, he agreed with the previous speakers. The consent of the receiving State, in the form of an *agrément*, was not necessary; but that State was entitled to know, if it so wished, how big the mission would be, what its membership would be, and who would be its

[1] *Yearbook of the International Law Commission, 1960*, Vol. II, p. 116.

head ; it should be given an opportunity to object to the choice of a particular person. That was the rule expressed in article 3, and it was a rule conforming to practice. The prior agreement referred to in the article was not merely the agreement which preceded the proposal to send the special mission ; it was also the agreement resulting from the negotiations concerning the sending and receiving of the special mission. He could accept article 3, subject to a few drafting changes.

38. Mr. AMADO said that he approved article 3 and would accept the wording suggested by Mr. Tunkin ; he wondered, however, what matters would be covered in the prior special agreement mentioned in that article : the sending of the special mission, the manner in which it would be received, and the names of the persons serving on it ? Or other matters as well ?

39. The CHAIRMAN speaking as a member of the Commission, said that the same question had occurred to him ; on reflection, it seemed obvious to him that, since the rule was that the sending State freely appointed the head and members of the special mission, the prior agreement could only be a derogation from that rule, to enable the receiving State to have a say in the appointment of the persons in question. That prior agreement concluded between two States could provide that the States would not send special missions to one another without mutual agreement on the persons who would serve on them, or it might relate only to a particular mission. It was not easy to make provision for everything that might be covered by such an agreement, and he was therefore inclined to accept the formula proposed by Mr. Tunkin, subject to the replacement of the phrase " the sending State is free to appoint " by the words " the sending States appoints ". He likewise thought that paragraph 2 should be omitted, for it was dangerous to try to specify what could form the subject of the prior agreement ; that provision would before long be superseded by practice.

40. With regard to the question of notification, he was sorry to say that he disagreed with Mr. Castrén ; inasmuch as the sending State appointed the head and members of the special mission and as the receiving State was free to object to the appointments, notification was essential. That idea should be introduced in article 3 or, as Mr. Rosenne had suggested, in article 2.

41. Mr. VERDROSS said that he likewise favoured the deletion of the word " normally " and accepted the wording proposed by Mr. Tunkin for paragraph 1 ; he would, however, suggest that the following proviso should be added : " unless the other party declares that the person appointed is not acceptable ". That proviso was based on a passage in article 9 of the Vienna Convention on Diplomatic Relations, which made a distinction between the declaration that a diplomatic agent (other than the head of mission, for whom an *agrément* was necessary) already arrived was *persona non grata* and the declaration that a person not yet arrived was not acceptable.

42. Mr. RUDA said that he was in agreement with the idea contained in article 3, but thought that that idea was indissolubly linked with the provisions of article 4 ; the sending State was free to appoint the head of the special mission without any need to request *agrément*. However, that rule was subordinated to the condition specified in article 4 that the territorial or receiving State could at any time notify the sending State that it regarded the head or any other member of the mission as *persona non grata* and refused to accept that person. The use of the words " at any time " made it clear that the notification in question could be given not only after the arrival of the mission but even before it set out.

43. He noted from paragraph (2) of the commentary to article 3 that the Special Rapporteur agreed with the late Mr. Sandström's views that a State was not obliged to receive an undesirable person even in the capacity of a member of a special mission and that it could therefore object to his being sent or, if he arrived notwithstanding, refuse all contact with him. Accordingly, it was necessary to refer to notification in article 3, in order that the intended idea should be fully expressed.

44. With regard to the drafting of the article, he found himself in agreement with Mr. Tunkin.

45. Mr. PAL said that there appeared to be general agreement on the substance of article 3, which, he thought, could therefore be accepted subject to some drafting improvements.

46. Commenting on paragraph 2, he said that, since it was expressed in inclusive and not in exhaustive terms, its provision would probably do no harm. However, if the majority of the members favoured the omission of paragraph 2 and the inclusion of its idea in paragraph 1, he would accept the view of the majority.

47. Mr. de LUNA said that in his view the requirement of notification was logical, but pointed out that notification of the membership of the special mission was required by paragraph 1 of article 7.

48. Mr. CASTRÉN explained that he had not meant to contend that notification was not necessary in the case of the head and principal members of the special mission ; he was merely opposed to the idea that prior communication of the complete list of the mission's members, including staff of lower rank, should be required.

49. Mr. TSURUOKA suggested that article 3 should begin with the words " Except as otherwise agreed " ; that wording would make it clear that there could be derogations from the rule set forth in the article.

50. Mr. YASSEEN said that in his view the Commission could retain paragraph 1 in the form proposed by the Special Rapporteur, except for the word " normally ". The paragraph reflected the international practice ; in particular, the clause providing that the receiving State could object to the selection of the person appointed stated a right which was uncontested in practice. Articles 3 and 7, taken together, said all that

needed to be said on that subject; namely, that the sending State was free to appoint the members of the special mission but that the other State could also express its views on the selection of those persons.

51. He doubted, however, that paragraph 2 should be retained; the idea expressed in it was correct but did not need to be stated.

52. Mr. BRIGGS said that, if the suggested deletion of the words "is free to [appoint]" were accepted, the clause would convey the wrong meaning. The sending State was in any case free to appoint the head of the special mission and its members, but that freedom could be limited by prior agreement. He urged the retention of the expression "The sending State is free to appoint".

53. Mr. YASSEEN added that the formula "the sending State appoints" would place too much emphasis on the competence of the appointing organ; that was not really the question, however, for the point was not to affirm that the State "appoints" but rather whether the State was free to appoint a particular person of its choice.

54. Mr. TUNKIN suggested that the Commission could conveniently use, for the purpose of article 3, the terminology of article 7 of the 1961 Vienna Convention on Diplomatic Relations, which stated that the sending State "may freely appoint" the members of the staff of the mission.

55. Mr. BARTOŠ, Special Rapporteur, noted that the members of the Commission agreed that the formal prior *agrément* of the receiving State was unnecessary in the case of a special mission. Accordingly, article 3 laid down the general rule that the sending State was free to appoint the head of the special mission and its members and it indicated that that rule could be departed from by special agreement. Whether the opening passage of the article should contain the word "normally", or the words "except as previously otherwise agreed" — the formula proposed by Mr. Tunkin — or the words "except as otherwise agreed" — the formula proposed by Mr. Tsuruoka — was therefore merely a question of drafting.

56. In reply to Mr. Amado, he explained that the prior agreement was an agreement concerning the exercise of the freedom referred to in paragraph 1. He hoped that the Drafting Committee would find a satisfactory formula to express that idea.

57. He found it difficult to proceed by analogy with the rule laid down in article 7 of the Vienna Convention on Diplomatic Relations, referred to by Mr. Tunkin. The Vienna Convention laid down a general rule which was the opposite of that proposed in his draft article 3. It would surely be paradoxical, in the drafting of a clause stating that as a general rule the *agrément* was unnecessary, to rely on article 7 of the Vienna Convention.

58. With regard to the question of notification, on which the Chairman and Mr. Castrén disagreed with him, he said that Mr. Pessou had rightly remarked that courtesy required the State sending the special mission to notify its composition to the other State, even in cases where the despatch of that mission was the subject of an agreement. In articles 6 and 7 of his draft, notification was regarded more from the procedural angle, not as a practical rule, whereas in article 3 it was regarded from the legal point of view. Was there an obligation to notify? Was notification a prior condition that had to be fulfilled before the receiving State could exercise its right to object? He was willing to include the idea of a duty to notify in his draft, but he would prefer it to appear in article 4.

59. Mr. de Luna's question concerned the possibility of declaring a person *persona non grata*; he would answer the question when the Commission came to consider article 4.

60. He himself had felt some doubt about the phrase which he had placed in brackets in paragraph 1 and he would not object to its deletion. Mr. Verdross's reference to article 9 of the Vienna Convention was well-founded.

61. Some members had said that paragraph 2 was unnecessary. He felt obliged to point out that in almost all cases, whether the special missions were political or technical, a distinction was drawn between a sending State's freedom to appoint the members of the mission and the limitation of the choice of the persons. Mr. Tunkin had even said that it might be stipulated in the prior agreement that certain specified persons would form part of the mission. But one should not confuse the case described in paragraph 2 with the right to declare a member of the mission unacceptable or *persona non grata*. When a State took such action it often did so for subjective reasons of for reasons connected with the relations prevailing between the two countries at the time, whereas paragraph 2 laid down a rule, evolved by practice, under which the two States by common agreement limited the choice of the persons who were to serve on the mission. That practice did not infringe the sovereignty of States; it was merely a way of facilitating contact between the two States concerned and of contributing to the mission's success. If political questions were to be discussed, the members of the mission should preferably be persons of some standing; if the matters to be discussed were technical, the request was usually made that the members of the mission should be experts. Paragraph 2 would help to remove any disagreement that might occur in that connexion. He was not convinced that the substance of paragraph 2 was already covered by paragraph 1.

62. Mr. TABIBI had said that there was no need to refer in paragraph (3) of the commentary to Mr. Jiménez de Aréchaga's views; in his (Mr. Bartoš's) opinion that was a technical question which could be settled by the Commission when it had considered the rest of the draft. With regard to the remarks concerning paragraph (7) of the commentary which stated that, in practice, States asked to be consulted on the selection of the person, he said he had often come across instances of such requests. It often happened that, as a result of such consultations, it was decided not to send

a particular person possessing the necessary qualifications because, for some special reason, the choice of that person was likely to upset public opinion in the receiving State; it could also happen that a particular person was sent, not because he was specially qualified in the subject in question, but because of his personal standing. In any case, such consultations between States should not be regarded as an encroachment on their sovereignty. It was a diplomatic and political question rather than a legal one.

63. Mr. TUNKIN said that he wished to clear up a misunderstanding; in mentioning article 7 of the Vienna Convention, he had not intended to refer to its substance, but merely to its language (" the sending State may freely appoint ... ").

64. Mr. TABIBI thanked the Special Rapporteur for his very full reply. However, he was not satisfied on one point: he could not agree that there was any general practice with regard to consultation. There existed a State practice regarding the notification of the sending of special missions, but there was no such practice with regard to consultation. Where the relations between the two States were good, there would of course be no problem. However, if those relations were not good, it was undesirable to give the receiving State a pretext for creating problems and putting the blame on the sending State.

65. A provision stipulating the requirement of notification would, he thought, provide a sufficient safeguard, combined with the right of the receiving State not to accept a person; however, any statement of a requirement of consultation would limit the sovereignty of the sending State and would not conform with the established practice.

66. Mr. BARTOŠ, Special Rapporteur, agreed with Mr. Tabibi that the practice was exceptional, not general. The misunderstanding had perhaps arisen because the words *en pratique* in the French text of the second sentence of paragraph (7) of the commentary had not been rendered in the English text.

67. The CHAIRMAN suggested that article 3 should be referred to the Drafting Committee, which would consider the various suggestions made with regard to paragraph 1 and decide which was the best; it would also review the comments made on paragraph 2 and decide whether it should be deleted.

It was so agreed.

ARTICLE 4 (Persons declared *persona non grata*)

68. The CHAIRMAN invited the Commission to consider article 4.

69. Mr. BARTOŠ, Special Rapporteur, said that, in the light of the debate on article 3, he proposed to redraft article 4 in the following manner: after the words " at any time " the words " after it has been notified of the composition of the special mission ", would be added, secondly, before the words " *persona non grata* " the words " not acceptable, and, after his arrival, as ", would be added.

70. The CHAIRMAN, speaking as a member of the Commission, said that it might be simpler to replace the passage following the words " the special mission " by the following text: " ... that it refuses to accept the head or any other member of the mission or that it regards him as *persona non grata* ".

71. Mr. VERDROSS, referring to the second sentence in article 4, said that the sending State was not obliged to appoint any other persons in place of the person declared *persona non grata*; it might refuse to discuss the matter, or might decide not to replace the person declared *non grata*.

72. Mr. AMADO pointed out that in such circumstances there would be no special mission. It was important to include a provision to the effect that the sending State was free to designate a replacement.

73. Mr. YASSEEN suggested that the words " shall appoint " should read " may appoint ".

74. Mr. BARTOŠ, Special Rapporteur, said that the first sentence of the article was based on two parallel propositions. In the first place, if there was prior consent, the person concerned could not thereafter be declared unacceptable, but that person might at any time become *persona non grata*. It sometimes happened that the receiving State changed its mind at the last moment with respect to the appointment of a person whose selection it had approved; such a procedure was contrary to the rules of courtesy and should be prohibited in law.

75. Secondly, the declaration of a person as *persona non grata* was an established institution in international law applying both to permanent and to special missions.

76. The second sentence of the article expressed a subsidiary idea. He had not intended to make it a mandatory rule and he was prepared either to delete the sentence or to adopt Mr. Yasseen's suggestion.

77. Mr. AMADO said that the question of a State's good faith should not be overlooked. It might happen that a Government decided *bona fide* to include in a special mission to another State a person whom that State was unable to accept. It was therefore necessary to provide that he could be replaced by some one else.

78. Mr. CASTRÉN said that article 4 should be redrafted so as to conform more closely to the corresponding article of the Vienna Convention on Diplomatic Relations (article 9 of that Convention). In commenting earlier on article 3 he had pointed out that the right of the receiving State to declare the members of a special mission *persona non grata* or not acceptable should be unqualified, exactly as was laid down in the Vienna Convention. Even if there had been prior agreement with regard to the composition of the special mission, it was always possible that some event might occur

which would give the receiving State good reason to withdraw its consent and to refuse to accept one or more of the members of the special mission. He therefore proposed that the first part of article 4 should be deleted (up to and including the words " member of the mission ") and that the rest of the sentence should be redrafted on the lines just suggested by the Special Rapporteur. The article should then include a new sentence worded in the same way as the last sentence of article 9, paragraph 1, of the 1961 Vienna Convention, *viz* " A person may be declared *non grata* or not acceptable before arriving in the territory of the receiving State ".

79. The last sentence of article 4 as it stood should be deleted. The receiving State could not insist that the sending State should replace the person concerned by some one else. The mission could continue its work without that person. Besides, the sending State had the right to recall the special mission if, for instance, the person declared *non grata* was the head of that mission.

80. The CHAIRMAN, speaking as a member of the Commission, said that his impression was that article 4 postulated two situations which could not both be dealt with in the same sentence. A declaration by a State that it could not accept a particular person was made before that person's arrival and could not be made if prior consent had been obtained; whereas the declaration that a person was *non grata* could be made later and arose out of that person's behaviour: in that case, the fact that prior consent had been given was immaterial.

81. He therefore thought that it would be better to draft two separate sentences, each relating to one of those situations. It would at all events be preferable to replace the words *l'autre Etat* in the French text by the words *l'Etat de réception.*

82. The last sentence of the article was perhaps hardly necessary. The sending State would certainly replace the person concerned; on the other hand, serious incidents might have occurred and it might have been decided not to proceed with the mission. The words " shall appoint " were in any case too categorical.

83. Mr de LUNA agreed with the Chairman and with Mr. Castrén. He recalled a case where the head of a special mission concerned with technical assistance who was to have been sent by one State to another had, before setting out, made statements concerning underdeveloped countries that had been regarded as offensive by the receiving State, which had then declared him *persona non grata.*

84. Mr. TSURUOKA said that he, too, thought that two cases should be differentiated: the case where the special mission had already arrived and where, if prior consent had been given, the receiving State could not refuse to accept the person concerned; and the case where, after the arrival of the mission, one of its members was declared *persona non grata,* whether or not there had been prior consent. Perhaps the expression *persona non grata* should be used only in connexion with the head of the mission, " not acceptable " being used only for the other members of the mission. The expression *persona non grata* should certainly be used, for it implied that the receiving State was not bound to give reasons for refusing to receive the person concerned.

85. The last sentence of the article might be replaced by some other formula; the refusal to accept a particular person did not necessarily put an end to the special mission.

86. Mr. BARTOŠ, Special Rapporteur, said that the Vienna Conference on Consular Relations, 1963, had decided, for democratic and equalitarian reasons that a declaration that a person was *non grata* or not acceptable could apply to all the members of a mission, including even the subordinate or service staff, irrespective of rank.

87. Mr. RUDA fully endorsed the Special Rapporteur's conception of article 4 but considered that the text should be amplified by a provision, modelled on a passage in article 9 of the Vienna Convention on Diplomatic Relations, to the effect that the receiving State was not required to give reasons for declaring any member of a special mission *persona non grata.* That particular point had not been covered in the Commission's original draft on diplomatic relations and had been added at the Conference itself. An analogous provision also appeared in the Convention on Consular Relations, 1963.

88. Mr. TUNKIN believed that article 4 covered a situation analogous to that contemplated in article 9 of the Vienna Convention on Diplomatic Relations and should reproduce the same principles. The receiving State could withdraw its consent to any member of a special mission even before the mission's arrival.

89. Mr. TSURUOKA noted that under article 9 of the 1961 Convention, the expression *persona non grata* could apply to the head of the mission or to any member of the diplomatic staff of the mission. It was possible to use the expression *persona non grata* in situations where the *agrément* had been requested, as in the case of the head of a diplomatic mission, but he doubted whether that expression was appropriate in the case of a special mission for whose head no formal *agrément* had been given.

90. Mr. TUNKIN said that, during the discussion on Mr. Sandström's report [2] the Commission had considered the possibility of applying the expression *persona non grata* only to cases where heads of mission and diplomatic staff were affected, the expression " not acceptable " to be used in cases involving other staff.

91. Mr. AMADO said that he could not see how a person could be declared not acceptable if he had

[2] For discussion of relevant passages in the Sandström's report (A/CN.4/129), see the summary record of the Commission's 567th meeting in *Yearbook of the International Law Commission, 1960,* Vol. I.

actually arrived in the receiving State. It was worth noting, moreover, that the word *grata* in the expression *persona non grata* was etymologically related to the word *agrément*.

92. Mr. BARTOŠ, Special Rapporteur, said that the Vienna Convention on Diplomatic Relations distinguished between persons for whom the *agrément* was necessary — heads of missions — and other persons, *viz*, the members of the diplomatic staff. During the discussion on the Convention on Consular Relations, ideas had changed and the two categories previously differentiated had been treated as one. In his view the question was a technical one; if the Commission did not approve of the terms used in the Convention on Consular Relations, it could use some other word.

93. Mr. ROSENNE said that the Commission was faced with the choice between the system laid down in article 9 of the Convention on Diplomatic Relations and that of article 23 of the Convention on Consular Relations. Personally, he would favour the former, as special missions essentially belonged to the diplomatic field. However, if the majority preferred the latter as a later expression of opinion of a diplomatic conference, he would abide by such a decision. The proposition that, once prior consent had been given in the form laid down in article 4, the right to declare a person *non grata* or not acceptable was excluded, could not be entertained because that right was an independant one having its source outside the initial agreement to receive members of the mission, which in ordinary diplomatic intercourse was always given in some manner, even if only in the form of a visa.

94. Mr. TSURUOKA said that in his view it would be preferable to incorporate both expressions — *persona non grata* and "not acceptable" — in the article, for, although some special missions were of a decidedly diplomatic and political character, others were of a purely technical nature.

95. Mr. BARTOŠ, Special Rapporteur, said that he had studied the practice in force in France and in the United States. In both a distinction was drawn between a declaration that a person was *non grata* and the practice of refusing to include in the diplomatic list the name of a person appointed to a diplomatic post. His own preference would be for a solution on the lines of that suggested by Mr. Tsuruoka, namely to use both expressions without giving an explanation and to leave their interpretation open. The only possible conclusions would then be that a State was at liberty to decline to admit a particular person into its territory.

96. The CHAIRMAN suggested that the article should be referred to the Drafting Committee, which would decide whether the Vienna Convention on Diplomatic Relations should be followed in whole or in part and whether the idea contained in paragraph (1) of the commentary should be incorporated in the text of the article. The Drafting Committe would also consider what attitude the receiving State could adopt if the sending State refused to take the action requested.

It was so agreed.

97. Mr. ROSENNE said that he had assumed that article 4 would be redrafted on the model of the whole of article 9 of the Convention on Diplomatic Relations or of the whole of article 23 of the Convention on Consular Relations.

The meeting rose at 1. p.m.

761st MEETING

Wednesday, 8 July 1964, at 10 a.m.

Chairman: Mr. Roberto AGO

Special Missions
(A/CN.4/166)
(continued)

[Item 4 of the agenda]

DRAFT ARTICLES ON SPECIAL MISSIONS

ARTICLE 5 (Appointment of a special mission to more than one State)

1. The CHAIRMAN invited the Commission to consider article 5 of the Special Rapporteur's report (A/CN.4/166).

2. Mr. BARTOŠ, Special Rapporteur, said that article 5 of his draft was modelled on article 5 of the Vienna Convention on Diplomatic Relations, 1961, Since the end of the Second Word War, some States had adopted a practice of sending goodwill missions, and even economic missions of a general character, to more than one State in the same region; but it could happen that the receiving State, for political reasons, declined to accept the mission on the ground that it had previously visited some other State, or even that it was subsequently to visit several other States.

3. He proposed to replace the word "appointment" in the title of the article by the word "sending", which would be more correct.

4. Mr. de LUNA said that, in general, he approved the article and the commentary. The provision was a useful one, since a "blanket" appointment was a lack of international courtesy which receiving States usually resented. He agreed that the word "sending" would be better in the title.

5. The CHAIRMAN though that the word *simultané* in the French text of the title should be omitted since it might create difficulties.