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YEARBOOK OF THE INTERNATIONAL LAW COMMISSION

1967

Volume I

Summary records of the nineteenth session

8 May—14 July 1967

UNITED NATIONS

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New York, 1968

INTRODUCTORY NOTE

The summary records in this volume include the corrections to the provisional summary records requested by members of the Commission and such editorial changes as were considered necessary.

The symbols appearing in the text, consisting of letters combined with figures, serve to identify United Nations documents. The figures in square brackets appearing against the draft articles on special missions show the final numbering of those articles in the Commission's report on this session.

The reports of the Special Rapporteurs on special missions and on relations between States and inter-governmental organizations, and certain other documents, including the Commission's report, are printed in volume II of this Yearbook.

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MEMBERS OF THE COMMISSION

Name	*Country of nationality*
Mr. Roberto AGO	Italy
Mr. Fernando ALBÓNICO	Chile
Mr. Gilberto AMADO	Brazil
Mr. Milan BARTOŠ	Yugoslavia
Mr. Mohammed BEDJAOUI	Algeria
Mr. Jorge CASTAÑEDA	Mexico
Mr. Erik CASTRÉN	Finland
Mr. Abdullah EL-ERIAN	United Arab Republic
Mr. Taslim O. ELIAS	Nigeria
Mr. Constantin Th. EUSTATHIADES	Greece
Mr. Louis IGNACIO-PINTO	Dahomey
Mr. Eduardo JIMÉNEZ de ARÉCHAGA	Uruguay
Mr. Richard D. KEARNEY	United States of America
Mr. NAGENDRA SINGH	India
Mr. Alfred RAMANGASOAVINA	Madagascar
Mr. Paul REUTER	France
Mr. Shabtai ROSENNE	Israel
Mr. José María RUDA	Argentina
Mr. Abdul Hakim TABIBI	Afghanistan
Mr. Arnold J. P. TAMMES	Netherlands
Mr. Senjin TSURUOKA	Japan
Mr. Nikolai USHAKOV	Union of Soviet Socialist Republics
Mr. Endre USTOR	Hungary
Sir Humphrey WALDOCK	United Kingdom of Great Britain and Northern Ireland
Mr. Mustafa Kamil YASSEEN	Iraq

Officers

Chairman: Sir Humphrey WALDOCK

First Vice-Chairman: Mr. José María RUDA

Second Vice-Chairman: Mr. Endre USTOR

Rapporteur: Mr. Abdullah EL-ERIAN

Mr. Anatoly P. Movchan, Director of the Codification Division of the Office of Legal Affairs, represented the Secretary-General and acted as Secretary to the Commission.

AGENDA

The Commisssion adopted the following agenda at its 896th meeting, held on 9 May 1967:

1. Special missions
2. Relations between States and inter-governmental organizations
3. State responsibility
4. Succession of States and Governments
5. Co-operation with other bodies
6. Organization of future work
7. Date and place of the twentieth session
8. Other business

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INTERNATIONAL LAW COMMISSION

SUMMARY RECORDS OF THE NINETEENTH SESSION

Held at Geneva from 8 May to 14 July 1967

895th MEETING

Monday, 8 May 1967, at 3.15 p.m.

Chairman: Mr. Mustafa Kamil YASSEEN
later: Sir Humphrey WALDOCK

Present: Mr. Ago, Mr. Albónico, Mr. Bartoš, Mr. Bedjaoui, Mr. Castañeda, Mr. Castrén, Mr. El-Erian, Mr. Eustathiades, Mr. Ignacio-Pinto, Mr. Kearney, Mr. Ramangasoavina, Mr. Reuter, Mr. Tammes, Mr. Tsuruoka, Mr. Ushakov, Mr. Ustor.

Opening of the Session

Tribute to the memory of the late Mr. Radhabinod Pal

1. The CHAIRMAN, after declaring open the nineteenth session of the International Law Commission, said that, since its last session, the Commission had lost an outstanding member, Mr. Radhabinod Pal. Members would long remember the humanist, the scholar and the judge, and he had already sent a message of condolence to Mr. Pal's family on the Commission's behalf.

The members of the Commission observed a minute's silence in tribute to the memory of Mr. Pal.

2. The CHAIRMAN said that he must also remind the Commission of what it owed to its former members who had not stood for re-election. Mr. Verdross had sent the Chairman an affecting letter in which he expressed his best wishes for the Commission's future work; the text of the letter had been circulated to members.

3. He welcomed those who had already been members of the Commission and the new members; he was sure that they would carry on the task in the spirit of co-operation and mutual understanding which had enabled the Commission to do such useful work.

4. He had represented the Commission at the twenty-first session of the General Assembly, during which he had observed how highly the Commission's work was appreciated. The General Assembly had expressed particular approval of the draft on the law of treaties and had decided to convene a plenipotentiary conference to embody that draft in the corpus of positive international law.

5. When representing the Commission as an observer at the recent sessions of the Asian-African Legal Consultative Committee and the European Committee on Legal Co-operation, his conviction had been strengthened that the Commission must devise still closer links with the international bodies concerned with matters within its competence.

6. Members of the Commission would regret the departure of the former Director of the Codification Division and Secretary to the Commission, Mr. Baguinian; he would like to welcome his successor, Mr. Movchan.

7. Mr. WATTLES (Deputy Secretary to the Commission) said that messages of regret had been received from Mr. Amado, who, to his great grief, would be unable to attend the session; from Mr. Nagendra Singh, who would be arriving on 22 May, from Mr. Ruda, who would be attending as soon as the special session of the General Assembly was over, and from Mr. Rosenne, who hoped to be able to attend on 17 May.

Election of Officers

8. The CHAIRMAN called for nominations for the office of Chairman.

9. Mr. AGO proposed Sir Humphrey Waldock, without whose devoted labour in the preparation of the draft on the law of treaties the Commission would certainly not have been able to submit a draft of such scope. Sir Humphrey's intellectual honesty and unselfish devotion would be even more valuable in the Chair at the always delicate stage of a first session of the Commission when part of its membership was newly-elected.

10. Mr. BARTOŠ, seconding the proposal, said that Sir Humphrey had firm opinions of his own, but had always been ready to revise those opinions in the interests of conciliation and the progress and development of international law.

11. Mr. CASTRÉN said that he also warmly supported the proposal.

Sir Humphrey Waldock was unanimously elected Chairman.

12. Mr YASSEEN said that he wished to associate himself with those tributes to Sir Humphrey Waldock to whom he was honoured to yield the Chair.

Sir Humphrey Waldock took the Chair.

13. The CHAIRMAN, after thanking the Commission for his election and for the generous words of his proposers, said he wished first to pay a tribute to the outgoing Chairman, to whose distinguished leadership during the eighteenth session the successful completion of the Commission's five years of work on the law of treaties was largely due.

14. The past five years, during which the Commission had discussed the difficult subject of the law of treaties, had been a great experience for him. The Commission was a place where one learned much; ideas once taken for granted in the academic field no longer looked as safe and sound when exposed to criticism in the Commission and to its unfailingly friendly discussions. It would be his aim as Chairman to continue the Commission's tradition of friendly co-operation.

15. Mr. PALTHEY (Deputy Director-General of the United Nations Office at Geneva), welcoming the Commission on behalf of the Secretary-General and the Director-General of the United Nations Office at Geneva, said he congratulated the Chairman on his election and wished to associate himself with the commendations expressed by members of the Commission. The outgoing Chairman, too, merited a tribute for the important part he had played in the work of the eighteenth session.

16. The International Law Commission had since its establishment worked unobtrusively, in a climate of friendly co-operation and with a true international spirit; its work might seem to the impatient world of today to be slow, but it was nonetheless creative, since it was building the foundations for good international relations. A large conference would deal next year with the draft on the law of treaties and would mark a new stage on that course.

17. One of the new items the Commission had on its agenda was relations between States and inter-governmental organizations, an item that was of special interest to the United Nations.

18. The United Nations Office at Geneva would be organizing another seminar on international law during the Commission's session and he hoped it would be as successful as the previous ones; he was sure that he could count on the collaboration of all members of the Commission to that end. It was a matter of importance that the Commission's work should be widely known; such seminars were one means of making it known.

19. The CHAIRMAN thanked the Deputy Director-General of the United Nations Office at Geneva for his kind words of welcome. The Office's attention to the Commission's needs was very important to the success of its work and he was sure the Commission could count on the Deputy Director-General's co-operation, just as the Deputy Director-General could be assured of the co-operation of members of the Commission for the Seminar on International Law.

20. Since the present session of the Commission would be the first which Mr. Amado would be unable to attend, he suggested that a message be sent to him on behalf of all the members of the Commission expressing their regret at his absence and conveying to him their warmest wishes for a speedy recovery of perfect health.

It was so agreed.

21. The CHAIRMAN called for nominations for the office of First Vice-Chairman.

22. Mr. CASTAÑEDA proposed Mr. Ruda.

23. Mr. EL-ERIAN seconded the proposal.

24. Mr. YASSEEN supported the proposal.

Mr. Ruda was unanimously elected First Vice-Chairman.

25. The CHAIRMAN called for nominations for the office of Second Vice-Chairman.

26. Mr. BARTOŠ proposed Mr. Ustor.

27. Mr. REUTER seconded the proposal.

28. Mr. TSURUOKA and Mr. EUSTATHIADES supported the proposal.

Mr. Ustor was unanimously elected Second Vice-Chairman.

29. Mr. USTOR thanked the members for his election to a high office in the Commission. It was a very great honour for any international lawyer to belong to the Commission and particularly for a new member to be elected to such an office.

30. The CHAIRMAN called for nominations for the office of Rapporteur.

31. Mr. TSURUOKA proposed Mr. El-Erian.

32. Mr. AGO seconded the proposal.

33. Mr. BARTOŠ, Mr. YASSEEN and Mr. USTOR supported the proposal.

Mr. El-Erian was unanimously elected Rapporteur.

34. Mr. EL-ERIAN expressed his thanks to the Commission for his election.

Organization of Work

35. The CHAIRMAN invited Mr. Movchan to address the Commission concerning the organization of its future work.

36. Mr. MOVCHAN (Secretary to the Commission), after expressing his appreciation of the honour of having been appointed Secretary, said that the Commission's decisions concerning the organization of its future work would enable the Secretariat to plan and prepare the work of each session more efficiently. The Secretariat had produced a short working paper (A/CN.4/L.119) to facilitate the Commission's consideration of that problem.

37. The Commission would recall that it had originally been planned to hold the first session of the Conference on the Law of Treaties at the beginning of 1968; that, however, had proved not to be feasible either for Austria, the host Government, or for the United Nations, and the dates now under discussion were 26 March to 24 May 1968. If those dates were adopted, the opening of the

Commission's 1968 session would have to be postponed to, say, 27 May and the session would last until about 2 August.

38. Mr. BARTOŠ, speaking as the Special Rapporteur on Special Missions, said that he was in a rather difficult position. Governments had been invited to send their comments on the draft to the Secretariat by 1 March. He had prepared his fourth report (A/CN.4/194 and Addenda) on the basis of the comments received by that date. More comments had, however, arrived after that date than before it, with the consequence that he had had to prepare further addenda to his report which were now being reproduced and translated.

39. The CHAIRMAN said he hoped the Commission would be able to complete its work on the topic of special missions at the present session and that it would adopt a programme of work which would enable it to begin its consideration of that item as soon as possible.

The meeting rose at 4.35 p.m.

896th MEETING

Tuesday, 9 May 1967, at 10.15 a.m.

Chairman: Sir Humphrey WALDOCK

Present: Mr. Ago, Mr. Albónico, Mr. Bartoš, Mr. Bedjaoui, Mr. Castañeda, Mr. Castrén, Mr. Eustathiades, Mr. Ignacio-Pinto, Mr. Kearney, Mr. Ramangasoavina, Mr. Reuter, Mr. Tammes, Mr. Tsuruoka, Mr. Ushakov, Mr. Ustor, Mr. Yassen.

Adoption of the Agenda
(A/CN.4/192)

1. The CHAIRMAN said that, before inviting the Commission to adopt the provisional agenda (A/CN.4/192), he wished to welcome Mr. Caicedo Castilla, the observer for the Inter-American Juridical Committee, and Mr. Golsong, the observer for the European Committee on Legal Co-operation. A communication had been received from Mr. Rizvi, the observer designated by the Asian-African Legal Consultative Committee, to the effect that he proposed to attend the Commission's proceedings from 26 June until the end of the session, unless the Commission preferred him to come earlier.

2. A cable had been received from Mr. Lachs, a former member of the Commission and now a Judge of the International Court of Justice, expressing his good wishes for a successful session.

3. He suggested that, in accordance with its usual practice, the Commission adopt the provisional agenda (A/CN.4/192) without prejudice to the order in which it might deal with the various items.

It was so agreed.

Organization of work

(resumed from the previous meeting)

4. The CHAIRMAN said that the Commission would no doubt endeavour to complete at the present session its work on item 1 of the agenda (Special Missions) and to make a start with item 2 (Relations between States and inter-governmental organizations). On item 3 (State responsibility), he understood that the Special Rapporteur intended to submit a preliminary report in order to obtain confirmation of the Commission's general directives as to how the topic should be handled. Some preliminary work had been done on item 4 (Succession of States and Governments), but as the Special Rapporteur for that topic, Mr. Lachs, was no longer a member of the Commission, a new Special Rapporteur would have to be appointed. The Commission would deal with item 5 (Co-operation with other bodies) in the course of the session when convenient to the observers sent by the various bodies with which the Commission co-operated. The Commission would no doubt wish to leave item 6 (Organization of future work) till the second half of the session, in order to allow members time for reflection and informal discussion. The working paper prepared by the Secretariat (A/CN.4/L.119) and the Sixth Committee's report to the General Assembly at its twenty-first session,[1] which set forth the views expressed in the Sixth Committee on the past work of the Commission and the organization of its future work, were both valuable documents.

5. With regard to special missions, the Special Rapporteur had prepared two further addenda (A/CN.4/194/Add. 3 and 4) to his fourth report; those new documents contained the Special Rapporteur's observations and proposals following the additional comments received from governments after he had completed the preparation of the main part of his report (A/CN.4/194 and Add. 1 and 2). The first of those two additional documents related to the Special Rapporteur's first sixteen draft articles and would be distributed shortly in the original French, so if members of the Commission were prepared to work on the basis of the French text only, the Commission could start work on item 1 at its next meeting.

6. Mr. BARTOŠ, speaking as Special Rapporteur for the topic of special missions, said that he would be prepared to introduce his report at the next meeting on that understanding.

7. The CHAIRMAN said he noted that there appeared to be no objection to the Commission starting at its next meeting to consider item 1.

The meeting rose at 10.50 a.m.

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[1] *Official Records of the General Assembly, Twenty-first Session, Annexes*, agenda item 84, document A/6516.

897th MEETING

Wednesday, 10 May 1967, at 11.15 a.m.

Chairman: Sir Humphrey WALDOCK

Present: Mr. Ago, Mr. Albónico, Mr. Bartoš, Mr. Bedjaoui, Mr. Castañeda, Mr. Castrén, Mr. Eustathiades, Mr. Ignacio-Pinto, Mr. Kearney, Mr. Ramangasoavina, Mr. Reuter, Mr. Tammes, Mr. Tsuruoka, Mr. Ushakov, Mr. Ustor, Mr. Yasseen.

Tribute to the Memory of the late Mr. Antonio de Luna

1. The CHAIRMAN said that it was his sad duty to inform the Commission of the death of one of its former members, Mr. Antonio de Luna, Spanish Ambassador at Vienna. Mr. de Luna had had a long and distinguished career as a legal scholar, as a member of his country's foreign service and, since 1962, as a member of the Commission, where he had been esteemed by all his colleagues for his warm human qualities, his vast historical and philosophical knowledge, and his unfailing devotion to the furtherance of the rule of law. He proposed to send a special message of sympathy to Mrs. de Luna.

The members of the Commission observed a minute's silence in tribute to the memory of Mr. de Luna.

Special Missions

(A/CN.4/193 and Addenda; A/CN.4/194 and Addenda)

[Item 1 of the agenda]

2. The CHAIRMAN invited Mr. Bartoš, Special Rapporteur, to introduce his fourth report on special missions (A/CN.4/194 and Addenda).

3. Mr. BARTOŠ (Special Rapporteur) said that the Commission had not had time at its eighteenth session to study certain articles in detail, which was perhaps fortunate, because the subject had been considerably illuminated by the many comments submitted by Governments.

4. The third addendum (A/CN.4/194/Add.3) to his fourth report contained the latest comments submitted by Governments on articles 1-16, with the opinions of the Special Rapporteur.

5. The Commission should also examine the remarks by the United States Government on the subject of Provisional Article 0 (A/CN.4/193), since they amounted to a proposal to amend article 1 of the draft articles (A/CN.4/194/Add.1). The United States proposal was to define the term "special mission" as follows:

"A special mission is one:

"(1) which is established by agreement between the sending State and the receiving State for a limited period to perform specifically designated tasks, and is headed or received by an official who holds the rank of Cabined Minister or its equivalent, or a higher rank; or

"(2) which is specifically agreed by the sending State and the receiving State to be a special mission within the meaning of this Convention."

6. Since that proposal was the furthest from the text of article 1 as provisionally adopted, he thought the Commission should examine it first, because if it were accepted, article 1 and article 2 would have to be completely refashioned.

7. The Commission had considered that, for the purposes of the draft articles, a "special mission" could be recognized as such irrespective of the rank of the person heading or receiving it. It was obvious that the aim of the United States in submitting its proposal was to preclude missions headed and received by ordinary officials from being regarded as special missions. In his opinion, the sending State should have absolute discretion to designate the head of a mission, and the receiving State should likewise have full liberty to appoint the person who was to receive it. The Commission had not wished to take the rank of the official appointed to head or receive the mission into account; its view had been that, provided the receiving State gave its consent to the sending of a temporary special mission for the performance of specific tasks, there was no need to stipulate more. In practice, difficulties would arise if article 1 required a mission headed by a Cabinet Minister to be received by an official of equivalent or higher rank, and in some countries the constitutional system did not include a Cabinet in the sense of the United States proposal. States had the prerogative of entrusting the heading or receiving of a special mission to an official, an expert or a politician, as they saw fit.

8. The CHAIRMAN asked whether the same question had been raised by other governments in their comments: if so, that would seem to indicate a need for a more precise definition of the concept of special missions in the Commission's draft.

9. Mr. BARTOŠ replied that, although Governments had submitted a number of suggestions concerning in particular the existence of diplomatic or consular relations between States, or reciprocal recognition, no country, apart from the United States, had submitted a proposal on the actual definition of "special missions".

10. Mr. REUTER said that the United States proposal raised a question of principle which could undermine the whole set of rules applicable to special missions. It was a question which seemed to have given concern to a number of other governments, the Netherlands Government for example.

11. In preparing the draft articles it had been the Commission's aim to offer governments a number of choices and leave them free to adopt whatever formula suited them within the framework of a well-defined but sufficiently flexible régime. If the rules applicable to special missions were too strict, States would be encouraged to get round them by a simple change of designation. Instead of being called members of "special missions", the persons concerned would be described as "*ad hoc* diplomats" and they would thus not enjoy the privileges stipulated in the convention. In order to prevent that

practice, it would be necessary to provide that the title of the mission and the rank of the person leading it should not be taken into consideration in connexion with the grant of privileges and immunities; and that again would be going too far.

12. In his opinion, the Commission should not adopt too rigid a formula but should rather put forward proposals which met the convenience of States; but he would accept the majority view.

13. Mr BARTOŠ said he admitted that a special mission should fulfil certain conditions, but he thought that the receiving State should be entitled to make requests as to the composition of the special mission even if criteria as restrictive as those proposed by the United States were not included in article 1.

14. Mr. EUSTATHIADES said that the Commission could provide for exceptions to the rules applicable to special missions, although in his view such a solution would be undesirable and would impair the very structure of the draft articles.

15. The Special Rapporteur had rightly drawn the Commission's attention to the United States proposal to adopt a restrictive definition of special missions, because, as Mr. Reuter had pointed out, Governments might be tempted to get round the special mission rules by declaring that a mission appointed or received by them was not a special mission.

16. Mr. AGO said that the rules contained in the draft articles were obviously obligatory, like every legal rule, but were rules of optional law. Consequently, if two or more States concluded a treaty or convention on the subject, such an instrument would not be invalidated by the draft articles.

17. The United States Government had raised the problem of the level of special missions. According to that Government, it would obviously be going too far to grant the status of "special missions", within the meaning of the draft articles, to technical missions, whose number was continually growing. The question before the Commission, therefore, was to decide whether or not it would be preferable to restrict the application of the special mission rules to missions of a certain level, but without requiring the mission to be headed or received by an official holding the rank of Cabinet Minister, as proposed by the United States.

18. Mr. RAMANGASOAVINA said that, like Mr. Ago, he did not think that the draft articles should confer the status of special mission on a technical mission.

19. A requirement that a special mission should be headed or received by a Cabinet Minister would raise serious problems, however, especially for newly independent States which could not afford to designate as head of a mission a Minister or Secretary of State whose duties kept him largely in his own country. Such States would be obliged to appoint officials to head their special missions.

20. Mr. USTOR said he agreed with the Special Rapporteur that the Commission should deal first with the definition of "special mission" proposed by the United States, a definition which was obviously based on that Government's unwillingness to extend diplomatic privileges and immunities to all of the many persons who were constantly travelling between countries on government business. In principle, he was prepared to agree that not all such persons should be treated as roving ambassadors, but he feared that if the United States definition were adopted, the convention would cover only a small group of high-level special missions and would leave the majority of special missions unprotected by its rules.

21. In his opinion, that would be a dangerous step and would amount to a failure on the part of the Commission to regulate adequately that particular area of international relations. The Commission would be better advised to adopt a broader definition of "special mission" in the first sixteen draft articles and to specify the exact distinction between various kinds of special mission when dealing with privileges and immunities in the subsequent articles.

22. Mr. TSURUOKA said that, at the present stage in its work, the Commission should not pay too much attention to the problem raised by the United States comment. It would be better to examine the draft articles one by one, bearing in mind that special missions varied in composition. In the course of that examination, the Commission would have occasion to consider whether a particular rule should apply to all special missions or should differentiate among them.

23. Mr. CASTRÉN observed that the Commission usually left definitions to the end; in the case of a definition involving important questions of principle, however, it might prefer to take a decision in advance. The definition proposed by the United States Government was too restrictive, but the question whether or not to give a definition of the term "special mission" remained to be decided. The characteristics of such missions were set out in articles 1 and 2: to include a definition of the term "special mission" in the introductory article might lead to duplication. Neither the Vienna Convention on Diplomatic Relations[1] nor the Vienna Convention on Consular Relations[2] gave a corresponding definition of the term "permanent mission" or the term "consular post".

24. As to the method of work, he supported Mr. Tsuruoka's suggestion that the Commission should examine the text article by article; a discussion dealing with each comment separately would be too long and complicated.

25. Mr. KEARNEY said that although he did not of course speak as a representative of the United States in any way, he nevertheless had some knowledge of the background of the United States Government's comments and therefore felt that he should put forward some observations on the problem which had arisen.

26. He fully agreed with the Special Rapporteur on the importance of special missions; there was no doubt that,

[1] United Nations Conference on Diplomatic Intercourse and Immunities, *Official Records*, vol. II (United Nations publication, Sales No.: 62.XI.1), p. 82.

[2] United Nations Conference on Consular Relations, *Official Records*, vol. II (United Nations publication, Sales No.: 64.X.1), p. 175.

as time passed, greater use would be made of such missions by States. The comments by the United States Government indicated that it regarded the growth of special missions as a most desirable development. Such missions provided experts with an opportunity for discussing matters within their own fields of competence and taking in a matter of days decisions which would have required many months of negotiations through the diplomatic channel or by means of correspondence.

27. It was precisely because of the increasing importance of special missions that the Commission should be careful not to formulate rules which might discourage States from relying on special missions and thereby diminish the importance of the institution. The United States Government was concerned that, if a whole series of formal requirements were laid down, the result might be that States would be less inclined to use special missions.

28. The heart of the problem lay in the definition of special missions. The question of determining what missions were entitled to the complete array of privileges and immunities and what missions should receive less privileges could be settled by reference to time, subject-matter or the level of the mission.

29. It was clearly impossible to formulate a definition of special missions on the basis of the subject-matter. Even a highly technical subject like atomic energy or the desalinization of water could result in very high-level diplomatic negotiations, depending on the interests of the countries concerned. Nor was the duration of the mission a reasonable basis on which to decide whether the full measure of privileges and immunities should automatically be granted. It was for those reasons that the United States Government had proposed that the question be settled by reference to the level of the special mission.

30. The formula proposed by the United States Government (A/CN.4/193) consisted of two parts. The first part, embodied in paragraph (1) of the proposed definition, contained a ready-made formula for the case of a special mission headed or received by an official of Cabinet Minister rank. The second part, embodied in paragraph (2) of the proposed definition, enabled the two States concerned to grant the privileges and immunities of special missions to missions headed by lesser officials if the two States so desired. A formula along those lines should prove comparatively easy to apply.

31. In recent years, special missions had been growing in numbers, importance and activity without being governed by any very formal rules. The comments by Governments indicated the concern felt in the great majority of countries at too broad a measure of privileges and immunities being granted to special missions. The United States Government's proposal was an attempt to meet that concern.

32. So far as the terms of its proposal were concerned, a better wording could perhaps be devised but it undoubtedly raised an important preliminary question which affected all the articles of the draft. He saw no need to take a general decision on the matter at that early stage but the question should be kept in mind.

33. Mr. USHAKOV said he thought that the United States proposal referred to the draft provisions prepared by the Special Rapporteur concerning so-called high-level special missions. It would therefore be more practical for the Commission to discuss that proposal when it took up those draft provisions.

34. Mr. CASTAÑEDA said that the main question to be decided was whether or not a special mission had in all circumstances the status of a special mission as defined in the draft articles. Clearly, not all special missions were entitled, regardless of their level, to the whole series of privileges and immunities set forth in those articles.

35. The United States Government's comments reflected that concern but took into account only one of the relevant factors, namely the level of the mission. In fact, the duration of the mission or the subject-matter could also be material and there might perhaps be other relevant factors.

36. In did not seem feasible to include all those factors in the definition of special missions. It was not sufficient, as the Special Rapporteur's article 1 appeared to indicate, that a mission should be temporary and that it should be entrusted with "the performance of specific tasks", for the whole régime of special missions to become automatically applicable.

37. As he saw it, there were two possible solutions to the problem. The first was the negative approach, with all its disadvantages; that approach would, as indicated by Mr. Reuter, lead States to give a mission another name so as to exclude it from the régime of special missions. The second solution would be to introduce a more adequate formulation of the concept of consent as an integral part of the definition of special missions. He suggested that the consent should not be limited to the mere question of the sending of the mission. It should refer also to the acceptance by the receiving State of the legal régime of special missions and also to the way in which that régime was to be applied, i.e. the scope and nature of the privileges and immunities to be granted to the mission and its members.

38. If those ideas were introduced into the definition, it would be possible for a State, when deciding whether to give its consent to the application of the régime of special missions, to examine whether the level, duration and subject-matter of the mission justified the granting of those privileges. And when he spoke of consent he was not referring to a mere passive acceptance but rather to a genuine expression of the will of the State. In that connexion, he supported the United Kingdom Government's proposal to refer to the express consent of the receiving State (A/CN.4/194/Add.1, under article 1).

39. Mr. YASSEEN said that the United States proposal did not merely raise a question of definition; it went much further. In reality it restricted the Commission's field of research and the scope of the proposed convention.

40. It was true that a mission could not be considered a special mission, within the meaning of the draft articles, solely because States wished it to be so considered. On the other hand an official going abroad to deal with a matter on behalf of his State must have a special status. The best way to define that status was to apply the theory of function: the envoy in question must be so placed as

to be able to perform his duties. Undue emphasis on privileges and immunities would be apt to alarm States.

41. The Commission had already recognized the difficulty that would arise in distinguishing between special missions according to whether they were technical or political in character; nevertheless it might consider establishing some kind of hierarchy of special missions, with a corresponding scale of status.

42. The United States proposal diminished the value of the Commission's work, for it was precisely with reference to "small" special missions that rules were most needed; missions at a high enough level to be headed by a minister and received by a minister were usually the subject of special agreements between the sending and the receiving State.

43. Mr. AGO said that a decision to leave the definitions until later would probably be satisfactory to all, provided of course that the Commission knew exactly what it wished to do. He personally believed that the Commission's task was to draw up minimum rules for application to all special missions regardless of their level, duties and duration. Such rules would have to be both strict and moderate, for care must be taken not to alarm States. If the Commission found later on that some of the rules did not suit all special missions, it would register the fact by distinguishing several categories of special mission, and then see whether that differentiation should be reflected in the definitions.

44. Mr. BARTOŠ, Special Rapporteur, said that articles 1 and 2 were concerned with the institution of special missions as such, and consequently dealt with questions of substance which should not be confused with questions of definition. It was also necessary, however, to ensure that no definition conflicted with the system of the draft articles. That was why he had drawn the Commission's attention to the United States comment.

45. After thorough discussion, and with the approval of the General Assembly, the Commission had decided on a system in which it had not distinguished several different categories of special missions. Perhaps, however, it might revert to the idea of a draft text concerning high-level special missions which might be at least the ministerial level. The Commission might therefore leave the United States comment aside for the time being and re-examine it when it came to take up the question of high-level special missions.

46. The comments made on article 1 fell into four groups, relating to the characteristics of the special mission, the question of consent, the question whether the dispatch of a special mission was subject to the existence of diplomatic relations between the two States, and lastly, the question whether the dispatch of a special mission entailed recognition of each other by the two States. The Commission might continue its discussion by examining the first group of comments.

47. The CHAIRMAN said that the general opinion in the Commission appeared to be that certain important matters of substance raised by the United States Government comments should not be set aside altogether but that the Commission should proceed with the discussion of the draft articles one by one, bearing in mind that at some later stage it would have to go into those matters. The Commission would then have to consider the question of the definition and the problem of the different categories of special mission; it would also have to examine the whole question of consent. The debate had produced a useful clarifying discussion but the Commission had not reached any definite conclusion on the matters raised by the United States Government's proposal.

48. The Commission would therefore proceed at its next meeting in the manner suggested by the Special Rapporteur.

The meeting rose at 1 p.m.

898th MEETING

Thursday, 11 May 1967, at 10 a.m.

Chairman: Sir Humphrey WALDOCK

Present: Mr. Ago, Mr. Albónico, Mr. Bartoš, Mr. Bedjaoui, Mr. Castañeda, Mr. Castrén, Mr. Eustathiades, Mr. Ignacio-Pinto, Mr. Kearney, Mr. Ramangasoavina, Mr. Reuter, Mr. Tammes, Mr. Tsuruoka, Mr. Ushakov, Mr. Ustor, Mr. Yasseen.

Also present: M. Golsong, Observer for the European Committee on Legal Co-operation.

Co-operation with Other Bodies

[Item 5 of the agenda]

1. The CHAIRMAN invited the observer for the European Committee on Legal Co-operation to address the Commission.

2. Mr. GOLSONG (Observer for the European Committee on Legal Co-operation) said that during the past year the Committee had completed its work on drafting five European conventions: on the place of payment of money liabilities, the adoption of children, information on foreign law, the recognition and enforcement of arbitral awards, and consular functions. Each included final clauses which might be of interest to the Commission, but he would speak only of one.

3. The purpose of the European Convention on Consular Functions, to be opened for signature by member States in December 1967, was to make uniform rules solely for consular functions, since the rules for consular privileges, immunities and relations had already been made by the 1963 Vienna Convention, to which it expressly referred and which it supplemented. It governed matters relating to estates, shipping and, in an optional protocol, aircraft. A further optional protocol provided for the application of the provisions of the Convention to refugees, and specified in its article 2, paragraph 2, that consular protection of refugees should wherever possible be accorded in consultation with the Office of the United

Nations High Commissioner for Refugees or any other agency of the United Nations which might succeed it.

4. On one point the European Convention went further than the Vienna Convention: the powers of a consul where a national of the sending State was deprived of his freedom. Under article 36 of the Vienna Convention certain consular functions could be exercised in such cases only if the national so requested or if he did not expressly oppose such action; whereas article 6 of the European Convention entitled a consular officer to be informed and to interview a detained national without his prior consent.

5. The final clauses of the European Convention dealt with the settlement of disputes, reservations, accession of third States, and so on. Two important provisions concerned disputes. The first laid down that any dispute which the parties could not settle themselves should be submitted to the International Court of Justice at the request of one of them. Under the second provision, special procedures for extra-judicial settlement, that would be open to the parties before they moved the Court, were to be devised by the Committee of Ministers of the Council of Europe.

6. Where reservations were concerned the Convention, like others already concluded in the Council of Europe, provided a system of negotiated reservations. Under that system, reservations could be made solely in respect of the provisions listed in an annex.

7. With regard to third States, the Convention on Consular Functions provided that such States might accede only with the unanimous approval of the Committee of Ministers of the Council of Europe. That system differed from those established in most of the other Council of Europe conventions, which provided for the accession of third States on much easier terms. Several States, both European and non-European, had thus acceded to various instruments already in force within the Council of Europe, such as those concerning patents, cultural affairs, extradition and mutual assistance in criminal matters.

8. The European Committee on Legal Co-operation was continuing work on State immunity from jurisdiction and the privileges and immunities of international organizations. It hoped to be able to complete its work in the spring of 1968, so that the International Law Commission would be able to take it into account during its own discussion of the relations between States and intergovernmental organizations.

9. The European Committee was particularly interested in the law of treaties and especially in the Commission's draft, as well as in the work of the United Nations Commission on International Trade Law set up under General Assembly resolution 2205 (XXI).

10. The Committee had greatly appreciated the attendance and participation of Mr. Bartoš and Mr. Yasseen as observers for the International Law Commission. The Committee's work, though concerned with matters of interest to member States, was designed to contribute to the construction of a more orderly international law, which was also the aim of the United Nations, and of the International Law Commission in particular.

11. Mr. YASSEEN said that he was waiting to receive the records of the Committee's last meeting before he wrote a report on his mission.[1] He desired, however, to stress forthwith how greatly he had admired the Committee's work; he had particularly appreciated the quality and insight of the report prepared by a working party of the Committee on the privileges and immunities of international organizations.

12. The Committee was taking a lively interest in the success of the movement towards codifying the law of treaties and had decided to establish a special sub-committee to study the Commission's draft. On that occasion he had thought it desirable to point out that the draft was a compromise and that, though it did not contain everything which individual States might have wished, it did at least state general rules which could be accepted by every country in the world.

13. Mr. BARTOŠ said that he had represented the Commission at the November session of the European Committee on Legal Co-operation, and had gathered that the Committee had great respect for the Commission and was anxious to work in harmony with it. He had been more than an observer or a visitor; he had had an opportunity to express his views, especially on the important matter of the ratification of international conventions. He had cited the example of the World Health Organization and the International Labour Organisation, which made provision for sanctions in order to induce States to act in an orderly manner by ratifying concluded conventions, since unless they did so all the work done was stultified.

14. Like the Commission, and although it was not a really satisfactory method, the Committee was sometimes compelled to omit controversial matters, even vital matters of substance, from the texts it drafted.

15. The Committee's aim was to introduce at the European regional level, sometimes with additions, the rules embodied in the universal conventions of the United Nations, even if they had not yet entered into force. The Committee was thus doing highly commendable work, especially since it had no separatist aim but was trying to develop rules of general international law by fitting them to the needs of a region.

16. Many members of the Committee had expressed their gratification that Mr. Raton had participated as a United Nations observer in the work of the expert sub-committee of the Council of Europe on the privileges and immunities of international organizations. The Committee was eager for even closer collaboration with the United Nations in general and with the Commission in particular. He believed that the Commission should continue its fruitful collaboration with the regional legal committees, in conformity with its terms of reference and the spirit of the Charter.

17. Mr. AGO said that one matter was of vital importance: in view of the present need for a codification of international law along the lines of a thoroughgoing redefinition, it was much to be regretted that certain

[1] Subsequently issued as document A/CN.4/198.

codification conventions, on which the Commission had expended a great deal of effort and which had been adopted by an international conference could not come into force for many States because they delayed ratifying them. The General Assembly should look into that problem at some time and solve it. What was possible within the International Labour Organisation, for example, which had set up an effective system to speed up the ratification of conventions, should also be possible for the major conventions codifying international law.

18. In the meantime, the best way to speed up ratification and to give concluded conventions greater chance of success was certainly closer collaboration between the Commission and all bodies able to influence governments and public opinion, such as the European Committee on Legal Co-operation, the Asian-African Legal Consultative Committee, and others.

19. Mr. EUSTATHIADES said that, as a member of the European Committee, he could testify that it esteemed the Commission most highly. He had had an opportunity to draw the Committee's attention to the problem of indefinitely postponed ratifications. The Council of Europe admittedly had practical and direct means of exerting its influence at regional level. It mainly dealt, however, with conventions for co-operation on various special matters rather than with actual codification conventions. The ratification problems it encountered were often due to the way in which conventions were drafted and to some discrepancy between the position of governments and the texts ultimately adopted.

20. Universal codification could, however, also be advanced by regional means. The precedent of the European Convention on Consular Functions was encouraging, though it should not be allowed to give rise to any exaggerated hopes. Collaboration between the Commission and the Committee might help to solve the problem of harmonizing regional and universal obligations.

21. Mr GOLSONG (Observer for the European Committee on Legal Co-operation) said he wished to thank members of the Commission who had referred to the usefulness of co-operation between the Commission and the European Committee, which was also the view of the European Committee. In reply to Mr. Ago, he confirmed that the European Committee regularly reviewed the number of ratifications to universal conventions, in order to encourage the member States of the Council of Europe to ratify them. The question would again be considered at the meeting in December.

22. The CHAIRMAN thanked the observer for the European Committee on Legal Co-operation for the interesting information which he had furnished and said it was most encouraging for the future codification of international law. The Commission had also listened with interest to the statements by Mr. Yasseen and Mr. Bartoš on their missions to the Council of Europe and associated itself with the gratitude expressed by them for the hospitality extended to them at Strasbourg.

23. Those two statements, and the further remarks by other members of the Commission, provided evidence of the reality and the usefulness of contacts with regional organizations. Nothing could be more disastrous to the movement for the codification of international law than the appearance of any wide divergence between regional movements for codification and the movement in the International Law Commission and the central organs of the United Nations. Maintaining close contacts with regional bodies was therefore of the very greatest significance. Such contacts should make it possible to prevent wide gaps from developing between legal ideas in different parts of the world and complicating the work of the Commission even further. They could also play an important part in promoting the acceptance of the measure of agreement reached in the Commission for the codification of various topics.

Special Missions

(A/CN.4/193 and Addenda; A/CN.4/194 and Addenda)

(resumed from the previous meeting)

[Item 1 of the agenda]

24. ARTICLE 1 (The sending of special missions) [2 and 7, para. 1].

Article 1 [2 and 7, para. 1]

The sending of special missions

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

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

25. The CHAIRMAN invited the Commission to consider article 1, the Special Rapporteur's proposals for which were contained in paragraph 28 of the section devoted to that article in his fourth report (A/CN.4/194/Add.1).

26. Mr. BARTOŠ, Special Rapporteur, said that, to begin with, he would be glad to have the Commission's opinion on the first group of comments relating to article 1, namely, those relating to the essential characteristics of a special mission; there were two such comments.

27. The Belgian Government suggested (A/CN.4/188) that the words "for the performance of specific tasks" and "temporary" in paragraph 1 should be deleted, since it considered that they should be included in the definition to be given in the introductory article. He personally would prefer to retain the present wording. In the Commission's view, a special mission was temporary, but its task was not necessarily so; the task was specified but was not always completed by the special mission.

28. The Chilean Government proposed (A/CN.4/193/Add.1) that a special mission should be defined solely in terms of its temporary nature; the specific nature of its tasks should not be stated. That proposal was incompatible with the Commission's system; its result would

be that a provisional general diplomatic mission would be regarded as a special mission. Under the Commission's system, however, a mission of that kind would be treated on the same footing as a permanent diplomatic mission. A special mission's task might be fairly broad, but it must be specific and must be specified in the credentials given to the special mission and accepted by the receiving State.

29. Mr. CASTRÉN said that he was in favour of the text adopted at the seventeenth session for the reasons which the Special Rapporteur had just stated.

30. Mr. REUTER said that he, too, supported the Special Rapporteur's comments. If, however, some members still harboured any doubts, the question could be deferred.

31. Mr. TSURUOKA said that he, too, agreed with the Special Rapporteur on the substance. It might help, however, if the word "temporary" were deleted from article 1 provisionally, on the clear understanding that the definition of a special mission should state that it was temporary.

32. Mr. KEARNEY asked whether he was to understand that the Commission's practice was to make the definitions subsidiary to the substantive articles. That seemed to be at variance with the practice in legislative drafting with which he was familiar. Also, if the definitions were not discussed till the end of the draft, the result might be to reduce them to a minimum.

33. Mr. BARTOŠ, Special Rapporteur, said that the practice of the Commission and of the international conferences he had attended was not to draft definitions until the essential concepts had been incorporated in the text. Definitions must not prejudge the text; they were derived from it. The converse method need not be rejected out of hand, but it was not the Commission's normal practice.

34. The CHAIRMAN said that his own experience with the topic of the law of treaties was that the Commission had no hard and fast rule as to the timing of its decisions on definitions. The general practice, however, had been to leave the more difficult discussions on definitions until very near the end of the Commission's work, though whenever the Commission had found that there was a close link between a particular definition and one of the substantive articles, it had considered that definition at the same time as the article in question.

35. He understood the remarks of Mr. Reuter and Mr. Tsuruoka to mean that they agreed to the retention in article 1 of the two elements under discussion, namely, the temporary character of the special mission and the specific character of its tasks, subject to the reservation that if those elements were later included in the definition of special missions, the drafting of article 1 might have to be revised. That view was also shared by the Special Rapporteur himself, who thought it preferable not to try to settle the definition of special missions at the present stage but to agree on the substance of article 1; of course, if certain points came later to be covered in the definition, it would be reasonable to adjust the language of article 1.

36. Mr. KEARNEY said he had asked his question because he had noticed that, at the previous meeting, Mr. Castañeda had suggested that certain factors relating to such matters as the level and duration of special missions should be specifically included in the definition.

37. Mr. ALBÓNICO said that he shared the Special Rapporteur's view that it was necessary to retain in article 1 the reference to the performance of specific tasks as one of the necessary elements of the special mission. The suggestion by the Chilean Government that a special mission should be defined solely in terms of the temporary nature of its functions was not well-founded; as pointed out by the Special Rapporteur, there were missions of a temporary or provisional character which did not constitute special missions, precisely because they were entrusted not with the performance of specific tasks but with general duties.

38. Similarly, and for the reasons given by the Special Rapporteur, he could not support the Belgian Government's suggestion to delete the words "For the performance of specific tasks" and "temporary". Both those elements should be retained in article 1.

39. The Commission should proceed with the utmost caution when dealing with the topic of special missions. The position was different from that which had obtained in the case of diplomatic and consular relations, in respect of which a considerable body of international law had been built up in the course of time. In the case of special missions, there were few well-established principles and the Commission was now called upon to formulate most of the rules in the matter. Personally, he shared the view of Mr. Reuter that, as far as possible, governments should be left free to regulate special missions by agreement.

40. The rules to be adopted by the Commission should therefore be flexible, so as not to constitute an obstacle to the activities of States and to the use of special missions.

41. Mr. REUTER said that the Commission should try to consider as soon as possible the régime *stricto sensu* of special missions. For the time being it was accepting as a working hypothesis the need to define a general régime in ordinary law. Some points had already been settled, others were more controversial. As the Special Rapporteur had observed, the Commission agreed that missions entrusted with a general task enjoyed diplomatic status and so fell outside the scope of the draft articles.

42. After hearing Mr. Kearney the Commission had considered, though with some hesitation, that it should make provision for a higher class of special mission. The idea had been put forward that States might withdraw some missions from the scope of the general régime, and he himself agreed with Mr. Ago that, for the moment, the Commission should not pay too much attention to that question when considering each article. It did not yet know what rules would be embodied in the general régime, and should wait until it had established them before deciding to what extent and in what circumstances States might obtain exemption from them.

43. Mr. EUSTATHIADES said he agreed with Mr. Reuter. The scope of certain technical definitions was limited, but the definition of a special mission actually

brought up the whole question of the scope of the convention's application. It would therefore be premature at the present stage of the Commission's work to go further into the definition of a special mission. If the problem were examined at once, some States would be inclined, for lack of knowledge of the exact scope of the convention, to reduce the privileges and immunities accorded to special missions.

44. Mr. BARTOŠ, Special Rapporteur, said that in his opinion the Commission ought not to change the provisionally adopted text of article 1, and the words "specific tasks" and "temporary special missions" should be retained, on the understanding that the Drafting Committee would be asked to frame the final text.

45. The CHAIRMAN said that the Commission appeared to agree with the Special Rapporteur that the references to the temporary character and the specific tasks of the special mission should be retained in article 1, without prejudice to the ultimate definition. That meant that the Commission rejected the suggestions for their deletion made by certain governments, but the question whether the two elements thus retained would ultimately appear in article 1 or in the definition of special missions would be a matter of drafting.

46. If there were no objection, he would consider that the Commission agreed to conclude its discussion of the point on that basis.

It was so agreed.

47. Mr. BARTOŠ, Special Rapporteur, suggested that the Commission examine the second group of objections by governments, relating to the notion of consent.

48. The Commission had established that the sending State could not send a special mission of its own accord without the consent of the receiving State, and had admitted that in practice such consent was generally given informally without an agreement providing that the special mission should be entrusted with some specific task; it had therefore not wished to decide on what terms such consent should be given.

49. The Belgian Government had raised an objection (A/CN.4/188) to the very use of the term "consent", which in its opinion "connotes tolerance rather than approval, whereas what happens in practice is that a proposal is made which is followed by an invitation". He had observed in his report that the term was used in its true sense, that of a consent which was the real expression of the will of the State, and did not necessarily imply an invitation. The Commission might perhaps add that explanation to its commentary to article 1.

50. The United Kingdom Government had proposed in its written comments (A/CN.4/188/Add.1) that the word "express" should be inserted before the word "consent"; but the Commission had wished to take into consideration the fact that consent, though a genuine expression of the will of the receiving State, was often given informally or even tacitly. The United Kingdom had also expressed the opinion, in its comments on the text of the Commission's commentary to article 1, that the status of certain permanent specialized missions should be regulated by international agreement.

51. Although he believed that consent need not necessarily be given formally, he admitted that under special conditions, States might conclude a treaty or simply exchange notes to define those special conditions by agreement. Since there could be no special mission without the consent, even if tacit, of the receiving State, he thought that the Commission should not qualify in any way the word "consent" in article 1, paragraph 1 as provisionally adopted. It might, however, explain in its commentary that consent was necessary in every case, but might be informal.

52. In the case of countries which required entry visas, the visa applications contained a statement of the reasons for which a person or delegation was requesting the visa, and the problem was more easily solved. Since Yugoslavia, like many other countries, had abolished that formality, the solution must be found within the general system applicable to special missions.

53. Mr. REUTER said that he approved the recommendations submitted by the Special Rapporteur and did not think that the Commission should change the text of the draft articles. The problem was whether the rules should be mandatory and to what extent; the Special Rapporteur was right in wishing to leave States free to stipulate that only special missions which had received their *agrément* should enjoy the benefits of the system set up under the convention.

54. Mr. TAMMES said that the amendments proposed by the Netherlands Government (A/CN.4/193) had been interpreted in some quarters as an attempt to restrict the scope of special missions; the purpose of those amendments, however, was merely to promote the introduction of legal rules which would facilitate international co-operation.

55. There would be less need for a restrictive definition of special missions if article 1, paragraph 1, were redrafted to make it clear that the "consent of the receiving State" implied a clear understanding between the sending and receiving States that the mission in question was a special mission in the sense of the proposed convention. In that case, "consent" would mean that the parties freely agreed that a set of rules aimed at facilitating the task of special missions would be applied, either in whole or in part, to a particular special mission.

56. The Special Rapporteur had expressed the opinion (A/CN.4/194/Add.1) that "the nature of special missions does not depend on the fact that Governments have agreed to confer the status of special mission on a group of representatives but that special missions are specific institutions in international law". It seemed to him, however, that some provision in article 1 for agreement concerning the task and status of the special mission would help to make the draft articles more easily acceptable to many States.

57. Mr. BARTOŠ, Special Rapporteur, said that the Commission should examine the comments by the Netherlands Government reproduced in paragraph 124 of his fourth report on special missions (A/CN.4/194) when it came to decide whether the rules in the draft articles were rules of *jus cogens* or of *jus dispositivum*.

58. Mr. USTOR said that he would have difficulty in accepting the United Kingdom proposal for the insertion of the word "express" before the word "consent" in article 1, paragraph 1. It often happened that special missions were sent out with the tacit approval of the receiving State; the insertion of the word "express", however, would mean that States parties to the convention would agree that special missions could not be sent out only with the tacit or informal consent of the receiving State. That would represent a considerable innovation in international practice and he questioned whether there was any real need for it.

59. Article 1, as at present drafted was an adequate codification of the existing situation in international law. It was true that it left unanswered the question of which special missions were entitled to privileges and immunities, but that question could be dealt with in the later articles, where it could, if necessary, be coupled with the requirement of "express consent". Meanwhile, it would be unwise to exclude from the definition of special mission the very numerous missions which were being sent out from one country to another every day, and which were not based on any formal specific agreement between the sending and the receiving States.

60. Mr. TSURUOKA said that qualification of the word "consent" by the word "express" was superfluous because the consent must obviously be real. He wondered whether provision should be made in the general system for special cases, depending on the authorities giving their consent. The Commission should decide that the authorities from whom the consent emanated were those specified in the draft convention on the law of treaties, and no exception should be provided.

61. Mr. CASTAÑEDA said that he agreed with the Special Rapporteur that it was undesirable to insert the word "express" before the word "consent" in article 1, paragraph 1. The real problem was to determine whether the consent covered only the actual sending of the special mission, or whether it also brought into force the whole régime applicable to special missions as such. He was inclined to agree with Mr. Tammes, despite the misgivings expressed by the Special Rapporteur, that the consent should also cover the status of the special mission and he would not object to the inclusion of a provision to that effect in article 1. Such a provision would also help to remove the doubts about that article which had been expressed by the United States.

62. Mr. BARTOŠ, Special Rapporteur, said that he would prefer not to discuss the status of special missions, which affected the validity of all the rules, until consideration of the problem of consent had been concluded.

63. Mr. YASSEEN said that the Commission should not modify the essence of the system, as the appointment of a special mission presupposed that there would be someone for it to talk to and it was therefore inconceivable that it could be regarded as a unilateral body. He agreed with Mr. Tsuruoka that it was enough for the consent to be real, although it could be tacit.

64. Mr. KEARNEY said he agreed with Mr. Castañeda and Mr. Tammes that the Netherlands suggestion might be incorporated in article 1 or article 2. In his opinion, it was not logical to assert that a proposal of that nature was a complete innovation or that it was not in accordance with the underlying idea of the convention. After all, the whole topic of special missions represented an innovation in international law, and since, as the Special Rapporteur had pointed out in his report, there was a lack of special rules on the subject, it was only proper that the Commission should try to create such rules.

65. Mr. CASTRÉN said that, for the reasons given by the Special Rapporteur, he was in favour of keeping the text of the article as already adopted. Like Mr. Tsuruoka and Mr. Yasseen, he believed that the Commission should require consent to be real but not necessarily express.

66. Mr. ALBÓNICO said he agreed with Mr. Castrén that the present text of article 1 should be retained. As Mr. Tsuruoka and Mr. Yasseen had already observed, the only question was whether the consent had actually been given. It would be officious for the Commission to attempt to lay down rules as to how it should be given; its ideas on that subject would appear in the record.

67. The CHAIRMAN, speaking as a member of the Commission, said he agreed with those who considered it unnecessary to insert the word "express" before "consent" in article 1, paragraph 1. That article was designed to make the same point as article 2 of the Vienna Convention on Diplomatic Relations, which stated: "The establishment of diplomatic relations between States, and of permanent diplomatic missions, takes place by mutual consent".[2] There, the only qualification of consent was that it must be "mutual". The question of express and tacit consent had, indeed, arisen in connexion with the law of treaties, but there had been a general tendency in the Commission to eliminate the adjectives and to let the word "consent" stand by itself.

68. He could not agree with the objection of the Belgian Government that the word "consent" connoted tolerance rather than approval.

69. The problem of consent as implying a recognition of status, which had been referred to by Mr. Tammes and Mr. Castañeda, was an important one, but the Special Rapporteur obviously preferred to deal with that problem in a later article.

70. Mr. TSURUOKA said that the consent must be valid in international law and must be given by authorities empowered to give it. He was not asking for an explanation to be added to the draft article, but he believed that the Commission should indicate in the commentary which the competent authorities should be.

71. Mr. BARTOŠ, Special Rapporteur, suggested that the Commission should explain in the commentary that the consent must be real and be given by competent authorities, but should not define those competent authorities, as they might be different in the constitutional system of each country.

[2] United Nations Conference on Diplomatic Intercourse and Immunities, *Official Records*, vol. II, p. 82.

72. The special mission came into being as soon as consent had been requested by the competent authorities of the sending State and given by the competent authorities of the receiving State.

73. The CHAIRMAN said that it appeared to be the general opinion of the Commission that the word "consent" in article 1, paragraph 1, should not be qualified.

74. Mr. BARTOŠ, Special Rapporteur, said that the Netherlands Government had proposed that the receiving State should give its consent and determine the mission's status. That was a serious problem, for, if the Netherlands proposal were accepted, the mission's status would depend on an institution of municipal law, whereas special missions were specific institutions in international law. To leave the receiving State free to determine the status of a special mission would hardly promote the progress of international law and good relations among peoples, and would open the door to disputes, discrimination or improper interference, which was precisely what the Commission wished to avoid.

The meeting rose at 12.55 p.m.

899th MEETING

Friday, 12 May 1967, at 10 a.m.

Chairman: Sir Humphrey WALDOCK

Present: Mr. Ago, Mr. Albónico, Mr. Bartoš, Mr. Bedjaoui, Mr. Castrén, Mr. Eustathiades, Mr. Ignacio-Pinto, Mr. Kearney, Mr. Ramangasoavina, Mr. Reuter, Mr. Tammes, Mr. Tsuruoka, Mr. Ushakov, Mr. Ustor, Mr. Yasseen.

Special Missions

(A/CN.4/193 and Addenda; A/CN.4/194 and Addenda)

(continued)

[Item 1 of the agenda]

ARTICLE 1 (The sending of special missions) [2 and 7, para. 1] *(continued)*[1]

1. The CHAIRMAN said that at the previous meeting[2] the Special Rapporteur had given his reasons for rejecting the suggestions put forward by the Netherlands Government in its comments on articles 1 and 2 (A/CN.4/194/Add.1). He invited the Commission to consider those suggestions.

2. Mr. CASTRÉN said that while he had no objection in principle to the Netherlands Government's proposal which, in his view, was unlikely to involve all the disadvantages mentioned by the Special Rapporteur, he could not recommend its adoption, because, first, it was unnecessary since the consent of the receiving State was always required for a mission to be able to function as a special mission, and that State was free to withhold its consent. Secondly, the receiving State might subject its consent to certain conditions relating, for example, to the status of the special mission, taking into account, of course, any non-discrimination clauses and the rules of *jus cogens*.

3. He saw no reason why the Commission should have to include in the text of the article itself provisions relating to the special mission's status, and oblige States to conclude detailed agreements on the subject.

4. However, he would have no objection to the inclusion of a reference to the Netherlands proposal in the commentary to article 1.

5. Mr. REUTER said he thought the Commission should consider the question raised by the Netherlands Government at the final stage of its work, though the problem would certainly be raised in the course of discussion.

6. The purpose of the convention was to lay down minimum rules which would be applicable in all cases where States had made no specific agreement. To such States the convention would be of great value. The problems raised by the sending of special missions were in practice of very rare occurrence, but when they did arise they were undoubtedly serious. Supposing, for example, that a member of a special mission was prosecuted for a crime or offence committed in the territory of the receiving State, the application of the provisions of a convention would make it much easier to solve the political problems involved.

7. Admittedly, a State signatory to the convention should be able to except any mission from the scope of the general system as it saw fit, but the Commission's reason for drafting a convention was undoubtedly to lay down rules of general application.

8. Mr. BEDJAOUI said he agreed with Mr. Reuter. Undoubtedly the Netherlands Government, like many others, wished to guard against the unforeseen dispatch of special missions, but its proposal would be apt to create problems, especially for countries which had just attained independence and which would frequently have occasion to dispatch or receive special missions for purposes of international co-operation. The Commission should therefore lay down a minimum number of rules that would be acceptable to as many States as possible, on the understanding that States would retain the power to conclude treaties or agreements as they saw fit in each individual case.

9. Mr. YASSEEN said that mutual consent was all that was needed for a mission to secure recognition as a special mission; once the mission existed, it would *ipso facto* have the status which the Commission was trying to establish. Such consent could, of course, be made subject to certain conditions or reservations. But the Netherlands proposal went too far, in that it made not only the sending of a special mission, but the grant to

[1] See 898th meeting, para. 24.

[2] Para. 74.

that mission of status as such, dependent on mutual consent, either express or tacit.

10. Mr. USHAKOV said it seemed to him that the problem raised by the Netherlands Government had already been solved in paragraph 1 of the draft article; the sending State and the receiving State could always make an agreement providing for a waiver of the rules of the convention.

11. Mr. TAMMES said that he had already explained at the previous meeting[3] that the Netherlands Government's suggestion was not intended to be in any way restrictive; its purpose was merely to ensure that a special mission would be recognized as such within the meaning of the draft articles now under discussion. That idea had already been clearly expressed in connexion with article 2 by the Special Rapporteur in his fourth report where he had said: "On receiving a visiting foreign mission, the receiving State is entitled to make it clear that it is not considered as a special mission" (A/CN.4/194/Add.1).

12. Mr. USTOR said that no objection would be made to the Netherlands Government's suggestion if it were interpreted in accordance with the explanation just given by Mr. Tammes, but he must point out that the language used in that suggestion contained the peremptory word "shall"—"The task of a special mission and its status as such shall be determined by mutual consent".

13. He himself agreed fully with Mr. Reuter, Mr. Yasseen and Mr. Bedjaoui that article 1 should not preclude the parties to the convention from making bilateral agreements concerning the status of a special mission, but that in cases where they did not do so, the special mission should automatically have the status of a special mission under the convention.

14. Mr. BARTOŠ, Special Rapporteur, said that the Commission had itself insisted that the consent of both the sending State and the receiving State was required for a special mission to be recognized as such. Perhaps the position was that, as the Australian Government had observed (A/CN.4/193/Add.3, para. 6), the draft articles and the commentaries as at present drafted did not adequately reflect the idea that States may themselves determine what they should regard as a special mission.

15. As Mr. Yasseen had rightly said, States could attach reservations and conditions to their consent, and in his view the Drafting Committee might so specify in the text of article 1. States should be left free to make exceptions to the general rules, and the sending State might possibly forgo sending special missions if the receiving State requested exceptions for reasons, not only of prestige, but perhaps relating to its sovereignty. Where no special agreement had been concluded on the subject between the States, the system provided by the convention should come into operation.

16. Moreover the Commission had provided for the possibility of limiting, by agreement, the privileges and immunities granted to a special mission. It might also happen that, at the opposite extreme, the receiving State would allow the special mission of the sending State to carry on certain activities in its territory, as was the case among the Benelux Governments; but it was for those States to settle that point for themselves. The Commission had proposed to the General Assembly, and the Assembly had agreed, that States might waive the general rules in the case of certain special missions, and article 1 might therefore include a clause on reservations and conditions.

17. Mr. EUSTATHIADES said that he was satisfied with the explanations given by the Special Rapporteur. In his view, the point at issue was one of substance which might be dealt with either in the commentary or in the text of the article, perhaps by means of a reference to the article on derogations. Some members of the Commission thought, perhaps, that in starting from a set of maximum rules and then providing for limitations in certain cases, there had been a tendency to go too far. They harboured some misgivings on the subject but he did not share them.

18. The CHAIRMAN said he thought the Commission could accept the general recommendations of the Special Rapporteur with regard to article 1, paragraph 1 and refer that paragraph to the Drafting Committee for further consideration with a view to giving it somewhat greater flexibility.

19. Mr. BARTOŠ, Special Rapporteur, said that the Drafting Committee would no doubt bear Mr. Eustathiades' suggestions in mind and would confine itself to mentioning in the commentary the question of reservations and conditions.[4]

20. The CHAIRMAN invited the Special Rapporteur to introduce article 1, paragraph 2.

21. Mr. BARTOŠ, Special Rapporteur, said that the fourth category of comments by governments dealt with the existence of diplomatic and consular relations between the sending State and the receiving State. That was a political as well as a legal matter, and the Commission had stressed in paragraph (3) of its commentary that "the existence of such relations is not an essential prerequisite" for the sending and reception of special missions; it had added that "During the existence of the special mission... States are entitled to conduct through the special mission relations which are within the competence of the general mission", and had expressed the opinion that, in cases where States or Governments did not recognize each other, special missions "could be helpful in improving relations between States".[5] However, the Commission had not considered it necessary to add a clause to that effect to article 1. Thus for example, Spain and Yugoslavia, which did not recognize each other, sent each other special missions and regulated their relations, especially their economic relations, in that way.

22. The Swedish Government had proposed (A/CN.4/188) that a provision be added to article 1 that sending or

[3] Para. 54.

[4] For resumption of discussion, see 926th meeting, paras. 1-22.

[5] *Yearbook of the International Law Commission, 1965*, vol. II, p. 166.

receiving a special mission did not in itself imply the recognition of a State. The Belgian Government had made a similar comment that special missions might be sent between States or Governments which did not recognize each other; but it specified that that in no way prejudged subsequent recognition (A/CN.4/188).

23. In the Sixth Committee of the General Assembly, the delegation of Ceylon had proposed that the application of the rules concerning special missions be confined to States which had diplomatic relations with each other.[6]

24. The Government of the Union of Soviet Socialist Republics considered that the question should be dealt with in the text of the article, in the following form: "Neither diplomatic and consular relations nor recognition is necessary for the sending and reception of special missions". (A/CN.4/188/Add.2)

25. Lastly, the Government of Chile had proposed that it be stated in paragraph 2 of the article that "special missions may be sent or received regardless of whether the Governments concerned recognize each other". (A/CN.4/193/Add.1)

26. Thus, Government comments might be regarded as falling into two categories. First come the proposal of the Government of Ceylon, which was the opposite of the other Governments' views and which paid little regard to the fact that in practice the exchange of special missions often took place between States which did not have diplomatic or consular relations.

27. With regard to the second category of comments, the Commission had shown caution by indicating in its commentary that the sending and reception of special missions by States which did not have regular diplomatic relations, or which were engaged in armed hostilities, were subject to the rules of the convention.

28. The Commission was therefore faced with three questions. The first was whether the application of the rules should be limited to States having diplomatic relations with each other. The second was whether mutual non-recognition was a bar to the sending and reception of special missions. And the third was whether or not to indicate that the sending and reception of special missions did not constitute tacit recognition.

29. The Swedish Government had examined the situation where, in a civil war, the insurgents were recognized as belligerents. That was a complex and extremely controversial problem, and he suggested that the Commission refrain from dealing with it at that stage in its work.

30. He would recommend that the Commission reject the proposal by the Government of Ceylon and specify in the text of the article that non-recognition was no bar to the sending and reception of special missions. The Commission should further specify that the sending or reception of special missions by States which did not recognize each other did not constitute tacit recognition. It could do that either in the text of the article or in the commentary.

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

31. Mr. EUSTATHIADES said that, leaving aside the question of the recognition of belligerents or insurgents, as the Special Rapporteur suggested, there remained only two questions to settle. The first was the question of the existence of diplomatic relations and the second, in two parts, whether non-recognition was a bar to the sending of a special mission, and whether the sending of a special mission implied recognition.

32. With regard to the first question there was no doubt in his mind that paragraph 2 of article 1 must be retained and he would not dwell on the matter.

33. With regard to the second question, the Swedish Government's comments made it pertinent to consider whether the sending of a special mission constituted a negotiation which, according to one view, might be regarded as tacit recognition. In his own opinion, recognition might lead to the establishment of diplomatic relations, but such a consequence was by no means a foregone conclusion. It a State wished to send a special mission without recognizing the receiving State, it must so state in express terms. In the absence of any indication to the contrary, it could be asserted that the sending of a special mission was a serious factor to be borne in mind in determining the existence of tacit recognition. A case in point was that of the 1949 Geneva Conventions,[7] under which the application of a minimum set of rules did not imply recognition of the belligerents in a civil war. The Swedish Government had confined itself to asking the question. The best plan would be to follow the precedents set by the 1949 Geneva Conventions, the 1954 Hague Convention[8] and other agreements or treaties.

34. It was for the Commission to decide whether the question should be dealt with in the commentary or in the text of the article, but he saw no need to specify that non-recognition was no impediment to the sending of special missions.

35. Mr. REUTER said that the Commission could not accept the Government of Ceylon's proposal.

36. There was, in his opinion, no necessity to stress the point concerning the sending of special missions where no diplomatic or consular relations existed. If, however, the Commission intended to examine the problem of recognition, it should find a form of words to the effect that the sending of a special mission did not necessarily mean recognition, but that the exchange of letters preceding the sending of the mission, the composition and the purpose of the mission might be equivalent to tacit recognition.

37. He doubted the wisdom of going deeply into a subject which involved a number of thorny problems; it might be thought that, if the Commission added a provision on that point to article 1, a State would be able to claim the benefit of the rules of the convention and that, once it was free to do so, it could hardly be denied participation in the convention, and that might amount to recognition.

[7] United Nations, *Treaty Series*, vol. 75.

[8] Convention for the Protection of Cultural Property in the Event of Armed Conflict, signed at the Hague on 14 May 1954 (United Nations, *Treaty Series*, vol. 249, p. 216).

38. A problem arose in that connexion in France, where the courts had to decide disputes affecting the delegation of North Viet-Nam; in view of such cases, it would be preferable to keep article 1 as it stood and to refrain from going into every of the problem in the text of the article.

39. Mr. YASSEEN said he still felt, despite what Mr. Eustathiades had said, that there were three questions to be answered. First, as the Special Rapporteur had pointed out, it was clear that the absence of diplomatic relations was no obstacle to the sending of a special mission, which might be the only means of contact between the two States concerned. Paragraph 2 was therefore calculated to facilitate and improve international relations.

40. Secondly, and for the same reasons, the absence of reciprocal recognition by two States should not be allowed to hinder the sending of a special mission; such a mission might well be sent for the specific purpose of negotiating recognition.

41. Thirdly, the sending of a special mission might constitute a stage in the process of recognition—a significant pointer to the general attitude of one State towards another. It would be a mistake to risk diminishing the positive value in that respect which could attach to the act of sending or receiving a special mission.

42. Mr. BEDJAOUI said that there would be no justification for subjecting the sending of a special mission to the dual requirement that the two States should have diplomatic relations and should recognize each other. The wording already adopted by the Commission went some way to settle the matter, and could be supplemented along the lines proposed by the Government of the Soviet Union.

43. The problem of recognition, however, had two aspects which, for all Mr. Eustathiades had said of them, were separate and distinct. The problem was a delicate one, and often a matter of politics rather than law. It might perhaps be a mistake to specify in the article that the sending or reception of a special mission did not imply mutual recognition by the States concerned. In the Conventions to which Mr. Eustathiades had referred, and whose provisions were essentially humanitarian, it was normal to say that the application of some of those provisions did not imply mutual recognition by the States concerned.

44. Special missions dealt with a wide variety of problems and it would be a pity, as Mr. Yasseen had observed, to slam the door on any chance of regarding an exchange of special missions as a step towards recognition. It would be better to state in the commentary that the sending or reception of a special mission did not "necessarily" mean that States recognized each other.

45. Mr. TSURUOKA suggested that the Commission should simply delete paragraph 2, which in his view described the present state of affairs but added nothing to paragraph 1 so far as rule-making was concerned.

46. There was no need to mention the question of recognition; everything depended on the consent of the State. From the practical point of view, only one situation would be worth taking into consideration: that of a State which had not recognized another State and which hesitated to receive a special mission from it, or to send one to it lest its action be construed as express or implied recognition. The Commission would therefore facilitate international relations, and perhaps promote the eventual establishment of genuine relations between two such States, by saying that the sending or reception of a special mission did not necessarily imply recognition. Since the question of recognition was very delicate, however, it would be better not to mention it in the text of the article.

47. Deletion from the text of any reference to diplomatic relations and to recognition would also facilitate the ratification of the future convention on special missions; for sometimes, when the examination of a treaty in the legislature was likely to provoke argument, a Government shrank from facing the difficulties, with the result that ratification was slow in coming.

48. He would prefer to see the points under discussion dealt with only in the commentary.

49. Mr. USHAKOV said he supported the Special Rapporteur's proposals.

50. Eight Governments had declared themselves in favour of including in article 1 a provision that neither the existence of diplomatic or consular relations nor mutual recognition by States was necessary for the sending or reception of a special mission. If supplemented along those lines, paragraph 2 would reflect current practice in international relations.

51. As to whether or not the sending or reception of a special mission signified that the two States concerned recognized each other, it was now established international practice that States which did not recognize each other could make certain contacts, either through special missions or by participating together in the work of international organizations, without any implication of mutual recognition. For example, the talks now going on between the People's Republic of China and the United States through their ambassadors at Warsaw—who could be deemed to be entrusted with a special mission—in no way signified that those two States recognized each other.

52. He did not think it was necessary to make that point in the article itself, but he would have no objection if the Commission stated it in the commentary, or even in the article, if it so preferred. Such a passage would reflect current practice and contemporary international law.

53. Mr. RAMANGASOAVINA said he too thought it impossible to accept the proposal of Ceylon that only States recognizing each other should be allowed to exchange special missions. It was between States that did not recognize each other, and between States that did not maintain diplomatic relations, that the sending of special missions could prove especially useful. Recognition, however, was a separate act—a matter of politics, and often of expediency, of which it was preferable to avoid all mention in the article.

54. Furthermore, paragraph 2, as it stood, might lead newly-independent States into error by encouraging them to think that diplomatic and consular relations were

unnecessary and that they could settle everything through special missions—a course that they already tended to take, for such missions were cheaper than permanent missions. He therefore proposed that paragraph 2 be amended to read:

"The sending and reception of special missions may take place between States whether or not they maintain diplomatic and consular relations."

That wording would also have the advantage of avoiding the question of recognition altogether.

55. Mr. CASTRÉN said he agreed with the Special Rapporteur that there was no reason to change the article by adding new features, unless it was to include in paragraph 2 a mention of recognition, as several Governments had suggested.

56. He also supported the Special Rapporteur's proposal that a statement should be added to the commentary, but not to the article, to the effect that the sending or reception of a special mission did not necessarily prejudge the recognition by States of each other.

57. He would revert to the specific question of civil war and insurrection at a later stage.[9]

58. Mr. AGO said he was sure that the members of the Commission were in agreement on the substance. Paragraph 1 made the essential point: for the sending of a special mission, everything depended on the consent of the States concerned. If consent was the deciding factor, the contents of paragraph 2 might seem superfluous; even so, it was perhaps advisable to state the obvious.

59. There was, however, one point of legal importance which ought to be brought out later, namely, that the sending of a special mission to a non-recognized State did not automatically imply recognition of that State. It seemed more necessary to settle that point of law than to state what was now stated in paragraph 2.

60. For the rest, he was confident that the Drafting Committee would be able to find a satisfactory form of words.

61. Mr. KEARNEY said he could not agree that the question of non-recognition was so clear and straightforward that it could just be referred directly to the Drafting Committee.

62. The question of non-recognition had two aspects: non-recognition of a government and non-recognition of a State. The question of non-recognition of a government should be comparatively easy to cover in paragraph 2 of article 1; that of the non-recognition of a State, on the other and, was a much more difficult problem. One of the consequences of the non-recognition of one State by another was that the two entities concerned were not in treaty relations with each other. It was therefore difficult to see how the proposed provision on non-recognition would operate: the two States concerned had no treaty relations and the provision in question would be embodied in a treaty, namely, the future instrument on special missions.

63. Most of the suggestions for covering the question of non-recognition were based on the idea that inclusion of a provision on the subject would facilitate ultimate recognition. That might be true in regard to the recognition of governments but the situation was altogether different with respect to the recognition of States. The draft articles to some extent prejudged the question of recognition. To give one simple example, article 15 dealt with the right of special missions to use the flag and emblem of the sending State: the flag and emblem constituted evidence of sovereignty and the flying of the flag, or the display of the emblem, of the sending State could therefore be considered as an indication of recognition.

64. He was therefore inclined to the view that it would be preferable not to include in paragraph 2 any reference to the problem of recognition, but to deal with the matter in the commentary.

65. He was a strong supporter of the use of special missions but thought that the inclusion of a provision on non-recognition would lead the Commission on to difficult legal terrain, besides involving the danger—to which Mr. Tsuruoka had drawn attention—of rendering the draft less likely to attract State support.

66. Mr. EUSTATHIADES said that he was entirely in favour of using an expression such as "does not necessarily imply recognition" at the point where the text was to provide that the sending of a special mission had no legal consequences with regard to the recognition of a State by another. The idea expressed by the words "in itself" or by the word "necessarily" was certainly to be found in the Geneva and Hague Conventions to which he had referred in his previous statement.

67. Mr. Bedjaoui had rightly drawn attention to the humanitarian character of those Conventions, but the problem was also a political one. It was difficult to prevent States from getting the impression that, if they consented to receive a special mission from a State which they did not recognize—with all that consent involved concerning the application of the provisions governing such questions as status—they would at least be admitting the existence of that State, which would confront them not only with political but also with technical problems, if only those of deciding on the minimum facilities that could be extended to such a mission.

68. That was an extremely delicate point, and governments were justifiably anxious about it. Since the question had been raised, the Commission had to answer it and in such a way as to facilitate relations between States, whether or not they recognized each other. If it was felt that the answer would overload the text of the article, it should be included in the commentary.

69. Mr. BARTOŠ, Special Rapporteur, said that the majority of members appeared to favour the idea of settling the question of recognition, as several Governments had requested, either by adding a provision on the subject to paragraph 2 or by stating in the article or in the commentary that the sending of a special mission did not prejudge the question of recognition between States. He too considered that the question should be settled,

[9] See 900th meeting, paras. 2-5.

partly because a contrary argument had been advanced and partly because, as Mr. Eustathiades had shown, States hesitated to perform an act which might commit them. Practical considerations demanded the establishment of contacts between States which did not recognize each other. It was therefore important that the Commission should clear up that point in one way or another in its draft articles, without going into matters of theory or the question of the form of recognition.

70. Mr. Ramangasoavina had drawn attention to the particular requirements of newly-independent States. He himself would add that new States were not always accorded immediate recognition by all other States; there again it would be useful to mention recognition in paragraph 2 of the article.

71. He had nothing new to propose, but accepted Mr. Ago's suggestion, which would solve the problem. He recommended that article 1 should be referred to the Drafting Committee so that the Committee might find a satisfactory form of words.

72. Mr. TSURUOKA said that he had no objection to the procedure recommended by the Special Rapporteur. However, he wished to stress that, since the Commission wanted to strengthen international relations, it must take the utmost care in drafting a statement on the problem of recognition. It was always possible that a State might wish to recognize another State tacitly, avoiding an excessively formal act likely to raise difficulties of, say, domestic policy, and might for that purpose decide to send a special mission, if necessary a high level one. The wording adopted by the Commission must not deprive it of that possibility.

73. Mr. BARTOŠ, Special Rapporteur, said that, even where formal recognition was granted, it was often preceded by the sending of a special mission with specific instructions to negotiate terms for recognition or to establish a *modus vivendi* leading to recognition later on. Such methods were necessary in international relations. Mr. Tsuruoka could rest assured that the consent of States was required, which meant that all risk was eliminated. The sovereign will of States was inviolable.

74. Mr. AGO said that Mr. Tsuruoka need have no anxiety. If a State wished to proceed to recognition of another State by sending a special mission, nothing could prevent it from doing so, and the circumstances of the individual case would make that apparent.

75. Furthermore States needed to be reassured about the other consequences which the sending of a special mission might have—a matter of concern to Mr. Kearney. The Commission had two ways of doing that. First, the text required the consent of States for the sending of a special mission, as the Special Rapporteur had just pointed out; consequently, in cases of the kind referred to by Mr. Kearney, the State could always refuse to send or refuse to receive a special mission. Secondly, the Commission should in his view specify that the sending or reception of a special mission did not automatically mean that the States concerned had undertaken to recognize each other.

76. Mr. USTOR said that there appeared to be general agreement on the essence of the matter; the difficulties which had arisen related merely to the manner in which the provisions of paragraph 2 would be drafted. Personally, he supported the Special Rapporteur's proposal to include in paragraph 2 a brief reference to recognition. The amended text would then adequately reflect the existing state of affairs.

77. He did not favour the suggestion by some members for the inclusion in article 1 of a safeguard regarding the implications as to recognition of the sending and acceptance of a special mission. The best solution would be to include in the commentary a passage which would reassure States on that score. The question was largely one of drafting and could safely be left to the Drafting Committee.

78. The CHAIRMAN said he noted that some members wished to include in paragraph 2 an explicit reference to the question of recognition, while an almost equal number would prefer to deal with the matter in a separate, or third, paragraph in the form of a safeguarding clause. The clause in question would state that neither the sending nor the receiving of a special mission was to be regarded as necessarily implying recognition. The use of such a wording would have the advantage of avoiding the question of State recognition and the treaty position that might depend on that question.

79. In a sense, the problem might be one of drafting because all members agreed that special missions could be exchanged by States that did not recognize each other. The problem of drafting and presentation was an important one, because if it were not solved in a satisfactory manner States might be deterred from accepting the draft.

80. Speaking as a member of the Commission, he said he was attracted to the solution proposed by Mr. Ago, which was in a sense intermediate between inclusion of a reference to non-recognition in paragraph 2 and the omission of such a reference from the text, leaving the matter to be dealt with in the commentary.

81. The intermediate solution would have the advantage of giving effect to the suggestions made by governments but of doing so negatively or by implication. As it stood, paragraph 2 was open to the interpretation that the Commission had set aside the question of recognition. The adoption of an additional paragraph as proposed by Mr. Ago would constitute an admission that special missions could be exchanged by States that did not recognize each other; that admission, however, would be couched in discreet language and would therefore not be so challenging.

82. Speaking as Chairman, he suggested that the question be referred to the Drafting Committee, which would devise a formula to meet the views expressed in the course of the discussion.

It was so agreed.[10]

The meeting rose at 1 p.m.

[10] For resumption of discussion, see 926th meeting, paras. 1-22.

900th MEETING

Tuesday, 16 May 1967, at 3 p.m.

Chairman: Sir Humphrey WALDOCK

Present: Mr. Ago, Mr. Albónico, Mr. Bartoš, Mr. Bedjaoui, Mr. Castañeda, Mr. Castrén, Mr. El-Erian, Mr. Eustathiades, Mr. Ignacio-Pinto, Mr. Kearney, Mr. Ramangasoavina, Mr. Reuter, Mr. Tammes, Mr. Ushakov, Mr. Ustor, Mr. Yasseen.

Special Missions

(A/CN.4/193 and Addenda; A/CN.4/194 and Addenda)

(continued)

[Item 1 of the agenda]

ARTICLE 1 (The sending of special missions) [2 and 7, para. 1] *(continued)*[1]

1. The CHAIRMAN said that, at the previous meeting, the Commission had exhausted the various points put to it by the Special Rapporteur with regard to article 1, except for the question of civil war and insurgents.

2. Mr. CASTRÉN said that the Special Rapporteur had invited his opinion on the Swedish Government's comments concerning the question of insurrection and civil war (A/CN.4/194/Add.1). He agreed with the Special Rapporteur that that question should be mentioned in the commentary. Moreover, the Commission's replies to those comments should at any rate appear in the records.

3. The Swedish Government rightly noted that, if belligerents had the capacity to send and receive special missions, the term "States" in the text of article 1 was hardly adequate. However, there was no need to change the wording of the article; it would be sufficient to explain in the commentary that the article was applicable by analogy to the parties to a civil war where the insurgents had been recognized as belligerents by the legal government and by the third States concerned.

4. The situation was more complicated where the insurgents were recognized by a third State but not by the legal government of the country. If that third State sent a mission to the insurgents, the legal government was not, in his opinion, bound to regard that mission as a special mission within the meaning of the convention which the Commission was preparing; consequently article 16, concerning the rights and duties of a third State, could not apply to the State in which the insurrection had broken out.

5. The Swedish Government also asked what would be the status of a special mission sent to the insurgents if they were defeated and the special mission was captured by the legal government in its territory. There again, if the legal government had not recognized the insurgents as belligerents, it was not, in his view, bound by the convention. Thus everything depended on recognition or non-recognition by the legal government. In the absence of such recognition, third States should have no official relations with the insurgents. At that stage in a civil war, they could send to the insurgents only unofficial agents to deal with day-to-day matters. In any case the legal government was under no obligation to treat such agents as members of a special mission or to confer special rights, privileges and immunities on them.

6. Lastly, the sentence: "The same concept will be found in the Vienna Convention on Diplomatic Relations (article 3, paragraph 1(a))" should be deleted from the commentary on article 1 because as the Swedish Government had pointed out, the parallel was not well-founded.

7. Mr. BARTOŠ, Special Rapporteur, said he was grateful to Mr. Castrén for presenting the question from the standpoint of a specialist in the law of war. There were many historical cases on record in which insurgents, not recognized as belligerents by the government of the State in which an insurrection had broken out, had entered into contact with third States. Such relations confronted those third States with the problem of interference in the domestic affairs of the State in which the insurrection had broken out. It would be going too far to claim the status of a special mission, within the meaning of the draft articles, for missions exchanged between insurgents and third States in such cases.

8. In practice it was found that, if the insurrection succeeded, relations established with it beforehand were regarded as legal, whereas if it failed all its acts were declared illegal. The Commission could not endorse that practice but, on the other hand, no other doctrine had yet taken shape in international law. Consequently, the best the Commission could do was to state its position in the commentary in such a way as to leave room for one part acceptance, one part criticism and one part toleration of the current practice.

9. Mr. YASSEEN said that he accepted the conclusions stated by the Special Rapporteur in his report. The question was worth mentioning in the commentary, but there was no reason to alter the text of the article.

10. The Special Rapporteur had been right to consider the hypothetical case of a special mission sent to insurgents who had the status of belligerents. That status existed, and differed both from outright recognition and from *de facto* recognition.

11. The difficulties mentioned by the Swedish Government did not seem insurmountable. The key to the problem lay in the principle upheld by Mr. Castrén: namely that, if the State in which the insurrection broke out did not recognize the insurgents as belligerents, recognition of those insurgents by a third State was not enforceable against the first State. In such circumstances a mission sent to the insurgents by the third State could not enjoy the status of a special mission within the meaning of the draft articles. It would be useful to mention that principle of non-enforceability in the commentary, as it offered a solution to many problems.

12. Mr. TAMMES said that it would not suffice merely to have the Swedish Government's remarks included in

[1] See 898th meeting, para. 24.

the commentary to article 1. The passage in paragraph (2) (*a*) of the existing commentary which referred to the question of civil war would have to be reworded so as to state that the draft articles on special missions were not deemed to apply to cases of insurrection or civil war. Clearly, if the articles had been intended so to apply, the term "States" in paragraph 1 of article 1 would not be wide enough and would have to be replaced by some controversial term such as "subjects of international law".

13. The question of extending the draft articles to cover the sending of missions to insurgents not recognized as belligerents by the constitutional government of the country concerned gave rise to certain difficulties of substance. If the struggle was continuing, a request by a foreign State to the belligerents to extend full privileges to a special mission would constitute an intervention by that foreign State in the domestic affairs of the State where the insurrection had occurred. If, on the other hand, conditions became stabilized, the fact that the foreign State had ignored the constitutional government could hardly be construed otherwise than as a *de facto* recognition of the insurgents.

14. It was not possible to escape from that dilemma by pointing out that the request for consent to the sending of a special mission did not prejudge the question of recognition. In the case of civil war, the two parties to the conflict both claimed control of the whole of the State territory, and the foreign State concerned could not avoid making a choice between the two rival parties.

15. There undoubtedly existed important humanitarian and other reasons for sending missions to belligerents in a civil war, but such missions should be of an informal character. The full machinery of the draft articles on special mission was not suitable for application to precarious situations of civil war and insurrection.

16. Mr. BEDJAOUI said that the problem raised by the Swedish Government had strong political overtones and was especially delicate in that it had often to be solved on the spur of the moment. But it was also a problem which the Commission could hardly avoid mentioning if it wished to draw up a convention of real use to the international community.

17. The Swedish Government rightly commented that the term "States" was inapposite if the article was to apply to insurgents recognized as belligerents. In a colonial-type war that term introduced an ambiguity; in a civil war it created an untenable situation, since there was no means of determining which was the legal government. However, he was not asking for a change in the text. He supported the Special Rapporteur's proposal that the matter should be dealt with in the commentary; that would solve several difficult problems.

18. The conditions under which insurgents might be recognized as belligerents had been defined by the Institute of International Law as long ago as 1900. Such recognition, however, was more a matter for third States than for the State at grips with the revolt. When insurgents were recognized as belligerents by a third State, that recognition was—as Mr. Yasseen had rightly stated—obviously not enforceable against the State which did not recognize them. However, as soon as the insurrection was recognized by third States, it might be said to have come on to the international scene, with the result that the government at grips with the insurrection was in fact challenged by that recognition.

19. In order to determine whether third States then had the right to send special missions to the insurgents, it was necessary to apply the criterion of the consent of the State in which the insurrection had broken out. The sending of special missions could hardly be made conditional on the express consent of that State, which as a rule would not give it, but it was also hard to dispense with its consent altogether. He hoped that the Commission would be fairly explicit on that subject in the commentary on article 1.

20. He wished to ask Mr. Castrén why, where a third State sent agents to the insurgents, the reputedly legal government should not grant such agents the status of a special mission within the meaning of the draft articles.

21. The problem of interference in the domestic affairs of a State was partly solved by the principle of non-enforceability; the procedure proposed by the Special Rapporteur was satisfactory in that respect too, since it represented a middle course.

22. Mr. EUSTATHIADES said that the Swedish Government had raised a genuine problem, but the Commission could not hope to examine all its many aspects. The problem could be resolved into two questions: whether the sending of a special mission to insurgents implied or did not imply recognition of those insurgents as belligerents, and whether such a mission should or should not be governed by the convention now in preparation.

23. On the second question there was little the Commission could do. Even if such a mission was entitled to all the facilities provided for in the draft articles, little purpose would be served by their provisions; whatever happened, obstacles would arise in practice, and special arrangements would be made to suit each individual case.

24. That left the first question, concerning the possible significance of the sending of a special mission to insurgents not recognized as belligerents. The history of Greece provided striking examples to illustrate the importance of that question; for instance, it was not until the Greeks who had risen against Turkey had been recognized as belligerents by Great Britain that they had been able to send missions to Great Britain. In practice, in the absence of any express stipulation to the contrary, contact with insurgents through a special mission could be considered a mark of tacit recognition. If the Commission wished to facilitate contacts with unrecognized insurgents, it could be guided by the Geneva humanitarian Conventions and specify that the sending or reception of such missions did not in itself necessarily imply the recognition of insurgents as belligerents. That clarification should appear in the commentary and not in the text of the article.

25. Recognition of insurgents as belligerents had effect only *inter partes*; such recognition by a third State in no way entailed the same recognition by the government of the State where the insurrection had broken out.

26. Mr BARTOŠ, Special Rapporteur, said that the question was certainly very complex. In practice recognition of an insurrection was often the prelude to the birth of a State. Thus, during the First World War the Allies had recognized the Polish and Czechoslovak nations and granted them, in a sense, the status of State, despite the absence of any established authority in the territory. That notion had developed further with the Charter of the United Nations, and there were several occasions on which peoples fighting for their freedom had been recognized as nascent States. Yugoslavia, for instance, had recognized Algeria even before the conclusion of the Evian Agreements, and had thereby got into diplomatic difficulties with France.

27. It sometimes happened, though more rarely, that insurgents were recognized as belligerents even by the government against which they were fighting. That situation raised special problems.

28. All such questions were resolved by political expedients, generally based on a guess as to the outcome of the struggle, and no general rules of international law could yet be formulated on the subject. In any case, the Commission had already decided in principle not to attempt any codification of the law of war, whether international or civil. Even the question of whether or not the term "State" should be used in such a context was really a matter for the law of war and should therefore be left out of consideration by the Commission for the time being.

29. If the commentary was drafted on the lines he proposed it would be helpful to the diplomatic conference, which could go further than the Commission if it saw fit.

30. Mr. AGO said he supported the observations just made by the Special Rapporteur. The problem was a fascinating one, but was outside the scope of the Commission's work. The Commission had decided, with respect both to diplomatic and consular relations and to the law of treaties, to confine itself strictly to relations between States; all other subjects of international law–whether entities on almost the same footing as States, such as the Holy See or insurgents, or other entities such as international organizations—had been left out of consideration for the time being.

31. The sentence in the commentary on article 1 to the effect that the same concept would be found in the Vienna Convention on Diplomatic Relations had been inadvertently misplaced. Originally it had come after the sentence stating that the special mission "must be sent by a State to another State".

32. The Commission should take care not to confuse the plenipotentiaries participating in the conference which would be convened to examine the draft convention on special missions. If the draft went into great detail on the subject of insurrection or civil war, the question would certainly be asked why the Commission had not gone into equal detail on that subject in dealing with diplomatic and consular relations.

33. Mr. CASTRÉN, replying to Mr. Bedjaoui, said that recognition of insurgents by a third State could not establish any legal relationship except between that State and the insurgents. The lawful government which had not recognized the insurgents had the right to ignore recognition by the third State; so far as that government was concerned, the insurgents did not yet possess any status under international law and could be treated as private individuals. If the insurgents gained victories and seized some territory, the government ought in all justice to recognize them as belligerents, but in practice that did not happen. A third State could always recognize the insurgents, but at its own risk. In practice there were only a few known cases of express recognition of insurgents by the government against which the insurrection was directed. Generally speaking, insurgents were recognized by third States but were recognized only implicitly by the government against which they were fighting; that had been the position, for example, during the Algerian war.

34. Mr. Eustathiades had asked whether the sending of a special mission to insurgents by a third State implied recognition of those insurgents as belligerents. His answer was that everything depended on the circumstances: if the special mission was political in character, its sending might imply recognition, but if it was technical in character it meant something different.

35. In common with the Special Rapporteur and many other speakers, he thought it would be better not to go into details on the subject but to make a fairly general but concise statement in the commentary.

36. The sentence about finding the same concept in the Vienna Convention on Diplomatic Relations should be deleted, unless it were replaced by a vaguer wording such as "A similar concept" instead of "The same concept".

37. The Swedish Government would probably be satisfied with the Commission's replies to its comments, which it would find in the summary records.

38. Mr. EL-ERIAN said that he agreed with the Special Rapporteur's conclusion that the comments by the Swedish Government, while useful, did not necessitate any amendment of the text of article 1.

39. Since the discussion had touched on general questions of method and approach he would remind members that the Commission had always confined its codification work to relations between States. In the draft articles on the law of treaties, as in those on diplomatic and consular relations before, the Commission had steered clear of questions relating to other branches of international law. It should keep to its basic practice of not entering into questions which related to other topics on its list of subjects for codification and which would need thorough consideration if they were to be disposed of properly.

40. The sending of special missions to entities not recognized as States raised the question of recognition, which was one of the topics on the list of subjects for codification to be considered in due course by the Commission. Article 11 of the draft Declaration on Rights and Duties of States, adopted by the Commission at its first session, embodied the Stimson doctrine of non-recognition of situations brought about by the illegal use of

force.[2] In that connexion, the Commission had considered a proposed article which would have provided that each State has "the right to have its existence recognized by other States", but had concluded that "the whole matter of recognition was too delicate and too fraught with political implications to be dealt with in a brief paragraph in this draft Declaration", and had noted that "the topic was one of the fourteen topics the codification of which has been deemed by the Commission to be necessary or desirable".[3]

41. The substance of the issue of recognition was not before the Commission. The topic of recognition was a separate one, which would receive the Commission's attention in due course. The only question before the Commission at the present stage was whether, in connexion with special missions, it should enter unnecessarily into certain difficult matters.

42. The Swedish Government had concluded its comments with the words: "The short reference in the commentary is not sufficient to clarify and settle the question". Obviously, the Commission could not in passing settle the important question of the recognition of belligerents. All that it could do was to include in the commentary to article 1 a brief passage to make it clear that the Commission had not wished to enter into a subject which would have necessitated a very thorough examination of a topic which was not before it. In doing so, the Commission would be following the practice which it had observed in connexion with the law of treaties, where it had set aside such problems as the relationship between customary law and treaty law and the question of objective régimes.

43. The CHAIRMAN said that, speaking as a member of the Commission, he fully agreed with Mr. El-Erian.

44. Summing up the debate as Chairman, he noted that no proposal had been made to amend the text of article 1 for the purpose of dealing in any way with the problems of civil war and insurrection. The only problem which had arisen was that of the form of the commentary. It was obvious that the form adopted by the Commission in 1965 had been such as to provoke the Swedish Government's comments and to raise the question of insurgency and civil war, a question which it had never been the Commission's intention to try to solve purely incidentally in the course of its handling of special missions. The Commission had always been careful not to encroach on any of the major topics with which it was to deal in the future, in order not to appear to prejudge any of the issues involved in those topics.

45. A number of useful suggestions had been made during the discussion regarding the form of the commentary. His own idea was that if the Special Rapporteur, in his final commentary, made the problem the subject of a reservation rather than of a definitive pronouncement, there should be no difficulty in securing general agreement.

46. He noted that, with the conclusion of the discussion on the question of insurgency and civil war the Commission had completed its consideration of all the separate points put to it by the Special Rapporteur. He therefore invited members to raise any new points which they might wish to make with regard to the text of article 1.

47. Mr. KEARNEY suggested that paragraph (7) of the commentary should be expanded. The present text only covered the case where the head or a member of the regular permanent diplomatic mission appeared as a member of a special mission; that situation did not usually give rise to any major difficulty. It was, however, necessary to deal with the fairly common problem of members of a special mission and members of a permanent mission working in the same area and for the same purpose. An ambassador would often insist on being at least the titular head of a special mission sent to the country where he was accredited.

48. Again, a special mission would often rely on the permanent mission for some of its services; that situation did not cause any difficulties. However, where a permanent mission was handling a problem but found it necessary to call in experts from its home country to deal with a special aspect of it, perhaps of a technical character, the question would arise of the status of those experts; perhaps they should be regarded as a special mission.

49. The present text of paragraph (7) of the commentary was clearly not sufficient to cover those points and he suggested that it should be elaborated.

50. Mr. BARTOŠ, Special Rapporteur, said he agreed that the concept mentioned in paragraph (2) (*a*) of the commentary as being embodied in the Vienna Convention on Diplomatic Relations was the idea that a special mission must be sent by a State to another State.

51. The last question to be examined in connexion with article 1 was that raised by the United Kingdom Government, which wanted to have the status of a member of a permanent mission who participated in a special mission made clear. In his opinion, the permanent mission was competent in all matters relating to the representation and the protection of the interests of its State in the territory of the State to which it was accredited. Consequently members of the permanent mission could also be members of a special mission and, if they were, had a dual status: on the one hand they retained their status as members of the permanent mission, and on the other hand they were entitled to certain exceptional facilities in their capacity as members of a special mission.

52. With regard to what Mr. Kearney had said, the Commission might delete paragraph 7 of the commentary to article 1 and leave the question to be settled by practice. There was one United States practice which was not willingly accepted in Yugoslavia: from time to time the United States permanent mission received persons who were not members of the permanent mission, assigned certain special functions to them, and requested that they be regarded as members of the permanent mission. In such cases the Yugoslav Government would be more inclined to regard those persons as members of a special mission.

53. The deletion of paragraph 7 of the commentary would have the advantage of removing all reference to the

[2] *Yearbook of the International Law Commission, 1949*, p. 288.

[3] *Ibid.* p. 289, para. 50.

questions which had prompted the United Kingdom comment.

54. The CHAIRMAN said that the Commission should avoid discussing the text of the commentary in detail. It was its usual practice not to discuss the commentaries till a late stage in its proceedings. The Special Rapporteur had made a note of Mr. Kearney's proposal regarding paragraph (7) of the commentary and, when the whole text of the commentary to article 1 was put before the Commission, it would consider whether the point raised by Mr. Kearney had been adequately dealt with. At the present stage, the Commission should concentrate on the text of article 1 itself.

55. Mr. EUSTATHIADES said that in his opinion the United Kingdom proposal to which the Special Rapporteur had referred deserved the Commission's attention and that something might be said on the subject, not in the article, but in the commentary.

56. Mr. BARTOŠ, Special Rapporteur, said he could accept Mr. Eustathiades's suggestion but thought it would be better to deal with the question in connexion with article 6, on the composition of the special mission.

57. Governments had made two comments on matters of drafting: the Greek Government had asked for the text to be made clearer and the Government of Gabon had asked for it to be further condensed. The Drafting Committee would certainly try to make the text as clear and concise as possible.

58. The CHAIRMAN said that the proposal put forward by the United Kingdom Government raised a different question from Mr. Kearney's proposal regarding paragraph (7) of the commentary. The United Kingdom Government's proposal concerned the status and treatment of individuals rather than the classification of the mission itself, and related more to article 3 than to article 1.

59. Speaking as a member of the Commission, he suggested that the Drafting Committee consider replacing in paragraph 1 the concluding words "the State to which they are to be sent" by the words "the receiving State", as in article 2. If it were not desired to use that expression, he suggested "the State by which they are to be received" or "the State which is to receive them". Any one of those suggestions would bring the terminology into line with that of the Vienna Convention on Diplomatic Relations.

60. Speaking as Chairman, he suggested that article 1 be referred to the Drafting Committee for consideration in the light of all the suggestions made during the discussion.

It was so agreed.[4]

61. Mr. BARTOŠ, Special Rapporteur, said that in its written comments, the United Kingdom Government had proposed that permanent specialized missions should be brought within the scope of the draft articles. He was opposed to that proposal because he had consistently taken the view that such missions were not special missions in the sense in which the Commission intended to use the term in the convention. A question of principle was involved. The continually increasing number of permanent specialized missions raised a problem which could not be solved in the draft articles.

62. Mr. YASSEEN said that, though he had no wish to prejudge the status of permanent specialized missions, he also thought that they did not come within the scope of the draft articles.

63. The CHAIRMAN said that the Commission had considered the problem before and had deliberately excluded the specialized form of permanent mission from the scope of the draft.[5] It was clear that the Commission did not wish to reconsider its decision in the light of the United Kingdom Government's comment.

ARTICLE 2 (The task of a special mission) [3].

64. *Article 2* [3]

The task of a special mission

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

65. The CHAIRMAN invited the Commission to consider article 2. The Special Rapporteur's proposals appeared in paragraph 23 of his comments (A/CN.4/194/Add.1).

66. Mr. BARTOŠ, Special Rapporteur, said that several Governments had expressed doubt whether the text of article 2 was sufficiently precise for a distinction to be drawn between a special mission and a permanent diplomatic mission. The Belgian and Yugoslav Governments had suggested that further information should be given on that point, either in the text of the article or in the commentary.

67. He himself, after considering the problem for a long time, was still of the opinion that the text of the article should not be amended but that the Commission might be more explicit in its commentary and specify how a distinction could be drawn between a special mission and a permanent diplomatic mission.

68. Mr. Tsuruoka had expressed the opinion that the permanent diplomatic mission could take over the tasks of a special mission and participate in its activities; other members of the Commission, on the other hand, had taken the view that, precisely in virtue of the mutual consent of the sending State and of the receiving State as provided for in article 2, the special mission possessed, for the entire duration of its functions, exclusive competence within its own field of activity.

69. The United Kingdom Government had considered that it would be desirable, when determining the mission's task, not to apply the rules on special missions on every occasion and for all kinds of missions coming from another State on official or quasi-official business. It considered it desirable "to limit in some way the purposes for which a special mission qualifying for the treatment contemplated in the draft articles may be constituted".

[4] For resumption of discussion, see 926th meeting, paras. 1-22.

[5] *Yearbook of the International Law Commission, 1964*, vol. I, 758th meeting, para. 44.

70. The United Kingdom was also concerned over the relationship between special missions and permanent diplomatic missions as regards their respective competence. It saw no need "for a rule of the exclusion of the tasks or functions of a special mission from the competence of the permanent diplomatic mission" and considered that since the matter seemed to be one for the sending State, any difficulties arising could be dealt with by an *ad hoc* arrangement.

71. The Government of Malta had also dealt with those questions in its written comments, while the Austrian Government had emphasized that care should be taken to ensure that the provisions of article 2 "impair the position of traditional diplomacy as little as possible". In its opinion, the relationship between permanent diplomatic missions and special missions should be expressly regulated, especially with regard to the immunities granted under the draft articles.

72. The Chilean Government had stressed the need to draw a clear distinction between the powers of the special mission and those of the permanent mission; it had proposed that the competence of the special mission, as distinct from that of the permanent mission, should be determined by the former's credentials and that, failing such determination "the competence of the permanent mission shall not be understood to be excluded".

73. The Government of Gabon had expressed the opinion that the text of article 2 could be further condensed, and the Greek Government had observed that it would be improved by greater clarity.

74. The United States Government considered that the sending State "should be free to specify exclusive competence in those instances it deems such an arrangement necessary", and the Japanese Government had commented that "such a problem as concerns the division of authority and functions had better be left to a settlement between the parties concerned in each individual case, and that no such provisions are necessary".

75. The question to be decided, therefore, was whether it was desirable to set specific limits to the competence of special missions or whether that problem could be solved by practice. On reflection he was of the opinion that the competence of special missions should be defined but that it was also necessary to take into account the internal arrangements in each State governing permanent missions which, like special missions, were subject to some higher authority. Disputes could arise even in countries with a long-established diplomatic service, for example where an eminent person was called upon to head a special mission and the same country's diplomatic representative might feel that his own authority was being encroached upon. The problem had political aspects, too: for example, the ambassador heading the permanent diplomatic mission might consider himself responsible for diplomatic relations between his own government and that of the country to which he was accredited, while the special missions might find it difficult to carry out their tasks in complete freedom.

76. He had at first considered that the competence granted to a special mission detracted from the competence of the permanent diplomatic mission, but he was no longer so sure about that and wondered, like certain Governments, whether the permanent diplomatic mission could assume of its own accord certain aspects of the competence of the special mission. Strictly speaking, the question was a political or diplomatic one, but it had legal consequences.

77. Mr. REUTER said he must first point out that the word "*tâche*" used in the French version of the title and text of the article connoted physical activities. He suggested that the Drafting Committee be asked to improve the text by substituting for that term some more precise legal term such as "*objet*" or "*compétence*".

78. On the matter of substance considered by the Special Rapporteur, it was open to question whether the Commission should lay down a rule which would, at least presumptively, exclude a special mission from the scope of the authority of the permanent diplomatic mission. Since article 2 provided that "The task of a special mission shall be specified by mutual consent of the sending State and of the receiving State", the competence (or task) of a special mission was, in his opinion, delimited by the States themselves.

79. Mr. YASSEEN said that the functions of a permanent diplomatic mission were very broad; a special mission seldom had a task that did not fall within the scope of the permanent mission. States were prompted to send or receive special missions by the desire to examine a specific problem, settle a dispute or seek an agreement.

80. The other question which arose was that of relations between the permanent mission and the special mission, in other words whether the special mission enjoyed exclusive competence in a given sphere or whether it pursued its activities in collaboration with the permanent mission. In his opinion, the notion of "mutual consent" provided an answer to that question.

81. The relationship between the permanent mission and the special mission was a matter for the sending State which gave instructions to the head of the permanent mission or to the head of the special mission as it saw fit. It was a purely domestic concern of the diplomatic service of the State concerned.

82. The Commission should avoid going into too much detail and he agreed with Mr. Reuter that the Drafting Committee should be asked to put the text of the article into final form.

83. Mr. USTOR said that the Commission could not establish hard and fast rules for solving possible conflicts of competence between permanent and special missions. Nor could it determine the relative advantage of one or other kind of mission.

84. Article 2 corresponded to article 3 of the Vienna Convention on Diplomatic Relations and not to article 4, as was stated in paragraph 1 of the Special Rapporteur's commentary. Many members of the Sixth Committee and governments in their comments had emphasized that, where possible, the wording of the present draft articles should follow that of the Vienna Convention. If different terms were chosen, such as the word "task" instead of

the word "function", the reason should be given in the commentary.

85. The CHAIRMAN said that apparently members did not wish to deal with the relationship between permanent and special missions in the text of article 2 and continued to think that it was a matter to be settled by each State, since it concerned internal arrangements and could be covered by the formula of mutual consent.

86. The article certainly raised some problems of drafting. The word "specified", for instance, used in the English text, seemed rather stronger than the word "*déterminée*" in the French text.

87. Mr. BARTOŠ, Special Rapporteur, said that his experience at his country's Ministry of Foreign Affairs was that the sending State usually gave the necessary instructions and, in the case of a high-level special mission, asked its permanent diplomatic representative to hold himself at the disposal of the head of the special mission for any assistance he might desire and leave him free to act on the political lines laid down by his government. Those were domestic matters and the Commission could not, in drawing up international rules, make provisions which would impair the sovereignty of States.

88. As Mr. Reuter had stressed, the special mission was brought into being and its competence was defined by mutual consent of the sending State and of the receiving State. That consent was very often given formally in an agreement between the two States, and arrangements were also made on matters of procedure; that removed any risk of a conflict of competence between the special mission and the permanent diplomatic mission. In such a case, then, the matter was settled by a treaty between the two States, whose clauses were binding on both parties.

89. In his opinion the text of article 2 was worded flexibly enough and needed no amendment. The Commission might, however, state in the commentary to the article, without laying down unduly rigid criteria, that it was for States to co-ordinate the activities of their own permanent missions and special missions. In most instances, special missions were independent of embassies, but on occasion some special missions were not subject to the Ministry of Foreign Affairs, either because they were sent for a military, commercial or other purpose or because they were led by persons of very high rank. Missions of that kind, however, were exceptions, and the Commission should lay down general rules without regard to such exceptions.

90. The Drafting Committee could be asked to improve the text, for instance by replacing the word "*tâche*" by the word "*compétence*"—which was certainly more precise from the legal point of view—but without making any change in the substance.

91. Mr. AGO said that the division of competence between the permanent mission and the special mission could be arrived at only on the merits of each individual case. It depended largely on the level of the special mission and the circumstances in which it was sent. That was exclusively a matter for the sending State to decide, except in a few very special cases.

92. So far as terminology was concerned, he agreed with Mr. Reuter; the term "*compétence*" would be more appropriate.

93. The CHAIRMAN suggested that article 2 be referred to the Drafting Committee for redrafting in the light of the discussion.

It was so agreed.[6]

ARTICLE 3 (Appointment of the head and members of the] special mission or of members of its staff) [8].

94. *Article 3* [8]

Appointment of the head and members of the special mission or of members of its staff

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

95. The CHAIRMAN invited the Commission to consider article 3. The Special Rapporteur's proposals appeared in paragraphs 13 and 14 of his comments. (A/CN.4/194/Add.1)

96. Mr. BARTOŠ, Special Rapporteur, said that, after long consideration of the United Kingdom comments on article 1, he was willing to add to article 3 a second paragraph specifying that members of permanent diplomatic missions might be appointed to special missions.

97. The Swedish Government had expressed the view that the words "Except as otherwise agreed" were superfluous and should be deleted; in his opinion, however, since the sending State had complete freedom of choice in appointing the head and members of the special mission, a balance should be struck by giving the receiving State an opportunity to limit that choice by reaching an agreement with the sending State.

98. The Netherlands Government had expressed the opinion that the prior consent of the receiving State should be required for the appointment of the head and other members of a special mission. In his opinion, such a requirement would encroach on the sending State's freedom of choice. Since under article 4 a person might be declared *persona non grata* or not acceptable, the receiving State could refuse to accept a particular person. Consequently, its sovereign rights were safeguarded and there was no need to lay down a rule of prior consent.

99. The United States Government had proposed that the sending State should give the receiving State advance notice of the mission's composition. The Commission had not objected to that proposal and he himself believed it to be useful. Under article 8, the sending State was required to notify the receiving State of the composition of the special mission and of its staff. He thought that, in article 8, paragraph 1, the words "in advance" might be inserted after the words "notify the receiving State", but he did not think that any such amendment should be introduced into article 3, since it would be tantamount to making the appointment of the head and members of a

[6] For resumption of discussion, see 926th meeting, paras. 23-49.

special mission dependent for its validity upon prior notification.[7]

100. The CHAIRMAN, speaking as a member of the Commission, said that articles 3 and 4 were not well placed. They should be preceded by articles 5 and 5 *bis*, an arrangement which would correspond to that followed in the Vienna Convention on Diplomatic Relations; moreover, it seemed undesirable that article 4 should follow closely upon article 3 since it might lead to misunderstanding as to the relation between the question of *persona non grata* and the requirement of the initial consent of the receiving State. The present faulty order was responsible for certain difficulties about notification and its relation to consent.

The meeting rose at 6 p.m.

[7] The Special Rapporteur subsequently changed his opinion; see 901st meeting, para. 67.

901st MEETING

Wednesday, 17 May 1967, at 10 a.m.

Chairman: Sir Humphrey WALDOCK

Present: Mr. Ago, Mr. Albónico, Mr. Bartoš, Mr. Bedjaoui, Mr. Castañeda, Mr. Castrén, Mr. El-Erian, Mr. Eustathiades, Mr. Ignacio-Pinto, Mr. Kearney, Mr. Ramangasoavina, Mr. Reuter, Mr. Rosenne, Mr. Tammes, Mr. Tsuruoka, Mr. Ushakov, Mr. Ustor, Mr. Yasseen.

Special Missions

(A/CN.4/193 and Addenda; A/CN.4/194 and Addenda)

(continued)

[Item 1 of the agenda]

ARTICLE 3 (Appointment of the head and members of the special mission or of members of its staff) [8] *(continued)*[1]

1. The CHAIRMAN invited the Commission to discuss article 3, which the Special Rapporteur had introduced at the previous meeting.

2. Mr. USTOR observed that the Special Rapporteur, in commenting in his third and fourth reports on the remarks on articles 3, 4 and 6 made by the Hungarian representative in the Sixth Committee of the General Assembly, had suggested that those remarks might be disregarded. Since he had acted as the Hungarian representative in the Sixth Committee on that occasion, he wished to clarify the position.

3. Where article 3 was concerned, the relevant passage of his statement in the Sixth Committee read as follows:

> "It seems desirable that the terms used in the draft on special missions be in conformity which the terminology of the Vienna Convention on Diplomatic Relations. In this respect I wish to refer to one single inconsistency between the Vienna Convention and the draft on special missions. The expression 'members of the mission' is used in the Vienna Convention so as to include the head of the mission, the diplomatic staff, the administrative and technical staff. In the draft lying before us—as seen, e.g., from articles 3 and 4, and particularly from article 6—the expression 'members of the mission' has a different meaning from that used in the Vienna Convention, namely it comprises only the head of the mission and the other main delegates, if any, but not the diplomatic, administrative, technical and service staff.
>
> "My delegation would not venture to say that the system adopted by the present draft is not clear and comprehensible in itself or that it lacks its own logic. But we draw attention most respectfully to the difficulties which the legislators of the various countries will encounter when transcribing the provisions of two similar conventions into terms of their own domestic laws. Then—I submit—it would present no small difficulty if it turned out that the expression 'members of a permanent mission' embraces an entirely different and much broader set of people than the expression 'members of a special mission'. While my delegation would not wish to propose at this juncture a definite solution to the problem, it would nevertheless be grateful if consideration could be given to it in the course of the future elaboration of the text."

4. In the summary record of the 843rd meeting of the Sixth Committee, that part of his statement had been summarized as follows:

> "He also urged the Commission to bring the language of its draft into conformity with the terminology of the 1961 Vienna Convention on Diplomatic Relations. In the latter instrument, the members of the diplomatic missions included the head of the mission, the diplomatic staff, the administrative and technical staff and the service staff. In draft articles 3, 4 and 6 on special missions, the latter comprised only the head of the mission and other principal delegates. Uniformity on this subject would facilitate the work of legislators of the contracting States in translating the provisions of two similar conventions into domestic law".[2]

5. In paragraph 9 of his observations on article 3 (A/CN.4/194/Add.1), the Special Rapporteur had quoted only the third sentence of that summary. Taken out of context, that sentence was perhaps somewhat ambiguous and it should, of course, be read in conjunction with the preceding and following sentences.

6. In conclusion, he wished to emphasize that the sole purpose of his statement was to place a necessary clarification on record.

[1] See 900th meeting, para. 94.

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

7. Mr. BARTOŠ (Special Rapporteur) thanked Mr. Ustor for his explanations and pointed out that his report indicated that the comment by the Hungarian delegation probably arose from a misunderstanding. The only documents he had been able to consult were the provisional summary records of the Sixth Committee and extracts prepared by the secretariat of the Commission.

8. It was certainly desirable to bring the terminology of the draft articles as far as possible into line with that of the Vienna Convention on Diplomatic Relations, and that was what the Commission had decided to do. The composition of a permanent mission, however, differed from that of a special mission. In a permanent mission the only plenipotentiary representative of the State was the head of the mission; the other members of the mission constituted its staff. In a special mission not only the head but often several members might be plenipotentiaries. Those were the members whom the Hungarian delegation had described as "principal delegates" and to whom the Commission had referred as "members [of the mission]", in the text of article 3 adopted in 1965. The words "as well as its staff" had been added to indicate the other persons composing the special mission. In his opinion, article 3 was one of the instances in which the Commission should depart from the terminology of the Vienna Convention. In the case of a special mission, the term "members of the special mission" referred, by virtue of article 6 of the draft, to a group of persons set apart by their duties and by the powers they had received from the sending State; they were not included in the expression "the staff of the special mission".

9. The CHAIRMAN noted that the matter of the Hungarian delegation's comments had been clarified.

10. With regard to the question of terminology, more than one Government had objected to the same phrase being used in different conventions with different meanings. The question was one which should be borne in mind.

11. Mr. REUTER said that article 3 raised questions of both substance and form. On the substance there could be no hesitation: the Commission's intention in article 3 was to state a residual rule. Governments could do what they wanted, but if they did not state clearly what that was, the residual rule would apply. The rule proposed in article 3 was reasonable, and also commendable for its liberality.

12. The form presented a number of problems. The Special Rapporteur had raised one at the previous meeting[3] by suggesting the addition of words providing that the special mission could include members of the diplomatic staff serving in the receiving State. He himself thought it would be sufficient if that point were made in the commentary. It could not raise any difficulties; persons so appointed would have a dual capacity and would benefit simultaneously from the provisions governing permanent and special missions.

13. Another important question was that raised by the Chairman at the previous meeting[4] regarding the relationship between article 3 and subsequent articles. He would not discuss it in detail at that time, but thought that the Commission would ultimately be obliged to add, after the words "except as otherwise agreed", some such words as "and subject to the provisions of articles 4, 5, 8...". The question was one for the Drafting Committee to settle.

14. Article 3 as now worded, in two sentences, was somewhat ambiguous. Anyone who did not read the commentary carefully would suppose that the meaning of the second sentence was absolute. That drawback could be overcome by combining the two sentences and saying, for example:"... may freely appoint, without the prior consent of the receiving State, the head... etc". Such wording would make clear that the proviso "except as otherwise agreed" applied to the second as well as to the first sentence of the present text.

15. Subject to what he had said, and if the Commission agreed on the necessity of a residual rule, he considered the article satisfactory and suitable for reference to the Drafting Committee.

16. Mr. CASTRÉN said he also accepted in substance article 3 as adopted at first reading. He agreed with the Special Rapporteur that the United States Government's comment (A/CN.4/193) about prior notification of the composition of the special mission should be borne in mind, and that the point could be settled by providing in article 8, which dealt with notification, that the composition of the special mission should be notified "in advance".

17. With regard to the wording of article 3, he accepted the Special Rapporteur's proposal and would put forward a further proposal of his own aimed at satisfying the Swedish Government, which wished the second sentence to be deleted. Without going so far, the Commission could combine the two sentences into one, as Mr. Reuter had just proposed, or else could say: "... may freely appoint the head, members and staff of the special mission without such appointments requiring the prior consent of the receiving State." That wording would indicate that the idea expressed in the existing second sentence was supplementary to that of the first sentence and not a repetition of it.

18. Concerning the order of the articles, he agreed that articles 3 and 4 were too close to the beginning of the draft and might be better placed after article 5, article 5 *bis*, if adopted, and even article 6.

19. Mr. TAMMES said he supported the proposal by the United States Government, which he understood had been accepted by the Special Rapporteur, that prior notification to the receiving State of the composition of a special mission should be required. The matter would arise again in connexion with article 8, but could also be appropriately discussed in connexion with article 3.

20. If the requirement of prior notification were to be included in article 3, the question would arise whether the receiving State, on receipt of such notification, was entitled to make observations on or raise objections to the composition of the special mission. In that connexion,

[3] Para. 96.

[4] Para. 100.

he drew attention to paragraph (3) of the commentary to article 4, which referred to the practice whereby the receiving State informed the sending State through the regular diplomatic channel that the head or a certain member of the special mission, even though consent had already been given to his appointment, represented an obstacle to the fulfilment of the mission's task.

21. Lastly, he noted the Special Rapporteur's remark in paragraph 14 (4) of his comments on article 3 (A/CN.4/194/Add.1) that the provision contained in the second sentence of article 3 "should be of a generally compulsory nature as one of the principles applicable to the institution of special missions". In view of that remark, he would like to know whether the initial proviso "except as otherwise agreed" also applied to the second sentence of article 3.

22. Mr. USHAKOV said that the phrase "except as otherwise agreed" seemed to mean that the parties could conclude an agreement limiting the sending State's freedom of choice; that would be going too far and would prejudice the sovereignty of that State. He would prefer to delete the phrase or to replace the word "otherwise" by the word "specially", which was less strong. The initial proviso in article 3 might also be expressed in terms similar to those of article 7 of the Vienna Convention on Diplomatic Relations, i.e. in the form of a reference to subsequent articles.

23. The second sentence of article 3 seemed superfluous, since it was already stated in the first sentence that the sending State might "freely" appoint the persons participating in the special mission. Moreover the second sentence was to some extent contradicted by the commentary, in which it was specified that the consent of the receiving State could sometimes be given in the form of a visa, through an exchange of views between the two States, and so forth.

24. He approved the United States Government's proposal that the article should include a provision requiring prior notice of the composition of the special mission to be given to the receiving State. If it was feared that that rule might be too strict, it could be qualified by adding the words "in principle" or some similar phrase.

25. Mr. AGO said that he was perplexed by article 3 and the succeeding articles. On listening to Mr. Ustor and the Special Rapporteur, he had gained the impression that both were right. It was sometimes necessary to depart from the Vienna Convention on Diplomatic Relations because a special mission was different from a diplomatic mission; however, since the draft articles now under consideration came after the codification of the rules on diplomatic missions, any difference in expression or terminology would be construed as a difference in substance deliberately made by the Commission. The Commission should therefore take care not to depart from the Vienna Convention except in those specific cases where it genuinely wished to establish a difference in status.

26. He supported the observations made by the Chairman at the previous meeting regarding the order of the articles.

27. With regard to the content of article 3, he questioned the advisability of introducing a rule differing in substance from the rule applicable to diplomatic missions by providing that the consent of the receiving State was not required for the appointment of the head of a special mission. The fact was that a special mission might have even more delicate tasks to perform than a diplomatic mission, for example between States which had no diplomatic relations or which did not recognize each other. Again, while the sending State could in theory, under article 3 as now worded, appoint as head of the special mission a person not approved by the receiving State, the latter would subsequently have an opportunity to declare that person *non grata*. The case was bound to arise in practice, and the consequences of such a step would be more serious than those of refusing consent before the final appointment of the person concerned. The rule laid down in article 3 would thus do nothing to foster the success of special missions or to facilitate relations between States. It would be better to require, in one way or another, the prior *agrément* of the receiving State for the appointment of the head of the special mission.

28. With regard to the proviso "except as otherwise agreed", he shared Mr. Ushakov's view. For the time being, he was proceeding on the assumption that all the rules laid down in the draft articles were rules from which States could depart by mutual agreement. If the proviso "except as otherwise agreed" or even "except as specially agreed" was included in certain articles, it might be inferred *a contrario* that articles not containing that reservation laid down rules from which no derogation was permitted. He would prefer to delete all such provisos wherever they appeared and to replace them, at the end of the draft articles, by a general provision authorizing derogations by agreement between States. If the Commission considered that there were certain rules laid down in the articles from which no derogation could be permitted, that should be clearly stated.

29. Mr. YASSEEN said that he endorsed the views expressed by the last two speakers concerning the initial proviso "except as otherwise agreed". If the proviso was to be retained, he would prefer the expression "Except as specially agreed". That question could be set aside for the time being and dealt with when the Commission had reviewed the entire draft and was in a position to decide the articles from which no derogation should be permitted.

30. The second sentence in article 3 was unnecessary. The first sentence made it sufficiently clear that the sending State was free to appoint whomever it wished. The *agrément* required for diplomatic missions was a somewhat cumbersome procedure, involving delays which were incompatible with the essentially temporary character of special missions.

31. On the other hand it was essential to retain the idea that the receiving State should be given advance notice of the composition of the special mission; such notice would obviate many difficulties. If the receiving State, on receiving such notice, felt unable to accept a particular person, it would advise the sending State accordingly,

even before that person's arrival. Such a step was far less serious than that of declaring *non grata* a person who had already arrived. What was more, such advance notice should be required not only for the head but for all members of the special mission. To make it clear that the notice did not infringe the freedom of choice of the sending State and that its only purpose was to safeguard the sovereignty of the receiving State, the Commission might place the provision concerning such notice in article 4.

32. Subject to those observations, he accepted the principles underlying article 3.

33. Mr. EL-ERIAN, referring to co-ordination with the 1961 Vienna Convention on Diplomatic Relations, said it was important to adhere to the order of articles and terminology of that Convention. The Commission should depart from that order and terminology only for good reason and should explain its grounds for doing so in every case.

34. With regard to the initial proviso "except as otherwise agreed", he noted the Swedish Government's suggestion that it should be omitted from article 3 and form the subject of a general clause at the beginning of the draft, and Mr. Ago's suggestion that such a general clause should be placed at the end of the draft. The Commission had already discussed on previous occasions[5] whether there was any place for *jus cogens* in the draft articles and it was difficult to see how it could enter into the subject of special missions. That did not, however, mean that it would be possible to depart from all the provisions of the draft articles without distinction; the Commission's aim was to lay down a general standard of conduct, leaving States free to adopt other arrangements by special agreement. It would therefore be difficult to adopt a general clause which would give the impression that all the provisions of the draft articles came into the same category. There might be a case for including in some articles a proviso to the effect that their provisions could be varied by special agreement between the parties.

35. As to the receiving State's consent to the composition of the special mission, it would be difficult to adopt the system of *agrément* in view of the variety and frequency of special missions. A special mission would sometimes complete its task in a few days and the system of *agrément* was too cumbersome and slow for a mission of that type. Moreover, although some missions were of a delicate political nature, most of them were not. It was necessary to adopt a flexible system suitable for all special missions, including both political and technical missions. However, although the system of *agrément* was not practical for special missions, the system of notification was perfectly acceptable.

36. Lastly, the wording of the first sentence of article 3 was too categorical. Since article 14 contained a restriction relating to the appointment of nationals of the receiving State, the statement that "the sending State may freely appoint" the members of the special mission was inaccurate. In the Vienna Convention on Diplomatic Relations the first sentence of article 7 (which corresponded to article 3 of the draft on special missions) read: "Subject to the provisions of articles 5, 8, 9 and 11, the sending State may freely appoint the members of the staff of the mission".[6] Article 8 of the Vienna Convention corresponded to article 14 of the draft on special missions.

37. Mr. CASTAÑEDA said that, at first sight, it seemed illogical not to require the prior consent of the receiving State for the appointment of the head of a special mission, when special missions were sometimes entrusted with even more delicate functions than permanent missions. Clearly, prior consent would not be needed in the case of a special mission headed by the Minister for Foreign Affairs himself; nor would there be much purpose in requiring such consent in the case of purely technical missions which would automatically be led by the head of the technical department concerned. However, between those two extremes there were many special missions of an intermediate character whose success very often largely depended on the personality of the head of the mission. He was thinking, for example, of certain special missions entrusted with the discussion of the position of Governments with regard to international organizations.

38. There appeared to be general support for the idea of including the requirement of advance notice in article 3. The main purpose of such notice should normally be to enable the receiving State to put forward any objections it might have to the composition of the special mission.

39. He was not urging that *agrément* should be required in the case of the head of a special mission; that traditional procedure for the acceptance of the head of a permanent mission was incompatible with the requirements of modern life. He merely wished to point out that provision should be made for the consent of the receiving State. Such provision would be in conformity with the usual practice of States, since it was customary for the two States concerned to agree not only on the sending of the mission but also on its composition.

40. Mr. TSURUOKA agreed that the current practice of States must be taken into account; but the Commission should not forget that the purpose of its draft was to facilitate relations between States by means of special missions, so that it could go somewhat ahead of practice in order to bring about development in international law.

41. His position was very close to those of Mr. Yasseen and Mr. Castañeda, namely that both the freedom of choice of the sending State and the will of the receiving State must be respected, since the special mission's success depended on collaboration between those two States. In that sense, prior notification of the composition of the special mission by the sending State to the receiving State was very useful. Since such notification was not mandatory, article 3 as it stood, even if it was regarded as a residual rule, gave the impression that the sending State had freedom of choice but that, unless otherwise agreed, the receiving State had no say in the special

[5] See *Yearbook of the International Law Commission, 1964*, vol. I, 725th meeting, paras 2-55, and *Yearbook of the International Law Commission, 1966*, vol. I, 877th meeting, paras. 7-74, 878th meeting, paras. 3-35 and 894th meeting, paras. 123-139.

[6] See United Nations Conference on Diplomatic Intercourse and Immunities, *Official Records*, vol. II, p. 83.

mission's composition. The Commission should therefore take another careful look at the wording of the article.

42. With regard to the substance, prior notification was necessary; it implied that the receiving State was entitled to negotiate with the sending State on the composition of the special mission. The psychological factor noted by Mr. Yasseen and Mr. Castañeda was important, for a refusal was far less serious before an unacceptable person arrived than when he was already there.

43. In short, it was a question of striking a balance between the rights of the sending and those of the receiving State.

44. Mr. ALBÓNICO said he agreed with those members who had urged that the draft articles should conform as closely as possible to the terminology used in international conventions dealing with similar subjects. In that connexion, the four Conventions on the law of the sea signed at Geneva in 1958 could serve as a pattern.

45. With regard to the initial proviso "except as otherwise agreed", he favoured a general clause, placed at the end of the draft and providing that, except in the case of certain specified articles, all the provisions of the draft could be set aside by special agreement.

46. Referring to the question of the consent of the receiving State, he pointed out that there was a great difference between a refusal of *agrément* and a declaration that a person was *non grata*. A State would refuse *agrément* on grounds connected with the previous activities of the diplomatic agent concerned. A declaration that a diplomatic agent was *persona non grata*, on the other hand, would be based on the agent's activities after he had entered upon his functions in the receiving State. He could not, therefore, agree with the statement in paragraph (3) of the commentary to article 3 that the interests of the receiving State were "safeguarded by article 4 (persons declared *non grata* or not acceptable)". It would be invidious to place the receiving State in the position of having to resort to a declaration that the head of mission was *persona non grata*, when the real situation was completely different. Besides, such a declaration might be unnecessarily prejudicial to the diplomatic agent concerned.

47. In the circumstances, consideration should be given to the suggestion that some provision should be made for the prior consent of the receiving State. He himself had not arrived at a definite conclusion on that point, but thought that Mr. Ago's suggestion should be carefully weighed.

48. Mr. REUTER said that the debate had taken a course that challenged the very principle of the convention on special missions. If the Commission only meant to lay down optional or residual rules, and if those rules were the same as those of the Vienna Convention on Diplomatic Relations, there was no point in drafting a convention at all. If the Commission meant to lay down rules differing from those of the Vienna Convention, they were bound to be more flexible rules. The sole purpose of article 3 was to deal conveniently with cases for which States had made no provision by mutual agreement. The article might perhaps be drafted quite differently, in some such words as: "The sending State may appoint... in accordance with the terms of the agreement establishing the mission. If the agreement does not designate those persons, the sending State shall notify their names as soon as they are appointed". Before one State could send a special mission to another State, there had to be an agreement; but that agreement might not specify the persons, especially if it concerned one of the countless special missions sent to settle, for instance, minor technical or cultural matters. In general, States displayed good faith in minor matters. Accordingly, if the agreement did not specify the persons, the sending State could be trusted to appoint persons acceptable to the receiving State; otherwise it was bound to run into trouble.

49. Mr. RAMANGASOAVINA noted that the Commission accepted the principle that the sending State might, by virtue of its sovereignty, freely appoint the head and members of the special mission as well as its staff. The notification provided for in the United States proposal seemed to him essential, if only to enable the receiving State to make an informed choice of the persons who were to negotiate with the members of the special mission.

50. On the other hand, the prior consent clause gave rise to difficulties, for the receiving State might use it to interfere in the domestic affairs of the sending State; it would, therefore, be preferable merely to provide for advance notice. To declare a person *non grata* or not acceptable might be a suitable procedure in the case of permanent diplomatic missions. For special missions, however, the system should be more flexible, and the Commission might, without departing from the Vienna Convention, leave the receiving State the right to refuse at any time to recognize a person as the head or a member of a special mission by notifying the sending State of its wishes, without having recourse to the clause concerning persons declared *non grata* or not acceptable.

51. Mr. BEDJAOUI agreed with Mr. Reuter that, subject to a few changes, the text of the article might be referred to the Drafting Committee.

52. The Special Rapporteur had skilfully avoided a number of pitfalls and kept the balance between the rights of the sending State and those of the receiving State, while taking into account the comments made by members of the Commission.

53. The "prior consent" formula was not very satisfactory; all the Commission need do in order to solve the problem was to agree that the sending State should give the receiving State advance notice of the composition of the special mission. The receiving State was forearmed against any risks presented by the freedom of choice allowed to the sending State, since the Special Rapporteur had listed in paragraph (4) of the commentary all the courses open to the receiving State if it sought to limit that freedom of choice.

54. The Drafting Committee would be able to put the text of the article into final form, taking into account the comments made by members of the Commission; it might, in particular, consider Mr. Ushakov's suggestions regarding the initial proviso.

55. Mr. AGO said that he would not like the Commission to misunderstand what he had meant by the term "*agrément*" which he had used in his first statement. That word should be understood to mean "consent"; it might even be provided that if, within a reasonable period, the receiving State made no objection to the appointment of a person as the head or a member of a special mission, its consent would be presumed. However, it was out of the question for the receiving State to be left with no way of objecting to the sending of certain persons other than the very serious procedure of declaring a person *non grata* on his arrival in its territory. In any case, that procedure had nothing to do with the "prior consent" clause and its purpose was different.

56. There would be no point in a notification procedure which consisted merely of informing the receiving State of the composition of the special mission without giving it any possibility of raising objections; for those reasons, he did not think it would be satisfactory merely to combine the provisions of article 4, concerning persons declared *non grata*, with the "advance notice" clause.

57. Mr. EUSTATHIADES said the Commission was justified in supposing that the sending State and the receiving State would in each case proceed by way of special agreement. If there was in addition a convention giving a State the option of refusing to recognize a person as the head or a member of a special mission, all difficulties would be removed.

58. In his view, therefore, article 3 should be drawn up in fairly flexible terms, without superfluous detail. He accordingly suggested that the words "Except as otherwise agreed" should be deleted but that both article 3 and article 8 should specify that the receiving State should be notified in time for it to express a refusal if it so wished. The second sentence of the article might well be deleted and, if a disagreement arose between the two States concerned, the provisions of article 4 would come into play. However, it would be preferable to deal with that point through some more flexible procedure than that of declaring a person *non grata* or not acceptable.

59. Mr. USTOR said that in his view the decision on whether or not to retain the phrase "except as otherwise agreed" should be held over until the Commission had disposed of all the other articles. The decision would depend on the proportion of articles containing dispositive rules.

60. Like Mr. Ushakov, he questioned the need for the second sentence of article 3.

61. Although the system of notification and *agrément* was accepted by States in principle, the Commission should consider something more flexible.

62. Article 3 covered three points that were also dealt with in the Vienna Convention on Diplomatic Relations, namely the question of the *agrément*, the accreditation of the head of a mission and the appointment of its members. In the case of permanent missions, accreditation was effected by a special procedure of nomination by the Head of State or the Minister for Foreign Affairs of the sending State and acceptance by the Head of State or Ministry for Foreign Affairs of the receiving State. A less formal procedure was allowed in the case of special missions, and the head of the mission did not have to be nominated by the Head of State or Minister for Foreign Affairs. That point needed some explanation in the commentary.

63. Mr. BARTOŠ, Special Rapporteur, observed that the ideas embodied in the draft article or the commentary did not necessarily reflect his own views; in some cases he had deferred to the wishes expressed by the majority.

64. Some members of the Commission seemed to be under the impression that it had decided in advance that all the rules it adopted would be residual rules, but in reality it would not decided until the end of its work which were compulsory provisions, and which were residual rules. As the Commission would remember, he had proposed that it should accept the idea that the rules on the legal status of special missions should in principle be compulsory, but that provision might be made for derogating from them, supplementing them or adapting them through bilateral or multilateral agreements.[7]

65. He would have no objection to arranging the articles in a more logical order, but the Commission had suggested to the General Assembly, and the Assembly had agreed, that the Commission should decide upon the order of the articles at the end of its work.

66. Some Governments had requested that prior consent should be mentioned in article 3, and the Drafting Committee had added the second sentence of the draft article. Like Mr. Reuter, he considered that sentence unnecessary, and he agreed that it would be better if the article were drafted as a single sentence.

67. He agreed with Mr. Ago and Mr. Ramangasoavina that the United States proposal concerning advance notice, a proposal which Mr. Ushakov had also approved, should be taken into consideration. Mr. Ago's suggestion that consent should be presumed if the receiving State made no objection within a reasonable period was particularly sound; it opened the way for discreet negotiations between Ministries of Foreign Affairs with a view to replacing a particular member of a special mission. He therefore wished to change the position he had taken at the previous meeting;[8] instead of amending article 8 on the lines proposed by the United States, he agreed to that amendment being applied to article 3.

68. Prior consent was not required in practice so far as special missions were concerned. In certain cases States concluded special agreements; in other cases provision for the sending and reception of special missions was made in treaties—for example, concerning frontier disputes—that laid down the conditions under which such missions would perform their functions.

69. With regard to what Mr. Ushakov had said, it should be noted that article 7 of the Vienna Convention on Diplomatic Relations dealt solely with the staff, whereas draft article 3 concerned the mission as a whole.

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[7] See document A/CN.4/194/Add.2, paragraphs 5 and 6 of the Special Rapporteur's comments on article "Y".

[8] Para. 99.

70. He saw no reason why the United Kingdom proposal should not be mentioned in the commentary, but he must point out that in practice commentaries were rarely consulted; they were largely unknown except to professors of international law and the legal advisers of ministries.

71. In paragraph (4) of the commentary to article 3, the words "*de facto*" had been inadvertently omitted; they should appear in the first sentence after the words "can limit".

72. Mr. ROSENNE congratulated the Special Rapporteur on an enlightening report which would simplify the Commission's task.

73. As the text now stood, the logical arrangement of the articles was disrupted by articles 5 and 7. The Commission should logically deal firstly with the appointment, composition and size of a special mission, secondly with the question of notification to the receiving State, and thirdly with the reaction of that State.

74. In reading the report, he had been disturbed by the reference to certain provisions being compulsory, as that was not in conformity with the Commission's decision on the draft articles on the law of treaties. Nor was he able to subscribe to the views expressed at the meeting about *jus cogens* and *jus dispositivum*.

75. The CHAIRMAN, speaking as a member of the Commission, said that, as he had already indicated at the previous meeting, the departure from the order followed in the Vienna Convention had rendered the articles less intelligible. The provisions on the sending of the same special mission to more than one State and on the sending of the same special mission by two or more States (articles 5 and 5 *bis*) ought to precede the provisions on the composition of a special mission. Article 7 was also out of place.

76. In its desire to depart from the provisions of the Vienna Convention concerning *agrément* as being too formal and inflexible for special missions, the Commission had combined the provisions concerning consent and those concerning the freedom of the sending State to appoint members of the mission. However, the elements of *agrément* had not been altogether eliminated from article 3. If the Commission accepted Mr. Ago's proposal for the addition of a clause stipulating that, if no objection was made within a reasonable period the consent of the receiving State should be presumed, it would have to decide whether such a provision was to apply only to the head of a special mission or to all its members. If the former, then the article would come close to the parallel provision in the Vienna Convention without the formal requirement of *agrément*. The present position of article 4, in which the element of consent had been retained, might lead to misunderstanding and it would be preferable to revert to the order of the Vienna Convention.

77. Speaking as Chairman, he said that there seemed to be a strong feeling in favour of postponing the decision on retaining the proviso "except as otherwise agreed" until a later stage in the discussion. There was also general agreement on the need to avoid using terms in a different sense from the Vienna Convention. It had been rightly suggested that if the article referred to a State's right freely to appoint the members of a special mission, a reservation must be made in respect of certain articles which undoubtedly placed restrictions on the appointment of members. He believed it was the consensus of opinion that notification was necessary in order to give the receiving State an opportunity to object.

The meeting rose at 1.5 p.m.

902nd MEETING

Thursday, 18 May 1967, at 10 a.m.

Chairman: Sir Humphrey WALDOCK

Present: Mr. Ago, Mr. Albónico, Mr. Bartoš, Mr. Bedjaoui, Mr. Castañeda, Mr. Castrén, Mr. El-Erian, Mr. Eustathiades, Mr. Ignacio-Pinto, Mr. Kearney, Mr. Ramangasoavina, Mr. Reuter, Mr. Rosenne, Mr. Tammes, Mr. Tsuruoka, Mr. Ushakov, Mr. Ustor, Mr. Yasseen.

Special Missions

(A/CN.4/193 and Addenda; A/CN.4/194 and Addenda)

(continued)

[Item 1 of the agenda]

ARTICLE 3 (Appointment of the head and members of the special mission or of members of its staff) [8] *(continued)*[1]

1. The CHAIRMAN invited the Commission to continue its consideration of article 3. It would first have to decide whether the article should be confined to the head of the special mission or should deal with all its members and staff. If an article on the lines advocated by Mr. Ago[2] were approved, then another article would have to be drafted concerning the power of the sending State freely to appoint members of a special mission.

2. Mr. BARTOŠ, Special Rapporteur, suggested that the Commission consider the case of the head and members of the special mission separately from that of the staff of the mission. In most instances the head and the members of the mission were virtually on an equal footing, since both were called upon to take part in negotiations; the provision concerning prior notification should therefore apply to the members as well as to the head. The situation of the staff might be covered in a new article.

3. Mr. AGO said that when, at the previous meeting, he had discussed the problem of notification and absence of objection he had been thinking only of the head of the special mission; but, after listening to the Special Rapporteur, he was wondering whether the same rule

[1] See 900th meeting, para. 94.

[2] See 901st meeting, para. 55.

should not be applied to the members of the special mission as to its head. The Commission should however be careful not to be too strict and not to extend the scope of the rule to too many persons.

4. In any case it would have to devote another article to the staff, and perhaps to the members too, if it decided to place them in the same category with regard to notification and absence of objection. The best plan would be to follow the order of the articles of the Vienna Convention on Diplomatic Relations, and lay down first the provisions concerning the head and principal members of the mission, including those concerning nationality problems dealt with in article 14; then those concerning freedom to appoint the head and members of the mission; and finally those contained in article 4.

5. Mr. CASTRÉN said that there was no disputing the right of the sending State to choose the head of the special mission and its members as well as its staff. The words "Except as otherwise agreed" should therefore be deleted, as several members of the Commission had already suggested. There was no need to include in article 3 any other reservations, apart, perhaps, from those concerning the nationality of the members of the special mission, a matter dealt with in article 14.

6. On the other hand, the declaration that persons were *non gratae* or not acceptable and, probably, the limitation of the number of staff were separate problems which did not usually arise until the special mission had taken up its functions.

7. Furthermore, as article 1 expressly provided, a State was not obliged to receive a special mission from another State. It was therefore unnecessary to specify in article 3 that the composition of the mission might require the consent of the receiving State, whatever form such consent might take.

8. At the previous meeting the Commission had discussed the question of *agrément* of the head of the special mission; it had formed the opinion that mere consent would be enough, and had ultimately accepted a presumption of consent. That made a considerable difference in the points at issue. In his view, the interests of the receiving State would be adequately safeguarded if the Commission adopted the United States proposal that the receiving State should be given prior notice of the composition of the special mission; that State would then be in a position to take action in the exceptional case where the head or a member of the mission or a member of the mission staff turned out to be someone personally unacceptable or where it wished to set limits to the numerical strength of the special mission.

9. The Commission should not complicate the problem by adopting detailed rules applicable to the head of the special mission or to the other persons attached to it. Since the receiving State could indirectly influence the composition of the special mission, he proposed that the second sentence in article 3 be deleted in order to avoid placing undue emphasis on the sending State's freedom to choose the members and staff of the special mission.

10. Mr. USHAKOV said that he had given a great deal of thought to the suggestions made by the Chairman at the previous meeting. In the absence of a written text, however, he could pass no final opinion on them.

11. All members of the Commission acknowledged that notification was necessary to enable the receiving State to decide its attitude before the special mission arrived. But notification was not indispensable, for instance where a special mission was led by the Prime Minister or the Minister for Foreign Affairs, for then there was every reason to suppose that the Minister would make his own choice of members for the special mission. The Commission should therefore adopt a fairly elastic formula.

12. Mr. Ago's suggestion regarding a clause on absence of objection was useful and could be mentioned in the commentary to the article rather than in the text.

13. The CHAIRMAN said he should make it clear that he had not made any proposal. He had intended merely to draw attention to certain points.

14. Mr. TAMMES, on the question whether the receiving State's consent was needed for members of the mission, said that preliminary talks or negotiations usually covered the competence and size of the special mission, its head, the facilities for the performance of its functions and its classification in the sense of the draft articles. In addition, the membership of the mission was discussed without any formal agreement being necessary on the part of the receiving State. That was the view of the Netherlands Government as indicated in paragraph 7 of its written comments (A/CN.4/193). A parallel provision appeared in article 19, paragraph 4, of the Vienna Convention on Consular Relations, which in some respects was more relevant to special missions than the Vienna Convention on Diplomatic Relations.

15. Mr. YASSEEN said that the Commission should take a decision on the substantive points at issue before referring the article to the Drafting Committee.

16. The sending State appointed the head and members of the special mission by a unilateral act; the receiving State might, in the view of some members of the Commission, have the right, not to appoint, but to accept a member of a special mission as an interlocutor and permit him to enter its territory. Notification was an essential formality if difficulties were to be avoided, but it was sufficient. It need not be a formal procedure; if a State knew the composition of a special mission in advance, that was all it required in order to exercise its right to admit or refuse to admit a person to its territory. That formality was all the more necessary when most countries were abandoning the visa system.

17. The course suggested by Mr. Ago seemed likely to cause difficulties, as it would give the impression that the receiving State had some right to participate in appointments, whereas it could only express its acceptance or refusal. Consequently, in his opinion, the provision concerning prior notification should appear, not in article 3, which dealt with the appointment of the head and members of the special mission, but in article 4, in order to stress the link between prior notification and the recognized right of a State to admit or refuse to admit a person to its territory.

18. With regard to the distinction drawn, for purposes of prior notification, between the head, the members and the staff of the special mission, he thought the Commission might omit mention of the staff, who in any case played only a minor role in the performance of the special mission's functions.

19. Mr. ROSENNE said that the only real problem was to find the proper balance between the rights of the sending and of the receiving State and to maintain the flexibility required because of the great variety of special missions. The matter was largely one of drafting and the article could be referred to the Drafting Committee, which might decide to divide the article into two parts and rearrange some of the subsequent articles.

20. Mr. KEARNEY said that notification served not only to enable the receiving State to express its dissatisfaction with the appointment of the head or individual members of a special mission, but also to enable the receiving State to carry out certain administrative obligations such as assisting, if required, in providing the requisite accommodation. It was therefore highly desirable for the notification to include all members and staff of a mission.

21. Mr. USTOR said that practice regarding notification varied widely and sometimes the composition of a special mission only became known to a receiving State after its arrival. In other cases all the details were made known in the course of the preliminary negotiations. The question was whether or not to require the parties to submit in advance a list of members of the mission in all cases. In his opinion the matter could be left to the discretion of the receiving State, which could ask to be notified in advance so as to be able to express its views on the composition of the mission.

22. Mr. EUSTATHIADES said he agreed with Mr. Castrén and Mr. Yasseen. The Commission seemed to be in favour of accepting prior notification, a formality whereby, as Mr. Yasseen had said, difficulties could be avoided, but it was still important that notification should be given in good time, whenever possible.

23. With regard to the appointments to be covered by notification to the receiving State, the rule should apply to the head and principal members of the special mission; appointments to technical or subordinate posts could not be expected to provoke any reaction on the part of the receiving State.

24. Mr. ALBÓNICO suggested that article 3 might be drafted to read more or less: "The sending State shall freely appoint the head of the special mission and its members as well as its staff but shall give prior notification thereof to the receiving State".

25. Mr. AGO said he feared that, in the course of the debate, some confusion had arisen between two separate problems: that of a discreet communication in advance by the sending State to the receiving State to make sure that the latter would not object to the appointment of a particular person, whose inclusion would interfere with the performance of the special mission's task; and that of the later notification of the full membership of the special mission for quite another purpose, namely, that of the privileges and immunities to which they would be entitled.

26. Since the Special Rapporteur had already laid down a notification procedure in article 8, it would perhaps be better to restrict the use of that term to article 8, and to use in article 3 some such wording as: "The sending State shall appoint the head of the special mission and its members as well as its staff, but shall first make sure that the names of these persons will not meet with any objection which might hamper the performance of the special mission's task".

27. Mr. TSURUOKA said that the Commission was trying to define the conditions best calculated to enable special missions to perform their tasks; it wished to make the procedure of sending and reception as simple as possible. If the special mission was of exceptional importance the procedure was bound to be somewhat burdensome but the Commission should take care to avoid going too far in either direction.

28. Notification should be provided for, in his opinion, not only in article 8 but also in article 3, on the understanding that in article 3 the notification would not be formal. Since it was for the sending State to appoint the members of the special mission, and since its choice was open to objection by the receiving State, the consent of the receiving State, or at least the absence of objection on its part, was essential. The Commission might therefore ask the Drafting Committee to state in the text of the article that a simple form of agreement sufficed; in his opinion, that would meet both requirements.

29. Mr. REUTER said that, as was inevitable, the Commission had passed on from article 3 to consider articles 4, 5 and 8; as it turned out, the discussion had been very useful. Members had reached agreement on a number of points. He would like to see a simple, balanced and flexible article for article 3, but it should not be allowed to swallow all the substance of the other articles. To arrive at the simplest possible text, the Commission should of course provide that it was the sending State which appointed the head of the special mission and its members as well as its staff; but it should also provide that the appointments were to be made under the conditions laid down in the agreement in virtue of which the mission was established. In many cases that agreement set numerical limits and even designated the persons who were to be members of the mission; in such cases it would be superfluous to require prior notice. And in the most difficult cases, the parties took care to agree in advance on the composition of the special mission. In his view, therefore, the second sentence of article 3 need only provide that: "The receiving State shall be informed of the composition of special missions".

30. Psychological considerations prompted the question whether it was also necessary to provide that the receiving State should communicate its acceptance or objection. There would be no difficulty in including such a provision in article 3, but it obviously applied not only to the head of the special mission but also to the members; the problem of the staff might be considered later.

31. The Commission should refer article 3 and the articles following it—especially article 8, which dealt expressly with notification—to the Drafting Committee. Notification was a complex problem; it was necessary to decide what the nature of the notification should be and what time-limit should be set for its transmission, and the Commission would do well to take up the other draft articles without delay.

32. Mr. KEARNEY said that, although article 8 laid down requirements concerning notification, nothing was stipulated about its timing. In his opinion it must be made in advance of the arrival of the mission.

33. Mr. BARTOŠ, Special Rapporteur, said that the sending State's freedom of choice in appointing the head and members of a special mission was often limited in practice, for it might be bound by a special agreement to appoint persons belonging to certain categories. For example, conventions on the settlement of frontier incidents included a clause under which each State appointed to the mission set up to investigate such incidents an examining magistrate, service officers and a physician; freedom of choice was thus exercised only within the limits of certain categories of persons. The same applied to meetings of ministers for foreign affairs or their deputies, where the freedom of choice was limited by a prior agreement. The principle, then, was that States had complete freedom of choice, but exceptions could be made.

34. So far as the prerogatives of the head and members of special missions were concerned, the practice of the Scandinavian countries was that such missions were composed of members of the legislature belonging to various parties, and that the head of the special mission could take no decision in which the members did not participate, inasmuch as the credentials were issued collectively. Where special missions were of some importance, the United Kingdom Government included Opposition Members of Parliament among the members of the mission; so that it was hard in practice to distinguish between "principal members" and "ordinary members" of a special mission. In fact, even when such special missions included civil servants, the credentials issued were sometimes collective.

35. With regard to the problem of notification, it seemed to him that the word "notice", which was used in the United States proposal (A/CN.4/193) might be confusing; he suggested that the word "information" be used instead. Such an information procedure was justified not only on political but also on practical grounds. His experience as legal adviser to his country's Ministry of Foreign Affairs showed that, when a special mission was composed of only one person, the practical problem was easy to solve but that, when it had several members, difficulties arose, and that was where the procedure of advance information proved extremely useful.

36. Referring to Mr. Ushakov's comments, he said that, where a special mission was led by the Prime Minister or the Minister for Foreign Affairs, the receiving State had to be given very detailed information to enable it to take all necessary measures, especially security measures. The United States even had a special service that escorted special missions on their travels. The purpose of advance information, therefore, was not merely to enable the receiving State to register its objections, but also to help it to discharge its duties as host country.

37. He was obliged to reconsider his favourable view of the absence of objection clause advocated by Mr. Ago, for he feared that such a provision might incline governments to raise objections too readily.

38. Mr. Eustathiades had rightly observed that the notice—or information—would have to be given, not merely in advance, but as far in advance as possible; the Drafting Committee might make that clear in the text of the article.

39. Members seemed to be agreed on the main points and in his opinion, the article could be referred to the Drafting Committee. He suggested that the Commission examine each of the succeeding articles separately, except articles 5 and 5 *bis*, which could be taken together.

40. Mr. ALBÓNICO said that, after consulting Mr. Ago, he wished to propose a different text for article 3, reading: "The sending State shall appoint the head of the special mission and its members as well as its staff, but shall first ascertain that the persons chosen will not meet with objection from the receiving State".

41. Mr. BARTOŠ, Special Rapporteur, said that the procedure instituted under the "absence of objection" rule advocated by Mr. Ago would involve having to obtain evidence of the absence of objection, which would take several months, and delay the special mission accordingly.

42. Mr. EL-ERIAN said he hoped that the Drafting Committee would take into account his suggestion that the provisions of article 3 be made subject to article 5, which gave the receiving State the right to object to the appointment of certain members, and to article 14, which dealt with the nationality of the head and members of the special mission.

43. The CHAIRMAN said it was difficult to form a clear opinion on the article until the Drafting Committee had submitted a new text. However, the general conclusion seemed to be that the procedure of notification should not be too formal. It was necessary to keep in mind that article 3 dealt with notification from a rather different point of view from article 8, which was intended to cover administrative arrangements. The main purpose of article 3 was to give the receiving State an opportunity of objecting to appointments.

44. Articles 3 and 4 dealt with entirely different matters, the latter being designed to meet the case when the receiving State wished to withdraw the consent it had previously given. The two articles should not be too closely linked.

45. He suggested that article 3 be referred to the Drafting Committee for redrafting in the light of the discussion.

It was so agreed.[3]

[3] For resumption of discussion, see 926th meeting, paras. 50-66.

ARTICLE 4 (Persons declared *non gratae* or not acceptable) [12]

46. *Article 4* [12]

Persons declared non grata *or not acceptable*

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

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

47. The CHAIRMAN invited the Commission to consider article 4, the Special Rapporteur's proposals for which were contained in paragraph 13 of his comments on that article in his fourth report (A/CN.4/194/Add.1) and in paragraphs 1 and 2 of his additional comments on article 4 in document A/CN.4/194/Add.3.

48. Mr. BARTOŠ, Special Rapporteur, said the Belgian Government and the Israel Government had proposed that the words "as appropriate" should be inserted at the end of the first sentence in paragraph 2. He had no objection to that proposal, for the two cases were distinct.

49. He did not entirely understand the Yugoslav Government's comment (A/CN.4/188). His own view was that the receiving State was entitled to declare a person *non grata* or not acceptable even if it had given by prior agreement its acceptance of that person's appointment. The State could avail itself of that discretionary power at any time, even without explaining its decision.

50. The Turkish representative in the Sixth Committee had expressed the view that the right to declare a person *non grata* or not acceptable should not apply to special missions.[4] That view was open to discussion in connexion with delegations to international organizations or to conferences convened by such organizations, but the right to question should be preserved in connexion with special missions, whose function was essentially to settle bilateral relations.

51. He had already replied, during the discussion of article 3,[5] to the Netherlands Government's comments (A/CN.4/193) relating to articles 3 and 4. He was still convinced that in those articles the Commission should keep very closely to the rules laid down in article 9 of the Vienna Convention.

52. The Government of Canada made no objection to the right to declare a person *non grata* or not acceptable, but raised the question of the time-limit by which the person concerned must leave the territory of the receiving State, and of the penalty to be applied if that time limit was exceeded. Article 4 as it stood was silent on that point. The Commission might adopt the expression "within a reasonable period", which was used in article 9 of the Vienna Convention. The term was vague, but it did have some meaning. In practice, it meant that the person was not obliged to leave the country immediately, but was given time to make arrangements for his journey and to hand over his functions.

53. For the time being he would pass over the question raised by the Chairman at the 900th meeting[6] concerning the right place for articles 3 and 4. The order suggested by the Chairman was logical, but the Commission would deal with that question after it had examined all the articles concerning the persons composing the special mission.

54. The Commission should refer article 4 to the Drafting Committee to consider whether the wording should be brought even closer to that of article 9 of the Vienna Convention.

55. Mr. KEARNEY said that, at the previous meeting,[7] Mr. Eustathiades, during the discussion on article 3, had suggested adopting a flexible approach which would involve dropping the reference to *persona non grata* from article 4. He supported that suggestion so far as members of special missions were concerned; the formula "not acceptable" was quite sufficient.

56. Mr. ROSENNE said he found the Special Rapporteur's proposals for article 4 generally acceptable.

57. On reflection, he favoured the retention of the reference to *persona non grata*. The use of that expression was connected with the question of accreditation, while the use of the term "not acceptable" was not connected with accreditation.

58. He could not support the Canadian Government's proposal to lay down a maximum duration for the period for leaving the receiving State. The position was that, when a person ceased to be recognized by the receiving State as a member of the special mission, by application of the provisions of article 4, the person concerned lost his status. The timing of his departure was an extremely delicate matter and, under general diplomatic law, there was no recognized time-limit. Cases had occurred in which a considerable time had elapsed before the actual departure. In the circumstances, he felt it would be most unwise to attempt to tie the hands of States in the matter.

59. Mr. USHAKOV said that the drafting of article 4 would depend largely on what the Commission decided with regard to the draft provisions concerning so-called high-level special missions. Rules 2, 3 and 4 of the draft provisions specified in their respective sub-paragraphs (b) that, when a Head of State, Head of Government or Minister for Foreign Affairs visited another State as head of a special mission, he could not be declared *persona non grata*. If the Commission decided not to prepare separate draft provisions concerning high-level missions, it would have to supplement article 4 with clauses providing for exceptions in those specific cases. He therefore proposed that the Commission defer the final drafting of article 4 until it had decided whether or not to prepare draft provisions concerning high-level special missions.

[4] *Official Records of the General Assembly, Twentieth Session, Sixth Committee*, 847th meeting, para. 24.

[5] See 900th meeting, para. 98.

[6] *Ibid.*, para. 100.

[7] Para. 58.

60. Mr. AGO said he supported Mr. Ushakov's proposal.

61. There was a difference between declaring a person *non grata* and declaring a person not acceptable. Under the Vienna Convention, the head of the mission or any member of the diplomatic staff could be declared *persona non grata*, whereas any other member of the staff of the mission could be declared not acceptable. If the Commission abandoned that distinction in the case of special missions, it might give the impression that such missions were only of secondary importance. If, on the other hand, the Commission meant to retain the distinction, it should make it perfectly clear by specifying that the head or the members of the special mission could be declared *personae non gratae* and that the members of the staff of the special mission could be declared not acceptable. In that respect, therefore, the article should be more closely aligned with the rules laid down in the Vienna Convention on Diplomatic Relations, as the Special Rapporteur had suggested.

62. Mr. CASTRÉN said that article 4 was satisfactory subject to slight drafting changes on the lines suggested by the Special Rapporteur and Mr. Ago.

63. The question raised by the Government of Canada could be dealt with in the commentary. The opinion expressed in that connexion by the Special Rapporteur in his report (A/CN.4/194/Add.3) that a person declared *non grata* should leave the receiving country immediately after the notification unless the receiving State had stipulated a time-limit, seemed rather too forthright. It would be preferable always to allow such a person a reasonable time, the length of which would vary from case to case, as was done in the case of diplomats.

64. He supported Mr. Ushakov's proposal.

65. Mr. ROSENNE said that the purpose of the expression "not acceptable" in article 4 was different from that served by the same expression in the corresponding article of the Vienna Convention on Diplomatic Relations. The intention of the Drafting Committee and of the Commission itself had been, as he recalled, to cover the case in which a person was declared not desirable before his arrival in the receiving State.

66. Mr. AGO replied that any such interpretation of the term "not acceptable" would conflict with the terms of the Vienna Convention on Diplomatic Relations. That Convention made provision, in the last sentence of paragraph 1 of its article 9, for declaring a person *non grata* or not acceptable, according to the category to which the person belonged, even before the arrival of that person in the territory of the receiving State.

67. Mr. EUSTATHIADES said that he saw no need to bring article 4 into line with the provisions of the Vienna Convention concerning the declaration of persons as *non gratae*. Under the Vienna Convention officials of high rank could be declared *personae non gratae*, whereas staff of lower rank were subject to a less serious form of declaration as persons not acceptable. For special missions the less serious declaration might suffice in all cases, regardless of the person's functions and whether he had or had not arrived in the receiving State.

68. Mr. BARTOŠ, Special Rapporteur, said that the Commission would certainly have to take Mr. Ushakov's proposal into account. A Head of State, a Head of Government or a Minister for Foreign Affairs did not forfeit his status by leading a special mission to a foreign State. In contrast an ambassador, even if he had previously held one of those high offices, lost his previous status when he was appointed ambassador and was thus subject solely to the rules governing diplomacy. If the Commission decided not to prepare draft provisions concerning high-level special missions, it would have to make an exception to the provisions of article 4 for the case of a Head of State, a Head of Government or a Minister for Foreign Affairs acting as head of a special mission.

69. The distinction between *persona non grata* and a person not acceptable was made in both Vienna Conventions, in article 9 of the Convention on Diplomatic Relations and in article 23 of the Convention on Consular Relations. It was a formal, not a substantive, distinction. The former notion had a long tradition behind it; the latter was more modern. He was not therefore opposed to Mr. Eustathiades's suggestion, which in a sense made for more democratic treatment of special missions.

70. He accepted Mr. Castrén's suggestion concerning the question raised by the Government of Canada. The Commission might state in the commentary that the time-limit within which a person must leave the receiving country was a practical question that depended on the circumstances.

71. Article 4 could be referred to the Drafting Committee.

72. Mr. YASSEEN said he supported Mr. Eustathiades's suggestion. His own impression had been that in the case of special missions a *persona non grata* declaration could be applied only to a person who had already arrived, whereas a declaration that a person was not acceptable could be applied to someone who had not yet arrived in the receiving State. Since there was no substantive difference between the two declarations, the draft article could be made less clumsy and easier to apply in practice by keeping only one of them.

73. The CHAIRMAN said that the Commission could now agree to the Special Rapporteur's proposal to refer article 4 to the Drafting Committee, and accept Mr. Ushakov's proposal that the text should be subject to revision in the light of any decision the Commission might take with respect to high level missions.

74. Speaking as a member of the Commission, he said that no substantial reason had been put forward for dropping the reference to *persona non grata* from article 4. From the point of view not only of legal elegance but also of the uniformity of the law, it was essential to adhere as closely as possible to the language of the two Vienna Conventions and he understood that to be the position of the Special Rapporteur himself.

75. Mr. EUSTATHIADES said that the question also had a historical aspect: a *persona non grata* declaration was usually connected with the past general attitude of a person serving in a general and permanent capacity. In the case of a special mission, the receiving State might

have reasons of some other kind for not accepting a certain person: more particularly, reasons connected with the performance of the special mission's task. In that respect the Commission might perhaps be wise not to put special missions, which were temporary and specific, on the same footing as diplomatic or consular missions, which were permanent and general.

76. The CHAIRMAN pointed out that no government had raised that question.

77. If there were no further remarks, he would consider that the Commission agreed to refer article 4 to the Drafting Committee for consideration in the light of the comments made during the discussion.

It was so agreed.[8]

ARTICLES 5 (Sending the same special mission to more than one State) [4] and 5 *bis* (Sending of the same special mission by two or more States) [5]

78. *Article 5* [4]

Sending the same special mission to more than one State

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

79. The CHAIRMAN invited the Commission to consider article 5, the Special Rapporteur's proposals for which were contained in paragraph 13 of the section of his fourth report (A/CN.4/194/Add.1) dealing with that article and in his additional comments on article 5 in documents A/CN.4/194/Add.3 and A/CN.4/194/Add.5.

80. It would be appropriate for the Commission to consider at the same time the Belgian Government's proposal (A/CN.4/188) for a new article 5 *bis* reading:

"*Article 5* bis [5]

"*Sending of the same special mission by two or more States*

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

81. In his fourth report (A/CN.4/194/Add.1), the Special Rapporteur did not advise the Commission to adopt the Belgian proposal.

82. Mr. BARTOŠ, Special Rapporteur, said that article 5 was to some extent based on article 5 of the Vienna Convention on Diplomatic Relations. It often happened in practice that a State sent the same special mission to several different States—perhaps situated in the same region—one after another. Formerly missions of that kind had often been sent for purposes of protocol; nowadays they were more often concerned with economic questions, such as the purchase of commodities like coffee or petroleum. In such cases disputes might arise if the special mission, having concluded its business in the first country or countries visited, decided against going on to the others.

83. Several Governments—those of Sweden, the USSR, the Ukrainian SSR, the Byelorussian SSR, the Netherlands and the United States—considered the article superfluous.

84. The Belgian Government commented that article 5 was one-sided and proposed that the Commission should draft a rule for the converse situation in which two or more States, for reasons of economy, sent a joint special mission to another State. That question was in fact dealt with indirectly in article 6. He was nevertheless submitting to the Commission the article 5 *bis* proposed by the Belgian Government.

85. He left it to the Commission to decide whether article 5 should be retained or deleted. If article 5 were deleted, article 5 *bis* would also have to be deleted. Practice would seem to require that the question should be settled; on the other hand, no purpose would be served by proposing a rule which States would consider unnecessary.

The meeting rose at 12.55 p.m.

903rd MEETING

Friday, 19 May 1967, at 10 a.m.

Chairman: Sir Humphrey WALDOCK

Present: Mr. Ago, Mr. Albónico, Mr. Bartoš, Mr. Bedjaoui, Mr. Castañeda, Mr. Castrén, Mr. El-Erian, Mr. Eustathiades, Mr. Ignacio-Pinto, Mr. Kearney, Mr. Ramangasoavina, Mr. Reuter, Mr. Rosenne, Mr. Tammes, Mr. Tsuruoka, Mr. Ushakov, Mr. Ustor, Mr. Yasseen.

Other Business

[Item 8 of the agenda]

THIRD SEMINAR ON INTERNATIONAL LAW

1. The CHAIRMAN invited Mr. Raton (Secretariat) to address the Commission on the subject of the Third Seminar on International Law organized by the United Nations Office at Geneva.

2. Mr. RATON (Secretariat) said that the third Seminar on International Law would be held from 22 May to 9 June; there would be twenty-four participants. In accordance with the wish expressed by the General Assembly and the Commission, the geographical distribution of the participants had been further improved, so that Africa south of the Sahara would now be represented by three participants, instead of one as at the second Seminar, Latin America also by three instead of one, and Asia by six instead of five; whereas western and eastern Europe, on the other hand, would have only seven and five representatives respectively.

3. The attendance of a larger number of nationals of developing countries had been made possible by generous gifts from the Governments of Denmark, the Federal

[8] For resumption of discussion, see 926th meeting, paras. 67 and 68.

Republic of Germany, Israel, Norway and Sweden; the gifts, ranging from $ 1,000 to $ 1,500 had paid for the award of fellowships. Finland had also offered a fellowship but had laid down conditions which could not be met in 1967; it was to be hoped that the Finnish offer would be maintained for 1968.

4. As usual, the programme of the Seminar related to the work of the Commission; it included the law of treaties, on which the Chairman had agreed to discuss his experience as Special Rapporteur; special missions; relations between States and international organizations; new questions concerning the law of the sea; and codification in general. The programme had been expanded to cover certain points examined by the Sixth Committee of the General Assembly; for example, Mr. Tammes would speak on fact-finding commissions and Mr. Ustor on international trade law.

5. It was gratifying to see new members of the Commission taking an interest in the Seminar. He appealed to all members of the Commission, old and new alike, to suggest lectures they would be prepared to give at future seminars; for the Director-General of the United Nations Office at Geneva, encouraged by the approval of the Commission and the General Assembly, intended to organize further seminars in the future. The success of such seminars obviously depended on the co-operation of members of the Commission, who provided the technical guidance; the responsibility of the United Nations Office was limited to administrative matters.

6. The Seminar had no budget of its own, and it would have been impossible to award fellowships without financial assistance from Governments. In 1966 there had been two fellowships for two participants, and in 1967 five fellowships would be shared among eight participants. It was to be hoped that such financial aid would be continued.

7. The CHAIRMAN said he could assure Mr. Raton of the Commission's co-operation both at the present session for the third Seminar and at future sessions for other seminars and expressed the hope that the Commission's discussions would prove of interest to the participants in the Seminar.

Special Missions

(A/CN.4/193 and Addenda; A/CN.4/194 and Addenda)

(resumed from the previous meeting)

[Item 1 of the agenda]

ARTICLES 5 (Sending the same special mission to more than one State) [4] and 5 *bis* (sending of the same special mission by two or more States) [5] *(resumed from the previous meeting)*[1]

8. The CHAIRMAN invited the Commission to discuss articles 5 and 5 *bis* which had been introduced by the Special Rapporteur at the previous meeting.

9. Mr. ROSENNE said he questioned whether it was in fact possible for the same special mission to be sent to more than one State. Special missions were defined in the introductory article 0 (Expressions used) (A/CN.4/194)[2] by reference to "the performance of a specific task" and that element constituted an essential part of the definition. The example had been given of a special mission being sent successively to several States to purchase coffee; however, the specific task would not be the same, since the purchase of coffee from one State was not the same task as the purchase of coffee from another.

10. The Special Rapporteur recognized that the parties would always be free to derogate from the provisions of article 5, since among his conclusions (A/CN.4/194/Add.1) was the statement "that the article is not of a generally compulsory nature".

11. The Commission should give due weight to the opinion expressed by the Governments of six countries—Sweden, the USSR, the Ukrainian SSR, the Byelorussian SSR, the Netherlands and the United States—representing a wide spectrum of the international community, which had urged the deletion of article 5. He did not believe that the article added anything in substance to what was already said elsewhere. The first sentence was already covered by the provisions of articles 1 and 2; the second sentence was covered by the whole concept of notification and agreement that ran through the draft articles. So far as the sending State was concerned, therefore, the provisions of the article contained nothing new. As for the receiving State, the third sentence was in fact covered by the provisions of the draft articles as a whole.

12. Similar considerations applied to article 5 *bis* and he concurred with the Special Rapporteur's conclusion that the proposed new article was unnecessary.

13. His own general conclusion was that neither article 5 nor article 5 *bis* was necessary; the problems with which the two articles dealt could be mentioned in the commentary to article 1. It was essential to ensure that each one of the articles of the draft was a rule of law and did not involve the Commission in questions of protocol, courtesy or the good conduct of political relations.

14. Mr. USHAKOV said that he had not yet made up his mind whether article 5 was superfluous or necessary. The crux of the article seemed to be the third sentence, which provided that each of the States concerned might refuse to receive such a mission. That rule, however, was no different from the rule requiring the consent of the receiving State, which had already been laid down in article 1, paragraph 1. That suggested that article 5 was superfluous.

15. He might be wrong, however. If the article proved to be necessary, he would propose amending it to provide that a State might send the same special mission to two or more States unless one of those States objected. A similar formula was to be found in article 6 of the Vienna Convention on Diplomatic Relations.

16. Mr. BEDJAOUI said that he too had long been in doubt about the value of article 5. There were many

[1] See 902nd meeting, paras. 78 and 80.

[2] Also printed in *Yearbook of the International Law Commission, 1966*, vol. II, document A/CN.4/189/Add.1.

cases in which a State sent the same special mission to several States; the specific circumstances had then to be considered. Whether the mission was an itinerant economic mission or a political goodwill mission, it could be regarded as consisting of as many bilateral missions as there were receiving States, on each of which an agreement had to be concluded between the sending State and the receiving State. It could also be maintained, however, that the intention of the sending State was to appoint a single mission to obtain a comprehensive view of a particular problem.

17. Article 5 prompted two main considerations. First, it was justified because it dealt with a new legal problem—that of the relations, not between the sending State and the receiving State, but among the various receiving States. Difficulties could arise if the attitude taken by the special mission in one of the States it visited was displeasing to one of the other States in which it was expected. Those difficulties were of an objective kind as distinct from those dealt with in article 4, which were subjective in that they concerned individuals.

18. Secondly, if article 5 were retained, the provision concerning prior notice would have to be amplified. As it now stood, article 5 merely required the sending State to inform each receiving State individually. Such bilateral notification would duplicate the notice which the Commission had discussed in connexion with article 3. If article 5 was to serve a real purpose, it should prescribe multilateral notification, whereby each State would be advised that the special mission was to visit certain other States. The right balance had to be struck, however, and the Commission might go too far if it required the sending State to give notice not only of the composition of the special mission but also of its purpose and of all the details affecting it.

19. The contents of the notice should be defined in the commentary. The Commission might also specify in the commentary that any receiving State could withdraw its consent if it was displeased at the attitude taken by the special mission in another State.

20. Mr. BARTOŠ, Special Rapporteur, said that the situation envisaged in article 5 was that of a special mission appointed to deal with a question of collective rather than bilateral diplomacy. The task of a coffee-purchasing mission, for example, was to investigate the market and compare the terms offered by various countries.

21. Goodwill missions, of which there were many, also raised questions of prestige concerning the order in which they visited the receiving States. Again, the composition of a special mission sent to several States could also present problems in that the inclusion of certain individuals might please some States and displease others.

22. Mr. TAMMES said that if article 5 were deleted, there would be no legal consequences. The acceptance by each of the receiving States concerned of the multilateral nature of the special mission would be a part of their consent to receiving the special mission. That fact explained why so many governments had expressed the view that article 5 was redundant.

23. The position, however, was quite different in the case of the new article 5 *bis* proposed by the Belgian Government, which contained a necessary provision. The proposed new article would have legal consequences; it would cover a new situation which was not dealt with anywhere in the draft articles. If article 5 *bis* were not included and a dispute arose, it could be contended that the draft articles did not apply to a situation such as that envisaged by the Belgian Government. Argument by analogy would not be enough.

24. The Commission should therefore consider whether it wished to cover the situation to which the Belgian Government had drawn attention. Personally, he thought that article 5 *bis* should be included. Belgium, Luxembourg and the Netherlands had had an excellent experience of joint missions and in no case had he heard any suggestion of inequality in the protection of the interests of the three States, despite the differences in their size and strength. The Belgian suggestion was probably inspired by the encouraging experience to which he had referred.

25. Mr CASTRÉN said that six Governments had proposed the deletion of article 5 and the Special Rapporteur had offered no opinion on the point. He personally was in favour of deleting it, for the reasons adduced by the Swedish Government: in particular, because the situation envisaged in the article was adequately covered by article 1, paragraph 1. Furthermore, there was no corresponding provision in the Vienna Convention on Diplomatic Relations.

26. If the Commission decided to retain article 5, he would propose that it should accept at least the Finnish Government's suggestion (A/CN.4/193/Add.4) that the scope of the article should be limited to the simultaneous accreditation of one special mission to several countries. As the Finnish Government pointed out, it was scarcely relevant that the mission had previously functioned in another country. In any case the last sentence of article 5 seemed superfluous, since article 1 of the draft already required the consent of the receiving State to the sending of a special mission.

27. Like Mr. Tammes, he agreed in principle to the inclusion in the draft articles of the article 5 *bis* proposed by the Belgian Government, although the Special Rapporteur in his report (A/CN.4/194/Add.1) had advanced certain arguments against the proposal.

28. In his own view, the adoption of such a provision would be justified on several grounds. First, joint special missions were already employed by States closely associated with each other. Secondly, whereas article 5 had no equivalent in the Vienna Convention on Diplomatic Relations, article 5 *bis* bore some resemblance to article 6 of that Convention. No risk or difficulty was involved in adopting a provision of that kind, for the sending States would be bound by the general rule to notify or inform the receiving State in advance, and the latter's consent was required in those circumstances as well.

29. With regard to the wording of article 5 *bis*, he proposed that the last sentence be deleted or replaced by a reference to article 1, paragraph 1.

30. Mr. YASSEEN said that article 5 emphasized the organ rather than its function. The case envisaged was that of a series of special missions which were timed close together and which thus derived a distinctive character from a certain unity of time.

31. He was not convinced that the article was superfluous; on the contrary, he thought it introduced a new feature. The notice provided for was not merely notice of the composition and task of the special mission but, first and foremost, notice that a special mission composed of the same persons was to visit certain States. That was a new rule and would be a useful means of averting difficulties in relations between States. The fact that the special mission was to visit a number of States was an important factor which the receiving States needed to know about in order to reach their decision. The essential provision of article 5 was therefore the second sentence, concerning notice. The last sentence really added nothing.

32. He might have occasion to express his views on article 5 *bis* at a later stage.

33. Mr. EL-ERIAN said he supported the retention of article 5. Those Governments that had proposed the deletion of that article had not raised any objection to the principles embodied in it; they had merely suggested that it was unnecessary because its contents were, in their view, already covered by other articles of the draft.

34. Personally he preferred not to attempt to read too much into the provisions of article 1 but instead to retain the express provisions of article 5. In practice, special missions were sent more often than not without any prior written agreement on all the points involved.

35. It was stated in paragraph (1) of the commentary to article 5 that there was "no corresponding provision in the Vienna Convention on Diplomatic Relations". That statement was perhaps literally true but he must point out that article 5, paragraph 1 of the Vienna Convention on Diplomatic Relations read:

> "The sending State may, after it has given due notification to the receiving States concerned, accredit a head of mission or assign any member of the diplomatic staff, as the case may be, to more than one State, unless there is express objection by any of the receiving States."[3]

36. It was not without interest to recall that the article as thus adopted by the 1961 Vienna Conference differed from the text of article 5 which the Commission had adopted at its tenth session and which had been submitted to the Conference. That article was confined to the head of the mission and read:

> "Unless objection is offered by any of the receiving States concerned, a head of mission to one State may be accredited as head of mission to one or more other States."[4]

37. As a result of the discussions at the Vienna Conference the scope of that article had been broadened so as to include not only the head of the mission but also its members. It was clear therefore that article 5 of the draft on special missions was in harmony with the 1961 Vienna Convention. Its provisions were to some extent covered by those of article 1; it was however desirable, in the interests of the success of special missions and of the promotion of friendly relations among States, not to leave the rules in the matter to be inferred from article 1, but to cover them by means of the express provisions of article 5.

38. Mr. AGO said that his first reaction on reading the comments by Governments had been very similar to Mr. Rosenne's. On reflection, however, he had come to think that article 5 had some value after all.

39. The Commission's purpose in that article was to legislate for two clearly defined situations. The first was that a State wished to discuss a particular question with several States and found it convenient to send to each of them, in turn, a special mission composed of the same individuals. In that case there were as many special missions as receiving States; on each occasion, the special mission was a bilateral mission, on which the sending State and the receiving State must agree. A difficulty might nevertheless arise, in that State B might agree to receive a special mission from State A but might very well be reluctant to do so if the special mission had previously visited, or was subsequently to visit, State C in order to discuss similar business. State B had therefore to be notified that the special mission from State A was also going to visit State C.

40. The second situation, perhaps occurring less often but not to be neglected, was that a State wished to send a special mission to a group of States, not one after the other, but simultaneously. For example, an industrial country, wishing to investigate the prospects for technical assistance to a group of developing countries, would send a special mission to the capital of one of those countries to discuss the matter with that country and the other countries at the same time; either some members of the mission would visit the other countries, or the mission would receive representatives of those countries at the place where it had established its headquarters. Conversely, a developing country might, for instance, send a special mission to Brussels to negotiate with the three Benelux countries simultaneously. Such cases were really more akin to the situation envisaged in the Vienna Convention on Diplomatic Relations, which provided that the ambassador to a given State could be accredited to another State or States at the same time.

41. In order to cover all those possibilities it would be useful to retain article 5, but it needed wording more clearly. In particular, the notice referred to in the second sentence should state that the special mission was to visit several States in turn or simultaneously, and should specify the States concerned. He supported Mr. Ushakov's suggestion and thought the Drafting Committee would be able to find a satisfactory formula.

42. Article 5 *bis* dealt with an entirely different matter, namely, a joint special mission from several States. He thought the Commission would do well to adopt the Belgian Government's proposal and to embody it in a separate article.

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[3] United Nations Conference on Diplomatic Intercourse and Immunities, *Official Records*, vol. II, p. 83.

[4] *Yearbook of the International Law Commission, 1958*, vol. II, p. 90.

43. Mr. CASTAÑEDA said that he fully agreed that itinerant special missions served a very useful purpose and that they were very much used in State practice. That type of mission gave rise to a number of special problems, such as the order of the visits to the various countries concerned, but it was doubtful whether there was any call for a special legal regime that would justify including in the draft a separate article on the subject.

44. He did not believe that the situation under discussion raised any special legal problems. It had been pointed out by Mr. Yasseen that the notification would, in such situations, have a special purpose and serve to inform the various receiving States of the fact that the same mission would visit all of them successively. If the suggestion were that the sending State should be under an obligation to inform the various receiving States of that fact, he thought it would be unwise to introduce a new rule to that effect. Such special missions were of an extremely flexible character and it was difficult to say in advance which countries would be visited. Sometimes, the results obtained in one country would affect the decision to send the same mission to another country. In certain cases, a special mission was sent to one group of countries and another to a second group of countries and the two missions afterwards joined forces for the purpose of their subsequent work.

45. In view of the wide variety of situations to be covered, he felt that it would be neither feasible nor desirable to try to formulate a general rule in the matter. Besides, article 5 as drafted did not contain any rule that was not already included in other articles of the draft, and it would be in accordance with the best methods of legislative drafting to drop the article as unnecessary. If, however, the Commission decided to retain it, no great harm would be done.

46. With regard to the Belgian Government's proposal for a new article 5 *bis*, it was important to note that the proposed provision, unlike article 5, did contain a new rule; it stated an exception to a general principle. However, the situations which it was intended to cover were very dissimilar and the problems to which they gave rise were necessarily the subject of special agreement between the States concerned. He was thinking, for example, of the problems of precedence as between the various national groups of a collective mission.

47. It would therefore be difficult to devise any rule but if the Commission wished to include an article on the subject, it should take a very general form and simply state that there was no obstacle to the sending of a joint mission by several States. Or the point could be dealt with in the commentary to one of the earlier articles.

48. Mr. REUTER said that, in considering article 5, it was important to distinguish three different factors: the individuals composing the special mission, the mission's task and the receiving States.

49. There were certainly many examples of special missions composed of the same individuals and performing the same task in several States; that task might be, for example, to hold consultations on a general topic concerning peace or international relations. That was a clear case; as Mr. El-Erian had said, the draft articles ought to include a specific provision on that point, by analogy with the Vienna Conventions.

50. It was also possible, however, to envisage a slightly different situation: that of a special mission, composed of the same individuals, which visited several States to perform related but not identical tasks, for instance to purchase coffee in one State and oranges in another. As to whether it could be maintained that only one special mission was involved, his reply would probably be in the negative, but the point was debatable.

51. In the third case, the task might be identical but the individuals were different. There would undoubtedly be a connexion between special missions so constituted, and problems of susceptibility might arise among the receiving States; the giving of notice to the States concerned would help to solve those problems. If the Commission wished to remind States of their duty to behave correctly towards one another, it could draft article 5 in more general terms and merely state that, if the task of the special mission was connected with that of a similar special mission sent to another State, the receiving State should be so advised. Such a provision would of necessity be vague, but it would have the merit of covering all possibilities.

52. He made no formal proposal and would abide by the majority view, but he thought the Commission needed to know exactly what it wished to do.

53. In the light of the discussion and of the Vienna Convention on Diplomatic Relations, article 5 *bis* seemed to him essential. With the efforts made towards regional economic organization in Europe and Latin America it had become a common practice for a group of States to appoint a joint special mission to discuss particular matters collectively. Such a special mission was sometimes an organ or a representative of a joint organization; if the task to be performed went beyond the competence of that organization, the mission had to be authorized separately by each of the member States it represented, so as to be able to negotiate on behalf of all of them.

54. In short, he considered that articles 5 and 5 *bis* should be retained, but that their wording could be improved.

55. Mr. KEARNEY said that the discussion had shown that there were no legal requirements for article 5. All the arguments which had been advanced in favour of the retention of the article reflected political considerations. Although the Commission was not debarred from taking such considerations into account, it should not underestimate the ability of Ministries of Foreign Affairs to deal with the problems which had been mentioned. His impression was that an article on the lines of article 5 would not help those ministries and might even hamper their freedom of action to some extent.

56. The proposed new article 5 *bis* was a much more important provision, in view of the considerable existing practice of joint missions. That practice should be fostered because of its many advantages, including that of economy. However, a provision on the lines of article 5 *bis* would not deal with the matter adequately. Joint missions raised problems which affected many of the

articles of the draft, including for example, the article dealing with the seat of the mission.

57. In the circumstances, the Commission should consider the possibility of a special study or review of the draft articles in order to deal with the problem of joint missions, either by including a general article on such missions or by amending the appropriate articles of the draft.

58. The CHAIRMAN said that the trend of the debate showed that there was considerable support for retaining articles 5 and 5 *bis*, subject to greater precision being introduced into their contents; at any rate, there was a general desire not to take a decision on the retention or deletion of those articles before the Drafting Committee had tried its hand at a new text giving them more precision and content.

Mr. Ustor, Second Vice-Chairman, took the Chair

59. Mr. TSURUOKA said that, although prepared to accept the majority view, he personally would prefer to see article 5 deleted, because he did not think it was really necessary. Opinions on the article might vary according to whether or not the sending State was held to be under an obligation to inform the receiving State that a particular mission might be sent to a third State before or after visiting the receiving State. If the sending State was held to be under such an obligation, and it failed, either unintentionally or intentionally, to inform the receiving State that the mission was to be sent to a third State, the consent of the receiving State would be void *ab initio*.

60. There were two possibilities. The first was that the receiving State might ask the sending State whether the special mission was to visit another State as well, and —depending on the reply it obtained—agree or refuse, as it saw fit, to receive the special mission. The second possibility—admittedly an unlikely one—was that the sending State might falsely maintain that its special mission was to visit only the receiving State which asked the question; in such circumstances it was clear that the consent of that State was invalidated by the untruthful statement of the sending State.

61. Some considered it desirable to impose on the sending State, through the provisions of an article, the obligation to inform the receiving State that the same special mission was to be sent to another country. If that view was accepted, several questions arose, and some members of the Commission had stressed the difficulty of establishing criteria by which to determine whether a given mission was the same mission. Even if a mission retained the same general composition on successive visits to different States, it was possible that, for one reason or another, one particular member of the mission would head it while it was in State A and another member would do so when it reached State B. That being so, it was open to question whether identity of purpose or consecutiveness should be the criterion.

62. Such problems made it difficult to lay down a practical rule which would facilitate international relations; the Commission might leave them for States to solve through usage instead of trying to codify the rules on the subject. At all events, even if article 5 contributed nothing of value, it presented no risks and could equally well be retained or deleted.

63. Mr. BARTOŠ, Special Rapporteur, said that in his commentary to article 5 (A/CN.4/194/Add.1) he had expressly mentioned the case "Where the same special mission, with the same membership and the same task, is sent to several States...". That rule—identity of membership and of task—was the one followed in practice; in the United States, the diplomatic usage was to address a note to the sending State asking what itinerary the special mission was to follow and on what dates it would be staying in a particular country.

64. Mr. BEDJAOUI said that he was in favour of retaining article 5 and of adopting the article 5 *bis* proposed by the Belgian Government. There was certainly no doubt about article 5 *bis*. Since, however, the two articles served different purposes, the Commission should not combine them into one.

65. Article 5 *bis* was a major innovation and, as Mr. Reuter had pointed out, met a genuine practical need at a time when States were coming together in regional groupings but stopping short of total integration. Since such States retained their national sovereignty, they could not act through a supra-national body, and consequently they had to send joint special missions. The question then arose as to how such missions should be constituted but that was a political problem and the Commission should mention it neither in the commentary nor, *a fortiori*, in the article.

66. Mr. ROSENNE said that the notice referred to in the second sentence of article 5 presumably would indicate whether the special mission was to function simultaneously in two States or consecutively, and whether or not it would consist of the same persons. Of course its task in the two countries would never be fully identical. Those were the only legal considerations raised by the article for the Drafting Committee to consider.

67. The greatest caution was needed in regard to the requirement of giving notification, so as to avoid undue rigidity and interference in the freedom of States to evolve the new patterns of diplomacy needed in a rapidly changing world. Perhaps the whole matter could be covered by a small amendment to article 1, paragraph 1, whereby the words "or States" would be inserted after the words "consent of the State".

68. Article 5 *bis* was undoubtedly useful, but possibly contained some hidden snags. The possibility would have to be considered of a special mission being composed partly of representatives of international organizations and partly of representatives of States, when it would not be clear what the exact demarcation of functions would be, or whether the representatives of an international organization were acting within the framework of its constituent instrument or exercising special competence conferred upon them by States. Possibly that particular question belonged to the topic of the relations between States and international organizations.

69. It was important not to exclude any of the various types of special mission, because an incomplete provision might frustrate the development of useful procedures. The Drafting Committee should be asked to try and evolve a text for article 5 *bis*.

70. Mr. RAMANGASOAVINA said that after listening to the arguments for and against the retention of article 5 and the adoption of a new article 5 *bis*, he was in favour of retaining article 5. That article dealt with a real situation, for it did happen that the same special mission was sent to two or more States, and that situation needed a legal basis.

71. The new article 5 *bis* supplemented article 5, and he hoped that the Commission would combine them in a single article providing that a State might send the same special mission to two or more States and that, conversely, a special mission might be sent by two or more States, the sending State or States then being required to give notice to the receiving State or States. The requirement of notice or information was what mattered, because States which were to receive a special mission needed to know its composition, purpose and itinerary in order to reach their decision.

72. Mr. YASSEEN said he approved the principle stated in article 5 *bis*, for there was nothing in positive international law to prevent several States from dispatching a single mission if the receiving State accepted it. It was a question of the sovereign will of States. Consequently, while he was favourably inclined towards the new article, he thought that, if the Commission decided to reject it, the situation would remain exactly as before because, provided that all the parties agreed, States would still be free to send joint special missions.

73. With regard to article 5, it was vital to retain the notification procedure; without it, the sending State would be at liberty not to inform the receiving State that the special mission was to visit other States, and that might lead to difficulties.

74. He therefore favoured the retention of article 5 and the adoption of the new article 5 *bis*. Article 5 was essential, however, whereas article 5 *bis* provided for something which was already possible under positive international law.

75. Mr. TSURUOKA said that, despite the Special Rapporteur's explanations, he still had some misgivings at the absence of provisions specifying the cases in which a special mission could be considered to be "the same special mission". Even though the commentary stated that a special mission was the same if it had the same membership, the question arose whether that still applied when one member of the mission was replaced. Again, where the commentary specified that the task must be the same, the question arose whether that meant the task in general or whether a minor change might prompt a decision that the task was no longer the same and consequently that the special mission was no longer the same. Without taking a perfectionist attitude, he hoped that the Commission would make a further effort and specify the cases in which a special mission was the same special mission.

76. He did not think article 5 *bis* had anything very new to contribute. However, since there was a similar provision —namely article 6—in the Vienna Convention on Diplomatic Relations, he would be inclined to accept it.

77. The CHAIRMAN,* speaking as a member of the Commission, said with reference to article 5 *bis* that the Special Rapporteur's observations contained cogent theoretical reasons against the sending of special missions by more than one State, one of them being that it could lead to inequality of rights. However, such missions were used in practice so that article 5 *bis* would constitute a codification of customary law.

78. As far as the sending of the same special mission to more than one State was concerned, some account must be taken of the fact that States might resent such a procedure. However, the article was necessary, particularly as a similar provision appeared in the Vienna Convention on Diplomatic Relations, to which no reservation had been made.

79. Mr. USHAKOV noted that the majority seemed to favour the new article 5 *bis*. In his opinion articles 5 and 5 *bis* were totally different, because the decision to send the same special mission to several States was a matter for the sending State and no prior agreement was needed in that case, whereas for the dispatch of a mission by several States, prior agreement was essential. Since the majority of the Commission appeared to agree with the principles embodied in article 5 *bis*, he suggested that the article should specify that, on the conclusion of a special agreement, a special mission might be sent by two or more States.

80. Mr. AGO said that, for a special mission to be regarded as the same mission, its membership should be essentially the same. Membership, however, was inadequate as a criterion; as the Special Rapporteur had rightly emphasized, its task had to be taken into account as well.

81. Mr. EUSTATHIADES said that articles 5 and 5 *bis* met not only existing needs but also needs which could arise in the future. The striking feature was not the legal aspect of the problem but the social requirements of the international community arising from the interdependence of States and regionalism both economic and cultural.

82. The problem arose and would arise in the future, both inside and outside international organizations. That new form of collective diplomacy could not be a matter of indifference to the Commission. Articles 5 and 5 *bis* brought both bilateral and collective diplomacy into play, and the Commission could not ignore those factors if it wished to ensure the development of international law. Little risk was involved because, under either article, all or any of the States concerned could refuse to receive such a mission.

83. In the case of article 5 *bis*, he was in no doubt that, from the legal point of view, the situation needed regulation.

84. With regard to article 5, the Commission might have referred in article 1 to the consent "of the States" instead

*.Mr. Ustor.

of the consent "of the State". There would be no objection to that solution from the legal point of view, but there were certain matters, such as notification, which were not mentioned in article 1. The Commission would have to go into the problem in greater detail in its commentary, and explain that notice was required where a special mission was to be sent to more than one State, either successively or simultaneously; the two possibilities should be distinguished in the interests of greater clarity. Also, paragraph 3 (b) of the commentary on article 5 stated that the special mission's "full powers may consist of a single document accrediting it to all the States with which the convention is to be concluded"; from the point of view of legal technicalities, that was a distinctive feature of the subject-matter of article 5.

85. According to the commentary, it was essential for the same special mission to have the same membership and the same task. The Commission might also provide for cases in which the membership was the same but the tasks were not; it should also draw a clear distinction between itinerant missions and simultaneous missions. That was not an academic problem but a real problem, and would become even more pressing in the future.

86. So far as presentation was concerned, the Commission could have drafted a single article beginning with the provisions of article 5 *bis*. That was a point of detail and he would not dwell on it, but he urged that more detailed explanations should be given in the commentary to article 5.

The meeting rose at 12.55 p.m.

904th MEETING

Monday, 22 May 1967, at 3 p.m.

Chairman: Sir Humphrey WALDOCK

Present: Mr. Ago, Mr. Albónico, Mr. Bartoš, Mr. Castañeda, Mr. Castrén, Mr. Eustathiades, Mr. Ignacio-Pinto, Mr. Kearney, Mr. Ramangasoavina, Mr. Reuter, Mr. Rosenne, Mr. Tammes, Mr. Tsuruoka, Mr. Ushakov, Mr. Ustor, Mr. Yasseen.

Welcome to Participants in the Third Seminar on International Law

1. The CHAIRMAN, welcoming the participants in the seminar on international law, said he hoped participants would benefit from listening to the Commission's discussions and from the opportunity of exchanging views with members and each other.

Letter from Mr. de Luna's son

2. The CHAIRMAN said that he had received a letter from Mr. de Luna's son in reply to the Commission's message of condolence on the death of his father. Mr. de Luna's son said that his family had been profoundly moved by the Commission's message. It had been his father's constant wish that the Commission continue its efforts to secure respect for international law by every State and respect for the values of every State so that each enjoyed legal guarantees in a stable peace.

The Commission took note of Mr. de Luna's letter.

Special Missions

(A/CN.4/193 and Addenda; A/CN.4/194 and Addenda)

(resumed from the previous meeting)

[Item 1 of the agenda]

ARTICLES 5 (Sending the same special mission to more than one State) [4] and 5 *bis* (Sending of the same special mission by two or more States) [5] *(resumed from the previous meeting)*[1]

3. The CHAIRMAN invited the Commission to continue its consideration of articles 5 and 5 *bis*.

4. Mr. BARTOŠ, Special Rapporteur, said that, on reflection, he had changed his mind about articles 5 and 5 *bis*. On reading the comments sent in by Governments he had had a feeling that the two articles were perhaps superfluous. He had found, however, that all but two of the members of the Commission were in favour of the two texts, subject to a few changes, and the arguments advanced by those members during the debate had convinced him.

5. The Union of Soviet Socialist Republics, the Byelorussian Soviet Socialist Republic and the Ukrainian Soviet Socialist Republic had requested the deletion of article 5. Mr. Ushakov had shown some hesitancy, and Mr. Rosenne had taken the view that the Commission should transfer the provisions of article 5 to article 1.

6. Some members of the Commission had wondered whether it was possible to state in article 5 a rule which was not merely a matter of protocol but a rule of law. Since the Commission's last meeting he had studied both theory and practice, and had concluded that it was possible to impose on a State which sent a special mission to more than one State the obligation to inform the receiving States that it was one and the same special mission.

7. Allowances had to be made for the susceptibilities of receiving States which must be given an opportunity to lodge an objection if they considered that their prestige was at stake. Thus the State of Israel and the Arab States were firmly opposed, for political reasons, to the sending of a special mission with the same membership and the same task to both.

8. With regard to notification, it had been suggested[2] that the word "information" should be used in article 3;

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[1] See 902nd meeting, paras. 78 and 80.

[2] See 902nd meeting, para. 35.

in article 5, subject to the Drafting Committee's approval, the words "prior notice" seemed appropriate. At all events, it was essential that the sending State should inform the receiving State that the same special mission was to visit other States, and should specify which States those were; in the United States, for example, the State Department announced its intention of sending a special mission or an itinerant envoy, and gave details of the route which the mission or envoy would take.

9. Article 5, then, met the need to establish a legal rule and to determine the legal consequences of an existing practice. The Commission could leave it to the Drafting Committee to prepare a text and to state with greater precision the conditions under which a special mission could be considered as one and the same mission.

10. There was no rule obliging a State to receive such special missions, and any State could invoke a change in the composition of a mission, such as the replacement of one person by another of lower rank, as grounds for refusing to receive the mission.

11. Referring to the task of the special mission, some members had questioned whether a special mission which was to negotiate imports of a given commodity in a given country, and which then went to another country to negotiate imports of another commodity, could be regarded as one and the same special mission. In his opinion it could not, unless the task had been defined in such general terms as to cover both sets of negotiations and the States concerned had accepted that definition of the task.

12. As for the link between articles 1 and 5, the provisions of article 1 were general in character, whereas article 5 laid down a particular rule, and he did not think the Commission should combine the two texts into a single article.

13. With regard to the new article 5 *bis*, there were many instances in practice of the same special mission being sent by two or more States to conclude a treaty or to perform a specific task. The Scandinavian countries, for example, often sent a single special mission to negotiate with a third State; Denmark, Norway and Sweden did so regularly and were sometimes joined by Iceland and Finland. The negotiations conducted by such joint missions could lead to the conclusion of bilateral agreements. For example, a special mission sent by the five States in question to Yugoslavia to negotiate the abolition of the visas had prepared a draft text with the representatives of Yugoslavia, and that text had been adopted by each of the six States in the form of a bilateral agreement. That was not an isolated example; the Belgo-Luxembourg Economic Union appointed a single negotiator to conclude treaties on behalf of Belgium and Luxembourg, although the text of each treaty might vary so as to reflect the legislation, especially the labour legislation, of the country concerned. In short, the proposal for a new article 5 *bis* seemed to him to meet a real need.

14. The CHAIRMAN said that it appeared to be the Commission's wish to refer articles 5 and 5 *bis* to the Drafting Committee for revision and the clarification of certain points in the light of the discussion, but without taking any final decision at that stage as to whether or not they should be retained.

It was so agreed.[3]

ARTICLE 6 (Composition of the special mission) [9]

15. *Article 6* [9]

Composition of the special mission

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

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

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

16. The CHAIRMAN invited the Commission to consider article 6, the Special Rapporteur's proposals for which were contained in paragraph 21 of the section on that article in his fourth report (A/CN.4/194/Add.1) and in his additional comments on article 6 in document A/CN.4/194/Add.3.

17. Mr. BARTOŠ said that article 6, unlike articles 3, 4, 5 and 5 *bis*, did not give rise to any difficulties.

18. In a special mission, the members, just like the head, represented the sending State within the limits of their powers; that was one of the features which, from the standpoint of composition, distinguished the special mission from the permanent diplomatic mission.

19. With regard to the size of the staff, paragraph 3 contained a clause under which it could be kept within reasonable limits. The same provisions appeared in the two Vienna Conventions. The Conference on Diplomatic Intercourse and Immunities had adopted it by majority vote;[4] the Union of Soviet Socialist Republics and the United States had voted against it on the ground that every State, by virtue of its sovereignty, was the sole judge of the size of the mission it accredited to another State.

20. The Belgian Government had proposed that the word "delegate" in article 6 should be substituted for the word "representative". He had been in favour of that proposal at first, but had come round to the opinion of most members of the Commission that all the members of the special mission were delegates. A special mission might be composed of a single member, who was then called a "representative"; in that case, the Belgian Government wanted the sole member of the special mission to be called a "delegate". In his view that was a question of terminology which could be settled by the Drafting Committee.

21. He saw no need to distinguish, in the composition of the special mission, any categories other than those of head of the special mission, the members and the staff.

22. The Government of Israel had made a comment (A/CN.4/188) on paragraph 3, but as only a drafting

[3] For resumption of discussion, see 926th meeting, paras. 69-73.

[4] See United Nations Conference on Diplomatic Intercourse and Immunities, *Official Records*, vol. I, 5th plenary meeting, paras. 16-25.

change was involved, and one which he considered justified, he did not think the Commission would wish to dwell on it.

23. The Union of Soviet Socialist Republics, the Ukrainian SSR and the Byelorussian SSR had requested the deletion of paragraph 3, which dealt with the possible limitation of the size of the staff on the grounds that such a provision was unnecessary in view of the tasks which were usually given to special missions and the fact that they were given for a specified time.

24. The Governments of Gabon and Greece had asked for improvements in the text of article 6. He thought the Drafting Committee would be able to meet their wishes.

25. The CHAIRMAN said that the Netherlands Government's comment (A/CN.4/193), to which the Special Rapporteur had referred in his report (A/CN.4/194/Add.1), seemed quite simple. It was that definitions such as "head of the special mission" or "members of the administrative and technical staff" should correspond to those used in the Vienna Convention on Diplomatic Relations.

26. Mr. AGO said that on the whole he agreed with the Special Rapporteur; he was in favour of the drafting amendments designed to improve the text, but he was not convinced of the utility of the proposals by Belgium and by the USSR, the Ukrainian SSR and the Byelorussian SSR.

27. He was not sure, however, whether the Commission had made enough allowance for the varied character of special missions. Article 6 provided that a special mission might consist of a single representative or of a delegation composed of a head and other members; but there were cases where for reasons other than reasons of protocol a State might send a special mission composed of two or three members without designating a head. One was the historical case of a special mission sent by a great Power to another State to re-establish relations which had been broken off; the mission had been composed of two persons of the same rank, neither of whom held the title of head of the special mission. Another possible case was that of a mission consisting of, for instance, the Minister of Foreign Affairs and the Minister of Trade, where, for obvious reasons, the sending State would not wish to subordinate either to the other. He therefore suggested the adoption of a more flexible wording, such as: "... a delegation composed of two or more members from among whom the sending State may designate a head".

28. Mr. CASTRÉN said that he approved of the text of article 6 as a whole, but doubted whether it was necessary to distinguish the members of the special mission from its diplomatic staff. No such distinction was made in the Vienna Convention on Diplomatic Relations, and all the diplomats attached to a permanent mission were included in the category of members of the mission.

29. Some Governments, in their comments, had raised the question whether the Commission was wise to adopt for special missions a different system from that established by the Vienna Conventions. Since the tasks of special missions could vary widely from mission to mission, it was arguable that the rules concerning the composition of such missions should be less strict. If the special mission's functions were mainly of a technical nature, all its members would normally be technical experts, but it was possible that such a mission would need diplomatic staff as well.

30. On examining the draft articles on special missions it would be found that, generally speaking, the Commission placed the diplomatic staff on the same footing as the members of the special mission where facilities, privileges and immunities were concerned. There were, however, some provisions, such as article 7, paragraph 2, which provided a different regime for the members on the one hand and the diplomatic staff on the other. He was not proposing that the Commission reverse the decision it had taken at the first reading; he merely wished to draw its attention to that problem once again.

31. Mr. USHAKOV said that he supported the proposal submitted by three Governments for the deletion of paragraph 3. That paragraph was based on article 11 of the Vienna Convention on Diplomatic Relations, but the problem had given rise to much discussion and some Governments had entered reservations when signing the Convention.

32. There were some inconsistencies between paragraph 7 of the commentary and paragraph 3 of the article. According to sub-paragraph (a) of paragraph 7 of the commentary, "It is customary for the receiving State to notify the sending State that it wishes the size of the mission to be restricted"; that presupposed the existence of a prior agreement between the sending State and the receiving State. According to sub-paragraph (*b*), "the agreement on the establishment... limits the size of the mission", while sub-paragraph (*c*) referred to "preliminary negotiations"; there again, there was clearly a prior agreement. Paragraph 3 of the article on the other hand provided that "the receiving State may require that the size of the staff be kept within limits considered by it to be reasonable and normal".

33. States were always at liberty to conclude a prior agreement in order to limit the size of a mission's staff and, since the Commission had accepted the principle of notification or information, the receiving State could signify its acceptance or refusal before the special mission entered its territory. If the receiving State were left free to impose limits on the size of the staff after the special mission's arrival, that would create serious difficulties and might well prevent the special mission from performing its task.

34. Furthermore, it should be remembered that the special mission was not a permanent mission but a temporary mission, which might be led by a person of high rank such as the Head of State or the Prime Minister; in such a case it was out of the question for the receiving State to pass any comment on the composition of the special mission. Notification was still required, but its purpose was to inform the receiving State, not to enable that State to raise objections to the composition of the special mission. It was inconceivable that a Head of State should be asked to limit the number of persons in his suite or the size of the staff of the mission he was leading. Paragraph 3 should therefore be deleted.

35. Mr. ROSENNE said that he agreed with the Special Rapporteur's conclusions, subject to the necessary drafting changes advocated by a number of Governments.

36. He endorsed Mr. Ago's remarks and was also concerned lest the Commission might be drafting the articles in an unduly rigid form and thereby placing special missions in a strait-jacket which had little connexion with real life.

37. Mr. KEARNEY said that, in view of the fact that the Commission evidently intended to include an article on the sending of the same special mission by more than one State, it would be preferable not to insist on a head being appointed, in case they found it difficult to agree on the person. That would need some consequential changes in article 7 and might create certain problems for ministries of foreign affairs, but the fundamental considerations which Mr. Rosenne had in mind about the need to avoid undue rigidity outweighed the need for precision.

38. Mr. EUSTATHIADES said he agreed with the Special Rapporteur that there was no need to take up the Belgian Government's proposal that the word "delegate" should be substitued for the word "representative". He also agreed with the Special Rapporteur on the other points at issue.

39. The Commission and the Drafting Committee would do well to consider Mr. Ago's proposal that the designation of a head for a special mission should not be made compulsory. Such designation might present difficulties, and not only where the special mission was at a high level. If the proposal were adopted, article 7, paragraph 1, would have to be amended accordingly, perhaps by the insertion of the words "where such a head is designated" after the words "The head of the special mission".

40. Mr. Ushakov's comments on paragraph 3 were most apposite. He himself, however, was concerned mainly with the possibility that, at a time when the special mission was already at work in the receiving State, its staff might be increased to an extent which that State considered excessive and incompatible with the arrangements arrived at by prior agreement. He would therefore prefer paragraph 3 to be retained, but in an amended form less open to the criticism expressed by Mr. Ushakov.

41. The expression "be kept" was ambiguous. It would be better to specify that "the receiving State may, before the special mission is sent, request that the size of the mission be kept within the limits considered by it to be reasonable". Moreover that wording would have the advantage of enabling the receiving State to state its position in advance with regard to any possible reduction or increase in the size of the special mission while its work was in progress.

42. With regard to the Belgian Government's comment on the use of the term "diplomatic staff" (A/CN.4/188), the Special Rapporteur's reply was satisfactory but he would suggest that the Commission amend slightly the end of paragraph 5 of the commentary so as to avoid stating that advisers and experts were necessarily included in the category of diplomatic staff; that was the very point which had prompted the Belgian comment.

43. Mr. YASSEEN said that at the first reading he had expressed some reservations about the idea contained in article 6, paragraph 3.[5] The ground for those reservations still held good, namely, that a balance had to be struck between the interests of the two States. It was true that, as the Special Rapporteur had pointed out, there were practical reasons why a receiving State might be unable to accept too large a mission. On the other hand, the sending State was entitled to appoint enough persons to enable the special mission to perform its task. A special mission only a few persons strong, on reaching the capital of a foreign State, found itself confronting the entire administration of the other party. Since the sending State was already at some disadvantage on that account, it would be going too far to give the receiving State the final say with regard to the mission's size.

44. Paragraph 3 was not well drafted; the verb "require" was too strong. All that was really involved was an agreement between the States. If the sending State did not accept the receiving State's judgement with regard to the special mission's size, there would be no special mission. It would be better to express the idea differently, perhaps by saying that the size of the special mission was a matter for agreement between the two States. In addition, the subjective criterion—"within limits considered by it to be reasonable"—should be replaced by an objective criterion, such as "within reasonable limits".

45. Mr. TSURUOKA said that he agreed with Mr. Ago on the substance of paragraph 1, but wondered whether the wording of that paragraph as it stood precluded the possibility that the sending State might refrain from designating a head for the special mission. Since there was some doubt on the subject, the Commission might adopt Mr. Ago's proposal in the interests of clarity.

46. That proposal however, raised the question who, if the special mission had no head, was entitled to express its will if its equal members disagreed. It was a point that needed clearing up, perhaps elsewhere in the draft; the lack of a head of the special mission should not be allowed to place the receiving State at a disadvantage.

47. He agreed with Mr. Yasseen about paragraph 3. The initial size of the special mission and the possibility of increasing or decreasing it should be the subject of a prior agreement between the sending State and the receiving State. That was the overriding consideration, but it must not be allowed to thwart the purpose of the draft, which was to facilitate international relations by means of special missions. In practice, if the sending State maintained the size of the special mission in the face of a protest from the receiving State, the special mission would find it harder to achieve its purpose than if the sending State met the receiving State's wishes. The receiving State's objection should, however, be presented in the form of a proposal rather than of a requirement. The main fault of paragraph 3, therefore, was its wording.

48. Mr. USTOR said that he would not dwell on the many questions of drafting which arose in connexion with

[5] *Yearbook of the International Law Commission, 1964*, vol. I, 761st meeting, para. 51.

article 6, except to recall his remarks on articles 3, 4 and 6 at the 901st meeting[6] when the Commission began its discussion on article 3.

49. On the substance of paragraph 1, he agreed with Mr. Ago. It was possible that a special mission might consist of two or three members, none of them bearing the title of head of the mission. That possibility was recognized by paragraph (3) of the commentary to article 7, where the second sentence read:

> "If it is composed of only two members, the sending State decides whether one shall bear the title of first delegate or head of the special mission."

The second sentence of paragraph (4) of that commentary added:

> "There are in practice instances of special missions whose members are delegates with equal rights under collective letters of credence for performing the tasks assigned to the special mission."

Clearly, situations of that kind must be kept in mind when drafting article 6.

50. With regard to paragraph 3, he had been much impressed by Mr. Ushakov's arguments in favour of its deletion. The receiving State's interests were sufficiently safeguarded by the need to obtain its consent for sending the special mission.

51. There remained the not very common case of a sending State increasing the size of its special mission by sending additional members in the course of its operations. That problem deserved consideration and his own view was that the receiving State, despite the consent given by it at the time of sending the special mission, had an implicit right to oppose a subsequent disproportionate increase in the size of the mission.

52. Mr. BARTOŠ, Special Rapporteur, said that there were two sides to Mr. Ago's question whether every special mission need have a head. At the domestic level, admittedly, it need not; a special mission often included several ministers, party leaders or other high-ranking persons among whom it was not desired to establish any hierarchy. At the international level, however, in relations with a foreign State, international custom and the rules of procedure of most international conferences required that even in such cases one person should be responsible for representing the mission vis-à-vis the other party.

53. By analogy with the rather exceptional situation where the Head of State was not an individual but a collective body—a situation which other States accepted but in which arrangements were made for one of the persons in question to represent the State vis-à-vis foreign States—the Commission might agree that a special mission should be composed of several equal members, but in that case the sending State would have to designate the member of the mission who was to represent it.

54. It was essential to preserve the distinction between the members of the special mission and the members of the staff of the special mission. That was one of the points where the draft articles should depart from the Vienna Convention on Diplomatic Relations.

55. Despite Mr. Ushakov's arguments, he was still convinced that the question of the size of a special mission sometimes arose after it had arrived in the receiving State and begun its work there. Paragraph 3 stated a dynamic, not a static, rule. What had initially seemed reasonable and normal might prove excessive or inadequate later on. Furthermore the rule applied "in the absence of an express agreement." Practice supplied arguments both for and against retaining such a provision in the draft articles. Some States, taking advantage of their material and financial superiority, had unduly increased the size of their special missions, often more for reasons of prestige than to meet any real need. Each case must be considered on its merits.

56. Some of the expressions in paragraph 3 which had been criticized, in particular the words "may require" and "within limits considered by it to be reasonable", had been taken from article 11 of the Vienna Convention on Diplomatic Relations and also appeared in article 20 of the Vienna Convention on Consular Relations.

57. If the Commission decided to include in the draft a provision similar to those articles 11 and 20 respectively of the two Vienna Conventions, it would still have to decide whether to make it as rigid as, or more flexible than, those articles. Several members had suggested that the idea should be kept but expressed in milder terms; he supported that suggestion.

58. The settlement of any dispute on that issue depended on the political relations between the two States. If those relations were bad, and if the receiving State feared that the sending State was trying to bring political influence to bear on it, it would request the sending State to reduce the size of its special mission and would allege as a pretext that some members of the mission were dealing with matters outside their duties or interfering in the domestic affairs of the receiving State.

59. Some means of settling a dispute should also be indicated. The rule that the receiving State was the sole judge in the matter had been adopted at Vienna under pressure from the smaller States. The Vienna Conferences, however, had left two questions unanswered, namely, what effect the receiving State's decision was to have, and at what point in time the supernumerary persons must leave the country. If the receiving State's request was not complied with, the law would be broken, but the receiving State had no legal remedy except to declare those persons *non grata*, and that was hardly a satisfactory procedure where a number of persons were concerned.

60. Another reason for mitigating the terms of the Vienna Conventions was that a special mission's task might be something entirely new, for which the requisite number of persons could not possibly be decided beforehand.

61. He suggested that it be left to the Drafting Committee to consider the questions of terminology raised by the Belgian Government and the observations made by the Netherlands Government, and that the obligation to designate a head for the special mission be removed

[6] Paras. 2-4.

on the understanding that, if the sending State did not designate a head, it would designate the member of the special mission who was to represent it vis-à-vis the receiving State. Paragraph 3 should be retained provisionally but the Drafting Committee should be asked to make its terms less rigid.

62. Mr. AGO said that the problem of paragraph 3 was not merely a matter of toning down the wording. The real problem, as Mr. Ushakov had cogently pointed out, depended on the content of the preceding articles.

63. The provision had been included in the two Vienna Conventions because, in the case of diplomatic and consular missions alike, the sending State was free to decide by whom and by how many persons it would be represented. If the sending State was equally free to decide the composition of a special mission, paragraph 3 was necessary. If, however, the Commission laid down in a preceding article a rule requiring the sending State to inform the receiving State in advance of the composition of the special mission so that the receiving State might present its objections if any, that was an adequate safeguard and paragraph 3 was unnecessary.

64. It remained to consider the hypothetical case, envisaged by Mr. Ustor and the Special Rapporteur, of an increase in the size of the special mission while its work was in progress. But if the sending State had stated in advance how large the special mission was to be, it could make no drastic change in the size of the mission without the agreement of the receiving State; otherwise it would be in breach of the original arrangements.

65. Everything depended, therefore, on the wording adopted for articles 1 and 3. In any case, as Mr. Amado had often reminded the Commission, it must be assumed that States had sufficient experience to be able to cope with exceptional situations.

66. Mr. BARTOŠ, Special Rapporteur, said that he agreed with Mr. Ago. If, however, the Commission decided to delete paragraph 3, it should explain in the commentary that it had done so because the draft provided that the sending State should give the receiving State notice of the composition of the special mission and that the receiving State should have an opportunity to object. Then the Commission would not incur the reproach of having neglected an important provision of the Vienna Conventions.

67. The CHAIRMAN said that, leaving aside for the time being the question of paragraph 3, the Special Rapporteur's proposals had met with approval and the Commission could now refer article 6 to the Drafting Committee for consideration of the various points which had arisen during the discussion.

68. With regard to paragraph 3, he noted that some members wished to delete it outright; others thought that it was useful but that its wording needed to be revised in order to take account of the different situation of special missions; lastly, Mr. Ago had stated that the Commission's final view on the retention of paragraph 3 would depend on its ultimate decision with regard to articles 1 and 3. That meant that it would be premature to discuss now the question of the omission of paragraph 3 and of any explanation that might be given in the commentary for its omission.

69. Mr. CASTAÑEDA said he did not believe that it would be a satisfactory solution to delete paragraph 3 and explain the deletion in the commentary. Paragraph 3 was necessary in order to deal with the case in which there was no agreement between the sending State and the receiving State regarding the size of the mission; where an agreement existed on that point, there was no problem.

70. The CHAIRMAN suggested that article 6 be referred to the Drafting Committee for consideration in the light of the discussion; the Drafting Committee would examine, in the light of its decisions concerning earlier articles, the question whether paragraph 3 was necessary.

It was so agreed.[7]

The meeting rose at 6.5 p.m.

[7] For resumption of discussion, see 926th meeting, paras. 74-98.

905th MEETING

Tuesday, 23 May 1967, at 10 a.m.

Chairman: Sir Humphrey WALDOCK

Present: Mr. Ago, Mr. Albónico, Mr. Bartoš, Mr. Castañeda, Mr. Castrén, Mr. Eustathiades, Mr. Ignacio-Pinto, Mr. Kearney, Mr. Ramangasoavina, Mr. Reuter, Mr. Tammes, Mr. Tsuruoka, Mr. Ushakov, Mr. Ustor, Mr. Yasseen.

Special Missions

(A/CN.4/193 and Addenda; A/CN.4/194 and Addenda)

(continued)

[Item 1 of the agenda]

ARTICLE 7 (Authority to act on behalf of the special mission) [14]

Article 7 [14]

Authority to act on behalf of the special mission

1. The head of the special mission is normally the only person authorized to act on behalf of the special mission and to send communications to the receiving State. Similarly, the receiving State shall normally address its communications to the head of the mission.

2. A member of the mission may be authorized either by the sending State or by the head of the special mission to replace the head of the mission if the latter is unable to perform his functions, and to perform particular acts on behalf of the mission.

2. The CHAIRMAN invited the Commission to consider article 7, the Special Rapporteur's proposals for which were contained in paragraph 20 of his comments on that article in his fourth report (A/CN.4/194/Add.1) and in

his additional comments on article 7 in the supplements to his fourth report (A/CN.4/194/Add.3 and 5).

3. Mr. BARTOŠ, Special Rapporteur, said that the rule that the head of the special mission was normally the only person authorized to act on behalf of the special mission and to send communications to the receiving State was a general, not an absolute rule. It was obvious that one person should negotiate and issue statements, but the rule needed flexible wording; that was why the Commission had used the word "normally" in the article. It had allowed for the possibility that States might agree that, in certain circumstances, other members should be authorized to act on behalf of the special mission.

4. The Swedish Government had expressed doubts about the use of the word "normally" and thought it should be replaced by the phrase "unless otherwise agreed". He himself was against the replacement or deletion of the word "normally" since the purpose of the article was to provide that one person, namely, the head of the mission, should be authorized to act on behalf of the special mission but that he could, if circumstances so required, be replaced by another member of the mission.

5. Mr. KEARNEY said he agreed with what had been said by the Special Rapporteur. Some modification of the text was, however, necessary so as to eliminate a certain rigidity in the article. It could be interpreted to mean that a head of mission could only be replaced if he was unable to perform his functions, but the sending State should be able to replace either him or any other member of a mission at any time.

6. Mr. BARTOŠ, Special Rapporteur, said he agreed with that view.

7. Mr. CASTRÉN said that he was satisfied with the text of article 7, subject to the changes proposed by certain Governments and accepted by the Special Rapporteur.

8. With regard to the word "normally", however, he shared the view expressed by the Government of Chile (A/CN.4/193/Add.1) and would prefer some such phrase as "Unless otherwise determined by the sending State, only the head of the mission...". Alternatively, the Commission might delete the words "normally the only person" from the first sentence of paragraph 1 and the words "Similarly" and "normally" from the second sentence of that paragraph.

9. With regard to paragraph 2, he thought that the Commission should adopt the Special Rapporteur's proposal, based on the Yugoslav Government's proposal in paragraph 5 of its comments (A/CN.4/188), and add to article 7 a new paragraph 3 reading:

> "A member of the staff of the special mission may be authorized to perform particular acts on behalf of the mission."

On the other hand, he opposed the United States Government's proposal to add the sentence: "The receiving State shall be notified of a change of head of mission". That point was already dealt with in article 8, paragraph 1 (*a*).

10. Mr. REUTER said he supported Mr. Castrén's remarks, but there was one problem to which he wished to draw attention. The head of the special mission was the only person authorized to act on behalf of the special mission and to send communications to the receiving State. Those were diplomatic acts, but there were other forms of activity, such as statements or communications to the Press and talks with persons other than representatives of the receiving State, which did not come under the heading of diplomatic activities. It was customary, for instance, for the delegations of States to international organizations to appoint a spokesman who was not the head of the special mission. That being so, he wondered whether the Commission should not include a clause to that effect in article 7.

11. Mr. USTOR said that the Special Rapporteur's suggested amendment to paragraph 2, to substitute the words "A member of a special mission or of its staff" for the words "A member of the mission", might render the provision too broad by extending its scope to include service staff.

12. Mr. AGO said he thought that the Drafting Committee could make the drafting changes in paragraph 1 which had been proposed by Governments and accepted by the Special Rapporteur.

13. With regard to the problem raised by Mr. Reuter, it was true that it was often the mission's spokesman, and not the head of the special mission, who made statements to the Press. He therefore agreed with Mr. Reuter that the Commission should word the article more flexibly in order to allow for situations which arose in practice.

14. Mr. TSURUOKA said that, although provision might be made for exceptions to the rule, paragraph 1 was nevertheless very important because, in order to facilitate relations between the receiving State and the special mission, only one person should be authorized to send official communications and to negotiate with the State. Subject to an improvement in the drafting, therefore, he favoured the retention of paragraph 1.

15. The situation described by Mr. Reuter often arose in practice, but he doubted that the Commission should insert a clause to that effect in article 7; he feared that, if it went into too much detail, the Commission might overload the text of the draft convention it was to prepare.

16. Mr. RAMANGASOAVINA said a possible solution to the problem raised by communications, such as statements to the Press, made by the special mission to persons or bodies other than representatives of the receiving State, might be to transfer the phrase "and to perform particular acts on behalf of the mission" from paragraph 2 to the end of the first sentence in paragraph 1. It seemed to him that the words "particular acts" could be taken to mean activities which were not, strictly speaking, diplomatic, such as statements to the Press.

17. The CHAIRMAN, speaking as a member of the Commission, said that there was no need to complicate paragraph 1, which related primarily to the head of a

special mission and persons authorized to act vis-à-vis the receiving State. If the question of a spokesman was to be covered at all it should be in paragraph 2.

18. Paragraph 2 was unduly restrictive, and in the English text the word "and" would confine the authority to performing a particular act on behalf of the mission to cases when the head of the mission had been replaced. The French text was less awkward. If the word "or" were substituted, instances of special authority, for example to act as spokesman—who in most cases would have to act under the control of the head of the mission if there was one—would be covered.

19. Mr. BARTOŠ, Special Rapporteur, said that the Commission had to lay down a rule stating the conditions under which communications took place between the two States, with the special mission representing one sovereign State vis-à-vis another sovereign State. Under article 7 it was "normally" the head of the special mission who acted on behalf of the mission and sent communications to the receiving State, but in certain circumstances he could delegate his powers to a member of the mission. As the United States Government had pointed out, the sending State also had full liberty to change the head of the special mission, provided that it so notified the receiving State in advance.

20. There were international customs which prescribed the conditions in which the head of the special mission could be replaced, either by decision of the sending State or by his delegating powers to particular members. In special missions of particular importance, the head of the mission negotiated at the highest level and did not concern himself with administrative or secondary questions; on occasion he tacitly delegated his authority to members of the mission, or even technical or subordinate staff, to act for him.

21. As Mr. Reuter had pointed out, the "public relations" of the special mission presented an increasing problem, for statements made to the Press sometimes had implications concerning the attitude of the sending State. The question arose, therefore, whether the spokesman should be regarded as a mere technical official or as a member of the special mission authorized to make political statements. Receiving States had sometimes lodged protests on the ground that a spokesman could not make a public statement in the course of negotiations unless the receiving State was notified beforehand. If the Commission wished to settle the point, he would help it to do so, though personally he did not see how there could be any rule other than one of courtesy.

22. If the Commission wished to give the special mission freedom to make statements to the Press, article 7 could be amended accordingly; if it was a question of official acts, Mr. Ramangasoavina's proposal could be adopted. The Commission should also specify whether the head of the special mission was to be the only person authorized to send official communications. Perhaps it should also provide, either in article 7, or in article 6, that a member of the special mission might be designated to act on behalf of the mission or to send communications to the receiving State. It was essential for the receiving State to be certain that a communication sent by a member of the special mission duly committed the sending State within the limits of the powers it had conferred on the mission.

23. Mr. USTOR said that article 7 departed from the Vienna Convention, which was based on the idea that a permanent mission was an institution of the sending State and not merely the ambassador's suite. Under the system of the Convention, the members of a permanent mission could act on behalf of the sending State in their respective competences. According to article 7 of the present draft, only the head of a mission represented the sending State; its members were his substitutes and could only act on his authority. Thus, in that respect there was a substantial difference between the Vienna Convention on Diplomatic Relations and the draft articles on special missions.

24. Mr. BARTOŠ (Special Rapporteur) said that, in a permanent diplomatic mission, the ambassador or the *chargé d'affaires* was the only person authorized to conduct negotiations or to send official communications, whereas in a special mission the task was very often divided among the various members, and each member might be authorized to negotiate on certain specific points. Sometimes members of the special mission even visited different parts of the territory of the receiving State for fact-finding purposes and the conclusions they reached were regarded as valid by the special mission. In that respect, therefore, it was impossible to place the special mission on the same footing as the permanent diplomatic mission.

25. Mr. EUSTATHIADES said he thought the word "Similarly" in paragraph 1 was inappropriate. In view of the United States comment that the receiving State should be notified of a change of head of the special mission, he suggested that the following sentence be added at the end of paragraph 2: "The receiving State shall be notified accordingly".

26. The CHAIRMAN, summing up the discussion, said that the Commission appeared to be generally satisfied with the structure of article 7, though it felt that greater flexibility and precision on the lines indicated by the Special Rapporteur were needed. He suggested that the article be referred to the Drafting Committee for consideration in the light of the discussion.

It was so agreed.[1]

ARTICLE 8 (Notification) [11]

27. *Article 8* [11]

Notification

1. The sending State shall notify the receiving State of:

(*a*) The composition of the special mission and of its staff, and any subsequent changes;

(*b*) The arrival and final departure of such persons and the termination of their functions with the mission;

(*c*) The arrival and final departure of any person accompanying the head or a member of the mission or a member of its staff;

(*d*) The engagement and discharge of persons residing in the receiving State as members of the mission or as private servants of the head or of a member of the mission or of a member of the mission's staff.

[1] For resumption of discussion, see 927th meeting, paras. 1-14.

2. If the special mission has already commenced its functions, the notifications referred to in the preceding paragraph may be communicated by the head of the special mission or by a member of the mission or of its staff designated by the head of the special mission.

28. The CHAIRMAN invited the Commission to consider article 8, the Special Rapporteur's proposals for which were contained in paragraph 17 of the section of his fourth report (A/CN.4/194/Add.1) dealing with that article and in his additional comments on article 8 in the supplements to his fourth report (A/CN.4/194/Add.3 and 5).

29. Mr. BARTOŠ, Special Rapporteur, said that article 8 was modelled, with some changes, on article 10 of the Vienna Convention on Diplomatic Relations. The Commission should take care not to confuse the notification procedure with the proposed information clause in article 3.

30. Several Governments had submitted comments. The Government of Israel had suggested some drafting changes which he recommended the Commission to refer to the Drafting Committee.

31. The Yugoslav Government had proposed that the Commission should mention that in some countries recruitment was in practice limited to auxiliary staff without diplomatic rank. He did not think such a statement should appear in the text of the article, although it might be included in the commentary.

32. The Japanese Government disagreed with paragraph (8) of the commentary, which described as "a sensible custom" the provisions of paragraph 2 to the effect that the special mission itself could communicate a notification direct to the receiving State. He left it to the Commission to reach a decision on that observation, which in his opinion was of no great importance; nevertheless, a special mission would face considerable difficulties if, from the scene of its operations, it had to apply to the embassy or the Ministry of Foreign Affairs every time it engaged or discharged someone.

33. The Chilean Government considered that notification was hardly necessary in the case of the persons referred to in paragraph 1 (*d*), unless they were to enjoy diplomatic privileges and immunities. He did not share that opinion; the international practice was that States should know what individuals were employed by foreign States, and they needed to be able to exercise some degree of supervision.

34. Mr. REUTER said he would like the Special Rapporteur to explain the connexions between article 8 and the other articles, and in particular, when and for what purpose notification must be given.

35. Mr. BARTOŠ, Special Rapporteur, said that the purpose of the notification procedure was to tell the receiving State the names of the members of the special mission and its staff who were in that State's territory. Some Governments furnished the members and staff of special missions with documents certifying their status as members of special missions, for use by them in claiming the facilities, privileges and immunities granted to them. That system made it easier for the receiving State to protect the members of special missions and to afford them all the privileges and immunities due to them in that capacity. Every receiving State had the indisputable right to know whether a person in its territory was or was not a member of a special mission.

36. Mr. AGO said that the Drafting Committee would have to co-ordinate articles 8 and 3 and even article 6 with extreme care in order to ensure that the draft articles were consistent and readily intelligible. Prior notice was a separate matter from the notification which was addressed to the receiving State when the special mission arrived or was already in its territory, and which enabled the administrative authorities of the receiving State to apply to the members of the special mission the régime provided for in the draft articles.

37. The new paragraph 3 proposed by the Special Rapporteur in paragraph 17 (4) of his comments on the article (A/CN.4/194/Add.1) seemed to him superfluous; in his opinion, the Commission should avoid going into too much detail.

38. An error seemed to have been made in the French text of article 8, paragraph 2, where the word "*modifications*" ought apparently to be replaced by the word "*notifications*".

39. Mr. TAMMES said he agreed with Mr. Ago. It would be useful to distinguish between two kinds of notification. First, prior information on certain essential features of the special mission, without which no agreement between the parties would be possible; and secondly, certain changes which might occur in regard to its head, staff or size after its arrival in the receiving State. The first kind of notification formed part of the initial agreement, whereas the second had to do with the orderly functioning of the mission. It would be preferable to avoid using the word notification to describe the first kind.

40. Mr. CASTRÉN said that the text of article 8 was satisfactory on the whole, and the Special Rapporteur's suggestions for certain changes in the commentary were also acceptable. Whether a new paragraph 3 need be added, entitling States to depart from the provisions of the article by agreement, depended on what became of the general provision on the subject.

41. The only point which caused him any concern was the Belgian Government's proposal that the opening words of paragraph 1 should be amended to provide that the sending State should notify the receiving State in advance. For the reasons given by the Special Rapporteur in his comments, it hardly seemed appropriate to require notification in advance in all cases. Perhaps the Commission could adopt a fairly flexible wording along the lines of the Vienna Convention on Diplomatic Relations, such as, "The sending State shall so far as possible give such notification in advance". However, he had no fixed ideas on the subject.

42. Paragraph 2, in his opinion, was a useful provision and should be retained.

43. Mr. USHAKOV said that he too considered that article 8 should be brought into conformity with the outcome of the discussion on article 3. That would need

only some simple drafting changes. Paragraph 1 might be amended to read:

"In addition to receiving the communications provided for in article 3 on the composition of the special mission and of its staff, the receiving State shall be notified of:

"(*a*) Any subsequent change in the composition of the special mission and of its staff."

Sub-paragraphs (*b*), (*c*) and (*d*) would then follow unchanged.

44. There seemed to be some inconsistency between paragraph 1, which provided that the sending State should effect the notifications, and paragraph 2, which provided that notifications might be communicated by the head of the special mission. He therefore proposed that the Commission adopt the wording of article 10 of the Vienna Convention on Diplomatic Relations, which merely stated "The Ministry... shall be notified of", without specifying what organ was to effect the notifications.

45. Paragraph 2 might be drafted to read:

"The head of the special mission may authorize a member of the mission or of its staff to present the communications provided for in the preceding paragraph."

46. Mr. EUSTATHIADES said that several speakers had stressed the need for a link between articles 3 and 8; that need had already become evident during the discussion of article 3.

47. Of all the questions dealt with in the draft articles, that of the notifications prescribed in article 8 was one of the most important. Unlike most of the other draft articles, which laid down rules to which exceptions were permitted by special agreement, article 8 dealt with a subject for which reference would be made to the convention, because notification set in motion the machinery of the privileges, immunities and facilities to be accorded to the special mission. It was therefore important to redraft the article in a more precise form.

48. As matters stood at present, article 3 would refer to prior notice or information. In paragraph (4) (*a*) of the commentary to that article, it was stated that the consent of the receiving State could be given in the form of a visa or in the form of acceptance of the notice of the arrival of a specific person; the reference to the latter form anticipated the subject-matter of article 8. A little further on, in paragraph (4) (*c*) of the commentary to article 3, it was stated that in practice the person or persons who would form a special mission were specifically designated in the agreement concerning the sending and reception of the special mission. The question might be asked, therefore, whether that specific designation of the composition of the special mission, on the one hand, and the consent of the receiving State by acceptance of the notice, on the other, would not produce exactly the same result as was aimed at in article 8.

49. Paragraph (3) of the commentary to article 8 explained that notification usually took place in two stages. The first was the preliminary notice, which should contain brief information concerning the persons designated and "should be remitted in good time"; the second was regular notification through the diplomatic channel. In his opinion, the preliminary notice was more relevant to article 3, and the condition expressed in the words "in good time" should be prescribed in that article.

50. Mr. Ushakov's proposal clearly showed that there was a close link between article 3 and article 8, paragraph 1 (*a*). Since the two articles dealt with closely connected matters, the Commission should perhaps bring them closer together in the draft. In what was now article 3 it could deal with everything relating to the composition of the special mission and of its staff, and keep for what was now article 8 matters relating to changes in that composition, to the arrival and departure of persons, and to the engagement and discharge of persons residing in the receiving State.

51. In the commentary, a sharp distinction should be drawn between the notification provided for in article 3, which was the first communication of the list of persons and was intended to give the receiving State an opportunity to react, and the notification provided for in article 8, which was designed to set in motion the machinery of privileges and immunities. If the first notification was accepted it became valid *ex nunc* and brought the privileges and immunities into effect.

52. Mr. ALBÓNICO said that his first impression had been that the notification mentioned in article 8 would constitute the performance of the duty to notify the composition of the mission, a duty which would be specified in article 3. It had since become clear that the notification covered by article 8 was different from the notification to be mentioned in article 3. Following that clarification, he had serious misgivings regarding the purpose, scope and effects of article 8 and the consequences of any failure to observe its provisions.

53. With regard to the purpose of article 8, he must point out that article 11 specified that the "functions of a special mission shall commence as soon as that mission enters into official contact with the appropriate organs of the receiving State". Article 11 also specified that the commencement of the mission's functions would not depend upon the submission of credentials; it would therefore seem to follow that those functions would commence with the notification mentioned in article 8. The members of the special mission would thus enjoy their privileges and immunities only from the date of that notification.

54. If that was to be the effect of article 8, its provisions would be at variance with those of the 1928 Havana Convention regarding Diplomatic Officers, which had been ratified by no less than fifteen Latin American States. Under article 22 of that Convention,[2] diplomatic officers enjoyed their immunities "from the moment they pass the frontier of the State where they are going to serve and make known their position". The same article specified that those immunities continued to be enjoyed

[2] Reprinted in *United Nations Legislative Series*, vol. VII, Laws and Regulations regarding Diplomatic and Consular Privileges and Immunities, New York, 1958, p. 421.

even after the mission was terminated, for the time necessary for the diplomatic officers to withdraw.

55. Thus, the Havana Convention did not require notification; diplomatic officers enjoyed the privileges and immunities specified in that Convention regardless of such notification, by the mere fact of their presence in the receiving State being made known.

56. Apart from article 11, there were a number of other provisions in the draft with which it was necessary to co-ordinate those of article 8. For example, the provisions on notification should apply when a member of the special mission was authorized to perform particular acts on behalf of the mission under paragraph 2 of article 7.

57. With regard to paragraph 2 of article 13 on the possibility of a special mission having more than one seat, it would be useful to require that the receiving State must be notified of the place where the mission would carry out its functions.

58. The scope of article 8 was thus not altogether clear and the article moreover contained no provisions concerning its effects; in particular, there was no indication of the consequences of non-observance of its provisions. The question arose whether the failure to make the notification required under article 8 would give the receiving State the right to refuse to recognize the special mission, or to extend privileges and immunities to its members.

59. Mr. BARTOŠ, Special Rapporteur, said that the purpose of article 8 was, first, to safeguard the security of the receiving State, which had the right to know what persons were coming to its territory with the special mission, and secondly, to give the persons composing the special mission the assurance that their presence was known to the receiving State and that they would accordingly receive the protection and facilities to which they were entitled.

60. It was true that, as a consequence of the discussion on article 3 at the present session, the Commission proposed to introduce a new idea into that article, namely, that of a preliminary notice stating the composition of the special mission before it was sent. In practice, however, not all the persons on the preliminary list would actually be sent to the territory of the receiving State, or would all arrive at the same time. On some occasions the head of the special mission and its highest-ranking members arrived only after some time had elapsed, during which the less important members had held preparatory negotiations. Very often, too, the sending State sent experts on various matters one after another, as the special mission took up their respective subjects. In all those cases the receiving State was entitled to know what persons had actually arrived, and it needed to know that in order to accord them the appropriate treatment.

61. Article 8, therefore, was not a repetition of what would be covered in article 3. Article 3 would require preliminary notice of the total composition of the special mission, while article 8 required notification of the actual arrival of the persons concerned. Under Mr. Ushakov's proposal, the notification prescribed in article 8, paragraph 1 (*a*), would apply only to a change in the composition of the special mission. For the reasons he had just stated, he considered it necessary that article 8 should require notification of the actual arrival of the persons named in the list communicated in the preliminary notice.

62. With regard to paragraph 2, the reply to Mr. Ushakov's comment was that, in the circumstances described, the head of the special mission acted as an organ of the State. Normally the organ of the State was the sending State's permanent diplomatic mission in the receiving State. In practice, however, special missions were in direct contact with each other. Moreover, there were special missions between States which had no diplomatic relations or which did not recognize each other; in such cases notification would be impossible if, as several Governments had suggested, it were made a condition that the notification should always be given through the diplomatic channel. The Commission should therefore think hard before deleting paragraph 2.

63. Finally, it should be remembered that article 8 instituted an arrangement which could be modified by agreement between States. In his opinion, the article could be referred to the Drafting Committee.

64. The CHAIRMAN said that the discussion had shown a general desire to invite the Drafting Committee to co-ordinate the provisions of article 8 with those of other articles, in particular articles 1, 3 and 11. He himself would add article 37, on the duration of privileges and immunities, an article which expressly referred to notification.

65. He therefore suggested that article 8 be referred to the Drafting Committee for consideration in the light of the discussion, with the particular instruction to pay close attention to problems of co-ordination with other articles of the draft.

It was so agreed.[3]

ARTICLES 9 (General rules concerning precedence) [16, paras. 1 and 3] and 10 (Precedence among special ceremonial and formal missions) [16, para. 2].

66. *Article 9* [16, paras. 1 and 3]

General rules concerning precedence

1. Except as otherwise agreed, where two or more special missions meet in order to carry out a common task, precedence among the heads of the special missions shall be determined by alphabetical order of the names of the States.

2. The precedence of the members and the staff of the special mission shall be notified to the appropriate authority of the receiving State.

67. *Article 10* [16, para. 2]

Precedence among special ceremonial and formal missions

Precedence among two or more special missions which meet on a ceremonial or formal occasion shall be governed by the protocol in force in the receiving State.

68. The CHAIRMAN invited the Commission to consider the interrelated articles 9 and 10, the Special Rapporteur's proposals for which were contained in

[3] For resumption of discussion, see 927th meeting, paras. 15-33.

paragraph 34 of the section dealing with article 9 in his fourth report (A/CN.4/194/Add.1), and in paragraph 11 of the section dealing with article 10. His additional comments on article 9 would be found in the supplements to his fourth report (A/CN.4/194/Add.3 and 5) and his additional comments on article 10 in document A/CN.4/194/Add.3.

69. Mr. BARTOŠ, Special Rapporteur, said that article 9 did not raise any very serious problems. As between special missions representing States which were by definition equal, questions of precedence should be settled by an objective criterion; the only criterion the Commission had been able to propose was that of the alphabetical order of the names of the States, and it had seen no need to go into further detail.

70. The comments of Governments related mainly to the question of the alphabetical order. The Belgian Government wished the alphabetical order to be determined in conformity with the protocol in force in the receiving State. The Government of Israel proposed that precedence should be determined by the alphabetical order of the names of the States concerned. The Yugoslav Government proposed that the alphabetical order should be the one in use in the receiving State or, failing that, the method used by the United Nations. The Austrian Government merely expressed the wish that the Commission should specify in what language the alphabetical order was to be determined. The Chilean Government proposed the alphabetical order in the language of the receiving State. Lastly, the Netherlands Government proposed that articles 9 and 10 should be combined.

71. In its earlier discussions[4] the Commission had not been able to settle the question of the alphabetical order. Some members had pointed out that the very name of certain countries varied from the protocol of one State to that of another. The matter was complicated if special missions met in a third State. It was, of course, out of the question to apply the criterion used in the Vienna Convention on Diplomatic Relations, namely, the date of the presentation of credentials.

72. He himself, in principle, favoured alphabetical order as a criterion and would prefer that it should, if possible, be the alphabetical order used by the United Nations. He did not believe, however, that the Commission need propose a rigid and uniform rule. He would leave it to the Commission to decide the matter.

73. Mr. AGO said he doubted the value of laying down, in the draft articles, a rigid rule from which practice was bound to differ. The rule would be appropriate if all missions had the same composition, but that was often not the case. For example, special missions from the States of the European Economic Community were to meet at Rome in a few days' time, on the occasion of the anniversary of the Treaty of Rome. If each of those missions were led by the Head of State, it would be possible to draw up a list of precedence in the alphabetical order of the names of the States. But it was inconceivable that a mission led by a Minister should take precedence over a mission led by a Head of State, solely because the former represented a country whose initial letter came earlier in the alphabet. He therefore thought it would be better to leave individual cases to be settled by protocol as they arose.

74. Mr. YASSEEN said that the example quoted by Mr. Ago showed how hard the problem was to solve. It was sometimes agreed that the heads of all special missions should be on an equal footing in matters other than those of protocol. For example, at the Conferences of Heads of State or Government of Non-Aligned Countries held at Belgrade and Cairo, the head of each delegation, whether Emperor or Minister, had presided in turn. Deleting article 9 would not solve the problem. He hoped the Commission would make a fresh effort to find a more reliable criterion.

75. Mr. BARTOŠ, Special Rapporteur, pointed out that article 9 dealt with special missions with full competence, whereas article 10 dealt with special missions of a ceremonial or formal character. Mr. Ago's example would be more relevant to article 10.

76. It might perhaps be desirable to combine the two articles, although article 9 was based on the sovereign equality of States as recognized in the Charter, whereas article 10 was based on international custom and tradition, which sometimes survived changes of régime.

77. In his opinion, it would be preferable to mention the criterion of alphabetical order, but without specifying any particular language or alphabet.

The meeting rose at 1 p.m.

906th MEETING

Wednesday, 24 May 1967, at 10 a.m.

Chairman: Sir Humphrey WALDOCK

Present: Mr. Albónico, Mr Bartoš, Mr. Castañeda, Mr. Castrén, Mr. Eustathiades, Mr. Ignacio-Pinto, Mr. Kearney, Mr. Ramangasoavina, Mr. Reuter, Mr. Tammes, Mr. Tsuruoka, Mr. Ushakov, Mr. Ustor, Mr. Yasseen.

Special Missions

(A/CN.4/193 and Addenda; A/CN.4/194 and Addenda)

(continued)

[Item 1 of the agenda]

ARTICLES 9 (General rules concerning precedence) [16, paras. 1 and 3] and 10 (Precedence among special ceremonial and formal missions) [16, para. 2] *(continued)*[1]

[4] See *Yearbook of the International Law Commission, 1964*, vol. I, 762nd meeting, paras. 25-63.

[1] See 905th meeting, paras. 66 and 67.

1. The CHAIRMAN invited the Commission to continue its discussion of articles 9 and 10.

2. Mr. BARTOŠ, Special Rapporteur, said that the difference between article 9 and article 10 reflected the difference in character between the two categories of special missions. For special missions with specific practical tasks, article 9 proposed a rule based on the equality of States, in other words, on the United Nations Charter, whereas for special missions of a ceremonial or formal character article 10 followed established custom in the various countries, and respected a traditional privilege of the receiving State.

3. The example given by Mr. Ago at the previous meeting[2] raised a question of the priority, not between special missions, but between the heads of special missions; that question could be settled in the draft provisions on high-level special missions if the Commission decided to prepare them.

4. He recommended that article 10 be retained on the understanding that, even if the receiving State followed certain rules of protocol that were incompatible with the sovereign equality of States, it must not exercise discrimination.

5. There was little in the way of comments by Governments on article 10. The Belgian Government found the article ambiguous and asked that it should be worded more clearly; the Greek Government concurred in that request. The Drafting Committee would certainly try to improve the article in that respect.

6. The Netherlands Government proposed that articles 9 and 10 should be combined; so did the Government of Israel, but it also proposed that there should still be two separate rules. In his opinion the second of those two proposals was the less open to objection, for the two kinds of special missions in question were quite different, as the Commission had recognized at its first examination of the draft articles.

7. Mr. USHAKOV said that matters of precedence were always very delicate and complicated. The article on precedence could cover only ceremonial occasions such as receptions and should be highly flexible.

8. Provision should perhaps be made in article 10 for the case in which a special mission was led by a head *ad interim*. Article 14 of the Vienna Convention on Diplomatic Relations dealt with that case by dividing heads of mission into three classes.

9. He suggested that, as in article 3, and for the same reasons, the expression "Except as otherwise agreed" at the beginning of article 9 be replaced by the expression "Except as specially agreed".

10. Mr. YASSEEN said that the Commission should try to find a criterion which would eliminate the delicate problems raised by articles 9 and 10. Both suggested methods—that based on the equality of special missions consequent upon the sovereign equality of States, as applied in article 9, and that based on the difference in rank between heads of missions, as applied in article 10—had much to recommend them. If the criterion adopted was the sovereign equality of States, all that was needed was to apply the rule of the alphabetical order of names of States. On the other hand, if the rank of the head of mission was taken into account, the criterion would rest on personal considerations, without prejudice to the principle of the equality of missions. The Commission should endeavour to find a single criterion in order to avoid having to make a distinction between missions of a ceremonial or formal character and other special missions, especially since formal missions might have other functions to perform and other missions might have some formal characteristics.

11. In his view, the criterion adopted in article 9 was the more suitable for general application. The arguments for the opposite view were, however, almost equally cogent. The Commission would have to make a greater effort to find a way out of the impasse.

12. Mr. REUTER said that he supported Mr. Ushakov's proposal that the expression "Except as otherwise agreed" at the beginning of article 9 should be replaced by the words "Except as specially agreed". Questions of precedence had to be settled not only as between heads of mission but also as between other persons.

13. He agreed with Mr. Yasseen that it would be better to lay down only one rule on the subject. Questions of precedence were admittedly serious and delicate, but he had the impression that the problem was really simpler than it appeared in the two articles. A rule had to be devised for cases where there was no agreement; the best plan was to follow the usage of the place where the problem arose. By that he did not mean the usage of the receiving State, for special missions might well have to meet in a third country. In other words, his suggestion was to hand the problem over to the chief of protocol of the place where the special missions met.

14. Mr. CASTRÉN said that, after studying the comments by Governments on articles 9 and 10 and the written comments by the Special Rapporteur, and after listening to the views expressed at the current session, he was coming to the conclusion that the best solution was to combine articles 9 and 10, as some Governments and several members had suggested.

15. He saw no need to devote two separate articles to questions of precedence, whether between the special missions of two or more States meeting at the same place to carry out a common task, or between the members and within the staff of a single special mission.

16. For the first case, common rules should be established governing both ordinary special missions and missions of a ceremonial or formal character. As the Netherlands Government had suggested, the best plan would be to apply the protocol in force in the receiving State, rather than the rule of the alphabetical order of names of States. He agreed with Mr. Ago and Mr. Ushakov that the rule should be flexible and adapted to the practice and usage of States. Obviously every State would find it desirable to avoid discrimination and any rules involving discourtesy.

[2] Para. 73.

17. The question of the precedence of the members and staff of a single special mission was an internal problem for the sending State, which had only to notify the receiving State, as provided by article 9, paragraph 2. In the French text of that provision, the adjective "*même*" might usefully be inserted before the word "*mission*" in order to bring out the difference from the preceding paragraph, as the Finnish Government proposed.

18. Mr. BARTOŠ, Special Rapporteur, said that he had no objection to placing both rules in the same article but considered it necessary to keep two separate rules in order to deal with cases which all the authorities concurred in describing as totally different.

19. Mr. EUSTATHIADES said that matters of precedence came within the realm of courtesy; the main requirement was flexibility, and there was no reason to uphold the principle of the sovereign equality of States at all costs. In any case that principle was subject to exceptions, according to the majority rule and in many other ways. What mattered was to obviate any possible difficulties.

20. Of the two extreme solutions that might be contemplated, both of them mechanical—that of a round table, advocated long ago by William Penn, or even a round room with as many doors as there were persons meeting, and that of alphabetical order—the former was not always feasible and the latter was too mechanical to deal with all the situations mentioned by previous speakers.

21. Like Mr. Yasseen and Mr. Castrén, he was inclined to prefer a single rule to cover all special missions, whether special missions in the ordinary sense of the term or missions of a ceremonial or formal character. What should that single rule be? He would suggest following the usage of the receiving State or of the place of meeting, if necessary in combination with alphabetical order as a residual system. It was customary for the representatives of States to defer to the decisions of the receiving State in matters of precedence, and it was in the receiving State's own interest to ensure that any friction was avoided. The rule he suggested would leave the receiving State entirely free, but if it ran into difficulties it would be able to resort to the alphabetical order method, which was one way of recognizing the sovereign equality of States.

22. A single article on precedence, applicable to both categories of special missions, might be drafted to read:

> "Except where regulated by the protocol in force or the usage prevailing in the receiving State or at the place of meeting, precedence shall be determined by the alphabetical order of the names of the States represented".

23. Mr. TSURUOKA said he agreed with Mr. Eustathiades that, generally speaking, the representatives of States accepted the customs or usage prevailing at the place where they met. They were, however, quick to notice any difference in treatment and, when they did, tried to find the explanation in precedent. There was some justification for their susceptibility, for the prestige of the State was undoubtedly involved.

24. Use of the alphabetical order did not mean that rank need be disregarded. For example, in drawing up a list of the members of two or more special missions, the normal procedure would be to list the States in alphabetical order, but if the heads of the special missions were invited to an official dinner they would be seated by rank, and the alphabetical order would apply only between persons of the same rank. An order of precedence based on rank did not mean discarding the principle of sovereign equality of States, but it applied that principle only where the persons concerned were of equal rank.

25. In view of those considerations, articles 9 and 10 were not ill-conceived. However, as several speakers had already suggested, it would be well to specify that the receiving State was entitled to apply the rules of its own protocol. The articles would then have very broad connotations since they would reinforce custom.

26. In order to ensure that custom did not diverge too far from the principle of the sovereign equality of States, the Commission should try to correlate the set of rules proposed on precedence, either in two paragraphs of a single article or in two separate articles.

27. Mr. CASTAÑEDA said he agreed with those speakers who favoured the retention of articles 9 and 10.

28. It would not assist the receiving State if protocol problems were left to be decided in accordance with that State's usages. In practice, most of the difficulties arose precisely because a foreign mission disagreed with the local usage. The Commission could be of assistance to the receiving State by laying down some general rule to which the receiving State could refer in case of divergence of views.

29. With regard to the choice of the most suitable rule, it seemed to him that the only possible solution was to adopt the system of the alphabetical order, in the language of the receiving State.

30. Mr. BARTOŠ, Special Rapporteur, said that to adopt the proposals put forward by some members of the Commission would turn the United Nations system of law upside down.

31. The rule of the sovereign equality of States, laid down in Article 2 (1) of the Charter, was a precious and fundamental rule. When the voting order of Member States had been under discussion during the preparation of the rules of procedure of the General Assembly, there had been criticism of the system used at the Paris Peace Conference in 1946, when the great Powers had come first and then the other States in alphabetical order. The General Assembly had therefore decided to adopt the alphabetical order system. States were called on sometimes in English alphabetical order and sometimes in French alphabetical order, depending on who was in the chair at each meeting, but it had finally been decided to use the English alphabetical order. Since then United Nations organs had always observed that rule, which was a protest against the inequality of States and which avoided the difficulties of making a choice between alphabetical orders.

32. It had been said that precedence was a matter of protocol. In his view it involved the equality and dignity of States. The receiving State could not impose a protocol

incompatible with the principles of international law; indeed, it had to bring its own protocol into line with the new principles which had become part of positive international law. The Commission could not leave it to the receiving State to make whatever rules it thought fit. The Commission had not only to codify international law but also to encourage its progressive development, in accordance with Article 13 (1) *a* of the Charter.

33. Articles 9 and 10 could not alter the fundamental rules of international law. That was why he was proposing a general rule for working special missions in article 9, and a special rule for ceremonial and formal missions in article 10. The second category of special missions was in practice subject to rules which varied from one receiving State to another. For example, at some ceremonies in Latin American countries, such as the inauguration of a new President, the ambassadors extraordinary sent for the occasion were required to present full powers and the order of precedence was the order in which they did so. At the Court of St. James's the protocol in force, last revised in 1905, gave Heads of State related by blood to the reigning Sovereign precedence over other Heads of State. In some countries ambassadors extraordinary took precedence over permanent ambassadors. The Commission could allow for such special arrangements in the case of ceremonial and formal special missions without violating international law.

34. If the Commission decided to prepare draft provisions concerning high-level special missions, it would be able to extend to those missions the rule that precedence should be governed by the protocol of the receiving State.

35. The CHAIRMAN, summing up the discussion, said that some members had indicated a preference for a single rule but the Special Rapporteur had strongly opposed that approach and had urged the need for two different rules to deal with the different types of case. For ordinary working purposes, the Special Rapporteur advocated the rule based on the equality of States.

36. There were perhaps three kinds of cases: first, the ordinary special mission; secondly, the special mission sent for ordinary business but with high-ranking persons among its members; thirdly, the special mission for ceremonial occasions.

37. He did not believe that, at the present stage, voting would solve the difficulties that had arisen; articles 9 and and 10 should therefore be referred to the Drafting Committee in general terms.

38. A general desire had been expressed in the Commission to ensure sufficient flexibility to take account of the practice in the matter and the Drafting Committee would no doubt take that desire into account.

39. He accordingly suggested that articles 9 and 10 be referred to the Drafting Committee, which would consider not only the questions of drafting but also the aspects of substance which had been raised during the discussion and prepare a new text or texts for submission to the Commission.

It was so agreed.[3]

[3] For resumption of the discussion of article 9, see 927th meeting, paras. 34-43. Article 10 was deleted (*ibid.*, para. 44).

ARTICLE 11 (Commencement of the functions of a special mission) [13]

40. *Article 11* [13]

Commencement of the functions of a special mission

The functions of a special mission shall commence as soon as that mission enters into official contact with the appropriate organs of the receiving State. The commencement of its functions shall not depend upon presentation by the regular diplomatic mission or upon the submission of letters of credence or full powers.

41. The CHAIRMAN invited the Commission to consider article 11, the Special Rapporteur's proposals for which were contained in paragraph 21 of the section of his fourth report (A/CN.4/194/Add.1) dealing with that article and in his additional comments on article 11 in the supplements to his fourth report (A/CN.4/194/Add.3 and 5).

42. Mr. BARTOŠ, Special Rapporteur, said that the purpose of article 11 was to specify the time at which the functions of a special mission commenced; the essence of the article was that its functions commenced "as soon as that mission enters into official contact".

43. In paragraph (12) of its commentary to that article, the Commission had requested Governments to advise it whether the article should include a rule on non-discrimination in the reception and commencement of the functions of special missions of the same character. The Government of the Upper Volta alone had advocated the inclusion of such a provision in article 11.

44. Most of the Governments which had given their views on that point—those of Malta, the Netherlands, the United Kingdom and the United States—had replied in the negative. Their main argument was that the nature of special missions varied very widely and that it was consequently difficult to establish absolute equality of treatment. They also argued that it was difficult to define precisely what constituted discrimination: for example, whether a warmer or cooler reception fell into that category. His own view was that the article should not be amended in that respect.

45. The Belgian Government proposed a new wording (A/CN.4/188) which seemed to differ only in form from that adopted by the Commission. The proposal might be examined by the Drafting Committee. He himself believed that it would be better not to mention in the article the special case of ceremonial and formal special missions.

46. Mr. TAMMES said that, in paragraph 15 of his written observations (A/CN.4/194/Add.1), the Special Rapporteur had drawn a clear distinction, from the legal point of view, between the commencement of the privileges and immunities of the mission, covered by article 37, and the commencement of the functions of the mission, covered by article 11.

47. In view of that distinction, the Special Rapporteur should explain what was the independent legal significance of the commencement of functions, apart from the commencement of privileges and immunities. If there were no such independent significance, there would be no need for the first sentence of article 11, which could consequently be limited to a statement that the commence-

ment of the functions of the special mission would not depend upon its presentation or the submission of credentials.

48. He agreed with the comment made by certain Governments that the prohibition of discrimination should not be linked with the commencement of functions but should be extended to the whole duration of the mission.

49. Mr. BARTOŠ, Special Rapporteur, said in reply that the question at what moment a person began to enjoy privileges and immunities was settled in draft article 37, corresponding to article 39 of the Vienna Convention on Diplomatic Relations. As a general rule, it was the moment when the person entered the territory of the receiving State.

50. Admission to the territory of the receiving State was one thing and commencement of functions was another. The head of a diplomatic mission commenced his functions when he presented his letters of credence. The moment when a special mission commenced its functions had yet to be determined; article 11 proposed a rule on the subject. The important point was to draw a clear distinction between the two moments. In practice several days might elapse between the arrival of the persons concerned in the territory and the commencement of the functions of the special mission. A person who had been admitted to the territory but who had not yet commenced his functions enjoyed his privileges and immunities and was not just an ordinary alien. It sometimes happened that a special mission's work was postponed and the persons concerned returned to their country without the special mission's ever having commenced its functions; in that case, they enjoyed their privileges and immunities for the duration of their stay.

51. If the Commission agreed with Mr. Tammes that the commencement of the functions of a special mission depended, not upon its presentation by the permanent diplomatic mission or upon the submission of full powers, but only upon entry into official contact, article 11 could be rearranged along those lines. He would have no objection; indeed, such a change would have the advantage of simplifying the article.

52. Mr. USTOR said that he shared the view that non-discrimination was not closely connected with the commencement of the mission's functions but raised a broader problem; in fact, it was more closely connected with precedence. He noted, however, that there appeared to be no provision in the draft articles corresponding to article 18 of the 1961 Vienna Convention on Diplomatic Relations, which read: "The procedure to be observed in each State for the reception of heads of mission shall be uniform in respect of each class".

53. In the absence of credentials or of a solemn reception in the case of special missions, there was no place for a similar article in the present draft, but he suggested that the idea underlying article 18 of the 1961 Vienna Convention should be incorporated into the text of articles 9 and 10 which the Drafting Committee was to prepare. That underlying idea of non-discrimination, based on the principle of the equality of States, would thus be taken into account with regard to protocol problems as well.

54. Mr. USHAKOV asked the Special Rapporteur whether the second sentence in article 11 was really necessary. It looked more like a commentary to the first sentence than a rule.

55. Mr. BARTOŠ, Special Rapporteur, in reply to Mr. Ustor, said that the question of a general rule on non-discrimination would be discussed in connexion with draft article 40 *bis*; in any case it seemed to him unnecessary to repeat that rule in every article.

56. Replying to Mr. Ushakov, he said that the second sentence was necessary because some States required special missions to be presented by the permanent diplomatic mission and to submit letters of credence or full powers. That requirement might cause difficulties, and it was precisely to avert them that the second sentence had been included.

57. Mr. USTOR pointed out that although there was a general provision on non-discrimination in article 47 of the Vienna Convention on Diplomatic Relations, its article 18 nevertheless contained a specific reference to the obligation to accord uniform treatment to heads of mission.

58. Mr. EUSTATHIADES said that Mr. Tammes had been right to draw the Commission's attention to the distinction between the commencement of the mission's functions and the commencement of the régime of privileges and immunities. The Special Rapporteur himself had stated in his reply to the new suggestions by Governments (A/CN.4/194/Add.1) that "the commencement of the special mission's privileges and immunities should not be confused with the commencement of its functioning".

59. A provision determining the commencement of a special mission's functions would clearly be useful, but there was no need to link it to article 37. Various arguments could be advanced in support of such a provision, but one of them stood out: Article "X" (A/CN.4/194/Add.2) provided that "The provisions contained in these articles shall be compulsory for the States that have acceded to them, unless the provisions contained in particular articles provide expressly that they may be modified by the States concerned in their reciprocal relations by mutual agreement", while article "Y" provided that "The provisions of the present articles shall not affect other international agreements in force as between States parties to those agreements".

60. Exceptions to the régime of special missions were therefore possible either because there were other international agreements in force or because the States concerned had agreed bilaterally that the settlement of certain questions should depend on the date of the commencement of the mission's functions. A third possibility was the adoption—independently of any international agreements—of domestic regulations taking the commencement of a special mission's functions as a basis.

61. In his opinion, therefore, the Commission should decide to retain an article 11, independent of article 37.

62. Mr. BARTOŠ, Special Rapporteur, said that he was in favour of retaining article 11 as it stood. He saw no

need to add a non-discrimination clause; there was one already in article 40 *bis*.

63. Mr. Ushakov, who had commented on the second sentence in article 11, could rest assured that there was a genuine need for that provision. The Commission, in its codification work, should bear in mind that the convention would be applied not only by Ministries of Foreign Affairs but also by administrative organs and executive agents at a lower level, and it should make matters easier for them by drafting provisions which were as clear and as full as possible.

64. Mr. CASTRÉN said that the first sentence of the article was perfectly clear; it might perhaps be appropriate to place the second sentence in the commentary. He would, however, accept the decision of the majority.

65. Mr. BARTOŠ, Special Rapporteur, said that the Commission could combine the two sentences into one if it preferred.

66. The CHAIRMAN said there seemed to be general agreement on the need to include article 11, which had some similarity to article 13 of the Vienna Convention. It dealt with the functions of the special mission as such and not with the functions of individual members. It would not be appropriate to deal with the question of uniform reception in articles 9 and 10, and a provision on the lines of article 18 of the Vienna Convention might be considered.

67. Speaking as a member of the Commission, he said that the second sentence of article 11 seemed unduly rigid and perhaps the Drafting Committee should be asked to examine ways of introducing greater flexibility.

68. He suggested that article 11 be referred to the Drafting Committee for redrafting in the light of the discussion.

It was so agreed.[4]

ARTICLE 12 (End of the functions of a special mission) [20, para. 1]

69. *Article 12* [20, para. 1]

End of the functions of a special mission

The functions of a special mission shall come to an end, *inter alia*, upon:

(*a*) The expiry of the duration assigned for the special mission;

(*b*) The completion of the task of the special mission;

(*c*) Notification of the recall of the special mission by the sending State;

(*d*) Notification by the receiving State that it considers the mission terminated.

70. The CHAIRMAN invited the Commission to consider article 12, the Special Rapporteur's proposals for which were contained in paragraph 11 of the section on that article in his fourth report (A/CN.4/194/Add.1) and in his additional comments on article 12 in document A/CN.4/194/Add.3.

71. Mr. BARTOŠ, Special Rapporteur, said that the significance of the words "*inter alia*" in the first line of the article was that the Commission had not wished to exclude other situations regarded by the States concerned as terminating the functions of a special mission.

72. The Belgian Government had proposed that, in the French text, the word "*rappel*" should be used rather than the word "*révocation*"; he thought the Drafting Committee would be able to decide that point after hearing Mr. Reuter's opinion.

73. The Belgian Government had also proposed the inclusion in article 12 of the provision in article 44, paragraph 2, which read: "The severance of diplomatic relations between the sending State and the receiving State shall not automatically have the effect of terminating special missions existing at the time of the severance of relations, but each of the two States may terminate the special mission". He was not in favour of that proposal, since it was for the States themselves to consider whether the functions of the special mission were terminated or not, and article 44, paragraph 2, specified that the functions of a special mission were not automatically terminated by the severance of diplomatic relations. The Belgian Government's comment might be reflected in the commentary, but not in the text of the article.

74. The Government of the Upper Volta had reintroduced a proposal submitted in 1960 by Mr. Sandström, the Commission's Special Rapporteur,[5] and referred to in paragraph (4) of the commentary to article 12 of the present draft. The Commission had already considered the effects of an interruption of negotiations between the special mission and the local authorities, and had concluded that such an interruption did not automatically terminate the functions of the special mission unless the mission was recalled by the sending State, or the receiving State gave notice that it considered the mission terminated. In his opinion, the Commission should not cite in article 12 any other case of the termination of a special mission's functions beyond the cases already enumerated there.

75. The CHAIRMAN said that, as far as the English text was concerned, the word "recall" was the right one and he supposed that it should be translated by the word "*rappel*".

76. Mr. REUTER said that, in the legal terminology of French-speaking countries and countries using the French system of law, the word "*révocation*" meant a disciplinary measure against a civil servant. Like the Belgian Government he would prefer the word "*rappel*" to be used.

77. He was somewhat perplexed by the juxtaposition of substantive causes for the termination of functions, in sub-paragraphs (*a*) and (*b*) of the article, and the formal causes stated in sub-paragraphs (*c*) and (*d*). Whereas the expiry of the duration assigned for the special mission would come about so to speak mechanically, the completion of the task of the special mission required some notification procedure because it was a matter for the judgement of the States concerned to decide whether a task had been completed. As he saw it, the real causes should be set out first, and the problems of the end and com-

[4] For resumption of discussion, see 927th meeting, paras. 45-55.

[5] *Yearbook of the International Law Commission, 1960*, vol. II, p. 113, article 15 (*a*).

mencement of the functions of a special mission should be dealt with side by side.

78. He questioned whether the existence of a special mission always presupposed the existence of a receiving State. Negotiations between two special missions could conceivably be held on the territory of a third State; that had been the case in some of the negotiations which had led to the Evian Agreements between France and Algeria.

79. Mr. EUSTATHIADES, referring to the Belgian Government's comments,[6] said the Special Rapporteur had suggested that article 44, paragraph 2, might be mentioned in the commentary to article 12. That did not seem a wholly satisfactory solution, since although article 44 was concerned with the duration of the facilities, privileges and immunities granted to the special mission, its paragraph 2 provided a means of terminating the functions of the special mission without stipulating that the severance of diplomatic relations automatically ended those functions.

80. Another important feature of paragraph 2 was that each of the two States might terminate the special mission if diplomatic relations were severed. That provision therefore affected the substance of article 12, and he would be inclined to recommend that the Commission add another sub-paragraph to article 12, which might read: "Notification by the sending State or the receiving State in the event of severance of diplomatic relations; such severance shall not necessarily involve the termination of the functions of the special mission."

81. Mr. USHAKOV said that he would rather that another sub-paragraph were added providing that a special mission might be terminated by agreement between the States concerned.

82. Mr. RAMANGASOAVINA said that sub-paragraphs (*a*) and (*b*) dealt with cases in which the mission's functions came to an end under normal conditions, whereas in the cases dealt with in sub-paragraphs (*c*) and (*d*) its functions ended before the expected duration had expired.

83. In sub-paragraph (*a*), the Commission should have specified that the expiry of the duration was not a peremptory time-limit, and should have made allowance for an extension. In the interests of consistency, the Commission might redraft sub-paragraph (*c*) on the lines of sub-paragraph (*d*): "Notification by the sending State that it is terminating the functions of the special mission". Moreover that wording would have the advantage of avoiding the use of the word "*révocation*" to which the Belgian Government and Mr. Reuter objected.

84. Mr. BARTOŠ, Special Rapporteur, said that, in enumerating the cases in which the functions of a special mission came to an end, the Commission might begin with agreement between the parties, as suggested by Mr. Ushakov. The sub-paragraph concerning the expiry of the duration would come next.

85. With regard to the task, he had some doubts after hearing Mr. Reuter. However, he thought it would be a difficult matter to determine whether the task had been completed or not; perhaps the article should require a finding by one or both of the parties that the task had been completed.

86. He proposed that sub-paragraphs (*c*) and (*d*) be combined in a single sub-paragraph in terms similar to those suggested by Mr. Ramangasoavina: "Notification by the sending State or by the receiving State that it considers the mission terminated".

87. With regard to article 44, paragraph 2, which the Belgian Government proposed for inclusion in article 12, it should be remembered that the end of the functions of a special mission entailed some notification; article 44, paragraph 2, dealt solely with a possible reason for the termination of the special mission's functions.

88. Mr. Reuter had commented that special missions might negotiate in the territory of a third State; in that event, the third State played the part and assumed the obligations of the receiving State. The Commission might, however, take Mr. Reuter's comments into account in article 16, entitled "Activities of special missions in the territory of a third State".

89. Mr. ALBÓNICO said that cases provided for in articles 5 and 5 *bis* were not covered in article 12. Sub-paragraphs (*a*) and (*b*) should be retained and a new sub-paragraph (*c*) inserted to deal with instances of termination by agreement between all the States concerned.

90. The present sub-paragraphs (*c*) and (*d*) which dealt with the same legal situation, and in which the whole stress was on notification, should be combined into one.

91. Mr. BARTOŠ, Special Rapporteur, said his first suggestion had been that article 12 should mention agreement between the parties, without specifying the number of parties. His second suggestion had been that sub-paragraphs (*c*) and (*d*) should be combined in a single sub-paragraph.

92. The CHAIRMAN suggested that article 12 be referred to the Drafting Committee. The problems it raised were mainly of a drafting character. Mr. Ramangasoavina's suggestion would simplify the drafting and it would also take account of article 44, paragraph 2.

It was so agreed.[7]

The meeting rose at 1.5 p.m.

[6] See above, para. 73.

[7] For resumption of discussion, see 929th meeting, paras. 1-20.

907th MEETING

Thursday, 25 May 1967, at 10 a.m.

Chairman: Sir Humphrey WALDOCK

Present: Mr. Ago, Mr. Albónico, Mr. Bartoš, Mr. Castañeda, Mr. Castrén, Mr. Eustathiades, Mr. Ignacio-Pinto, Mr. Jiménez de Aréchaga, Mr. Kearney, Mr.

Ramangasoavina, Mr. Reuter, Mr. Tammes, Mr. Tsuruoka, Mr. Ushakov, Mr. Ustor, Mr. Yasseen.

Special Missions

(A/CN.4/193 and Addenda; A/CN.4/194 and Addenda)

(continued)

[Item 1 of the agenda]

ARTICLE 13 (Seat of the special mission) [17]

1. *Article 13* [17]

Seat of the special mission

1. In the absence of prior agreement, a special mission shall have its seat at the place proposed by the receiving State and approved by the sending State.

2. If the special mission's tasks involve travel or are performed by different sections or groups, the special mission may have more than one seat.

2. The CHAIRMAN invited the Commission to consider article 13, the Special Rapporteur's proposals for which were contained in paragraph 13 of the section of his fourth report (A/CN.4/194/Add.1) dealing with that article and in his additional comments on article 13 in document A/CN.4/194/Add.3.

3. Mr. BARTOŠ, Special Rapporteur, said that special missions were often called upon to travel. They might therefore have more than one seat; thus the United States special mission which had gone to Yugoslavia to look for the graves of American soldiers had had both a central seat at Belgrade and regional seats as well. Similarly the special mission which had gone to Skoplje after the earthquake had had field seats and a central seat.

4. Several Governments had submitted comments. The Belgian Government had said that the need for the proviso "In the absence of prior agreement" was not readily apparent because "in any case the procedure contemplated consists of a proposal followed by its approval". In his own view, a receiving State might be unwilling to receive a foreign special mission in a certain locality in its territory, not for political reasons, but simply because it would have difficulty in providing the mission with suitable quarters there. As the Belgian Government noted, in practice the seat of a special mission was always determined by mutual consent; but that consent might be given either in advance or later on. In its draft of article 13, paragraph 1, the Commission had wished to cover both possibilities.

5. The Government of Israel had suggested that the words "In the absence of prior agreement" be replaced by the expression "Except as otherwise agreed". The wording proposed by the Government of Israel was doubtless more elegant, though, in his opinion, the wording used in article 13 was the right one. The Commission could leave the question to be settled by the Drafting Committee.

6. The Government of the Upper Volta had expressed the opinion that "the receiving State is competent to choose the seat of the mission, without the participation of the sending State". According to that Government, it was not always possible to secure equality of choice between the two States and, where it was not, priority should be given to the receiving State.

7. The Netherlands Government commented that it was not at all customary for the receiving State to make or await suggestions on the location of a special mission's seat, particularly when the special mission had duties primarily of a political nature that could be discharged within a relatively short period, and it was usual for that kind of special mission to be housed by the permanent mission of the sending State. It observed that, even in countries where the movement of foreign diplomats was restricted, "the receiving State need not necessarily interfere in matters concerning the location of the seat, provided a locality is chosen near that of the Government". It proposed that article 13, paragraph 1, be amended to read:

> "In the absence of prior agreement, a special mission shall have its seat at the place chosen by the sending State, provided the receiving State does not object."

8. In his opinion the question of the seat was extremely important, for a special mission must have a seat at which to receive communications addressed to it by the receiving State. In some countries a special mission could have an official seat and a private seat, but that was a detail which the Commission could well ignore.

9. The United States Government had suggested that article 13 be deleted because "the fact that a special mission is of a temporary character runs counter to its having a seat". In his opinion that solution was too drastic and was inconsistent with usage.

10. The Chilean Government had suggested the addition of a provision to the effect that, if a mission's tasks involved travel, "one of the seats should be considered the principal seat". He saw no objection to the adoption of that suggestion.

11. The question of the special mission's seat was of no great importance in theory but it was in practice because, while some Powers could house special missions in their embassy premises, not all States were in a position to do so.

12. Mr. YASSEEN said that article 13 was necessary and he was opposed to its deletion. The problem of the special mission's seat could arise in practice, and the Commission should try to find a satisfactory solution. It should make provision not merely for the principal seat but also for such secondary seats as a special mission might sometimes need, depending on the nature of its task.

13. With regard to the wording of the articles he was prepared to accept the text as submitted to the Commission, for agreement, whether express or tacit, between the two parties remained the basic principle. However, he preferred the wording suggested by the Netherlands Government; it upheld the basic principle but was more in accordance with the rules of hospitality. The least the receiving State could offer the sending State was a free choice of the locality best suited to it, and it should be

understood that the receiving State could object to that choice only for good and sufficient reasons.

14. Mr. TAMMES said that article 13 was a typical example of the tendency in the draft to go into too much detail and to seek to instruct governments about all possible contingencies. The present article sought to indicate how governments should select the seat of a special mission in the absence of prior agreement, with the receiving State making the first move; that, according to one Government, was consistent with the principle of sovereignty. It had also been argued that the requirement that the sending State must accept the place chosen by the receiving State would conflict with the principle of the Charter concerning the sovereign equality of States.

15. He would have thought it preferable to delete the article altogether and leave it to governments to agree on the seat of the special mission, in accordance with the practical requirements of each particular case.

16. Mr. KEARNEY said that article 13 was not of great importance and should be deleted, for the reasons given by Mr. Tammes. He had been surprised that the Special Rapporteur should regard the United States proposal to drop the article as radical. What was radical was to try to impose upon States the requirement that they should choose a seat; in his opinion, there was no legal justification for doing that. The article as at present drafted had no legal effects and imposed no rights or duties. The only reasons for making it mandatory would be either political or practical, but he supposed that if there were political considerations Ministries of Foreign Affairs would not overlook them.

17. Paragraph 2 was unnecessarily rigid and the article as a whole would not make the draft more acceptable to States.

18. Mr. BARTOŠ, Special Rapporteur, said that, although a special mission was a temporary mission, that did not necessarily mean that it would last only a few days; it might last for a year or more, just as it might be composed of a single delegate or of more than a hundred people. The latter case had arisen several times with special missions sent by great Powers. In such cases the question of the choice of seat was obviously not a matter of indifference to the government of the receiving State, and might even give rise to serious political disputes. It would be wrong, therefore, to underrate the importance of the problem.

19. The Commission had to strike a balance between the interests of the sending State and those of the receiving State with regard to the choice of the seat of the special mission. If a special mission filled up all the hotels and many of the villas in a holiday resort during the tourist season, that was bound to do some harm to the interests of the receiving State.

20. Mr. CASTRÉN said that he was in favour of retaining article 13; the requirement that there should be an agreement between the two parties was no encroachment on the sovereignty of States.

21. He was also in favour of deleting, as proposed by the Belgian and Chilean Governments, the opening words of the article, "In the absence of prior agreement", since the rest of the provision made them redundant. There was only one possibility involved, not two as the Special Rapporteur claimed, for the receiving State's proposal on the choice of the seat could just as well be presented, and the sending State's consent given, before the mission began to function as afterwards.

22. With regard to paragraph 2 he was ready, for practical reasons, to accept the Chilean Government's proposal for the addition of a provision to the effect that one of the seats, when there were two or more, should be considered the principal seat, and should be chosen as provided in paragraph 1.

23. Mr. AGO said that he did not underrate the importance of article 13 but hoped the Commission would not spend too much time on it.

24. All that paragraph 1 as at present worded amounted to was that, in the absence of prior agreement, the seat was chosen by subsequent agreement. The wording suggested by the Netherlands Government, though perhaps more elegant, merely reversed the statement, and presumed agreement if the receiving State did not object. In any case no rule of law was involved. Paragraph 2 merely recorded a fact, and did not lay down any principle.

25. He had no preference, therefore, as to whether the Commission kept or dropped article 13. If it decided to keep it, it ought perhaps to allow for a situation in which a special mission sent to two or more States had its seat, not only in one of the receiving States, but also in the others. It would seem enough merely to mention that possibility in the commentary.

26. Mr. USHAKOV said it was not clear whether the word "seat" was to be understood to mean the premises at which the members of the special mission stayed or the offices in which the special mission carried out its work. If it meant the offices, it was for the sending State to decide whether particular premises were or were not suitable for the performance of the special mission's task. If it was to be left to the sending State to choose the locality in which the special mission would have its seat, as the Netherlands Government proposed, that locality should be the one best suited to the performance of the special mission's task.

27. In the absence of prior agreement, it was for the receiving State to propose a locality, and the choice of that locality was always open to negotiation with the sending State. Since the receiving State exercised its sovereignty throughout its territory, he proposed that the words "and approved by the sending State" should be deleted from paragraph 1. In the same paragraph, the words "shall have its seat" should be replaced by the words "shall be installed".

28. Mr. ALBÓNICO said that the Special Rapporteur had ascribed too much importance to article 13. The main thing was to ensure that there was no encroachment on the sovereign rights of the receiving State and to prevent the sending State from setting up permanent administrative centres without the agreement of that State. Personally he considered that the article should be deleted.

29. Mr. EUSTATHIADES said that the choice of the seat had been a difficult problem throughout the history of international conferences, so much so that a conference had sometimes been cancelled for lack of agreement on a meeting-place. The problem now, however, was the choice, not of a State, but of a locality within a State.

30. There were two ways of approaching that problem: the one proposed in the Special Rapporteur's text, and the one proposed by the Netherlands Government. State sovereignty was not at issue in either case, for there was an agreement. The amendment suggested by the Netherlands Government would give the sending State the right to propose the seat and the receiving State the right to object; that was the opposite of what the Special Rapporteur proposed in his text, so that it could not be called a mere drafting amendment.

31. To reconcile the two points of view he would suggest some such wording as: "The special mission shall have its seat at the place fixed by agreement between the sending State and the receiving State on the proposal of either of them". In practice the initiative in proposing the seat should preferably be left to the sending State and the receiving State would be entitled to object; alternatively, it could be left to the receiving State, which was familiar with local conditions, to take the initiative in proposing the seat and the sending State would be entitled to reject that choice if it thought fit.

32. It would be a mistake, therefore, to delete the article: it provided that agreement was necessary since either of the two States could object to the other's proposal. If, however, members of the Commission were not convinced of the need for a provision on the seat of the special mission, he would suggest that the article begin with the words:

"Where a seat is provided for the special mission, it shall be fixed by agreement...".

33. At all events the Drafting Committee had all the material it needed to devise a wording to satisfy everyone.

34. Mr. YASSEEN, referring to Mr. Ago's remarks, said that the rule of law in article 13 was that the choice of the seat must be subject to express or tacit agreement. Mr. Ushakov, on the other hand, held that, in the last resort, the receiving State must be given the right to determine the seat. A choice had to be made between those two conflicting solutions.

35. He himself supported the principle that the choice of the seat should be determined by agreement between the two States, for the sending State could hardly be forced to accept a place which did not suit it, and conversely the special mission's seat could not be determined against the will of the receiving State.

36. Mr. REUTER said that throughout the draft the Commission's first consideration should be the interests of the receiving State, for it was in that State's territory that the special mission performed its functions.

37. The Commission might state it as a presumption that, if the States concerned had not determined the special mission's seat by agreement, the seat was at the place where the special mission was to meet the representatives of the receiving State for the first time. That presumption could, of course, be modified by the conclusion of a subsequent agreement concerning the seat of the special mission.

38. Mr. BARTOŠ, Special Rapporteur, speaking as a member of the Commission, said that the question of the seat of the special mission—meaning its offices and not merely the premises at which it stayed— had given rise to too many difficulties and disputes in the past for the Commission to overlook it. In his first report on special missions[1] he had proposed the presumption that the special mission had its seat in the city where the Ministry of Foreign Affairs of the receiving State was situated. Only if the parties succeeded in reaching an agreement to establish the seat of the mission elsewhere would that presumption cease to be the rule.

39. Without some such rule, extremely serious situations could arise. To give one instance, a special mission had gone to a certain place on the instructions of the sending State; that choice had not suited the receiving State, and it had been on the point of interning the members of the special mission.

40. The Commission should take care not to sacrifice the sovereignty of the sending State to that of the receiving State. As Special Rapporteur he deferred to the Commission's wishes, but if any text subordinating the sending State to the receiving State were put to the vote, he would vote against it.

41. Mr. USHAKOV said that he was in favour of prior agreement on the choice of the special mission's seat, but if the receiving State successively proposed various localities to the sending State and the latter rejected them one after another, the result would be an impasse. He therefore maintained his proposal for the deletion of the words "and approved by the sending State".

42. Mr. AGO said that, if the Commission accepted the suggestions made by Mr. Yasseen or Mr. Eustathiades, article 13 could be said to lay down a rule; that would not be the case if the Commission decided to make no change in the wording of paragraph 1. It was of no consequence which State proposed and which State accepted. Alternatively, the Commission might perhaps accept the presumption that, in the absence of agreement to the contrary, the special mission's seat was situated in the capital of the receiving State.

43. Mr. CASTRÉN said he supported the wording suggested by Mr. Eustathiades.

44. Mr. BARTOŠ, Special Rapporteur, said that he too supported that suggestion but would prefer the Commission to maintain the presumption that the special mission had its seat at the place where the Ministry of Foreign Affairs was situated.

45. The CHAIRMAN said that, although three members were in favour of deleting the article, the general view seemed to be in favour of considering a revised text. Some

[1] *Yearbook of the International Law Commission, 1964*, vol. II, p. 101.

support had been expressed for the Netherlands proposal, but on the whole members seemed to favour a simple and flexible rule that required the agreement of the parties on the lines of the proposal made by Mr. Eustathiades.

46. Speaking as a member of the Commission, he said that he shared the view of the majority and considered that the agreement between the parties would often be tacit. It was undesirable to lay too much emphasis on the question which party should make the initial proposal about the seat of the special mission.

47. There was no parallel provision in the Vienna Convention on Diplomatic Relations. But an analogous provision did appear in article 4, paragraph 2, of the Convention on Consular Relations, and it should be noted that there the choice of the seat lay with the sending State. However, a special mission was not the same as a permanent mission or a consulate, and the Commission should consider itself free to frame the rule in the most appropriate manner.

48. There was some doubt in the Commission as to whether there was any need for the kind of detailed provision put forward in paragraph 2, and the Drafting Committee might consider whether it should be either omitted or modified on the lines suggested by Mr. Ago.

49. He suggested that article 13 be referred to the Drafting Committee for reconsideration in the light of the discussion.

It was so agreed.[2]

ARTICLE 14 (Nationality of the head and the members of the special mission and of members of its staff) [10]

50. *Article 14* [10]

Nationality of the head and the members of the special mission and of members of its staff

1. The head and members of a special mission and the members of its staff should in principle be of the nationality of the sending State.

2. Nationals of the receiving State may not be appointed to a special mission except with consent of that State, which may be withdrawn at any time.

3. The receiving State may reserve the right provided for in paragraph 2 with regard to the nationals of a third State who are not also nationals of the sending State.

51. The CHAIRMAN invited the Commission to consider article 14, the Special Rapporteur's proposals for which were contained in paragraph 14 of the section on that article in his fourth report (A/CN.4/194/Add.1) and in his additional comments on article 14 in documents A/CN.4/194/Add.3 and 5.

52. Mr. BARTOŠ (Special Rapporteur) said that both the substance and the form of the three paragraphs of article 14 closely paralleled those of the three paragraphs of article 8 of the Vienna Convention on Diplomatic Relations.

53. The Swedish Government considered the expression "in principle" in paragraph 1 too vague. The position was that paragraph 1 stated the general rule and exceptions to it were provided for in paragraphs 2 and 3; moreover, the expression "in principle" was borrowed from article 8, paragraph 1, of the Vienna Convention. The Swedish Government had also suggested the deletion of paragraph 3.

54. The Chilean Government had suggested even more radical amendments (A/CN.4/193/Add.1), and would like paragraph 1 to be so worded that persons composing special missions could be of any nationality. That amendment was submitted as one of form, but in his opinion it went to the substance.

55. The Chilean Government said that, if the proposed wording were adopted, article 36 should be brought into line with it, and that if it were not adopted, the present wording of paragraph 1 would lay down a rule far more rigid than that in the Vienna Convention, in which the nationality restriction only applied to diplomatic staff. The Chilean Government therefore suggested that, if its first proposal were not adopted, the word "diplomatic" should be inserted before the word "staff" in paragraph 1. He was inclined to accept that suggestion; thus amended, the rule on special missions would be no stricter than the rule on permanent diplomatic missions.

56. Apart from that, he was not in favour of amending article 14, since the present tendency was for States to be represented by their own nationals. Some States, however, particularly new ones, were occasionally obliged to employ nationals of other countries to represent them. Furthermore, some Latin American States looked to the country of residence rather than to that of nationality. It was therefore only natural to allow derogations from the general rule if the receiving State did not object.

57. Mr. AGO said he agreed with the Special Rapporteur. It was important to preserve some symmetry between the draft and the Vienna Convention, in particular to retain the words "in principle".

58. For reasons which had been given on many occasions, he would like to see the reference to the head of the special mission in paragraph 1 deleted. And rather than limit the rule in paragraph 1 to diplomatic staff, as the Chilean Government was proposing, he would also delete the reference to the members of the staff of the special mission, since diplomats would generally be members of the special mission rather than of its staff. If paragraph 1 simply specified "the members of a special mission", the rule would be a little less rigid than the provisions on diplomatic missions, which would be an advantage.

59. Mr. YASSEEN said that paragraph 1 was usefu[1] for the same reason that the corresponding provision in the Vienna Convention on Diplomatic Relations was useful. Because of the essentially temporary nature of special missions and the generally less important functions of the members of their staffs, he supported Mr. Ago's proposal to delete the reference to staff in paragraph 1.

60. Subject to that minor reservation, he saw no difficulty in accepting an article based on recognized principles, which confined itself to restating the necessary provisions without going into extraneous matters such as conflicts of nationality.

[2] For resumption of discussion, see 929th meeting, paras. 21-35.

61. Mr. USTOR said that it was essential to maintain the provisions of paragraph 1; it would be very difficult to explain any departure from the system adopted in article 8 of the Vienna Convention on Diplomatic Relations and article 22 of the Vienna Convention on Consular Relations. The provisions of paragraph 1 should cover both members of the special mission and members of its diplomatic staff.

62. Mr. CASTRÉN said he still thought, as he had done during the discussion of the article in 1964,[3] that the provision in paragraph 3 concerning nationals of third States was too rigid. However, since the two Vienna Conventions contained a similar provision, and since the Special Rapporteur and the majority of the Commission seemed to approve of such an arrangement, he would not propose any change.

63. He was glad that the Special Rapporteur had accepted the second amendment proposed by the Chilean Government regarding the staff of a special mission, because it would probably be preferable not to put the members of the diplomatic staff on the same footing as other members of the staff.

64. Mr. REUTER said that he agreed with Mr. Ago.

65. He suggested that a reservation should be included in the commentary for the case where an international organization as such was entrusted with a special mission, because the rule would then need to be interpreted with considerable flexibility.

66. Mr. EUSTATHIADES said he supported Mr. Ago's suggestion to delete from paragraph 1 the reference to members of the staff of the special mission.

67. In paragraph 2 he would like to see the final words, "which may be withdrawn at any time", deleted. It was reasonable to ask for the consent of the receiving State in such a case, but it would be going too far to empower it to withdraw its consent at any time. The receiving State would obviously have examined the case closely before giving its consent; if for serious reasons it subsequently wished to withdraw its consent, it could fall back on other provisions of the draft articles, for instance by declaring the person *non grata.*

68. His main observation, however, concerned paragraph 3. Like Mr. Castrén, he thought the rule too rigid. Nor was he convinced that it was essential to follow the Vienna Conventions on the matter in question, because temporary missions were very different from permanent missions. Moreover, the fact that there were States which could not appoint special missions consisting solely of their own nationals should be borne in mind. He would not make any formal proposal, but hoped that the rule could at least be relaxed.

69. Mr. ALBÓNICO said that the objections raised by the Governments of Sweden and Chile to the words "in principle" in paragraph 1 were not well-founded. That paragraph was not so much a legal norm as a recommendation to the sending State to endeavour as far as possible to appoint its own nationals. The use of the words "in principle" was therefore quite appropriate.

70. On the other hand, he favoured the second alternative proposal by the Government of Chile and the similar proposal by Mr. Ago, which would confine the provisions of paragraph 1 to the diplomatic staff, thereby bringing article 14 into line with the corresponding provision of the Vienna Convention on Diplomatic Relations. The text as it now stood was more rigid than that of article 8 of that Vienna Convention, because it extended to staff other than diplomatic staff.

71. He supported paragraph 2 as it stood; it embodied a long-standing rule of international law, which required the consent of the receiving State to the appointment of one of its own nationals as a member of a foreign mission.

72. He favoured, however, the deletion of paragraph 3. In the case of special missions, there did not appear to be the same strong grounds for including that provision as in the case of permanent missions. Moreover, special missions often dealt with highly technical subjects, for which it was sometimes necessary for the sending State to employ foreign experts.

73. Mr. CASTAÑEDA said he supported the Special Rapporteur's proposals for paragraph 1. He also supported the amendment proposed by the Government of Chile, which would exclude technical and administrative staff from the operation of paragraph 1; their position was not the same as that of diplomatic staff.

74. With regard to paragraph 2, he supported the suggestion by Mr. Eustathiades to delete the concluding proviso. Once the receiving State had given its consent to the appointment of one of its own nationals, there was no valid reason to permit the withdrawal of that consent at any time. It would be illogical for the receiving State, after it had given its permission to the appointment, to withdraw it merely on the ground of the nationality of the person concerned. The interests of the receiving State were already sufficiently safeguarded by the provisions of article 4, which enabled it to bring to an end the functions of any member of the special mission by declaring that person *non grata.* Under article 4, the receiving State was not required to give any reasons for its decision.

75. If the concluding words "which may be withdrawn at any time" were deleted from paragraph 2, that would affect the operation of paragraph 3. Subject to that deletion, he favoured the retention of paragraph 3, since that would serve to discourage a practice which, while not altogether desirable, should not be absolutely forbidden. A sending State might, in certain exceptional cases, need to appoint a national of a third State.

76. Mr. YASSEEN said that, in supporting Mr. Ago's suggestion concerning paragraph 1, he had been thinking of the entire staff of special missions and not merely the diplomatic staff, which could obviously be the subject of an exception. The staff of the special mission, however, consisted mainly of persons discharging secondary duties and mostly recruited in the receiving State.

[3] For earlier discussion of this article (then numbered 13), see *Yearbook of the International Law Commission, 1964*, vol. I, 763rd meeting, paras. 31-51, and 770th meeting, paras. 2-6.

77. Paragraph 2, especially its final words, stated a very useful rule. The situation in question was quite exceptional: it involved nothing less than the loyalty of the individual towards the State of which he was a national. Such a situation was only acceptable if both the individual and that State enjoyed full guarantees. Even if the receiving State consented initially, it must always be entitled to prevent one of its own nationals from confronting it in the special mission of a foreign State.

78. Deletion of the final words would suggest that the consent of the receiving State, once given, could not be withdrawn. It had been said that the receiving State could declare a person *non grata*. In his view such a declaration, the principal consequence of which was departure from the State's territory, could only apply to an alien. In the present state of the law such a measure did not seem applicable to a national of the receiving State.

79. Paragraph 3 was indispensable. The fact that a special mission included a national of a third State might have unfortunate results, for example if grave tension existed or a serious dispute arose between the third State and the receiving State. The receiving State had to be able to object to such a situation. Moreover, under paragraph 1 the receiving State would normally expect to negotiate with a special mission consisting solely of nationals of the sending State.

80. Mr. BARTOŠ (Special Rapporteur) said he thought that the general rule stated in paragraph 1 should be at least as strict as the corresponding rule in the Vienna Convention on Diplomatic Relations, because special missions sometimes handled very delicate questions. The more fully he recognized the unwisdom of extending the requirement of the sending State's nationality to the entire staff of a special mission, the more necessary he found it to retain that requirement for diplomatic staff.

81. The rule contained in paragraph 2, particularly its final words, had been discussed at length at the Vienna Conference on Diplomatic Intercourse and Immunities. The opinion had finally prevailed that the presence in the mission of nationals of the receiving State might be harmful to relations between that State and the sending State. In the draft articles the rule would only apply to persons of high rank: the head and members of the mission and diplomatic staff. Questions concerning the rest of the staff were dealt with in articles 34 and 36 of the draft.

82. With regard to paragraph 3, it should be noted that if a person had the dual nationality of the sending State and the third State he would be regarded as a national of the sending State, and therefore the rule would not apply. The Vienna Conference had recognized that, if relations between the receiving State and the third State deteriorated, the presence of a national of the third State might be detrimental to relations between the sending State and the receiving State. But some countries lacked qualified staff and had to call on foreigners to make up their special missions. For that reason, although the practice had been authorized, it had been thought necessary for the receiving State to be able to exercise some control and to enjoy the same rights with regard to such persons as to its own nationals.

83. He would like to see the wording of the Vienna Convention retained in the article, because then the Commission could not be reproached for trying to innovate.

84. He urged that article 14 be retained without change, subject to the amendment to paragraph 1 proposed by the Chilean Government, which he had already accepted, and to review by the Drafting Committee.

85. The CHAIRMAN, summing up the discussion, said it seemed to be generally agreed that there should be no departure from the rules embodied in the Vienna Conventions without most substantial reasons. Most members felt that paragraph 2 should be maintained in its entirety. As for paragraph 3, it was equally necessary to retain it, in order to avoid the implication that the receiving State would not have the right in question where nationals of a third State were concerned. The provisions of paragraph 3 were not unduly rigid, since they merely specified that the receiving State "may reserve" the right provided for in paragraph 2 with regard to nationals of a third State.

86. He suggested that article 14 be referred to the Drafting Committee for consideration in the light of the discussion and for incorporation of the Chilean Government's proposal, bearing in mind the definition of special missions as far as the wording of paragraph 1 was concerned.

It was so agreed.[4]

The meeting rose at 1 p.m.

[4] For resumption of discussion, see 929th meeting, paras. 36-50.

908th MEETING

Friday, 26 May 1967, at 10 a.m.

Chairman: Sir Humphrey WALDOCK

Present: Mr. Ago, Mr. Albónico, Mr. Bartoš, Mr. Castañeda, Mr. Castrén, Mr. Eustathiades, Mr. Ignacio-Pinto, Mr. Jiménez de Aréchaga, Mr. Kearney, Mr. Ramangasoavina, Mr. Reuter, Mr. Tammes, Mr. Tsuruoka, Mr. Ushakov, Mr. Ustor, Mr. Yasseen.

Special Missions

(A/CN.4/193 and Addenda; A/CN.4/194 and Addenda)

(continued)

[Item 1 of the agenda]

ARTICLE 15 (Right of special missions to use the flag and emblem of the sending State) [19]

1. *Article 15* [19]

Right of special missions to use the flag and emblem of the sending State

A special mission shall have the right to display the flag and emblem of the sending State on the premises of the mission, on the residence of the head of the mission and on the means of transport of the mission.

2. The CHAIRMAN invited the Commission to consider article 15, the Special Rapporteur's proposals for which were contained in paragraph 13 of the section dealing with that article in his fourth report (A/CN.4/194/Add.1) and his additional comments on article 15 in document A/CN.4/194/Add.3.

3. Mr. BARTOŠ, Special Rapporteur, said that article 15 was based on article 20 of the Vienna Convention on Diplomatic Relations. Whether the proposed rule was necessary for all special missions was, however, open to question. In his opinion it was necessary for political missions, particularly those at a high level, and for certain technical missions, especially when they had to deal with frontier questions, to travel by ship or boat, or to participate in ceremonial occasions. It must be admitted, however, that some special missions had no need to fly their flag or to display their national emblem.

4. A further question was whether article 15 should be placed in part I of the draft, where it was now, or whether the right to display the flag should be regarded as a privilege or a facility for the performance of the special mission's tasks, in which case the article should be placed in part II. There was something to be said for both courses, and he left it to the Drafting Committee to suggest the right place for the article.

5. The Belgian Government suggested, with regard to the use of the flag and emblem on means of transport, that the rule should be brought more closely into line with article 20 of the Vienna Convention, and that the right to display the flag and emblem should be restricted to the means of transport of the head of the mission. In his view, what was appropriate for diplomatic missions, where the main consideration was protocol, might not be sufficient for special missions, for they might wish the public to know of their presence; furthermore the use of the flag might help the receiving State in protecting the special mission.

6. The Netherlands Government proposed two changes. The first was that the proviso "Except as otherwise agreed" should be inserted at the beginning of the article. He could accept that proposal, for the rule stated was one to which exceptions were permitted by agreement. The sending State was entitled *ex jure* to use its flag and emblem, but it did not surrender its sovereign rights if, pursuant to an agreement with the receiving State, it refrained from such use.

7. He could also accept the Netherlands Government's second proposal, namely, that the phrase "when used on official business" should be added at the end of the article. That proviso, taken from article 29, paragraph 2, of the Vienna Convention on Consular Relations, would be justified in the case of special missions.

8. Mr. USTOR said he noted that in his comments on article 15 in his fourth report (A/CN.4/194/Add.1), the Special Rapporteur stated: "During the discussion in the Sixth Committee of the General Assembly, the Hungarian representative expressed the view that there was no need to retain draft article 15, which should be regarded as an instance of the rule that special missions are required to comply with the laws and regulations of the receiving State."

9. That sentence did not accurately reflect the remarks which he had made as Hungarian representative in the Sixth Committee on that occasion, and which had been well summarized in the summary record of the 843rd meeting of the Sixth Committee as follows:

> "The right granted under article 15 to use the flag and emblem of the sending State on the means of transport of the mission was more extensive than the right granted under article 20 of the 1961 Vienna Convention on Diplomatic Relations, and that might not be generally justified.
>
> "As regards paragraph (2) of the commentary on article 15, he proposed a solution along the lines of article 29, paragraph 3 of the 1963 Vienna Convention on Consular Relations which subjected the right to use the flag and emblem of the sending State to the laws, regulations and usages of the receiving State. It went without saying that the local restrictions should not be discriminatory and should not nullify the aforementioned right"[1]

10. The sole purpose of his statement was to place the necessary clarification on record.

11. Mr. BARTOŠ, Special Rapporteur, said that it would be very dangerous to leave it open to the receiving State to authorize, or refuse to authorize, a sovereign State to use its flag and emblem.

12. Mr. CASTRÉN said that his impression was, first, that article 15 stated a rule from which the States concerned could derogate by agreement, and secondly that the article could remain where it was; but he would not go into those two questions for the time being.

13. Of the proposals submitted by Governments, the only one he thought the Commission need consider was the Netherlands Government's second proposal, to add the phrase "when used on official business" at the end of the article. Generally speaking, special missions should be treated as consular posts rather than as permanent missions so far as the use of the flag and emblem was concerned. A high-level special mission, however, might require different treatment.

14. Mr. RAMANGASOAVINA said that article 15 presented some minor problems. As the text stood, a special mission had the right to display the flag and emblem of the sending State on the premises of the mission, on the residence of the head of the mission and on the vehicles it used. He feared that right might be abused in the case of the mission's vehicles, and he therefore supported the Netherlands Government's proposal that the flag should be displayed on the means of transport only when the latter was being used on official business. It was true that circumstances sometimes made it appropriate to display the flag on a special mission's means of transport in order to give it prestige or a ceremonial character, but it would be a mistake to try to bring draft article 15 exactly into line with article 20 of the Vienna Convention on Diplomatic Relations.

[1] *Official Records of the General Assembly, Twentieth Session, Sixth Committee*, 843rd meeting, paras. 38 and 39.

15. The function of the permanent mission was to ensure that a nation was continuously represented, a principle which had engendered the controversial notion of extra-territoriality; but that did not apply to a special mission, which was of limited duration and which might take any of several forms. A high-level special mission naturally involved some ceremony, but there were many special missions of a more modest nature which on occasion, for reasons of safety, might even have to refrain from displaying a flag on their means of transport, for example when travelling in a disturbed area. The display of a flag or an emblem, therefore, depended on what was fitting at the time and on local conditions. Consequently, the agreement on that question should be made after, and not before, the special mission reached its destination.

16. He supported both the Netherlands Government's proposals, with some slight changes, and suggested that the article read: "With the agreement of the Government, a special mission may display the flag and emblem of the sending State... and on the means of transport of the mission when used on official business".

17. Mr. USHAKOV said he agreed with Mr. Ramangasoavina. Indeed, not only was it unnecessary to display an emblem or a flag on the premises of the mission, but there was often no need for official premises at all. Many missions simply stayed at a hotel, where the display of the flag or emblem of the sending State would obviously be out of place.

18. The matter was one of privileges, not of immunities, and it was quite natural that different missions should enjoy different privileges. Little purpose would be served by displaying the flag or emblem of the sending State on the premises or vehicles of, say, a veterinary mission. In any event, the question was subject to the rules of international law and to the laws of the receiving State. Thus the USSR proposed to extend to special missions, subject to reciprocity, all the privileges and immunities accorded to permanent diplomatic missions.

19. He suggested that article 15 should open with the wording: "In conformity with the laws and regulations of the receiving State, a special mission may display...".

20. Mr. BARTOŠ, Special Rapporteur, said that the two Vienna Conventions forbade individual States to lay down rules on privileges and immunities that conflicted with the rules of international law on the subject, since domestic rules must take account of the privileges and immunities prescribed by the rules of international law. Any country could establish rules for domestic use concerning privileges and immunities, but they were not for external use and were not applicable to embassies or legations. Moreover, under article 41 of the Vienna Convention on Diplomatic Relations, the receiving State was required not to prejudice the privileges and immunities conferred on the representatives of countries by the rules of international law. It could enact legislation relating to the application of those rules to domestic organs, but it was forbidden to restrict the field of application or the extent of the privileges and immunities prescribed by the rules of international law. Where rules were for external use, international conventions or custom must be applied.

21. Mr. USHAKOV said that USSR legislation on the privileges and immunities accorded to permanent diplomatic missions was wholly based on the provisions of the Vienna Convention. He had merely mentioned certain domestic rules, such as that which—again in conformity with the Vienna Convention—provided that only the head of the mission could display a flag on his vehicle. Other countries conferred that right on all members of the mission.

22. The USSR had not yet prepared legislation on special missions, but it could perfectly well extend to them the privileges and immunities of permanent diplomatic missions on a basis of reciprocity, without in any way infringing the existing rules of international law.

23. The CHAIRMAN said that there was no need at the present juncture to engage in a discussion on the compulsory nature of article 15 or on the possibility of departing by agreement or unilaterally from the rules it embodied; the Commission would have to examine that question in a more general context at a later stage of its discussions.

24. As far as the contents of article 15 were concerned, the Commission should consider whether it wished to retain an article which was modelled on the corresponding provisions of the two Vienna Conventions.

25. Mr. YASSEEN said that, in his opinion, article 15 did not raise any serious problems; the rule it proposed could do no harm whatever and might even be useful in some cases.

26. The article was worded in such a way as to cover all contingencies and to obviate many difficulties. In particular, it imposed no obligation on the special mission to display the national flag or emblem if it preferred for some reason or other to go unnoticed.

27. Article 15 did not lay down any rule of *jus cogens*; States might agree that a special mission should not display the flag or emblem of the sending State. In the absence of such agreement, the special mission had a right to use that flag and emblem on its premises, if any, on the residence of its head, and on its means of transport, especially when used on official business. He therefore accepted the second proposal by the Netherlands Government.

28. On the other hand, the first amendment submitted by that Government did not seem essential. The Commission would be considering at a later stage the problem of the relative standing of the rules laid down in the draft articles, and there was no need to specify in article 15 that the rule stated there was subject to exceptions.

29. He had no preference with regard to the position of the article, which could be referred to the Drafting Committee.

30. The CHAIRMAN asked the Special Rapporteur whether there was any reason for allowing the sending State's flag to be used more freely on the means of transport than under article 20 of the Vienna Convention on Diplomatic Relations.

31. Mr. AGO said he recalled that the Commission intended to provide for the hypothetical case where a special mission had no head.

32. Mr. BARTOŠ, Special Rapporteur, in reply to the Chairman, said that the reason why article 15 was so worded was that, apart from the head of the special mission, other persons belonging to the mission might need to travel on official business. The restriction imposed by the Netherlands Government's second proposal seemed sufficient.

33. He still thought that Mr. Ushakov's proposal, making the use of the flag and emblem by the special mission subject to the laws of the receiving State, would be a source of difficulties and disputes. But to meet Mr. Ushakov, he proposed that an additional paragraph should be included in the article, modelled on article 29, paragraph 3, of the Vienna Convention on Consular Relations and reading:

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

34. The CHAIRMAN noted that there was considerable support for the second proposal by the Netherlands Government to introduce the words "when used on official business".

35. He also noted the Special Rapporteur's suggestion to deal with the point raised by Mr. Ushakov by introducing a provision similar to paragraph 3 of article 29 of the 1963 Vienna Convention on Consular Relations.

36. In the commentary, the Special Rapporteur would no doubt explain why the use of the flag was being extended to the means of transport of persons other than the head of the special mission.

37. He suggested that article 15 be referred to the Drafting Committee for consideration in the light of the discussion.

It was so agreed.[2]

ARTICLE 16 (Activities of special missions in the territory of a third State) [18]

38. *Article 16* [18]

Activities of special missions in the territory of a third State

1. Special missions may not perform their functions in the territory of a third State without its consent.

2. The third State may impose conditions which must be observed by the sending State.

39. The CHAIRMAN invited the Commission to consider article 16, the Special Rapporteur's proposals for which were contained in paragraph 16 of the section on that article in his fourth report (A/CN.4/194/Add.1) and in his additional comments on article 16 in document A/CN.4/194/Add.3.

40. Mr. BARTOŠ, Special Rapporteur, said that the Commission had added paragraph 2 to article 16 only after very full discussion.[3] It had also thought of specifying that the third State, after giving its consent, might withdraw it, but in the end had thought it sufficient to express that idea in the commentary, on the grounds that third States should not be encouraged to give their consent lightly and then withdraw it.

41. Governments had given close attention to the question of possible withdrawal of the third State's consent. The Governments of Belgium (A/CN.4/188), Chile (A/CN.4/193/Add.1), Israel (A/CN.4/188), and the United States (A/CN.4/193) in their written comments, and the Hungarian delegation in the Sixth Committee,[4] had proposed that a provision should be added authorizing the third State to withdraw its consent. He recommended that that proposal be adapted and that a paragraph 3 be accordingly added providing that the third State might withdraw its consent at any time and without being obliged to give any reasons for its decision.

42. The Japanese Government (A/CN.4/188/Add.4) had raised two questions. First, whether the third State, once it had given its consent, had the rights and assumed the obligations of the receiving State under the draft. The addition of a paragraph 3, along the lines he had indicated, would make it easier to answer that question. In his opinion a consenting third State was not in exactly the same position as a receiving State. When consent had been given, and until it was withdrawn, the third State was bound to apply the rules of hospitality.

43. Secondly, the Japanese Government pointed out that, if the definition of a special mission in article 1 were adopted, special missions which were engaged in activities exclusively in the third State might not come within the definition of "special mission". In his own view, unless there was a special agreement, missions which did not conform to the definition given in article 1 were not "special missions" within the meaning of the draft articles; they were missions called upon to work in the territory of a third State, and that State was not, with regard to those missions, in the position of a receiving State within the meaning of the draft articles.

44. The Commission might deal with those two questions in the commentary.

45. Mr. TAMMES said that article 16 constituted a special application of the rule of general international law that one State could not perform sovereign acts in the territory of another without the latter State's consent. The discretionary right of the latter State to refuse that consent logically implied the right to attach conditions to that consent when given. The provisions of article 16 thus appeared as a restatement of existing law. The legal consequence was that the rule expressed in article 16 would apply whether the third State ratified the future convention on special missions or not.

46. However, the commentary to article 16 suggested that the article contained more than a restatement of existing law. The second sentence of paragraph (6) of that commentary implied that, for the duration of the special mission, the third State could not impose conditions other than those which it had initially laid down when giving its consent to the special mission's operations in its territory.

[2] For resumption of discussion, see 929th meeting, paras. 51-61.

[3] See *Yearbook of the International Law Commission, 1964*, vol. I, 763rd meeting, paras. 52-82, and 770th meeting, para. 8.

[4] *Official Records of the General Assembly, Twentieth Session, Sixth Committee*, 843rd meeting, para. 40.

47. Such an interpretation would not be consistent with the right recognized to the third State to withdraw its hospitality at any moment. That interpretation would also be inconsistent with the rights of a receiving State generally under the draft articles.

48. To illustrate his point, he would take the example of a conference of special missions to deal with an important political subject, held in the territory of a third State. In the event of wide publicity being given to the activities in question, as a result, for instance, of members' press conferences, the host country could easily be embarrassed. And clearly, the host country's position must be protected.

49. He therefore suggested that, in order to meet that point, article 16 be reworded on some such lines as:

> "A third State which gives its consent to the performance of the functions of a special mission in its territory may at any time withdraw its consent or attach conditions thereto."

50. Mr. KEARNEY said that the question whether or not the third State had to assume the obligations imposed by the convention on the receiving State was an important one and could not be relegated to the commentary. If the answer was in the affirmative, as he thought it should be, the appropriate provision would need to be included in the article itself.

51. Mr. USHAKOV observed that article 16 in its present form raised problems of interpretation; that applied particularly to the term "third State". Did it mean a State which gave hospitality to special missions of other States so as to enable them to negotiate with each other? The USSR had been in that position when the delegations of India and Pakistan had met at Tashkent. He was inclined to think that in such a case the third State was really a receiving State. It had been suggested in connexion with another article that the reference to the receiving State should be replaced by a reference to the State in which missions met.

52. However, article 16 could also be understood to apply to the case where, for example, a special mission established to negotiate with two or more countries intended to perform its task in a country other than those with which it was to negotiate. The article therefore needed clearer drafting.

53. Mr. CASTRÉN said that he could accept the proposals put forward by several Governments for the addition to article 16 of an express provision authorizing a third State to withdraw its consent. In his opinion, however, the wording proposed by the Government of Israel went into too much detail; all that was needed was to add at the end of paragraph 1 the final words of article 14, paragraph 2, "which may be withdrawn at any time".

54. The remainder of the wording proposed by the Government of Israel could appear in the commentary, together with the Special Rapporteur's replies to the comments by the Japanese Government (A/CN.4/194/Add.3).

55. Mr. EUSTATHIADES said that article 16 was a useful provision, designed to facilitate contacts between sending States by enabling them to dispatch special missions to the territory of a third State.

56. Paragraph 1 provided that "Special missions may not perform their functions in the territory of a third State without its consent". According to paragraph (3) of the commentary, however, the "formal consent" of that State was not necessary, while according to paragraph (4), "the prior approval of the third State is often simply a matter of taking note of the intention", and "If the third State makes no objection to the notification... approval is considered to have been given". The point was whether prior consent should be required or whether mere absence of objection—or tacit consent—was sufficient. In his opinion the consent should be express; if the Commission did not share that opinion it should state in the text of the article—and not in the commentary— that special missions might perform their functions in the territory of a third State provided that State did not object.

57. Some Governments had referred to the freedom of the third State to withdraw its consent at any time. In his view, when the third State agreed to receive special missions in its territory it was acquainted with the functions they were to perform; the Commission should not emphasize that acknowledged freedom of the third State in the text of the article, lest it hamper the activities of the special missions. Exceptional circumstances could, of course, arise and if the Commission wished to mention withdrawal of consent in the text, the phrase "in wholly exceptional cases" should be added.

58. The problem of applying the system of privileges and immunities to special missions performing their functions in the territory of a third State had been raised by the Belgian Government and by the Japanese Government. If the special missions were dispatched by States signatories of the convention and the third State was also a party to the convention, the problem did not arise; but if any one of those three States had not ratified the convention, there was no assurance that a special agreement would be concluded. The Commission might mention that problem in the commentary.

59. Mr. JIMÉNEZ de ARÉCHAGA said that according to the commentary the approval of the third State might be expressed by taking note of an oral notification of the intention to send a special mission to its territory, no time limit being established for inferring acceptance. It was not surprising that the reference to the obligations of the third State in the commentary had aroused concern among Governments, a number of which wished to reinsert certain safeguards in the text of the article.

60. The Belgian Government's proposal to insist on the need to obtain the prior consent of the third State was justified, as was the United States Government's proposal that it should be "express" consent. He agreed with the limitation in the Government of Israel's proposal that the consent could be conditional and that it could be withdrawn without any reason being given.

61. As to whether the provisions of the convention applied to the third State, a question that had been raised

by the Belgian and Japanese Governments, that depended upon whether the third State gave its consent and was willing to extend either all or some of the privileges provided for in the draft articles.

62. If all those limitations were inserted, the question arose as to whether article 16 should be retained or whether the matter could be left to be regulated on an *ad hoc* basis by the States concerned.

63. Mr. BARTOŠ, Special Rapporteur, suggested that the Commission should specify in the article that the rights and obligations of the third State towards special missions performing their functions in its territory would be those of a receiving State. If that point was made only in the commentary it might be virtually ignored because, although the authorities responsible for implementing a convention knew the text, they were often unfamiliar with the commentary.

64. Mr. CASTAÑEDA said he agreed with the Special Rapporteur that the legal position of the third State should be made clear as well as whether the régime of the draft articles applied to it, and whether the fact of its giving consent automatically made it subject to the draft articles. He would have thought it was necessary to provide that once a third State had given its consent for a special mission to operate in its territory, it would have to observe the provisions of the draft articles. He doubted whether it was necessary to require that consent be "express".

65. Mr. YASSEEN said it was questionable whether the convention would apply to a State which was genuinely a third State and in whose territory special missions performed their functions. In his opinion the Commission could not place a third State on exactly the same footing as a receiving State until it had examined the problem in greater detail.

66. Mr. AGO said he agreed with Mr. Yasseen. The Commission could not expect to impose on a third State all the obligations of a receiving State. A somewhat similar problem had arisen during the drafting of the Vienna Convention on Diplomatic Relations, in connexion with the passage of a diplomat through the territory of a third State. The problem facing the Commission was different, in that special missions might remain in the territory of the third State for some time. The Commission should examine the full consequences of that situation.

67. Mr. CASTRÉN said that, unless the third State imposed conditions as provided for in paragraph 2, it would be regarded as a receiving State. Perhaps the Commission might specify in the article that, except as otherwise agreed, the third State might impose conditions which must be observed by sending States.

68. Mr. USTOR said that if a third State was not a party to the convention, the provisions of the convention would not be binding on it, except if they embodied general rules of international law. Those provisions which constituted progressive development would only be binding on the parties.

69. Mr. EUSTATHIADES said he feared that the term "third State" might be taken to mean a State not a party to the convention. He would therefore prefer some such wording as: "... in a territory other than that of the States sending the special missions". But, although that wording would be clearer, it would not resolve the question of substance, namely that of the régime to be applied. The Commission should therefore consider whether it should not further clarify the matter by going into greater detail either in the commentary or in the article itself.

70. Mr. AGO said he did not think Mr. Eustathiades's suggestion would solve the problem. Obviously, if the third State had not ratified the convention, it was in any case only required to apply the provisions of the convention to the extent that they corresponded to the customary rules of international law. But even if the third State had ratified the convention, it could not be considered bound to treat special missions as though they were special missions sent to itself. In any event, the problem was too complex for the Commission to solve before the end of the meeting; it would have to examine the draft articles as a whole and decide which of their provisions it could apply to a third State.

71. Mr. YASSEEN said that the Commission might ask the Special Rapporteur to reconsider the problem and let it have his conclusions.

72. Mr. USTOR said he entirely agreed with Mr. Yasseen; article 16 needed to be given more substance.

73. Mr. TSURUOKA said he did not think the Commission should depart from the text of article 16. A third State which consented to receive special missions in its territory thereby accepted certain obligations, and there was every reason to suppose that it would take all necessary measures to enable the special missions to perform their functions in its territory without undue impediment.

74. Mr. BARTOŠ, Special Rapporteur, said that the expression "third State" was used in the Vienna Conventions and no one had felt any need to define it; it had been in current use in international law for more than a century. In private law the analogous expression "third party" denoted a person who was not a party to a juridical relationship but who might in certain cases have certain rights and obligations by virtue of that relationship.

75. The Commission could leave it to the sending State and the third State to define by agreement the conditions under which special missions would perform their functions in the territory of the third State; failing agreement, the customary rules of international law would apply. He agreed, however, that the problem merited more detailed study and, if the Commission so desired, he was prepared to submit a specific report on the subject at its next meeting.

76. The CHAIRMAN suggested that further discussion of article 16 be postponed until the next meeting.

It was so agreed.

Appointment of Drafting Committee

77. The CHAIRMAN said that the Commission's officers proposed that the Drafting Committee should consist of the two Vice-Chairmen, Mr. Ruda and Mr. Ustor; the General Rapporteur, Mr. El-Erian; the Special Rapporteurs, Mr. Bartoš and Mr. Ago; Mr. Albónico, Mr. Kearney, Mr. Ramangasoavina, Mr. Reuter, Mr. Rosenne, Mr. Ushakov and Mr. Yasseen. Mr. Albónico might not be able to attend the whole session, in which case another Spanish-speaking member would be co-opted. It was hoped that the Committee would begin its work the following week. The tempo of its work would be partly determined by the speed of production of the summary records.

It was so agreed.

The meeting rose at 1 p.m.

909th MEETING

Monday, 29 May 1976, at 3 p.m.

Chairman: Sir Humphrey WALDOCK

Present: Mr. Ago, Mr. Albónico, Mr. Bartoš, Mr. Castañeda, Mr. Castrén, Mr. Ignacio-Pinto, Mr. Jiménez de Aréchaga, Mr. Kearney, Mr. Nagendra Singh, Mr. Ramangasoavina, Mr. Tammes, Mr. Tsuruoka, Mr. Ushakov, Mr. Ustor, Mr. Yasseen.

Special Missions

(A/CN.4/193 and Addenda; A/CN.4/194 and Addenda)

(resumed from the previous meeting)

[Item 1 of the agenda]

ARTICLE 16 (Activities of special missions in the territory of a third State) [18]
(resumed from the previous meeting)[1]

1. The CHAIRMAN said that a telegram of good wishes had been received from Mr. Tunkin, a former member of the Commission. He welcomed Mr. Nagendra Singh to the Commission.

2. Mr. NAGENDRA SINGH said it was a great privilege to join the Commission. He was glad to be able to take part in the present discussion and regretted that his arrival had been delayed.

3. The CHAIRMAN said that in the course of the debate on article 16, the question had arisen of the legal régime applicable in the cases envisaged in that article and the legal obligations of the host State in those cases.

4. The further question had also arisen of the possible difference between the case where the host State had invited the participants to a meeting of special missions and the case where the State merely tolerated the use of its territory for the purposes of such a meeting. He invited the Special Rapporteur to give his views on those points.

5. Mr. BARTOŠ, Special Rapporteur, said that, on reflection, he had the following suggestions to make on article 16. The words "which may be withdrawn at any time" should be added to paragraph 1; paragraph 2 should remain unchanged, and a new paragraph 3 should be added, to read:

> "In the absence of any special agreement, the third State is required to guarantee to special missions the privileges and immunities necessary for the performance of their task."

That formula would provide an adequate guarantee and at the same time it was flexible since the States concerned would be free to determine by agreement what privileges and immunities special missions should enjoy. The Drafting Committee could, of course, make whatever drafting changes it saw fit.

6. Mr. YASSEEN said he welcomed the Special Rapporteur's suggestions. In particular, the addition to paragraph 1 of the phrase "which may be withdrawn at any time" would obviate many difficulties.

7. He asked whether the new paragraph 3 suggested by the Special Rapporteur meant that special missions performing their functions in the territory of a third State were to enjoy all the privileges and immunities provided for in the draft articles, or whether the expression "necessary for the performance of their task" had a restrictive meaning. It was arguable that some of the privileges and immunities provided for in the draft articles were not essential to the performance of the functions of special missions and were based rather on the theory of representation.

8. Mr. BARTOŠ, Special Rapporteur, said that in his opinion the only privileges and immunities which the third State was required to grant were those essential to the functioning of the special mission. The third State was making a sacrifice even by admitting special missions to its territory; it could not be expected to assume any responsibilities beyond those essential to enable the special missions to perform their task. In other words, he did not think that article 16 should place the third State on exactly the same footing as a receiving State, for there was a considerable difference between the two situations. A third State for the purpose of article 16 was a host State which lent its good offices, and it should be put to the least possible inconvenience by doing so.

9. He had considered whether article 16 should specify what privileges and immunities were necessary, but had concluded that it was better to leave that to be settled by practice.

10. Mr. YASSEEN said he agreed with the Special Rapporteur that a State which invited the special missions of two other States to meet in its territory should not, except as specially agreed, be obliged to grant such special missions any privileges or immunities beyond those necessary for the performance of their task. It was nevertheless

[1] See 908th meeting, para. 38.

extremely difficult to draw the dividing line between privileges and immunities which were essential and those which were not. He hoped the Drafting Committee would be able to find some form of words which would settle the matter.

11. Mr. USHAKOV said that the article would serve no purpose if it did not specify what privileges and immunities the host State was required to grant to special missions. If the Commission considered that the privileges and immunities in question should always be determined by prior agreement between the States sending the special missions and the States in whose territory the special missions met, that should be clearly stated. Another solution would be to specify which articles of the draft were applicable in the case under consideration.

12. Mr. AGO said that article 16 raised a delicate question. The expression "privileges and immunities necessary for the performance of their task" was open to conflicting interpretations. Sending States could claim that all the privileges and immunities provided for in the convention were essential to the performance of their special missions' task, while the State in whose territory the special missions were meeting could maintain that very few of them were essential. That might create serious difficulties.

13. Furthermore, article 16 would apply to very different cases. For instance, the State in whose territory the missions met might itself have taken the initiative of inviting the parties; and since the meeting was being held under its auspices, it would be natural for it to grant the widest privileges and immunities. But there were other cases where, from considerations of mere convenience, the parties might have requested the hospitality of the third State; there would then be far less of an obligation to grant privileges and immunities.

14. Like Mr. Ushakov, he was inclined to think that the question of privileges and immunities in such cases should be settled by agreement between the States concerned, but it remained to be seen whether the Commission ought to propose a residual rule. In any event, the word "necessary" was not very helpful. The Commission should state its intention clearly before the article was referred to the Drafting Committee.

15. Mr. BARTOŠ, Special Rapporteur, pointed out that his suggested paragraph 3 included the proviso "In the absence of any special agreement". The special missions referred to in article 16, because they performed their functions in the territory of a third State, needed more privileges and immunities than were provided for in article 40 of the Vienna Convention on Diplomatic Relations and article 54 of the Vienna Convention on Consular Relations, which dealt only with transit through the territory of a third State.

16. He had no objection to Mr. Ushakov's suggestion that the articles of the draft which were applicable should be enumerated, so as to indicate the minimum obligations which the third State had to assume in all cases. The Drafting Committee could undertake that enumeration.

17. The problem was of great political importance. Cases occurred where two special missions could not negotiate in the territory of either of the States concerned, so that the agency of the third State was vital to the future relations between those two States and even to the maintenance or restoration of peace between them. Article 16 was not concerned merely with technical questions relating to privileges and immunities; it involved several major principles of international law.

18. Mr. USTOR said that the 1961 Vienna Convention on Diplomatic Relations laid down two different régimes of privileges and immunities: the general régime of a permanent mission and the régime applicable in a transit State. Article 16 on special missions envisaged a third category of cases and it was for the Commission to decide what régime had to be applied in those cases.

19. Personally, he was inclined to think that the situation of the "third State" under article 16 was very much closer to that of a receiving State than to that of a transit State. Probably, the third State was bound to give almost all the privileges and immunities extended by a receiving State.

20. He agreed with the Special Rapporteur that the various provisions on privileges and immunities should be reviewed in detail before the Commission decided whether any of those privileges and immunities were not essential to a special mission in the situations envisaged in article 16. When that review had been completed, it would be possible for the Commission to reach a decision on the text of article 16.

21. Mr. CASTRÉN said he feared there might be some contradiction between paragraph 2, under which the third State could impose conditions, and paragraph 3, which would require the third State to guarantee to special missions the necessary privileges and immunities. If the Commission accepted the Special Rapporteur's suggestions, those two paragraphs should perhaps be combined into one, which might read:

> "The third State may impose conditions which must be observed by the sending State, but in any event it shall guarantee to special missions the privileges and immunities necessary for the performance of their functions."

22. Mr. BARTOŠ, Special Rapporteur, said that he had no objection to Mr. Castrén's suggestion.

23. The CHAIRMAN, summing up the discussion, said that there was general agreement to accept the proposal put forward by a number of Governments for the inclusion in paragraph 1 of a provision regarding the withdrawal of consent. The Drafting Committee would also have to consider whether the consent of the receiving State to admit a special mission should be required to be an express consent.

24. Consideration would equally have to be given, first, to the question whether the privileges and immunities were to attach in all cases or only in those where the third State had deliberately placed itself in the position of a receiving State and, secondly, to the question whether in any event some distinction should be made between the latter case and the case in which the third State merely tolerated the presence of the special missions on its territory.

25. Finally, the Drafting Committee would have to decide whether a definition of "third State" should be included in the draft. No such definition appeared in the Vienna Convention on Diplomatic Relations but a definition of "Third State" had been included in article 2, paragraph 1(*h*), of the Commission's draft articles on the law of treaties.[2]

26. All those questions would involve problems of drafting, and the Commission should reserve its final opinion until it received a text from the Drafting Committee. He therefore suggested that article 16 be referred to the Drafting Committee for consideration in the light of the discussion.

It was so agreed.[3]

ARTICLE 39 (Transit through the territory of a third State) [43]

27. *Article 39* [43]

Transit through the territory of a third State

1. Subject to the provisions of paragraph 4, if the head or a member of the special mission or a member of its diplomatic staff passes through or is in the territory of a third State, while proceeding to take up his functions in a special mission performing its task in a foreign State, or when returning to his own country, the third State shall accord him inviolability and such other immunities as may be required to ensure his transit or return. The same shall apply in the case of any members of his family enjoying privileges or immunities who are accompanying the person referred to in this paragraph, or travelling separately to join him or to return to their country.

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

3. Third States shall accord to official correspondence and other official communications in transit, including messages in code or cipher, the same freedom and protection as is accorded by the receiving State. Subject to the provisions of paragraph 4, they shall accord to the couriers and bags of the special mission in transit the same inviolability and protection as the receiving State is bound to accord.

4. The third State shall be bound to comply with the obligations mentioned in the foregoing three paragraphs only if it has been informed in advance, either in the visa application or by notification, of the transit of the special mission, and has raised no objection to it.

5. The 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 bags of the special mission, whose presence in the territory of the third State is due to *force majeure*.

28. The CHAIRMAN said that the Special Rapporteur wished to introduce at that point article 39 which dealt with the comparable problem of the transit State.

29. The Special Rapporteur's proposals for article 39 were contained in paragraph 13 of the section of his fourth report (A/CN.4/194/Add.2) dealing with that article and in his additional comments on article 39 in document A/CN.4/194/Add.4.

30. Mr. BARTOŠ, Special Rapporteur, said that article 39 was based on article 40 of the Vienna Convention on Diplomatic Relations, but the two articles differed particularly on one point, namely, that article 39 referred not only to the diplomatic agent of the special mission but also to members of the special mission passing through the territory. Generally speaking, however, the tenor of the two articles was substantially the same.

31. As Mr. Ushakov had said, the primary consideration in drafting article 39 had been to guarantee freedom of transit in general; certain privileges and immunities had then been enumerated in order to explain what freedom of transit meant.

32. Although the text of article 39 did not present any major dificulties at the present stage of the discussion, it should be noted that articles 16 and 39 differed considerably in certain respects. Whereas article 16 dealt with a third State which had consented to certain activities of other States taking place in its territory, under article 39 the presence of a special mission in the territory of the third State meant one of two things: either the third State had given permission for transit, or the special mission found itself obliged to pass through the territory of the third State even without permission. Cases of *force majeure* dealt with in the last paragraph of article 39—for example, diversion from the route originally planned—were considered to fall within the second category.

33. In short, articles 16 and 39 laid down two different rules and article 39 offered two variants, the first being stated in paragraphs 1 to 4 and the second in paragraph 5.

34. The Commission's idea in drafting article 39 had been to take over article 40 of the Vienna Convention on Diplomatic Relations without change. It was essential to make provision for the transit of the special mission through the territory of a third State, because it often occurred in practice. Special missions generally passed through the territory of other States, which—quite apart from any privileges and immunities they might grant—endeavoured to facilitate their passage. It should be noted that the meetings involved were often courtesy meetings. The transit of special missions through the territory of a third State was sometimes extremely important, as history had shown, and he considered it a necessity that the provisions of article 40 of the Vienna Convention on Diplomatic Relations should be applied to special missions.

35. Mr. TAMMES said he noted that, under the provisions of paragraph 4 of article 39, the third State was bound to grant privileges and immunities "only if it has been informed in advance... of the transit of the special mission and has raised no objection to it". That provision did not appear in the corresponding article 40 of the Vienna Convention on Diplomatic Relations, under which privileges and immunities were always extended to diplomats in transit and absence of objection to transit was not laid down as a prior condition. The commentary to article 39 of the draft articles on special missions, as adopted by the Commission in 1965,[4] merely recorded that essential difference between the two texts but did not explain

[2] *See Yearbook of the International Law Commission, 1966*, vol. II, document A/6309/Rev.1, Part II, chapter II.

[3] For resumption of discussion, see 930th meeting, paras. 104-112.

[4] *Yearbook of the International Law Commission, 1965*, vol. II, p. 189.

why there was a deviation from the system of the Vienna Convention.

36. The Special Rapporteur stated in paragraph 13(4) of his comments in his fourth report (A/CN.4/194/Add.2): "In principle, the provision contained in this article should be generally compulsory in the absence of a special agreement between the sending State and the third State concerned." It was therefore necessary to explain clearly the reasons for the departure from the system embodied in article 40 of the Vienna Convention on Diplomatic Relations.

37. Furthermore, since paragraph 4 of article 39 left the question of objection entirely to the discretion of the third State, he suggested that the concluding words "and has raised no objection to it" be amended so as to specify that objection could only be made in exceptional cases or on reasonable grounds. A qualification of that type, to be interpreted and applied in good faith, would make it possible to prevent the whole purpose of article 39 from being frustrated by the use of the discretionary rights recognized in paragraph 4.

38. Mr. USHAKOV said he wished to make a few comments purely on matters of drafting. First, under paragraph 4, the third State could object to free transit through its territory, as prescribed in paragraphs 1, 2 and 3; that included the free transit of messages in code or cipher as prescribed in paragraph 3. It was out of the question that such messages should be exposed to the risk of objection, and he therefore proposed that paragraph 4 be amended so as to preclude any such interpretation.

39. Secondly, the expression "receiving State", in paragraph 3, needed careful consideration. The discussion on article 16 had led the Commission to the conclusion that a State giving hospitality to special missions should not be regarded as a receiving State. Paragraph 3 should also take into account the position of a State providing hospitality on its soil for two or more special missions for the purposes of article 16. That point needed clearing up.

40. In paragraph 2, it might be appropriate to mention the case of a special mission presided over by a Head of State, Prime Minister or Minister for Foreign Affairs, in other words, of a high-level mission. In that case, any administrative, technical and service staff in the suite of the high-ranking diplomatic agent should perhaps be granted the same diplomatic privileges and immunities as the head of the mission.

41. Lastly, paragraph 1 used the expression "third State". There had already been some discussion on that subject during the consideration of article 16. If the Commission used the expression "third State" in article 16 to denote a State which provided one or more special missions with hospitality, it seemed to him that the third State, or transit State, referred to in article 39 was, in a sense, a "third State" in relation to the third State mentioned in article 16.

42. Mr. BARTOŠ, Special Rapporteur, said he did not think that paragraph 4, which had not been taken from the Vienna Convention on Diplomatic Relations, was well worded; indeed, it had been criticized a great deal. The question was whether the third State was entitled to object to the transit of the special mission through its territory, or was in duty bound to allow the special mission to pass. The Commission could not leave such an important question unanswered.

43. Mr. Tammes had not gone as far as the Netherlands Government, which proposed that the article should be dispensed with altogether. In his view article 39 was needed, and the only passage which could be dispensed with was the phrase "and has raised no objection to it". Several Governments had observed that the third State could be under no obligation if it had not been informed of the transit of the special mission. Paragraph 4 went some way towards conveying that idea, and if the phrase "and has raised no objection to it" were deleted, the paragraph would come close to stating that the third State was under a duty to allow the special mission to pass.

44. Mr. Ushakov wanted the notion of the third State more clearly defined. He (the Special Rapporteur) had done a great deal of research on that point but to no avail. Perhaps Mr. Ushakov could enrich legal terminology by finding an expression to denote a host State which had no direct relationship with the special mission. It was true that the use of the term "third State" in both article 16 and article 39 might create confusion. Article 16 referred to the activities of special missions in the territory of the third State; article 39 dealt with the transit of the special mission through the territory of the third State, in other words with the case of a mission which was in transit and which was not authorized to engage in activities in the territory of the State traversed *en route*. He was prepared to consider any proposal which a member might submit with a view to clarifying the notion of the third State.

45. The comments made by Governments included many on paragraph 4. The Governments of Belgium, Chile and Israel thought that the third State should be informed, and the Government of Chile thought further that the third State should be free to object to the transit. The United States Government had raised the question of vehicular accidents which might occur *en route*. The same question had been raised by the Netherlands delegation at both Vienna Conferences, but the proposal that immunities should be restricted in such circumstances had been rejected. In practice the question was already settled, for most States required a certificate of insurance for the vehicle whether the occupants enjoyed diplomatic immunities or not.

46. The Netherlands Government suggested that the article should be omitted altogether. The United Kingdom Government proposed that third States should be entitled to permit the transit of a special mission without at the same time granting it immunities. That meant, first, that the permission of the third State was necessary for transit, and secondly that the third State could permit transit without granting privileges or immunities. In his opinion the United Kingdom Government's proposal called into question the Commission's entire system, and even that of the two Vienna Conventions.

47. Mr. ALBÓNICO said that three types of case could arise concerning the position of a special mission in relation to a third State. The first was that contemplated in article 16, where the privileges and immunities granted to the special mission would be those agreed by the States

concerned; the Drafting Committee could devise a residuary rule for the case where no specific agreement on that question was concluded.

48. The second was the case of a special mission whose presence in the territory of a third State was due to *force majeure*, the case contemplated in article 39, paragraph 5. As far as that case was concerned, there was every justification for granting the special mission all the rights specified in paragraphs 1, 2 and 3 of the article.

49. The third was the case of the transit of a special mission to and from the receiving State. For that case, paragraph 4 specified certain obligations for the third State, on the sole condition that notification was made and that no objection was raised by the third State.

50. But paragraphs 1, 2 and 3 of article 39 laid down a very wide range of privileges. Those privileges affected several categories of persons: the head of the special mission, members of the mission, members of its diplomatic staff, members of the families of those persons, members of the administrative and technical or service staff and members of their families. Provision was also made for privileges for "official correspondence and other official communications in transit, including messages in code or cipher" and for "couriers and bags of the special mission in transit". It was difficult to accept such a broad range of privileges for the benefit of special missions which were merely in transit.

51. He would like finally to clarify a comment by the Chilean Government, which had proposed the amendment of paragraph 4 so as to cover all methods of information about the transit of the special mission. The text as it stood made provision only for a visa application and a formal notification; but the information in question could well be conveyed in some other manner. Whatever the means whereby the third State was informed, article 39 would apply only if the third State raised no objection to the transit of the special mission. He himself favoured the change of wording proposed by the Chilean Government.

52. Mr. KEARNEY said he agreed with Mr. Albónico that it was undesirable to grant an unduly wide range of privileges and immunities, even on a temporary basis, to special missions in transit. It should be remembered that transit of special missions involved a much larger number of persons than transit by members of permanent missions to and from their duty stations, which was covered by article 40 of the Vienna Convention on Diplomatic Relations. Article 39 therefore involved a correspondingly greater burden on countries of transit than article 40 of the Vienna Convention, while problems such as the difficulties arising out of traffic accidents would be much greater. He therefore considered that a much less rigid system would have to be adopted.

53. Mr. USTOR said he noted from paragraph (2) of the commentary that the Commission considered "that a third State is not bound to accord to its nationals who form part of a foreign special mission passing through its territory the privileges and immunities which the receiving State is not bound to guarantee to its nationals who are members of a foreign special mission (see article 36 of the draft)". He agreed with that statement and considered that it was in accord with the Vienna Convention on Diplomatic Relations. The position should, however, be made clear in the text of the article itself and not merely in the commentary.

54. On one point paragraph 3 of article 39 differed from the corresponding paragraph of article 40 of the Vienna Convention on Diplomatic Relations: in the second sentence, after the word "couriers", the words "who have been granted a passport visa if such visa was necessary" had been omitted. He wished to know whether that omission was intentional, and, if so what was the reason.

55. Mr. TAMMES said that the Netherlands Government had not proposed the deletion of the whole article but had wished to point out that the system of privileges and immunities depended upon consent being given to transit. Unless some criterion were laid down for justifying refusal to give consent, then it considered that the article ought to be dropped. In his opinion such criteria could be found, and consent could only be withheld in exceptional cases. Clauses of that kind had been inserted in the Conventions on the law of the sea.

56. Mr. BARTOŠ, Special Rapporteur, said that although he would prefer an objective criterion to one which employed terms such as "reasonable" or "extreme" which, where there was no court of appeal, left it to one party to decide whether the rule was applicable or not, he was prepared to accept Mr. Tammes's suggestion and word paragraph 4 in such a way that the third State would be able to object to transit only in extreme cases. The rule would not be based on a legal criterion but would impose a moral obligation.

57. He could not accept the United Kingdom Government's proposal, which would oblige States sending special missions to apply for permission for transit through the territory of the third State. He assumed that such permission would be granted or withheld through the grant or denial of a visa by the third State.

58. The United States Government's comments and the remarks by Mr. Kearney and Mr. Albónico raised the question of restrictions on freedom of transit. The Commission could reconsider that question when the article came back from the Drafting Committee; it could then decide whether certain restrictions should be placed on freedom of transit and on the grant of privileges and immunities.

59. In the Vienna Convention a distinction had been drawn for that purpose between diplomatic staff and their families on the one hand and technical and administrative staff and members of their families on the other, thus obviating many difficulties. If, in the case of special missions, passage in transit was not subject to any restrictions, complaints might be heard from transit States that special missions were constantly travelling to and fro. That situation was not covered by the Vienna Convention, and he had to admit that he had not considered it either.

60. In general, the article should not depart from the Vienna Convention on the main point; the other questions were minor ones and could be left to the Drafting Committee.

61. Mr. JIMÉNEZ de ARÉCHAGA said that in some respects article 39 conferred wider privileges and immunities than were normally accorded to diplomats in transit, but with respect to heads of special missions it did not go as far as some international treaties, such as the Inter-American Convention on Diplomatic Officers,[5] which dealt with both permanent and special missions. Its provisions concerning privileges and immunities were applicable to both.

62. Paragraph 4 would be too drastic if it were interpreted as meaning that States that were reluctant to grant immunities would have to deny the special mission transit. It would be more reasonable to give them discretion to allow transit while refusing immunities.

63. He could not agree with the Special Rapporteur that the United Kingdom proposal undermined the whole system of special missions. Possibly the denial of immunities might affect the status of certain special missions, but in those cases the missions would probably travel by some other route. Normally they would pass through the country even if they were not granted immunities. In his opinion the United Kingdom proposal would give a measure of flexibility that would help to solve certain practical difficulties and should be considered by the Drafting Committee.

64. Mr. TSURUOKA said that article 39 should be drafted in the most flexible terms possible. However, the Commission should leave no room for uncertainty in the interpretation of the provisions, and a paragraph should perhaps be added to the commentary explaining the meaning of the passage in the first sentence of paragraph 1 which read: "the third State shall accord him inviolability and such other immunities as may be required to ensure his transit or return".

65. The special mission was granted privileges and immunities only because it needed to travel in transit through the territory of a third State, and the enjoyment of those privileges and immunities should be limited in time and space. The purpose of the convention was to facilitate international relations, and if the Commission wished a large majority of States to accept the text it should avoid making the provisions of the convention so strict that some States would refuse to ratify it or would do so only with reservations.

66. Mr. NAGENDRA SINGH said that, in the interests of promoting international co-operation, the Commission should *de lege ferenda* treat special missions on the same footing as permanent missions, particularly in those instances when the former were carrying out functions of equal importance.

67. Mr. YASSEEN said that the Commission should be guided by existing practice. Article 39 imposed no obligation on a third State to allow a special mission to travel in transit through its territory or to grant the members of that special mission privileges and immunities.

68. The United Kingdom proposal that third States should be entitled to permit transit without also granting immunities to a special mission seemed calculated to facilitate international relations; if the proposal was not adopted, the only choice open to a third State would be between denying a special mission transit through its territory and granting it the privileges and immunities prescribed by the convention.

69. Mr. BARTOŠ, Special Rapporteur, said he hoped that the Commission would make a definite choice between the text suggested by the United Kingdom Government and that of the present draft. His own view was that paragraph 4 of the present draft left the third State free to object to the transit of a special mission and, in the case of a prior agreement, to deny the special mission the enjoyment of privileges and immunities in its territory.

70. The CHAIRMAN invited the Commission to comment on the United Kingdom proposal that the transit State should have the option of allowing passage, without granting privileges and immunities to the special mission.

71. Mr. CASTRÉN said the terms of paragraph 4 were too strict and he would prefer the wording suggested by Mr. Tammes, to the effect that the third State could not object to the transit of a special mission through its territory except in extreme cases.

72. Mr. USHAKOV said that, in his opinion, the problem raised by the United Kingdom Government was already solved in paragraph 4 of the article: if the third State could deny the special mission transit through its territory, it could always deny it privileges and immunities.

73. The provision requiring third States to accord the special mission freedom of official communication, including messages in code or cipher, and inviolability for its couriers should be mandatory.

74. Mr. USTOR said that if the sending State had to apply for visas for members of the special mission, the transit State might either grant them, or grant them subject to special conditions, or refuse them completely. A problem would, however, arise if nationals of the sending State were permitted freely to travel through the transit State without having to obtain visas.

75. He agreed with Mr. Ushakov that the question of correspondence and communication was a separate problem and that third States could not refuse correspondence and communication in transit.

76. Mr. RAMANGASOAVINA said that he understood the reasons for the United Kingdom Government's comment. That country was in a special position inasmuch as special missions sent by the Governments of English-speaking African countries often had to pass through London in order to catch their airline connexions to the territory of the receiving State; missions from French-speaking African countries were in a similar position, and had to travel to Paris first in order to reach their destination. Paris and London were junctions, and both the United Kingdom Government and the French Government often had occasion to issue transit visas, but they might feel some reluctance to grant privileges and immunities at the same time.

[5] Convention regarding Diplomatic Officers, adopted by the Sixth International American Conference and signed at Havana on 20 February 1928: League of Nations, *Treaty Series*, vol. CLV, p. 261.

77. The problem was totally different when a special mission was obliged to travel through the territory of an intermediate country in order to perform its task, and the Commission should include in the article some special provisions adapted to the needs of the various countries of transit.

78. Mr. CASTAÑEDA said that there was no real discrepancy between the system of the Vienna Convention on Diplomatic Relations and the United Kingdom proposal, but he considered paragraph 4 preferable to the United Kingdom proposal because the latter might have a restrictive effect on the granting of privileges and immunities.

79. Permission to send official correspondence and communications through a third State could not be withheld, as it was vitally important for the international community that there should be no restriction in that respect.

80. The CHAIRMAN said that there seemed to be some division of opinion in the Commission. Although the option proposed by the United Kingdom Government was not excluded by the existing text of article 39, the latter was inspired by a somewhat different point of view. In the opinion of the Special Rapporteur, once a transit State allowed a special mission passage through its territory, privileges and immunities were granted automatically.

81. However, although he had no responsibility for interpreting the United Kingdom Government's observation, he presumed that it had in mind the possibility of a State's not wishing to allow passage to a special mission as such, but being willing for its members to travel as private individuals. In his opinion the United Kingdom proposal was designed to facilitate international relations and to render the draft convention more acceptable to States, because so many parliaments were averse to extending privileges and immunities.

82. Mr. TSURUOKA, reverting to his previous remarks, said he wondered whether the Commission, without departing from the system based on article 40 of the Vienna Convention on Diplomatic Relations, could not set some limits of time and space to the régime of privileges and immunities.

83. Mr. BARTOŠ, Special Rapporteur, said that if the Commission wished to ensure the development of international relations, it must guarantee a special mission freedom of transit. Special missions sent by some countries, such as Nepal or Afghanistan, were always compelled, for geographical reasons, to pass through the territory of a third State. Moreover, if freedom of transit was not guaranteed, a special mission would have no assurance that it would be able to perform its task.

84. The problem was extremely important and, in view of the fundamental differences between the United Kingdom proposal and draft article 39, he was afraid the Drafting Committee would have the utmost difficulty in submitting a compromise solution to the Commission. Perhaps the Drafting Committee could prepare two texts, and the Commission would have to choose between them.

85. Mr. YASSEEN said that he did not think there was any difference in principle between draft article 39 and the wording suggested by the United Kingdom Government; the difference was one of emphasis.

86. Article 39, paragraph 4, in no way obliged the third State to grant a special mission freedom of transit through its territory. He personally would have no objection to imposing such an obligation on third States, but he wondered whether a plenipotentiary conference meeting to examine the draft convention would take the same view.

87. The CHAIRMAN said he agreed with Mr. Yasseen that perhaps the divergence of view in the Commission was not very wide. The Drafting Committee might succeed in finding an intermediate solution. He accordingly suggested that the article be referred to the Drafting Committee for reconsideration in the light of the discussion.

It was so agreed.[6]

The meeting rose at 6 p.m.

[6] For resumption of discussion, see 931st meeting, paras. 7-18.

910th MEETING

Tuesday, 30 May 1967, at 10 a.m.

Chairman: Sir Humphrey WALDOCK

Present: Mr. Ago, Mr. Albónico, Mr. Bartoš, Mr. Castañeda, Mr. Castrén, Mr. Ignacio-Pinto, Mr. Jiménez de Aréchaga, Mr. Kearney, Mr. Nagendra Singh, Mr. Ramangasoavina, Mr. Tammes, Mr. Tsuruoka, Mr. Ushakov, Mr. Ustor, Mr. Yasseen.

Special Missions

(A/CN.4/193 and Addenda; A/CN.4/194 and Addenda)

(continued)

[Item 1 of the agenda]

ARTICLE 40 *bis* (Non-discrimination) [50]

1. *Article 40* bis [50]

Non-discrimination

1. In the application of the provisions of the present articles, the receiving State shall not discriminate as between States.

2. However, discrimination shall not be regarded as taking place:

(*a*) Where the receiving State applies any of the provisions of the present articles restrictively because of a restrictive application of that provision to its special mission in the sending State;

(*b*) Where by custom or agreement States extend to each other more favourable treatment than is required by the provisions of the present articles;

(*c*) Where States agree among themselves to reduce reciprocally the extent of the facilities, privileges and immunities for their special missions in general or for particular categories of their special missions, although such a limitation does not exist with regard to other States.

3. Discrimination also shall not be regarded as taking place where there is inequality in the treatment of special missions which belong to different categories or are received in different circumstances.

2. The CHAIRMAN invited the Commission to consider the Special Rapporteur's proposal contained in his fourth report (A/CN.4/194/Add.2) for an article 40 *bis*.

3. Mr. BARTOŠ, Special Rapporteur, said that the Commission, after having at first decided not to include in the draft a rule prohibiting discrimination, had eventually instructed the Special Rapporteur to submit a draft article on the subject based on article 47 of the Vienna Convention on Diplomatic Relations and article 72 of the Vienna Convention on Consular Relations. The course of events was described in his fourth report (A/CN.4/194, paras. 251-259).

4. The article 40 *bis* he was submitting was based on those articles, but it also contained new elements.

5. First, paragraph 2 (*c*) rendered the non-discrimination rule inoperative where States had agreed among themselves to accord their special missions less favourable treatment than provided for in the draft articles. He regarded that provision as just and in keeping with the Commission's thinking on the subject, because privileges and immunities belonged to States, not to persons, and it was States which were best qualified to decide what conditions were necessary.

6. The purpose of paragraph 3 was to express the view which the Commission had always held, that special missions in different categories and charged with different tasks could not be treated in exactly the same way. It was obvious, for example, that a political mission negotiating a treaty of alliance would receive more attention than a small technical mission; that sort of thing should not be regarded as discriminatory.

7. In short, the non-discrimination rule was founded on the sovereign equality of States, but that did not mean that all special missions should be treated absolutely alike.

8. The General Assembly had approved the Commission's last report and Governments had raised no objections to the general rule; in fact the Government of Gabon in its comments (A/CN.4/193) had emphasized its importance. The Government of the United States (A/CN.4/193) had merely questioned the usefulness of a rule of non-discrimination in regard to the mode of reception of special missions, a matter not covered by article 40 *bis*.

9. Mr. CASTRÉN said that on the whole he approved both the substance and the form of the new article, which the Special Rapporteur had drafted in accordance with the wishes and general instructions of the Commission.

10. Paragraph 1 and paragraphs 2 (*a*) and (*b*), which were taken from the Vienna Conventions, laid down reasonable general rules which were equally applicable to special missions.

11. The principle enunciated in paragraph 2 (*c*) was also just, but he wondered whether it was necessary. How could such measures as those described constitute discrimination if they were based on agreements between the States concerned and were not detrimental to other States? He was not against retaining that provision, but whether or not it was necessary would also depend on the Commission's decision concerning a general clause on the right of derogation.

12. Paragraph 3 was not only extremely useful but also necessary, in order to complete the preceding provisions, and it would probably have the approval of Governments. The whole of the beginning of the sentence was clear, but the last part, "or are received in different circumstances", needed clarification. Although the report gave no hint that such was the case, the clause appeared to refer primarily to high-level special missions. If so, that should be stated in the article itself, which should also make clear in what other cases the rule of non-discrimination did not apply.

13. Mr. TAMMES suggested that the prohibition of discrimination should not be confined to the receiving State. A transit State, for example, should also avoid discrimination in the application of article 39. Paragraph 1 of article 40 *bis* should therefore read: "The parties to the present article shall not discriminate..."

14. The fact that such a wording would represent a departure from the system of the two Vienna Conventions should not deter the Commission from adopting that proposal; the Commission had already deviated from the provisions of the Vienna Conventions in connexion with other articles of the draft on special missions, such as article 39.

15. For the rest, he shared the doubts expressed by some Governments regarding the usefulness of the whole article. An article on non-discrimination was necessary in a convention on permanent diplomatic missions or consulates, because such missions and consulates were uniform institutions. Special missions, on the other hand, took many different forms; differences of treatment would be applied on all kinds of relevant and reasonable grounds. There were many provisions, such as those of article 4, which give States the faculty to take discretionary action without having to give reasons.

16. In such circumstances, there would be a danger that a State applying a reasonable differentiation might be accused of objectionable discrimination.

17. Mr. USHAKOV said he fully approved of the substance of the article but wished to make a few suggestions of a purely formal character in order that the article should reflect the thinking of the Special Rapporteur more closely.

18. Basically, there were three situations in which differential treatment should not be regarded as discriminatory. The first was in the case of reciprocity, which was dealt with in paragraph 2 (*a*). The second was the situation resulting from prior agreement, or established custom, between the sending State and the receiving State, as provided for in paragraph 2 (*b*), under which more favourable treatment could be granted than the draft articles required.

19. The third situation arose from the fact that most of the articles of the draft were dispositive articles from which States could derogate by special agreement. Paragraph 2(*c*) could be worded to read: "any special agreement between

the sending State and the receiving State derogating from the dispositive articles of this Convention". Thus worded, it would apply not only where States agreed to extend more favourable treatment to each other, but also where they decided to accord each other less favourable treatment. Incidentally, the correct expression was definitely "special agreement" and not "mutual agreement".

20. If paragraph 2 were worded in that way, paragraph 3 would not be necessary.

21. Mr. CASTAÑEDA said he supported both the substance and the form of article 40 *bis*.

22. It was no doubt difficult to apply the principle of non-discrimination in a matter which was largely left to the will of the receiving State. A special mission could not even be sent without the agreement of the receiving State, and that State could make its consent subject to conditions without giving any grounds.

23. It was perhaps precisely because of the discretion left to the receiving State that an article on the lines of article 40 *bis* was necessary. The article expressed an aspiration of contemporary international society. Its provisions would naturally have to be applied and interpreted in good faith; they would then constitute an effective instrument to prevent the more flagrant acts of discrimination.

24. Mr. KEARNEY said he agreed that the relationship between article 40 *bis* and special agreements with regard to special missions needed clarification.

25. The expression "as between States", which was used in paragraph 1, would also need clarification, since it was unclear whether it referred only to States parties to the future convention. The same expression was to be found in other articles of the draft.

26. Mr. YASSEEN said that the justification for article 40 *bis* was that discrimination should be eliminated everywhere. It was a well-balanced article which began by stating the principle and went on the specify various circumstances which were not to be regarded as evidence of discrimination, namely, reciprocity and agreements extending or limiting the privileges and immunities provided for in the draft articles.

27. Special missions being extremely varied, it was obvious that the same treatment could not be applied to all of them, and that slight modifications dictated by the nature or level of a special mission should not be regarded as discriminatory.

28. There was one point which might usefully be emphasized by the Commission, namely that discrimination could be particularly serious when several special missions were in the territory of the same State at the same time to discuss a question together. The discrimination problem could still arise, although less conspicuously, even without the coincidence of time. Relations between States evolved as the months and the years went by, with the consequence that some differences in treatment or reception, for example, could not be regarded as contravening the rule of non-discrimination.

29. Mr. JIMÉNEZ de ARÉCHAGA said he supported the principle of non-discrimination as applied to the privileges and immunities of special missions, but article 40 *bis*, as at present drafted, had an unduly wide application, since it began with the words "In the application of the provisions of the present articles". That general formula would cover such matters as the manner of reception of special missions. The United States Government, in its comments on article 11 (A/CN.4/193), had stated that it was neither necessary nor desirable that all special missions should be received in the same manner. And as Mr. Yasseen had pointed out, the manner of reception would depend on such matters as the existence of close relations between the States concerned and the position held by the leader of the mission.

30. For those reasons, he did not support the idea of erecting into a legal rule the principle of non-discrimination in matters other than privileges and immunities. As far as privileges and immunities were concerned, however non-discrimination was already covered by the Special Rapporteur's proposed new article 17 *ter* (A/CN.4/194/Add.2).

31. Mr. ALBÓNICO said he favoured the retention of the basic rule in article 40 *bis* but would urge the Commission to be extremely cautious in the granting of privileges, immunities and facilities to special missions.

32. He therefore suggested that the article be confined to the contents of paragraph 1. He had no objection to the rule in paragraph 2 (*b*) relating to the agreement between States, but the provision was not essential because States could always agree to extend to each other more favourable treatment than was required by the provisions of the draft articles.

33. On the other hand, he was opposed to the inclusion of paragraphs 2 (*a*), 2 (*c*) and 3, which specified cases in which discrimination was possible. At the present stage of development of international law, it would be most undesirable to specify grounds of discrimination in that manner.

34. Article 40 *bis* should be reworded on some such lines as:

> "In the application of the provisions of the present articles, States shall not discriminate in any way except by special agreement".

35. Mr. USTOR said that, even if article 40 *bis* were not included, the principle of non-discrimination would still apply: the general rule that a convention was equally binding on all its signatories implied non-discrimination. That being so, he could support the inclusion of an article on the subject.

36. As proposed, article 40 *bis* contained a number of basic ideas. The first idea was that embodied in paragraph 1, supplemented by paragraph 3, that special missions of the same nature should be treated without discrimination.

37. The second idea was that of restrictive application by way of reciprocity, the clause in paragraph 2 (*a*). That clause appeared in the 1961 Vienna Convention on Diplomatic Relations as paragraph 2 (*a*) of article 47, but it had been the subject of much criticism in the Commission when it was proposed to include it also in the draft articles on consular relations.

38. During that discussion Mr. Padilla Nervo had said that:

> "In his opinion, it was quite the most regrettable provision in the whole of the Vienna Convention, because it allowed some latitude of application, whereas in fact what what was required was strict compliance with the precise terms of the Convention. It seemed a great mistake to imply that States could avoid fulfilling the obligations of the Convention on the ground that they were taking retaliatory action."[1]

In the course of the same discussion, Mr. Bartoš had pointed out that "the participants in the Vienna Conference had included paragraph 2 (*a*) for political, rather than for juridical reasons. The result was something which could not be regarded as desirable in international law; no jurist could recommend opening the door to what amounted to reprisals."[2]

39. For those reasons, the Commission had not included the clause in its draft on consular relations. The 1963 Vienna Conference, however, had overruled the Commission and had introduced into the Convention on Consular Relations a provision similar to that which appeared as paragraph 2 (*a*) of article 47 of the 1961 Vienna Convention on Diplomatic Relations.

40. Once again, the Commission was called upon to decide the same issue, on the present occasion in connexion with special missions, and he for one could hardly support a provision which could not fail to prove distasteful to most jurists.

41. The third idea was that of possible agreements between States, to which reference was made in paragraphs 2 (*b*) and (*c*). The contents of those provisions seemed to him more suitable for inclusion in the article which dealt with the relationship between the draft articles on special missions and other bilateral and multilateral instruments.

42. But as far as article 40 *bis* was concerned, he would be in favour of confining it to the contents of paragraph 1, supplemented by parts of paragraph 3, with a possible cross-reference to the article dealing with the relationship between the draft articles and other conventions.

43. Mr. YASSEEN, replying to Mr. Ustor, said that a few years previously he had himself spoken in favour of strict application of the articles without any possibility of extending or restricting the facilities, privileges and immunities provided for. Since then, after experience acquired at large plenipotentiary conferences where States expressed their views direct, he had changed his opinion and he was now glad that the Commission had kept an open mind for every eventuality.

44. Mr. BARTOŠ, Special Rapporteur, said he noted with satisfaction that all the members of the Commission agreed on the need for a rule laying down the principle of non-discrimination as stated in paragraph 2 of the present text of article 40 *bis*. That paragraph contained three rules, based on three different principles.

45. In paragraph 2 (*a*), the dominant idea was that of retaliation, based on the spirit of reprisals. That attitude had been dictated by the signs of bad faith on the part of certain States in their interpretation of conventional rules. It was true, as Mr. Ustor had said, that at the Vienna Conference on Consular Relations the principle of retaliation had not been accepted in committee; in plenary, however, the political and diplomatic viewpoints had prevailed, and the principle had been adopted. Moreover, it was the International Law Commission which had asked the Special Rapporteur to reproduce the provisions adopted by the two Vienna Conferences, and that was why the first sub-paragraph of paragraph 2 was based on the principle of good faith, according to which no State could claim more favourable treatment than that which it accorded to the other parties to the convention. It would be for the Commission to take a decision on that point, however.

46. It might be asked whether it was possible to invoke the most-favoured-nation clause in connexion with paragraph 2 (*b*). It was not; for although States could grant each other additional privileges and immunities, what was guaranteed to all States was the minimum laid down in the convention.

47. Sub-paragraph (*c*) dealt with the converse principle. States could agree between themselves to reduce the extent of the privileges, immunities and facilities granted. If they did so, they could not subsequently complain of discriminatory measures. States could not demand full application of the convention when, by *inter se* agreements or arrangements, they had agreed to restrict the privileges and immunities provided for. If article 17 *ter* was compared with the present text of article 40 *bis*, it would be seen that they were two different ways of expressing one and the same principle. Under the terms of article 17 *ter* States could, by mutual agreement, derogate from the rules applicable, whereas according to article 40 *bis*, discrimination was not regarded as taking place when States agreed between themselves to grant each other more favourable or less favourable treatment than was required by the provisions of the draft.

48. Turning to paragraph 3, he explained that it had been at the request of the Australian and other Governments that the Commission had provided for the possibility of applying different treatment to missions in different categories. In order to decide whether privileges and immunities should be reduced for special missions in certain categories, it would be necessary to make a careful examination of part II of the draft. The phrase "or are received in different circumstances", at the end of the paragraph, had been the subject of much controversy. The fact was, however, that special missions could be received very favourably, for example, when the States participating in the negotiations were on very friendly terms, whereas conditions could be less favourable when the receiving State was in a difficult situation, through disaster or peril, for example. Mention should also be made of the case where economic and trade relations between States had just improved, with the consequence that the special mission was received with exceptional friendliness.

49. There was, of course, a dividing line between legal treatment and courtesy. The text might perhaps require

[1] *Yearbook of the International Law Commission, 1961*, vol. I, 608th meeting, para. 46.

[2] *Ibid.*, para. 52.

revision or amplification. Was it necessary to add certain explanations or to put them in the commentary, or should the provision be retained as it stood? In any case, he was not opposed to the deletion of the phrase "or are received in different circumstances", if the Drafting Committee thought it advisable.

50. It would be remembered that technical, quasi-technical and semi-technical missions, and semi-political missions as well, had asked to be received on the same footing as missions of great political importance. It seemed clear, however, that a mission with a more restricted task could not claim the same treatment as one responsible for concluding a treaty of alliance or of general co-operation; he therefore considered that only special missions in the same category could claim to be received in an identical manner.

51. Mr. Tammes's proposal would improve the text, but the Commission should not adopt it until it had taken a decision on the preceding article. If its decision was favourable to the idea that the transit State had a duty to grant the usual privileges and immunities to a mission passing through its territory, Mr. Tammes's proposal, assimilating the transit State to the receiving State, should be considered.

52. He hoped that he had also answered the comments made by Mr. Ushakov. With regard to the questions raised by Mr. Ustor, he was willing to delete paragraph 2 (*a*), although it was based on general international law, whatever certain States might think.

53. Mr. NAGENDRA SINGH said he favoured the retention of paragraphs 1, 2 (*a*) and 2 (*b*). The deletion of any of those paragraphs, or the introduction of any change in their text, could give rise to difficulties of interpretation. He also favoured the retention of paragraph 2 (*c*) *ex abundanti cautela*. He saw no strong reasons, on the other hand, for retaining paragraph 3. In particular, he had doubts with regard to the concluding phrase, "or are received in different circumstances". If the circumstances were different, it would seem that the question of discrimination did not arise.

54. The CHAIRMAN, speaking as a member of the Commission, said that he shared the doubts which had been expressed with regard to paragraph 3, at any rate in its present form. He noted that the Special Rapporteur was prepared to consider the deletion of the concluding words "or are received in different circumstances"; if they were retained, they would take much of the substance out of the article by opening too wide a door to interpretation. As pointed out by Mr. Yasseen, except where there was a real unity in time, the circumstances in which special missions were received would tend to differ.

55. The other idea contained in paragraph 3, the question of special missions of different categories, was an important one but involved the difficulty of determining what those categories were. It was true that some examples were given in the commentary, but an explanation in that form was not sufficient, since the commentary would later disappear and only the article would remain.

56. The Drafting Committee should consider whether the point embodied in paragraph 3 was so much part of the essence of special missions that it should be included in paragraph 1, which could then be recast to state that: "States may not discriminate as between special missions of a similar category."

57. The question had also been raised of extending the provisions of article 40 *bis* to a transit State, as well as to the receiving State. Consideration should also perhaps be given to extending the provisions of the article to a State which merely permitted the conduct of business on its territory by special missions. The Drafting Committee would have to consider the possibility of formulating wording which would cover all those points.

58. Mr. AGO said he shared the Chairman's doubts regarding paragraph 3 of the present text of article 40 *bis*. If the convention was to contain a separate chapter on high-level missions to which a special régime was applicable, any differentiation between other categories of special missions would amount to discrimination. Moreover, the phrase "or are received in different circumstances" at the end of paragraph 3, opened the way for all sorts of abuses and subjective judgements, so much so that there would be every advantage in deleting paragraph 3 from the draft.

59. The CHAIRMAN suggested that article 40 *bis* be referred to the Drafting Committee for consideration in the light of the discussion.

It was so agreed.[3]

60. Mr. AGO said he wished to make a comment which related to the whole group of articles already considered at the present session. On the whole, the standpoint of those articles was essentially bilateral. Nevertheless, they made provision for some cases of plurality. For instance, the Commission had dealt with the case of a special mission which negotiated successively or even simultaneously with several States. Following a suggestion by the Belgian Government, the Commission also proposed to deal with the case in which several States sent a joint special mission to another State to negotiate with it. Finally, article 16 dealt with the case in which special missions sent by different States met in the territory of a third State, either at its invitation or because the States concerned had asked its permission. It should be noted that in the latter case the terminology adopted by the Commission was no longer entirely suitable. There was not a sending State and a receiving State, but several sending States and one third State, which received the special missions in its territory.

61. In his opinion the Commission should also deal with the increasingly frequent case in which several States simultaneously sent to the capital of another State special missions responsible for multilateral negotiations in which the State in whose territory they met was also taking part. An example was the conversations then taking place in Rome between missions from the six members of the European Economic Community. In that case, he thought that the terms of reference and the task of the special missions should be discussed in advance and settled, not bilaterally between each sending State and the State in whose territory the meeting was to be held, but between all the States concerned. There should be special provi-

[3] For resumption of discussion, see 931st meeting, paras. 19-21.

sions in the draft to take account of that situation, so that the articles would deal with special missions not only as instruments for bilateral relations, but also as instruments for collective negotiation.

62. Mr. BARTOŠ, Special Rapporteur, replying to Mr. Ago's comment, said that he had raised that question in 1963 and the Commission had asked the two special rapporteurs appointed to study, respectively, special missions and relations between States and inter-governmental organizations, to consult each other in order to determine whether the question came within the scope of either topic. In his opinion, if the meeting was convoked by States, then the question related to special missions. Unfortunately the two special rapporteurs had never had an opportunity of consulting each other on the point, and Mr. El-Erian was now absent. He was willing to examine the question and submit a proposal to the Commission.

63. Mr. CASTRÉN said that the problem raised by Mr. Ago was most important. Although some aspects of it, at least, had already been dealt with under article 16, there was no reason why the Commission should not examine the matter more thoroughly.

64. Mr. RAMANGASOAVINA said he also agreed that the concepts of "sending State" and "receiving State", as defined in the draft, might be inadequate in certain circumstances, particularly where several States sent special missions to another State for a conference. The term "receiving State" might be reserved for the case of bilateral negotiations. When several special missions met in the territory of a third State, which was not itself a party to the negotiations, that State could be called the "host State".

65. Mr. JIMÉNEZ de ARÉCHAGA said that at its twelfth session the Commission had decided "not to deal with the privileges and immunities of delegates to congresses and conferences as part of the study of special missions, because the topic of diplomatic conferences was connected with that of relations between States and intergovernmental organizations."[4] At the fifteenth session the question had been raised again, with particular reference to conferences convened by States, and most members had expressed the opinion, that for the time being the terms of reference of the Special Rapporteur should not cover the question.[5] The Commission should abide by that decision.

66. The CHAIRMAN suggested that the matter be left aside for the time being, particularly as it would be interesting to hear Mr. El-Erian's views. Mr. El-Erian had considered the point in connexion with the relationship between his report on the relations between States and inter-governmental organizations and the report on special missions.

67. To avoid clumsy drafting, definitions might be needed of the receiving State, the third State and any other State that might be concerned with the application of the draft convention.

68. Mr. YASSEEN said that the case referred to by Mr. Ago was an extreme one: it was neither a conference proper, nor a meeting convoked by an international organization.

69. The CHAIRMAN said that it would all depend on what was meant by the expression "international conference".

70. Mr. USTOR pointed out that the Commission had not dealt with the case where a State sent several different special missions to the same receiving State at the same time, when questions of precedence might arise.

71. Mr. AGO said that the conversations which he had in mind were neither a meeting convoked by an international organization nor a diplomatic conference in the strict sense. What he wished was that the Commission should cover a case similar to that dealt with in article 16, but where the State on whose territory the meeting took place was itself a party to the negotiation. He welcomed the Special Rapporteur's proposal that he should report on the matter without awaiting the return of Mr. El-Erian, who was dealing with an entirely different subject.

ARTICLE 40 (Obligation to respect the laws and regulations of the receiving State) [48]

72. *Article 40* [48

Obligation to respect the laws and regulations of the receiving State

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

2. The premises of the special mission must not be used in any manner incompatible with the functions of the special mission as laid down in these articles or by other rules of general international law or by any special agreements in force between the sending and the receiving State.

73. The CHAIRMAN invited the Commission to consider article 40. The Special Rapporteur's views were given in paragraph 4 of the section dealing with that article in his fourth report (A/CN.4/194/Add.2).

74. Mr. BARTOŠ, Special Rapporteur, said that paragraph 1 reproduced *mutatis mutandis* article 41, paragraph 1, of the Vienna Convention on Diplomatic Relations and article 55 of the Vienna Convention on Consular Relations. Paragraph 2 reproduced article 41, paragraph 3, of the Vienna Convention on Diplomatic Relations.

75. No government had offered any comments on the article and he did not think it was necessary to alter either the text or the commentary.

76. Mr. YASSEEN said he approved the text of the article but might later wish to question the placing of paragraph 2.

77. There seemed to be no real point in retaining the last part of paragraph 2, from the words "as laid down..." onwards. Since the Commission had defined the functions of the special mission in other articles, it was sufficient to stipulate that the premises of the special mission should not be used in any manner incompatible with its functions.

[4] See *Yearbook of the International Law Commission, 1963*, vol. II, document A/5509, para. 63.

[5] *Ibid.*

78. Mr. BARTOŠ, Special Rapporteur, said that Mr. Yasseen's comment was justified and he would delete that part of the sentence.

79. Mr. NAGENDRA SINGH said that he was in favour of retaining article 40 and the commentary on it without change.

80. The CHAIRMAN, commenting on the proposed amendment to article 40, observed that in general the Commission preferred to keep to the wording of the Vienna Convention on Diplomatic Relations, unless there were good reasons of substance for not doing so.

81. He suggested that article 40 be referred to the Drafting Committee.

It was so agreed.[6]

ARTICLE 42 (Professional activity) [49]

82. *Article 42* [49]

Professional activity

The head and members of the special mission and the members of its diplomatic staff shall not practise for personal profit any professional or commercial activity in the receiving State.

83. The CHAIRMAN invited the Commission to consider article 42, the Special Rapporteur's proposals for which were contained in paragraph 11 of the section dealing with that article in his fourth report (A/CN.4/194/Add.2) and in his additional comments in document A/CN.4/194/Add.4.

84. Mr. BARTOŠ, Special Rapporteur, said that article 42, which reproduced *mutatis mutandis* the text of article 42 of the Vienna Convention on Diplomatic Relations, had been the subject of comments by several Governments.

85. The Belgian Government proposed replacing the words "shall not practise", in the second line, by the words "shall not carry on", which appeared in article 57, paragraph 1, of the Vienna Convention on Consular Relations. It also proposed supplementing the article by the addition of provisions similar to those of article 57, paragraph 2, of that Convention, which laid down that members of the families of the persons referred to in article 42 should be prohibited from practising for personal profit any professional or commercial activity in the receiving State. He saw no objection to the first proposal, which was a question of form; with regard to the second, however, although he would not oppose it, he wondered whether the Commission should go into details of that kind.

86. The Turkish delegation had made certain comments during the discussions in the Sixth Committee of the General Assembly[7] and he had asked it to provide him with certain explanations, but had received no reply to his request.

87. The Netherlands Government had proposed adding the words "and they may not do so for the profit of the sending State unless the receiving State has given its prior consent" at the end of the article. When considering that point, the Commission had decided to keep to the formula used in the Vienna Convention on Diplomatic Relations.[8] He did not think the Commission should change its view, since under article 40, paragraph 1, the members of special missions were under an obligation to respect the laws and regulations of the receiving State.

88. The Government of Israel had proposed adding the words "without the express prior permission of that State" at the end of the article because it considered that in particular instances the members of a special mission ought to be allowed to engage in some professional or other activity whilst in the receiving State.

89. The Government of Canada had observed that article 42 "does not cover members of special missions who, on behalf of the sending State, might carry on activities not consonant with the mission's terms of reference".

90. He noted that the general trend was to restrict the freedom of members of a special mission to exercise a professional activity, even where the activity was not carried on for personal profit. He personally favoured retaining the text of article 42 and was prepared to accept the formal amendment proposed by Belgium that the words "shall not practise" should be replaced by the words "shall not carry on".

91. Mr. AGO said he saw no reason why the Commission should depart from the formula adopted in the Vienna Convention on Diplomatic Relations. If, in exceptional circumstances, the members of the special mission were to carry on a professional or commercial activity in the territory of the receiving State, such cases could be regulated by bilateral agreement between the sending State and the receiving State.

92. The Commission should therefore keep to the existing wording of article 42, as formally amended by the Belgian Government and the Special Rapporteur. The article would then read: "The members and the diplomatic staff of the special mission shall not carry on for personal profit any professional or commercial activity in the receiving State".

93. Mr. CASTRÉN said he agreed with Mr. Ago. If any difficulty arose, it would be better to settle it by reference to the provisions of the Vienna Convention on Diplomatic Relations rather than to those of the Convention on Consular Relations, which laid down a slightly different system.

94. It would be enough to mention the Canadian Government's observation in the commentary.

95. Mr. NAGENDRA SINGH said that, while he agreed that as a general principle the Commission should follow the wording of the Vienna Convention on Diplomatic Relations, he was in favour of the Belgian Government's proposal to substitute the words "shall not carry on" for the words "shall not practise", which was a rather clumsy phrase in English.

[6] For resumption of discussion, see 937th meeting, paras. 88-107.

[7] See *Official Records of the General Assembly, Twentieth Session, Sixth Committee*, 847th meeting, para. 24.

[8] *Yearbook of the International Law Commission, 1965*, vol I, 809th meeting, paras. 10-51.

96. The Israel Government's proposal to add the words "without the express prior permission of that State" was justified. If that change were made, the word "personal" in the present text of article 42 should be deleted, since professional activity could result in group profit.

97. He favoured the proposal made by the Special Rapporteur in his report (A/CN.4/194/Add.2) to substitute the words "The members and diplomatic staff of the special mission" for the words "The head and members of the special mission and the members of its diplomatic staff."

98. Mr. TSURUOKA pointed out that the States concerned could always, if circumstances demanded, conclude an agreement authorizing the members of a special mission to carry on professional activities.

99. Mr. JIMÉNEZ de ARÉCHAGA said that article 42 should be approved as it stood; he was opposed to incorporating the Israel Government's amendment.

100. The discussion on that subject at the seventeenth session, at the 809th meeting, shed light on the scope of article 42 and particularly on the character of the prohibition against the exercise of professional or commercial activity. One member had expressed the view that "it was hardly necessary to lay down rules as stringent as those applicable to permanent missions. It was right that diplomats and consular officers should not be allowed to carry an any other professional activity; but a special mission might be composed of persons from very different walks of life, businessmen, for example, who might even be established in the receiving State. If such a person was forbidden to carry on any activity for his own account so long as the mission lasted, governments might have difficulty in securing the services of competent persons."[9] On that occasion Sir Humphrey Waldock had argued that States were not precluded from reaching agreement on a less stringent rule.

101. Mr. BARTOŠ, Special Rapporteur, said he agreed that the possibility of the States concerned concluding an agreement to enable the members of a special mission to carry on professional activities should be mentioned in the text of the article. He suggested that the Commission refer article 42 to the Drafting Committee.

102. Mr. USTOR said he would like to know exactly what was meant by the expression "professional activity". Would it, for example, include the writing of a newspaper article, which might not be paid for, or any kind of artistic performance? Perhaps some explanation was needed in the commentary.

103. Mr. BARTOŠ, Special Rapporteur, said that some members of the Commission had thought that the members of a special mission should be allowed to carry on professional or commercial activities, and even to avail themselves for that purpose of their status as members of a special mission. Others had taken the opposite view and contended that businessmen who were members of economic special missions could, on the strength of their official duties, secure advantages in the host country to the detriment even of their compatriots.

104. The CHAIRMAN said that there seemed to be general support for the Belgian Government's amendment to substitute the words "shall not carry on" for the words "shall not practise". He suggested that the article be referred to the Drafting Committee.

It was so agreed.[10]

ARTICLE 41 (Organ of the receiving State with which official business is conducted) [15]

105. *Article 41* [15]

Organ of the receiving State with which official business is conducted

All official business with the receiving State entrusted to the special mission by the sending State shall be conducted with or through the Ministry for Foreign Affairs of the receiving State or such other organ, delegation or representative as may be agreed.

106. The CHAIRMAN invited the Commission to consider article 41. The Special Rapporteur's proposals were contained in paragraph 7 of the section on that article in his fourth report (A/CN.4/194/Add.2) and in his additional comments in document A/CN.4/194/Add.4.

107. Mr. BARTOŠ, Special Rapporteur, said that article 41 had originally formed part of article 40 and was based on article 41, paragraph 2, of the Vienna Convention on Diplomatic Relations. The general rule stated in article 41 was that all official business should be conducted with the Ministry of Foreign Affairs. The rule could be modified in cases where special missions had to deal with organs of the receiving State specifically responsible for the matters of interest to the missions.

108. The Canadian Government had suggested that, in the commentary, emphasis should be placed on the need for the prior agreement of the receiving State "to the communication by the special mission with other of its own organs than its Foreign Ministry." He personally would prefer that the Drafting Committee should be asked to submit either the wording used in the article, namely, "... as may be agreed", or the wording "...to which the Ministry for Foreign Affairs directs the special mission".

109. The Belgian Government had proposed replacing the word "organ" by the word "authority", but from the legal point of view an organ was merely a representative of the authority and did not necessarily possess its powers. He could agree to add the word "authority" to the list at the end of the article, but thought the word "organ" should be retained.

110. The question whether article 41 should be incorporated in article 40 remained open, but he would prefer to keep the two articles separate.

111. Mr. AGO said he agreed with the Special Rapporteur. The Drafting Committee could decide whether or not article 41 should be retained as a separate article.

[9] *Ibid.*, para. 44.

[10] For resumption of discussion, see 938th meeting, para. 58.

112. The CHAIRMAN suggested that article 41, which, in the absence of comment he presumed was generally acceptable, be referred to the Drafting Committee.

It was so agreed.[11]

The meeting rose at 12.50 p.m.

[11] For resumption of discussion, see 938th meeting, para. 57.

911th MEETING

Wednesday, 31 May 1967, at 11.30 a.m.

Chairman: Sir Humphrey WALDOCK

Present: Mr. Ago, Mr. Albónico, Mr. Castañeda, Mr. Castrén, Mr. Ignacio-Pinto, Mr. Jiménez de Aréchaga, Mr. Kearney, Mr. Nagendra Singh, Mr. Ramangasoavina, Mr. Reuter, Mr. Tammes, Mr. Tsuruoka, Mr. Ushakov, Mr. Ustor, Mr. Yasseen.

Also present: Sir Gerald Fitzmaurice, Mr. Lachs, Mr. Žourek, Mr. Caicedo Castilla, Observer for the Inter-American Juridical Committee.

Statements by Sir Gerald Fitzmaurice, Mr. Lachs and Mr. Žourek

1. The CHAIRMAN welcomed three former members of the Commission, Sir Gerald Fitzmaurice, Mr. Lachs and Mr. Žourek. He said it was a special pleasure to greet Sir Gerald who, in the years 1955 to 1960, had been special rapporteur on the law of treaties and who in that capacity had prepared five reports containing profound studies on many aspects of that branch of the law, which had been of the greatest value in furthering the Commission's work and of the greatest help to his successor.

2. As a member of the Commission, he had worked for a year with Mr. Žourek, whose excellent reports on consular relations had found fruition in the Vienna Convention on that subject.

3. He thanked Mr. Lachs for his contributions to the discussion on the law of treaties in the Commission and for his work in the Drafting Committee.

4. Sir Gerald FITZMAURICE said that the President of the International Court of Justice was to have met the Secretary-General in Geneva that week to discuss matters of common interest and had intended to visit the Commission on that occasion to convey his best wishes for the continued success of its work, already so impressive and of such moment to the community of nations. However, the planned meeting had been postponed and the President had deputed to him the task of visiting the Commission.

5. Despite the obvious difference of functions, there were close links between the Court and the Commission and a number of members of the latter had become Judges of the Court. In both cases members were elected by governments, not as representatives of countries but in their personal capacity as jurists, and they had a scientific task to perform in accordance with their consciences.

6. The two bodies had a community of interest and a common legal foundation. The Court had to declare the law, not as an arbitrary process but in accordance with the provisions of Article 38, paragraph 1, of its Statute. The Commission's task was less circumscribed, for it was the main international codifying agency, but it still had to take into account the elements laid down in that article. The work of each influenced the other and they had a joint obligation to make every effort to promote the law.

7. As a former special rapporteur on the law of treaties he wished to pay his tribute to the Commission's remarkable achievements on that topic.

8. The CHAIRMAN asked Sir Gerald to convey the Commission's thanks to the President of the Court for his message. The codification, elucidation and progressive development of the law was often said to be an essential prerequisite for extending the acceptance of the Court's jurisdiction and for its successful operation as a judicial instrument, and the process was certainly an indispensable condition for the peace and welfare of the international community.

9. He also wished to mention the feelings of personal friendship which existed between the Judges of the Court and members of the Commission.

10. Mr. LACHS said that the mutual respect that existed between the Court and the Commission was a hopeful aspect in the development of international law, and though their members came from different parts of the world with differing legal philosophies there was a considerable degree of understanding between them.

11. Mr. ŽOUREK said he was very glad of the opportunity of seeing his former colleagues in the Commission again and meeting the new members. Although he no longer took part in the work of the Commission, he still continued to follow its activities out of scientific and professional interest. During his many travels he had always endeavoured to make better known the part played by the Commission, whose work for the codification of international law contributed to the development of relations between all peoples. For instance, in the course of a symposium held in West Berlin he had recently delivered a lecture on the activities of the Commission.

12. The draft articles on the law of treaties had been successfully completed and the codification of important rules of international law had been carried through, thanks in large measure to the authority and skill of Sir Humphrey Waldock, whose merits the Commission had very properly recognized by electing him Chairman. The documents of the Commission were a valuable source of information to him and enabled him to maintain a sort of spiritual contact with the Commission.

Co-operation with other Bodies

(resumed from the 898th meeting)

[Item 5 of the agenda]

13. The CHAIRMAN invited the observer for the Inter-American Juridical Committee to address the Commission.

14. Mr. CAICEDO CASTILLA (Observer for the Inter-American Juridical Committee), after paying a tribute to the work accomplished by the Commission in the codification of international law, said that, in the inter-American sphere, there had been three outstanding achievements in the past twelve months: first, the technical meeting held by the Inter-American Juridical Committee from July to October 1966; secondly, the Protocol for the amendment of the Charter of the Organization of American States (OAS), prepared by the Third Special Inter-American Conference held at Buenos Aires in February 1967, and thirdly, the Declaration on economic integration by the Presidents of the American Republics at the April 1967 meeting at Punta del Este.

15. At its 1966 meeting the Committee had examined first the question of a code of private international law for the countries of America. A number of codes were already in existence, but they conflicted with one another to some extent; they were the 1928 Bustamante Code, the Montevideo Treaties of 1889 and 1940, and the unofficial North American codification entitled the *Restatement of the Law of Conflict of Laws*. The Committee had stressed the importance of preparing a unified code, because hundreds of thousands of nationals of American States lived in other American States of which they were not nationals; the formulation of rules to solve the conflicts of laws which thus arose would promote good relations between the American States. The proposed economic integration of the region also made it urgent to facilitate the settlement of conflicts of laws on such matters as international contracts, insurance and banking. The work on the preparation of a new code of private international law was well advanced and a specialized conference of representatives of American States would meet in the forthcoming months to pronounce on the problem.

16. The Committee had also examined the question of the gap in the OAS system for the peaceful settlement of disputes, a gap which arose from the fact that the American Treaty on Pacific Settlement—the Pact of Bogotá of 30 April 1948[1]—had not been ratified by all the countries of the region. That Treaty made provision for such methods of peaceful settlement as mediation, conciliation, arbitration and judicial settlement by the International Court of Justice; some countries of the region, however, did not accept compulsory arbitration, while others were not prepared to accept the compulsory jurisdiction of the International Court. The Committee had urged the ratification of the Treaty by those countries which had not yet done so.

17. The Committee had also dealt with the law of outer space and had recommended Governments of the American States to adhere to the "Legal Principles Governing the Activities of States in the Exploration and Use of Outer Space" set forth in the Declaration embodied in General Assembly resolution 1962 (XVIII) of 13 December 1963 and in subsequent General Assembly resolutions on outer space. The Committee had urged the Governments of the American States to co-operate in all efforts to give legal effect to those principles by means of a world-wide convention, and had specifically reiterated Principle 3: "Outer space and celestial bodies are not subject to national appropriation by claim of sovereignty, by means of use or occupation, or by any other means". It had also recommended to those Governments to promote the setting up of a world body with a sufficient measure of jurisdiction in matters of outer space to deal with controversies arising from the use of such space, including damage caused by outer space activities.

18. The Committee took the view that the traditional Latin American doctrine in the matter of State responsibility, which ruled out concepts of objective liability with regard to claims by aliens, did not stand in the way of the acceptance of the recommendations adopted by the United Nations General Assembly with regard to the international responsibility of States for injuries caused as a result of outer space activities. Latin America rejected the notion of objective liability which had been put forward in connexion with claims by aliens in respect of injuries sustained by them at the hands of authorities or private individuals in their country of residence and the diplomatic protection of such injured aliens. On that point, a firm stand had been adopted in Latin America, based on the equal treatment of nationals and aliens and the need to prove an actual delinquency on the part of the State, and to show that legal remedies had been exhausted before international responsibility could arise; in addition, the Latin American concept of denial of justice was a restrictive one. The international responsibility of a State for its activities in the exploration and use of outer space concerned damage to aliens living outside its territory. The Latin American principles to which he had referred related to claims by resident aliens against the State in whose territory they resided and were therefore not applicable in the matter.

19. Lastly, the Committee had examined the question of amendments to the Charter of the Organization of American States, in respect of which it had been claimed that a distinction could be drawn between certain amendments which entered into force immediately and others which required ratification. The Committee had rejected that distinction and had stated that, in all cases, amendments to the OAS Charter would enter into force only after ratification by two-thirds of the member States, as specified in that Charter.

20. The Buenos Aires Conference of February 1967 had formulated a Protocol embodying a number of important amendments to the OAS Charter, intended to accelerate and render more flexible the operation of the Organization. One amendment would have the effect of replacing the Inter-American Conference, which met every five years, by an annual General Assembly, as the supreme authority of the Organization. Another amendment dealt with the question of the admission of new members, for which no provision had been made in the OAS Charter; the Protocol specified a two-thirds majority of the member States for such admissions.

21. The Inter-American Treaty of Reciprocal Assistance signed at Rio de Janeiro on 2 September 1947[2] would continue to govern the whole question of aggression and

[1] United Nations, *Treaty Series*, vol. 30, p. 84.

[2] United Nations, *Treaty Series*, vol. 21, p. 93.

threats to the peace and security of the continent; the system of collective security in that treaty had worked satisfactorily in practice and had made it possible to solve a number of very grave problems.

22. At present, the Organization of American States had a Council which, in turn, had three organs: the Inter-American Economic and Social Council, the Inter-American Cultural Council and the Inter-American Council of Jurists. The Protocol for the amendment of the OAS Charter would have the effect of setting up independent councils, each with its own functions: a Permanent Council, an Economic and Social Council and a Council for Education, Science and Culture. The Inter-American Council of Jurists would be abolished, but the Inter-American Juridical Committee would continue as the main legal organ of the Organization and would report directly to the annual General Assembly, instead of to the five-yearly Conference through the Inter-American Council of Jurists.

23. In addition, the Committee would be enlarged from nine to eleven members, elected for a period of four years by the OAS General Assembly. Its terms of reference would include the promotion of the codification and progressive development of international law and the study of legal problems relating to the integration of the developing countries of America.

24. The amendments to the OAS Charter would also have the effect of strengthening the Inter-American Economic and Social Council, which would meet annually at the ministerial level, and would have an executive committee in the shape of the Inter-American Committee on the Alliance for Progress. Indeed, the emphasis on economic problems was a characteristic feature of the amendments embodied in the Protocol.

25. Some of the economic provisions thus amended had a legally binding character, such as the recognition by all the member States that the integration of the developing countries of the continent constituted one of the objectives of the Inter-American system; States accordingly bound themselves to take all necessary steps to accelerate the process of integration. All member States undertook to avoid any policies and measures which could have an adverse effect on the economic and social development of other member States; they also agreed to join together in seeking a solution to any urgent or serious problems which might arise regarding the development or economic stability of any member State. The more economically developed countries undertook not to require reciprocal concessions from the developing countries when granting them tariff reductions or concessions regarding non-tariff barriers.

26. No amendment had, however, been approved in respect of the main principles on which the Organization of American States was based, such as the equality of States and the non-recognition of territorial changes brought about by force. The Buenos Aires Protocol also expressly maintained in force article 15 of the Charter of the Organization of American States, which specified that:

> "No State or group of States has the right to intervene directly or indirectly, for any reason whatever, in the internal or external affairs of any other State. The foregoing principle prohibits not only armed force but also any other form of interference or attempted threat against the personality of the State or against its political, economic and cultural elements."[3]

27. The question of non-intervention had given rise, after the events in the Dominican Republic, to much earnest discussion in the American continent. At the 1965 Rio de Janeiro Conference, the Colombian delegation had proposed the reaffirmation of the principle of non-intervention in strong and unambiguous terms. As a result of that proposal, the Rio de Janeiro Conference had recommended to the Third Special Inter-American Conference the retention of such fundamental principles as that of non-intervention when formulating amendments to the OAS Charter.

28. The meeting of Heads of State held at Punta del Este in April 1967 had adopted a Declaration for the progressive establishment, as from 1970, of a Latin American common market, which was to be substantially operative within fifteen years. Admittedly, that meeting had not given rise to any legal obligations but it did constitute a point of departure towards a new stage in the history of Latin America, since it had been convened to promote the economic emancipation of the peoples of the continent. The Declaration would of course need to be implemented by means of legal instruments, the first of which would be a general integration treaty.

29. Co-operation between the International Law Commission and the Inter-American Juridical organs should be strengthened, especially as certain items appeared on the agendas of both. For instance, the Inter-American Juridical Committee had studied the question of State responsibility from the American point of view and in 1967 would consider the topic of the succession of States and Governments.

30. The exchange of observers should therefore continue. The International Law Commission had been ably represented by Mr. Jiménez de Aréchaga at the meeting of the Inter-American Council of Jurists at San Salvador in February 1965. Now that the Committee was to continue as the main legal organ of the Organization of American States, he had the privilege of inviting the Commission to be represented at the next session of the Committee, to be held from 10 July to 9 October 1967 at Rio de Janeiro.

31. Co-operation between the two bodies could also take the form of efforts by the Committee to urge the member Governments of OAS to ratify the international conventions which had resulted from the work of the International Law Commission. The Committee could do useful work in that respect because its recommendations were generally heeded by the Governments of the American States. He proposed to raise that question at the next meeting of the Committee and fully expected satisfactory results.

32. He extended to the Commission his sincere wishes for the success of its work in the codification and progressive development of international law.

[3] United Nations, *Treaty Series*, vol. 119, p. 56.

33. The CHAIRMAN thanked the observer for the Inter-American Juridical Committee for his very full and informative statement on the legal work being done in the Organization of American States. He said it was particularly interesting to learn that the Committee would be studying State responsibility and the succession of States, since those two topics were on the Commission's own agenda. As Mr. Caicedo Castilla had himself been present at the 898th meeting, when item 5 had been discussed, there was no need for him to repeat what he had said about the importance of developing links with regional legal organizations and of preventing an undue divergence in the development of legal philosophies.[4] The inter-American Organization had been a pioneer in the codification and harmonization of law on a regional plane.

34. Mr. CASTAÑEDA said that 1966 had been a fruitful year in the Latin-American continent with the completion of agreements on economic integration and the amendment of the Charter of the Organization of American States. Mr. Caicedo Castilla had taken part in the latter process and was particularly well qualified to make his statement. In addition, he was the author of a study on collective action and non-intervention.

35. He reserved his right to comment on Mr. Caicedo Castilla's statement once he had had the opportunity to study it, particularly in regard to strengthening the links between the Inter-American Juridical Committee and the Commission.

The meeting rose at 12.45 p.m.

[4] See 898th meeting, para. 23.

912th MEETING

Thursday, 1 June 1967, at 10 a.m.

Chairman: Sir Humphrey WALDOCK

Present: Mr. Ago, Mr. Albónico, Mr. Bartoš, Mr. Castañeda, Mr. Castrén, Mr. Ignacio-Pinto, Mr. Jiménez de Aréchaga, Mr. Kearney, Mr. Nagendra Singh, Mr. Ramangasoavina, Mr. Reuter, Mr. Tammes, Mr. Tsuruoka, Mr. Ushakov, Mr. Ustor, Mr. Yasseen.

Special Missions

(A/CN.4/193 and Addenda; A/CN.4/194 and Addenda)

(resumed from the 910th meeting)

[Item 1 of the agenda]

ARTICLE 44 (Cessation of the functions of the special mission) [47 and 20, para. 2]

1. *Article 44* [47 and 20, para. 2]

Cessation of the functions of the special mission

1. When a special mission ceases to function, the receiving State must respect and protect its property and archives, and must allow the permanent diplomatic mission or the competent consular post of the sending State to take possession thereof.

2. The severance of diplomatic relations between the sending State and the receiving State shall not automatically have the effect of terminating special missions existing at the time of the severance of relations, but each of the two States may terminate the special mission.

3. In case of absence or breach of diplomatic or consular relations between the sending State and the receiving State and if the special mission has ceased to function,

(*a*) The receiving State must, even in case of armed conflict, respect and protect the property and archives of the special mission;

(*b*) The sending State may entrust the custody of the property and archives of the mission to a third State acceptable to the receiving State.

2. The CHAIRMAN invited the Commission to consider article 44, the Special Rapporteur's proposals for which were contained in paragraph 13 of the section on that article in his fourth report (A/CN.4/194/Add.2) and in his additional comments in document A/CN.4/194/Add.4.

3. Mr. BARTOŠ, Special Rapporteur, said that the cases when the functions of special missions came to an end were listed in article 12 and that the purpose of article 44, which corresponded to article 45 of the Vienna Convention on Diplomatic Relations, was to set out rules on the consequences of cessation of functions.

4. The Belgian Government considered that paragraph 2 of article 44 would be better placed in article 12, and that the final words, "but each of the two States may terminate the special mission", were superfluous. He was quite willing to transfer the provisions of paragraph 2, but saw no strong reason for putting them in one of the two articles rather than the other. On the other hand, he considered that the final words of the paragraph were useful, for although it was true that the severance of diplomatic relations did not entail cession of the functions of the special mission, each State must nevertheless have the right to terminate the special mission if relations were broken off. Such action should not be considered an arbitrary act. Even if, for instance, the two States had previously agreed to hold conversations through special missions at given intervals, in the event of severance of diplomatic relations each of them would be able to release itself from that undertaking.

5. Referring to the first two comments by the Government of Israel (A/CN.4/188) he confirmed, first of all, that if the sending State had no permanent diplomatic mission or consular post in the receiving State, paragraph 1 of article 44 did not, of course, apply. It would be for the Commission to decide whether it wished to retain that provision or not. Similarly, paragraph 3 (*b*) could not apply if no third State agreed to take charge of the property and archives of the special mission; but the same was true of article 45 (*c*) of the Vienna Convention on Diplomatic Relations. The sending State could not compel another State to protect its interests. In his view the receiving State was responsible for protecting the property and archives of the special mission so long as they had not been taken over by a third State.

6. The third comment by the Government of Israel was justified; the Commission should consider whether it was advisable to ensure that the sending State could remove

its archives. The archives of a State were inviolable and their removal should not be obstructed.

7. The comment by the United Kingdom Government (A/CN.4/188/Add.1) raised a two-fold question. Was it necessary to add to the draft the institution of inviolability of the premises of the special mission after the cessation of its functions, by inserting a provision similar to article 45 (*a*) of the Vienna Convention on Diplomatic Relations? And, if so, should that inviolability be limited to "a reasonable period"? In his opinion, special missions were in a different position in that respect from permanent diplomatic missions: since the premises of special missions were premises necessary to them during the performance of their functions, it was questionable whether the inviolability of those premises should be extended after the mission had ceased to function. If the Commission decided to add to the draft a provision on inviolability of the premises of the special mission after it had ceased to perform its functions, he thought that inviolability should not continue indefinitely, since in the long run it might place too great a burden on the receiving State, particularly if it was faced with a shortage of accommodation. "A reasonable period" in such circumstances would be the time needed to move the property and archives to other premises or out of the territory of the receiving State, but it was always very difficult to decide what was "a reasonable period".

8. With regard to the proposal by the Canadian Government that the article be "broadened to cover specifically the routine conclusion of functions due to the fulfilment of the objects of a special mission", that idea was more appropriate in article 12, where it was already expressed in a slightly different form in sub-paragraph (*b*).

9. He suggested that the Commission confine itself to considering the third comment by the Government of Israel, regarding the need to make express provision in article 44 for the removal of the archives from the territory of the receiving State.

10. Mr. YASSEEN said that in his opinion the provisions of paragraphs 1 and 3 were indispensable. Paragraph 2, on the other hand, did not seem necessary. The main idea in that paragraph was that the severance of diplomatic relations between the sending State and the receiving State did not automatically have the effect of terminating special missions existing at the time of the severance; that idea was correct, but to express it, it would be sufficient to add a few words to paragraph 2 of article 1, making it provide that the existence of diplomatic or consular relations was not necessary for the sending or reception of special missions or for the continuance of their functions.

11. The final phrase of paragraph 2 also stated a correct idea: when diplomatic relations were broken off between the sending and the receiving State, each of those two States had the right to terminate the special mission. But that was true at any time, even when diplomatic relations had not been broken off between the two States. A special mission could only carry on its activities if the two States agreed that it should do so; one of them could not impose the continuation of those activities on the other. The final phrase was therefore not indispensable.

12. With regard to the comment by the United Kingdom Government, he did not think it advisable to introduce the idea of a "reasonable period" in that context, where good faith in implementing the convention should be sufficient. In practice, States agreed on what was to be done with the property and archives of the special mission after it had ceased to function; if an armed conflict broke out between them, they relied on the good offices of a third State. It would be better to abide by the general principle of respect for the property and archives of the special mission, without going into too much detail; to introduce the idea of a "reasonable period" might weaken the rule and engender controversy.

13. Mr. KEARNEY said he agreed with Mr. Yasseen that paragraph 2 was somewhat out of place in an article which dealt with the practical steps to be taken in connexion with the cessation of a special mission.

14. The approach adopted in article 44 was rather one-sided; it placed the whole emphasis on the obligations of the receiving State instead of on those of the sending State. The article also betrayed a tendency to overlook the temporary nature of special missions.

15. The provisions of the article were unduly influenced by the rules adopted in the 1961 Vienna Convention with regard to permanent missions. It should be remembered that the cessation of the functions of a permanent mission was not a normal occurrence; the mission would, in the normal course of events, be reopened. In the case of a special mission, the functions were of a temporary nature and were normally intended to terminate after a period of time.

16. In the circumstances, when a special mission left the receiving State, it should be under an obligation either to take its papers with it and dispose of its property, or to make suitable arrangements to leave everything with the permanent mission or consulate of the sending State.

17. He therefore suggested that the article should make provision for the obligations of the sending State, while at the same time specifying those of the receiving State, in the unusual circumstances mentioned in the article.

18. Mr. USHAKOV said he approved of the substance of article 44, but wished to make two comments.

19. First, he wondered whether it had been intended to make a distinction between "cessation of functions" and "termination" of the special mission. In his view, the two expressions described the same situation.

20. Secondly, paragraph 1 appeared to refer to the ordinary cases of cessation of functions of the special mission, namely, expiry of the duration assigned for the special mission and completion of its task, which were provided for in article 12, as well as cessation of the functions of the special mission by mutual agreement between the States concerned, which was also an ordinary case. He saw no need to state in article 44 a rule applicable to ordinary cases of the cessation of functions of the special mission. Like article 45 of the Vienna Convention, article 44 of the draft should be reserved for exceptional cases, namely, that of the severance of diplomatic or consular relations and that of armed conflict. Thus the real substance of article 44 was in paragraph 3.

21. Mr. USTOR said he agreed with those speakers who considered that paragraph 2 was not in its right place in article 44 and should be moved to some other place in the draft. In the 1963 Vienna Convention on Consular Relations, the matter was dealt with in article 27, entitled "Protection of consular premises and archives and of the interests of the sending State in exceptional circumstances ". A title on those lines should be adopted for article 44. The present title was much too similar to that of article 12, "End of the functions of a special mission". A change of title could be made if paragraph 2 were moved somewhere else.

22. To some extent, he agreed with Mr. Kearney that the case envisaged in article 44 was much more exceptional than those for which provision was made in article 45 of the Vienna Convention on Diplomatic Relations and article 27 of the Vienna Convention on Consular Relations. When diplomatic or consular relations were severed, the departing diplomats or consuls could not take with them all their archives and belongings; a special mission, on the other hand, did not normally leave anything behind.

23. There was also the possibility that a special mission might, on departure, leave its task to be continued by a diplomatic mission or a consulate of the sending State.

24. Mr. IGNACIO-PINTO said that, like other members of the Commission, he had the impression that article 44 to some extent duplicated article 12. The titles of the two articles were so similar that it was hard to see what difference there was between them. Since article 44 dealt with the consequences and the steps to be taken in the cases envisaged, it should be possible to link the two articles, perhaps by changing the title of article 44.

25. In view of what was stated in article 1, paragraph 2, article 44, paragraph 2 did not seem to be indispensable. Moreover, it was obvious that each of the two States concerned was at liberty to terminate the special mission when it considered that it should not continue. He therefore agreed with Mr. Yasseen and supported the Belgian Government's suggestion.

26. His view on the question of the obligation of the receiving State to protect the property and archives of the special mission for an indefinite period of time was the same as Mr. Kearney's. A special mission was by nature provisional and temporary; it had no need to amass a quantity of archives and it was hard to conceive its owning property.

27. He hoped that he would have an opportunity of supporting an article confined to essential matters connected with the consequences of the cessation of the functions of a special mission.

28. Mr. CASTRÉN said that he was prepared to accept article 44, subject to drafting changes. The proposals by the Governments of Israel and the United Kingdom would mean going into too much detail; the questions they raised could be dealt with in the commentary. Nor did he see any reason for altering the article's position in the draft.

29. It might be that paragraph 2 was not absolutely necessary and that article 1 of the draft could be expanded in the way suggested by Mr. Yasseen, but he had no objection to that aspect of the question of diplomatic relations being dealt with separately in article 44.

30. There was no reason why paragraph 1 should not be given general scope, although, as Mr. Ushakov had pointed out, it was mainly concerned with exceptional cases.

31. Mr. NAGENDRA SINGH said he agreed that it was the duty of the sending State to dispose of the property of the special mission and clear its premises on the conclusion of the mission's operations.

32. Like article 45 of the Vienna Convention on Diplomatic Relations, article 44 dealt with the protection of the property and archives of the special mission but unlike that article 45, it said nothing about the premises. That gap could give rise to doubts.

33. Article 12 of the draft provided for termination of a special mission by notification. Since notification of that type could be very abrupt, some time lag was essential to allow the sending State to wind up the affairs of its special mission. He therefore suggested that consideration be given to the United Kingdom's suggestion for a reasonable time-limit in the matter. It was true that the 1961 Vienna Convention did not contain any such rule, but that Convention dealt with permanent missions, whereas special missions were essentially of a temporary character.

34. Mr. BARTOŠ, Special Rapporteur, said that the meaning would be brought out better if paragraph 2 of article 44 were dropped and a new paragraph inserted in article 12 providing that "where diplomatic or consular relations have been severed, States may terminate the special mission", the severance of diplomatic relations being regarded as a special situation. That amendment, which corresponded to the proposal by the Belgian Government, could be referred to the Drafting Committee. But he was not in favour of dealing with the matter in article 1, as Mr. Yasseen had proposed, for then the consequences of the severance of diplomatic relations on an already existing special mission would not be made clear.

35. In considering paragraphs 1 and 3, it was necessary to differentiate between three entirely different sets of circumstances. In the first case, referred to in paragraph 1, the special mission ceased to function or terminated in a normal way. It often happened that a special mission left its property and archives scattered in various places in the receiving State where it had been carrying out its work. That could happen, for example, if a frontier delimitation mission left its technical equipment behind on the spot. Who was entitled to take possession of it? The obvious answer seemed to be that the permanent diplomatic mission or a consular post of the sending States should do so. On the other hand, he agreed with Mr. Kearney that, when the special mission had completed its work, the sending State should, as a general rule, take possession of its archives and property as soon as possible. A situation might arise, however, where a mission had come to an end and the sending State and the receiving State had broken off diplomatic or consular relations or had no such relations. In that situation, as the Government of Israel had pointed out, the receiving State should permit the sending State to remove its property. In case of confiscation or blockade,

the receiving State was required to respect the property and archives of the special mission. A third possibility was that the sending State might place the property and archives of the special mission under the protection of a third State.

36. Mr. Ushakov had pointed out that article 44 dealt both with normal cessation of the functions of the special mission and with cessation for special reasons, whereas article 45 of the Vienna Convention on Diplomatic Relations dealt only with exceptional circumstances, cases where diplomatic relations between two States had been broken off. But article 45 of the Vienna Convention also referred to a situation in which "a mission is permanently or temporarily recalled"; that was not a special case, for a State might decide to close an embassy or consulate for economic, administrative or other reasons without diplomatic or consular relations being severed.

37. Mr. Ustor had mentioned a situation which, as he had described it, did not arise either in practice or in theory: the case of a special mission which withdrew and handed over its task to a consular post or other organ. A special mission never had any authority to transfer its functions to a consular post or other organ remaining on the spot. In practice, the sending State recalled the special mission and then gave one of the organs—whether diplomatic or consular—representing it on a permanent basis the necessary authority to continue the task of the special mission. Indeed, tasks of that kind very often formed part of the duties of such an organ. That did not mean that special missions were unnecessary. In many instances, their purpose was to deal with a particular problem and it was left to the permanent mission to put the finishing touches and to go into points of detail. In other words, a special mission was often entrusted with the preparatory work in connexion with a given matter, after which the sending State instructed its permanent diplomatic mission or consular post to perform the "final act". It should be made clear that, when a special mission entrusted its property and archives to the permanent diplomatic mission or consular post, that was an internal matter for the sending State. In short, his proposal was that article 44, paragraph 2, should be incorporated in article 12 and that, in the case of paragraphs 1 and 3, the Drafting Committee should take into account all the suggestions made by the members of the Commission.

38. With regard to the United Kingdom Government's proposal concerning the inviolability of the special mission's premises for a reasonable period, that aspect of the matter could perhaps best be dealt with, not in the article itself, but in the commentary, as Mr. Castrén had suggested; for it had to be remembered that the receiving State might regard property and archives left on the spot by the special mission for an indefinite period of time as an encumbrance.

39. Mr. USHAKOV said that the Special Rapporteur had made a convincing case and he would withdraw his comments on draft article 44 and article 45 of the Vienna Convention on Diplomatic Relations. But he still considered it unfortunate that draft articles 12 and 44, which dealt with two different subjects, should have been given similar titles.

40. Mr. BARTOŠ, Special Rapporteur, said that in that case he would propose that the existing title of article 44 be reworded to read "Consequences of the cessation of the functions of the special mission".

41. Mr. ALBÓNICO suggested that paragraph 1 of article 44 be moved to article 12, which was entitled "End of the functions of the special mission", since it dealt with the fate of the property and archives of the special mission when the mission ended its functions. The other two paragraphs of article 44 should form a new article, to be placed immediately after article 12.

42. The CHAIRMAN said there was almost complete agreement in the Commission that paragraph 2 was not well placed in article 44. He personally strongly supported the suggestions for its removal somewhere else in the draft.

43. Some of the difficulties which had arisen were due to article 44 having been placed in part III (Miscellaneous clauses) instead of in part II (Facilities, privileges and immunities), where it properly belonged.

44. He suggested that article 44 should be referred to the Drafting Committee for consideration in the light of the discussion.

It was so agreed.[1]

ARTICLE 17 (General facilities) [22]

45. *Article 17* [22]

General facilities

The receiving State shall accord to the special mission full facilities for the performance of its functions, having regard to the nature and task of the special mission.

46. The CHAIRMAN invited the Commission to consider article 17, the Special Rapporteur's proposals for which were contained in paragraph 7 of the section dealing with that article in his fourth report (A/CN.4/194/Add.2) and in his additional comments in document A/CN.4/194/Add.4.

47. Mr. BARTOŠ, Special Rapporteur, said he wished first to make a few general remarks about the facilities, immunities and privileges dealt with in part II of the draft, to which he had also referred in paragraphs 1-18 of his report (A/CN.4/194/Add.2).

48. The problem was to decide on what principle the system of facilities, privileges and immunities should be based. In his first report on special missions[2] he had advocated the functional theory, which was the basis for the Convention on the Privileges and Immunities of the United Nations[3] and of the Vienna Convention on Diplomatic Relations. According to that theory, privileges and immunities attached to the function and not to the individual, and the recipients enjoyed them when acting in their official capacity.

49. Some members of the Commission had thought that the system of privileges and immunities should apply not

[1] For resumption of discussion, see 938th meeting, paras. 59-65.

[2] *Yearbook of the International Law Commission, 1964*, vol. II, document A/CN.4/166.

[3] United Nations, *Treaty Series*, vol. I, p. 17.

only to the head and members of a special mission but also to its administrative and technical staff, and the majority had decided accordingly. But States were reluctant to extend the application of the system to too many persons, and members of the Commission had expressed the same concern. The General Assembly tended to treat special missions like permanent diplomatic missions in that respect. Consideration had also been given to dividing special missions into categories, such as technical, political and high-level, with privileges and immunities commensurate with the nature and importance of the mission. It had also been suggested that the relevant factor was the composition of the special mission, and that privileges and immunities should be granted to certain of its members only. His own observations on the subject were to be found in his fourth report (A/CN.4/194/Add.2).

50. The written comments of the Swedish Government had repeated the argument put forward by its delegation in the Sixth Committee of the General Assembly, where the Swedish representative had drawn attention to the problem of granting immunities and privileges to a great number of people; he had also pointed out that, while the great quantity of special missions "makes a codification desirable, it also makes it difficult, for immunities and privileges granted to a few may not meet insurmountable obstacles, but the same immunities and privileges given to many may cause a real problem".[4]

51. The Nigerian representative thought that privileges and immunities should be granted to members of special missions on the basis of their functions and not of their personal status.[5]

52. The Netherlands Government or its delegation had repeatedly stressed how difficult it would be for national parliaments to ratify a convention which provided for too extensive a system of privileges and immunities. He did not think anyone would dispute the need to keep the system within reasonable limits, but the question was how to define those limits.

53. Before embarking on its examination of the articles constituting part II of the draft, the Commission should decide in general terms whether it intended to alter its view, which was based on the three principles that facilities, privileges and immunities were accorded *ex jure* and not by virtue of the comity of nations; that States were bound to apply the criteria of the Vienna Convention on Diplomatic Relations and grant benefits accordingly; and that it was for the sending State and the receiving State to decide on the extent to which they wished, in the interests of their relationship, to grant privileges and immunities to special missions. The set of rules laid down on the subject constituted a sort of model system from which States could derogate, although in his opinion there were some rules which they must always observe, such as for example those concerning the personal freedom of members of special missions.

54. The point was, should the Commission change its view or should it take into consideration certain comments such as those put forward by the Canadian Government, which thought that "the grant of such privileges and immunities should be strictly controlled by considerations of functional necessity and should be limited to the minimum required to ensure the efficient discharge of the duties entrusted to special missions", or by the Greek Government, whose view was that the privileges and immunities granted should be "kept within the limits strictly necessary for the work of the mission."

55. Mr. TAMMES said that his answer to the Special Rapporteur's question, directed particularly to new members of the Commission, as to whether the Commission should opt for the representative or the functional principle, was that he had no hesitation in choosing the latter as a basis for the provisions on privileges and immunities. Modern international law favoured the functional theory, though not in a restrictive sense; in fact, as had been pointed out at the seventeenth session, certain types of special missions such as high-level or frontier demarcation missions might enjoy wider facilities than those granted to permanent missions when that was necessary for the performance of their functions.

56. When submitting its final draft on diplomatic intercourse and immunities, the Commission had indicated that there were three theories that had influenced the development of privileges and immunities. The first was the "extra-territoriality" theory, which personally he considered to be obsolete; the second was the "representative character" theory, and the third, which appeared to be gaining ground in modern times, was the "functional necessity" theory, which justified privileges and immunities as being necessary to enable the mission to perform its functions.[6]

57. As it had stated in its report to the General Assembly, the Commission had been guided by the third theory in solving problems on which practice gave no clear pointers, while also bearing in mind the representative character of the head of the mission and of the mission itself. The considerations set out in that report were even more applicable to the present draft. Practice was developing rapidly but there was no special customary law that could serve as a guide.

58. He had concluded from the Commission's report on the first part of its seventeenth session [7]that it favoured the functional theory, in which case the principle should be clearly expressed in article 17.

59. The final phrase in the present text of article 17, reading "having regard to the nature and task of the special mission", was not satisfactory and might be read as meaning that missions of different kinds should be granted facilities of varying scope, but that matter was dealt with in article 17 *ter*. The text should be modified on some such lines as "The receiving State shall accord to the special mission such facilities as may be necessary, having regard

[4] See *Official Records of the General Assembly, Twentieth Session, Sixth Committee*, 844th meeting, para. 10, and the comments by the Swedish Government in document A/CN.4/188.

[5] *Official Records of the General Assembly, Twentieth Session, Sixth Committee*, 847th meeting, para. 17.

[6] *Yearbook of the International Law Commission, 1958*, vol. II, p. 95.

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

to its nature and task". Such wording would be consistent with Article 105 (2) of the Charter.

60. Mr. ALBÓNICO said that the legal basis of privileges and immunities was an important matter and affected the scope and content of the articles under discussion. The modern functional principle should be followed, though some exceptions might occur in practice in the form of concessions to the representative principle.

61. It was important to note that nine Governments, three in the Sixth Committee and six in their written comments, had shown themselves so reluctant to accord privileges and immunities to special missions that there was some ground for doubting whether they would sign the convention.

62. He was particularly anxious to state his views because he would not be present when the Commission came to approve the articles finally. In his opinion, full privileges and immunities should only be granted to ceremonial special missions headed by Heads of State, Heads of Government or Ministers for Foreign Affairs or to high-level political missions even when not led by persons in that category. They should only be given to the head of the mission or to members of the diplomatic staff of the next lower rank who were indispensable to the performance of the missions's functions and only in respect of official acts. Thus he entirely rejected the line taken by the Vienna Convention on Diplomatic Relations.

63. He fully supported the development of special missions and the grant to them of all the safeguards and privileges they required for the successful discharge of their important functions, which would be to the advantage of great Powers and developing States alike. But it was important to facilitate the work of those responsible for social order in the receiving State, such as judges, who had to take into consideration not only the privileges and immunities of permanent missions, but also those of international officials, which were already numerous, and of persons working under some special agreement between the sending and receiving States. International relations would benefit from the provision of a minimum standard of privileges and immunities, and an approach on those lines would increase the chances of the convention's being accepted by governments.

64. Mr. CASTRÉN said he favoured the functional theory, which had been the basis for the Vienna Convention on Diplomatic Relations and accorded with modern tenets of international law. However, since special missions could differ in nature, composition and task, it seemed necessary to supplement the functional theory with the theory of representation, at least with respect to high-level special missions or those performing important tasks.

65. Although the Commission had generally tried to model its draft articles concerning privileges and immunities on the provisions of the two Vienna Conventions, particularly the Convention on Diplomatic Relations, it was not always possible to do so. The Commission could depart from them either to restrict or to extend the scope of privileges and immunities.

66. Several Governments seemed to be advocating a restrictive approach; in his opinion, the Commission should take account of their comments and amend the articles at the second reading, but only to the extent compatible with the requirements of the functional theory and the theory of representation, and taking due care that special missions were not hampered in the proper performance of their duties.

67. The Commission should also consider the possibility of restricting the scope of the privileges and immunities granted to certain kinds of special mission, as well as the classes of person accorded the benefit of such privileges and immunities. The problem would be of particular importance where there was a peremptory rule, as the Swedish Government had pointed out.

68. Mr. JIMÉNEZ de ARÉCHAGA said that, of the two alternatives of granting full diplomatic privileges and immunities including immunity for personal acts, or of granting privileges and immunities only in respect of official acts necessary for the exercise of official functions on the lines of the provisions of Article 105 (2) of the Charter, Governments clearly favoured the latter. However, difficulty would arise with high-level missions if Heads of State or important ministers were not accorded the same privileges and immunities as an ambassador. One solution would be to provide the right degree of flexibility in the articles allowing States to reach agreement in advance on the scope of the privileges and immunities to be accorded. In the absence of prior agreement, the rules laid down in the convention would apply. Possibly the wise course would be to provide for minimum privileges and immunities required for the performance of the functions of the special mission, in the absence of agreement to the contrary between the States concerned. That would not close the door to the possibility of full privileges and immunities for high-level missions, including immunities in respect of personal acts.

69. Mr. AGO said that, in general, he agreed with the Special Rapporteur that the Commission's main preoccupation in deciding on the scope of the privileges and immunities should be what the special mission needed in order to be able to perform its functions.

70. He nevertheless wished to remind the Commission that its task was not to decide in favour of a particular theory but to formulate concrete rules; those rules should be established in the light of State practice, where it existed, and of whatever progressive development might require. In other words, the Commission should adopt a pragmatic attitude and leave it to future publicists to decide which theory formed the basis of any particular article.

71. Some Governments had shown themselves inclined to limit the system of privileges and immunities; he himself agreed that the Commission should exercise a degree of caution. It had to avoid going too far in either direction; but in his view it was perhaps inadvisable to draw too rigid a distinction between the needs of a special mission and those of a permanent mission. In any case, the question as to whether privileges and immunities should be granted to members of special missions only in respect of acts performed by them in the exercise of their duties or of a wider nature should be examined on its merits;

the Commission should not adopt an *a priori* attitude based on one or the other theory.

72. Mr. RAMANGASOAVINA said that the Special Rapporteur had rightly drawn the Commission's attention to the advantages of the functional theory, for privileges and immunities attached to the function and not to the individual, except in the circumstances referred to by Mr. Castrén.

73. It was easy to understand why Governments tended to restrict the privileges and immunities granted to members of special missions; the Commission had therefore to aim at establishing the minimum of privileges and immunities to be regarded as mandatory. It was a delicate problem, because the receiving State could not be left to decide on its own to what extent it would apply the system provided for in the convention; members of special missions might find themselves in a position of uncertainty, which would hardly facilitate the performance of their task. The Commission should therefore work out a fairly flexible formula requiring the receiving State to guarantee certain privileges and immunities to special missions.

74. Mr. USHAKOV said his opinion was, as the Special Rapporteur had stated in the draft preamble (A/CN.4/194/Add.2), that "the status, privileges and immunities to be conferred on special missions are not accorded for the benefit of persons but for the purpose of assuring the effective exercise of the functions of special missions in so far as they represent States". The Commission's decision on the scope of the system of privileges and immunities should be deferred until it had settled the drafts of the various articles and came to consider the preamble.

The meeting rose at 1.5 p.m.

913th MEETING

Friday, 2 June 1967, at 10 a.m.

Chairman: Sir Humphrey WALDOCK

Present: Mr. Ago, Mr. Albónico, Mr. Bartoš, Mr. Castañeda, Mr. Castrén, Mr. Eustathiades, Mr. Ignacio-Pinto, Mr. Jiménez de Aréchaga, Mr. Kearney, Mr. Nagendra Singh, Mr. Ramangasoavina, Mr. Reuter, Mr. Tammes, Mr. Ushakov, Mr. Ustor, Mr. Yasseen.

Special Missions

(A/CN.4/193 and Addenda; A/CN.4/194 and Addenda)

(continued)

[Item 1 of the agenda]

ARTICLE 17 (General facilities) [22] *(continued)*[1]

1. The CHAIRMAN invited the Commission to continue its consideration of article 17. He reminded members that it was not intended to be a general article on privileges and immunities but was of a limited character.

2. Mr. YASSEEN said he did not think that the Commission had to concern itself with either the basis or the nature of the obligation to grant facilities, privileges and immunities. Once the Commission had decided to propose drafting a general convention on special missions, the basis of the obligation was going to be found in legal rules, the source of which was an international convention. The Commission, however, should decide what theory it intended to be guided by in its investigations, for it was the duty of the legislator to define clearly the theory on which he relied in formulating legal rules.

3. He would again like to argue in favour of the functional theory, for in his opinion what justified facilities, privileges and immunities and determined their scope was function. If it adopted that principle, the Commission would be able to decide what facilities the special mission needed in order to carry out its task in the conditions and atmosphere most favourable to good international relations. The representative theory should not be completely rejected, of course, since it must be applied to high-level special missions, particularly to those led by a Head of State. In the latter case, moreover, the privileges and immunities granted to such an important personage were not alien to his function.

4. Mr. REUTER said he hoped that the Commission could now get on with the drafting of the articles without spending any more time on the distinction between the functional theory and the representative theory which, as had just been said, must be based on presumption.

5. Mr. NAGENDRA SINGH said that the practical and administrative problems raised by the article were as important as the legal ones. The number of special missions and of persons composing them was so great that the scope of the privileges and immunities to be granted them must be limited. He agreed with the functional principle and that the privileges and immunities should be restricted to those required for the performance of the mission's task. The important matter of high-level missions led by Heads of States was covered in article 17 *quater*. That type of mission would have to be covered by a special agreement between the States concerned.

6. Mr. USTOR said he favoured a pragmatic approach. He considered that the functional necessity theory was the most widely accepted, but it failed to indicate when the "necessity" began or ended. Of course the representative character theory could not be entirely set aside, particularly where high-level missions were concerned.

7. Mr. KEARNEY said that, after listening to the arguments of his colleagues, he had come to the conclusion that he was a representational functionalist rather than a functional representationist.

8. The CHAIRMAN, speaking as a member of the Commission, said that the conflict between the two theories should not be exaggerated. It was more a question of emphasis than of choice. The whole basis of privileges and immunities was the representative character of the persons concerned and, on the other hand, even the repre-

[1] See 912th meeting, para. 45.

sentation of the State by its head was the performance of a function. Mr. Ago had been right in advocating a pragmatic approach[2]. The functional necessity theory had grown with the development of new forms of diplomacy of many varying kinds, with limited objectives.

9. The Commission should try to arrive at standard rules—and that did not necessarily mean minimum rules. Those rules should correspond to the requirements of the mission's functions. They might not be appropriate for high-level missions or for those of a very minor character, for which special provisions might be needed.

10. Mr. BARTOŠ said that the functional theory could not be applied independently of the representative theory, and vice versa; one or the other would predominate, depending on the individual case.

11. The question of the conditions which would enable the members of the special missions to perform their functions was entirely different. For that reason, it was advisable to study each question separately and to disregard the question of the position of the Head of State, which could perhaps be dealt with in the chapter on high-level special missions, where representation played a more important part. Even in certain technical missions, representation could become of paramount importance.

12. Article 17 had the same general meaning as article 25 of the Vienna Convention on Diplomatic Relations, except that it contained the following additional words at the end of the sentence: "having regard to the nature and task of the special missions". It was obvious that the task and nature of special missions varied, unlike those of permanent diplomatic missions. That distinction was what the last phrase was intended to emphasize.

13. Coming back to the proposed amendments, he said that he was not opposed to the suggestion of the Netherlands Government that the expression "full facilities" should be replaced by the words "such facilities as may be necessary for the performance of its functions". That was a question of style, to be decided by the Drafting Committee.

14. With regard to the Canadian Government's comment that article 17 was drafted too vaguely, in that the facilities granted were not specified, he said that they were not specified either in the corresponding article of the Vienna Convention or in the Netherlands Government's proposal.

15. The United States Government's proposal (A/CN.4/193) referred to the attitude of the receiving States. Under article 17, as well as under article 25 of the Vienna Convention and the Netherlands proposal, the receiving State was required to accord "full facilities", which meant that it was obliged to grant the facilities needed by the special missions, whereas the text proposed by the United States Government: "*L'État de réception accorde à la mission spéciale les facilités voulues*" ("the receiving State shall accord to the special mission the desired facilities")[3] seemed to allow the receiving State to do as it wished. The meaning of the word "*voulues*" ("desired") should be more precisely defined and, in particular, it should be made clear by whom those functions were "*voulues*". If that adjective had the same meaning as the word "necessary", he would not oppose the amendment, although he preferred the Netherlands Government's proposal, subject to any amendments by the Drafting Committee.

16. Mr. CASTRÉN said that, like the Special Rapporteur, he considered article 17 was satisfactory in its present form. It should be kept in its proper place and not moved to the end of part II, as proposed by the Canadian Government.

17. The apprehensions felt by the United Kingdom (A/CN.4/188/Add.1) about the present text of article 17 and the interpretation which might be put on it with respect to the obligations of the receiving State were unfounded, for article 17 did no more than state a general principle, which was just and reasonable, and the concrete obligations of the receiving State were defined in the succeeding articles.

18. The phrase added at the end of the provision, "having regard to the nature and task of the special mission", was helpful, for it served to emphasize the diversity of special missions and gave more flexibility to the rule. In his opinion, therefore, article 17 could be accepted as it stood.

19. Mr. KEARNEY pointed out that what the United States Government had proposed was the deletion of the word "full" before the word "facilities" in the English text of article 17. The insertion of the word "*voulues*" after the word "*facilités*" in the French translation of the United States proposal must have been an error.

20. He was not quite certain what the United States Government's intention had been, but he supposed that the amendment had been prompted by a desire to draw a distinction between the requirements of permanent missions, which were more or less established and well-known, and the variable requirements of special missions, for the determination of which no standards existed.

21. Perhaps the text of article 17 would be improved if it were modified to read: "The receiving State shall accord to the special mission the facilities required for the performance of its functions...".

22. Mr. JIMÉNEZ de ARÉCHAGA said that in his opinion the Commission must define minimum rules that could be applicable to most special missions. The scope of privileges and immunities could be reduced or increased by special agreement. The text should not go as far as article 25 of the Vienna Convention on Diplomatic Relations, which provided that the receiving State should accord "full facilities" for the performance of the functions of the mission.

23. The Drafting Committee should consider the United States Government's amendment, since the Special Rapporteur's objection to it had been based on a mistranslation and was therefore not justified. The wording suggested by Mr. Kearney would be adequate.

24. Mr. USTOR said that the fundamental consideration underlying the text of article 23 of the Commission's

[2] *Ibid.*, para. 69.

[3] But see paragraph 19 below.

draft on diplomatic privileges and immunities had been expressed in the commentary in the following terms "The receiving State (which has an interest in the mission being able to perform its functions satisfactorily) is obliged to furnish all the assistance required, and is under a general duty to make every effort to provide the mission with all facilities for the purpose"[4]. Bearing in mind that a special mission could not function without the consent of the receiving State, it was clear that its position was not very different from that of a permanent mission.

25. He doubted whether the last phrase in article 17 added anything useful; it would be preferable to model the text on the Vienna Convention, since, as the commentary on article 23 of the Commission's draft also stated: "it is assumed that requests for assistance will be kept within reasonable limits".[5] That would meet the Netherlands Government's desire for some restriction on the scope of the article.

26. Mr. NAGENDRA SINGH said that a distinction should be made between permanent and special missions and the words "full facilities" replaced by some such phrase as "all necessary facilities". That would meet the point made by the Netherlands Government and would be consistent with the functional principle.

27. Mr. CASTAÑEDA said he considered the present wording of article 17 satisfactory. Although the concluding phrase, "having regard to the nature and task of the special mission", did not add anything from the strictly legal point of view, it was useful for psychological reasons in that it emphasized the nature and task of the mission. It was precisely because of the diversity of the nature and task of special missions that in some cases greater facilities were extended than in others.

28. He did not think that the verb "*accorde*" in the French text was altogether satisfactory, since it could be taken as a statement of fact, whereas it was intended to express a legal obligation, as was done in English by the words "shall accord". It should be possible to improve the text by using a formula such as "*est tenu d'accorder*".

29. Some Governments had found the expression "full facilities" too sweeping and had expressed the fear that it might involve the danger of over-broad interpretation. One Government had even mentioned the possibility of the expression being considered as suggesting that the receiving State must defray the expenses of the special mission. Such fears could be allayed either by means of an explanation in the commentary, or by adding at the end of the article the words: "and in conformity with the following articles". In that way, article 17 would make it clear that the expression "full facilities" was intended to cover those facilities which were specified in the articles which followed.

30. Mr. CASTRÉN said that the importance of article 17, which was a provision of a general nature, depended on the succeeding articles. As far as the wording was concerned, he could agree to the words "full facilities" being replaced by the words "the necessary facilities".

31. Mr. USHAKOV said that he was in favour of retaining the text of article 17, though to satisfy the United States Government he would not object to the words "full facilities" being replaced simply by "the facilities" or by some other expression which the Drafting Committee might propose.

32. Mr. EUSTATHIADES said that article 17 was satisfactory, for the sending State might consider that the facilities accorded to the special mission were adequate and the receiving State might consider that they were not excessive. The principle laid down in the article would find its application in the series of articles relating to facilities, privileges and immunities; the wording of the article might also be considered sufficiently broad to govern those cases which would not be covered in the following articles.

33. There was therefore no need to change the wording of the article, unless possibly along the lines suggested by Mr. Nagendra Singh and Mr. Castrén.

34. Mr. REUTER said that the Drafting Committee would be able to deal with problems of terminology, but if the Commission wanted to delete the word "full", it should replace it by "the necessary facilities" or some other similar expression.

35. Mr. BARTOŠ, Special Rapporteur, said that some limit had to be placed on the facilities granted to the special mission, as had been requested by several Governments, particularly by the Belgian Government, and that they should not be granted except to the extent necessary for the performance of the special mission's task.

36. The Commission should now refer the article to the Drafting Committee which, in the light of the comments by Governments and by members of the Commission, would replace the words "full facilities" by some expression that, while indicating the obligation of the receiving State to grant certain facilities to certain missions, would place certain limits on those facilities.

37. The CHAIRMAN said that most members of the Commission clearly felt that the concluding phrase was a useful element in article 17.

38. The only problem raised had been that of the revision or deletion of the adjective "full" before the word "facilities", which some Governments feared might lead to an extensive interpretation of the receiving State's obligations. Those fears had been somewhat exaggerated; there was little danger, for example, of a receiving State being asked to pay the expenses of a special mission, and if such request were ever made it would undoubtedly be rejected. However, the Drafting Committee would consider whether the expression "full facilities" should not be replaced by some such formula as "appropriate facilities" or "the facilities required".

39. During the discussion, it had been suggested that article 17 was in the nature of a general provision on facilities, which meant the facilities set forth in subsequent articles. He could not agree with that view. Article 17,

[4] *Yearbook of the International Law Commission, 1958*, vol. II, p. 96.

[5] *Ibid.*

like article 25 of the Vienna Convention on Diplomatic Relations, was an independent article on facilities, and distinct from the provisions on the various privileges and immunities contained in subsequent articles.

40. He suggested that, as proposed by the Special Rapporteur, article 17 be referred to the Drafting Committee for consideration in the light of the discussion.

It was so agreed.[6]

ARTICLE 18 (Accommodation of the special mission and its members) [23]

41. *Article 18* [23]

Accommodation of the special mission and its members

The receiving State shall assist the special mission in obtaining appropriate premises and suitable accommodation for its members and staff and, if necessary, ensure that such premises and accommodation are at their disposal.

42. The CHAIRMAN invited the Commission to consider article 18, the Special Rapporteur's proposals for which were contained in paragraph 7 of the section on that article in his fourth report (A/CN.4/194/Add.2) and in his additional comments on article 18 in document A/CN.4/194/Add.4.

43. Mr. BARTOŠ, Special Rapporteur, said that, while article 18 was based on article 21 of the Vienna Convention on Diplomatic Relations, the provisions of the two articles were not absolutely identical. As the special mission was temporary in nature, unlike a permanent mission it did not have to acquire or construct buildings to provide accommodation for its members or premises for its offices.

44. The Netherlands Government proposed the addition of the words "Where necessary..." at the beginning of the article. He accepted that proposal, though it would mean having to make certain drafting changes in the article to avoid duplication with the words "if necessary".

45. The Greek Government had expressed the view that the privileges and immunities granted to missions with a limited technical task must be restricted. He could not recommend that the Commission adopt that suggestion because, whatever the category of the special mission, it had to obtain premises and accommodation.

46. He agreed that the text of the article was not wholly satisfactory and, since foreigners were able to obtain accommodation in some countries without any need for the intervention of the receiving State, he had tried to find a formula which would not place the receiving State under a formal obligation to provide the special mission with accommodation for its members and staff.

Mr. Ustor, Second Vice-Chairman, took the Chair.

47. Mr. JIMÉNEZ de ARÉCHAGA said he supported the Special Rapporteur's proposal to accept the Netherlands Government's drafting amendment.

48. That being said, he must warn the Commission against the danger of attempting to be too specific in article 18. As he had already pointed out with respect to certain other articles, it was dangerous to introduce in express terms ideas that were already implicit in the text of the 1961 Vienna Convention on Diplomatic Relations. Article 18 provided a clear example of that danger. Article 21 of that Convention already implied that the receiving State must, if need be, ensure that the necessary premises and accommodation for the mission should be placed at its disposal. By introducing in article 18 the additional concluding proviso, the Commission would open the door to the interpretation that the 1961 Vienna Convention did not imply any such obligation in the case of a permanent mission.

49. Mr. CASTRÉN said he considered the present text of article 18 satisfactory; the few differences between that article and article 21 of the Vienna Convention on Diplomatic Relations were well-founded.

50. The Special Rapporteur proposed the addition of the words "Where necessary" at the beginning of the article, the effect of which would be to make the article less categorical, as the Netherlands Government wished. He regretted that he could not accept that addition. As the Special Rapporteur had rightly pointed out, it was obvious that, if the special mission and its members and staff did not need premises and accommodation it was not entitled to request them and the receiving State was under no obligation to help it to obtain them. Moreover, contrary to what the Netherlands Government claimed, the provision adopted on first reading did not differ from the Vienna Convention in that respect. The reservation "Where necessary" was not to be found in paragraph 1 of article 21 of the Vienna Convention but only in paragraph 2, which corresponded to the last sentence of article 18 of the draft; the expression "if necessary" was even more restrictive.

51. Mr. REUTER said he fully agreed with Mr. Castrén. It was normal that the receiving State should "assist" the special mission to organize its stay in a place with which it was not familiar, for example, by ensuring that the demands of landlords remained within reasonable limits. The rule stated in the article was really the minimum, and he was surprised that there should be any wish to whittle it down even further. If it were desired to tone down the expression somewhat, the words "at its request" could be added after "the special mission", though it would hardly be possible to assist the special mission against its will.

52. Mr. ALBÓNICO said he supported article 18 without any amendment. Like article 17, it merely provided for material facilities which should be given under the rules of courtesy. There could therefore be no question of placing any restrictions or conditions on the rules stated in those articles.

53. Mr. YASSEEN said he supported the comments of Mr. Castrén and Mr. Reuter. It was certainly a minimum requirement that the receiving State should assist the special mission in obtaining appropriate premises and suitable accommodation. The receiving State did not, of course, have to provide accommodation for the special mission free of charge; it was merely asked to assist the mission to obtain satisfactory accommodation.

[6] For resumption of discussion, see 930th meeting, paras. 113-115.

54. Mr. USHAKOV said he supported the present wording of the article except on one minor point. The members and staff of the special mission always needed suitable accommodation but, as he had already had occasion to point out, in view of the considerable differences between special missions they did not always need offices; he therefore suggested that article 18 be so worded as to require the receiving State to assist the special mission to obtain suitable accommodation for its members and staff and, "when necessary", appropriate premises.

55. Mr. NAGENDRA SINGH said that, in the English text, the meaning of the word "ensure" was not quite clear. The first part of article 18 laid down a clear obligation for the receiving State to provide the necessary assistance to the special mission in finding accommodation and premises. The latter part of the article, however, could be taken as laying down an obligation to guarantee the provision of accommodation. The result would be to place a special mission on a better footing than a permanent mission, since the corresponding article of the Vienna Convention on Diplomatic Relations contained no such guarantee. He accordingly suggested the deletion of the concluding words "and, if necessary, ensure that such premises and accommodation are at their disposal".

56. Mr. YASSEEN, replying to Mr. Nagendra Singh's comments, said that he considered the last sentence essential. In exceptional cases, when the special mission had difficulty in obtaining the accommodation it needed, the receiving State was required to take the necessary steps to ensure that accommodation was placed at the special mission's disposal. It was obvious that, if the special mission could not find accommodation, it could not remain and could not carry out its task.

57. Mr. BARTOŠ, Special Rapporteur, said that in practice there were numerous instances where special missions had had great difficulty in obtaining accommodation, particularly when they had to go to frontier areas or places remote from large towns; in such cases intervention by the local authorities was necessary to enable them to find accommodation and carry out their tasks. Generally speaking, the accommodation problem was less difficult in towns but even there, it could happen as a result of war or natural disaster or owing to exceptionally crowded conditions, that special missions would be unable to carry out their task unless the receiving State took the necessary steps to enable them to find accommodation.

58. Mr. JIMÉNEZ de ARÉCHAGA said he supported the proposal by Mr. Nagendra Singh to delete the last part of the sentence. As he had pointed out in his earlier remarks, that last part expressed an idea which was already implicit in the first part of the article and in article 21 of the Vienna Convention on Diplomatic Relations. If it were retained, the Commission's text might affect the interpretation of the 1961 Vienna Convention. A government might argue *a contrario* that the benefit in question did not apply to permanent missions; the fact that the Commission had found it necessary to introduce a specific provision for special missions would be advanced as an argument in favour of that restrictive interpretation of the Vienna Convention.

59. Mr. NAGENDRA SINGH said that all members accepted the basic principle that both permanent and special missions must be assisted to obtain accommodation and premises. However, if a provision were introduced suggesting that the receiving State must guarantee accommodation, a sending State might claim that such accommodation must be provided on the date specified by the sending State: if the receiving State suggested an alternative date, that suggestion might be construed as a refusal to accept the special mission.

60. In practice, the normal position was that the two States concerned came to a mutual agreement with regard to the convenient date, and the receiving State was thus able to carry out its obligation to assist in finding suitable accommodation and premises.

61. Mr. EUSTATHIADES said that article 18 expressed two ideas. The first, which was quite correct, was that the receiving State was required to assist the special mission in obtaining the premises and accommodation it needed. It could happen that, despite that assistance by the receiving State, the special mission was unable to obtain such premises and accommodation. The second idea, contained in the concluding phrase of the article, then came into play, namely, that the receiving State was required to ensure that the special mission was supplied with such premises and accommodation.

62. But that concluding phrase could be interpreted as placing an even greater obligation on the receiving State, whereby it would be required to supply premises and accommodation at its own expense. If, for example, the special mission stated that the premises and accommodation proposed by the receiving State in accordance with the first part of the article were not suitable, the receiving State might then be compelled to provide premises and accommodation at its own expense, in accordance with the concluding phrase. That doubt about how the concluding phrase was to be interpreted could be cleared up in the commentary.

63. He agreed with the Special Rapporteur and Mr. Yasseen that a solution should be provided for exceptional cases where the assistance of the receiving State was not sufficient. He suggested that the words "if necessary", which might raise delicate problems, be deleted and that the concluding phrase be reworded to read "and, if special circumstances so require, ensure that such premises and accommodation are at their disposal".

64. Mr. IGNACIO-PINTO said that article 18 was satisfactory. The problems which had been raised were merely a question of drafting. He shared the view expressed by a number of other speakers that, if the assistance of the receiving State was not sufficient, more effective action was required. Perhaps all the objections would be met if the expression "if need be" were used instead of "if necessary".

65. Mr. YASSEEN said he understood article 18 to mean that the receiving State had, first, an obligation to supply assistance, in other words the means, and, secondly, in certain exceptional cases, an obligation to ensure the result. But the concluding phrase could not mean that the receiving State would be required to pay for the

premises and accommodation provided for the special mission.

66. Members seemed to be in agreement on the substance, so that the only problem was the wording. It was to be hoped that the Drafting Committee would find a wording which would faithfully reflect the Commission's thinking.

67. Mr. BARTOŠ, speaking as a member of the Commission, said that the accrediting State sometimes resorted to requisition in order to provide premises for a permanent diplomatic mission when the mission had difficulty in obtaining them. That had been the case, for example, during the Second World War, when diplomatic missions accredited to the USSR were invited to leave Moscow for Kuybyshev, or after the war, in several European capitals where many premises had been destroyed or rendered unusable. The question of the receiving State's obligation to ensure that diplomatic missions were supplied with premises and accommodation had been discussed at the Vienna Conference but no rule on the subject had been included in the Convention because the participants had considered that it would apply only in exceptional cases.

68. Speaking as Special Rapporteur, he noted that members were not far from agreement. Article 18 should specify that the receiving State was required to assist the special mission in obtaining premises and accommodation and that, where necessary, in special or exceptional circumstances, the receiving State was required to ensure that premises and accommodation were at the disposal of the special mission. Only the first of those obligations was included in article 21 of the Vienna Convention, but it might perhaps be argued that the second was included in the fifth paragraph of the preamble to that Convention, where the States parties affirmed that the rules of customary international law should continue to govern questions not expressly regulated by the provisions of the Convention.

69. Mr. ALBÓNICO said that, as he understood it, it was essentially the sending State's responsibility to find accommodation and premises for the special mission. The receiving State was under an obligation to assist the sending State in the matter.

70. The concluding phrase was intended to deal with exceptional problems. An example of such a problem was the case where the receiving State, in pursuance of its obligation to assist the special mission in the matter, reserved a wing of an hotel to serve as premises or accommodation for the mission but, for some reason, the hotel management failed to honour the reservation. The receiving State would then be under a duty to ensure that the premises in question actually became available.

71. Lastly, he saw nothing in either the provisions of article 18 or those of the corresponding article of the Vienna Convention on Diplomatic Relations to suggest that the receiving State might have to bear in any way the cost of providing accommodation and premises for the special mission.

72. Mr. CASTRÉN said he shared the Special Rapporteur's view and considered the suggestions by Mr. Eustathiades and Mr. Ignacio-Pinto excellent.

73. It remained to be explained why the draft would give special missions a guarantee which the Vienna Convention did not give to diplomatic missions. The Special Rapporteur had said that that guarantee could be based on custom. That might be sufficient reason perhaps, but the point should at least be made clear in the commentary.

74. Mr. BARTOŠ, Special Rapporteur, proposed that the Commission refer the article to the Drafting Committee with a request that it clarify the concluding phrase.

75. Mr. JIMÉNEZ de ARÉCHAGA said that the Commission should follow its normal procedure and refer article 18 to the Drafting Committee in general terms for consideration in the light of the discussion; the Commission would later take a decision on the text proposed by the Drafting Committee.

76. The CHAIRMAN said that there was unanimous support for the retention of article 18, the first part of which had not met with any objection.

77. The second part of the article had given rise to some differences of opinion. It was generally agreed, however, that the provision in question was intended to deal with exceptional circumstances, and the Drafting Committee would have to devise suitable language to express the receiving State's obligations in those exceptional cases.

78. He suggested that article 18 be referred to the Drafting Committee for consideration in the light of the views expressed during the discussion.

It was so agreed.[7]

ARTICLE 19 (Inviolability of the premises) [25]

79. *Article 19* [25]

Inviolability of the premises

1. The premises of a special mission shall be inviolable. The agents of the receiving State may not enter the premises of the special mission, except with the consent of the head of the special mission or of the head of the permanent diplomatic mission of the sending State accredited to the receiving State.

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

3. The premises of the special mission, their furnishings, other property used in the operation of the special mission and its means of transport shall be immune from search, requisition, attachment or execution by the organs of the receiving State.

80. The CHAIRMAN invited the Commission to consider article 19, the Special Rapporteur's proposals for which were contained in paragraph 18 of the section on that article in his fourth report (A/CN.4/194/Add.2) and in his additional comments on article 18 in document A/CN.4/194/Add.4.

81. Mr. BARTOŠ, Special Rapporteur, said that article 19 corresponded to article 22 of the Vienna Convention on Diplomatic Relations, but differed from it in several respects.

[7] For resumption of discussion, see 930th meeting, paras. 116-121.

82. Paragraph 1 expressed the Commission's idea that special missions were working for the sending State but did not represent the sending State in the receiving State for general purposes, for which the permanent diplomatic mission was the normal representative of the sending State. In the event of disagreement between the receiving State and the special mission as to whether agents of the receiving State should be permitted to enter the premises of the special mission, a disagreement which would be likely to impair relations between the sending State and the receiving State, the head of the permanent diplomatic mission of the sending State could be called upon to settle the matter; clearly he would only settle it in accordance with the interests of the sending State.

83. Paragraph 2 was identical with paragraph 2 of article 22 of the Vienna Convention.

84. Paragraph 3 differed in one respect from paragraph 3 of article 22 of the Vienna Convention in that the property used for the operation of the special mission was not always located in the premises of the special mission: sometimes it was in the area concerned, as, for example, when the special mission was engaged in frontier demarcation or other technical tasks.

85. Article 19 had given rise to numerous comments by Governments. The Governments of Canada, the United States, Israel and the Netherlands proposed that a provision be added to paragraph 1 similar to that contained in article 31, paragraph 2, of the Vienna Convention on Consular Relations to make it clear that the consent of the head of the special mission could be assumed in case of fire or other disaster requiring prompt protective action. The Commission had already discussed that problem on a number of occasions, in particular when drawing up its draft convention on diplomatic intercourse and immunities[8] and in connexion with special missions. Bearing in mind that in some cases fire or other disasters had been provoked deliberately in order to enable agents of the receiving State to enter the premises of the mission, it had, at first reading, refrained from including a provision of that kind in the draft on special missions.[9]

86. The Governments of Austria, Chile and Israel were concerned about the conflict of competence between the head of the special mission and the head of the permanent diplomatic mission to which paragraph 1 might give rise and had made various suggestions on that subject. The Austrian Government proposed that paragraph (5) of the commentary on article 2 should be amended, the Chilean Government thought that the head of the special mission should have exclusive competence when the premises of the special mission were located in premises other than those of the permanent mission, and the Israel Government thought that competence should lie with the head of the permanent diplomatic mission, provided the permanent mission was located in the same town as the premises of the special mission.

87. The Netherlands Government took up the proposal put forward by him in his second report that the provisions of paragraph 1 should be extended to cases where the special mission was accommodated in a hotel or other public building.

88. With regard to paragraph 2, the Chilean Government proposed the addition of a provision to the effect that the special mission should inform the receiving State as to what premises it was occupying. He was not opposed to such an addition.

89. Commenting on paragraph 3, the United Kingdom Government proposed that the immunity in question should be limited to property located on the premises of the special mission, while the United States Government observed that the proposed provision concerning furnishings and real estate did not seem necessary and might make it more difficult for the special mission to obtain the facilities which it needed in order to perform its task. Lastly, the Netherlands Government proposed the deletion of the word "search" in paragraph 3.

90. He would wait until the Commission had taken a decision on those various proposals before making his own recommendations with respect to article 19.

The meeting rose at 1.5 p.m.

914th MEETING

Monday, 5 June 1967, at 3.15 p.m.

Chairman: Sir Humphrey WALDOCK

Present: Mr Albónico, Mr Bartoš, Mr. Castañeda, Mr. Castrén, Mr. Eustathiades, Mr. Ignacio-Pinto, Mr. Jiménez de Aréchaga, Mr. Kearney, Mr. Nagendra Singh, Mr. Ramangasoavina, Mr. Reuter, Mr. Tammes, Mr. Ushakov, Mr. Ustor, Mr. Yasseen.

Special Missions

(A/CN.4/193 and Addenda; A/CN.4/194 and Addenda)

[Item 1 of the agenda]

ARTICLE 19 (Inviolability of the premises) [25] *(continued)*[1]

1. The CHAIRMAN said that a message had been received from Sir Gerald Fitzmaurice thanking the Commission for its welcome and stating that he would convey the Commission's observations to the President of the International Court of Justice.

2. He invited the Commission to resume its consideration of article 19.

3. Mr. CASTRÉN said that he accepted paragraphs 1 and 2 as they were at present worded. He was not sure

[8] See, for example, *Yearbook of the International Law Commission, 1958*, vol. I, 455th meeting, paras. 55-78, and 456th meeting, paras. 1-14.

[9] See *Yearbook of the International Law Commission, 1965*, vol. I, 804th meeting, paras. 96-105, 805th meeting, paras. 1-28 and 817th meeting, paras. 7-10.

[1] See 913th meeting, para. 79.

whether it would be advisable to follow certain suggestions which had been made that the article, like article 31, paragraph 2, of the Vienna Convention on Consular Relations, should provide that the consent of the head of the mission might be assumed in case of fire or other disaster. Certainly, where high-level special missions were concerned, the reply should be in the negative.

4. The new paragraph proposed by the Netherlands Government (A/CN.4/193) would be better in the commentary than in the text of the article. The Chilean Government's proposal (A/CN.4/193/Add.1) was sensible but went into too much detail.

5. With regard to paragraph 3, the Belgian Government's proposal that the text of article 22, paragraph 3 of the Vienna Convention on Diplomatic Relations should be followed, so that, in the French text, the word "*exécution*" would be replaced by the expression "*mesure d'exécution*", and the words "by the organs of the receiving State", at the end of the paragraph, would be deleted, was perfectly sound. Protection should not be confined, as the United Kingdom Government had proposed, to property on the premises of the special mission and to its means of transport, because it had to be remembered that a special mission often carried out its task elsewhere than on its premises. The only change which he would wish would be the replacement of the words "and its means of transport" by the words "including its means of transport".

6. Mr. TAMMES said that it was important to consider the relationship between article 19 and article 40, paragraph 2, which read:

> "The premises of the special mission must not be used in any manner incompatible with the functions of the special mission as laid down in these articles or by other rules of general international law or by any special agreements in force between the sending and the receiving State".

7. That provision was taken from paragraph 3 of article 41 of the 1961 Vienna Convention on Diplomatic Relations. The 1961 Vienna Conference had left outside the scope of article 41 the question of political asylum, as indicated by the Commission itself in the concluding sentence of paragraph (4) of its commentary to article 40 of its 1958 draft on diplomatic intercourse and immunities[2] on which the 1961 Vienna Convention was based.

8. The question therefore arose whether the inviolability of the special mission, as laid down in article 19, would prevail in the case where a common criminal took refuge in the premises of the special mission. Where permanent missions were concerned, absolute inviolability had been generally accepted until recently but was incompatible with the functional necessity theory.

9. The introduction of a provision to cover the question of entry into the premises in such emergencies as fire would not, of course, cover the case of refuge taken by a fugitive from ordinary justice. That problem was a clear case of the practical application of the functional necessity theory. Under that theory, such abuse of the functions of the mission would not be allowed. Under the representational principle, the conclusion would be the opposite: an abuse of functions would be preferred to an abuse of the exceptions to inviolability.

10. Mr. KEARNEY said that, while the 1963 Vienna Convention on Consular Relations made provision for a presumption of consent to entry of the premises in case of fire or other disaster requiring prompt protective action, the 1961 Vienna Convention on Diplomatic Relations contained no such provision. In the circumstances, if the Commission were to fail to include a provision on the subject in article 19, the conclusion would be reached, when interpreting article 19, that in the case of special missions no such presumption could be made.

11. In view of the temporary nature of special missions, their position was different not only from permanent missions but even from consulates. Normally the special mission's premises would be in a hotel or an office building, where the danger of fire or other disaster was considerable. It would therefore be most unwise to introduce into the draft articles on special missions a rule of absolute inviolability for the premises of such missions.

12. For those reasons, he favoured the inclusion in article 19 of a clause on presumed consent in the case of fire or other disaster, on the lines of article 31, paragraph 2, of the 1963 Vienna Convention.

13. Mr. USHAKOV said that in principle he approved the wording of article 19. It should be noted, however, that in paragraph 1, the words "or [with the consent] of the head of the permanent diplomatic mission of the sending State" referred to ordinary special missions and not to high-level special missions. It should therefore be made clear that the situation provided for did not apply to special missions headed by a Head of State or other high-ranking personality.

14. So far as the remainder of article 19 was concerned, the text could be left as it stood, on condition that article 18 provided that the premises of the special mission were established "with the consent of the receiving State", in other words, by agreement between the two States. If article 18 were not amended in that sense and implied that the choice of accommodation for the special mission depended only on the will of the sending State, the present wording of article 19 would be unacceptable. As the Government of Chile had pointed out, if the receiving State did not know what premises were occupied by the special mission, it could not take the necessary steps to prevent damage to them. Difficulties might then arise between the sending and the receiving States.

15. Mr. ALBÓNICO said that, while he was in general agreement with article 19, he thought that it would be useful to include in it a provision to deal with the case of fire or other disaster, as suggested by the Government of Israel. The consent of the head of the special mission should also be assumed in the case of action by the proper authorities to apprehend an escaped common criminal.

16. He supported the Belgian Government's suggestion to delete the concluding words of paragraph 3, "by the organs of the receiving State", since such measures could

[2] *Yearbook of the International Law Commission, 1958*, vol. II, p. 104.

be taken at the request of private individuals. He suggested, however, that the list "search, requisition, attachment or execution" should be expanded so as to cover provisional or protective measures of attachment.

17. He also supported the Chilean Government's suggestion that paragraph 2 should state that a special mission must inform the receiving State what premises it occupied by means of suitable identification. In order to apply the provisions of article 19 on inviolability, it was necessary that the receiving State should know to what premises the inviolability applied.

18. Mr. EUSTATHIADES said that he fully agreed with the United States Government's view, as amplified by Mr. Kearney, that, in the case of fire or other disaster, the consent of the head of the special mission should be assumed, for it was inadmissible that the authorities of the receiving State should not be able to intervene in exceptional circumstances of that kind.

19. The question of diplomatic asylum, mentioned by Mr. Tammes, raised a serious question on which the Commission had not touched in its recent work. The solution put forward at the time of the Vienna Conference on Diplomatic Intercourse and Immunities, namely, that reference should be made to treaties and to general principles, was inadequate for, if there were no treaties, it was difficult to see what general principles should be applied, since they differed in different States. Since the question of the right of asylum had not been settled in the case of permanent diplomatic missions, it might be asked what the position was in the case of special missions and what the practice was in that connexion, if any. Complete silence on that point could be dangerous, as it might lead to the right of asylum being claimed in certain cases.

20. Since the matter had been raised, it was for the Special Rapporteur to find some way of dealing with the situation.

21. Mr. CASTAÑEDA said that he was inclined to support the inclusion of a provision similar to the last sentence of article 31, paragraph 2, of the 1963 Vienna Convention, to deal with such cases as fire and other extreme emergencies. A provision on those lines did not mean that the premises of the special mission could be entered in every case. The presumption of consent was rebuttable; it was always open to the head of the mission to refuse admission to the premises if he was prepared to take the responsibility for such refusal, either because he felt that there was no grave danger or because he considered that special reasons existed.

22. He was also inclined to support the suggestion by the Netherlands Government to cover the case where the special mission was accommodated in a hotel or other public building. However, the question was one of detail and, since the point was implicitly covered by paragraph 1 of article 19, it would be sufficient to deal with it in the commentary.

23. Lastly, in connexion with paragraph 18 (*d*) of the Special Rapporteur's observations (A/CN.4/194/Add.2), he agreed that special protection should be established for property used in the operation of the special mission. As explained elsewhere by the Special Rapporteur, it was quite usual for a special mission to use material of various kinds away from its premises.

24. Mr. USTOR said that the draft should not contain any reference to the disputed question of diplomatic asylum; that type of asylum was admitted in Latin America under the conditions specified in certain regional treaties, but in most parts of the world, any attempt to grant diplomatic asylum would be regarded as an unwarranted interference in the domestic affairs of a State. In the case of such interference, the question arose whether force could be used as a reprisal for the violation of international law thus committed. His own view was that interference of that kind involved the international responsibility of the State claiming to grant diplomatic asylum; the State injured by that interference in its domestic affairs was entitled to exercise all its rights under international law. Those rights did not include reprisals by force, but did include the right to resort to peaceful means for the settlement of disputes.

25. As far as special missions were concerned, the clear provisions of article 40, paragraph 2, settled the whole question, which was thus outside the scope of article 19.

26. With regard to the problem of fire or other disaster, the Commission had the choice between the system of the 1963 Vienna Convention, which assumed the consent of the head of mission in such cases, and the system of the 1961 Vienna Convention. Personally he favoured the system of the 1961 Convention, because special missions were closer to permanent diplomatic missions than to consulates.

27. Mr. JIMÉNEZ de ARÉCHAGA said that he would reply to the four questions raised by the Special Rapporteur in paragraph 18 of his observations on article 19.

28. First, with regard to sub-paragraph (*a*), he was in favour of adopting the idea that the consent of the head of the mission was assumed in case of fire or other disaster. Secondly, with regard to sub-paragraph (*b*), he found it unnecessary to include the new paragraph 1(*a*) proposed by the Netherlands Government because the idea in it was already implicit in paragraph 1. Thirdly, with regard to sub-paragraph (*c*), he was not in favour of deleting the word "search", since it helped to define the scope of inviolability and its deletion could lead to misunderstanding. Fourthly, with regard to sub-paragraph (*d*), he was not in favour of the establishment of special protection for property used in the operation of the special mission; inviolability should be confined to the property used by the mission on its premises.

29. That being said, he proposed to deal with the important question of diplomatic asylum, which was covered by article 40, paragraph 2, quoted by Mr. Tammes. The reference in the concluding words of that paragraph to "any special agreements in force between the sending and the receiving State" were intended to cover existing treaties on diplomatic asylum, which made such asylum part of the functions of a diplomatic mission. That point was made clear by the concluding sentence of paragraph (4) of the Commission's commentary to article 40 of its 1958 draft on diplomatic intercourse and immunities, which read: "The question of asylum is not dealt with in the

draft but, in order to avoid misunderstanding, it should be pointed out that among the agreements referred to in paragraph 3 there are certain treaties governing the right to grant asylum in mission premises which are valid as between the parties to them."[3]

30. Thus paragraph 2 of article 40 of the draft on special missions, by providing for existing agreements between States on the right of diplomatic asylum, performed the same function as paragraph 3 of article 41 of the 1961 Vienna Convention. If the Commission adopted the article it would not be introducing a rule which conflicted with existing practice in Latin America or elsewhere.

31. Mr. REUTER pointed out that under the terms of paragraph 2 of article 19, the receiving State was under a special duty to take steps to protect the premises of the special mission; those steps were of a preventive character and no provision had been made for the case in which the receiving State should put a stop to incidents: for example, when it should expel demonstrators who had invaded the premises of the special mission. Consequently, the drafting of paragraph 2 should be improved and should include a general clause placing the receiving State under a duty not only to prevent the premises of the special mission from being invaded or damaged, but also to put an end to incidents caused in the premises of the special mission by the intrusion of disturbers of the peace.

32. With regard to the comments by Mr.Ushakov, he said that the difficulties mentioned might be due to the fact that the receiving State did not know what premises were being used by the special mission and that it could not provide for the inviolability and protection of premises of which neither the location nor the use had been notified to it by the sending State. Under those conditions, the provisions of paragraph 2 would be difficult to apply. Mr. Ushakov had also suggested that the choice of the premises of the special mission should be the subject of agreement between the sending State and the receiving State, but he (Mr. Reuter) would prefer not to take a position on that point.

33. Paragraph 3 did not appear to add anything very useful, since under the terms of paragraph 1 the premises of the special mission were inviolable; however, if there were practical reasons for maintaining that paragraph he would not oppose it.

34. But there was one case for which the Vienna Convention on Diplomatic Relations did not provide a solution, and that was the case where the special mission sent by a given State was installed in the premises of a permanent diplomatic mission or special mission sent by another State and made use of its property. The question arose to which of the two States the receiving State was required to apply the provisions of paragraph 3. In his opinion, the receiving State should decide for itself, since the premises were in its territory. The Commission should accordingly be rather cautious in its commentary to article 19 and refrain from specifying in paragraph (6) of that commentary that protection should be accorded "to all property, by whomsoever owned, which is used by the special mission".

35. As for the right of asylum in the premises of a special mission, he did not think the Commission was called upon to examine that question.

36. Mr.USHAKOV said he preferred the formula adopted in article 22 of the Vienna Convention on Diplomatic Relations to that of article 31 of the Convention on Consular Relations, for in his opinion the agents of the receiving State should not enter the premises of the special mission without the consent of the head of the mission. Although permanent diplomatic missions should always have their own premises, that did not apply to special missions unless they were headed by a person of high rank, a Head of State, for instance, in which case the inviolability of their premises should be absolute.

37. At the 1961 United Nations Conference on Diplomatic Intercourse and Immunities, the Soviet Union delegation had argued that, although a fire in the premises of the diplomatic mission might damage buildings and public or private property adjoining those premises, the damage would be much more serious if the agents of the receiving State entered the premises of the diplomatic mission without the permission of its head;[4] the situation would be the same in the case of a high-level special mission or one performing important duties, for example, in the military sphere.

38. The Commission had considered that in that matter it should be guided by the Convention on Diplomatic Relations, and in his opinion it should not change its attitude.

39. Mr. NAGENDRA SINGH, replying to the four questions put to the Commission by the Special Rapporteur in his report, said that he had no strong views on question (*a*). There would be no harm in following article 31, paragraph 2, of the Convention on Consular Relations, but obviously the fire-brigade would not wait for the consent of the head of mission before entering the premises. His answer to question (*b*) was in the negative, as it was to question (*c*), because he was in favour of paragraph 3 as it stood. As for question (*d*), he doubted whether it was necessary to provide for the protection of property used by special missions.

40. Mr. TAMMES, on the question of asylum, said he would refer the Commission to the statement made by the Chairman of the Committee of the Whole at the Vienna Conference on Diplomatic Intercourse and Immunities, which read:

> "The United Nations General Assembly, by its resolution 1400 (XIV) of 21 November 1959, had requested the International Law Commission to undertake the codification of the principles and rules of international law relating to the right of asylum. It would therefore be preferable to await the outcome of the Commission's work before embarking upon the task of regulating the matter."[5]

[3] *Yearbook of the International Law Commission, 1958*, vol. II, p. 104.

[4] See United Nations Conference on Diplomatic Intercourse and Immunities, *Official Records*, 21st meeting of the Committee of the Whole, paras. 37-39.

[5] *Ibid.*, vol. II, p. 57.

41. The Conference had been criticized for not dealing with the problem of asylum, but the general view had been that the institution of diplomatic asylum was unaffected by the Convention. That would also be true of the present article, which closely followed article 22 of the Convention.

42. Mr. YASSEEN said that the four questions put by the Special Rapporteur must be answered in the negative for the reasons already given by other members of the Commission. The Commission was not called upon to consider the question of diplomatic asylum.

43. Mr. BARTOŠ, Special Rapporteur, said that, owing to the nature of their work, special missions generally needed to have their own premises. Great Powers, such as the United States and the Soviet Union, could build premises for their special missions on the sites belonging to their permanent diplomatic missions, but that possibility was not available to all States, owing to lack of the necessary financial means. The case of special missions with a small staff and limited activities did not raise any problem, but the same was not true of technical missions, which needed certain equipment and the necessary premises to carry out their work, often away from the town in which the permanent diplomatic mission was located. That case occurred often enough in practice to justify the inclusion of a provision in the draft articles.

44. With regard to the right of asylum, the question had been discussed at length at the Vienna Conference on Diplomatic Intercourse and Immunities in 1961. The delegations of the Latin American countries had considered that the right of asylum should be provided for in the text of the Convention on Diplomatic Relations, but that proposal had not gained the two-thirds majority necessary for its adoption. Several cases were on record in which the receiving State had refused to recognize the right of asylum, and although it had not sent its agents into the premises of a permanent diplomatic mission, it had nevertheless exerted pressure to compel the mission not to avail itself of the right of asylum.

45. At the request of the Latin American States, the United Nations General Assembly had asked the International Law Commission to place the right of asylum on its programme of work, but as the Commission had not had time to consider that question, it would be preferable not to take it up in connexion with the draft articles on special missions.

46. With regard to the measures to be taken in case of fire or other disaster, he agreed that since the receiving State was required to protect the premises of the special mission, the inviolability of those premises must not prevent effective measures of protection from being taken. He was still doubtful, however, about whether to include in the draft a provision similar to that at the end of paragraph 2 of article 31 of the Vienna Convention on Consular Relations. On the one hand, such a provision might favour the designs of people who would not hesitate to cause an accident with the sole object of being able to enter the premises of a mission and seize its documents; but on the other hand, there were circumstances in which public safety required immediate intervention, and refusal to admit firemen, for example, would be wrong. The Commission must choose between inviolability at all costs and humanitarian duty.

47. The question of the protection to be accorded to property used in the work of a special mission was all the more complicated because such property did not always belong to the sending State; it sometimes belonged to the receiving State or to private persons. If the property were seized as a result of a judicial decision, the special mission would be prevented from carrying out its work. The measure should be suspended at least until the special mission had been able to procure equivalent equipment, but that was not always easy, particularly where scarce technical apparatus was concerned. The Commission should take a decision on the question whether the guarantee in article 19, paragraph 3, should apply to all property used by a special mission, and not only to property on its premises.

48. He noted that the Commission agreed to the insertion in article 19 of a provision such as had been proposed by the Government of Chile, to the effect that premises would only benefit from the guarantees provided in the article if the receiving State had been informed that the premises were occupied by a special mission.

49. Mr. CASTAÑEDA said that a special problem sometimes arose in Latin American countries when persons given asylum were not lodged in the permanent mission but in special premises. If the receiving State were not informed, it could not know that those premises also enjoyed immunity.

50. There was some contradiction between article 19 and article 40, which stipulated that "The premises of the special mission must not be used in any manner incompatible with the functions of the special mission...". Even if the premises of a special mission were used for purposes other than the performance of its functions, that did not release the receiving State from its obligation to grant them inviolability. As indicated in paragraph (4) of the Commission's commentary to article 40 of its draft on diplomatic intercourse and immunities, "Failure to fulfil the duty laid down in this article does not render article 20 (inviolability of the mission premises) inoperative but, on the other hand, that inviolability does not authorize a use of the premises which is incompatible with the functions of the mission".[6] Something on the lines of that statement ought to be incorporated in the commentary to article 40 of the present draft and even perhaps in that to article 19.

51. Mr. EUSTATHIADES said that, in connexion with political asylum, some members of the Commission had referred to the draft convention on diplomatic relations adopted by the Commission in 1958, in particular to article 40 of that draft, which had become article 41 of the Convention, and its accompanying commentary, and had suggested that the Commission should take it as a basis for the relevant provisions of its draft on special missions. But it was clear from the commentary to article 40 of the draft convention on diplomatic relations that the Commission had considered that political asylum in the premises of a diplomatic mission was not contrary to general international law. Personally, he did not think that an analogy in that respect between diplomatic missions and

[6] *Yearbook of the International Law Commission, 1958*, vol. II, p. 104.

special missions was justified in the present state of international law. If the Commission decided not to refer to the right of asylum in article 19, it should explain in the commentary that the subject had been left aside because it was reserved for later study.

52. With regard to the question of the measures to be taken in case of fire or other disaster, it should be noted that, under the terms of article 20, "The archives and documents of the special mission shall be inviolable at any time and wherever they may be", which meant even in case of disaster. Consequently, if the Commission decided not to include in article 19 the express provision which had been suggested by several Governments, it might at least specify that in case of disaster article 20 would enter into force.

53. Mr. BARTOŠ, Special Rapporteur, said that, at the 1961 Vienna Conference, nobody had raised the question of political asylum in connexion with article 41, paragraph 3 of the Vienna Convention on Diplomatic Relations. During the discussion on that provision, the subject most frequently mentioned had been the practice of certain large States of staging miscellaneous exhibitions, entertainments and displays in their embassies. Delegates had wanted such use of the premises of the diplomatic mission to be regulated by bilateral agreement between the receiving and the sending States. The question of political asylum had been raised independently of article 41.

54. Since opinion was so divided on the question of the right of asylum, he suggested that the Commission draft a provision on the subject and, as it had already done on other occasions, include it in the draft between square brackets so that the conference of plenipotentiaries could either retain it or delete it.

55. The CHAIRMAN said that the discussion had been an illuminating one for academic lawyers, but too much of it had been devoted to the question of asylum. It would be thought very strange if, after two diplomatic conferences had left the subject aside, the Commission were suddenly to decide to include provisions on asylum in a draft of far narrower scope. The topic had been referred to the Commission for special study and it had never been the intention of governments that it be dealt with incidentally as part of another topic.

56. He hoped the Commission would agree on a solution of the kind suggested by the Special Rapporteur and Mr. Eustathiades whereby a passage would be inserted in the commentary, outlining the history of the discussion of that question during the work on diplomatic and consular relations and mentioning that it was to be taken up in future.

57. Mr. JIMÉNEZ de ARÉCHAGA said that if a new passage were added to the commentary, it should be modelled on the text given in the Commission's commentary to its draft articles on diplomatic intercourse and immunities, on which Mr. Padilla Nervo had been very insistent. The Latin American members were not asking for either approval or condemnation of that practice.

58. The CHAIRMAN pointed out that it had been clearly suggested that the commentary should contain an account of the way the question of asylum had been dealt with in the past.

59. Mr. JIMÉNEZ de ARÉCHAGA said that he could not agree to a statement on the lines of that suggested by Mr. Eustathiades. The present draft articles must allow the *inter se* practice regarding asylum which existed among certain States. Apart from other purposes, the premises of special missions could be used for giving asylum.

60. The CHAIRMAN, summing up the discussion, said that there seemed to be general agreement not to include any special provisions on asylum in the draft articles, but to insert a passage on the matter in the commentary.

61. Members also seemed to be agreed on the need to require the sending State to notify the receiving State what premises were to be used by the special mission, since in the absence of such notification it would be difficult for the receiving State to discharge its obligations.

62. There had been considerable discussion as to whether or not a *force majeure* clause should be inserted in article 19, or whether the problems resulting from such cases should be left to be regulated by other articles. He doubted whether the question was of as much importance for the present draft as it had been for the premises of permanent missions. If there were any real obstruction on the part of the sending State over any of the provisions of article 19, the manifestly temporary character of a special mission and the power of the receiving State to terminate it at short notice would be a potent weapon militating in favour of finding a balance between the interests of the two States. In his own opinion, the phraseology of article 31, paragraph 2, of the Convention on Consular Relations was not particularly helpful, since it failed to indicate whether the presumption that consent was given would prevail over the refusal of consent. Perhaps the matter could be left to the Drafting Committee for consideration in the light of the two Vienna Conventions.

63. He suggested that article 19 be referred to the Drafting Committee.

It was so agreed.[7]

64. Mr. TAMMES said he hoped he had not conveyed the impression that he was in favour of a comprehensive article on asylum. His purpose had been to draw the Commission's attention to the relationship between the inviolability of the premises and the abuse of privileges attached to functions, and he had only mentioned asylum as an example.

The meeting rose at 6 p.m.

[7] For resumption of discussion, see 931st meeting, paras. 2-6.

915th MEETING

Tuesday, 6 June 1967, at 10 a.m.

Chairman: Sir Humphrey WALDOCK

Present: Mr. Ago, Mr. Albónico, Mr. Bartoš, Mr. Castañeda, Mr. Castrén, Mr. Eustathiades, Mr. Ignacio-

Pinto, Mr. Jiménez de Aréchaga, Mr. Kearney, Mr. Nagendra Singh, Mr. Ramangasoavina, Mr. Reuter, Mr. Tammes, Mr. Tsuruoka, Mr. Ushakov, Mr. Ustor, Mr. Yasseen.

Special Missions

(A/CN.4/193 and Addenda; A/CN.4/194 and Addenda)

(continued)

[Item 1 of the agenda]

ARTICLE 20 (Inviolability of archives and documents) [26]

1. *Article 20* [26]

Inviolability of archives and documents

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

2. The CHAIRMAN invited the Commission to consider article 20, the Special Rapporteur's proposals for which were contained in paragraph 5 of the section on that article in his fourth report (A/CN.4/194/Add.2) and in his additional comments in document A/CN.4/194/Add.4.

3. Mr. BARTOŠ, Special Rapporteur, said that article 20 reproduced *mutatis mutandis* article 24 of the Vienna Convention on Diplomatic Relations and article 33 of the Vienna Convention on Consular Relations.

4. The Greek Government considered that the application of the provision to technical special missions and special missions of short duration should be restricted, but in his opinion there could be no exceptions to the principle of inviolability of archives and documents.

5. The CHAIRMAN said he noted that there were no comments on article 20, the text of which was based on a provision contained in both Vienna Conventions.

6. He suggested that the article be referred to the Drafting Committee, with the expectation that there would be no change in its text.

It was so agreed.[1]

ARTICLE 21 (Freedom of movement) [27]

7. *Article 21* [27]

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 its functions, unless otherwise agreed.

8. The CHAIRMAN invited the Commission to consider article 21, the Special Rapporteur's proposals for which were contained in paragraph 8 of the section dealing with that article in his fourth report (A/CN.4/194/Add.2).

9. Mr. BARTOŠ, Special Rapporteur, said he thought the article did not raise any serious difficulties, although it had given rise to certain objections.

10. In the Sixth Committee of the General Assembly the Turkish representative had opposed the granting of freedom of movement to all members of the special mission throughout the territory of the receiving State and had urged that a special mission should only be granted the freedom of movement necessary for the performance of its task.[2]

11. The Swedish Government had also proposed a less liberal solution than that adopted in the draft (A/CN.4/188).

12. To restrict freedom of movement to journeys necessary for the task of the special mission was, of course, entirely in accordance with the functional theory. There was no rule of international law against the adoption either of a broader concept—subject to the guarantees necessary for national security—or of a more restrictive one. He himself was inclined to favour the former.

13. Mr. CASTRÉN proposed the deletion of the words "unless otherwise agreed", at the end of the article. The text contained another reservation, which did not appear in the Vienna Conventions, under the terms of which freedom of movement was only ensured in so far as it was necessary for the performance of the functions of the special mission. It would be wrong to limit that freedom still further, for the special mission would then no longer be able to perform its task. Moreover, if the Commission decided to insert in the draft a general clause on derogations by mutual agreement between the States concerned, the proviso at the end of the article would become unnecessary in any case.

14. Mr. BARTOŠ, Special Rapporteur, explained that the concluding words, "unless otherwise agreed", also covered certain special situations. It frequently happened that special missions were given permission to travel in forbidden zones, such as military zones, in order to perform their task. Perhaps the text was not sufficiently clear on that point; the Drafting Committee could clarify it as required.

15. Mr. CASTRÉN said that the concluding words, "unless otherwise agreed" appeared in many articles of the draft, and generally amounted to a restriction. But from the example given by the Special Rapporteur, it would appear that they might equally well connote an extension of the rule. The Drafting Committee would therefore have to take that dual aspect of the problem into account.

16. The CHAIRMAN, speaking as a member of the Commission, said that he agreed with the Swedish Government's objection to the phrase "unless otherwise agreed". That phrase was open to the interpretation that it referred to a possible agreement to grant fewer facilities than were necessary for the performance of the special mission's task. In order to avoid that difficulty, those words should be replaced by some such formula as "in the absence of a specific agreement".

[1] For resumption of discussion, see 931st meeting, paras. 22-24.

[2] *Official Records of the General Assembly, Twentieth Session, Sixth Committee*, 847th meeting, para. 24.

17. There remained, however, the more general problem of the relationship between a clause of that type and the proposed general article on the question of specific agreements which departed from the provisions of the draft articles. That problem could only be dealt with by the Drafting Committee.

18. Mr.REUTER said he fully agreed with the Chairman. He proposed that the reservations at the beginning and at the end of the article should both be deleted. Thus simplified, the text would still make it clear that a special mission could enter forbidden zones if the performance of its task so required.

19. Mr. USHAKOV said that the words "for reasons of national security" did not appear in article 26 of the Vienna Convention on Diplomatic Relations and he therefore saw no reason why they should be included in article 21 of the draft. It was for the receiving State to draw up laws and regulations to cover that matter and that State was not required to give the reasons why it had created prohibited zones.

20. He was in favour of maintaining the words "unless otherwise agreed", because it was necessary to provide for cases where the receiving State, with the consent of the sending State, decided to take charge of the special mission's movements.

21. Mr. Reuter's proposal to delete the words "Subject to its laws and regulations concerning zones entry into which is prohibited or regulated" was unacceptable. The inclusion of that proviso, which was also to be found in article 26 of the 1961 Vienna Convention, made it clear that the receiving State, by virtue of its sovereign rights, was at liberty to establish prohibited zones and to issue laws and regulations regarding them.

22. Mr. BARTOŠ pointed out that article 26 of the Vienna Convention on Diplomatic Relations opened with the words "Subject to its laws and regulations concerning zones entry into which is prohibited or regulated for reasons of national security, the receiving State..." Moreover, contrary to what Mr. Ushakov had said, the expression "for reasons of national security" did appear in that article; on the other hand, it did not appear in the Vienna Convention on Consular Relations and the Commission would therefore have to choose between the two.

23. Mr. EUSTATHIADES said that the underlying principle of article 21 was that a special mission should be granted all the freedom of movement necessary for it to carry out its functions. The proviso at the beginning of the article was necessary, because, if the special mission had to enter prohibited zones to perform its task, the question then arose whether, in case of dispute, the needs of the special mission prevailed over those of national security. On the whole, it would perhaps be best to keep the proviso, since it facilitated negotiation and prevented tension from arising between the States concerned.

24. Mr. YASSEEN said that article 21 was well balanced, in that it sought to reconcile differing points of view. The special mission's freedom of movement should be confined to the journeys which it had to make in performing its task. It was not a question of the principle of freedom of movement for an individual, but of the freedom that a special mission must have to carry out its duties.

25. Mr. JIMÉNEZ de ARÉCHAGA said he must point out that the proviso regarding restrictions "for reasons of national security" appeared both in article 26 of the 1961 Vienna Convention on Diplomatic Relations and in article 34 of the 1963 Vienna Convention on Consular Relations. Such restriction was necessary in the case of both permanent missions and consulates because members of such missions and consulates enjoyed freedom of movement throughout the territory of the receiving State. The position, however, was different with regard to a special mission, whose members only enjoyed "such freedom of movement and travel" as was "necessary for the performance of its functions". There was no need for any restriction relating to national security, since the members of a special mission would only enter a restricted zone if such entry formed part of the mission's task, in which case it would naturally be authorized by the receiving State.

26. Mr. RAMANGASOAVINA said it was clear that the freedom of movement of members of a special mission was subject to three restrictions. First, it must not jeopardize the national security of the receiving State; secondly, it was granted only to the extent that it was necessary to enable the special mission to perform its duties; and thirdly, it was subject to any derogations made by mutual agreement. As had already been pointed out, the third condition might result either in a restriction or in an extension of the freedom.

27. He proposed that the article be amended to read "The receiving State shall ensure to all members of the special mission freedom of movement and travel on its territory to the extent that is this necessary for the performance of the task of the special mission and is compatible with the security needs of the State".

28. Mr. NAGENDRA SINGH said he agreed with Mr. Ushakov that there was no necessity to state the reasons for restrictions; they need not be only national security, but could be physical danger or health risks from an epidemic. It would perhaps therefore be more correct to refer to zones entry into which was prohibited or regulated by law that was applicable to all and to give no specific reasons. However, he would hesitate to propose any departure from the language used in article 26 of the 1961 Vienna Convention and article 34 of the 1963 Vienna Convention.

29. The Drafting Committee would no doubt examine carefully both the drafting and the punctuation of the article; in particular, the concluding phrase "unless otherwise agreed" would have to be reworded in order to prevent any misunderstanding.

30. Mr. REUTER said that freedom of movement and travel was accorded to the members of the special mission, not so as to permit them to go on sight-seeing tours but in order to enable them to carry out their task. If the opening words of article 21, "Subject to its laws and regulations... national security", were deleted, it would still be understood that members of special missions were required to comply with the laws and regulations in force on the territory of the receiving State and not to proceed to areas,

access to which was prohibited for various reasons such as epidemics, road dangers and so on. He had no objection to using the wording of article 26 of the Vienna Convention on Diplomatic Relations, but it must be remembered that the provisions of that Convention applied to people who were residing permanently on the territory of the receiving State, whereas members of special missions left the territory of the receiving State once they had completed their task.

31. Mr. BARTOŠ, Special Rapporteur, said that the freedom of movement and travel granted to members of special missions was limited by what was necessary to enable them to perform their duties. In practice, some States placed fairly severe restrictions on that freedom and occasionally themselves decided where the mission should travel and where it should stay. In principle, the freedom of movement of special missions to United Nations Headquarters was subject to certain restrictions, unless they obtained a special permit.

32. At the United Nations Conference on Diplomatic Intercourse and Immunities, the expression "for reasons of national security" had met with some opposition, but the Conference had not wished to specify public health or other reasons in article 26 of the Convention.

33. Mr. Castrén feared that the words "unless otherwise agreed" would impose further restrictions on the freedom of movement of special missions. On the contrary, cases might arise where, by agreement between the receiving State and the sending State, those words would make it possible to enlarge the opportunities granted to members of a special mission to travel in the territory of the receiving State. Mr. Yasseen had rightly said that the article was well-balanced; the last sentence enabled the parties to agree to allow special missions to enter "zones entry into which is prohibited or regulated".

34. He urged the Commission to retain the provisions which appeared in article 21 and to leave it to the Drafting Committee to find a wording that would be clearer and more precise while conforming to the principle laid down in article 26 of the Vienna Convention on Diplomatic Relations.

35. The CHAIRMAN said that, if there were no objection, he would consider that the Commission agreed to refer article 21 to the Drafting Committee as proposed by the Special Rapporteur.

It was so agreed.[3]

ARTICLE 22 (Freedom of communication) [28]

36. *Article 22* [28]

Freedom of communication

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

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

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

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

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

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

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

37. The CHAIRMAN invited the Commission to consider article 22, the Special Rapporteur's proposals for which were contained in paragraph 18 of the section on that article in his fourth report (A/CN.4/194/Add.2) and in his additional comments in documents A/CN.4/194/Add.4 and Add.5.

38. Mr. BARTOŠ, Special Rapporteur, said that article 22, which was of a technical character, had been the subject of a good deal of comment by Governments, which had made several suggestions.

39. The Netherlands Government's comment was that, atlhough special missions should enjoy freedom of communication in the conditions described in article 22, some restriction could be placed on the exercise of that freedom by mutual agreement between the States concerned, and it had proposed that an introductory paragraph be added to that effect.

40. The United Kingdom Government did not consider that a special mission had the right to have a diplomatic bag of its own if the sending State had accredited a permanent diplomatic mission to the receiving State, and it had asked that it should be made clear that the word "free" in paragraph 1 had the sense of "unrestricted". His view was that special missions were often called upon to carry out their tasks in places where the sending State did not have a permanent diplomatic mission and that they should therefore be able to use their own bag in order to communicate with their government in the best possible conditions.

41. The Yugoslav Government took the view that couriers *ad hoc* had not completed their task until they had returned to their point of departure and so maintained that they should enjoy immunity for their return journey instead of losing it as soon as they had delivered the bag

[3] For resumption of discussion, see 931st meeting, paras. 25-27.

in their charge to the consignee, as provided for in paragraph 6. The Yugoslav Government's argument was obviously logical, but if the Commission adopted it, then couriers *ad hoc* of special missions would enjoy wider immunities than were granted by the Vienna Convention to *ad hoc* diplomatic couriers.

42. The Belgian Government had raised the problem of the inadequacy of the protection provided for the telegraphic communications of special missions and had asked that such missions should be authorized to transmit government telegrams in the conditions provided for in annex 3 of the 1959 International Telecommunication Convention. He had put that problem before the Commission,[4] which had considered that it was a minor problem, since under the terms of article 22, paragraph 1, special missions could send messages in code or cipher to the sending State, and since the future convention on special missions would enter into force after the International Telecommunication Convention and accordingly its provisions would override those of the latter.

43. The Belgian Government had also made suggestions concerning the use of wireless transmitters, but he thought that special missions should comply with the regulations and obtain the consent of the receiving State. In a work of codification, the Commission ought not to concern itself with those questions, which should be dealt with in the annexes to technical conventions.

44. The Gabonese Government had taken up an argument which had been put forward on several occasions by Mr. Tsuruoka, and urged that special missions, except in special cases, should transmit their official documents to the sending State by the bag of the permanent diplomatic mission of that State.

45. The Greek Government had asked whether it would not be possible to restrict privileges and immunities, especially for technical and short-term missions, but that was a question of a general nature and the Greek Government had not submitted any concrete proposal.

46. Mr. REUTER said that the expression "free communication on the part of the special mission for all official purposes" in paragraph 1 was incorrect; he was fully aware that the expression was to be found in article 27 of the Vienna Convention on Diplomatic Relations, but hoped that the provisions of the draft articles on special missions would be more carefully drafted.

47. Mr. CASTRÉN said that the article followed almost word for word the text of the corresponding articles of the Vienna Conventions, more particularly that of the Vienna Convention on Diplomatic Relations. That assimilation was justified and it was therefore unnecessary to amend the present text.

48. The Belgian Government's second suggestion for an addition to the provision in paragraph 1 concerning wireless transmitters could be accepted, subject to drafting amendments.

49. The new paragraph which the Netherlands Government proposed should be inserted in order to emphasize the residual character of the provision would sound rather too peremptory. It was not a question of depriving special missions of freedom of communication, but of imposing, where necessary, certain restrictions on that freedom. For that reason, it would seem appropriate to add a new provision at the end of the article reading more or less: "The freedom of communication of the special mission shall be subject to limitations by mutual agreement between the States concerned". Should the Commission adopt a general clause on the right of derogation, that new provision would, of course, become superfluous.

50. Lastly, he wished to point out that paragraphs (1) and (2) of the commentary referred only to the Vienna Convention on Diplomatic Relations, whereas article 22, paragraph 7, was based on article 35 of the Vienna Convention on Consular Relations.

51. Mr. EUSTATHIADES said that the provisions of article 22 went too far in assimilating special missions to permanent diplomatic missions and that he could understand the perplexity of certain Governments. Mr. Castrén's proposal offered a solution which he personally was prepared to accept.

52. With regard to the written comments by the United Kingdom Government about the special mission's right to a diplomatic bag of its own, he questioned whether it was advisable to recognize such a right in the case of a special mission of secondary importance which carried out its activities in a place where there was a permanent diplomatic mission accredited by the sending State. In his opinion, the Commission should seek a solution half-way between the formula of article 22, paragraph 1, and that advocated by the United Kingdom Government; the use of the bag by the special mission, might, for example, be the subject of a special agreement between the sending State and the receiving State.

53. Mr. USHAKOV pointed out that the term "courier" was used in paragraphs 1, 5 and 7 and the term "courier *ad hoc*" in paragraph 6, whereas it was couriers *ad hoc* that were meant throughout.

54. Since the Drafting Committee intended to devote a special article to the host State, the words "host State" should be inserted in article 22 after words "the receiving State".

55. Mr. BARTOŠ, Special Rapporteur, said that, like Mr. Eustathiades, he considered that the right to use the bag should not be recognized in the case of special missions which were located in the same place as the permanent diplomatic mission or consular post; in such cases the special mission should use the bag and courier of the permanent mission.

56. It should be noted that apart from regular diplomatic couriers, there were couriers *ad hoc* appointed by the sending State, as well as special couriers who might be the captain of a ship or of a commercial aircraft. Ministries of Foreign Affairs had reduced the number of regular couriers and made more use of special couriers, because they could thereby communicate more quickly and easily

[4] For previous discussion of article 22, see *Yearbook of the International Law Commission, 1965*, vol. I, 805th meeting, paras. 77-90, 806th meeting, paras. 1-37, and 817th meeting, paras. 15 and 16.

with their permanent diplomatic missions or special missions.

57. With respect to the provisions concerning the host State, he was putting the final touches to his proposals, which he would communicate in writing to the Secretariat so that the Commission could consider them before referring them to the Drafting Committee.

58. Subject to an amendment along the lines indicated by Mr. Eustathiades, he thought that the Commission could refer article 22 to the Drafting Committee, which, in the light of Mr. Reuter's comments, would improve its style before returning it to the Commission.

59. The CHAIRMAN said that if there was no objection, he would consider that the Commission agreed to adopt the Special Rapporteur's proposal to refer article 22 to the Drafting Committee for consideration in the light of the discussion; in particular, the Drafting Committee would consider Mr. Eustathiades' suggestion for taking into account the comments of the United Kingdom and some other Governments.

It was so agreed.[5]

ARTICLE 23 (Exemption of the mission from taxation) [24]

60. *Article 23* [24]

Exemption of the mission from taxation

1. The sending State and the head of the special mission and the members of its staff shall be exempt from all national, regional or municipal dues and taxes in respect of the premises of the special mission, other than such as represent payment for specific services rendered.

2. The exemption from taxation referred to in this article shall not apply to such dues and taxes payable under the law of the receiving State by persons contracting with the sending State or the head of the special mission.

61. The CHAIRMAN invited the Commission to consider article 23, the Special Rapporteur's proposals for which were contained in paragraphs 10 to 14 of the section dealing with that article in his fourth report (A/CN.4/194/Add.2) and in his additional comments in document A/CN.4/194/Add.4.

62. Mr. BARTOŠ, Special Rapporteur, said that the article reproduced *mutatis mutandis* article 23 of the Vienna Convention on diplomatic relations. The Commission had omitted the words "whether owned or leased" which appeared in the Vienna Convention, because it considered that they were not really applicable to the case of special missions.

63. The Belgian Government had proposed that in paragraph 1 the words "in his capacity as such" be added after the words "the head of the special mission". He had no objection to that addition.

64. The United Kingdom Government had proposed that in paragraph 1 the words "including taxes on capital gains arising on disposal" should be added after the words "premises of the special mission". He agreed with the idea underlying that proposal, but pointed out that it was difficult to mention one tax in particular without mentioning the others, of which there was a great variety. It would be better to retain the general expression used in article 23 of the Vienna Convention.

65. The first comment by the Netherlands Government was based on an error in the translation of the article into English: in the French original there was no mention of the members of the staff of the special mission.

66. In its second comment, the Netherlands Government proposed the deletion of the article. He advised the Commission to retain the article, since temporary missions could last long enough for the question of taxation of the premises to arise. That was why the Commission had decided at the first reading to provide that special missions should have the same treatment as diplomatic missions in that respect. The rule stated in the article would save States a good deal of uncertainty and unnecessary formalities.

67. The mention of article 23 by the Government of Israel in its comments on terminology must, he thought, be due to an error. The comment by the Greek Government raised the general question of the extent of the privileges and immunities to be granted to special missions.

68. Mr. ALBÓNICO said that he was in favour of dropping article 23, as had been proposed by the Netherlands and Greek Governments. Since special missions were temporary in character and had a limited task, it was quite unnecessary to grant them exemption from taxation. If the article were retained, the Belgian amendment for the insertion of the words "in his capacity as such" should be adopted and the exemption limited to the head of mission; that change would bring the article into line with article 23 of the Vienna Convention on Diplomatic Relations.

69. Paragraph 2, which referred to private persons who had entered into a contract with the sending State, was completely out of place. Tax laws were invariably construed restrictively and any exemption that might be granted was extended only to the person or persons specifically designated in the law.

70. Mr. AGO said that, in his opinion, the exemption provided for in article 23 was necessary. Special missions could last for quite a long time and in any case they would need premises, even if they generally leased them. The article was therefore indispensable in order to avoid many difficulties.

71. To enable the scope of the clause to be clearly understood, it was necessary to bring out the fact that the taxes referred to were not taxes payable by members of the special mission as persons but taxes on the premises for which the special mission itself was liable. The reason why the Commission had mentioned the head of the special mission—as had already been done in the Vienna Convention—in paragraph 1 was to provide for the special case in which the law of the receiving State did not permit the special mission to lease the premises itself, with the consequence that the head or one of the members of the mission had to lease them in his own name. The addition of the words "in his capacity as such", proposed by the Belgian Government, would be pointless, since, as the article mentioned the premises of the special mission, it

[5] For resumption of discussion, see 931st meeting, paras. 28-40.

was obvious that it could not refer to acts performed in a private capacity.

72. The Commission should retain the article as it stood, except for a slight change, namely, that paragraph 1 should mention not only the head but also the members of the special mission, in case the mission had no head.

73. Mr. NAGENDRA SINGH said that article 23 should be retained, as it would be a useful provision. The reference to members of the staff could be dropped, however, because they were not included in article 23 of the Vienna Convention on Diplomatic Relations. As special missions rarely needed premises of their own there would be little justification for extending the immunity by adding to the wording of the 1961 Vienna Convention. The Belgian Government's proposal, supported by the Special Rapporteur, to insert the words "in his capacity as such" after the words "head of the special mission", should be considered by the Drafting Committee.

74. There was no need for the United Kingdom proposal to add the words "including taxes on capital gains arising on disposal"; that might be relevant to diplomatic or consular missions but not to special missions.

75. The CHAIRMAN said that the reference to the members of the staff, in the English version of paragraph 1, was obviously due to a mistake.

76. Mr. KEARNEY said that he had no objection to article 23, but its application in practice might cause difficulties, particularly in outlying districts, if the exemptions were not from taxes on property but from use or sale taxes.

77. Mr. USTOR said that the title of article 32 in the Convention on Consular Relations, with appropriate changes, should be adopted for article 23, which dealt with the exemption of the premises from taxation. The wording of paragraph 1 should also follow the wording of that article and should make no reference either to the head or to the members of the mission.

78. Under the fiscal system of most countries it was the owner and not the lessee who had to pay taxes on premises. Paragraph 2 would therefore weigh more heavily on poorer States that were not in a position to buy premises, since the taxes would be passed on to them in the rent, whereas richer States which bought premises would enjoy immunity. He was therefore not very satisfied with that paragraph.

79. Mr. ALBÓNICO said that there was a defect in the drafting of article 23, which was also to be found in the corresponding article of the Vienna Convention on Diplomatic Relations, in that it referred to the premises "of the special mission", whereas in fact it was the sending State and not the special mission which was either the owner or the lessee of the premises. Premises owned by the sending State would more usually be premises used by the permanent mission, part of which would be allocated to the special mission, and such premises would enjoy the same exemptions as were provided for in the Convention on Diplomatic Relations.

80. He could not agree with Mr. Ago that article 23 only referred to taxes on property. Taxes on rented premises were personal taxes payable by the tenant, and the Belgian Government's amendment had some meaning in that context. Its purpose was to make it clear that, if the premises were for the personal use of the head of the mission, then they would be liable to taxation.

81. Mr. BARTOŠ, Special Rapporteur, said that article 23 of the Vienna Convention on Diplomatic Relations and article 32 of the Vienna Convention on Consular Relations were based on two very different ideas. The former provided the normal solution, accepted by everyone, of exemption from taxation of the owners or tenants of the premises, not exemption of the premises themselves. The converse solution was, to his thinking, entirely wrong. At the first reading, the Commission had chosen to adopt the solution of the Convention on Diplomatic Relations. However, he would not be opposed to the Drafting Committee's changing the title of article 23 to make it clear, in order to satisfy Mr. Ustor, that the tax exemptions in question related to the premises of the special mission.

82. In reply to Mr. Kearney, he said that the first Vienna Conference had discussed and rejected a proposal to generalize United States practice concerning the reimbursement of consumption taxes. He would not recommend the Commission to adopt a formula of that kind for special missions.

83. The inclusion of paragraph 2 was justified. A similar provision appeared in the two Vienna Conventions. Its purpose was to prevent certain abuses and limit the exemption to taxes paid by those who were normally required to pay them under the law of the receiving State. The receiving State ought not to gain any tax revenue by reason of the fact that a special mission was present in its territory and using premises there, but the owner of premises ought not to be exempted from taxation merely because he leased those premises to a special mission. As to the question whether the owner would raise the rent so as to recover the tax from his tenant, that was another matter, and one with which the Commission was not concerned.

84. He did not propose any change in article 23. The Drafting Committee could examine the various points of detail that had been raised, such as the addition of the words "in his capacity as such", and might possibly delete the reference to the head of the special mission if it thought, like Mr. Ustor, that only the sending State was concerned.

85. The CHAIRMAN suggested that article 23 be referred to the Drafting Committee. The wording seemed to have found favour with most members.

86. Speaking as a member of the Commission, he hoped that the Belgian amendment for the inclusion of the words "in his capacity as such" would not be incorporated because that would mean having to examine all the other articles to see whether the same addition was necessary. They must rely on the articles being interpreted in good faith, references to the head of the mission being taken as meaning the person who was acting in that capacity.

Article 23 was referred to the Drafting Committee.[6]

The meeting rose at 12.55 p.m.

[6] For resumption of discussion, see 931st meeting, paras. 41-55.

916th MEETING

Wednesday, 7 June 1967, at 10 a.m.

Chairman: Sir Humphrey WALDOCK

Present: Mr. Ago, Mr. Albónico, Mr. Bartoš, Mr. Castañeda, Mr. Castrén, Mr. Ignacio-Pinto, Mr. Jiménez de Aréchaga, Mr. Kearney, Mr. Nagendra Singh, Mr. Ramangasoavina, Mr. Reuter, Mr. Tammes, Mr. Ushakov, Mr. Ustor, Mr. Yasseen.

Special Missions

(A/CN.4/193 and Addenda; A/CN.4/194 and Addenda)

(continued)

[Item I of the agenda]

ARTICLE 24 (Personal inviolability) [29]

1. *Article 24* [29]

Personal inviolability

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

2. The CHAIRMAN invited the Commission to consider article 24, the Special Rapporteur's proposals for which were contained in paragraph 14 of the section dealing with that article in his fourth report (A/CN.4/194/Add.2) and in his additional comments in document A/CN.4/194/Add.4.

3. Mr. BARTOŠ, Special Rapporteur, said that the article reproduced *mutatis mutandis* article 29 of the Vienna Convention on Diplomatic Relations. It was one of the articles in the draft which raised the question of the conditions necessary for the functioning of the special mission.

4. The Belgian Government considered that the personal inviolability granted to members of special missions should be limited to acts performed in the exercise of their functions. The Netherlands Government was of the same opinion, but proposed the addition of a paragraph stipulating that, at the request of the sending State, and provided the receiving State did not object, personal inviolability should be granted for all acts. The same Government had also proposed the addition, after article 24, of a new article based on articles 40, 41 and 42 of the Vienna Convention on Consular Relations.

5. The United Kingdom Government, in its comments on articles 24, 25 and 26 of the draft, suggested that inviolability and immunity should be restricted to official acts and official documents.

6. He also drew the Commission's attention to the comments by the Canadian Government (A/CN.4/193).

7. The Commission should take a decision on the question whether to maintain in the article the principle of the general inviolability of persons, as embodied in the Vienna Convention on Diplomatic Relations. He himself was in favour of retaining that principle, because it was difficult to distinguish between acts which were performed in the exercise of official functions and acts which were not. But the inviolability of persons, that was to say, the fact that they could not be arrested or detained, did not necessarily mean that they were not subject to the laws and jurisdiction of the receiving State. The question of immunity from jurisdiction was independent of that of inviolability and would be discussed in connexion with article 26.

8. He would leave aside for the time being the question of extending inviolability to the whole staff of the special mission, which had been raised by the Government of Israel (A/CN.4/188).

9. Mr. AGO said that the Commission should not amend article 24 on a point which, in his opinion, was essential. The needs of a special mission, with respect to personal inviolability, were exactly the same as those of a diplomatic mission. Quite apart from any representational or functional theory, a special mission certainly could not be assured of freedom to perform its task if its members were in danger of arrest or detention pending trial at any time. They must be protected from that danger even in respect of acts performed in their private capacity.

10. Mr. TAMMES said that both the remarks of previous speakers and the written comments of the United Kingdom Government called for certain observations which went beyond article 24. The United Kingdom Government had pointed out that the scale of immunity and inviolability prescribed in articles 24, 25 and 26 appeared "excessive, and inappropriate to the character and functions of special missions" and had expressed a preference for "a restriction of immunity and inviolability to official documents and official acts".

11. It was significant that almost all the Governments which had expressed their views, either in written comments or in statements in the Sixth Committee of the General Assembly, had adopted a similar approach. Some of them had indicated a general preference for the functional principle; others had made specific proposals to introduce restrictions or qualifications in some of the articles on privileges and immunities.

12. The Commission itself had discussed that approach in connexion with article 17 and had decided to give the provisions of that article a limited effect by restricting them to the question of facilities.[1] Since the only facility for which provision was made in the draft articles was that of accommodation, in article 18, the effect of article 17 was very limited indeed.

13. In the case of other articles, however, the general tendency in the Commission had been to adhere to the basic proposition that special missions should be equated, as far as practicable, with permanent missions. Personally, he had been disturbed to note that tendency, which differed markedly from the trend apparent in government comments. It was difficult to see how governments could be made to change their position, unless the Commission

[1] For discussion of article 17, see 912th meeting, paras. 45-74, and 913th meeting, paras. 1-40.

could demonstrate that they were mistaken on legal grounds.

14. It was of course easier to apply a system of full inviolability and immunity than a system based on the functional principle. That principle raised the question who was to have the last word in the qualification of a situation. It would be necessary in each specific case to determine whether a particular act was necessary for the performance of the functions of a special mission, and that would have to be decided in the last resort by the parties themselves, acting in good faith. In most cases, it would be the views of the receiving State, as the territorial sovereign with power to terminate the special mission, which would prevail. If the Commission could devise specific rules to avoid leaving the matter entirely to the judgement of the receiving State, it would be performing a great service to governments.

15. Mr. REUTER said he endorsed Mr. Ago's comments. No form of interference with the physical liberty of members of a special mission could be tolerated. The distinction which some writers sought to draw between acts performed in the exercise of functions and other acts raised an insoluble problem. For purely practical reasons, it must be assumed that the members of a special mission were engaged exclusively in the performance of their task. It would be unthinkable that the receiving State should have the right, on the basis of more or less arbitrary evidence and very fragile criteria of time and place, to arrest a person who had come for the sole purpose of negotiating on behalf of the sending State.

16. The question whether a person was acting as the representative of a State arose in several branches of international law, in particular, in that of State responsibility. International law recognized that all acts by armed forces engaged the responsibility of the State to which they belonged.

17. The Commission would not contribute to the solution of the problems which might arise by proposing that personal inviolability be restricted to acts performed in the exercise of official functions. If the receiving State considered that it had cause for complaint concerning acts by a member of a special mission, it could ask the sending State to recall him.

18. Mr. NAGENDRA SINGH said that the problem would be simple if all special missions were of the same category. In fact, every special mission was a category in itself.

19. For a special mission which was political in character, general inviolability for its members was undoubtedly necessary. For special missions of a technical, economic, cultural or social character, he would be inclined to agree with the United Kingdom Government's view that their needs were adequately served if inviolability were to be restricted to official documents and official acts.

20. Since, however, it was impossible to make provision for each type of special mission separately, he was driven to the conclusion that article 24 must remain in its present form and he therefore agreed with the Special Rapporteur's proposals for the article. He would suggest, however, that the first sentence be shortened. The Special Rapporteur had already proposed the deletion of the words "head and" but the words "and of the members of its diplomatic staff" should also be dropped as redundant, since the definition of "members of the special mission" should include members of the diplomatic staff, as was the case in article 1(*b*) and (*c*) of the Vienna Convention on Diplomatic Relations. The sentence would then read: "The person of the members of the special mission shall be inviolable".

21. Mr. CASTRÉN said he accepted article 24 as drafted. While he understood the concern expressed by Mr. Tammes and the Governments which had criticized the article, he did not think that it should be amended. Moreover, several Governments had approved of the draft.

22. As Mr. Nagendra Singh had pointed out, the difficulty was due to the fact that special missions differed very widely and it was not possible to divide them into categories and formulate rules for each category. Consequently, he saw no other solution than to propose a residuary rule, a standard applicable to all special missions—perhaps a higher standard than was required for some of them—and to authorize States to conclude special agreements to apply a stricter rule to some special missions of a technical character.

23. Mr. JIMÉNEZ de ARÉCHAGA said that, as he understood it, the intention of the Commission was to formulate a set of average rules applicable to all special missions, and to allow for the possibility of granting more extensive privileges to high-level missions.

24. The provisions of article 24 did not represent a standard suitable for all special missions, but rather an extensive measure of inviolability more suitable for high-level missions.

25. He supported the idea of confining personal inviolability to official acts. A wider provision on inviolability would deter governments from adopting the draft articles. Governments would have to obtain the consent of their parliaments for the approval of the draft articles, and there was a general resistance in national parliaments to the granting of privileges and immunities to broad categories of persons. In the United Kingdom Parliament there had been considerable opposition to granting certain privileges and immunities to international officials, even though those privileges were limited to official acts.

26. The lack of homogeneity of special missions constituted an argument in favour of average, or limited, privileges rather than of the extreme privileges proposed by the Special Rapporteur. The Commission should adopt a flexible provision along the lines proposed by the Netherlands Government and incorporated in article 17 *ter*.

27. Mr. KEARNEY said that he was in full agreement with the previous speaker. When the Commission had discussed the choice between the functional and the representational approach, the majority of members had expressed support for the functional principle. Articles 24, 25 and 26 provided the real test for the application of that principle. The present discussion, however, had revealed that certain members who had previously expressed support for the functional view now adopted an approach

which equated a special mission with a permanent mission of a representative character.

28. Full personal inviolability was essential to members of a permanent mission because they had to remain in the country in order to maintain relations with the receiving State. Members of a special mission, on the other hand, were in the receiving State merely to perform a particular task for a limited period of time; if there were no special mission, the tasks performed by it would normally be carried out by the permanent mission.

29. There should be no difficulty in applying a rule which limited personal inviolability to acts performed in exercise of a mission's functions. He had heard of few cases in which a special mission had been prevented from carrying out its task because of the absence of absolute personal inviolability for its members. That was precisely the situation at present: there were in many countries large numbers of special missions carrying out their duties satisfactorily without the special requirements embodied in article 24 and the following articles. He for one could not accept the view that it was essential to grant extreme privileges and immunities on the ground that the absence of such extreme privileges might give the receiving State an opportunity to bring pressure to bear on the special mission. Naturally, a special mission of a representational character would require all manner of privileges and immunities; otherwise, it would not be able to perform its representative function.

30. For those reasons, he supported the suggestion of the United Kingdom Government to adopt as the standard rule a limitation of personal inviolability to official acts, and to adjust the position for missions of an especially high level.

31. Mr. ALBÓNICO said he must repeat his view that it was essential to adopt a restrictive criterion when granting privileges and immunities to members of special missions. A realistic approach of that kind would promote the codification of international law.

32. The measure of privileges and immunities to be extended should depend on the composition and the functions of the special mission as well as on the nature of the acts performed by the mission. In view of the diversity of special missions in those three respects it would be very difficult to lay down a general rule applicable to all of them.

33. He accordingly favoured laying down in the draft articles a minimum standard of privileges and immunities for all special missions, while leaving the door open for the granting of full diplomatic privileges to certain types of mission. In the case of personal inviolability, the appropriate minimum standard was inviolability limited to official acts.

34. He would support the retention of article 24, subject to the limitation of inviolability to official acts and to the addition of a proviso on the possibility of specific agreements.

35. Mr. RAMANGASOAVINA said that he was in favour of maintaining article 24 as it stood. It was true that, where privileges and immunities were concerned, the Commission had considered it necessary in certain cases to distinguish between special missions and diplomatic missions. But it was very difficult to say whether a person was acting in the exercise of his official functions or privately. There was a risk that the Commission would achieve nothing if it tried to establish such a differentiation.

36. Admittedly, it was proposed in article 17 *ter* to distinguish between different categories of special missions, and article 27 provided that the sending State could waive certain privileges and immunities. Nevertheless, in view of the wide variety of special missions, it seemed to him to be difficult to decide what privileges and immunities should be granted to a particular category of special missions. Of course, States were always at liberty to settle the question of privileges and immunities in whatever way they liked by means of an agreement; but, from the psychological point of view, it had to be remembered that members of permanent missions and members of special missions often had to deal with the same matter together, and that it would then seem odd that some persons should enjoy certain privileges and immunities whereas others did not.

37. If, on the basis of the functional theory, the Commission tried to lay down a rule restricting the privileges and immunities of special missions, that rule should follow directly after the definition of a special mission, in order to prevent any comparison with permanent missions.

38. Mr. USHAKOV said that he was in favour of leaving article 24 unchanged, because it reflected what was generally accepted practice in international affairs. The rule contained in the article was, for instance, already part of Soviet law.

39. In certain special cases, it would always be open to the States concerned to come to an agreement that a mission sent by one of those States to the other was not a "special mission" as defined in the future convention.

40. Mr. USTOR said that he shared the view that personal inviolability was necessary for persons who acted for the sending State in the territory of the receiving State. The personal inviolability specified in article 24 represented not a major privilege but a standard one. Personal inviolability meant freedom from arrest or detention; it did not affect the question of jurisdiction, a matter which was dealt with in article 26, on immunity from jurisdiction. Acceptance of article 24 did not preclude divergences of views among members over article 26.

41. Article 24 raised the important question of the relationship between personal inviolability and notification. In connexion with the inviolability of the premises of the special mission, the Commission had agreed on the duty of the sending State to identify the premises which would enjoy inviolability. That point would no doubt be considered by the Drafting Committee when formulating article 8. A similar problem arose with regard to the personal inviolability of the members of the special mission, and he would like to know whether a receiving State which failed to observe the personal inviolability of a member of a special mission could invoke as an excuse the fact that it had not been duly notified of the composition of the special mission.

42. Mr. BARTOŠ, Special Rapporteur, said that, before the last war, members of special or ordinary missions travelled on *laissez-passer* and many mistakes were thereby avoided. In modern times, that requirement had practically disappeared and even visas had been abolished between certain States.

43. Mr. Ustor's question raised a serious problem. Mr. Kearney, like other members of the Commission and some Governments, considered that a special mission should give prior notice to the State on whose territory it intended to stay or through which it intended to travel. But even if that precaution were taken, mistakes could be made with regard to the identity of members of the mission. It was therefore essential, in his view, that members of special missions should carry a diplomatic passport or some other document attesting to their rank and profession and bearing the visa of the embassy of the receiving State or of the State of transit.

44. That was clearly a question which the Commission had not considered with sufficient thoroughness.

45. The CHAIRMAN, speaking as a member of the Commission, said that he was inclined to share the views expressed by Mr. Jiménez de Aréchaga. The problem would have been easier if the Commission had made some progress on the subject of high-level missions before embarking on a discussion of articles 24, 25 and 26. The Commission would undoubtedly provide for full diplomatic privileges and for a broad category of high-level missions and in the case of a mission headed by a Head of State, the privileges would be even more extensive.

46. In article 24, the intention was to deal with the common or day-to-day special mission, whether of a technical or of a political character. For such missions, the functional approach should be adopted.

47. He was disturbed at the suggestion by some members that the functional principle was unworkable. The Commission could not possibly take that view because that principle was being applied daily by international organizations with respect to the privileges and immunities of their officials. There was therefore no reason for not adopting the functional principle in the present context, although it could of course lead to difficulties in marginal cases.

48. Instead of the system of full personal inviolability, which had been taken from article 29 of the 1961 Vienna Convention on Diplomatic Relations, the Commission could adopt a more limited system, such as that embodied in article 41, paragraph 1, of the 1963 Vienna Convention on Consular Relations, which specified that "Consular officers shall not be liable to arrest or detention pending trial, except in the case of a grave crime and pursuant to a decision by the competent judicial authority".

49. If the Commission were to provide for full diplomatic privileges and immunities for the average special mission, he feared that the draft articles would not prove acceptable to Governments. He therefore hoped that a more flexible rule would be adopted, which would attract the consent of a large number of States.

50. Speaking as Chairman, however, he said that he could only note that the general trend of the Commission was in favour of adopting the diplomatic standard.

51. Mr. JIMÉNEZ de ARÉCHAGA pointed out that some members who favoured full diplomatic privileges had been thinking in terms of high-level missions. He therefore urged that the Drafting Committee be given a broad mandate, in the hope that it would formulate article 24 in flexible terms that would attract general support.

52. Mr. REUTER said that he wished first of all to make it clear that, in regulating the question of personal inviolability now before it, the Commission was not deciding questions of immunity, which would be settled later.

53. It was impossible to rely on the practice of the international organizations; when the question arose of suspending the inviolability of a member of a mission, the international organization which had sent the mission was always consulted. The problem was quite different in a situation where, for instance, a territorial State asserted after a motor car accident that it was never one of the functions of a special mission to cause traffic accidents and arrested the person responsible. As far as personal inviolability properly so called was concerned—as distinct from court proceedings—it seemed to him inadmissible that the receiving State should have the right unilaterally to deprive the person charged of his liberty. It was permissible to contend that the receiving State should be given the sovereign right to decide unilaterally whether an act formed part of the functions of the mission; that was an attitude that it was possible to take. But the Commission had to choose: either the receiving State had the right to take a unilateral decision or it did not. The Commission could only say yes or no; there was no possibility of compromise.

54. Mr. BARTOŠ, Special Rapporteur, said that he too considered it necessary to establish a very clear distinction between the question of personal inviolability and the question of immunity from jurisdiction in certain special cases.

55. He attached importance to the principle of personal inviolability and to the duty of the receiving State or the State of transit to respect it.

56. With regard to the question of immunity, he would refer members of the Commission to articles 17 *bis* and *ter*, consideration of which had been postponed.[2] Under article 17 *bis*, States were at liberty to waive certain privileges, facilities and immunities by mutual agreement. It was naturally easier to grant a derogation if the States concerned trusted each other. The principle of immunity from jurisdiction would then be respected, unless the sending State had waived it by agreement; such a waiver could be made either before or after the offence had been committed.

57. Under several frontier conventions, frontier officials such as sanitary inspectors, veterinary surgeons, parasitologists, post office and railway officials and so forth were granted functional immunity but not immunity from jurisdiction. Legal annals showed that cases where such officials had been arrested in the absence of a waiver of immu-

[2] For discussion of these articles, see 925th meeting, paras. 31-53.

nity from jurisdiction had sometimes led to the closing of frontiers and to a serious crisis in the relations between the frontier States.

58. In short, personal inviolability was a standard rule which had been included in the Vienna Conventions. In his view, article 24 could be retained as it stood and sent to the Drafting Committee. Later, when the Commission came to consider article 26, it could decide whether the provisions on immunity from jurisdiction should be revised with a view to making them more flexible or to altering some of the details of their application.

59. The CHAIRMAN said he noted that there was a clear majority in the Commission in favour of adopting the system taken from article 29 of the 1961 Vienna Convention on Diplomatic Relations.

60. If there were no objection, he would consider that the Commission agreed to refer article 24 to the Drafting Committee for consideration in the light of the discussion, as proposed by the Special Rapporteur.

It was so agreed.[3]

ARTICLE 25 (Inviolability of the private accommodation) [30]

61. *Article 25* [30]

Inviolability of the private accommodation

1. The private accommodation of the head and members of the special mission and of the members of its diplomatic staff shall enjoy the same inviolability and protection as the premises of the special mission.

2. The papers, correspondence and property of the persons referred to in paragraph 1 shall likewise enjoy inviolability.

62. The CHAIRMAN invited the Commission to consider article 25, the Special Rapporteur's proposals for which were contained in paragraph 11 of the section on that article in his fourth report (A/CN.4/194/Add.2) and in his additional comments in document A/CN.4/194/Add.4.

63. Mr. BARTOŠ, Special Rapporteur, said that article 25 reproduced *mutatis mutandis* article 30 of the Vienna Convention on Diplomatic Relations. He recommended that the Commission adopt the same formula as in the introductory article and replace the expression "of the head and members of the special mission" by the expression "of the members of the special mission".

64. Article 25 had been the subject of comments by Governments and the Belgian Government had proposed the addition at the beginning of paragraph 2 of the words, "Except as provided in article 26, paragraph 4...", since it considered that the members of a special mission ought not to enjoy a more extensive inviolability than that granted to diplomatic agents by the 1961 Vienna Convention.

65. The United Kingdom Government, in its comments on articles 24, 25 and 26, had expressed the view that the scope of the inviolability provided for by those articles was excessive and that in article 25 it should only apply to official documents and official acts. He did not share that view and did not think that that proposal should be adopted.

66. The Netherlands Government had proposed the deletion of article 25, but he considered that the Commission should not abolish a guarantee as important as inviolability of the private accommodation, papers and correspondence of members of the special mission, for that inviolability was necessary for the performance of the special mission's task.

67. According to the Canadian Government the scope of article 25 was "somewhat excessive"; the provisions of article 24 seemed to it to be sufficient so far as inviolability was concerned. If article 25 was to be retained, a reservation should be added to it similar to one contained in article 31, paragraph 2, of the Vienna Convention on Consular Relations, which had been referred to by the Canadian Government in connexion with article 19; in the Canadian Government's opinion, it did not seem possible to require the receiving State to guarantee any special protection of private accommodation which, in the case of special missions, would "usually be in hotel rooms; generally, the receiving State had no other duty than to take "reasonable precautions".

68. The Greek Government had asked that restrictions be placed on the inviolability provided for in article 25 in the case of technical or short-term missions, even if they were responsible for negotiating and signing a treaty.

69. He considered that the Commission should retain article 25, subject to any derogations which the sending State and the receiving State might decide upon by mutual agreement.

70. Mr. REUTER pointed out that, in paragraph 11 of his comments (A/CN.4/194/Add.2), the Special Rapporteur had concluded that the article should not be amended, whereas in paragraph 5 he had recommended that the Commission should adopt the amendment proposed by the Belgian Government (A/CN.4/108). In his (Mr. Reuter's) opinion, that was an interesting proposal and the Drafting Committee might perhaps find it necessary to provide for a derogation from the principle of inviolability where a final judgement had been given by a court of law.

71. Mr. BARTOŠ, Special Rapporteur, said that the Belgian Government's proposal was "to introduce, as in article 30 of the Vienna Convention on Diplomatic Relations, a proviso regarding measures of execution on property..." In his opinion, the Commission ought not to mention property in article 25, paragraph 2; it could be the subject of a separate article, as in the Vienna Convention on Diplomatic Relations.

72. Mr. KEARNEY said he supported the Special Rapporteur's suggestion concerning property.

73. That left to be decided the question whether papers and correspondence included private papers, particularly those that would fall within the exceptions set forth in ar-article 26. In his opinion, if a member of a special mission should be subpoenaed and required to produce documents in a civil case, he would have to comply with such orders.

[3] For resumption of discussion, see 931st meeting, paras. 56-58.

74. Mr. JIMÉNEZ de ARÉCHAGA said that article 24 granted extensive immunities, including immunities from criminal jurisdiction, similar to those accorded under the two Vienna Conventions. The Commission should be cautious with respect to articles 24 to 26 and lay down a moderate rule, for otherwise the draft articles might not be acceptable to States.

75. Given the special character of special missions, there was no real need for article 25, particularly for paragraph 2. The immunities of important special missions could be covered in a general article providing that the provisions of the Vienna Convention on Diplomatic Relations applied to them.

76. Mr. YASSEEN said that he could agree to the deletion of the words "and property" in paragraph 2, but he did not think that the Commission should permit the slightest exception to the rule of the inviolability of the papers and correspondence of members of the special mission and its diplomatic staff. After all, in order to determine whether the papers and correspondence were of an official or a private nature, the agent of the receiving State would have to examine them, and that itself would be an infringement of the principle of inviolability.

77. Mr. NAGENDRA SINGH said he wished to propose as a compromise solution that special missions should be divided into two categories, political and non-political, with the former receiving immunities of the kind accorded to permanent missions and the latter lesser immunities such as those accorded under the Convention on Consular Relations. That course should satisfy governments like the United Kingdom and Netherlands Governments, which were anxious to lay stress on the functional aspect of special missions.

78. There seemed to be no need for the word "private" to qualify the word "accommodation" in paragraph 1, since the accommodation was that of the special mission itself.

79. Mr. AGO said that he shared Mr. Yasseen's view; if the inviolability of papers and correspondence was not guaranteed, the special mission could not perform its task. If there were diplomatic relations between the sending State and the receiving State, the special mission and its members could, if necessary, avoid trouble by entrusting their correspondence to the permanent diplomatic mission but if there were none, the fact that the receiving State was permitted to examine the papers and correspondence itself to decide whether they were official or private could give rise to serious difficulties.

80 With regard to property, the problem was less important in the case of a special mission than in that of a permanent diplomatic mission, but for movable property, such as means of transport, it might be necessary to provide certain safeguards.

81. Mr. ALBÓNICO said that during the discussion on articles 24 and 25, there had been some confusion between the concept of inviolability and that of immunity from jurisdiction. The personal inviolability of a diplomatic agent or of a member of a special mission consisted in the absolute prohibition to touch his person or attack his freedom and dignity. Any restraint on personal freedom under the rule of law could only be the consequence of a warrant for arrest following legal proceedings or, in exceptional cases, where there had been a flagrant offence. There could be no doubt that the head and members of the special mission enjoyed the most complete personal inviolability and accordingly there was no need to draw any distinction between official and non-official acts.

82. The problem of immunity from jurisdiction and arrest, search or seizure of documents should be dealt with in article 26 and not in article 25.

83. Mr. JIMÉNEZ de ARÉCHAGA said that the point raised by Mr. Yasseen was already covered by article 20 and article 22, paragraph 2. It would be going too far to grant immunity from jurisdiction for personal papers.

84. Mr. CASTRÉN said that he could not approve the deletion of paragraph 2, which in no way duplicated the provisions of articles 20 and 22. Article 20 provided for the inviolability of the archives and documents of the special mission and article 22 for that of its official correspondence, whereas article 25, paragraph 2, referred to the inviolability of the papers and correspondence of members of the special mission and its diplomatic staff.

85. The Commission should retain article 25, with the amendments recommended by the Special Rapporteur.

86. Mr. USHAKOV said that he too was in favour of keeping article 25, and in particular paragraph 2, for the reasons stated by Mr. Castrén.

87. Mr. REUTER said that under French law, public documents were not allowed to fall into the hands of private persons but became the property of the National Archives. As Mr. Yasseen had said, the difficulty was to determine whether a document was official or private, which presupposed that it would have to be examined and that meant, in the case of special missions, that the inviolability of the documents and correspondence of members of that mission would necessarily be infringed.

88. In the last analysis, the problem was a jurisdictional one and the Commission seemed to be divided into two camps, one preferring the jurisdiction of the sending State and the other that of the receiving State. Perhaps, in a final article, the Commission could include a provision to the effect that the sending State could waive inviolability. It would be dangerous, however, to admit exceptions to the principle of inviolability since exceptions would render the concept nugatory.

89. Mr. BARTOŠ, Special Rapporteur, said that in international law the concept of extra-territoriality had been replaced by the concept of inviolability, which was to be found in the Vienna Conventions of 1961 and 1963.

90. Article 24 of the Convention on Diplomatic Relations provided for the inviolability of the archives and documents of the mission, whereas article 30 provided for the inviolability of the diplomatic agent's papers and correspondence. That distinction was particularly important in the case of special missions, whose members did not enjoy the guarantees conferred by permanent residence

and frequently had to carry their papers and correspondence themselves. He could illustrate that point from his own experience. On his way to the International Court of Justice at The Hague and carrying important documents, he had been ordered by a frontier official to provide those documents for inspection and only by a determined resistance and his invocation of the agreement between the Netherlands Government and the International Court of Justice had he succeeded in avoiding inspection. That example proved that the inviolability of the papers and correspondence of members of special missions must be absolute if the mission was to be able to perform its task.

91. As several members had observed, it was extremely difficult to determine whether correspondence was official or private; letters addressed to members of the special mission or received by them often concerned both their personal activities and their functions as members of the mission.

92. With regard to the property of members of the special mission, the Commission could either delete the reference to it in paragraph 2, or insert at the beginning of the paragraph the proviso suggested by the Belgian Government, or even make it the subject of a new article. He preferred not to make any recommendation.

93. Mr. JIMÉNEZ de ARÉCHAGA said that the incident described by the Special Rapporteur confirmed the view propounded by himself and other members of the Commission, that special missions in general should be accorded the privileges and immunities necessary for the exercise of their functions. The protection which the Special Rapporteur had obtained for the official papers he was carrying derived from Article 42, paragraph 3, of the Statute of the International Court of Justice, which was based on the functional theory and referred to "the privileges and immunities necessary to the independent exercise of their duties" enjoyed by "agents, counsel and advocates of parties before the Court".

94. It was clear from the Commission's comments on its drafts concerning diplomatic and consular relations that inviolability and immunity were two different things. In the system established by the Vienna Conventions, inviolability was the wider concept and included immunity.

95. The CHAIRMAN, speaking as a member of the Commission, said that he had no difficulty in accepting article 25, since, if it were amended to conform to the Vienna Convention on Consular Relations, it should be adequate. He agreed with Mr. Yasseen that it was impossible to distinguish between private and official correspondence without running counter to the principle of inviolability.

96. In his opinion, article 24 went too far and ought to have been modelled on the corresponding article in the Vienna Convention on Consular Relations. The exception to immunity from jurisdiction provided for in that Convention in respect of crimes should be applied to special missions. A member who had committed a crime would in any event cease to be useful to the mission.

97. He suggested that article 25 be referred to the Drafting Committee which should consider whether or not the question of inviolability of property should be dealt with in a separate article.

It was so agreed[4]

The meeting rose at 12.55 p.m.

[4] For resumption of discussion, see 931st meeting, paras. 59-63.

917th MEETING

Thursday, 8 June 1967, at 10 a.m.

Chairman: Sir Humphrey WALDOCK

Present: Mr. Ago, Mr. Albónico, Mr. Bartoš, Mr. Castañeda, Mr. Castrén, Mr. Ignacio-Pinto, Mr. Jiménez de Aréchaga, Mr. Kearney, Mr. Nagendra Singh, Mr. Ramangasoavina, Mr. Tammes, Mr. Ushakov, Mr. Ustor, Mr. Yasseen.

Special Missions

(A/CN.4/193 and Addenda; A/CN.4/194 and Addenda)

(continued)

[Item 1 of the agenda]

ARTICLE 26 (Immunity from jurisdiction) [31]

1. *Article 26* [31]

Immunity from jurisdiction

1. The head and members of the special mission and the members of its diplomatic staff shall enjoy immunity from the criminal jurisdiction of the receiving State.

2. Unless otherwise agreed, they shall also enjoy immunity from the civil and administrative jurisdiction of the receiving State, except in the case of:

(*a*) A real action relating to private immovable property situated in the territory of the receiving State, unless the head or member of the special mission or the member of its diplomatic staff holds it on behalf of the sending State for the purposes of the mission;

(*b*) An action relating to succession in which the person referred to in sub-paragraph (*a*) is involved as executor, administrator, heir or legatee as a private person and not on behalf of the sending State;

(*c*) An action relating to any professional or commercial activity exercised by the person referred to in sub-paragraph (*a*) in the receiving State outside his official functions.

3. The head and members of the special mission and the members of its diplomatic staff are not obliged to give evidence as witnesses.

4. No measures of execution may be taken in respect of the head or of a member of the special mission or of a member of its diplomatic staff except in the cases coming under sub-paragraphs (*a*), (*b*) and (*c*) of paragraph 2 of this article, and provided that the measures concerned can be taken without infringing the inviolability of his person or of his residence.

5. The immunity of the head and members of the special mission and of the members of its diplomatic staff from the jurisdiction of the receiving State does not exempt them from the jurisdiction of the sending State.

2. The CHAIRMAN invited the Commission to consider article 26, the Special Rapporteur's proposals for which were contained in paragraph 14 of the section on that article in his fourth report (A/CN.4/194/Add.2) and in his additional comments in document A/CN.4/194/Add.4.

3. Mr. BARTOŠ, Special Rapporteur, said that article 26 contained a series of rules based on article 31 of the Vienna Convention on Diplomatic Relations.

4. The most important rule was that set forth in paragraph 1, which granted the representatives of the special mission and the members of its diplomatic staff full immunity from criminal jurisdiction. The Drafting Committee was studying the question of the designation of the various members of the special mission.

5. The rule in paragraph 2 was of secondary importance, for members of special missions were seldom involved in questions which fell within the competence of the civil or administrative jurisdiction.

6. Paragraphs 3 and 4 reproduced the provisions of article 31, paragraphs 2 and 3, of the Vienna Convention on Diplomatic Relations.

7. Paragraph 5 was a reminder rather than a strict rule: the representatives and the diplomatic staff of a special mission continued to be subject to the jurisdiction of their country of origin. At the Vienna Conference there had even been talk of the sending State's obligation to take proceedings against any of its nationals who had committed an offence on the territory of the receiving State.

8. The article had given rise to a number of queries.

9. The United Kingdom Government considered that special missions should be accorded only "minor or functional immunity, whereas members of the Commission had decided in favour of full immunity for criminal jurisdiction, though leaving it open to States to restrict that immunity where necessary.

10. The Commission had not gone so far in the case of immunity from civil and administrative jurisdiction. The first paragraph of the United Kingdom Government's comments on that subject (A/CN.4/188/Add.1) was of a somewhat technical character, while the second advocated limiting immunity to official acts and modifying the text of the article accordingly. In his view, although the Commission accepted that there should be full personal inviolability, there was no need to lay down such absolute rules on the subject of immunity from civil and administrative jurisdiction.

11. Paragraph 4 should be more clearly worded. The object should be not to restrict immunity from measures of execution, but to provide safeguards in their execution.

12. With regard to the comments by the Canadian Government (A/CN.4/193), his view was that article 24, on personal inviolability, was very important since it provided for *habeas corpus*, but that article 26 dealt with a quite different matter. There was, however, a link between the two rules and the question of which should be applied was not so much one of substance as of degree.

13. There were a number of points which the Commission would have to decide. First, should the rule in paragraph 1, granting full immunity from criminal jurisdiction to the representatives and the members of the diplomatic staff of the special mission, as provided in article 31 of the Vienna Convention on Diplomatic Relations, be maintained? Secondly, should there be a rule granting immunity from civil and administrative jurisdiction, as in paragraph 2, that would be subject to the limitations contained in article 31 of the Vienna Convention on Diplomatic Relations, or should the immunity enjoyed by the representatives and the members of the diplomatic staff of the special mission be limited to acts performed in the exercise of their official functions, as provided in article 43 of the Vienna Convention on Consular Relations? Thirdly, should the rule in paragraph 3, which had not met with any criticism, be left as it stood? Fourthly, should the limited immunity described in paragraph 4 of the draft be retained or should the Commission decide in favour of the provisions of the Vienna Convention on Diplomatic Relations? Fifthly, should the wording of paragraph 5 be maintained, or should there be a provision that the sending State was required to take proceedings against the representative of a special mission or a member of its diplomatic staff who had committed a punishable offence on the territory of the receiving State? On that fifth question there were two points of view: one, that the sending State was obliged to take proceedings; and the other, that the receiving State, through its public prosecutor, was entitled to proceed against the official of a special mission who had committed the offence. Although he himself preferred the former view, as a jurist he considered that it was absurd to require a State to take more severe steps against its own agents than it would have done in the case of ordinary citizens. Yet that was what happened in the case of what were called "related" offences.

14. Mr. ALBÓNICO said that he was troubled by the fact that paragraph 1 provided for wider immunities than those accorded under the Vienna Convention on Diplomatic Relations by giving full privileges to the technical and administrative staff. It ran counter to the modern tendency to favour the functional theory and would cause difficulties by extending full immunity from criminal jurisdiction to persons who could not be prosecuted in the country where they had committed the crime. Under Chilean legislation they could not be prosecuted in Chile because no criminal proceedings could be instituted against a Chilean diplomat or consular official except in respect of official acts.

15. There seemed to be some inconsistency in paragraph 2 (*c*), since, under article 42, members of a special mission were prohibited from engaging in any professional or commercial activity.

16. There was no reason to follow the system of the Vienna Convention in paragraph 3, which should be modified so as to allow the head and members of a special mission and of its diplomatic staff to give evidence in writing. That was the practice in his country and in a number of other Latin American countries.

17. Mr. TAMMES said that he would prefer that article 26 should be modelled on article 43 of the Convention on Consular Relations, which was simple and clear. That article limited immunity from jurisdiction to acts

performed in the exercise of consular functions and provided effective protection for the free exercise of consular functions.

18. In drafting article 43, the Commission had preferred the qualification "in the exercise of consular functions" to the qualification "in respect of official acts within the limits of consular powers" and had given its reasons in paragraph (3) of the commentary to its draft, which read:

> "In the opinion of some members of the Commission, the article should have provided that only official acts within the limits of the consular powers enjoy immunity from jurisdiction. The Commission was unable to accept this view. It is in fact often very difficult to draw an exact line between what is still the consular official's official act performed within the scope of the consular functions and what amounts to a private act or communication exceeding those functions. If any qualifying phrase had been added to the provision in question, the exemption from jurisdiction could always be contested, and the phrase might be used at any time to weaken the position of a member of the consulate."[1]

19. A formula on the lines of article 43 would obviate uncertainties due to unilateral application and interpretation or the danger of an excessively broad interpretation by the receiving State.

20. An additional safeguard lay in the independence of the courts, which had the last word in applying and interpreting international treaties. The courts of his country and probably those of many others were not likely to take any notice of a government's interpretation of its international obligations.

21. Mr. JIMÉNEZ de ARÉCHAGA said he agreed with the two previous speakers that the article should be made more restrictive, but rather than redraft it on the lines of article 43 of the Vienna Convention on Consular Relations, he would prefer a wording of the kind originally proposed by the Special Rapporteur in article 27 of his second report. Paragraph 2 of that article read: "They shall also enjoy immunity from its civil and administrative jurisdiction in respect of acts performed in the exercise of their functions in the special mission".[2] No better reason for adopting such a wording could be adduced than that put forward by the Special Rapporteur himself when he had said "... special missions should not be given the same immunities as diplomatic staff; their functions were not permanent and there was no reason why it should be not possible to bring a civil action against them. A member of a special mission who was domiciled in his own country could always challenge the jurisdiction of the courts of the country where he was residing temporarily. The position was quite different for a diplomat who resided permanently in the receiving State and who had to uphold his status in the diplomatic corps".[3]

22. Mr. AGO said that in his view the difficulties raised by article 26 were caused by the terms used. The use of the words "The head and members of the special mission" had given rise to a fear that the immunity for which it provided was wider than that accorded to diplomats by the Vienna Convention on Diplomatic Relations. It was for that reason that the Drafting Committee proposed replacing the words "the head and members of the special mission and the members of its diplomatic staff" by the words "the representatives of the State in the special mission and the members of its diplomatic staff", thus making it quite clear that the members of the technical and administrative staff of the special mission did not enjoy the same treatment as the most important members of the mission.

23. It would be inappropriate to establish too close an analogy between the provisions of the draft articles on special missions and the provisions of the Vienna Convention on Consular Relations, because consuls carried out duties which came essentially within the province of municipal law and they did not usually represent the sending State in its relations with the receiving State, whereas diplomats and members of special missions did. Moreover, in article 26 the Commission was stating a residuary rule; the States concerned were always at liberty to limit by agreement the immunities provided for in the draft.

24. A careful study of the problem made it clear that those who would benefit from the immunities would normally be the two or three most important members of the special mission—whom the Drafting Committee proposed to call "representatives"—and the members of the mission's diplomatic staff. In most cases, the latter already belonged to the permanent diplomatic mission of the sending State and, being diplomatic officials, enjoyed all the privileges and immunities attached to that status. If the Commission decided to limit immunities, it might bring about a paradoxical state of affairs in which, if the head of the special mission was a person of high rank but not a diplomat, he would have less extensive immunity than his assistants who were career diplomats.

25. He did not think that the concern about the exemption from measures of execution referred to in paragraph 4 was really justified; it was seldom that a member of a special mission— which was essentially temporary in nature—owned property on the territory of the receiving State.

26. In short, he saw no reason why the Commission should depart from the provisions of article 31 of the Vienna Convention on Diplomatic Relations, especially as article 26 stated a residuary rule and it was open to the States concerned to agree on a different arrangement.

27. Mr. USHAKOV said that he did not think that the Commission should amend article 26 to restrict the scope of the immunity from jurisdiction accorded to members of a special mission.

28. Since reference had been made to the Vienna Convention on Consular Relations, it was worth remembering that some governments had concluded agreements or bilateral treaties under which wider privileges and immu-

[1] *Yearbook of the International Law Commission, 1961*, vol. II, p. 117.

[2] *Yearbook of the International Law Commission, 1965*, vol. II, p. 132.

[3] *Yearbook of the International Law Commission, 1965*, vol. I, 807th meeting, para. 65.

nities were granted than those provided in the Vienna Convention. The Soviet Union, for instance, had concluded a number of such agreements with different countries.

29. As for the functional theory, it was doubtful whether all the duties that a special mission might perform could be defined. The functions of diplomatic and consular officials were easy to define and had been set out in detail in the Vienna Conventions, but special missions had an extremely wide range of activities, which might be technical, military or political, and it would be impossible to list them all.

30. Mr. KEARNEY observed that the Commission had not yet defined what were a special mission's functions; and indeed it might prove impossible to do so. Presumably they were what was essential for the mission to carry out its task. There seemed to be a fundamental cleavage of opinion in the Commission on the matter, and he could not agree with Mr. Ago's argument that the present draft had no connexion whatever with the Convention on Consular Relations. Consuls performed a wide range of functions and in special cases might be more important and influential than a minister. Mr. Ago and some other members of the Commission seemed to think that a special mission possessed full diplomatic privileges, but that was far from true at the present day when many special missions were not of high political importance and were not engaged in negotiating international agreements.

31. It was certainly worth considering the suggestion by Mr. Nagendra Singh at the previous meeting[4] that special missions should be classified into political and non-political missions.

32. He doubted whether the argument that liability to civil jurisdiction would interfere with the performance of a special mission's function could be sustained. He was therefore not in favour of that exemption, except in the case of high-level missions, which should be exempt from any jurisdiction of the receiving State. Ordinary everyday special missions should not be exempt from criminal jurisdiction in serious cases. That result could be achieved by inserting in draft articles some kind of a waiver clause. It would be better to proceed on the lines he had suggested rather than to adopt a dogmatic attitude and try to legislate for every type of mission.

33. Mr. CASTRÉN said that he was of the same opinion as Mr. Ago. Until the Commission had solved the questions of principle concerning the special régime of certain categories of special mission, in particular high-level missions, and the limits to derogations, it would be difficult to take a position on the subject of immunity from jurisdiction. For that reason, the only amendment to article 26 which he could accept would be to extend the reservation in paragraph 2, "Unless otherwise agreed..." to the provisions of paragraphs 1, 3 and 4.

34. Mr. NAGENDRA SINGH said that in his opinion high-level missions should enjoy complete immunity from jurisdiction, but that would not be justified in the case of the numerous missions of a minor character. An article of the kind proposed by the Special Rapporteur in his second report might be suitable for non-political missions.

35. The difficulties which had arisen over article 26 could not be solved until the Commission had arrived at some kind of classification.

36. The CHAIRMAN, speaking as a member of the Commission, said that the Commission was reaching a stage when it would be difficult to make progress without reaching agreement on some definitions and on the classification of the members of a special mission, including the administrative and technical staff dealt with in article 32. It was important to bear in mind that certain special missions of a technical character might include high-level scientists who might be regarded by their own country as more important than diplomats themselves. What should be the position of such persons? Were they necessarily to be considered technical staff?

37. His general position, however, was that he would prefer the privileges and immunities of members of special missions to be restricted to the heads of the mission.

38. Mr. USHAKOV said he did not think that the Commission had to consider the various categories of special missions in connexion with each article. The Commission had already provided, in article 1, that States could send special missions with the consent of the receiving State, in article 2 that the task of special missions should be specified by mutual consent of the sending State and of the receiving State, and in article 8 that the sending State should notify the receiving State of the composition of the special mission; those provisions seemed sufficient. The States concerned could always decide by mutual agreement that a mission was not a special mission within the meaning of the convention and should therefore not enjoy privileges and immunities.

39. The CHAIRMAN, speaking as a member of the Commission, said that while some flexibility was necessary, all difficult problems could not be left to be resolved by special agreement between the States concerned. The Commission should try to devise standard articles that would be appropriate in normal circumstances, particularly as special missions might be sent in a hurry without time for reaching detailed agreement. Unless the articles were fairly precise and practical, States might either not ratify or make extensive reservations to the convention in order to maintain freedom of action and the convention would not be particularly useful.

40. Mr. JIMÉNEZ de ARÉCHAGA said that the Commission must formulate average rules for the usual type of special mission; high-level missions could be regulated by providing that the more generous rules on privileges and immunities established by the Vienna Convention for permanent diplomatic missions would apply in those cases. The Commission should certainly not ignore the fairly general view of governments that the rules should not be too liberal. In any particular situation, States could always agree to grant full immunity from jurisdiction.

41. Mr. AGO said that there was no difference of views so far as substance was concerned: each member was considering only one aspect of a real situation which took

[4] Para. 77.

many forms. The Commission should consider that real situation from all its aspects before drawing up articles which would always be better adapted to one aspect than to another.

42. With regard to definitions, it was for the Commission to prepare them; the Drafting Committee merely had to formulate them. It might seem easy to draw a distinction between important special missions on the one hand, and technical or secondary missions on the other, but it was conceivable that, if there were an eminent scientist among the members of a technical special mission, the receiving State might bring a civil or criminal action against him for the purpose of keeping him there.

43. Unless the Commission considered the problem of the composition of special missions very carefully, there was a danger that the provisions it adopted would apply only to certain situations.

44. Mr. NAGENDRA SINGH said he entirely agreed with the Chairman on the need to define terms such as "members of the diplomatic staff". If it were not for the large number of special missions of varying kinds, he would be in favour of applying the classical rules concerning the immunity of envoys, which would ensure uniform treatment. However, as special missions differed widely, the extent of the immunity granted to each must also differ. Important political missions could not be treated like mere consular missions.

45. If the Commission failed to reach agreement on a classification of special missions, article 26 would not require much alteration.

46. Mr. USTOR said that an immunity confined to acts performed in the exercise of official functions was virtually no immunity at all. In that connexion, it was worth considering a passage from the Harvard Draft relating to members of permanent diplomatic missions, which read:

> "In so far as the member acts in his official capacity, his immunity confounds itself with that of the sending state itself, and depends, not upon the person of the representative, but upon the intrinsic nature of the act performed. International law imposes upon the courts of the receiving state an incompetence *ratione materiae* in the case of public acts. The incompetence of the courts in the case of official acts does not constitute a diplomatic privilege in the sense that it is imposed by international law as an exception to the competence which the courts would normally possess."[5]

47. If, therefore, the future convention on special missions were to grant a purely functional immunity to certain persons, those persons would in fact have no more immunity than they would enjoy in the absence of any convention.

48. Clearly, where a special mission had a genuinely representative character, its members or "representatives" —to use the term adopted recently by the Drafting Committee—should enjoy the same immunities as a diplomat in respect of both criminal and civil jurisdiction.

49. He had been much impressed by Mr. Ago's remark that it would be anomalous not to grant diplomatic immunity to the representatives of the State who headed a special mission when their assistants who were career diplomats enjoyed such immunity, since those assistants would normally be drawn from the permanent mission of the sending State or from the staff of its Ministry of Foreign Affairs.

50. Naturally, the administrative and technical staff and the service staff of the special mission would only enjoy functional immunity, in accordance with other articles of the draft.

51. For those reasons, he accepted article 26 in its present form for the purposes of regular special missions.

52. There was also the question of government officials sent on missions abroad, who, according to one writer, were apparently treated as ordinary aliens visiting the receiving State. What that writer said was:

> "Neither the International Law Commission nor publicists have dealt with the question of the status of the various officials of government administrations who go abroad on mission. The practice of States provides us with hardly any information either. In our opinion, this is due to the fact that it is unnecessary to treat them differently from any other alien on the territory of the State."[6]

53. Perhaps the Commission should adopt language which excluded from the scope of the immunity from jurisdiction government officials travelling abroad who did not represent their State. That would allay the doubts of those members who wanted to restrict the scope of immunities.

54. The CHAIRMAN, speaking as a member of the Commission, said that he would have no difficulty in supporting the provisions of article 26 if they were to apply only to persons who should be treated as diplomats. It would be perfectly logical to give to those persons the same privileges as diplomats in respect of immunity from jurisdiction. The real problem, however, was to determine who those persons were.

55. Mr. BARTOŠ, Special Rapporteur, said that the most important question had been raised by Mr. Nagendra Singh, that of the distinction that could be drawn between different categories of special mission. It was extremely difficult to classify special missions in clearly defined categories, or even to distinguish political missions from technical special missions. Special missions seemingly of the most technical character, for example a mission for scientific co-operation or a mission sent to negotiate access for a landlocked State to a port in a foreign State, often had very delicate political aspects. Even the performance of such a matter-of-fact and apparently harmless task as the opening of an ice-bound river, could, in certain circumstances, lead to a lot of injured feelings.

56. Even special missions of an identical character were liable to be treated differently according to circumstances or according to the state of political relations and the degree of friendship between the countries concerned.

[5] *Research in International Law*, "I, Diplomatic Privileges and Immunities"; Supplement to the *American Journal of International Law*, vol. 26, 1932, p. 99.

[6] P. Cahier, *Le droit diplomatique contemporain*, Geneva, 1962, pp. 371 and 372.

Between friendly States, full privileges and immunities were unnecessary and no difficulty could arise, whereas between States whose relations were strained, even the grant of full privileges and immunities would not always prevent disputes. Consequently, the establishment of clearly defined categories would not always help much.

57. Moreover, under the terms of article 17 *ter* of the draft, States could introduce distinctions, by mutual agreement, in the extent of the facilities, privileges and immunities granted to special missions, having regard to their nature and requirements.

58. In reply to Mr. Ustor, he would point out that as early as 1964 he had noticed that Professor Philippe Cahier did not seem to be fully aware that such things as special missions existed, and in fact they did hardly exist until after the Second World War. It was because their use and numbers were steadily increasing that the Commission and the General Assembly had decided to add a draft on special missions to the draft convention on diplomatic relations and that the 1961 Vienna Conference had requested a supplementary study on that question. He did not think that the members of special missions had ever been regarded as ordinary aliens; they were at least regarded as distinguished foreigners and treated with particular respect, if not as diplomats in the strict sense.

59. He was still convinced that immunity from criminal jurisdiction, as provided for in article 26, paragraph 1, was indispensable. As to whether that immunity should be limited to acts performed in the exercise of the mission's functions, it was very difficult to determine whether an act was a part of such functions or not. If a member of a special mission entered into relations with citizens of the receiving State and tried to obtain information from them that was directly related to the work of the special mission, should such actions be considered as part of the functions of the special mission or as attempted espionage?

60. If, as Mr. Tammes wished, the Convention on Consular Relations were taken as a model in that respect, it should be remembered that that Convention prescribed a minimum number of privileges and immunities and allowed for the possibility of derogations to extend them. Many States made use of that possibility in their mutual relations. For example, the USSR and the United States had concluded an arrangement whereby both States granted the broadest immunities even to service staff and even to locally-recruited staff. The Convention on Consular Relations was the result of numerous compromises between the conflicting demands of various groups of countries: the developing countries in particular had been less willing to grant broad privileges and immunities to consular officers than to diplomats. If, in the case of special missions, the Commission limited immunity from criminal jurisdiction to acts performed in the exercise of their functions, that rule would lead to many difficulties in practice.

61. With respect to immunity from civil and administrative jurisdiction, as a general rule the members of special missions did not insist on that immunity, which was granted to diplomatic agents under article 31 of the Vienna Convention on Diplomatic Relations. After all, even a special mission which lasted a long time was essentially only a visitor in the receiving country. In his opinion, protection against measures of execution, such as that provided in the Vienna Convention, was more important for members of special missions. On that point he shared Mr. Ago's view. Moreover, the 1961 Vienna Conference, in one of its resolutions, had recommended that sending States should do their best to facilitate the administration of justice in the receiving State.[7]

62. He fully understood Mr. Albónico's misgivings. According to the Anglo-American system, which had also been adopted in Latin America, municipal courts judged only acts committed in the territory under their jurisdiction, which was not the case in continental Europe.

63. In reply to the Chairman's comments, he said that article 32 defined the status of the administrative and technical staff of the special mission. For that staff, he was not averse to the idea of limiting immunities to acts performed in the exercise of their functions, which was what many States wished. That would, however, involve some danger, because, as Mr. Amado had observed at previous sessions, such subordinate staff sometimes knew more secrets than a second or third secretary of embassy and should consequently be covered by complete immunity from criminal jurisdiction.

64. The Commission could refer article 26 to the Drafting Committee and ask it to consider whether, in paragraph 2, immunity from civil and administrative jurisdiction should be limited to acts performed in the exercise of the special mission's functions or, to put it more explicitly, to acts performed in the exercise of its functions and in connexion with the exercise of its functions.

65. Mr. USTOR pointed out that the passage which he had quoted referred to government officials travelling abroad but not on a special mission. Elsewhere in his book, Mr. Cahier had dealt with special missions and had stressed the need to grant members of such missions personal inviolability and certain other privileges.

66. The CHAIRMAN said that in view of the great variety of special missions, two problems arose. The first was to determine what constituted a special mission for the puposes of the draft articles; the second was to determine what persons were to benefit from the provisions of article 26. There could be no doubt that some of the concern expressed by Governments in their comments had arisen from the fact that the Commission itself was not clear as to which persons would be covered by article 26 and article 32 respectively.

67. In the circumstances, members were bound to have some reservations on article 26 until the Commission came to a decision on the question of the various categories of special missions and on the subject of definitions.

68. Mr. BARTOŠ, Special Rapporteur, recalled that in his first report he had proposed defining diplomatic staff by stating that it included advisers, experts and secretaries;[8] that definition, which had been borrowed from the Convention on the Privileges and Immunities of the United

[7] See United Nations Conference on Diplomatic Intercourse and Immunities, *Official Records*, vol. II, p. 90, resolution II.

[8] *Yearbook of the International Law Commission, 1964*, vol. II, p. 93, paragraph (3) of commentary to article 6.

Nations, had the advantage of preventing any confusion between the ranks of officials in the diplomatic service, which was an internal matter for each State. It might perhaps be advisable to return to that definition, for the term "diplomatic staff" was very vague.

69. The CHAIRMAN said that, if there were no objections, he would consider that the Commission agreed to refer article 26 to the Drafting Committee for consideration in the light of the discussion, as proposed by the Special Rapporteur.

It was so agreed.[9]

Organization of Future Work

[Item 6 of the agenda]

70. The CHAIRMAN said that one of the problems with which the Commission would have to deal in the organization of its future work was the appointment of a new Special Rapporteur for the topic "Succession of States and Governments," to replace Mr. Lachs, the former Special Rapporteur, who had since been elected a Judge of the International Court of Justice.

71. He had availed himself of Mr. Lachs's recent visit to discuss with him the topic of the succession of States and Governments. Mr. Lachs had expressed the view, which he had authorized him (the Chairman) to communicate to the Commission, that it would be practicable and probably helpful, as a first step, to treat as a separate topic the question of the succession of States and Governments with respect to treaties and, if desired, to appoint a separate special rapporteur for that question. He invited the Commission to reflect on that possibility so that members could give their views when the Commission came to examine the programme of its future work at a forthcoming meeting.

The meeting rose at 1 p.m.

[9] For resumption of discussion, see 933rd meeting, paras. 2-13.

918th MEETING

Friday, 9 June 1967, at 10 a.m.

Chairman: Sir Humphrey WALDOCK

Present: Mr. Ago, Mr. Albónico, Mr. Bartoš, Mr. Castañeda, Mr. Castrén, Mr. Ignacio-Pinto, Mr. Jiménez de Aréchaga, Mr. Kearney, Mr. Nagendra Singh, Mr. Ramangasoavina, Mr. Tammes, Mr. Ushakov, Mr. Ustor, Mr. Yasseen.

Other Business

(resumed from the 903rd meeting)

[Item 8 of the agenda]

THIRD SEMINAR ON INTERNATIONAL LAW

(resumed from the 903rd meeting)

1. The CHAIRMAN said the Commission greatly appreciated the contribution made by the participants to the success of the Third Seminar on International Law. Members of the Commission who had given lectures during the Seminar had all been impressed by the high level of the debates and had been gratified at the results achieved. He wished particularly to thank Mr. Raton for all the work done in making the arrangements for the Seminar, which had substantially contributed to its success.

2. Mr. RATON (Secretariat), thanking the Chairman for his kind words, said it had been a pleasure for him to carry out his duties in connexion with the organization of the International Law Seminar, which would not exist were it not for the Commission and its valuable support. He wished in particular to thank Mr. Ago, Mr. Bartoš, Mr. Reuter, Mr. Tammes, Mr. Tsuruoka, Mr. Ustor, Mr. Yasseen and Sir Humphrey Waldock, from whose lectures those participating in the Seminar had derived such great benefit. He was glad to learn that Mr. Eustathiades and Mr. Castañeda had promised to lecture next year. He also wished to express his satisfaction with the work done by those participating in the Seminar; they had shown great diligence and had followed the course with close attention. He hoped that those Governments which had granted scholarships would show the same generosity next year and that other Governments would not forget to translate words into deeds and thereby enable nationals of the developing countries to take part in the Commission's work and profit from its wealth of learning.

Special Missions

(A/CN.4/193 and Addenda; A/CN.4/194 and Addenda)

(resumed from the previous meeting)

[Item 1 of the agenda]

ARTICLE 27 (Waiver of immunity) [41]

3. *Article 27* [41]

Waiver of immunity

1. The immunity from jurisdiction of the head and members of the special mission, of the members of its staff and of the members of their families, may be waived by the sending State.

2. Waiver must always be express.

3. The initiation of proceedings by one of the persons referred to in paragraph 1 of this article shall preclude him from invoking immunity from jurisdiction in respect of any counter-claim directly connected with the principal claim.

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

4. The CHAIRMAN invited the Commission to consider article 27, the Special Rapporteur's proposals for which were contained in paragraph 4 of the section on that article in his fourth report (A/CN.4/194/Add.2) and in his additional comments in document A/CN.4/194/Add.4.

5. Mr. BARTOŠ, Special Rapporteur, said that the underlying idea of article 27 was the possibility for the sending State of waiving immunity from jurisdiction, an immunity which was granted not to the persons concerned but to the State as such. Waiver must be express.

6. Few comments had been received from governments. That by the Government of Israel related to form and had become less important since the Drafting Committee had decided to change the terminology used to designate the persons forming part of the special mission.

7. The Chilean Government's suggestion regarding the placing of the article was a matter connected with the arrangement of the draft and it would therefore be considered later.

8. Mr. Reuter had suggested to him that the article should include an additional provision permitting the sending State to waive immunity from jurisdiction in advance. The intention of such a provision, which was flexible, was to cover certain missions for which immunity from jurisdiction was unnecessary. The Commission might therefore consider adopting such a provision, which did not appear in the corresponding article of the Vienna Convention on Diplomatic Relations.

9. The other rules in article 27 were taken from article 32 of that Convention.

10. Mr. JIMÉNEZ de ARÉCHAGA proposed an amendment to article 27 which, he hoped, would reconcile the divergent views which had been expressed in the Commission on the subject of privileges and immunities. His amendment was to add after paragraph 1, a further paragraph to read: "The sending State shall waive the immunity specified in paragraph 1 in respect of civil claims of persons in the receiving State, when this can be done without impeding the performance of the functions of the special mission". That wording was taken from resolution II adopted by the 1961 Vienna Conference which had adopted the Vienna Convention on Diplomatic Relations.[1]

11. The addition of a clause of that type would strengthen the functional aspects of the draft articles, while leaving the sending State in control of the situation.

12. Mr. CASTRÉN said that, in general, he accepted the text of article 27. He would, however, suggest that the words "and of the members of their families" in paragraph 1 be deleted, since there was another draft article—article 35—entitled "Members of the family" which contained a reference to articles 24 to 31 in connexion with privileges and immunities. The words "and of the members of their families" did not appear in the corresponding article in the Vienna Convention.

13. It was possible that he might have something to say later on the amendments proposed by Mr. Reuter and Mr. Jiménez de Aréchaga.

14. Mr. TAMMES said he strongly supported the amendment proposed by Mr. Jiménez de Aréchaga.

15. In its debate on article 24 and 25, the Commission had discussed possible ways of bridging the gap between the restrictive tendencies expressed in government comments and the protective tendencies of the draft articles. It was significant that the Governments which had expressed opposition to the philosophy of the draft articles included those of States great and small, old and new, developed and developing and represented different social and economic systems.

16. One of the possible means of bridging the gap would be to limit the number of persons to whom privileges and immunities would normally apply. Another was offered by the proposal by Mr. Jiménez de Aréchaga to amend article 27, a proposal which was based upon the language of a recommendation unanimously adopted by the 1961 Vienna Conference. That Conference enjoyed a high authority and the very strong language which it had used in resolution II could be taken as expressing world legal opinion in the matter.

17. The proposed amendment would make the whole system of immunities less rigid and would introduce a rather more compulsory element into the practice of waiver.

18. It was important to remember that waiver of immunity was standard practice in international organizations. In the case of United Nations officials, the relevant provision was contained in section 20 of the Convention on the Privileges and Immunities of the United Nations, adopted by General Assembly resolution on 13 February 1946, which read:

> "Privileges and immunities are granted to officials in the interests of the United Nations and not for the personal benefit of the individuals themselves. The Secretary-General shall have the right and the duty to waive the immunity of any official in any case where, in his opinion, the immunity would impede the course of justice and can be waived without prejudice to the interests of the United Nations. In the case of the Secretary-General, the Security Council shall have the right to waive immunity."[2]

19. A similar clause was to be found in a great many treaties relating to the privileges of international organizations and their officials, in particular the agreements between certain organizations and the host countries regarding the headquarters of those organizations.

20. Lastly, he would ask the Special Rapporteur whether it might not be possible to extend the system of waiver to personal inviolability, dealt with in article 24, and to the giving of evidence, dealt with in article 26, paragraph 3. From the technical point of view, waiver normally applied to immunity of jurisdiction, but the possibility should perhaps be considered of extending it to questions of inviolability and the giving of evidence, as was done in article 45 of the 1963 Vienna Convention on Consular Relations. He was not, of course, suggesting that there was an analogy between special missions and consulates, but merely drawing attention to a legal technique that might prove useful in connexion with article 27.

[1] United Nations Conference on Diplomatic Intercourse and Immunities, *Official Records*, vol. II, p. 90.

[2] United Nations, *Treaty Series*, vol. 1, p. 26.

21. Mr. KEARNEY said he also strongly supported the proposal by Mr. Jiménez de Aréchaga, which would provide an acceptable means of reconciling the different views expressed in the Commission on the extent of privileges and immunities. The adoption of that proposal would make the whole set of articles much more attractive to States in general; if the draft were overloaded with privileges for special missions and their staff, it was unlikely to be accepted by Governments.

22. Mr. USHAKOV, referring to Mr. Reuter's proposal,[3] pointed out that the possibility of waiving immunity in advance was implied in the existing text of paragraph 1.

23. With regard to Mr. Jiménez de Aréchaga's proposal, he thought that, however much one might discuss what privileges and immunities should be granted, it was impossible to change the meaning of article 27 without altering the contents of article 26. If it were decided to provide in article 26 for minor or functional immunity, the Commission must say so explicitly. But it was completely illogical to extend the immunities in article 26 and to provide in article 27 that the State would waive them.

24. Article 27 should therefore be retained as it stood. It enunciated the rule of the sovereignty of the State, which was well-established in modern international law: the immunity was accorded to the State and only the State could waive it.

25. Mr. BARTOŠ, Special Rapporteur, said he wished first to point out to Mr. Castrén that paragraph 1 of article 32 of the Vienna Convention—in which, it was true, the phrase "and of the members of their families" did not appear—referred to article 37, which began with the words "The members of the family of a diplomatic agent... shall...enjoy the privileges and immunities specified in articles 29 to 36". The Commission could also use the cross-reference method, of course, but it seemed to be falling out of favour in modern drafting.

26. The idea underlying Mr. Jiménez de Aréchaga's amendment was contained in resolution II of the 1961 Vienna Conference. He agreed with Mr. Ushakov that that amendment raised a question of substance which should be dealt with in article 26. Article 26 could limit immunity from jurisdiction to acts performed in the exercise of functions, but it was not possible to provide for immunity and then immediately afterwards call upon States to waive it. The sending State might have reasons such as fear of publicity from which its dignity would suffer, for preferring that a case should not be brought before the courts of the receiving State, but in that case it would try to reach a compromise. That was the meaning of resolution II of the Vienna Conference, which recommended that the sending State should waive immunity or use its best endeavours to bring about a just settlement of the claim.

27. The provision of the Convention on the Privileges and Immunities of the United Nations to which Mr. Tammes had referred was to be applied by the Secretary-General and was concerned only with the organization's officials; in no circumstances could the Secretary-General waive the immunity of members of delegations. He did not think that the Commission could adopt a United Nations disciplinary rule and require States to apply it to their representatives. Resolution II of the 1961 Vienna Conference might and in fact did have some authority even with regard to special missions, but it contained merely a recommendation, not a rule binding on States. Of course, at large conferences and even at the United Nations—for example at United Nations Headquarters in New York—the receiving State could convey a warning to delegations through the Secretary-General. For the members of special missions, however, there was no need for such a procedure, since the receiving State could declare the person *non grata* or not acceptable.

28. Mr. Tammes had also suggested that for the purpose of immunity from jurisdiction, members of special missions should be treated on the same footing as consular officers, but leaving aside the question whether that assimilation would be justified, he must point out that, generally speaking, the Commission had decided to take the Vienna Convention on Diplomatic Relations as the model for its draft.

29. His reply to Mr. Tammes' comments also applied to those by Mr. Kearney. The Commission should try to find a balance and adopt a practical approach. The big States always had adequate safeguards because of their power; their ordinary citizens were sometimes better protected than the officials of smaller States. It was particularly the small and medium-sized States which needed the safeguards provided in the draft. The problem was a very real one.

30. He acknowledged the force of Mr. Ushakov's arguments, and accordingly withdrew his support for Mr. Reuter's suggestion. States would have other means of waiving or limiting privileges and immunities, such as that provided in article 17 *ter*.

31. He therefore considered that article 27 should be retained and that it could be referred to the Drafting Committee for final editing.

32. Mr. NAGENDRA SINGH said he agreed with Mr. Ushakov that there would be some contradiction between the amendment proposed by Mr. Jiménez de Aréchaga and the wording used in the present text of the article. Consideration should therefore be given to the possibility of diluting the language of the proposed amendment, and couching it in the form of a recommendation rather than a mandatory rule.

33. Mr. CASTRÉN said that, though he concurred with the Special Rapporteur with regard to the substance, he still thought that the reference to "members of their families", in article 27, was ill-advised. Since the situation of members of the family was not dealt with until article 35 and since that category of persons had not been mentioned in any of the preceding articles, even in article 26, it was illogical to mention it in article 27. The Vienna Convention on Diplomatic Relations contained a drafting error in that respect which the Commission was not obliged to repeat.

[3] See paragraph 8.

34. Mr. AGO, commenting on Mr. Jiménez de Aréchaga's proposal, suggested that the Commission should adopt, in addition to its draft articles, a resolution containing a recommendation modelled on that contained in resolution II of the 1961 Vienna Conference. A resolution of that kind might serve a useful purpose and dispel the misgivings of certain Governments. On the other hand, he would be reluctant to see such a recommendation incorporated in a draft article, for articles could state rights or obligations, but not make recommendations. And the Commission could not make that recommendation an actual obligation to waive the privileges and amenities provided for in the preceding articles, since that would mean contradicting itself.

35. The CHAIRMAN, speaking as a member of the Commission, said that Mr. Ago's suggestion would provide a useful solution if the Commission definitely rejected Mr. Jiménez de Aréchaga's amendment.

36. He was not very convinced by some of the technical objections put forward against that amendment. For instance, the waiver provisions of the Convention on the Privileges and Immunities of the United Nations which related to representatives were very similar to those which related to international officials. Section 14, which was part of article IV, dealing with the representatives of Member States, was couched in similar terms to section 20 and specified that "a Member not only has the right but is under a duty to waive the immunity of its representative in any case where in the opinion of the Member the immunity would impede the course of justice, and it can be waived without prejudice to the purpose for which the immunity is accorded".[4]

37. When the Commission came to deal with the topic of relations between States and intergovernmental organizations, it would no doubt find that there was a considerable number of international organizations for which similar provisions existed on the waiver of immunity of representatives of Member States. It was for the Commission to decide whether it wished to equate special missions with permanent diplomatic missions and adopt the same approach as the 1961 Vienna Conference, or whether it wished to treat members of special missions in a manner closer to the system in force for representatives of States to international organizations.

38. Mr. BARTOŠ, Special Rapporteur, said he agreed with Mr. Ago. The Drafting Committee, in dealing with article 27, could consider the possibility of drawing up a recommendation on the lines of that contained in resolution II of the 1961 Vienna Conference. At the same time, he must point out that resolution II offered States two alternatives: they could either waive immunity or use their best endeavours to bring about a just settlement. The Commission could not just choose one of those alternatives.

39. Mr. JIMÉNEZ de ARÉCHAGA said that it was not the practice of the Commission to adopt resolutions: its duty was to codify international law and to contribute to its progressive development, not to make recommendations to States like the one suggested.

40. The system embodied in the 1961 Vienna Convention on Diplomatic Relations and in resolution II had been adopted with the needs of permanent diplomatic missions in mind. Special missions needed a different system which would impose on the sending State the legal obligation to waive immunity in certain circumstances.

41. He was not impressed by the argument that in some cases the threat to expose in court details of the private life of an official might be detrimental to the interests of the sending State; should that in fact happen, it was always open to the sending State not to waive the immunity of the official.

42. Under his amendment, the sending State would always retain control of the situation. The experience acquired with the operation of the Convention on the Privileges and Immunities of the United Nations had shown the great usefulness in practice of placing a duty to waive the immunity on the authority that controlled the official; the existence of that duty gave that authority great powers of persuasion over the official, and was used to serve the ends of justice and the prompt settlement of claims.

43. He was prepared to substitute for the wording he had proposed a wording on the lines of the second sentence of section 14 of the Convention on the Privileges and Immunities of the United Nations.

44. Mr. USHAKOV asked Mr. Jiménez de Aréchaga who, in his opinion, was to judge that waiver of immunity would not hamper the special mission in the performance of its functions. If it was to be the sending State, such a provision would add nothing new to the article; if it was to be the receiving State or the two States together, the position was quite different.

45. Mr. JIMÉNEZ de ARÉCHAGA replied that the decision would rest with the sending State.

46. The CHAIRMAN, speaking as a member of the Commission, said that the United Kingdom practice illustrated the fact that both the sending State and the receiving State had possibilities of action in the matter. The usual approach was to suggest to the authorities of the sending State that they should either waive the immunity or make arrangements for a confidential arbitration of the claim; if the sending State did not adopt either of those two courses, the receiving State would declare the official concerned *persona non grata*.

47. Speaking as Chairman, he suggested that article 27 be referred to the Drafting Committee for consideration in the light of the discussion.

It was so agreed.[5]

Mr. Ustor, Second Vice-Chairman, took the Chair.

ARTICLE 28 (Exemption from social security legislation) [32]

48. *Article 28* [32]

Exemption from social security legislation

1. The head and members of the special mission and the members of its staff shall be exempt, while in the territory of the

[4] United Nations, *Treaty Series*, vol. 1, p. 22.

[5] For resumption of discussion, see 933rd meeting, paras. 14-56.

receiving State for the purpose of carrying out the tasks of the special mission, from the social security provisions of that State.

2. The provisions of paragraph 1 of this article shall not apply:

(*a*) To nationals or permanent residents of the receiving State regardless of the position they may hold in the special mission;

(*b*) To locally recruited temporary staff of the special mission, irrespective of nationality.

3. The head and members of the special mission and the members of its staff who employ persons to whom the exemption provided for in paragraph 1 of this article does not apply shall observe the obligations which the social security provisions of the receiving State impose upon employers.

49. The CHAIRMAN invited the Commission to consider article 28, the Special Rapporteur's proposals for which were contained in paragraph 7 of the section dealing with that article in his fourth report (A/CN.4/194/Add.2) and in his additional comments in document A/CN.4/194/Add.4.

50. Mr. BARTOŠ, Special Rapporteur, said that article 28 corresponded to article 33 of the Vienna Convention on Diplomatic Relations. At the first reading, the Commission had not considered it necessary to retain paragraphs 4 and 5 since, on the whole, the system adopted in the draft was favourable to derogations.

51. The Drafting Committee would deal with the question of terminology raised in the comment by the Government of Israel, in the light of the solutions contemplated for other articles.

52. The United Kingdom Government proposed the deletion of paragraph 2(*a*) which, in its opinion, overlapped with article 36. That question could be considered by the Drafting Committee.

53. The Netherlands Government proposed the deletion of the entire article; he thought that would be going too far. The proposed rule was useful, since the members of the special mission might fall ill or have an accident during their stay in the receiving State.

54. The Chilean Government proposed that paragraph 2(*a*) be worded to read "To nationals or permanent residents of the receiving State, unless the latter are members of the diplomatic staff of the mission", a wording which would radically alter that provision.

55. Lastly, the Greek Government requested that the privileges and immunities granted by the article should be restricted.

56. Mr. CASTRÉN said he approved of the provisions contained in article 28 but wondered whether it really served a useful purpose to retain in paragraph 1 the phrase "while in the territory of the receiving State for the purpose of carrying out the tasks of the special mission", since it was obvious that exemption from social security legislation, like most of the privileges and immunities, was granted for the duration of the stay of the members of the special mission in the territory of the receiving State. No corresponding phrase was to be found in article 33 of the Vienna Convention on Diplomatic Relations.

57. Mr. JIMÉNEZ de ARÉCHAGA asked why articles 23, 28 and 34 referred to members of the staff of a special mission whereas articles 25 and 26 referred to members of its diplomatic staff. If the difference was inadvertent, it would be preferable to use the same expression throughout.

58. There might be a case for inserting a provision on the lines of the one included in the two Vienna Conventions allowing for voluntary participation in social security arrangements of the receiving State.

59. Mr. BARTOŠ, Special Rapporteur, said that the Drafting Committee had decided to replace the words "the head and members of the special mission and the members of its staff" by "the representatives on the special mission and the members of its diplomatic staff". Social security legislation was applicable to everyone, and the exemption provided for in article 28 was not a privilege reserved exclusively for diplomatists; it should extend to all members of the special mission, subject to the provisions of paragraph 2.

60. If the Commission agreed with Mr. Jiménez de Aréchaga, he saw no objection to adding a provision analogous to that of article 33, paragraph 4, of the Vienna Convention on Diplomatic Relations, to the effect that the exemption provided for in paragraph 1 did not preclude voluntary participation in the social security system of the receiving State. If the Commission saw fit it could also add the text of article 33, paragraph 5, of the Vienna Convention.

61. With regard to the phrase mentioned by Mr. Castrén, while he did not regard it as entirely superfluous, he could agree to its deletion in order to bring the text into line with that of article 33 of the Vienna Convention.

62. Mr. RAMANGASOAVINA said that article 28 raised no difficulty; it was normal that the members of a special mission should not participate in the social security system of the receiving State, since such participation involved not only paying contributions but also receiving benefits. The text of the article was sufficiently clear; it definitely stated that the exemption applied to all the members of the mission, including service staff, but that the system became applicable to them as soon as they left the special mission, if they remained in the territory of the receiving State.

63. There was no reason why the Commission should add to the article paragraphs 4 and 5 of article 33 of the Vienna Convention on Diplomatic Relations, since those two paragraphs referred to persons permanently resident in the receiving State.

64. Mr. CASTAÑEDA said that on the whole he approved of article 28. He saw no need to mention "private servants", as was done in paragraph 2 of article 33 of the Vienna Convention, since what was involved there was an exception, and the Commission had to establish a general rule.

65. The Commission might perhaps provide, as was done in article 33, paragraph 4, of the Vienna Convention, for voluntary participation of the members of special missions in the social security system of the receiving State, but it seemed superfluous to add paragraph 5 of article 33, since it was obvious that the States

concerned could conclude bilateral or multilateral agreements concerning social security.

66. Mr. ALBÓNICO asked whether article 28 referred only to social security legislation or to all labour legislation including laws about contracts and benefits.

67. Mr. BARTOŠ, Special Rapporteur, said that the States that ratified the convention on special missions would be members of the International Labour Organisation and, as such, would be bound to extend the benefits of the social security system to any person working in their territory. The conventions concluded under the auspices of the International Labour Organisation formed what might be termed a body of international legislation, and the Commission had provided in its draft articles on the law of treaties that States could not derogate from general international law.

68. Mr. ALBÓNICO said that he was not satisfied with the Special Rapporteur's reply; article 28 should apply to all the labour legislation of the receiving State.

69. Mr. BARTOŠ, Special Rapporteur, pointed out that the International Labour Office did not confine itself to the study of labour legislation; about a third of its activities were devoted to social security problems.

70. Mr. AGO emphasized that article 28 referred exclusively to social security legislation; labour legislation was not mentioned. Paragraph 1 provided for exemption from social security provisions and paragraph 2 provided for an exception to that exemption, in other words, for the application of the social security system of the receiving State to certain members of special missions.

71. Mr. BARTOŠ, Special Rapporteur, said that the purpose of the Chilean Government's proposal was to exempt all members of the special mission, even if they were nationals of the receiving State, from social security provisions.

72. The CHAIRMAN, speaking as a member of the Commission, said that the corresponding provisions in the Vienna Conventions were clearly confined to social security legislation; they contained no special provisions concerning labour legislation in general.

73. Mr. CASTAÑEDA said he thought that Mr. Albónico's observation was calculated to bring out more clearly the obligation on special missions to respect certain rules of labour legislation.

74. Mr. JIMÉNEZ de ARÉCHAGA said that it was probably unnecessary to extend the scope of article 28 so as to include labour legislation in general because of the provision in article 40, paragraph 1, concerning the obligation to respect the laws and regulations of the receiving State.

75. Mr. ALBÓNICO said that he did not wish to press his point, but wished the Commission to realize that a national of the receiving State or a person permanently resident there, if employed in a special mission, must respect the labour legislation of the country. He could not be treated on a different footing from persons employed elsewhere.

76. Mr. AGO said he considered that the provisions of article 28 met all the points raised by members of the Commission. When the special mission employed a national of the receiving State, the question of the labour legislation to be applied must be settled on the basis of the rules of private international law. Normally, such labour relationships were governed by local law. On the other hand, the laws of the sending State would apply in the case of labour relationships established in that State between the sending State and its nationals. But, even in the case of relationships governed by foreign law, the question of compliance with local social security laws might arise, as it could be considered a matter of public order. That was why provision had had to be made in article 28 for exemption.

77. Mr. BARTOŠ, Special Rapporteur, said that the Chilean Government had proposed amending paragraph 2(*a*) to open with the words "... to nationals of the receiving State or aliens domiciled there".* The Commission had preferred the wording "or permanent residents", for the Vienna Conference on Diplomatic Relations had drawn a distinction between domicile, which could be temporary, and permanent residence.

78. For the end of paragraph 2(*a*) the Chilean Government had proposed the wording "unless the latter are members of the diplomatic staff of the mission", but he preferred the wording of the Vienna Convention, which had been used in article 28, as it seemed less restrictive.

79. Mr. ALBÓNICO said he considered that paragraph 2 should also apply to nationals of the sending State resident in the receiving State.

80. Mr. TAMMES said that article 28 was acceptable.

81. The CHAIRMAN suggested that article 28 be referred to the Drafting Committee.

It was so agreed.[6]

The meeting rose at 1 p.m.

* Literal translation. The English translation of the Chilean Government's proposal in document A/CN.4/193/Add.1 already uses the expression "permanent residents" adopted at the Vienna Conference (see para. 54 above).

[6] For resumption of discussion, see 933rd meeting, paras. 57-62.

919th MEETING

Monday, 12 June 1967, at 3 p.m.

Chairman: Sir Humphrey WALDOCK

Present: Mr. Ago, Mr. Bartoš, Mr. Castañeda, Mr. Castrén, Mr. Jiménez de Aréchaga, Mr. Kearney, Mr. Nagendra Singh, Mr. Ramangasoavina, Mr. Reuter, Mr. Tammes, Mr. Ushakov, Mr. Ustor, Mr. Yasseen.

Special Missions

(A/CN.4/193 and Addenda; A/CN.4/194 and Addenda)

(continued)

[Item 1 of the agenda]

ARTICLE 29 (Exemption from dues and taxes) [33]

1. *Article 29* [33]

Exemption from dues and taxes

The head and members of the special mission and the members of its diplomatic staff shall be exempt from all dues and taxes, national, regional or municipal, in the receiving State on all income attaching to their functions with the special mission and in respect of all acts performed for the purposes of the special mission.

2. The CHAIRMAN invited the Commission to consider article 29, the Special Rapporteur's proposals for which were contained in paragraph 10 of the section dealing with that article in his fourth report (A/CN.4/194/Add.2) and in his additional comments in document A/CN.4/194/Add.4.

3. Mr. BARTOŠ, Special Rapporteur, said that article 29 accorded special missions only strictly limited immunity. The basic purpose of the article was to grant members of the special mission and members of its diplomatic staff exemption only from dues and taxes on income attaching to their functions with the special mission, and not from dues and taxes on private income having its source in the receiving State or from taxes on capital levied on investments in commercial undertakings in the receiving State.

4. Few objections had been made to the article. The Government of Israel had submitted a comment concerning the extension of the exemption to the entire staff. The Commission could take a decision on that comment when it came to consider article 32.

5. The United Kingdom Government asked that the article should go into more detail, for as it stood, it might be construed as exempting from stamp duty cheques, receipts, etc., given by the head, members and diplomatic staff of a special mission in the course of their duties, which was contrary to the Stamp Act. It had certainly not been his intention to give such scope to the exemption provided for in article 29 and in that way to facilitate a kind of tax fraud. Similarly, with respect to the United Kingdom Government's comment on a mission sent to promote the export trade of the sending State, he had never contemplated exempting persons who derived profits from activities of that kind. The wording of article 29 should therefore be amended to allay the United Kingdom's fears on those various points. What the article was directed to was official acts performed by the special mission, certificates issued by it, certain receipts, etc., but not any activity of the kind mentioned by the United Kingdom Government.

6. The United States Government recommended the amendment or deletion of the final phrase, "and in respect of all acts performed for the purposes of the special mission", while the Greek Government asked that the privileges and immunities generally of the special mission should be restricted. Neither had suggested extending the immunity provided in article 29 or including the list of exceptions provided for in article 34 of the Vienna Convention on Diplomatic Relations. After due reflection, he was agreeable to deleting the final phrase, for the article was concerned not with personal exemptions for members of the mission but with the exemption of the special mission. Its deletion would represent a further restriction on that exemption, which was already very limited.

7. Mr. KEARNEY said that by agreeing to drop the concluding phrase "and in respect of all acts performed for the purposes of the special mission", the Special Rapporteur had disposed of one of the problems raised by article 29. In connexion with such taxes as those on meals and beverages, the question would arise whether they fell under the heading of official entertainment and should therefore be tax-free. If the final phrase were not dropped, there would undoubtedly be difficulties, because protocol officials would wish to be liberal with respect to the tax exemption of members of special missions, while Treasury officials would instinctively take a restrictive attitude.

8. With regard to the remainder of the article, he had doubts as to the workability of the general formula it embodied. In his opinion, the Commission should consider whether it would not be better to adopt a text on the lines of article 34 of the 1961 Vienna Convention on Diplomatic Relations.

9. Mr. CASTRÉN said he agreed with the United Kingdom Government's comment that the exemption given to the members and diplomatic staff of the special mission was too wide and that it should apply only to "emoluments or fees paid by the sending State or, so long as the mission is for the governmental purposes of the sending State, to emoluments or fees paid by other sources in the sending State" (A/CN.4/188/Add.1). Another possibility would be to adopt the wording used in the Vienna Convention on Diplomatic Relations, but he had not yet formed a definite opinion on that point.

10. He also agreed with the United Kingdom Government that the commentary was not clear. The second sentence in paragraph (2) could either be deleted, or replaced by the following text: "Since the starting point is different, it is no longer necessary to list, as in article 34 of the said Vienna Convention, the cases where there is no exemption from dues and taxes".

11. Mr. NAGENDRA SINGH said that the Commission had not intended in article 29 to give any wider tax exemption than that granted to permanent missions by article 34 of the 1961 Vienna Convention. Unfortunately, it was possible to put a very broad interpretation on article 29 as it stood, a possibility to which the United Kingdom had drawn attention in its comments.

12. It should be specified that special missions were obliged to pay the dues and taxes mentioned in article 34, paragraphs (*a*) and (*f*), of the 1961 Vienna Convention, since otherwise it might be open to doubt whether, in fact, special missions were obliged to pay sales taxes

on furniture purchased by them and registration dues in respect of premises occupied by them.

13. Lastly, if the final phrase of the article were deleted, there was no need to retain the word "dues"; if it was only income tax that was intended, the words "dues and taxes" should be replaced by the word "taxes".

14. Mr. REUTER said he too thought that the exemption granted was too wide. To restrict it, it could be specified that the exemption applied to income attaching "directly" to the functions of the special mission and to all acts which were "principally" acts of the special mission. That was one method.

15. The second method was that usually adopted by the United Kingdom, namely, the enumerative method. A list of immunities would be drawn up, mentioning some of the most typical dues and taxes from which the special mission was exempt, and the words "and other similar taxes" would be added, so that any cases not mentioned could be settled by analogy.

16. Mr. JIMÉNEZ de ARÉCHAGA said that the attempt to adopt in article 29 a general formula intended to be more restrictive than article 34 of the 1961 Vienna Convention had not had the expected result, as was clearly shown by the comments of the United Kingdom and United States Governments. In particular, the expression "all income attaching to their functions" was at the same time both unduly restrictive and unduly broad. It was unduly restrictive because it exempted only the income, leaving outside the exemption taxes and dues levied on sums other than income; and it was unduly broad because, as pointed out by the United Kingdom Government, there could be cases in which income was taxable.

17. Deletion of the final phrase might have the effect of enlarging the effect of the exemption, thereby intensifying the discrepancy between the draft articles and the 1961 Vienna Convention.

18. The Commission should simply revert to the formula already endorsed by two conferences of States; that formula was to be found in article 34 of the 1961 Vienna Convention and article 49 of the 1963 Vienna Convention.

19. Mr. BARTOŠ, Special Rapporteur, said he did not share the opinion of Mr. Jiménez de Aréchaga, for there were two entirely different problems involved: permanent diplomatic agents and consular officers had their legal domicile in the receiving State, whereas members of special missions were only there temporarily. Moreover, members of special missions were not permitted to engage in financial activities in the territory of the receiving State and could not enjoy any immunity except exemption from dues and taxes on the salaries and wages which they received from the sending State.

20. Instead of stating in principle, like the two Vienna Conventions, that members of the mission were exempt from all dues and taxes with the exception of those listed in the text, article 29 laid down the rule that the only exemption enjoyed by members of the special mission was exemption from dues and taxes on income attaching to their functions. To ensure good international relations, the sole purpose of a special mission should be to carry out its task; it could therefore be granted only the exemption provided for in article 29.

21. It was in order to prevent the activities objected to by the United Kingdom Government from being included among acts performed for purposes of the special mission and in order to take into account the comment of the United States Government that the text of the final phrase was not clear, that he had suggested deleting the words: "and in respect of all acts performed for the purposes of the special mission". No exemption would therefore be granted in respect of such acts, except by way of agreement—financial agreement, double taxation agreement, and so on. In practice, it sometimes happened that the receiving State asked for a joint mission to visit its territory, and paid all its expenses but that was an exceptional case.

22. What the Commission had to do was not to draw an analogy between the Vienna Conventions and article 29, but starting from the situation governed by the Vienna Convention, to reach a reasonable solution appropriate for special missions.

23. The CHAIRMAN, speaking as a member of the Commission, said that he agreed with Mr. Jiménez de Aréchaga. The United Kingdom Government was correct in pointing out that, by dropping the list of exceptions appearing in article 34, sub-paragraphs (*a*) to (*f*), of the 1961 Vienna Convention, the Commission had undoubtedly made article 29 of the draft on special missions broader than that article.

24. Nor could the problem be solved by merely dropping the concluding phrase. The expression "attaching to their functions" would remain and it constituted the main source of difficulty. If that general expression were maintained, there was a risk that article 29 might be construed as giving exemption from taxation which exceeded the exemptions laid down in article 34 of the Vienna Convention.

25. In the circumstances, he was in favour of adopting a text on the lines of article 34 of the 1961 Vienna Convention. The members of a special mission were in a position which was not very different from that of members of the permanent diplomatic mission of the sending State, since they were in the receiving State not because they so wished but in order to perform their functions. Of course, inasmuch as special missions had a temporary character, the field of operation of the article on tax exemption would be limited, but since their position was essentially the same as that of permanent missions, there was no need to look for a different phraseology.

26. Mr. JIMÉNEZ de ARÉCHAGA said that the position of special missions undoubtedly justified giving their members fewer privileges with respect to dues and taxes than members of permanent missions, and such had undoubtedly been the purpose of the Commission in article 29. Because of the extreme complexity of tax matters, however, the Commission had not achieved that purpose and the deletion of the concluding phrase would make the article even wider. The fact that article 29

contained none of the exceptions specified in paragraphs (*a*) to (*f*) of article 34 of the 1961 Vienna Convention could be invoked as an argument to claim for members of special missions exemption from indirect taxes and other dues, taxes and charges specified in those paragraphs.

27. At its seventeenth session, the Commission had discussed the question of the "possible inclusion of an article on the lines of article 34 of the Vienna Convention on Diplomatic Relations". The Special Rapporteur had then indicated that he "was undecided whether exceptions should be made in favour of members of special missions or whether a provision like article 23 of his draft would be better". He had gone on to say that "There was a material difference between article 23, to paragraph 3 of which the Commission had made reservations, and article 34 of the Vienna Convention on Diplomatic Relations, which related only to the diplomatic agent. As special missions stayed only temporarily in the territory of the receiving State, the same considerations did not apply".[1]

28. In response to the Special Rapporteur's request for the views of members of the Commission, Mr. Tunkin had stated that "a special mission, one dealing with frontier problems, for example, might stay in a country for as long as a year, and the question could then arise whether its members were liable to taxation in the receiving State. It might be wiser to insert a provision covering the point on the basis of article 34 of the Vienna Convention on Diplomatic Relations".[2] The Special Rapporteur had accepted that suggestion.[3]

29. The history of article 29 thus showed that it had been prepared simply in order to deal with a case where a special mission remained for a long period in the receiving State and could be assimilated to a permanent mission for purposes of taxation. It would therefore be fully justifiable simply to adopt the text of article 34 of the 1961 Vienna Convention.

30. Mr. NAGENDRA SINGH said that he could accept a text similar to article 34 of the 1961 Vienna Convention instead of the present text of article 29.

31. The proposed wording of article 29 did not cover the exceptions envisaged in paragraphs (*a*), (*e*) and (*f*) of article 34 of the 1961 Vienna Convention, but should be construed as covering those specified in paragraphs (*b*), (c) and (*d*) of that article, since, in order to define the income subject to exemption, article 29 used the expression "income attaching to their functions".

32. In view of that situation, the adoption of article 29 as it stood, with the deletion of the concluding phrase, could be interpreted as giving members of a special mission a greater measure of tax exemption than members of a permanent mission.

33. Mr. USHAKOV said that, even though the beneficiary of the exemption under article 34 of the Vienna Convention on Diplomatic Relations and article 29 of the draft was the diplomatic agent or members of the special mission, it was to the mission itself that the immunity was granted. Consequently, the words "and in respect of all acts performed for the purposes of the special mission" were perfectly appropriate. However, as the Special Rapporteur had pointed out, the wording of the article was not particularly felicitous. Instead of saying that the members of the special mission "shall be exempt from all dues and taxes, national, regional or municipal... on all income attaching to their functions...", it would perhaps be better to keep to the solution adopted in the Vienna Convention and to provide for exemption from all dues and taxes other than those listed. In that case, paragraphs (*a*), (*b*), (*e*) and (*f*) of article 34 of the Vienna Convention could be incorporated in the draft and paragraphs (*c*) and (*d*), which did not really concern special missions, could be omitted.

34. Perhaps the Special Rapporteur could adopt for article 29 the wording used in article 34 of the Vienna Convention on Diplomatic Relations.

35. Mr. BARTOŠ, Special Rapporteur, said that article 29 granted fewer privileges to members of special missions than article 34 of the Vienna Convention gave to diplomatic agents since, while article 34 of the Vienna Convention provided for a general exemption from all dues and taxes on income, including income received by the diplomatic agent originating in the sending State, article 29, with the amendment he had proposed, limited the exemption strictly to income attaching to functions with the special mission. The wording used in article 29 had already been adopted by the Commission at first reading. If the Commission now wished to alter the exemption provided for in article 29, it would have to find some other formula than that used in article 34 of the Vienna Convention, since the exceptions contained in paragraphs (*a*) to (*f*) of that article were relevant only in relation to the very broad exemption provided for in the first paragraph. The problem, then, was not the wording of the article but the concept of the system defined in it.

36. Mr. CASTAÑEDA said that, in mixed economy countries, where public authorities and private undertakings worked closely together for the development of foreign trade, it was sometimes very difficult to distinguish between the objectives of the country as a whole and those of the private sector, and between the means which both employed. Say, for example, a country of that kind sent to another country, to negotiate a trade agreement, a special mission headed by the minister of foreign trade and composed partly of permanent officials and partly of representatives of the private sector, if the latter conducted some commercial business in connexion with the negotiations, that business could produce profits which, in the terms of the article, would be literally "income attaching to their functions with the special mission" and, as such, exempt from all taxation to which they would normally be subject in the receiving State.

37. He shared the Special Rapporteur's view regarding the general concept of the article; it was obvious that a rule which limited tax exemption to income attaching to functions with the special mission was more restrictive

[1] *Yearbook of the International Law Commission, 1965*, vol. I, 808th meeting, para. 33.

[2] *Ibid.* para. 34.

[3] *Ibid.* para. 35.

than the rule embodied in article 34 of the Vienna Convention, even with its exceptions.

38. However, there was nothing to prevent the two ideas being combined. The final phrase could be deleted, as the Special Rapporteur had proposed, and a sentence added reproducing the exceptions listed in article 34 of the Vienna Convention.

39. Mr. USHAKOV said he was afraid that the article would be inadequate if the exemption from dues and taxes was limited to "income" attaching to functions with the special mission. In his opinion, the article should apply not only to income but also to expenditure, in other words, to purchases. It might therefore be better to retain the final phrase, "in respect of all acts performed for the purposes of the special mission", which had the advantage of covering purchases as well as sales.

40. Mr. USTOR said that he understood the Special Rapporteur's desire to grant members of special missions fewer taxation privileges than members of a permanent mission, on the ground that they would stay in the receiving State for only a short period. But special missions sometimes stayed for a long time and any restriction of tax exemption would not be in keeping with the articles previously adopted by the Commission, in which special missions had been equated with permanent missions in respect of privileges.

41. The United Kingdom Government's comments were not intended to restrict the taxation privileges of members of special missions; the purpose of those comments had been to point out that article 29 as it stood could have the effect of giving special missions greater privileges than permanent missions. The implication was that the United Kingdom Government wished to place both types of missions on an equal footing as far as tax exemption was concerned.

42. If the Commission wished to limit tax exemption exclusively to salaries and emoluments, the text of article 29 should be amended so as to make that position clear. However, he himself would not favour a text which left outside the scope of tax exemption such items as sales tax and petrol tax, exemption from which was necessary for the performance of the functions of the special mission.

43. What he did favour was placing special missions on an equal footing with permanent missions with regard to taxation.

44. Mr. AGO said that the Commission had two alternatives. Either it could place members of special missions on exactly the same footing as members of permanent missions in respect of taxation, and reproduce article 34 of the Vienna Convention almost *in toto*, but some held that that would be going rather too far.

45. Or it could adopt the course intended by the Special Rapporteur and give the members of special missions fewer privileges than diplomatic missions. That intention had, apparently, been misunderstood by some; perhaps the term "income" gave rise to confusion. What the Special Rapporteur had in fact meant to do was to exempt from taxes the salaries and emoluments received by members of the special mission in respect of their functions with the special mission, and nothing more. If that was the Commission's opinion, it would be better to say so clearly and use some such wording as, for example: "Members of the special mission shall be exempt from all dues and taxes, national, regional or municipal, on salaries and other emoluments received in respect of the functions which they perform in the special mission".

46. In short, the Commission should either follow the Vienna model or adopt as simple a formula as possible and avoid the use of equivocal terms liable to bring up questions relating to the purchase or sale of goods, for questions of that kind had nothing to do with article 29. Article 29 was concerned only with the tax exemption granted to members of the special mission.

47. Mr. USHAKOV said that, like article 34 of the Vienna Convention, article 29 provided for tax exemptions to meet the needs of the special mission as such, even though, according to the text of the articles, the exemptions were granted to the members of the mission. The two articles should be compared with article 23 of the Vienna Convention and article 23 of the draft respectively, which granted tax exemption to the mission itself, but only in respect of the premises which it occupied. The wording proposed by Mr. Ago, which would limit the exemption to the salaries of members of the special mission, would not be sufficient.

48. Mr. AGO said that the Commission should maintain the distinction between exemptions granted to different subjects which were the special mission, that was to say the sending State, in respect of the premises, and the members of the special mission in respect of what they received in their personal capacity. In his view, article 29, as at present worded, applied to the members of the special mission and not to the special mission itself.

49. Mr. RAMANGASOAVINA said he agreed with Mr. Ago's remarks when he had spoken the first time. If the Commission reverted to the formula contained in article 34 of the Vienna Convention, with its list of exceptions, it would be indicating to members of special missions several possibilities of personal gain, whereas they ought to devote themselves wholly to the work of the special mission. Article 29 should be read in conjunction with article 42 which prohibited members of special missions from practising for personal profit any professional or commercial activity in the receiving State.

50. If it were amended on the lines proposed by Mr. Ago, article 29 would be simple and clear and would avoid comparisons which could only complicate the situation.

51. Mr. BARTOŠ, Special Rapporteur, suggested that he should submit two formulations to the Drafting Committee: one on the lines of that proposed by Mr. Ago, that was to say, very close to the one the Commission had adopted by a majority at first reading, and the other reflecting the wishes of those members of the Commission who were in favour of reproducing the provisions of article 34 of the Vienna Convention.

52. Personally, he was against the latter solution, which he felt was not in line with the purposes of a special

mission, but he would submit a text on a trial basis so that the Drafting Committee could compare the two.

53. The CHAIRMAN said that the alternatives were to restrict the exemption granted in article 29 to salaries and emoluments, in which case the text would need careful drafting because the word "income" in English was wider than salaries and emoluments, or to adopt an article on the lines of the Vienna Convention on Diplomatic Relations under which certain articles purchased for the purpose of a special mission's functions would be exempt from taxation. If the first alternative were adopted, articles for the official use of the mission would, as Mr. Ushakov had pointed out, be liable to tax.

54. Perhaps the article should be referred to the Drafting Committee without the Commission taking any decision of principle.

55. Mr. AGO said he would accept either of the alternatives mentioned by the Chairman, but must point out that, if the Commission based its text on article 34 of the Vienna Convention, it would be giving members of special missions more privileges than if it kept to the text proposed by the Special Rapporteur. Moreover, he was not sure that a formulation based on article 34 of the Vienna Convention would meet all Mr. Ushakov's objections, since although the privileges granted would then be broader, they would still be granted to persons and not to the special mission itself. Neither of the two solutions considered met that point; if it was to be met fully, another article would be needed.

56. If the Commission chose the more restrictive system, the one which limited exemption to the salaries received by members of the special mission in respect of their functions in the special mission, there would no longer be any reason for drawing a distinction in the article between members of the special mission and its diplomatic staff on the one hand, and its administrative and technical staff and its service staff on the other. By the terms of paragraphs 2 and 3 of article 37 of the Vienna Convention, members of the administrative and technical staff enjoyed the same tax exemptions as the diplomatic agent, and members of the service staff enjoyed exemption from dues and taxes on the emoluments they received by reason of their employment. Only if the Commission chose a more liberal system, based on article 34 of the Vienna Convention, would it have to make a distinction between representatives of the State and the members of the diplomatic staff on the one hand, and the administrative and technical staff and service staff on the other; the latter would then be entitled only to exemption from taxes on their salaries or wages.

57. Mr. BARTOŠ, Special Rapporteur, said that, to meet Mr. Ushakov's wishes, he would draft a new paragraph for incorporation in article 23, stating that acts performed by the special mission would be exempt from all taxes and dues. Such a provision would, however, need to be accompanied by a proviso like "In the absence of any objection on the part of the receiving State", since a convention on special missions could not require States to grant indeterminate fiscal privileges.

58. It must be remembered that purchase and sale were two aspects of the same operation; in most States buyer and seller were jointly responsible for payment of the duty or tax on the operation.

59. Mr. REUTER said he was afraid that the Commission was going from one extreme to another. It should not be forgotten that the stay of members of the special mission in the receiving State was not voluntary. If they were exempt only from taxes on their salaries, they would be in exactly the same position as international officials, who normally did not pay taxes on their salaries but did pay taxes on their private income. That would be absurd in the case of members of a special mission. In many countries any person became subject to tax on the whole of his income after a stay of seven months; that meant that, if a special mission lasted more than seven months in one country, under the proposed rule its members would become liable to tax on their private income, which had nothing to do with the performance of their functions in the special mission, whereas the opposite should be the case. Trying to be too precise created a great many problems.

60. The CHAIRMAN observed that exemptions on articles for personal use would no doubt be obtained through the permanent mission.

61. He suggested that article 29 be referred to the Drafting Committee.

It was so agreed.[4]

ARTICLE 30 (Exemption from personal services and contributions) [34]

62. *Article 30* [34]

Exemption from personal services and contributions

The receiving State shall exempt the head and members of the special mission and the members of its diplomatic staff from all personal services, from all public service of any kind whatsoever, and from military obligations such as those connected with requisitioning, military contributions and billeting.

63. The CHAIRMAN invited the Commission to consider article 30, the Special Rapporteur's proposals for which were contained in paragraph 9 of the section dealing with that article in his fourth report (A/CN.4/194/Add.2) and in his additional comments in document A/CN.4/194/Add.4.

64. Mr. BARTOŠ, Special Rapporteur, said that, in drafting article 30, he had started from the ideas underlying article 35 of the Vienna Convention on Diplomatic Relations. However, he had considered that exemption from personal services and contributions ought to be accorded not only to the head and members of the special mission but to the entire staff of the mission, including locally recruited staff, regardless of nationality or domicile. Otherwise, the regular functioning of the special mission could not be ensured. The Commission had considered that the legal rules corresponding to those needs of the special mission would involve an excessive derogation from the sovereign rights of the receiving State, but it

[4] For resumption of discussion, see 933rd meeting, paras. 63-74.

had decided to mention in the commentary the arguments which had been put forward.

65. The United Kingdom Government thought that there was no need to include in the article a clause relating to nationals of, and permanent residents in, the receiving State, as there was a general provision relating to those categories of persons in article 36 of the draft.

66. With reference to paragraphs (2) and (3) of the commentary, the Netherlands Government stated that there was no need to supplement the article.

67. The Canadian Government accepted the text of the article but did not approve of paragraph 2(*b*) of the commentary.

68. The Greek Government wished the immunities and privileges provided in the article to be limited, particularly in the case of technical or short-term special missions.

69. To meet the points made by Governments in their comments, he was prepared to specify in the commentary that, in the case of members of the staff who were nationals or permanent residents of the receiving State, exemption from personal services would depend on the decision of the receiving State.

70. Mr. USTOR said that article 30 was acceptable: it rightly did not go beyond the limits of article 35 in the Vienna Convention on Diplomatic Relations. However, as it codified an existing international practice it should start with the words "The head and members of the special mission and the members of its diplomatic staff shall be exempt...". The decision did not lie with the receiving State, as was the case in article 31. He hoped that the Drafting Committee would consider the modification he had suggested.

71. Mr. AGO said he did not agree that the proposed text should be altered, or that it was necessary to mention specifically the exception for nationals of, and permanent residents in, the receiving State. On the other hand, the impression should not be given that that exception would be established automatically by article 36, which dealt exclusively with immunity from jurisdiction and inviolability, for it might then be thought that the members of the special mission who were nationals of the receiving State would enjoy the immunity provided under article 30.

72. Mr. RAMANGASOAVINA said it should be specified in article 30 that members of the staff who were nationals of, or permanent residents in, the receiving State were not exempt from personal services. In a country suffering from deforestation and erosion, for instance, if the government required all the people to help with a reafforestation programme, it would be difficult to exempt certain citizens from that obligation merely because they were employed in the service of a foreign country.

73. The Special Rapporteur said in his commentary that those services could be used as a powerful weapon by the receiving State to harass the special mission. Naturally, States should execute the provisions of treaties with at least a minimum of good faith, but whatever international instruments might say, States could always, if they wished, hamper the work of a mission. It had been argued that special missions were generally of short duration, but in fact they sometimes lasted two or three years.

74. Mr. NAGENDRA SINGH said that it would be neither normal nor reasonable to require the receiving State to exempt nationals and permanent residents from personal services, as the Special Rapporteur had suggested. That point apart, article 30 was satisfactory.

75. Mr. BARTOŠ, Special Rapporteur, replying to Mr. Ustor, said that the State granted exemption from personal services because it was the State which imposed those services *ex officio*. In the case of members of the staff who were nationals of, or permanent residents in, the receiving State, great care would admittedly have to be exercised with regard to exemption from personal services. As a jurist, however, he believed it was preferable to apply the principle that everyone was of good faith until the contrary was proved.

76. Except for the first question raised by Mr. Ustor for the attention of the Drafting Committee, and subject to the Committee's decision to replace the phrase "The head and members of the special mission and the members of its diplomatic staff" by "The representatives and the members of the diplomatic staff", he thought there was no need to alter the proposed text.

77. The CHAIRMAN said that article 30 had not provoked any objection but the commentary would need to be cautiously worded as far as nationals of the receiving State were concerned. Their position and that of permanent residents in the receiving State might be considered when the Commission discussed article 36 and could either be regulated by a proviso of the kind found at the beginning of paragraph 1 of that article, or left to the good faith of the States concerned.

78. He suggested that article 30 be referred to the Drafting Committee.

It was so agreed.[5]

ARTICLE 31 (Exemption from customs duties and inspection) [35]

79. *Article 31* [35]

Exemption from customs duties and inspection

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

(*a*) Articles for the official use of the special mission;

(*b*) Articles for the personal use of the head and members of the special mission, of the members of its diplomatic staff, or of the members of their family who accompany them.

2. The personal baggage of the head and members of the special mission and of the members of its diplomatic staff shall be exempt from inspection, unless there are serious grounds for presuming that it contains articles not covered by the exemptions mentioned in paragraph 1 of this article, or articles the import or export of which is prohibited by the law or controlled by the quarantine regulations of the receiving State. Such inspection shall be

[5] For resumption of discussion, see 933rd meeting, paras. 75-77.

conducted only in the presence of the person concerned, of his authorized representative, or of a representative of the permanent diplomatic mission of the sending State.

80. The CHAIRMAN invited the Commission to consider article 31, the Special Rapporteur's proposals for which were contained in paragraph 12 of the section dealing with that article in his fourth report (A/CN.4/194/Add.2) and in his additional comments in document A/CN.4/194/Add.4.

81. Mr. BARTOŠ, Special Rapporteur, said that he had based article 31 on article 36 of the Vienna Convention on Diplomatic Relations, although he had not copied the text exactly. For instance, in sub-paragraph (*b*), the phrase "including articles intended for his establishment" had been omitted, because the question of establishment did not arise for members of a special mission. Similarly, the words "members of his family forming part of his household" had been replaced by "members of their family who accompany them". Exemption from inspection of the personal baggage of members of special missions was subject to the same conditions as that granted to diplomatic agents.

82. The Belgian Government thought the word "articles" in sub-paragraph (*b*) was too vague and should be replaced by "personal effects"; that point could be left to the Drafting Committee. The Belgian Government also proposed the deletion of the words "or of the members of their family who accompany them".

83. The Swedish Government observed that there was a discrepancy between the expression "who accompany them" in article 31 and the words "who are authorized by the receiving State to accompany them" in article 35, paragraph 1. With regard to the latter expression, he would point out that, although the receiving State could limit the number of the members of the family accompanying a member of a special mission, an authorization from that State would not always be necessary.

84. The Austrian Government said that there was some inconsistency between the wording of articles 31 and 32 of the draft with regard to exemption of administrative and technical staff from customs duties. The United Kingdom Government expressed an almost identical opinion.

85. The Canadian Government considered that the exemption referred to in the article should be removed, because it should remain a matter of courtesy and reciprocity.

86. The Government of Gabon considered that exemption of members of special missions from customs duties was one of the matters in which some discretion should be left to the authorities of the receiving State.

87. The United States Government had expressed reservations concerning the scope of exemption from customs duties and inspection. Its comments raised a matter of principle which the Commission should settle before making any amendment to article 31.

88. Lastly, the Greek Government considered that the privileges and immunities provided in the article should not be so extensive.

89. The comments of Governments related to the substance of the article, and the Commission should consider them carefully.

The meeting rose at 5.50 p.m.

920th MEETING

Tuesday, 13 June 1967, at 10 a.m.

Chairman: Sir Humphrey WALDOCK

Present: Mr. Ago, Mr. Bartoš, Mr. Castañeda, Mr. Castrén, Mr. Eustathiades, Mr. Jiménez de Aréchaga, Mr. Kearney, Mr. Nagendra Singh, Mr. Ramangasoavina, Mr. Reuter, Mr. Tammes, Mr. Ushakov, Mr. Ustor, Mr. Yasseen.

Special Missions

(A/CN.4/193 and Addenda; A/CN.4/194 and Addenda)

(continued)

[Item 1 of the agenda]

ARTICLE 31 (Exemption from customs duties and inspection) [35] *(continued)*[1]

1. The CHAIRMAN invited the Commission to continue its consideration of article 31, which had been introduced by the Special Rapporteur at the previous meeting.

2. Mr. CASTRÉN said that he was inclined to accept the existing text of article 31. Nevertheless, there was good reason for the comments by the Governments of Belgium and Sweden, both of which proposed that in paragraph 1 (*b*) the words "or of the members of their family who accompany them" should be deleted, since the matter was dealt with in article 35, paragraph 1. The Special Rapporteur had first said, in paragraphs 6 and 9 of his comments (A/CN.4/194/Add.2), that he accepted that suggestion, but had then said in paragraph 12(2) that it would be enough to mention the comments by those Governments in the commentary to the article. He (Mr. Castrén) could not agree; his view was that the sentence should be dropped, as it duplicated the provisions of article 35.

3. Mr. JIMÉNEZ de ARÉCHAGA said that while the provisions of paragraph 1 (*a*) had not elicited any comment, those of paragraph 1(*b*) had given rise to objections by all the Governments that had submitted comments on the article. The privilege of importing articles for personal use without paying customs duties or taxes was, in the case of permanent diplomatic missions, one of those which created most difficulty. If that privilege were extended to special missions, the draft articles were unlikely to receive general support.

[1] See 919th meeting, para. 79.

4. He therefore suggested that the exemption laid down in paragraph 1 should be restricted to articles necessary for the performance of the functions of the special mission and to the personal effects and baggage brought in by its members. It would not then extend to the duty-free importation of such articles as beverages and cigarettes, which was such a sensitive point in many countries.

5. Mr. NAGENDRA SINGH said he agreed with the proposal to delete the concluding words of paragraph 1 (*b*); the question of the members of the family would be covered by other provisions of the draft.

6. He could accept the remainder of paragraph 1 (*b*) because he interpreted the words "articles for the personal use" as having very much the same meaning as the words "personal effects and baggage", suggested by the Belgian Government.

7. The Austrian Government had drawn attention to the problem of the administrative and technical staff, covered by paragraph 2 of article 37—and not 36 as erroneously indicated by that Government—of the 1961 Vienna Convention on Diplomatic Relations. The members of the administrative and technical staff were not mentioned in article 31 of the draft on special missions. It was article 32 which dealt with that staff, but unlike article 37, paragraph 2, of the 1961 Vienna Convention, it made no provision for customs exemption in respect of articles imported at the time of first installation. The reason for that difference in approach was that members of the special mission would not normally stay long in the receiving State.

8. If the intention was not to grant any customs exemption to members of the administrative and technical staff except for the very limited privilege specified in paragraph 1 (*b*) of article 31, the words "the privileges and immunities specified in articles 24 to 31" in article 32 should be amended to read "the privileges and immunities specified in articles 24 to 30".

9. He had anticipated some of his observations on article 32 because, as was shown by the Austrian Government's comments, articles 31 and 32 were closely connected.

10. Mr. KEARNEY said that, since a special mission was temporary in character and limited in purpose, it should be granted fewer customs exemptions than a permanent diplomatic mission. Article 31, however, granted exemption from customs duties on articles for the personal use of all members of the special mission, including administrative and technical staff. It was therefore necessary to introduce some limitation into the provisions of paragraph 1. In view of the difficulty of making a distinction in practice between articles for official use and articles for personal use, he did not favour a limitation based on that distinction. Instead, he suggested that customs exemption should be confined to articles imported at the time of first installation, on the lines of article 37, paragraph 2, of the 1961 Vienna Convention. The special mission should be able to bring in, at the time of its first entry into the receiving State, such articles as it would require during its stay.

11. The formula which he proposed would give both States enough freedom and protection to suit the purposes of most special missions. Should a particular special mission need to conduct activities lasting a long time, the receiving State would certainly consent to make the necessary arrangements by special agreement.

12. Mr. TAMMES said that a number of government comments had shown the close connexion between articles 31 and 32. Article 32 specified that members of the administrative and technical staff enjoyed "the privileges and immunities specified in articles 24 to 31". Such staff would thus benefit from the exemption from all customs duties on articles for their personal use set forth in article 31.

13. The question whether such a wide measure of customs exemption was appropriate should be examined in the light of the provisions of article 2 of the draft. Paragraph (2) of the commentary to that article stated: "The scope and content of the task of a special mission are determined by mutual consent. Such consent may be expressed by any of the means indicated in paragraph (4) of the commentary on article 1. In practice, however, the agreement to the sending and reception of special missions is usually of an informal nature, often merely stating the purpose of the mission".[2]

14. In practice, arrangements for sending and receiving a special mission were often made in an extremely informal manner. They sometimes took the form of a mere telephone conversation between an expert and his counterpart in another country. As a result, the local authorities in the receiving State would have no prior knowledge of the arrival of the expert, accompanied by his administrative and technical staff; they would become aware of the privileges of the members of the special mission only when explanations were given to them by the central authorities. At the moment of entry into the receiving State, the position would thus be one of great confusion for the customs authorities, who would have to apply the provisions of article 31. Those authorities would not be aware of the arrangements made for the special mission and article 8 on notification did not provide an answer to the problem, since it made no provision for prior notification.

15. Article 31 should be examined with great care, bearing in mind the informal character of the arrangements for the special mission and the wide range of exemptions for which the article made provision.

16. Mr. USHAKOV said that he found it difficult to understand the doubts expressed by certain Governments with regard to paragraph 1 (*b*). For ordinary people articles for their personal use and their personal effects were always exempt from customs duty everywhere and the sub-paragraph did not provide for any privileges for members of special missions. There was consequently no basis for the United States Government's comment that the provision would result in the grant of personal privileges for members of special missions.

[2] *Yearbook of the International Law Commission, 1965*, vol. II, p. 166.

17. It was in fact paragraph 2 of article 31 which, like article 36 (2) of the Vienna Convention on Diplomatic Relations, was important, for it provided that the baggage of members of special missions should be exempt from inspection. Spirits and tobacco were subject to the customs regulations, which might include a limitation on the quantity per person, established by the receiving State.

18. He saw no reason why the exemption provided for in paragraph 1 (*b*) should be restricted and considered that the article should be retained as at present worded.

19. Mr. JIMÉNEZ de ARÉCHAGA said that there would be no problem if the provisions of article 31 were interpreted in the manner indicated by Mr. Ushakov. But the words "articles for personal use", employed in the 1961 Vienna Convention, had in fact been interpreted much more broadly. Under article 36 of that Convention, in many countries members of permanent diplomatic missions enjoyed such privileges as exemption from customs duty on the importation of a new motor car every two years and on the importation of certain quantities of foodstuffs and beverages. There would be vigorous resistance by governments to the extension of such privileges to members of special missions.

20. In 1958, when the Commission had adopted article 34 of its draft on diplomatic intercourse and immunities —the text on which article 36 of the 1961 Vienna Convention was based—it had stated in paragraph (3) of the commentary thereto:

> "Because these exemptions are open to abuses, States have very frequently made regulations, *inter alia*, restricting the quantity of goods imported or the period during which the import of articles for the establishment of the agent must take place, or specifying a period during which goods imported duty-free must not be resold. Such regulations cannot be regarded as inconsistent with the rule that the receiving State must grant the exemption in question."[3]

21. It was thus clear that, in practice, the privilege in question involved much more generous customs treatment than would be granted to any ordinary person.

22. It was true that the words "in accordance with such laws and regulations as it may adopt" gave the receiving State the power to regulate the matter and some countries had used that power to restrict the privilege. Those countries, however, were the exception rather than the rule.

23. Mr. USHAKOV said he agreed that abuses might arise in applying the provision on exemption from customs duties, but those abuses were caused by the exemption of baggage from inspection and not by paragraph 1 (*b*). The receiving State was in no way required to grant exemption on the scale which Mr. Jiménez de Aréchaga had just mentioned. What practice was followed was a domestic matter and was governed by the laws of the receiving State. The point was that paragraph 1 (*b*) did not give members of special missions any more rights than any other alien.

24. Mr. REUTER said that the subject was of some importance. Considering that customs difficulties arose over articles such as typewriters, portable radios, cars and so forth being brought into a country, obviously the results would be very different according as a liberal text or a restrictive text was chosen. In any case, he would accept the majority view on the point.

25. For reasons of form, paragraph 1 should be redrafted to read something like: "The receiving State shall adopt the necessary laws and regulations to permit...".

26. Paragraph 2 referred to the import or export of articles prohibited by law or controlled by the quarantine regulations of the receiving State. The paragraph seemed to draw a distinction between a strict prohibition laid down by law and a mere quarantine regulation. That was unacceptable, for, in addition to quarantine regulations, which applied mainly to dogs, there were also plant-health certificate requirements and several others of the same kind. He therefore proposed that the passage be amended to read: "or articles the import or export of which is prohibited or controlled by special regulations in the receiving State."

27. Mr. BARTOŠ, Special Rapporteur, said that article 31 did not include the phrase relating to articles intended for the establishment of the mission—which appeared in the Vienna Convention—because the staff of a special mission was not established in the receiving State.

28. He could not agree with Mr. Ushakov: paragraph 1 (*b*) did not refer so much to personal effects contained in the baggage as to articles for personal use imported into the receiving State. Mr. Jiménez de Aréchaga had rightly raised the problem of customs-free consignment of articles for the personal use of members of a special mission. The article clearly stated that "articles for... personal use" enjoyed the exemption, and did not specify that what was referred to was articles contained in the baggage. In practice, diplomats obtained articles from all countries without paying customs duties; if that practice were adopted by members of special missions, it might prove harmful to the interests of the mission.

29. Imports of alcohol and tobacco had always been a point of dispute between special missions and the receiving State. That was why the Commission had adopted the reservation set out in the first part of paragraph 1, the wording of which showed that the exemption was not absolute, but that its application and modalities were governed by the receiving State. The receiving State should not, however, consider itself thereby authorized to take discriminatory measures. It was for that reason that the Commission had decided to mention the question of the importation of such articles in its commentary to the 1965 draft.[4]

30. Mr. Ushakov had quite rightly pointed out that the used personal effects of any foreigner were exempt from customs duties when imported in his baggage and that that was a universal rule.

[3] *Yearbook of the International Law Commission, 1958*, vol. II, p. 100.

[4] *Yearbook of the International Law Commission, 1965*, vol. II, p. 186.

31. With regard to customs duties on cameras or cine-cameras, transistors and portable typewriters, which were now regarded as personal effects of travellers, the latest convention on tourism provided for customs exemption for such articles.

32. He doubted whether the Commission should accept Mr. Jiménez de Aréchaga's proposal that reference should be made to articles contained in baggage. In any case, members of special missions proceeding to countries where the food was very different from that of their own should be enabled to import foodstuffs, as well as medicaments which might be unobtainable in local pharmacies. That was an argument in favour of the wording used in the Vienna Convention.

33. The question before the Commission was whether or not it should retain the wording adopted for the Vienna Convention. If it did, the door would be opened to abuses in connexion with subsequent imports; if it did not, a new text might create difficulties for special missions. The Commission should be fully aware of the implications of a possible limitation of the exemption.

34. The Commission should also agree on the exact meaning of the word "articles" and decide whether it referred to articles contained in and arriving at the same time as the baggage, or to articles for personal use, irrespective of how they were imported into the receiving State.

35. The CHAIRMAN said that the issue with regard to paragraph 1 (*b*) was whether the exemption should cover only articles brought into the receiving State when the special mission first entered the country, or whether the privilege should also apply to articles subsequently imported for the personal use of the members of the special mission.

36. Mr. AGO said that the Commission should not pay overmuch attention to questions of customs exemption; even if there might be some abuse, the State granting the exemption could not be seriously harmed thereby.

37. Generally speaking, he was not in favour of adopting different wording from that used in the Vienna Convention on Diplomatic Relations. On one particular point, however, he agreed with Mr. Reuter, namely, that the French text of article 36, paragraph 1, of that Convention, was incomprehensible. He himself had protested against it during the Conference, but to no purpose. If the Commission wrote a clearer provision into its draft, it might help indirectly to render the Vienna Convention more intelligible. Instead of the phrase "in accordance with such laws and regulations" the Commission might use some such wording as "subject to such laws and regulations", if that was the meaning it wished to give to the opening phrase of the article.

38. In paragraph 1 (*b*) the qualification "forming part of his household", referring to members of the family, used in article 36 of the Vienna Convention, had been replaced by "who accompany them". That wording might raise a problem; for instance, if the wife of a member of a special mission did not travel with her husband and only arrived some days later, would she be regarded as not accompanying her husband and in consequence be denied the privileges provided for in that paragraph 1 (*b*)?

39. Mr. BARTOŠ, Special Rapporteur, said he had suggested at the previous meeting that the words "who accompany them" might be replaced by the words "authorized to accompany them". That would also cover the point that the receiving State did not always issue such authorizations. Alternatively, the Commission might adopt the simplest wording of all, "or of the members of their family", without any qualification.

40. Mr. AGO said he would prefer the last-mentioned solution, because it would be better not to raise questions of authorization in the draft.

41. The CHAIRMAN pointed out that the Commission had decided to deal with the question of members of the family in another part of the draft.

42. Mr. EUSTATHIADES said he associated himself with Mr. Ago's and Mr. Reuter's criticism of the drafting of article 36, paragraph 1, of the Vienna Convention. The lack of precision in the opening sentence of article 31 made it necessary to adopt a different wording, in order to avoid practical difficulties.

43. With regard to paragraphs 1 (*a*) and 1 (*b*) he considered that "articles for the official use of the special mission", referred to in paragraph 1 (*a*), could be sent separately, but that "articles for the personal use of the head and members of the special mission", referred to in paragraph 1 (*b*), should be part of the baggage of the person concerned and should arrive with him; they could be brought in on several occasions if the person concerned left and came back, but separate import should be excluded.

44. Mr. BARTOŠ, Special Rapporteur, describing the background of the identical provisions included in article 36, paragraph 1, of the Vienna Convention on Diplomatic Relations and in article 50, paragraph 1, of the Vienna Convention on Consular Relations, which read "The receiving State shall, in accordance with such laws and regulations as it may adopt, permit...", said that at the first Vienna Conference, several heads of delegations, including himself, had taken the view that the provision was procedural, rather than substantive. According to that view, the receiving State could not determine whether or not the case was one for exemption; all it could do was to establish the modalities for exemption. For instance, it could lay down restrictive regulations governing such points as the time-limit within which applications must be submitted and the inspection or declaration of articles. In the light of that explanation, the provision had been adopted by a two-thirds majority, but it could not be denied that there was some doubt as to its meaning.

45. Other explanations had been put forward during the second Vienna Conference, and it had been said that the receiving State could fix the extent to which exemption would be granted.

46. The two Conferences had thus adopted an identical provision, but attached different meanings to it. The

Commission was not, of course, obliged to use the same wording. The English text of the opening words of paragraph 1, "The receiving State shall, in accordance with such laws and regulations as it may adopt, permit...", was undoubtedly more satisfactory than its French equivalent. In the draft articles on diplomatic intercourse and immunities adopted by the Commission in 1958, the French version of the corresponding article, article 34, was closer in construction to the English, since it read: "*L'État accréditaire accorde, suivant les dispositions de sa législation...*" ("The receiving State shall, in accordance with the regulations established by its legislation...").[5] The Commission might consider going back to a wording of that kind.

47. Mr. USTOR said that until 1961 the exemption of diplomatic agents from customs duties was not regarded as a rule of customary international law but merely as a matter of international courtesy. The 1961 Vienna Conference had raised that exemption to the status of a rule of international law, but had done so under a compromise formula embodied in the words "in accordance with such laws and regulations as it may adopt".

48. The position was that, as between parties to the 1961 Vienna Convention, the duty to grant customs exemption to diplomatic agents now constituted a rule of international law. At the same time, however, the receiving State had wide powers to introduce laws and regulations to regulate the whole matter in all its details.

49. As far as the privilege set forth in paragraph 1 (*b*) was concerned, the position was in some ways similar to that of tax exemption. It was possible to arrive at quite different results depending on what was considered to be a high-level special mission or a mission of the ordinary kind. Perhaps the Drafting Committee should be instructed to prepare alternative texts, as in the case of article 29, on exemption from dues and taxes, so that the Commission could reach a definite decision at a later stage.

50. Mr. CASTRÉN said that the introductory part of paragraph 1 contained a reservation which enabled the receiving State to limit the scope of the exemptions provided for in paragraphs 1 (*a*) and 1 (*b*). It would be unwise to amend the substance of paragraph 1 (*b*), since some special missions might continue for a very long time, even for several years.

51. The CHAIRMAN said that the Commission seemed to have no very clear view on the issue of substance and should perhaps wait for a fresh text from the Drafting Committee which would have to pay special attention to the wording of the opening proviso.

52. Speaking as a member of the Commission, he said that the issue was not of great importance, and perhaps was more a matter of presentation than substance. If the Commission formulated a very strict rule, confining the exemption to personal baggage, members of the special mission might seek further privileges through the permanent mission. As many governments were reluctant to grant extensive immunities, a restrictive approach might commend itself to them. They might be uneasy if special missions in their own right had access to the exemptions of a permanent mission, but their concern would be allayed by the fact that those exemptions would be subject to the rules governing permanent missions. Even if a provision on the lines of the corresponding provision of the Vienna Convention on Diplomatic Relations were adopted, he doubted whether that would open the door to dangerous abuse.

53. He suggested that the article might now be referred to the Drafting Committee.

It was so agreed.[6]

ARTICLE 32 (Administrative and technical staff) [36]

54. *Article 32* [36]

Administrative and technical staff

Members of the administrative and technical staff of the special mission shall, if they are not nationals of or permanently resident in the receiving State, enjoy the privileges and immunities specified in articles 24 to 31, except that the immunity from civil and administrative jurisdiction of the receiving State specified in paragraph 2 of article 26 shall not extend to acts performed outside the course of their duties.

55. The CHAIRMAN invited the Commission to consider article 32, the Special Rapporteur's proposals for which were contained in paragraph 15 of the section dealing with that article in his fourth report (A/CN.4/194/Add.2) and in his additional comments in document A/CN.4/194/Add.4.

56. Mr. BARTOŠ, Special Rapporteur, said that article 32 corresponded to article 37, paragraph 2, of the Vienna Convention on Diplomatic Relations; the other matters dealt with in the latter article were divided up in the draft between article 33 (Members of the service staff), article 34 (Private staff) and article 35 (Members of the family). At the first reading, the Commission had considered it preferable to split up in that way the provisions concerning the various categories of persons grouped together in article 37 of the Vienna Convention.

57. Article 32 laid down the same rules for administrative and technical staff as did the Vienna Convention, but the idea expressed in the last sentence in article 37, paragraph 2, of the Convention had been omitted, since there could be no question of first installation for that category of persons, or of installation for the diplomatic staff of the special mission. The only other difference between article 32 and the corresponding provision in the Vienna Convention was that members of families were not mentioned in the former; it was apparently the Commission's intention to group everything concerning members of families in article 35, and he was wholly in favour of that method.

58. The Government of Israel suggested that the privileges and immunities set forth in the article should be extended to the entire staff of the special mission. That was a different conception from that of the Commission.

[5] *Yearbook of the International Law Commission, 1958*, vol. II, p. 104 (French), p. 100 (English).

[6] For resumption of discussion, see 933rd meeting, paras. 78-82.

59. The United Kingdom Government feared that the wording of the article might give administrative and technical staff the right to customs privileges for first installation. As he had just explained, however, that privilege was excluded.

60. Both the Belgian Government and the United Kingdom Government considered it unnecessary to insert the clause excluding nationals of, and permanent residents in, the receiving State from the application of the article, since that question was dealt with in article 36. He agreed that it was better to avoid repetition; the point could be dealt with by the Drafting Committee.

61. The Netherlands Government proposed that the article should be amended in such a manner that liability for damage resulting from road accidents fell outside the scope of the immunity. He would point out that immunity from civil and administrative jurisdiction was limited to acts performed in the course of duty. Obviously, it was sometimes extremely difficult to determine whether a particular motor trip came within the course of duty of the special mission or not, and whether the offence of exceeding the speed limit, for example, could be attributed to the needs of the special mission. The Commission might perhaps add the words "and to motor vehicle accidents" at the end of the article.

62. The United States Government doubted whether it was necessary to extend the privileges and immunities provided for in the article to members of families. The Commission could consider that point when it came to discuss article 35.

63. The essential problem was to decide whether, in the case of administrative and technical staff, the Commission wished to follow the model of the Vienna Convention on Diplomatic Relations or to depart from it. If it wished to depart from it, it should review each of articles 24 to 31 in order to decide whether or not it was applicable to administrative and technical staff, but he would advise against a review. In his opinion, except for the restriction on immunity from civil and administrative jurisdiction —and, possibly, motor vehicle accidents— members of the administrative and technical staff should enjoy exactly the same privileges and immunities as members of the diplomatic staff, for the administrative and technical staff was essential for the efficient operation of the special mission.

64. Mr. USHAKOV said that the provision laid down in the last sentence of article 37, paragraph 2, of the Vienna Convention should be included in article 32 of the draft. Of course, in the case of the administrative and technical staff of a special mission, it was not a question of articles imported at the time of their first installation but of their baggage and personal effects. He suggested, therefore, that the following sentence be added at the end of article 32: "They shall also enjoy the privileges specified in article 31, paragraph 1, in respect of their baggage and personal effects." On the other hand, the draft should not, any more than did the Vienna Convention, provide that the personal baggage of the administrative and technical staff should be exempt from inspection.

65. With reference to the proposal that it should be made clear that immunity did not apply to responsibility for damage resulting from road traffic accidents, that was a matter for the civil courts. Since article 32 provided that the immunity from civil jurisdiction granted to administrative and technical staff did not apply to acts performed outside the course of their duties, it was pointless to include a special provision on that subject.

66. Mr. CASTAÑEDA said that the exemption from customs duties mentioned in article 31, paragraph 1, might mean that administrative and technical staff would be able to import various articles subsequently.

67. Mr. KEARNEY said that although the privileges granted in article 31 were not restricted to first entry privileges, they should be so restricted in article 32 for practical reasons. Anyone who had had experience of dealing with personnel matters for foreign service staff was aware how much resentment could be caused by giving different treatment to persons of equivalent grades.

68. Mr. REUTER said that the question of road traffic accidents raised very complex legal problems. The Government which had proposed that article 32 should be amended so that immunity would not apply in the case of road traffic accidents was undoubtedly hoping for the establishment of a general rule under which there could never be any question of international status in such cases and road traffic accidents would come under ordinary law. He wondered, however, whether that result would be achieved by the wording which had been proposed.

69. With regard to civil and administrative questions only, he himself favoured a rule which went beyond the scope of special missions and would eventually become part of French law: that was the rule that every driver was responsible for any accident caused by him. No privileges should be granted in such cases; all drivers should be compelled to take out an insurance policy. The question was a difficult one and, for the time being, the Commission did not have the necessary information on which to take a final decision. It should, therefore, either stress the seriousness of the question in its report and explain that it did not have the necessary information to reach a decision, or consider very carefully whether it could adopt a formula which would also cover the case of motor vehicles driven by a head of mission or a diplomatic agent.

70. Mr. BARTOŠ, Special Rapporteur, said he proposed that a sub-paragraph (*d*) be added at the end of article 26, paragraph 2, reading: "An action relating to road traffic accidents". There would then be no immunity from the civil and administrative jurisdiction of the receiving State. That had to be made clear, for it frequently happened that the compensation paid by insurance companies was inadequate.

71. The CHAIRMAN said that if motor car accidents were to be covered in a separate provision, presumably the Special Rapporteur would present a formal proposal.

72. Mr. BARTOŠ, Special Rapporteur, said he could accept the addition to the end of article 32 proposed by

Mr. Ushakov. He was also prepared to include in article 36 the clause concerning nationals of the receiving State and persons permanently resident in that State.

73. The CHAIRMAN suggested that the Drafting Committee be asked to consider the question of a separate provision on liability for motor car accidents in connexion with article 26.

It was so agreed.[7]

74. Mr. USTOR suggested that the Drafting Committee might also consider the possibility of eliminating articles 32 to 35 and incorporating their substance in the preceding articles so as not to have two separate sets of articles on the members of the mission and of its diplomatic staff, on the one hand, and the members of the administrative, technical and service staff on the other. The draft would then follow the Vienna Convention system less closely, but would be easier to consult and to understand.

75. Mr. BARTOŠ, Special Rapporteur, said that the participants in the Vienna Conference had not been completely satisfied with the wording of article 37 of the Convention on Diplomatic Relations. It might therefore be better to devote a special article to each category of staff.

76. The CHAIRMAN, speaking as a member of the Commission, said that he doubted whether it was necessary to drop the reference to nationals of, or permanent residents in, the receiving State, for such a deletion would be a departure from the Vienna Convention on Diplomatic Relations and might be confusing.

77. Speaking as Chairman, he suggested that article 32 be referred to the Drafting Committee, together with the problem of liability for road traffic accidents.

It was so agreed.[8]

Membership of the Drafting Committee

78. The CHAIRMAN said that he had received a letter from Mr. Albónico stating that, for reasons beyond his control and very much to his regret, he had had to go back to Chile and would not be returning before the end of the session. That left the Drafting Committee without a Spanish-speaking member and he suggested that Mr. Jiménez de Aréchaga be asked to replace Mr. Albónico.

79. Mr. JIMÉNEZ de ARÉCHAGA said he was willing to serve on the Drafting Committee.

80. Mr. AGO said he regretted the forced departure of Mr. Albónico and noted with concern that, despite the enlargement of the Commission's membership, the number of members participating in the work of the session had not increased. He asked the Chairman to appeal to all members to do their utmost to attend the Commission's meetings during the last few weeks of the session, for if there were any more absences, the question of voting might raise serious problems.

The meeting rose at 1 p.m.

921st MEETING

Wednesday, 14 June 1967, at 10.10 a.m.

Chairman: Sir Humphrey WALDOCK

Present: Mr. Ago, Mr. Bartoš, Mr. Castañeda, Mr. Castrén, Mr. Eustathiades, Mr. Jiménez de Aréchaga, Mr. Kearney, Mr. Nagendra Singh, Mr. Ramangasoavina, Mr. Reuter, Mr. Tammes, Mr. Ushakov, Mr. Ustor, Mr. Yasseen.

Special Missions

(A/CN.4/193 and Addenda; A/CN.4/194 and Addenda)

(continued)

[Item 1 of the agenda]

ARTICLE 33 (Members of the service staff) [37]

1. *Article 33* [37]

Members of the service staff

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

2. The CHAIRMAN invited the Commission to consider article 33, the Special Rapporteur's proposals for which were contained in paragraph 11 of the section dealing with that article in his fourth report (A/CN.4/194/Add.2) and in his additional comments in document A/CN.4/194/Add.4.

3. Mr. BARTOŠ, Special Rapporteur, said that article 33, which was based on article 37, paragraph 3, of the Vienna Convention on Diplomatic Relations, provided that members of the service staff enjoyed immunities only in respect of acts performed in the course of their duties and were exempt from dues and taxes in respect of the emoluments they received by reason of their employment.

4. The Belgian Government asked that an express reference should be made in that article to exemption from social security legislation. The Drafting Committee would have to decide whether there was any need to mention social security, which had already been dealt with in article 28.

5. The Greek Government thought that that provision was too extensive. He, on the contrary, thought that it would be a mistake to put any further restriction on any privileges and immunities provided for that category of staff.

6. His conclusion was that the article could be kept in its present form, with perhaps the addition of the phrase

[7] See 933rd meeting, para. 2.

[8] For resumption of discussion, see 934th meeting, paras. 1-27.

suggested by the Belgian Government concerning the exemption from social security legislation of members of service staff who were not nationals of the receiving State or permanently resident in that State.

7. Mr. REUTER said that he agreed with the Special Rapporteur's conclusions. He wished however to ask him whether, from the terminological point of view, the expressions *"ressortissants de l'État de réception"* and *"qui ont la nationalité de l'État de réception"*, used in the heading and in the text of article 36 of the draft, were equivalent.

8. Mr. BARTOŠ, Special Rapporteur, said that the word *"ressortissants"* had been wrongly used in the French text of the Vienna Conventions. In French jurisprudence, the word *"ressortissants"* had a much broader meaning than the term *"nationaux"*. The inhabitants of French possessions who did not possess French nationality had been considered *"ressortissants"* of the French State. Later on, the notion had been applied to members of the French Foreign Legion, and, in time of war, to any person serving in the French armed forces. He did not know the exact reason why the Vienna Conventions used the term *"ressortissants"*, but he himself preferred the word *"nationaux"*. Constitutional law drew a distinction between active and passive subjects and the same distinction was made in Slavic and German terminology.

9. Mr. YASSEEN said that he approved the article as a whole. The immunity provided for that category of staff of the special mission could not be restricted any further. The article was, in fact, a strict application of the functional theory.

10. He shared the Special Rapporteur's view regarding the Belgian Government's suggestion. The question raised by Mr. Reuter, although essentially terminological, touched on an important subject. The legal systems which had granted persons a status different from that of nationals were on the decline, and it was inadvisable that article 33 should, by using the word *"ressortissants"*, give further currency to a notion which was becoming obsolete. The expression which should be used was *"qui n'ont pas la nationalité de l'État de réception"*.

11. Mr. CASTRÉN said that what the Commission was now discussing was not a question of substance; questions of form should be referred to the Drafting Committee. Although he personally felt that the word *"ressortissants"* ought to be avoided, he considered it better to keep the present wording of the article, since it reproduced the terms used by the two Vienna Conventions.

12. Mr. JIMÉNEZ de ARÉCHAGA said that the Belgian Government's proposal to delete the reference to the nationality or permanent residence of members of the service staff was acceptable, because the point was covered in article 36, paragraph 2.

13. The Belgian Government's second amendment (A/CN.4/188) should not be accepted because it would create doubts about the position of locally-recruited temporary staff who were not nationals of or permanently resident in the receiving State.

14. The Netherlands Government's proposal (A/CN.4/193) could create practical difficulties because there might be some uncertainty as to whether accidents caused, for example, by a lorry or a bicycle would be excluded.

15. Mr. NAGENDRA SINGH said that both the amendments proposed by the Belgian Government should be referred to the Drafting Committee, since no issue of substance was involved.

16. Mr. EUSTATHIADES, referring to the Netherlands Government's comments, said he wished to advert to a question which had been discussed at the previous meeting. He understood that traffic accidents were to be the subject of a separate provision, which the Commission would consider later in connexion with article 26. He would like to know, however, whether a person attached to the domestic staff of a member of a special mission enjoyed immunity from civil jurisdiction if he was responsible for an automobile accident. Did such a person belong to the "service staff" within the meaning of article 33?

17. Mr. BARTOŠ, Special Rapporteur, said that under a classification frequently used in international law and international practice, chauffeurs were considered as members of the "service staff"; it was in connexion with that category of staff that the problem of traffic accidents mainly arose. That was probably the reason why the Netherlands Government had made its comment. If the Commission accepted the suggestion which Mr. Reuter had made at the previous meeting,[1] that immunity from civil jurisdiction in general should be abolished for acts involving third-party liability for motor accidents, the problem would be more or less solved. The question then arose whether a similar limitation should be placed on functional immunity, a solution which had not in fact been accepted at the Vienna Conference. In his opinion, a cook driving a car to the market on an errand for a member of the special mission was not covered by functional immunity, in contradistinction to the official chauffeur who, when driving a member of the mission, was acting in the course of his duties. He preferred to keep to the formula adopted by the Vienna Convention on Diplomatic Relations.

18. With regard to the term *"ressortissants"*, certain countries, like France, maintained the fiction or institution of privileged foreigners, while other countries, like the United States, had the institution of protected persons. It was incorrect to say, however, that persons who enjoyed the right of asylum were *"ressortissants"* of the country of asylum. That was a point on which the Drafting Committee should reflect, for what it all came to, as Mr. Reuter had said, was a question of terminology.

19. Mr. USHAKOV said that, in his opinion, chauffeurs were not members of the service staff, either within the meaning of article 1(*g*) of the Vienna Convention on Diplomatic Relations or within the meaning of article 0(*l*) of the draft.

20. Mr. BARTOŠ, Special Rapporteur, said that in his own country a chauffeur was considered a skilled worker

[1] Para. 69.

and therefore a member of the technical staff. In some countries, no skill was considered necessary for that function, while in others, a chauffeur was treated as a domestic servant. It was hard to say what was the commonest view on the question.

21. The CHAIRMAN said that the problem raised by the use of the word "*ressortissant*" was one that affected the French text, although its meaning might also have a bearing on the interpretation of the English text. Any change of terminology would mean a departure from the text of the Vienna Convention on Diplomatic Relations.

22. Mr. YASSEEN said that as he understood the matter, the term "*ressortissant*" in French terminology had a different connotation from that of the term "*national*". The Commission would perhaps decide to support Mr. Castrén's view and adopt the terminology of the two Vienna Conventions, but it should be remembered that since 1961 forty States had gained their independence and that consequently the word "*ressortissant*", which had perhaps been justified at the time, was no longer acceptable.

23. Mr. BARTOŠ, Special Rapporteur, said he had the impression that in the United Kingdom, a distinction was made between "citizens" and "subjects" and it seemed to him that it was approximately the same difference as the one between "*nationaux*" and "*ressortissants*".

24. The CHAIRMAN said that in the English text of the Vienna Convention on Diplomatic Relations the word "national" had been used, and perhaps in United Kingdom practice it was interpreted in a fairly wide sense.

25. Mr. USTOR said that the interpretation of the word "*ressortissants*" had been discussed at length in the League of Nations in connexion with the application of the Treaty of Versailles and the Treaty of Trianon. One view was that it more or less meant nationals, and another that it meant the population living in a certain country and not only the nationals of the country.

26. The CHAIRMAN said he thought that the expression "permanently resident" would be sufficient in the present context.

27. Mr. BARTOŠ, Special Rapporteur, said that the question of the distinction between "*nationaux*" and "*ressortissants*" did not arise in the case of the English or Spanish texts and he accordingly proposed that the word "*nationaux*" be adopted for the French text. After all, the expression "*ressortissants*" belonged to the old French terminology, which went back to the Treaty of Vienna.

28. The CHAIRMAN suggested that article 33 be referred to the Drafting Committee.

It was so agreed.[2]

ARTICLE 34 (Private staff) [38]

29. *Article 34* [38]

Private staff

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

30. The CHAIRMAN invited the Commission to consider article 34, the Special Rapporteur's proposals for which were contained in paragraph 9 of the section on that article in his fourth report (A/CN.4/194/Add.2)and in his additional comments in document A/CN.4/194/Add.4.

31. Mr. BARTOŠ, Special Rapporteur, said that the article corresponded to paragraph 4 of article 37 of the Vienna Convention on Diplomatic Relations and followed it very closely. The expression "private servants" used in that Convention had, however, been replaced by the expression "private staff", as in the Vienna Convention on Consular Relations. There were two reasons for that change in the terminology: first, the word "servant" was reminiscent of a social order that was now a thing of the past, and secondly, the persons to whom the article referred might be private tutors or nurses, who were certainly not servants.

32. The article also contained the words "who are authorized by the receiving State to accompany them in the territory of the receiving State", which did not appear in the corresponding provision of the Vienna Convention on Diplomatic Relations.

33. Apart from those two changes, the article laid down precisely the same rules as the corresponding provision of the Vienna Convention. The persons concerned were entitled to exemption from dues and taxes only on the emoluments they received by reason of their employment. In other respects, their status was left to the discretion of the receiving State, as was made clear in the last two sentences of the article.

34. The exception made in the case of persons who were nationals of or permanently resident in the receiving State gave rise to the same problem as in article 33. The Commission should note in that connexion that some States, especially the Arab States, preferred the idea of "habitual residence" to that of "permanent residence". Tunisia had observed that some aliens habitually resident in North African countries made a kind of profession of offering their services to special missions from various States, thereby creating potentially awkward situations. Generally speaking, it was the Commonwealth countries which regarded permanent domicile as an established legal institution.

35. He had already dealt with the comment by the Netherlands Government, which considered that the expression "private servants" should be reintroduced.

[2] For resumption of discussion, see 934th meeting, paras. 28-30.

36. The Greek Government wished to restrict the privileges and immunities of the persons referred to in the article. But the privileges for which the article provided represented the minimum. He (Mr. Bartoš) had always considered, and still considered, that such persons should be granted "minor" immunity from criminal jurisdiction, because they were indispensable to the functioning of the special mission. But the Commission had not taken that view and no Government had advocated it; consequently, he would not raise it again.

37. The only point on which he desired to have the Commission's opinion was the United Kingdom Government's suggestion that exemption from taxation on emoluments should not extend beyond six months.

38. The CHAIRMAN said he did not consider that the United Kingdom proposal justified an alteration in the text, because it dealt with a very special point which had little significance in the case of special missions as they were usually of short duration.

39. Mr. YASSEEN said that he too saw no reason to alter the wording of the article as a result of the United Kingdom Government's comment. Most special missions were of short duration and the article moreover contained a provision which made the presence of such persons dependent on the agreement of the receiving State, which could thus make its acceptance of them subject to certain conditions if it wished.

40. Mr. AGO said that he agreed with Mr. Yasseen. The Commission should not make any changes in the terminology used in the article. In particular, it would be better not to drop the expression "permanently resident in" which had been preferred to any other by the Vienna Conference on Diplomatic Intercourse and Immunities. It must be remembered, too, that if a receiving State had any objection to the presence of some other person, it always had the right not to accept him.

41. The CHAIRMAN suggested that article 34 be referred to the Drafting Committee.

It was so agreed.[3]

ARTICLE 35 (Members of the family) [39]

42. *Article 35* [39]

Members of the family

1. The members of the families of the head and members of the special mission and of its diplomatic staff who are authorized by the receiving State to accompany them shall, if they are not nationals of the receiving State, enjoy the privileges and immunities specified in articles 24 to 31.

2. Members of the families of the administrative and technical staff of the special mission who are authorized by the receiving State to accompany them shall, if they are not nationals of or permanently resident in the receiving State, enjoy the privileges and immunities specified in article 32.

43. The CHAIRMAN invited the Commission to consider article 35, the Special Rapporteur's proposals for which were contained in paragraph 16 of the section dealing with that article in his fourth report (A/CN.4/194/Add.2) and in his additional comments in the supplements to that report (A/CN.4/194/Add.4 and Add.5).

44. Mr. BARTOŠ, Special Rapporteur, said that article 35 corresponded to paragraph 1 of article 37 of the Vienna Convention on Diplomatic Relations, but contained certain new provisions deemed necessary in the case of special missions. For instance, the phrase "who are authorized by the receiving State to accompany them" had been added, although he was not very satisfied with that wording. Admittedly, there were cases where the receiving State, either for political reasons or for reasons of expediency—for example, when the special mission was moving to frontier areas—did not authorize members of the special mission to take members of their families with them. But express permission was not invariably required and he would therefore prefer the wording "if the receiving State does not object".

45. The other noteworthy difference from the Vienna Convention was the addition of a paragraph 2, which concerned members of the families of the administrative and technical Staff and touched on a question which had not been dealt with in article 32.

46. With regard to paragraph 1, in which there was a reference to articles 24-31, the Belgian Government found it hard to see how a member of the family could enjoy tax exemption on "income attaching to functions with the special mission", for which provision was made in article 29. There were occasions, however, where a member of a special mission was entitled to an addition to his salary if he was accompanied by a member of his family; in that case, the reference to article 29 was justified. It was a minor point, which could be settled by the Drafting Committee.

47. The Drafting Committee would have to examine paragraph 2 carefully in order to eliminate as far as possible the misunderstandings which appeared to have provoked the comments by the United Kingdom and Austrian Governments.

48. In addition to repeating the comment on road accidents which it had made on previous articles, the Netherlands Government proposed that the words "in so far as these privileges and immunities are granted to them by the receiving State" be added to paragraph 1 and that paragraph 2 be amended accordingly.

49. The United States Government doubted whether the proposed rule was necessary, while the Greek Government wished to restrict the privileges and immunities for which the article provided.

50. Thus, the substance of article 35 had been seriously criticized, especially in the comments by the United States and Netherlands Governments.

51. Mr. TAMMES said that the text of article 35 was not clear. If the phrase "the members of the families of the head and members of the special mission and of its diplomatic staff who are authorized by the receiving State to accompany them" meant that those persons always required the authorization of the receiving State,

[3] For resumption of discussion, see 934th meeting, paras. 31 and 32.

then a rule to that effect would have to be inserted at the beginning of the draft among the articles dealing with consent and notification. Personally he did not think that such an interpretation was possible, given the fact that travel between many countries was free and members of families could travel in their own right without any need for an authorization: the question of restricted areas was of course a separate one. That being so, he presumed that the phrase must mean that only authorized members of families could enjoy the privileges and immunities specified in articles 24 to 31, the matter being left to the discretion of the receiving State. Thus article 35 did not amount to much and the reference to authorization should either be deleted and the privileges and immunities extended to all members of families, or a more elastic formula of the kind incorporated in article 34 should be adopted.

52. Mr. AGO said that article 35 dealt with the privileges and immunities accorded to members of the family and it was obvious that, in order to enjoy those privileges and immunities, the members of the family had first to have been admitted into the receiving State. Was there really any need for the Commission to decide the awkward question whether the receiving State had to give official permission for members of a special mission to be accompanied by members of their families or whether such permission could be assumed? To avoid creating unnecessary difficulties, he would suggest that the passage should merely refer to "the members of the families".

53. Mr. NAGENDRA SINGH said that he entirely agreed with the Belgian Government's comment regarding tax exemption for members of the family. Those persons would not normally stay long enough in the receiving State for their incomes to be taxable; however, if circumstances arose in which they earned income that was taxable in the receiving State, there was no justification whatsoever, under the functional principle, for granting them exemption.

54. As he had mentioned during the discussion on articles 31 and 32, the provisions of those articles granted members of the administrative and technical staff of a special mission greater privileges than those enjoyed by the corresponding staff of permanent missions. As far as members of the families of such staff were concerned, paragraph 2 of article 35 gave them greater privileges than those extended to persons of the same category by the 1961 Vienna Convention. Article 37, paragraph 2, of that Convention gave members of the family the benefit of the privileges and immunities specified in articles 29 to 35. With regard to the privileges specified in article 36 of the 1961 Convention, those persons only enjoyed the benefit of paragraph 1 "in respect of articles imported at the time of first installation".

55. Since article 32 of the draft extended to the administrative and technical staff of the special mission the benefit of the "privileges and immunities specified in articles 24 to 31", and article 31 did not limit customs exemption to articles imported at the time of first installation, the result was to give them, and consequently members of their families by virtue of paragraph 2 of article 35, greater privileges than those granted to the same categories of persons in the case of permanent missions by the 1961 Vienna Convention.

56. Special missions were temporary by nature, so did not require any customs exemption; if any such exemption were to be granted, it should be limited to articles imported on first installation.

57. He supported the proposal for the deletion of the words "who are authorized by the receiving State to accompany them".

58. Mr. JIMÉNEZ de ARÉCHAGA said he also approved the deletion of those words. In 1965, the Special Rapporteur had proposed an article 31, entitled "Status of family members", which dealt at length in paragraphs 1, 2 and 3 with the question of the entry of members of the families of the head and members of the staff of the special mission.[4] The discussion on that article[5] had shown little support in the Commission for the idea of a special authorization regarding the entry of members of the family into the receiving State. As a result, paragraphs 1, 2 and 3 had been dropped from the article. However, in the shortened text introduced at the 819th meeting as article 34, entitled "Members of the family", the words "who are authorized by the receiving State to accompany them" appeared in paragraph 1.[6]

59. Those words, which were a survival from the earlier text, should be deleted. The idea which they were intended to convey could be covered in one of the general articles of the draft, such as article 3 or article 4.

60. He agreed with the Special Rapporteur's recommendation (A/CN.4/194/Add.2) that the Netherlands Government's proposal concerning paragraph 1 should not be adopted. He did not agree, however, with the Special Rapporteur's favourable view of the suggestion by that same Government that the members of the family should not enjoy immunity in respect of damage resulting from road accidents.

61. That suggestion was inadequate in two respects. First, it dealt with only one type of civil claim and ignored such claims as those arising from divorce and maintenance litigation. Secondly, it was too drastic in that it would rule out all immunity from jurisdiction.

62. He was in favour of keeping to the principle adopted at the 1961 Vienna Conference, which was based on immunity combined with the possibility of waiver. At the 918th meeting[7] he had put forward a proposal based on the system embodied in sections 14 and 20 of the Convention on the Privileges and Immunities of the United Nations.[8] Under that system, the receiving State would have not only a right but a duty to waive the immunity where, in its opinion, that immunity would impede the course of justice and could be waived without prejudice to the purpose for which the immunity had been granted.

[4] *Yearbook of the International Law Commission, 1965*, vol. II, p. 136.

[5] *op. cit.*, vol. I, 808th meeting, paras. 48-61.

[6] *Ibid.*, 819th meeting, para. 93.

[7] Paras. 10 and 43.

[8] United Nations, *Treaty Series*, vol. 1, pp. 22 and 26.

63. It was essential to adhere to that system, which had been strongly upheld by the first Secretary-General of the United Nations in the first test case relating to the application of section 20 of the Convention. That case related to a violation of the speed limit by the Secretary-General's official chauffeur when driving him to an urgent meeting of the Security Council; the New York Court of Appeal had upheld the immunity in that case.

64. Mr. USHAKOV said that he approved the proposal to include in article 35 the words "who are authorized by the receiving State to accompany them" or some other expression conveying the same idea. The Vienna Conference had not succeeded in defining the expression "members of the family" because ideas on the subject varied from one country to another. In the case of a permanent mission, it was possible to decide by means of an exchange of notes with the authorities of the receiving State what persons were authorized to accompany members of the mission as members of their families; but in the case of special missions, which were nearly always temporary, those concerned did not have sufficient time to settle the matter. Article 35 should therefore be very clear on that point.

65. Paragraph 2 of the article was not very happily worded. Instead of using the expression "the privileges and immunities specified in article 32" and thus referring the reader to "the privileges and immunities specified in articles 24 to 31", it would be better to say in so many words "the privileges and immunities specified for the administrative and technical staff".

66. Mr. EUSTATHIADES said that his views on article 35, paragraph 2, were the same as Mr. Ushakov's. As it stood, the paragraph might imply that the electrician's daughter, for example, would enjoy quite unnecessary privileges and immunities, and that impression would only be dispelled if the reader referred to articles 24 to 31. It would therefore be better to state that the only privileges and immunities in question were those granted to the administrative and technical staff. With regard to the words "who are authorized by the receiving State to accompany them", he would point out that authorization did not depend on the grant of immunities. If those words were retained, it would be necessary to make clear what was meant by the word "authorized". Another solution would be to accept Mr. Ago's proposal and to say simply "the members of the families".

67. The suggestion by the Netherlands Government that the words "in so far as these privileges and immunities are granted to them by the receiving State" should be added at the end of paragraph 1 seemed worth adopting. To give privileges and immunities to all members of the families of the administrative and technical staff was stretching courtesy too far.

68. He would, of course, accept the solutions to which he had just referred, but it would in fact be preferable not to mention members of the families of the administrative and technical staff.

69. Mr. CASTRÉN said that he had already expressed the view that the provision that members of the staff of a special mission could not be accompanied by their families unless authorized to do so by the receiving State was too strict. He was grateful to the Special Rapporteur for his conciliatory attitude in proposing that the wording be changed so as to state that authorization by the receiving State was not necessary but that that State could object to members of the special mission being accompanied by members of their families. He accepted that proposal.

70. Mr. BARTOŠ, Special Rapporteur, said that he had not been responsible for the proposal that privileges and immunities should be granted to members of the administrative and technical staff; it had been the Commission itself which had decided to follow the Vienna Convention. Mr. Eustathiades seemed to think that the words which the Netherlands Government proposed to add to paragraph 1 would restrict the privileges and immunities accorded to members of the families of the administrative and technical staff: but paragraph 1 did not refer to the administrative and technical staff. Personally he could not accept the Netherlands Government's proposal, but he must leave it to the Commission to settle the question of principle.

71. He could accept Mr. Ushakov's suggestion that the words "the privileges and immunities specified for the administrative and technical staff" be added at the end of paragraph 2.

72. Replying to Mr. Nagendra Singh, he pointed out that where installation in general was concerned, no provision was made in the draft for any privilege in connexion with articles imported on first installation, even in the case of the diplomatic staff.

73. He proposed to delete the words "who are authorized by the receiving State to accompany them" and to include in the article a sentence to the effect that the receiving State could restrict the number of members of families accompanying members of the mission.

74. The question of defining "members of the family" had been deliberately left aside. The Vienna Conference had not succeeded in finding a definition acceptable to all countries.

75. Mr. NAGENDRA SINGH said that he had not proposed that members of the family should be given customs exemption on articles imported on first installation. He had objected to members of the family of the administrative and technical staff of the special mission being given privileges more extensive than those specified for the same category of persons by the 1961 Vienna Convention in the case of permanent missions.

76. The combined effect of the various articles on special missions would be to give the administrative and technical staff of special missions and the members of their families privileges in excess of those granted by article 37, paragraph 2, of the 1961 Vienna Convention; that was the reason for the objections by the United Kingdom and Austrian Governments. The position should be remedied by deleting paragraph 2 of article 35 and amending article 32 by substituting for the words "the privileges and immunities specified in articles 24 to 31", the words "the privileges and immunities specified in articles 24 to 30".

77. The CHAIRMAN said that the point made by Mr. Nagendra Singh was one of substance, but it arose out of a question of drafting.

78. The discussion had shown that the Commission as a whole did not support the retention of the words "who are authorized by the receiving State to accompany them". The Drafting Committee would consider the suggestion by Mr. Jiménez de Aréchaga to cover that point in one of the early articles of the draft, and the suggestion by the Special Rapporteur to insert a passage which would allow the receiving State to make the entry of members of the family conditional, or to place limitations upon it.

79. He suggested that article 35 be referred to the Drafting Committee for consideration in the light of the discussion.

It was so agreed.[9]

The meeting rose at 1.5 p.m.

[9] For resumption of discussion, see 934th meeting, paras. 33-39.

922nd MEETING

Thursday, 15 June 1967, at 10.5 a.m.

Chairman: Sir Humphrey WALDOCK

Present: Mr. Ago, Mr. Bartoš, Mr. Castañeda, Mr. Castrén, Mr. Eustathiades, Mr. Jiménez de Aréchaga, Mr. Kearney, Mr. Nagendra Singh, Mr. Ramangasoavina, Mr. Reuter, Mr. Tammes, Mr. Ushakov, Mr. Ustor, Mr. Yasseen.

Special Missions

(A/CN.4/193 and Addenda; A/CN.4/194 and Addenda)

(continued)

[Item 1 of the agenda]

ARTICLE 36 (Nationals of the receiving State and persons permanently resident in the territory of the receiving State) [40].

1. *Article 36* [40]

Nationals of the receiving State and persons permanently resident in the territory of the receiving State

1. Except in so far as additional privileges and immunities may be recognized by special agreement or by decision of the receiving State, the head and members of the special mission and the members of its diplomatic staff who are nationals of or permanently resident in that State shall enjoy only immunity from jurisdiction, and inviolability, in respect of official acts performed in the exercise of their functions.

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

2. The CHAIRMAN invited the Commission to consider article 36, the Special Rapporteur's proposals for which were contained in paragraph 13 of the section on that article in his fourth report (A/CN.4/194/Add.2) and in his additional comments in document A/CN.4/194/Add.4.

3. Mr. BARTOŠ, Special Rapporteur, said that the rules in article 36 had been the subject of much debate at the two Vienna Conferences. Discussion had turned on the question of the nationality of members of the mission, who, in principle, should be nationals of the sending State and, more particularly, on the question of members of the mission permanently resident in the receiving State, a category which had been regarded with some suspicion. In the case of nationals of the receiving State, the latter had the right to refuse to allow them to join the special mission. In the case of persons permanently resident in the receiving State, the problem was more difficult, for many countries were bound by conventions which guaranteed freedom of establishment for aliens. Of course, the receiving State could always resort to the expedient of declaring such persons *non grata*, but that was a fairly serious decision. In any case, even if the Commission adopted the Vienna wording, more than one point would still have to be clarified.

4. He had no objection to the comment by the Belgian Government, which was of a drafting nature.

5. The Swedish Government's request that the commentary to the article should be revised would be taken into consideration.

6. He fully approved the United Kingdom Government's observation that the clause relating to nationals of, and permanent residents in, the receiving State should appear only once, namely in article 36.

7. With regard to the comments of the Netherlands Government, which asked for the deletion of the article, he recalled that that Government had taken the same position at the two Vienna Conferences, but that an overwhelming majority of States had been in favour of placing some limitation on access to diplomatic and consular posts.

8. The Commission should therefore decide whether it was necessary to maintain the limitation principle and, if so, to what extent. For the time being, that limitation was guaranteed, first, by the rule under which such members of the special mission enjoyed only functional immunity and, secondly, by the provision which required the receiving State to 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. That provision was more a recommendation or "psychological rule" than a rule of actual law.

9. He was in favour of retaining article 36, subject to certain drafting changes.

10. Mr. TAMMES said that he saw no compelling reason for the inconsistency between the provisions of article 36,

which referred to persons "who are nationals of or permanently resident in" the receiving State, and article 14 on the nationality of the head and the members of the special mission and of members of its staff, which referred only to nationality, without any mention of permanent residents.

11. That anomaly reflected an inconsistency between articles 8 and 38 of the 1961 Vienna Convention on Diplomatic Relations, on which articles 14 and 36 of the draft on special missions were based. The explanation of that inconsistency was that the reference to permanent residents, which was not to be found in the International Law Commission's draft articles on permanent diplomatic missions, had been introduced by the 1961 Vienna Conference, which had, however, omitted to bring the text of article 8 into line with that of article 38.

12. It was significant that the decision to insert in both paragraphs of article 38 of the 1961 Vienna Convention the words "or permanent resident(s)" after the word "national(s)" had been taken in the Committee of the Whole of the 1961 Vienna Conference by the not very convincing majority of 27 votes to 8, with 32 abstentions.[1] The model of the 1961 Convention was, therefore, not very persuasive. Moreover, he saw no reason why the limitation in respect of permanent residents should be introduced in connexion with special missions, where so much was left to the agreement of the States concerned. But if the Commission preferred to equate permanent residents in the receiving State with nationals of that State in article 36, then the text of article 14 should be reconsidered, since the two articles involved the same basic principle.

13. Mr. BARTOŠ, Special Rapporteur, pointed out that at the 12th plenary meeting of the Vienna Conference, article 38 had been adopted by more than two-thirds of the votes.

14. Mr. TAMMES said that the vote he had mentioned related specifically to the introduction of a reference to permanent residents. Of course, as was usual at international conferences, the 1961 Vienna Conference had adopted the article as a whole by a large majority, but that vote did not relate specifically to the question of equating residents with nationals.

15. The comments of Governments favouring the deletion of article 36 were a reflection of the Commission's own views as expressed in paragraph (4) of its commentary to article 36:

> "The Commission stresses that, in its view, it is better that this question should be settled by mutual agreements rather than that general international rules should be laid down on the subject".[2]

16. Mr. CASTAÑEDA said that while he was in favour of retaining article 36, at the same time he had some doubt about the soundness of the rule it expressed. Even if the Vienna Conference had finally admitted that nationals of the receiving State could be diplomatic agents, that situation was not a desirable one, and all the less so in the case of a special mission. To take as an example the case of a special mission composed of businessmen who were nationals of the receiving State; they would enjoy immunity for acts performed in the exercise of the functions of the special mission, but where was the line to be drawn between their official acts and the acts performed in their own private interest? And what was one to say about their privileged position in relation to other businessmen of the receiving State? Might it not be advisable, in that case, to refuse functional immunity? Admittedly a derogation from the rule could be made by mutual agreement.

17. Mr. NAGENDRA SINGH said that he was inclined to agree with Mr. Tammes that there was some inconsistency between articles 14 and 36. Either the reference to permanent residents should be dropped from article 36, or it should be introduced into article 14.

18. Mr. BARTOŠ, Special Rapporteur, said that the sending State was not prohibited from designating permanent residents of the receiving State as members of a special mission; the point was that they would enjoy only functional immunity.

19. As the Australian and New Zealand Governments had observed at the time, it sometimes happened that merchants or businessmen who were established in the territory of the receiving State but were nationals of the sending State took unfair advantage of their position in order to serve their own private interests; in that case, the receiving State should be able to refuse them privileges and immunities. That view had also been upheld by a large number of African and Asian countries.

20. The question raised by Mr. Castañeda of how to draw the line between acts attaching to the function and acts performed in a private capacity was a difficult one. The answer depended on the interpretation placed on article 42, on professional activity. Latin American practice was for businessmen who were members of a special mission to take advantage of their stay in the territory of the receiving State to deal with private matters. United Kingdom practice was for the sending State first to delegate a kind of semi-official mission of businessmen to study market possibilities. That advance mission was followed by the official mission to conclude a trade agreement. There was always a certain interval between the cessation of the functions of the unofficial mission and the sending of the official mission.

21. Mr. Tammes had rightly pointed out that the draft submitted by the Commission at Vienna had not contained any provision concerning persons permanently residing in the receiving State. The addition had been made at Vienna on the suggestion of Commonwealth and African countries. The Scandinavian and Benelux countries had not opposed that provision, although in their opinion there was a danger that it might limit the possibilities of international relations. The Commission had therefore to decide whether to maintain that clause from the Vienna Convention on Diplomatic Relations.

22. Mr. KEARNEY said he supported the retention of article 36 as it stood.

[1] United Nations Conference on Diplomatic Intercourse and Immunities, *Official Records*, vol. II, p. 66, para. 191(5).

[2] *Yearbook of the International Law Commission, 1965*, vol. II, p. 188.

23. He was opposed to any change in article 14 which would cut down unnecessarily the sending State's freedom of choice. There was no strong feeling against the use for a special mission of persons permanently resident in the receiving State and any attempt to restrict such use would give rise to many problems.

24. From the practical point of view, the text of article 36 reflected the desire of States not to increase the scope of privileges and immunities. Those considerations applied with considerable force in the case of a person who resided permanently in the receiving State and was regarded by the inhabitants of that State as one of them; the extension of privileges to such a person sometimes gave rise to feelings of resentment.

25. Mr. JIMÉNEZ de ARÉCHAGA said he also supported article 36 as it stood. The text reflected the distinction adopted at the 1961 Vienna Conference between three categories of persons: first, the diplomatic personnel who enjoyed full immunity; secondly, persons who enjoyed the more limited immunity "in respect of acts performed in the course of their duties", to use the expression appearing in article 33 and taken from article 37 (3) of the Vienna Convention on Diplomatic Relations; and, thirdly, the nationals of and permanent residents in the receiving State who enjoyed the even more limited immunity "in respect of official acts performed in the exercise of their functions", as stated in article 36, paragraph 1, and in the corresponding provision of the 1961 Vienna Convention, on which that paragraph was based.

26. In 1957, the Commission itself had deliberately introduced into the text on diplomatic intercourse and immunities the word "official" before "acts", precisely in order to confine the immunity and the inviolability strictly to the indispensable minimum necessary to enable the member of the staff of the mission concerned "to perform his duties satisfactorily", as indicated in paragraph (2) of the commentary to what had then been article 30 on diplomatic agents who were nationals of the receiving State.[3]

27. He therefore urged the Commission to adopt article 36 in the form in which it had been submitted.

28. Mr. USHAKOV said that articles 14 and 36 contemplated an exceptional situation to which in principle everyone, including the members of the Commission, objected. The question was in fact one that should be settled at the conference: it was for plenipotentiaries to say whether their governments were for or against the rejection of that principle.

29. Mr Tammes had rightly said that articles 14 and 36 should be brought into line. Would it not be possible to provide in article 14 that the consent of the receiving State was also required for the appointment of persons permanently resident in that State? The problem would then be simplified. If the Commission did not accept that view, he would naturally not object to the retention of article 14 as at present worded.

30. The situation to which Mr. Castañeda had referred actually occurred very seldom. Special missions were generally composed of government officials of the sending State and diplomats, who were not concerned with private business. There was of course no harm in providing for that somewhat exceptional situation, but in his view the article should be retained as at present worded.

31. Mr. REUTER said that he favoured the retention of articles 14 and 36 which, like the whole draft, represented a compromise between the interests of the sending and receiving States. Article 36 was complementary to article 14, in the sense that article 14 gave the receiving State the legal right to object to the appointment of certain members of the special mission, and article 36 gave the receiving State an assurance that, if it refrained from making use of that right, it would not pay too high a price for doing so.

32. Mr. YASSEEN said that in his view article 36 was acceptable as it stood. It was natural that a national of the receiving State should be given functional immunity and articles 14 and 36 supplemented each other very neatly. There was no need to mention persons permanently resident in the receiving State in article 14 because, if they were nationals of the sending State, incompatibility would arise between their legal position as nationals and their legal position as permanent residents.

33. The best course would be for the receiving State, at the time when it was notified of the arrival of a special mission and of its membership, to refuse if necessary to agree to the appointment of one or more persons covered by those provisions.

34. Mr. CASTRÉN said that he could accept article 36, which he too regarded as a compromise. Nevertheless, as the Special Rapporteur had suggested, the Drafting Committee might reword certain passages in the commentary which were open to misinterpretation.

35. Mr. RAMANGASOAVINA said that he also was in favour of retaining article 36 as at present worded. It usefully supplemented article 14, in which the Commission laid down the principle that, essentially, special missions were composed of nationals of the sending State. But there might be exceptions; for instance, some of the members of the special mission might be nationals of the receiving State or nationals of a third State, permanently resident in the receiving State. Article 36 was useful because it gave the receiving State the right not to grant the same privileges and immunities to such persons as it did to the other members of special missions.

36. With regard to the question raised by the Belgian Government of the placing of the word "*que*" in the French text of the last phrase in paragraph 1, his view was that both phrases were equally acceptable.

37. Mr. EUSTATHIADES said that he found both article 14 and article 36 satisfactory. The difficulty to which Mr. Castañeda had referred would certainly arise in practice and would be solved on a functional basis; but it was impossible to go into such details in the draft.

38. The slight difference between articles 14 and 36 was deliberate and well advised. Article 14 provided that the sending State could not appoint a national of the receiving State to a special mission except with the consent of that State. During the discussion on article 14 at the 907th

[3] *Yearbook of the International Law Commission, 1957*, vol. II, pp. 141 and 142.

meeting, some members of the Commission, including Mr. Castrén and himself, had expressed the view that paragraph 3 of that article was rather too strict. It would be a mistake to go still further, and especially to raise the question of consent again in connexion with article 36. Some States—and he was not referring only to newly-independent States—might find it essential to appoint persons residing in the receiving State as members of a special mission.

39. Mr. CASTAÑEDA, referring to Mr. Ushakov's remarks, said that special missions with a mixed membership were in fact quite common, at any rate in certain countries, such as those importing capital and manufactured goods. For instance, a Belgian special mission on economic co-operation which had visited Mexico had been headed by the Prince of Liège and its members had included two Belgian Ministers and several Belgian civil servants as well as about fifteen private bankers. His Government had had every reason to be satisfied with the membership of that mission. The sending State might equally well include in its special mission persons who were nationals of, or resident in, the receiving State and carried on professional activities there, as for example businessmen or bankers. In that case, acts performed by those persons in their official capacity on behalf of the special mission would be almost indistinguishable from acts performed by them in their private capacity on behalf of their firms. The consequence of article 36 would be that such persons would enjoy immunity from civil jurisdiction in respect of acts performed by them as bankers or businessmen in their country of residence, a situation which would be inequitable so far as the other bankers or businessmen in that country were concerned. It was true that the receiving State could object to such persons being members of the special mission, but why should it not be given the opportunity of accepting them on condition that it did not have to grant them immunity? It was hardly possible for the Commission to refuse to contemplate such an eventuality.

40. The CHAIRMAN, speaking as a member of the Commission, said that some problems of application would be bound to arise for many articles. As far as article 36 was concerned, however, it should be possible to interpret the words "official acts performed in the exercise of their functions" without undue difficulty as covering only those acts which were performed on behalf of the special mission.

41. He himself agreed with Mr. Jiménez de Aréchaga and other speakers that articles 14 and 36 should be retained as they stood. They dealt with quite different aspects of the question and there was no reason why the Commission should adopt the same solution for the problem of permanent residents in both articles.

42. Mr. USTOR said that he was in general agreement with article 36. The point raised by. Mr. Castañeda could be met by amending the opening words of paragraph 1 which now read: "Except in so far as additional privileges and immunities may be recognized by special agreement...". That proviso covered only the case in which additional privileges might be granted; it could be amended so as to cover also the possibility of more restricted privileges being agreed upon by the States concerned in a special agreement.

43. Mr BARTOŠ, Special Rapporteur, said that it would be comparatively easy to bring articles 14 and 36 into line with each other by including in article 14, paragraph 3, an additional stipulation that the receiving State could also reserve the right to refuse persons of whatever nationality who were permanently resident in the receiving State. He would submit a draft in that sense to the Drafting Committee, although personally he did not consider such a provision necessary, for it was always open to the receiving State to declare such persons *non grata* or unacceptable; in that case the person or persons concerned would not have to leave its territory but would have to cease performing any functions in the special mission.

44. The situation to which Mr. Castañeda had referred did occur in practice. But some countries regarded it as inadmissible and it was impossible to conceive of it occurring in the case of special missions from the socialist countries; in the case of the capitalist countries, some accepted it and others merely tolerated it.

45. The proviso at the beginning of paragraph 1 made the rule very flexible. What was guaranteed was immunity from jurisdiction and inviolability in respect of official acts performed by members of the mission in the exercise of their functions. It was, of course, hard to distinguish between those acts and other acts. That question had not yet been settled even in municipal law, and in international law the dividing line was even less clearly established.

46. Most members of the Commission were in favour of the existing wording of the article. The proposed rule was useful from the psychological point of view, because the granting of privileges and immunities to persons possessing the nationality of the State visited, or permanently resident there, was a matter which was viewed by many people with misgivings. On the other hand, it might be useful for some countries to be able to appoint such persons as members of special missions. Although he had no objection to an attempt being made to find a more satisfactory wording, he would advise the Commission to maintain the rule, which had been adopted by a more than two-thirds majority at the Vienna Conference.

47. He would amend the commentary so as to make it clear that nothing in the text of the article ran directly counter to the views expressed by the Belgian, Swedish and Netherlands Governments in their comments.

48. He proposed that article 36 be referred to the Drafting Committee.

49. Mr. EUSTATHIADES said that it was his understanding that the Special Rapporteur had agreed to refer in paragraph 3 of article 14 to persons permanently resident in the receiving State. In his view, that would be going too far. Since the purpose of special missions was to encourage closer international relations, it was inconceivable that the consent of the receiving State should be required before the sending State could appoint as members of a special mission persons who were permanently resident in the receiving State.

50. The CHAIRMAN pointed out that the Commission, in its discussion on article 14 at the 907th meeting, had not

expressed any view that could serve as a basis for changing that article. The question which had now been raised with regard to article 14 should be discussed when the Commission came to consider the text of that article again.

51. As far as article 36 was concerned, there was a large majority in favour of retaining it as it stood. There arose only questions of drafting, which could be dealt with by the Drafting Committee, such as the placing of the word "*que*" in the French version of the article. Personally, although he found the drafting of the article unsatisfactory, he would be reluctant to depart from the language used in the 1961 Vienna Convention simply on grounds of elegance of language.

52. He had always found it somewhat strange that the last sentence of paragraph 2, like the corresponding provisions of the 1961 Vienna Convention, should apply only to members of the staff of the mission and to the private staff. The requirement that "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" should surely apply also to the more important persons mentioned in paragraph 1, whenever the receiving State might be called upon to exercise jurisdiction over them.

53. He suggested that article 36 be referred to the Drafting Committee for consideration in the light of the discussion.

It was so agreed.[4]

ARTICLE 43 (Right to leave the territory of the receiving State) [46]

54. *Article 43* [46]

Right to leave the territory of the receiving State

The receiving State must, even in case of armed conflict, grant facilities in order to enable persons enjoying privileges and immunities, other than nationals of the receiving State, and members of the families of such persons irrespective of their nationality, to leave at the earliest possible moment. It must, in particular, in case of need, place at their disposal the necessary means of transport for themselves and their property.

55. The CHAIRMAN invited the Commission to consider article 43, the Special Rapporteur's proposals for which were contained in paragraph 8 of the section dealing with that article in his fourth report (A/CN.4/194/Add. 2).

56. Mr. BARTOŠ, Special Rapporteur, said that the article corresponded to article 44 of the Vienna Convention on Diplomatic Relations.

57. Two proposals had been made by the Government of Israel. The first referred to the terminology used and would be considered by the Drafting Committee.

58. The second proposal was that the archives of the special mission should be mentioned as well as its property. He had no objection to that proposal but he considered that the question of the archives was adequately dealt with in article 44 of the draft.

59. Mr. REUTER said that, although he supported the Special Rapporteur's conclusions, he wished to point out that the second proposal by Israel referred rather to draft article 44, which did not seem to provide for situations where the special mission ceased to function and the sending State and the receiving State had no diplomatic or consular relations with each other.

60. The expression "their property", in draft article 43, was rather surprising, but he did not propose to object if the Commission did not succeed in finding a more satisfactory expression.

61. Mr. BARTOŠ, Special Rapporteur, said that, at its 912th meeting, the Commission had considered the possibility of incorporating an additional provision in article 44 to the effect that, if the special mission ceased to function in circumstances where there were no diplomatic or consular relations between the two States, it should be possible for the sending State to remove its archives.

62. Mr. EUSTATHIADES said that, even though that question was dealt with in article 44, there was no objection to mentioning the archives in article 43, as the Israel Government requested, since article 43 dealt with a quite exceptional situation.

63. Mr. KEARNEY asked whether the phrase "persons enjoying privileges and immunities" was meant to include permanent residents in the receiving State, who were accorded a certain degree of immunity, so as to ensure that they could leave the territory of that State.

64. Mr. BARTOŠ, Special Rapporteur, said that the idea at the Vienna Conference had been that all nationals of the sending State would be able to leave the country in the circumstances described, even if they were permanently resident there. That was a general rule of international law which applied to the exceptional situation contemplated in the article before the Commission. There had been much discussion at the Vienna Conference about another question, namely, whether, in the case of armed conflict, wives or children who were nationals of the receiving State were permitted to follow their husbands or fathers.[5] The question had been settled on the basis that the unity of the family should be maintained. The same situation might arise in the case of special missions, and he would therefore advise the Commission to maintain the expression used in the Vienna Convention.

65. The CHAIRMAN suggested that article 43 be referred to the Drafting Committee, which would need to take account of the suggestions by the Government of Israel and to consider the relation of that article with article 44.

It was so agreed.[6]

[4] For resumption of discussion, see 934th meeting, paras. 40-48.

[5] United Nations Conference on Diplomatic Intercourse and Immunities, *Official Records*, vol. I, Summary Records of the Committee of the Whole, 36th meeting, paras. 72-74, and 37th meeting, paras. 1-7.

[6] For resumption of discussion, see 934th meeting, paras. 64-73.

ARTICLE 37 (Duration of privileges and immunities) [44, paras. 1 and 2]

66. *Article 37* [44, paras. 1 and 2]

Duration of privileges and immunities

1. Every person entitled to privileges and immunities shall enjoy them from the moment he enters the territory of the receiving State for the purpose of performing his functions in a special mission, or, if already in its territory, from the moment when his appointment is notified to the competent organ of that State.

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

67. The CHAIRMAN invited the Commission to consider article 37, the Special Rapporteur's proposals for which were contained in paragraph 7 of the section dealing with that article in his fourth report (A/CN.194/Add.2) and in his additional comments in part two of document A/CN.4/194/Add.4.

68. Mr. BARTOŠ, Special Rapporteur, said that the article reproduced *mutatis mutandis* paragraphs 1 and 2 of article 39 of the Vienna Convention on Diplomatic Relations.

69. The Belgian Government had proposed that the word "organ" be replaced by the word "authority". He did not agree, for an organ was not necessarily an authority. One solution might be to use the expression adopted by the Drafting Committee in the case of another article, namely "the Ministry of Foreign Affairs or other organ".

70. The Chilean Government found the expression "on expiry of a reasonable period" too vague and proposed that it be made more precise by adding the words "granted by the receiving State". He accepted that suggestion.

71. Mr. YASSEEN said that he too considered the Chilean Government's proposal acceptable. As for the Belgian Government's proposal to replace the word "organ" by the word "authority", it would be best to say simply "from the moment when his appointment is notified to that State".

72. Subject to those comments, he could accept article 37.

73. Mr. USTOR said that article 37 was acceptable but its meaning should be made clearer; a departure from the wording of the Vienna Convention on Diplomatic Relations was both necessary and justified. As it stood, the text failed to cover the position of members of the family of the head and members of the special mission and of its diplomatic staff who enjoyed privileges and immunities.

74. Mr. AGO said he wondered what had prompted the Commission to take the decision to split up article 39 of the Vienna Convention into two parts. Was the death of a member of a special mission more important than the death of a member of a permanent diplomatic mission, that it should be dealt with in a separate article? Unless there was good reason for that decision, it would be better to amalgamate articles 37 and 38 and consequently to delete the title "Case of death".

75. Mr. BARTOŠ, Special Rapporteur, said it was true that there was a gap in the Vienna Convention, in that it did not mention members of the family. He therefore proposed to add a third paragraph to article 37 to state that the privileges and immunities granted to members of the family had the same duration as the privileges and immunities of the persons they accompanied.

76. Replying to Mr. Ago, he agreed that it would be more logical to insert paragraph 3 of article 39 of the Vienna Convention, which also dealt with the duration of privileges and immunities, in article 37 rather than in article 38. On the other hand, article 39, paragraph 4, of the Vienna Convention had no direct connexion with article 37.

77. He proposed that article 37 be referred to the Drafting Committee; in addition to its present two paragraphs, it would include a third paragraph dealing with members of the family and a fourth consisting of paragraph 1 of article 38.

78. Mr. EUSTATHIADES said that he could accept Mr. Yasseen's proposal to drop the words "the competent organ" and to say simply "from the moment when his appointment is notified to that State". He would also suggest that paragraph 3 of article 38 be included in article 29, on exemption from dues and taxes.

79. The CHAIRMAN suggested that article 37 be referred to the Drafting Committee without the Commission taking any final decision on its substance.

It was so agreed.[7]

ARTICLE 38 (Case of death) [44, para. 3, and 45]

80. *Article 38* [44, para. 3, and 45]

Case of death

1. In the event of the death of the head or of a member of the special mission or of a member of its staff, the members of his family shall continue to enjoy the privileges and immunities to which they are entitled until the expiry of a reasonable period in which to leave the country.

2. In the event of the death of the head or of a member of the special mission or of a member of its staff, or of a member of their families, if those persons are not nationals of or permanently resident in the receiving State, the receiving State shall facilitate the collection and permit the withdrawal of the movable property of the deceased, with the exception of any property acquired in the country the export of which was prohibited at the time of his death.

3. Estate, succession and inheritance duties shall not be levied on movable property the presence of which in the receiving State was due solely to the presence there of the deceased as the head or member of the special mission or member of its staff, or as a member of their families.

81. The CHAIRMAN invited the Commission to consider article 38, the Special Rapporteur's proposals for which were contained in paragraph 6 of the section dealing with that article in his fourth report (A/CN.4/194/Add.2).

[7] For resumption of discussion, see 934th meeting, paras. 49 and 50.

82. Mr. BARTOŠ, Special Rapporteur, said that the article was based on article 39, paragraphs 3 and 4, of the Vienna Convention, As had been suggested, paragraph 1 of article 38 would be moved to article 37 and paragraph 3 to article 29.

83. If the Commission decided that article 38 was to consist solely of paragraph 2, the title of the article would have to be altered. Alternatively, it could be left to the Drafting Committee to decide in which article that paragraph should be placed.

84. Mr. AGO said that although he acknowledged that the paragraph did not deal with the question of the duration of privileges and immunities, he was in some doubt whether there was really any point in breaking up the text of the Vienna Convention because of a title which ultimately would not appear in the convention proper. What had to be established was the principle that when a person ceased for one reason or another to be a member of a special mission, any laws which might, for instance, prohibit the removal of his property from the receiving State did not apply. He himself thought that it would be preferable to include the provisions of article 39 of the Vienna Convention in a single article.

85. The CHAIRMAN observed that article 38 raised problems primarily of drafting and arrangement. Generally speaking, the substance of the article seemed to be acceptable. He suggested that it be referred to the Drafting Committee.

It was so agreed.[8]

The meeting rose at 1.5 p.m.

[8] For resumption of discussion, see 934th meeting, paras. 51-63.

923rd MEETING

Friday, 16 June 1967, at 10.5 a.m.

Chairman: Sir Humphrey WALDOCK

Present: Mr. Ago, Mr. Bartoš, Mr. Castañeda, Mr. Castrén, Mr, Eustathiades, Mr. Jiménez de Aréchaga, Mr. Kearney, Mr. Nagendra Singh, Mr. Ramangasoavina, Mr. Reuter, Mr. Tammes, Mr. Tsuruoka, Mr. Ushakov, Mr. Ustor, Mr. Yasseen.

Special Missions

(A/CN.4/193 and Addenda; A/CN.4/194 and Addenda)

(continued)

[Item 1 of the agenda]

ARTICLE 17 *quater* (Status of the Head of State) [21]

1. *Article 17* quater [21]

Status of the Head of State

The Head of State who leads a special mission of the sending State enjoys in the receiving State all the facilities, privileges and immunities which are accorded, under the rules of international law and international custom, to a Head of State on an official visit to the receiving State.

All persons forming part of a special mission which is led by a Head of State and the members of his suite shall enjoy all the facilities, privileges and immunities which are enjoyed in the receiving State by the diplomatic staff of permanent diplomatic missions accredited to that State and all the facilities, privileges and immunities which may be necessary for the performance of the tasks incumbent on the members of special missions.

2. The CHAIRMAN invited the Commission to consider the Special Rapporteur's proposal for a new article 17 *quater* (A/CN.4/194/Add.2) and drew attention to his additional comments thereon in the supplements to his fourth report (A/CN.4/194/Add. 4 and Add. 5).

3. Mr. BARTOŠ, Special Rapporteur, said the first question for the Commission's consideration was whether it was desirable to lay down special rules for so-called high-level special missions. He had outlined the history of the problem and of the work which had been done on it in his report (A/CN.4/194, paragraphs 246-250).

4. With regard to article 17 *quater* of the draft, he wished to draw the Commission's attention to paragraphs 1, 2 and 3 of the commentary (A/CN.4/194/Add. 2).

5. There was a difference of opinion as to whether it was possible to speak of high-level special missions when the mission was headed by a high-ranking personage who was not the Head of the State, such as a Prime Minister, Minister for Foreign Affairs, Cabinet Minister, and so on. The United States proposal (A/CN.4/193) which had served as a basis for discussion during the debate at the 897th meeting on the definition of special missions had provided that a special mission headed by a minister or high-ranking official should be received in the receiving State by a minister or official of the same rank. The Commission ought to base itself on that proposal if it decided to adopt special rules on so-called high-level special missions.

6. Actually, the important thing was the mission itself and not the head of the mission. If the Commission adopted the notion of high-level special missions, where, in the hierarchy of high-ranking persons, would be the dividing line between the ordinary special mission and the high-level special mission? Would it adopt some other criterion for that distinction? What would be its attitude towards members of Parliament? It was the Head of State and his executive that were considered, generally speaking, as representing the State abroad.

7. He had no personal preference and he hoped that the Commission would adopt whatever point of view was most commonly recognized among States.

8. Mr. JIMÉNEZ de ARÉCHAGA said that it would be impossible to establish a distinction between political and non-political missions or a hierarchy of importance between them. Nor should the Commission attempt to codify rules governing the legal position of a Head of State or a Foreign Minister visiting another country, as they raised problems outside general diplomatic law. The subject was a separate one and must be dealt with as a whole.

9. However, it should be possible to formulate an objective criterion for defining high-level special missions and

to arrive at an acceptable solution that took account of all the views expressed in the discussion. That was particularly important when so many members of the Commission were absent. A provision adopted by a close majority and without the support of the Governments which had taken the trouble to submit comments was doomed to failure.

10. He thought that agreement would be possible on a text that might be inserted between articles 23 and 24 and which would read:

> "The members of the diplomatic staff of a special mission headed by a Head of State, Head of Government or a Minister of State shall enjoy the privileges and immunities established in articles 29 to 32 and 36 of the Vienna Convention on Diplomatic Relations. These same articles shall also apply to the head and members of the diplomatic staff of a special mission when the sending and the receiving States so agree before the departure of the mission."

A provision on those lines would furnish an objective criterion for defining a high-level mission.

11. Under articles 24, 25, 26, 27 and 31, other special missions would be given reduced privileges and immunities in accordance with their functional requirements.

12. Mr. RAMANGASOAVINA said that, although the distinction made in article 17 *ter* between the categories of special missions seemed to him injudicious, it seemed entirely natural, on the other hand, that special missions led by a Head of State should be given special protection and surrounded with a certain solemnity. In that case it was the representational theory which prevailed.

13. In the case of special missions headed by a Minister for Foreign Affairs or some other high-ranking personage who was not a Head of State, rather special treatment might be provided for, though there was no need to go so far as to draft separate articles concerning them. The solution proposed by Mr. Jiménez de Aréchaga might be adopted and the provisions laid down in the Vienna Convention on Diplomatic Relations applied to such missions.

14. In principle, he was opposed to dividing special missions into different categories based on their level or on their technical character. Article 40 *bis*, on non-discrimination, provided in paragraph 2(*c*) that States could agree among themselves to reduce reciprocally the extent of the facilities, privileges and immunities for particular categories of missions. A few amendments should be made to that provision in order to regulate the question of special treatment without having to draft a new article.

15. Mr. YASSEEN said that, in drawing up the draft convention, the Commission had realized that it had to lay down a kind of general law for special missions or, in other words, the necessary minimum rules for the performance of their tasks. States could agree mutually on additional privileges and immunities in order to take account of the exceptional nature or particular level of a given special mission, but the Commission's draft should represent a general formula which would be applicable to ordinary cases. It was very difficult to draw up a list of the necessary qualifications and titles to justify granting a more generous status to a special mission headed by a high-ranking personage who was not the Head of State. Normally, States entered into negotiations concerning the sending of a high-level special mission and determined the status which it should be given.

16. The draft was based on the idea that different special missions did not receive different treatment, but it provided for an exception in the case of special missions led by the Head of State, whose status was established by rules of international law. Article 17 *quater* could therefore be kept, since it was not a rule in itself but rather a reference to the rules of international law.

17. Mr. USHAKOV said that in principle he shared the view expressed by Mr. Yasseen. If, however, the Commission adopted a special article on special missions led by a Head of State, Prime Minister or Minister for Foreign Affairs, certain provisions of the draft would become inapplicable. Thus, in the draft provisions concerning so-called high-level special missions annexed to his second report[1] the Special Rapporteur had laid down a number of rules concerning special missions headed by a Minister for Foreign Affairs, which replaced certain articles of the draft.

18. In his opinion, the Commission should decide either to deal with only minimum standards in its draft—and ignore the question under consideration—or to draft a few articles to govern the case of high-level special missions.

19. Mr. NAGENDRA SINGH said that the realities of life must be taken into account in any process of codification; there was no overlooking the fact that special missions were sometimes led by Heads of State and Heads of Governments, and the draft articles should therefore include some provision on that subject. A distinction should be made, however, between special missions led by Heads of State and Heads of Government and those led by ministers, of varying rank, or officials. He did not share the view of Mr. Jiménez de Aréchaga, who had put Heads of State on the same level as ministers. The Special Rapporteur had made a commendable effort to frame an article concerning Heads of State, but the drafting might need touching up and it would probably have to be expanded.

20. The best solution would be to provide for minimum standards and to leave it to the States concerned to reach agreement about any special privileges and immunities to be accorded.

21. Mr. AGO said that it was important not to confuse two different things: the status of the special mission as a whole, and the status of the persons who formed part of it. The status of the special mission might vary, depending on whether it was a more or less high level mission, but he was not sure that it was necessary to make that distinction. Was the mere fact that a special mission was led by a Head of State, a Prime Minister or a Minister for Foreign Affairs sufficient reason why the whole mission should be given different treatment and, more particularly, why the

[1] *Yearbook of the International Law Commission, 1965*, vol. II, p. 144, sub-paragraphs (*b*), (*d*), (*f*), and (*g*) of rule 4.

other members of the mission should automatically be entitled to the full privileges and immunities provided for in the Vienna Convention on Diplomatic Relations? The Commission would do better to confine itself to defining the personal situation of the Head of State, the Prime Minister, the Minister for Foreign Affairs or other personages of the same rank when one of them formed part of a special mission.

22. In connexion with another article of the draft,[2] the Commission had already envisaged the case where a special mission included members of the diplomatic staff of the permanent mission of the sending State in the receiving State; it had thought that in that case such persons retained their status as members of the permanent mission, which was governed by the Vienna Convention on Diplomatic Relations. By analogy inasmuch as general international law furnished certain rules concerning the status of a Head of State, a Prime Minister or a Minister for Foreign Affairs on an official visit to a foreign State, the Commission could lay down a rule specifying that when one of those persons or a person of similar rank formed part of a special mission, his situation was governed not by the articles of the draft, but by the rules of general international law. There was no need to do anything more.

23. Mr. REUTER said that the point under discussion was connected with the subject of article "X" (A/CN.4/194/Add. 2), on the legal status of the provisions, and raised a question which came up in connexion with almost all the articles: what purpose did the Commission have in mind in preparing its draft? He personally thought that the convention which was being drafted was intended primarily to facilitate the task of governments by proposing a ready-made solution which in the majority of cases would relieve them of the necessity of laying down detailed conditions. Above all else, therefore, it was necessary to produce something which would be convenient to use. The proposed model should be a single text or include only a very small number of variants. Since the Commission had already worked out a system of general law, it could limit itself to reminding States that they could agree on different special systems which might be either broader or stricter than the general system.

24. Certain members of the Commission, it seemed, would prefer the system defined in the draft to be a minimum system, the least which States could offer in any given case. If the Commission adopted that approach, the system should be fixed at a rather low level and be based more on the Convention on Consular Relations.

25. If the Commission thought it necessary to state special rules concerning high-level special missions, he agreed with Mr. Yasseen, and for the same reasons, that it would be better to consider only the case of the special mission on the highest level, the special mission led by a Head of State. In that case, the draft would gain by being slightly more explicit: since the Commission would refer to the rules of general international law, it would take the opportunity to specify what those rules were. But it was no doubt already too late to undertake a work of that kind.

26. He hoped that the draft would define a general system and a system for special missions at the Head of State level. For the rest, States would be completely free to define the system which they wished to apply, by referring either to the Vienna Convention on Diplomatic Relations or to the rules concerning special missions at the level of Heads of State, and they would also not be prevented from applying a stricter system, if they preferred, than the general system defined in the draft.

27. Mr. BARTOŠ, Special Rapporteur, said he agreed that it was extremely difficult to delimit so-called high-level special missions, seeing that the hierarchy of functions varied considerably from one country to another. For reasons of convenience, the rules of procedure of the Security Council provided that a Head of State, a Head of Government or a Minister of Foreign Affairs did not have to produce credentials, since those persons were presumed to represent their State.

28. It would not be very difficult to lay down rules of international law which would be applicable in the case of an official visit by a Head of State, for those rules were to some extent fixed; but, even so, the way in which a Head of State was treated in a foreign country generally depended in practice on an agreement between the two States, and in particular on the protocol of the receiving State.

29. In general, the suite of a Head of State enjoyed full privileges and immunities, but in that case, too, a question of definition arose: what persons or category of persons could lawfully claim to form part of his suite?

30. He could accept Mr. Yasseen's proposal that only the first sentence in article 17 *quater* should be kept. That sentence had a fairly precise meaning because of the reference to an "official visit", which was different from a State visit or a private visit. He was convinced that in most cases everything would be settled by an agreement between the States concerned.

31. He was not opposed to the solution proposed by Mr. Jiménez de Aréchaga as far as its substance was concerned. As a general rule, however, he was against inserting a reference to an existing convention in a draft convention. After all, it was possible that States which had not ratified the Vienna Convention might ratify the new convention on special missions, and in that case the duties of those States would be ill-defined.

32. The Commission was technically well equipped to take a valid decision and he therefore urged it to say whether it wished to abide by its previous decision not to draft any separate provisions concerning so-called high-level special missions.[3] If it reversed that decision, he would submit a draft.

33. Mr. TSURUOKA said that the Commission would be wise to abide by its previous decision, especially after the explanations given by the Special Rapporteur.

34. In that case, the Commission could decide to keep only the first sentence in article 17 *quater*, as suggested by Mr. Yasseen and supported by the Special Rapporteur.

[2] Article 3.

[3] See *Yearbook of the International Law Commission, 1966*, vol. II, document A/6309/Rev. 1, Part II, para. 69.

35. The Commission, however, could also adopt another method, based on what it had done in its draft articles on the law of treaties.[4] Article 2, paragraph 1 (*a*) of that draft indicated that the articles referred primarily to treaties in written form concluded between States, and article 3 safeguarded the legal force of international agreements not in written form or not concluded between States, as well as the application to those agreements of the rules set forth in the articles to which they would be subject independently of those articles.

36. Similarly, with regard to high-level special missions, the Commission could state that special missions led by a Head of State, a Prime Minister, a Minister for Foreign Affairs or persons holding an equivalent rank in the sending State were not "special missions" within the meaning of the articles, but that that in no way prevented the application of the rules of international law to such missions, independently of the articles.

37. The CHAIRMAN said that the Commission would continue its consideration of article 17 *quater* at its next meeting; he noted that five different approaches to the problem had been suggested.

38. The Commission would be sorry to hear that, for unavoidable reasons, Mr. Tsuruoka would be unable to attend the remainder of the session and it would thus lose the benefit of his wisdom and constructive suggestions.

39. Mr. TSURUOKA said he regretted having to leave before the end of the session, but hoped to be able to attend the twentieth session.

The meeting rose at 11.35 a.m.

[4] *Ibid.*, following paragraph 38.

924th MEETING

Monday, 19 June 1967, at 11.40 a.m.

Chairman: Sir Humphrey WALDOCK

Present: Mr. Ago, Mr. Bartoš, Mr. Castañeda, Mr. Castrén, Mr. Eustathiades, Mr. Jiménez de Aréchaga, Mr. Kearney, Mr. Nagendra Singh, Mr. Ramangasoavina, Mr. Reuter, Mr. Tammes, Mr. Ushakov, Mr. Ustor, Mr. Yasseen.

Special Missions

(A/CN.4/193 and Addenda; A/CN.4/194 and Addenda; A/CN.4/L.121)

(continued)

[Item 1 of the agenda]

ARTICLE 17 *quater* (Status of the Head of State) [21] *(continued)*[1]

1. The CHAIRMAN invited the Commission to continue its consideration of article 17 *quater*.

2. Mr. BARTOŠ, Special Rapporteur, said that, before continuing, he wished to draw attention to the amendment (A/CN.4/L.121) submitted by Mr. Jiménez de Aréchaga at the previous meeting,[2] the effect of which would be to upset the entire system which had so far been built up with respect to privileges and immunities. Under the terms of the proposed new article, which would be article 23 *bis*, there would no longer be any separate system for special missions. In the case of high-level special missions and special missions for which States had agreed in advance that those provisions would apply, there would merely be a reference to the articles of the Vienna Convention on Diplomatic Relations. All other special missions would be subject, in the matter of privileges and immunities, to the system which applied to officials of the United Nations.

3. If the Commission decided in favour of Mr. Jiménez de Aréchaga's amendment, they would have to consider the entire second part of the draft all over again.

4. The CHAIRMAN said that he would try to summarize the opinions and suggestions put forward during the discussions.

5. The Special Rapporteur had proposed a system, embodied in his article 17 *quater* and supplemented in his article 17 *ter*, which made provisions for only one special category of special mission, namely a mission led by a Head of State. For other special missions, any special régime would be a matter of agreement between the two States concerned; the agreement would be either an *ad hoc* one relating to a particular special mission, or a general agreement covering a whole series of special missions to to be exchanged by the countries concerned.

6. One of the problems which arose in connexion with high-level special missions was that they could be headed by a variety of different dignitaries, such as Ministers of State and members of Parliament. One member of the Commission, Mr. Yasseen, had asked that the category of high-level special missions should be restricted to those led by a Head of State, but Mr. Ushakov had objected that such an approach would create a presumption that, in the absence of a specific agreement between the two States concerned, a special mission headed by the Prime Minister or Foreign Minister of the sending State would be governed by the standard rules on ordinary special missions. Mr. Tsuruoka had therefore proposed that that difficulty should be dealt with by means of a general provision excluding from the operation of the draft articles on special missions those missions which were led by a Head of State or by certain other high dignitaries; the reservation might be on the lines of article 3 of the Commission's draft articles on the law of treaties[3] and would specify that the fact that the draft articles did not relate to high-level special missions did not affect the legal status of those missions or the application to them of any of the rules set forth in the draft articles, to which they would be subject independently of those articles.

[1] See 923rd meeting, para. 1.

[2] Para. 10.

[3] *Yearbook of the International Law Commission, 1966*, vol. II, document A/6309/Rev. 1, Part. II, following paragraph 38.

7. Mr. Ramangasoavina had proposed another solution to that problem: the article on high-level special missions should be eliminated, which would limit the draft articles to the standard rules, and all special cases should be dealt with by an agreement between the States concerned.

8. A different approach to the whole question had been suggested by Mr. Ago, who had urged that the Commission should formulate special provisions for the high dignitaries themselves, rather than for the special missions to which they belonged; according to that approach, the other members of a high-level special mission would be governed by the standard rules on ordinary special missions.

9. Lastly, the Commission had before it a proposal by Mr. Jiménez de Aréchaga for the addition of a new article 23 *bis*, combining the Special Rapporteur's ideas with the suggestion made by certain Governments in their comments that high-level special missions should include all special missions headed by an official of not less than Cabinet rank. It should be noted, however, that one of those Governments, that of the United States, thought that the standard articles on special missions should govern only the high-level special missions in question, whereas ordinary special missions would be governed by agreement between the states concerned. In his proposal, Mr. Jiménez de Aréchaga had adopted an opposite approach: the diplomatic staff of high-level special missions would enjoy the diplomatic privileges and immunities specified in certain articles of the 1961 Vienna Convention on Diplomatic Relations, while ordinary special missions would be governed entirely by the draft articles on special missions. At the same time, he had proposed that the same articles of the 1961 Vienna Convention should apply to the head and the diplomatic staff of a special mission, if the sending and receiving States had so agreed before the departure of the mission.

10. Mr. JIMÉNEZ de ARÉCHAGA said that the Chairman had accurately interpreted the scope and intention of his proposal for a new article 23 *bis*.

11. He was not suggesting any radical change in the Commission's approach to the whole topic of special missions, but was merely proposing a means of bridging the differences of opinion which had arisen with regard to the privileges and immunities to be enjoyed by members of special missions. The scope of those privileges and immunities, as far as ordinary special missions were concerned, was still an open question: the Drafting Committee was endeavouring to devise a formula capable of attracting general support in the Commission.

12. The purpose of his proposed article 23 *bis* was to give States the possibility of choosing an alternative formula which could be used in preference to the standard rules for special missions, so as to meet the requirements of high-level special missions.

13. Objection had been raised to the method used in article 23 *bis* of referring back to certain articles of the 1961 Vienna Convention on Diplomatic Relations. That objection could easily be met by replacing the reference in question by the text of the rules set forth in articles 29 to 32 and 36 of that Convention.

14. Article 23 *bis* did not contain any provision concerning the status of the Head of State, which would continue to be governed by existing international law; it referred only to members of the diplomatic staff of a special mission led by a Head of State, a Head of Government or a Minister for Foreign Affairs. It should also be remembered that the provisions of article 23 *bis* did not extend to the administrative and technical staff or the service staff of a high-level special mission.

15. Mr. KEARNEY said that the substance of article 17 *quater* was not vital to the general scheme of the draft articles. It was not essential that the draft should contain special provisions on special missions headed by a Head of State or other important dignitary. The fact of the matter was that, in such cases, detailed preparations were always made beforehand. Also, the position in law was that the courtesies, privileges and immunities extended to the head of such a mission were at least equal to those extended to the head of a permanent diplomatic mission. It did not seem necessary to deal, in connexion with such high dignitaries, with the problem whether they could be declared *non grata* or not; it was hardly conceivable that such a declaration would be made in the case of a visiting Prime Minister or Minister for Foreign Affairs of another country.

16. The text of the first paragraph of article 17 *quater* amply illustrated that point; the provisions of that paragraph merely required States to follow the accepted international practice when receiving a special mission led by a Head of State. A provision of that type was not essential to the draft.

17. A more important problem was that the application of the draft articles on special missions would clearly depend on whether the receiving State was prepared to regard a particular group of visiting foreign officials as a special mission within the meaning of the draft. The text of article 1 as adopted by the Drafting Committee[4] made it clear that it would be for the receiving State to say whether a group of visiting officials from the sending State qualified as a special mission and were therefore governed by the rules set forth in the draft articles. A system of that kind was perhaps advantageous for the larger and more influential States but might not be convenient for the others. In the circumstances, the proposal put forward by Mr. Jiménez de Aréchaga was attractive because it laid down certain objective requirements and did not leave the determination of what constituted a special mission to the discretion either of the sending State or of the receiving State.

18. That proposal also had the merit of going to the heart of the problem, which was to determine the privileges and immunities to be granted to special missions. It had been pointed out that article 17 *quater* raised two separate questions: first, whether there should be any special rule for high-level missions; secondly, to what persons should privileges and immunities be granted. Personally, he considered that the two problems could be approached as a single question, namely, that of determining whether privileges and immunities under the draft articles should not be limited to persons of high rank.

[4] See 926th meeting, para. 2.

19. However, the most serious problem was to determine what the Commission meant by a special mission, so as to define the scope of the privileges and immunities to be granted. The concept of a special mission was not a fixed legal concept; there was no definition accepted either by treaty or by State practice. The Commission was therefore not yet clear about the purpose of the draft articles under discussion. He could give the following examples of official visits, in respect of which it would be necessary to determine whether they constituted special missions or not: a visit by a doctor of medicine from the Ministry of Health of one country to his counterpart in another country in order to discuss with him questions of malaria control; a visit by members of the Protocol Department of the Foreign Ministry of one country to their colleagues in the Foreign Ministry of another country for the purpose of making arrangements for the visit of a Minister for Foreign Affairs; a visit by a major-general to attend the testing of a new type of rifle for the purpose of reporting on the possibility of purchasing it from the country which produced it. With the development of international communications, official visits of that kind accounted for the bulk of official movements. The Commission should earnestly consider whether officials engaged in visits of that type really required a broad measure of diplomatic privileges and immunities. For his part, he thought that it would be a mistake to extend to them all the privileges and immunities set forth in the draft articles on special missions.

20. The proposed article 23 *bis* would make it possible to confine the granting of diplomatic privileges and immunities to a limited category of persons, so that other officials could be left outside the scope of the draft articles.

21. The CHAIRMAN said that Mr. Kearney had drawn attention to the problem of the lower range of special missions, whereas the Commission was at present discussing what might be called the upper range of those missions. It was working on the assumption that the standard articles on special missions would apply in the generality of cases and was considering whether special arrangements should be made to deal with high-level missions.

22. Mr. USTOR said that article 17 *quater* covered only the "Head of State". But in certain countries the Executive consisted of a collegiate body whose chairman could not, properly speaking, be considered a Head of State; in fact, under certain constitutional systems, the chairman of the collegiate executive was not the highest dignitary in the country and did not always represent his country at the highest level. It was therefore essential to adopt a more flexible formula which could be applied to all possible constitutional forms.

23. As other speakers had already pointed out, the provisions of article 17 *quater* did not constitute a codification of the subject, since they merely referred to existing international law in the matter. The Commission should therefore accept the offer made by the Special Rapporteur to draft a set of substantive rules on the special position of high dignitaries when those dignitaries led special missions.

24. In order to prove acceptable to governments, the draft articles on special missions should embody an average or standard set of rules rather than minimum rules. They should therefore reflect the treatment which governments were most likely to concede to special missions and the treatment which they usually expected to see granted to their own special missions. His own view was that a special mission was a mission presented as such by the sending State and accepted as such by the receiving State. Since the draft was to include provisions concerning notification, the receiving State would have all the necessary safeguards; it would be in a position to refuse to regard as a special mission any group of officials who were travelling in the interests of some organ of the sending State but were not acting as representatives of the State as such.

25. Since the draft articles on special missions would relate to the average type of mission, it was necessary to make some provision for special arrangements for high-level missions; whence the need for article 17 *quater*, provided that it stated the substantive rules to be applied to a Head of State or other dignitary heading a special mission. He agreed with Mr. Ago that the other members of a high-level special mission should not be given different treatment from that received by members of ordinary special missions.

26. The proposed article 23 *bis* applied only to special missions headed by a dignitary of at least the rank of Cabinet Minister. That proposal had the defect of downgrading by implication a special mission headed by an ambassador; missions of that kind, however, were often sent to deal with extremely important matters. In State practice, it was the rule rather than the exception that a special mission was headed by an ambassador, who should enjoy the privileges normally granted to diplomatic agents.

27. He was in favour of article 17 *quater*, provided its scope was extended to cover dignitaries other than the Head of State, and provided also that it was drafted so as to state the rules in the matter instead of merely referring to "the rules of international law and international custom".

28. Mr. CASTRÉN said that his view, like Mr. Ago's, was that the status of special missions and that of the high dignitaries who headed them should be dealt with separately. The essential thing was to formulate general rules for special missions which were not governed by a special agreement, without considering, at that stage, all the categories of special missions. The draft took the diversity of special missions into account in several places, in particular in article 40 *bis*, and it should not be forgotten that article 17 *ter* and articles "X" and "Y" still had to be considered.

29. Although there was no necessity to determine in the draft the status of high dignitaries who headed special missions, it was not sufficient merely to mention the matter in the commentary, which would not appear in the final text of the future convention. Two solutions had been suggested: either to insert a reservation concerning such personages and their suites in the preamble of the convention, or to adopt an article which would refer to the rules of international law governing the matter. He himself was in favour of the second solution, which had been proposed by the Special Rapporteur.

30. He would suggest that the second sentence in article 17 *quater* should be deleted and that the first sentence should mention not only the Head of State, but also the Head of Government, the Minister for Foreign Affairs and perhaps also the other members of the Cabinet. States would always be able to provide for special treatment for other high dignitaries by special agreement. Article 17 *quater* would then read:

"A Head of State, Head of Government, Minister for Foreign Affairs or other member of the Cabinet who leads a special mission of the sending State, as well as his suite, shall enjoy in the receiving State all the privileges, immunities and facilities which are accorded them on an official visit to that State, in conformity with the provisions of international law, international custom and special agreements concluded between the sending State and the receiving State".

31. At first glance, Mr. Jiménez de Aréchaga's amendment seemed hardly acceptable, but he might have occasion to revert to it later.

32. Mr. TAMMES said that he had examined the records of the Commission's previous session and could see no justification for confining the provisions of article 17 *quater* to the Head of State. Nor did the comments by Governments provide any grounds for that limitation.

33. From the practical point of view, it was more important to regulate the position of high officers of State other than the Head of State, since there existed well-established rules of international law on the treatment to be extended to a Head of State but few, if any, on the subject of other high dignitaries such as a Vice-President of a Republic or President of the Senate.

34. The Commission should therefore prepare two articles on high-level missions, the first to deal with the problem of a special mission headed by a Head of State, and the second to cover other high-level missions. It would then be for the future conference of plenipotentiaries to decide whether those two articles should be incorporated in the final instrument on special missions.

35. That approach would go far towards meeting the purposes of Mr. Jiménez de Aréchaga's proposed article 23 *bis* and would have the advantage of being more specific than the method of merely referring to certain articles of the 1961 Vienna Convention. It should be remembered that the draft articles on special missions virtually reproduced, with minor adaptations, the various articles of the 1961 Vienna Convention and made the rules embodied in that Convention applicable to all special missions.

36. It would be helpful if the Secretariat would inform the Commission how many States had so far ratified the 1961 Vienna Convention on Diplomatic Relations or had otherwise declared themselves bound by its provisions.

37. Lastly, he would like to ask Mr. Ustor whether it was always open to a government to state whether or not it wished to consider a particular mission a special mission for the purposes of the application of the draft articles.

38. Mr. USTOR said the answer was in the affirmative. Under the terms of the draft articles, the consent of both the receiving State and the sending State was necessary. The sending State must express its intention to send a group of officials as a special mission; faced with that request, the receiving State could reply that it was prepared to receive the officials in question but did not wish to regard them as a special mission. Such a situation could arise when, for instance, there was a question whether a particular mission would represent the sending State or only its State Railways.

39. The CHAIRMAN said that the discussion had shown that it was desirable that the Drafting Committee should report to the Commission at an early stage on the question, which had already been referred to it, of the definition of a special mission. The Drafting Committee should also consider what bearing the question of notification would have on that definition.

40. It was clear, however, that the draft on special missions was intended to regulate many of the examples given by Mr. Kearney. The Commission had drafted its rules on special missions in such a way that they applied to the ordinary type of day-to-day mission. Accordingly, it would have to consider the question whether it was advisable to incorporate in the draft special rules on high-level dignitaries for cases when such dignitaries headed a special mission.

41. Mr. USHAKOV said that the discussion had shown the impossibility of defining the notion of "high-level special missions"; it was an expression that could be applied to missions which included not only the Head of State or the Prime Minister but also a great variety of other dignitaries. It was equally impossible to determine the immunities and privileges which should be accorded to the staff of a high-level special mission, for in certain cases all members of the special mission were considered as forming part of the suite of the Head of State, and by virtue of that fact enjoyed diplomatic privileges and immunities, while in other cases, only some of them had that status.

42. It would be better merely to refer to international custom without trying to lay down special rules for high-level special missions and he therefore proposed that article 17 *quater* should be drafted to read:

"A Head of State, Head of Government, ministers or other high dignitaries heading a special mission shall enjoy all the facilities, privileges and immunities accorded to them by special agreement between the States concerned."

43. Mr. REUTER said that the Commission should give an answer to three fundamental questions. First, how many essential régimes would be provided for by the convention? Secondly, how was the category or categories of missions to which the convention would apply to be defined? Thirdly, what régime would apply to that category or to those categories?

44. Personally, he considered that the convention should provide for a single régime of a general nature. The average category to which it would apply could, as Mr. Ustor had said, be defined in each case by a special decision of the States concerned. If that was not regarded as sufficient, the Drafting Committee would have to try to

establish certain objective criteria which would make it possible to determine, in the absence of a definition by States, whether the convention applied; in that case the criterion was likely to be sought in the general idea of the "representation of the State". So far as the régime which would apply to the average category was concerned, he could not accept Mr. Jiménez de Aréchaga's proposal recommending a régime similar to that for international officials, since it would jeopardize all the work the Commission had already done.

45. Once those three fundamental questions had been answered, the Commission could consider the secondary problems, and the proposals concerning them, but it was important that all the work already done should not be called in question.

46. Mr. AGO said that the discussion seemed to suggest the conclusion that it was inadvisable to introduce the very idea of "high-level special missions" and to place missions on different levels. The Commission might therefore consider that all the articles already examined laid down general rules and insert in the draft convention special clauses relating, not to high-level special missions, but to special missions including high dignitaries or, more precisely, to the situation of those dignitaries when they formed part of a special mission. The general rules could then be stricter, since the high dignitaries would enjoy special treatment. The Commission should therefore consider the question from the point of view of the composition of the special mission rather than attempt to draw a distinction between various categories of special missions, which might create insuperable difficulties.

47. Mr. JIMÉNEZ de ARÉCHAGA said he was very concerned at Mr. Ustor's reply to the question put to him by Mr. Tammes. If an *ad hoc* agreement was necessary in each case in order that a special mission should be governed by the draft articles, then the whole purpose of the draft would be fundamentally changed. It would cease to be a draft convention and would become a mere set of model rules. Moreover, if the application of the draft was to be entirely at the discretion of the receiving State, the door would be left open to undesirable forms of pressure. The Commission must decide whether, for the purposes of defining special missions, it wished to adopt an objective or a subjective criterion.

The meeting rose at 1 p.m.

925th MEETING

Tuesday, 20 June 1967, at 10.5 a.m.

Chairman: Sir Humphrey WALDOCK

Present: Mr. Ago, Mr. Bartoš, Mr. Castañeda, Mr. Castrén, Mr. Eustathiades, Mr. Jiménez de Aréchaga, Mr. Kearney, Mr. Nagendra Singh, Mr. Ramangasoavina, Mr. Reuter, Mr. Tammes, Mr. Ushakov, Mr. Ustor, Mr. Yasseen.

Special Missions

(A/CN.4/193 and Addenda; A/CN.4/194 and Addenda; A/CN.4/L.121)

(continued)

[Item 1 of the agenda]

ARTICLE 17 *quater* (Status of the Head of State) [21] *(continued)*[1]

1. The CHAIRMAN invited the Commission to continue its consideration of article 17 *quater*.

2. Mr. CASTAÑEDA said that the Commission, having decided to adopt a special article on high-level special missions, could not confine itself to formulating rules relating to dignitaries heading special missions, but must also try to define the status of the special mission itself, on which the situation of its other members depended.

3. With regard to method, it was not enough merely to refer to the rules of international law and international custom. He agreed with Mr. Ustor and Mr. Reuter that a minimum number of rules must be clearly stated, from which it would of course be open to States to depart, either by unilateral decision or by mutual agreement.

4. As to reference to the provisions of the Vienna Convention on Diplomatic Relations which appeared in Mr. Jiménez de Aréchaga's proposal (A/CN.4/L.121),[2] it would be better from the point of view of legal drafting to refer instead to the corresponding articles of the draft itself, which had already been adapted to the needs of special missions.

5. Also in view of the proposed new terminology, article23 *bis* should commence with the words: "The representatives and the members of the diplomatic staff of a special mission...".

6. Lastly, in order to avoid having to revise the whole of part II of the draft, the provisions applicable to other missions could be left in abeyance so that for the present only high-level special missions would be dealt with.

7. Mr. BARTOŠ, Special Rapporteur, said that few members had replied to the two questions he had put to the Commission before it began to consider article 17 *quater*, namely, should special rules be formulated for so-called high-level special missions, and what should be the criterion for distinguishing those missions from other special missions?

8. On the first question, he agreed with Mr. Ago that a distinction should be drawn between the special mission itself and the dignitary who headed it and for whom certain courtesies and honours should be provided, as well as certain special legal rules, particularly with regard to his suite. The Commission should give a clear answer to that question, either affirmative or negative.

9. On the second question, the very notion of high-level special mission was difficult to define with precision, because of the diversity of examples to be found in the different countries. The definition of special mission pro-

[1] See 923rd meeting, para. 1.

[2] *Ibid.*, para. 10.

posed by the United States Government, (A/CN.4/193), which also referred to high-level special missions, had not been endorsed by the Commission. But the notion of special mission had been established since 1960,[3] and that definition had not given rise to any objection from any quarter since then. It had been proposed to draw a distinction between technical special missions and political special missions but, in view of the difficulties involved, the idea had been dropped.

10. With regard to Mr. Jiménez de Aréchaga's amendment, he (the Special Rapporteur) was not in favour of the proposed reference to the provisions of the Vienna Convention on Diplomatic Relations because the Commission, throughout its work on the draft, had continually striven to adapt the provisions of that Convention to the needs of special missions. Mr. Jiménez de Aréchaga's amendment amounted to an attempt to reverse the principle which the Commission had adopted. The Commission must decide whether it was better to start by laying down the privileges and immunities to be extended to special missions and allowing States to depart from that general rule—the method followed in the draft—or to exclude privileges and immunities in principle and accord them only to special missions headed by a high dignitary and to missions to which the sending State and the receiving State had agreed in advance that they should be accorded—the solution proposed by Mr. Jiménez de Aréchaga. The essential point was to choose one of those methods and to abide by it.

11. The second paragraph of Mr. Jiménez de Aréchaga's proposal stated that articles 24, 25, 26, 27 and 31, applicable to other special missions, would then provide only for functional immunities similar to those enjoyed by United Nations officials. He thought it was a mistake to try to assimilate the representatives and members of a special mission to United Nations officials, since the privileges and immunities were granted to the sending State and not to the members of the mission. The functional theory as applied to privileges and immunities had already been rejected by the Commission which had considered that it was too difficult to draw a dividing line between private acts and official acts.

12. Although there were rules concerning a Head of State, international law did not contain any rules governing the case where the Head of the Government or the Minister for Foreign Affairs headed a special mission, or the position of his suite. He therefore agreed with Mr. Ago that it should be specified that a Head of Government, Minister for Foreign Affairs or other similar dignitary would be treated with all the courtesies and honours due to his high office. That solution would make it possible to take into account both the protocol rules and the legal rules in the matter, as well as international practice and custom.

13. The CHAIRMAN said that no member had suggested reversing the principle on which the Commission had been working so far. There was general agreement that there would be a number of standard rules, which would apply to all special missions, except in two types of cases: first, where the draft articles themselves laid down a special rule, and secondly, where the States concerned agreed to depart from the standard rules.

14. What the Special Rapporteur wanted to know, before proceeding any further with his work, was whether the Commission wished to adopt a special rule, or set of rules, on the subject of high-level missions. All the members had dealt with that question during the discussion, but had made different suggestions on the best way to formulate rules on high-level missions. The Special Rapporteur, however, wished to have more precise views from members on the criterion to be adopted for determining what constituted a high-level mission. The Special Rapporteur himself appeared to favour Mr. Ago's approach of placing the emphasis not on the special mission itself, but on the treatment to be extended to certain dignitaries when they formed part of a special mission.

15. Mr. EUSTATHIADES said that, when a Head of State or a high-ranking dignitary headed a special mission, the well-established rules of international courtesy would apply and it was therefore sufficient for the draft articles to refer, in general terms, to international custom. With regard to persons forming the suite of a Head of State, it was difficult to decide who those persons were and what facilities, privileges and immunities they should enjoy.

16. Mr. AGO said that the only allegedly objective criterion for deciding whether a special mission was a "high-level" mission was really whether or not the membership of the mission included certain dignitaries. It might then be asked whether the presence of a Head of State or of a minister with the special mission must involve granting facilities, privileges and immunities to some official who would not enjoy such facilities if the Head of State or minister were not leading the special mission. The problem became even more complex if the dignitary in question left his post at the head of the special mission for a time, since the question would then arise whether in his absence the members of the special mission continued to enjoy the same privileges and immunities.

17. That was why he took the view that the Commission ought not to establish any distinction between the various categories of special missions but should deal only with the status of the Head of State himself or of the minister by reference to the provisions of general international law and to international custom.

18. Mr. USHAKOV said that he did not see how the Commission could formulate articles on high-level missions, because it was impossible to draw up a list of all the dignitaries whose presence would make a special mission a high-level one. In his proposal, Mr. Jiménez de Aréchaga had mentioned the Head of State, the Head of Government and the Minister for Foreign Affairs; but that list was incomplete and did not take into account the fact that the rules of precedence varied considerably from one State to another. If high-ranking dignitaries took part in a special mission, they would enjoy the benefits, in the matter of facilities, privileges and immunities, of the régime prescribed by international custom or by the agreements entered into by the States concerned. The Commission,

[3] See *Yearbook of the International Law Commission, 1960*, vol. II, p. 179.

in its draft articles, should deal only with the régime applicable to special missions as a whole.

19. Mr. JIMÉNEZ de ARÉCHAGA said that, in proposing a new article 23 *bis*, he had not intended to reopen the question of the whole approach to the draft. In fact, his proposal affected only articles 24, 25, 26, 27 and 31—articles on which the Commission had not yet reached any conclusion but which it had referred to the Drafting Committee. In some cases, the Commission had actually taken the unusual course of requesting the Drafting Committee to submit two alternative texts in order to take into account the two trends which had become manifest in the course of the discussion, one the tendency to grant full diplomatic immunities, and the other the trend in favour of the functional approach, combined with the duty of the sending State to waive immunity, on the analogy of section 14 of the 1946 Convention on the Privileges and Immunities of the United Nations. Any reference made by him in his proposal or in his statements either to the system of the 1961 Vienna Convention on Diplomatic Relations or to that of the 1946 Convention was merely a convenient manner of indicating the two types of régime; those references should not be misinterpreted as attempts to introduce into the draft articles on special missions all the pecularities either of the 1961 Vienna Convention or of the 1946 Convention.

20. However, in view of the Special Rapporteur's strong opposition to his proposal for an article 23 *bis*, he would withdraw it. At the same time, he wished to ask the Special Rapporteur three questions which were fundamental to the whole work of the Commission on special missions. First, would the application of the future convention on special missions depend on a previous acknowledgement, or a specific agreement, that that convention was applicable as such in each concrete case? Secondly, what would be the situation when States did not make such an acknowledgement or specific agreement: was the convention applicable as a subsidiary rule, or, if not, what was the legal status of a special mission sent under those circumstances? And thirdly, was a State authorized to acknowledge the convention as applicable to a special mission from one State, but not to a special mission of an identical nature from a different State?

21. The CHAIRMAN said that those questions were more for the Commission to decide than for the Special Rapporteur to answer; they would inevitably be considered when the Commission came to examine the draft articles prepared by the Drafting Committee.

22. The problem of high-level missions did not depend on the answer to those questions, but that answer could have an effect on low-level missions: the latter type of special mission would be affected by the definition of what constituted a special mission for the purposes of the draft articles.

23. He therefore urged Mr. Jiménez de Aréchaga not to press for an answer to his questions at the present stage.

24. Mr. REUTER said that the Commission's task was to codify the rules of international law; in the case of high-level special missions, however, the Special Rapporteur himself, with all his learning, was unable to say what were the applicable rules. The Commission should therefore be content with a draft article on some such lines as: "Nothing in the present articles shall stand in the way of the application of the usage, practice or customary rules applicable to a Head of State, Minister or person of equivalent rank."

25. Mr. YASSEEN said that the Commission should formulate draft articles on the standard rules applicable to special missions in cases where the States concerned had not entered into a special agreement on the subject. Since there were very few international rules applicable to dignitaries other than a Head of State, or occasionally a Minister for Foreign Affairs, the best course would be to lay down the régime of special missions in general, to make a reservation in respect of the Head of State, and to leave it to States themselves to settle by agreement the facilities, privileges and immunities which they proposed to grant to certain high-ranking dignitaries when they participated in a special mission.

26. Mr. CASTRÉN said he had the impression that many members of the Commission considered it impossible to lay down special rules for high-level special missions and that the Commission should confine itself to making a reservation in respect of those missions. Personally, he would be inclined to adopt the text proposed by Mr. Ushakov at the previous meeting,[4] while extending the benefits of privileges and immunities to members of the suite of the high-ranking dignitary and specifying that the privileges and immunities in question were those recognized not only by international custom and special agreements but also by the general principles of international law.

27. He thought that article 17 *quater* could now be referred to the Drafting Committee.

28. The CHAIRMAN said that, although different views had been expressed during the discussion, there was a general disinclination in the Commission to try to draft a code of rules for high-level special missions. A large number of members had arrived at the conclusion that the best solution would be to include in the draft articles a general reservation on the subject. The Drafting Committee would consider the best formula for the purpose, taking into account the proposals made by Mr. Ushakov and Mr. Reuter. The Drafting Committee would, in addition, study the question whether the general article to be drafted should cover only the Head of State or also some other dignitaries; it would also consider whether the suite of such dignitaries should receive special treatment.

29. Mr. BARTOŠ, Special Rapporteur, said it was his understanding that the Commission rejected the idea of including in the draft special provisions on high-level special missions. He agreed with Mr. Ago and Mr. Ushakov that only an article on the exceptional privileges and immunities to be extended to a Head of State and possibly to certain other high-ranking dignitaries should be drafted.

30. The CHAIRMAN said that, if there were no objection, he would consider that the Commission agreed to

[4] Para. 42.

refer article 17 *quater* to the Drafting Committee for consideration in the light of the discussion.

It was so agreed.[5]

ARTICLES 17 *bis* (Derogation by mutual agreement from the provisions of part II) [—] and 17 *ter* (Difference between categories of special missions) [—]

31. *Article 17* bis [—]

Derogation by mutual agreement from the provisions of part II

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

32. *Article 17* ter [—]

Difference between categories of special missions

Distinctions may be introduced, by mutual agreement, in the extent of the facilities, privileges and immunities granted to special missions, having regard to the different categories of special missions and to the conditions needed to ensure the regular functioning of these particular categories, so that all special missions between the same States need not necessarily be treated in the same manner, but may be treated according to their nature and within the limits laid down by agreement between the sending State and the receiving State.

33. The CHAIRMAN invited the Commission to consider the Special Rapporteur's proposals for a new article 17 *bis* and a new article 17 *ter* (A/CN.4/194/Add. 2). The Special Rapporteur's additionalc omments on the articles were to be found in the supplements to his fourth report (A/CN.4/194/Add. 4 and Add. 5).

34. Mr. BARTOŠ, Special Rapporteur, suggested that the Commission examine article 17 *bis* and article 17 *ter* together, since they in fact constituted two paragraphs of a single article.

35. Mr. TAMMES said that the meaning of article 17 *ter* was not quite clear. Any State was of course free to grant broader privileges and immunities to a special mission than those set out in the draft convention and such distinctions could be introduced by mutual agreement. The question was whether article 17 *ter* could be interpreted to mean that less protection than the minimum provided for in the draft could also be decided upon by agreement between the two States. If that interpretation was to be excluded, the phrase "and by the present Convention" should be added at the end of the article. Otherwise, it would be possible for States to agree even that no privileges and immunities at all should be granted to a special mission.

36. Mr. BARTOŠ, Special Rapporteur, said that the Commission's intention was not to extend privileges and immunities, but to enable States to limit them or even abolish them if they regarded them as unnecessary.

37. Mr. CASTRÉN said that the question dealt with in article 17 *bis* was dealt with more fully in article 17 *ter*, which was closely linked with article "X" (A/CN.4/194/Add. 2), consideration of which had been deferred until a later meeting. Also, article 17 *ter* dealt with the same problems as paragraphs 2(*b*), 2(*c*) and 3 of article 40 *bis*. It might therefore be better to defer examination of article 17 *ter* or merely to hold a preliminary discussion on it, for if the Commission subsequently adopted a general provision on the right of derogation by mutual agreement between the States concerned, the article would lose its *raison d'être*.

38. The objective criteria cited in article 17 *ter* as possible reasons for different treatment—different categories of special missions, nature of missions and conditions needed to ensure their regular functioning—were rather vague, and the distinction between the various categories and the nature and tasks of special missions should be specified. He accordingly proposed that the words "and tasks" be added after the words "according to their nature" in the last sentence of the article.

39. Mr. EUSTATHIADES said that the problem of the difference between categories of special missions related to the actual definition of the special mission. Whatever that definition might be, it was understood that the fact of belonging to a special mission guaranteed its members the enjoyment of certain facilities, privileges and immunities.

40. The draft articles provided for a single system whereby States might, by mutual agreement, decide on derogations to restrict or to extend the facilities provided for. The provisions of article 17 *ter* seemed to be unnecessary from the point of view of legal technique, since article 17 and article 40 *bis*, paragraph 3, would suffice to cover the case of so-called high-level missions.

41. According to the Commission's report on the work of its eighteenth session, cited by the Special Rapporteur in paragraph 1 of his observations on article 17 *ter*, Governments were concerned that "the extent of certain privileges and immunities should be limited in the case of particular categories of special missions".[6] The régime laid down by the draft articles was a general one, applicable to all special missions, and the Commission should take the concern of Governments into account and refrain from providing for a category which would enjoy an even more favourable régime of facilities, privileges and immunities.

42. He did not consider that article 17 *bis* overlapped with article "X", which in its existing form merely complicated the situation. In his opinion, the solution would be either to mention in the appropriate articles the possibility that their application could be modified—in which case article "X" would become redundant—or to list in article "X" the articles for which that possibility was provided. In any case, articles 17 *bis* and "X" should be considered together.

43. Mr. BARTOŠ said that the wording of article "X" did not reflect the proposal submitted at the beginning of the session. What was needed was a formula which would specify that, with the exception of certain articles, to be listed, States might derogate from the provisions of the other articles of the convention.

[5] For resumption of discussion, see 937th meeting, paras. 68-75.

[6] *Yearbook of the International Law Commission, 1966*, vol. II, document A/6309/Rev.1, Part II, para. 61.

44. The CHAIRMAN said that article "X" should be left aside, as it was controversial and would have to be aligned with other articles in the light of the decisions taken by the Commission.[7]

45. Mr. YASSEEN said that article 17 *bis* merely dealt with a special application of articles "X" and "Y" and that it would be better to defer consideration of the question until the Commission considered article "Y" (A/CN.4/194/Add. 2), on the relationship between the draft articles and other international agreements.

46. The CHAIRMAN said that article "X" was a very broad provision which raised the question of a *jus cogens* in a general fashion. It was possible to have firm views on that article without necessarily holding the same views on the narrow issue raised in article 17 *bis*. The Special Rapporteur was anxious to elucidate the Commission's views on the substance of article 17 *bis*; the wording of the provision, which would be conditioned by that of articles 40 *bis*, "X" and "Y", could be left to the Drafting Committee. The Commission should now decide whether it wished to include a clause along those lines; he appreciated that the provision might involve some difficulty for certain members in connexion with such a question as inviolability.

47. Mr. USHAKOV said that articles 17 *bis* and 17*ter* were unnecessary, for there was nothing to prevent States from considering that a given mission was not a special mission within the meaning of the draft, and that the provisions on special missions were therefore inapplicable.

48. Mr. NAGENDRA SINGH said he considered that the provision in article 17 *ter* was useful. In view of the wide variety of special missions which had to be provided for, it would be wise to mention the possibility of differential treatment and derogation by mutual consent.

49. Mr. AGO said that the Commission was called upon to give its views only on the underlying principle of article 17 *bis*. The purpose of that article was to enable States, not to consider that certain missions were not special missions within the meaning of the convention, but to grant special missions greater or lesser privileges and immunities than those provided for in the convention. The question was one of a partial derogation from the provisions of the convention. In his opinion, the principle was sound and should be retained, but the article itself was superfluous, as the principle could appear in article "X", on the legal status of the provisions. In any case, the Commission could not take a decision on article "X" until all the other articles of the Convention had been drafted.

50. Mr. JIMÉNEZ de ARÉCHAGA said he supported the view that States should have latitude to agree on more limited privileges and immunities, having regard to the regular functions of special missions and to the nature of of their tasks. He also endorsed Mr. Castrén's and Mr. Tammes's suggestions: there must be minimum criteria for the facilities, privileges and immunities to be enjoyed by missions which were not entitled to benefit by the full range of diplomatic privileges and immunities. The best solution might be to combine articles 17 *bis* and 17 *ter*.

51. Mr. USHAKOV said that the derogation in article 17 *bis* was, in his opinion, general rather than partial.

52. Mr. BARTOŠ, Special Rapporteur, said that the purpose of article 17 *bis* was to stipulate that privileges and immunities would be granted subject to derogation by agreement between the States concerned. If that idea was accepted, the Commission must decide where it was to appear. It might perhaps constitute a paragraph of article "X".

53. The CHAIRMAN suggested that, since the Commission seemed to be agreed on the desirability of including a provision along the lines of articles 17 *bis* and 17 *ter*, the text should be referred to the Drafting Committee.

It was so agreed.[8]

The meeting rose at 1 p.m.

[8] For resumption of discussion, see 937th meeting, paras. 76-80, when it was decided to delete these articles.

926th MEETING

Wednesday, 21 June 1967, at 10 a.m.

Chairman: Sir Humphrey WALDOCK

Present: Mr. Ago, Mr. Bartoš, Mr. Castañeda, Mr. Castrén, Mr. Jiménez de Aréchaga, Mr. Kearney, Mr. Ramangasoavina, Mr. Reuter, Mr. Tammes, Mr. Ushakov, Mr. Ustor, Mr. Yasseen.

Special Missions

(A/CN.4/193 and Addenda; A/CN.4/194 and Addenda)

(continued)

[Item 1 of the agenda]

DRAFT ARTICLES PROPOSED BY THE DRAFTING COMMITTEE

1. The CHAIRMAN invited the Commission to consider the texts of articles submitted by the Drafting Committee.

ARTICLE 1 (Sending of special missions) [2 and 7][1]

2. Mr. AGO, Acting Chairman of the Drafting Committee, said that the Drafting Committee proposed the following text for article 1:

"1. States may, for the performance of specific tasks, send temporary special missions to another State with the consent of the latter.

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

[7] It was subsequently decided to delete article "X". See 937th meeting, para. 81.

[1] For earlier discussion, see 898th meeting, paras. 24-74, 899th meeting, paras. 1-82, and 900th meeting, paras. 1-60.

"3. A State may send a special mission to a State, or receive one from a State, which it does not recognize."

3. That text differed only slightly from the one considered by the Commission. Paragraph 3 took into account the views expressed by certain Governments and members of the Commission who wanted the article to specify that non-recognition did not imply that special missions could not be sent. The idea was also implicit in the new text that the sending of a special mission did not automatically imply recognition, since it allowed some latitude of interpretation of the consequences of sending such a mission.

4. Mr. USTOR pointed out that the word "temporary" in paragraph 1 had only been adopted provisionally by the Drafting Committee, since it might later be decided not to use that qualification except in the article on definitions.

5. Mr. BARTOŠ, Special Rapporteur, said that the temporary nature of special missions was an important factor, which should be stated both in the description and in the definition of special missions. Moreover, it was important to mark the difference between special missions which came to an end once their task was accomplished and specialized non-temporary missions, such as the technical missions which socialist countries sent for an unlimited period or the missions arranged between Common Market countries, which were often bilateral and which would continue as long as the organization itself.

6. Mr. KEARNEY said that paragraph 3 raised some difficulties, since it introduced the concept of recognition into article 1. The Drafting Committee had thought that, as drafted, the paragraph would not raise the question of recognition, but if that were the case, it was redundant, since it merely restated the requirement of the consent of both States, set out in paragraph 1. On the other hand, if it implied a reference to recognition, that should be stated directly. In his opinion, the paragraph was unnecessary, but if the majority of the Commission wished to retain it, it should be explicitly stated that the sending of a special mission to a State had no effect on recognition.

7. Mr. YASSEEN said he could accept the article submitted by the Drafting Committee. The decision on the word "temporary" should be deferred until the Commission came to consider the article on the definition of special missions. No one actually questioned the purely temporary character of special missions.

8. Although paragraphs 2 and 3 were both necessary, paragraph 3 was the more important. Three different situations could arise in relations between two States. Either the States might not recognize each other; or the States might recognize each other but have no diplomatic and consular relations; or again the States might recognize each other and have diplomatic and consular relations. In the third case there was no problem about sending a special mission. The second case was covered by paragraph 2, and the first by paragraph 3. In the first case, all that the Commission could indicate was that States which did not recognize each other could exchange special missions, but that that would in no way prejudge the question of mutual recognition.

9. Mr. AGO, Acting Chairman of the Drafting Committee, said that the special missions with which the Commission was dealing were certainly temporary special missions; the decision as to whether or not to retain the word "temporary" should be postponed until the definitions had been settled.

10. Paragraphs 2 and 3, which did not lay down a rule but simply stated a fact, could be deleted, but if the Commission did decide to retain paragraph 2, it must also retain paragraph 3.

11. Mr. BARTOŠ, Special Rapporteur, said that the article could be adopted as it had been submitted by the Drafting Committee. The Commission was not competent to give its views on the recognition of States and should confine itself to saying that States which did not recognize each other could exchange special missions. In that sphere, practice had finally prevailed over theory, as was shown by the recent decision of the Federal Republic of Germany to send a mission to the German Democratic Republic. Paragraph 3 was therefore not only reasonable but necessary, for although diplomatic and consular relations were of necessity bilateral, recognition, on the contrary, could be unilateral—one party recognized the other but was not recognized by it—and that raised a separate problem.

12. The CHAIRMAN, speaking as a member of the Commission, said that he had never been in favour of including paragraphs 2 and 3. If, however, other members considered that they had some utility, to place them in article 1 seemed to give them disproportionate emphasis. He would prefer to see article 1 reduced to the first paragraph and followed by articles 5, 5 *bis*, and 5 *ter*, then by the present paragraphs 2 and 3 of article 1 as a separate article, and then by article 2.

13. There was a discrepancy between paragraphs 1 and 3. Paragraph 1 spoke of "States" and "temporary special missions" while paragraph 3 spoke of "a State" and "a special mission"—in the singular.

14. Speaking as Chairman, he said that the Commission should not take conclusive votes on the articles as yet, since the coherence of the draft might thereby be lost. Since, however, the Drafting Committee must have some guidance as to the acceptability of the articles, he suggested that for the time being the Commission endorse the articles in principle, reserving the question of arrangement for subsequent decision.

It was so agreed.

15. Mr. BARTOŠ, Special Rapporteur, proposed the following order for the articles: paragraph 1 of article 1, article 5, article 5 *bis*, article 5 *ter*, paragraphs 2 and 3 of article 1 as a separate article, article 6, article 3 and article 4.

16. In article 1, paragraph 1, which dealt with the simplest case, he considered it better to use the formula: "A State may... send a temporary special mission to another State...". Since article 5 dealt with the sending of the same mission to two or more States, and article 5 *bis* with the sending of a joint mission to a State by two or more States, there was a problem of structural arrange-

ment, but that could be left aside for the time being and taken up later, as had been agreed.

17. Mr. KEARNEY suggested that the Special Rapporteur should insert some explanation in the commentary to clarify the Commission's position with regard to recognition.

18. Mr. REUTER said that article 1 was hardly suitable for a discussion of structural arrangement, in view of the differences of opinion over paragraph 1 and the questionable value of paragraphs 2 and 3.

19. From a drafting standpoint, he was not in favour of replacing the plural by the singular, since the article might then be interpreted as implying that a State could send only one special mission.

20. Mr. AGO, Acting Chairman of the Drafting Committee, said he concluded from the discussion that paragraph 1 of article 1 now became article 1, and that the other two paragraphs would form a separate article, the place of which, probably after article 5 *ter*, would be settled later.

21. In paragraph 1, the question of retaining the adjective "temporary" would be left over until the definition had been adopted. The Drafting Committee could decide whether to use the plural or the singular; in his opinion the singular was preferable and certainly did not exclude the possibility of sending several special missions. In any case, the present wording "States ... to another State ..." was bad and should be revised.

22. The CHAIRMAN suggested that, in the light of those clarifications, the Commission approve article 1.

It was so agreed.[2]

ARTICLE 2 (Field activity of a special mission) [3][3]

23. Mr. AGO, Acting Chairman of the Drafting Committee, said that the Drafting Committee proposed the following title and text for article 2:

"*Field of activity of a special mission*"

"The field of activity of a special mission shall be specified by the consent of the sending State and of the receiving State."

24. The only change made in the Commission's text had been the replacement of the word "task" by the words "field of activity". To some extent at least, the task of the special mission was determined by the sending State, whereas the consent of both States did not concern that task but rather the field in which the mission could negotiate with the receiving State. The word "competence" had been rejected because of its legal implications and the difficulties to which it might give rise.

25. Mr. TAMMES said that there was a discrepancy between the French and English texts of article 2, since the French referred to "*consentement mutuel*", whereas the English merely referred to "consent".

26. In view of the discussion at the last few meetings, he was obliged to reserve his position on the article. In connexion with articles 17 *bis* and 17 *ter*, a number of speakers, including the Special Rapporteur, had expressed the view that a State could, so to speak, contract out of the convention if it did not regard a mission as a special mission. He was not sure whether that was in fact possible, but if it was, the logical place to say so was in article 2.

27. The CHAIRMAN, speaking as a member of the Commission, said he could not see how that problem arose in connexion with article 2, although the question of what actually constituted a special mission and whether a visit of foreign officials should be regarded as a special mission arose in a number of articles and would have to be dealt with in a specific article.

28. Mr. TAMMES said he had raised the question in connexion with article 2 because the Special Rapporteur had referred to it in his observations on that article.

29. Mr. CASTAÑEDA said that the Commission could, of course, take Mr. Tammes's comments into account when it considered the article on definitions, but that would be equivalent to treating the consent of the receiving State as a constituent element of the legal status of the special mission. It would be better simply to state that the consent was necessary for the system of facilities, privileges and immunities provided for in the draft to enter into force. That provision should be included in article 2, for if mutual consent was indispensable in order to specify the special mission's field of activity, a special mission could not be recognized as such within the meaning of the draft without the consent of the receiving State. The field of activity and the legal status of the special mission were related concepts and could be discussed at the same time by the States concerned.

30. The CHAIRMAN, speaking as a member of the Commission, said that that suggestion would involve the Commission in defining the tasks of special missions, and that, in his opinion, was impossible.

31. Mr. REUTER said that, like Mr. Tammes, he had noticed that the words "*consentement mutuel*" were used in the French text of article 2 as adopted by the Drafting Committee, whereas in the English text the word "consent" was used. On the other hand, in paragraph 1 of article 1, the words used were "consent" and "*consentement*" respectively. The lack of symmetry was perhaps intentional and he wondered whether in reality it did not conceal a problem of substance. Also, the Drafting Committee had replaced the word "task" in article 2 by the expression "field of activity". That change might lead to the belief that an attempt was being made to give the sending State a less active role in the matter of consent. The Commission should place the States on a level of complete equality and use a wording which would make it clear that consent must be given by both States for the same purpose, by express or tacit agreement.

32. Mr. BARTOŠ, Special Rapporteur, said that he would not present the article on definitions until the Commission had completed its consideration of the draft articles as a whole.

33. The Commission should not go back to problems which had already been discussed. Members who wished

[2] For resumption of discussion, see 930th meeting, paras. 2-16.

[3] For earlier discussion, see 900th meeting, paras. 64-93.

to change the draft articles should follow the normal procedure and submit amendments.

34. Mr. AGO, Acting Chairman of the Drafting Committee, referring to article 1, said that when a State took the initiative of sending a mission, it had to obtain the consent of the receiving State; the Drafting Committee had therefore considered that the expression "mutual consent" could not logically be used in that case. On the other hand, in order to determine a special mission's field of activity under the terms of article 2, States entered into negotiations and that required mutual consent.

35. The Drafting Committee had thought that the word "task" could be understood as meaning the purpose which the sending State assigned to the special mission and that, in that sense, the consent of the receiving State was unnecessary. On the other hand, the "field of activity", an expression which the Drafting Committee had considered more precise, had to be determined by the mutual consent of the sending State and the receiving State, which, as Mr. Reuter has pointed out, was given on a level of complete equality.

36. He saw no necessity to refer to the status of the special mission in article 2, for if the States concerned agreed that it was a special mission, its status was defined in the draft articles themselves.

37. Mr. JIMÉNEZ de ARÉCHAGA said that while he agreed that discussion of the question whether special agreement was required in each case might be deferred, he did not think that it should be deferred until the Commission began to consider its article on definitions. Perhaps article 2 would be clearer if the term "scope of the tasks" were used instead of "field of activity".

38. Mr. USTOR said he could not quite agree that a State might refuse to accept a special mission or to recognize the sending State, but could not deny the status of a special mission sent to it. For instance, a State might inform another State that it wished to send a group concerned with railway questions; the other State might agree to accept the group but might question whether it constituted a special mission, and the sending State might agree that, although the group could negotiate certain matters, it really represented only certain narrow interests, and would not fall within the scope of the convention.

39. Mr. REUTER said that the problem was to decide whether it was clear from article 2 that the sending State and the receiving State were on a par. The initiative in sending a special mission was not always taken by the sending State; the mission might have been sent at the request of the receiving State itself or following negotiations between the States concerned.

40. Mr. TAMMES said he could not agree with Mr. Ago's argument about article 2. The Commission was preparing a convention to accommodate States, and if a certain article was liable to create confusion, it was obliged to draw attention to the problems involved. If the sending State believed that a special mission was entitled to full protection in accordance with the Vienna Convention on Diplomatic Relations and the receiving State held a different view, article 2 could become a source of confusion, litigation and dispute.

41. Mr. KEARNEY said that the point could be settled if the Commission would define what it meant by special missions.

42. Mr. USHAKOV said that an official of a given State who entered into relations, for the purpose of negotiations, with representatives of another State in the territory of that State could not claim to be a member of a special mission. The Commission might make that clear in article 2.

43. Mr. BARTOŠ, Special Rapporteur, said that in the example given by Mr. Ushakov, if the official were the bearer of a message inviting the appropriate authorities of the receiving State to consider him a member of a special mission and if those authorities gave their consent, the official had the status of a member of a special mission within the meaning of the draft articles. It often happened in practice that during a first phase of diplomatic negotiations, one State sent emissaries to another State and that, during a second phase, if the negotiations led to positive results, the emissary or emissaries would be regarded, following the consent of the receiving State, as members of a special mission. It was in order to take such a situation into account that the expression "prior consent" had not been used in the text of either article 1 or article 2: the word used was simply "consent", without any qualification.

44. The CHAIRMAN, speaking as a member of the Commission, said that the concern expressed by Mr. Tammes and other members did not properly relate to article 2, which dealt only with the scope of the activities of special missions, not with their character. The broader problem of the capacity in which visiting officials acted and whether they constituted special missions was scattered throughout the articles of the convention. The Commission would, however, become involved in hopeless difficulties if it made the field of activity of a special mission the criterion for the definition of such missions.

45. Mr. YASSEEN said that article 2 ought not to cause any difficulty, since the field of activity of every special mission was delimited by virtue of the most indubitable rule of all, namely, that it required the mutual consent of the sending State and the receiving State.

46. Mr. JIMÉNEZ de ARÉCHAGA said he quite agreed with the view that, when a State agreed to receive representatives on temporary missions and proper notification had been made, the convention must apply even in the absence of formal recognition. He had only raised the question because other members seemed to have doubts on the subject.

47. The CHAIRMAN said that that aspect of the question should not be dealt with in connexion with article 2.

48. Speaking as a member of the Commission, he said he wished to suggest two drafting improvements: first, to replace the word "specified" by "determined", and secondly, to insert the word "mutual" before the word "consent", in order to bring the text into line with the

French original, and make it conform to the corresponding text of the two Vienna Conventions.

49. Speaking as Chairman, he suggested that the Commission should approve article 2, subject to final drafting by the Drafting Committee.

It was so agreed.[4]

ARTICLE 3 (Appointment of the members of the special mission) [8][5]

50. Mr. AGO, Acting Chairman of the Drafting Committee, said that the Drafting Committee proposed the following title and text for article 3:

"*Appointment of the members of the special mission*"

"Subject to the provisions of articles ..., the sending State may freely appoint the members of the special mission after having informed the receiving State of the number and the identity of the persons it intends to appoint."

51. Some members of the Commission had stressed the need for the sending State to inform the receiving State, before the appointment, of the number and identity of the persons it intended to appoint, so that the receiving State could object if it wished. The text now proposed for article 3 incorporated that idea, but without specifying the purpose of the communication, which was implied.

52. Mr. CASTRÉN said that at the 902nd meeting[6] Mr. Eustathiades had proposed specifying that the receiving State must be informed "in good time". He would also like to know the reason for requiring the sending State to inform the receiving State of the identity of the persons it intended to appoint.

53. Mr. AGO said that the Drafting Committee had gone further than Mr. Eustathiades because it had specified that the sending State should appoint the members of the special mission after it had informed the receiving State.

54. The Drafting Committee had felt it necessary to specify that the identity of the persons concerned should also be mentioned in the communication to the sending State, since the receiving State might object not only to the number of persons in the special mission but also to the inclusion of a particular person in that mission.

55. Mr. YASSEEN asked whether, in the French text, it would not be preferable to say "*après avoir fait connaître*" rather than "*après avoir informé*".

56. Mr. REUTER agreed that the expression "*après avoir fait connaître*" was more in conformity with protocol usage.

57. The CHAIRMAN, speaking as a member of the Commission, suggested that, in the light of the explanations given by the Acting Chairman of the Drafting Committee, article 3 be reworded to read:

"Subject to the provisions of articles ... and after having informed the receiving State of the number and the identity of the persons it intends to appoint, the sending State may freely appoint the members of the special mission."

58. Mr. JIMÉNEZ de ARÉCHAGA said that the text of article 3 differed substantially from the text submitted to governments for their comments. The proviso "after having informed the receiving State ..." introduced in a disguised form the concept of the prior consent of the receiving State. Was that change based on comments by Governments?

59. Mr. AGO, Acting Chairman of the Drafting Committee, said that the text now proposed represented a compromise between the complete freedom advocated by some members of the Commission and the absolute requirement of consent urged by others.

60. The CHAIRMAN said that, from the legal point of view, the position would be that the sending State appointed the members of the special mission but the appointment was not effective under the draft articles until the receiving State had been informed.

61. Mr. CASTRÉN said he could accept article 3 as proposed, since article 1 specified that a special mission was sent with the consent of the receiving State.

62. Mr. YASSEEN said that the compromise solution embodied in article 3 would not serve if the communication to be made by the sending State to the receiving State were considered as a mere formality, and if it were admitted that the sending State could appoint someone notwithstanding an objection by the receiving State.

63. Mr. AGO said that one was entitled to expect the sending State to take account of any objections put forward by the receiving State. If it did not, the receiving State could always declare a person *non grata*. It was precisely in order to avoid that happening that article 3 required the sending State to notify the receiving State of the number and identity of the persons it intended to appoint.

64. Mr. YASSEEN suggested that the Drafting Committee consider the possibility of transferring the provisions of article 3 to article 4, which dealt with persons declared *non grata* or not acceptable.

65. The CHAIRMAN, speaking as a member of the Commission, said that he would oppose any close link being established between article 3 and article 4; the question of initial acceptance was a different one from that of persons declared *non grata* or not acceptable.

66. Speaking as Chairman, he said that, if there were no objection, he would consider that the Commission agreed to approve article 3 in principle on the understanding that the Drafting Committee would re-examine the wording.

It was so agreed.[7]

[4] For resumption of discussion, see 930th meeting, paras. 17-25.

[5] For earlier discussion, see 900th meeting, paras. 94-100, 901st meeting, paras. 1-77, and 902nd meeting, paras. 1-45.

[6] Para. 22.

[7] For resumption of discussion, see 930th meeting, paras. 26-42.

ARTICLE 4 (Persons declared *non grata* or not acceptable) [12][8]

67. Mr. AGO, Acting Chairman of the Drafting Committee, said that the Drafting Committee proposed the following text for article 4:

"1. The receiving State may, at any time and without having to explain its decision, notify the sending State that any representative or any member of the diplomatic staff of the special mission is *persona non grata* or that any other member of the staff of the mission is not acceptable. In such case, the sending State shall, as appropriate, either recall the person concerned or terminate his functions with the mission. A 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."

68. The CHAIRMAN said that, if there were no objection he would consider that the Commission agreed to approve article 4 in principle.

It was so agreed.[9]

ARTICLE 5 (Sending of the same special mission to two or more States)[10]

ARTICLE 5 *bis* (Sending of a joint special mission by two or more States)[10]

ARTICLE 5 *ter* (Sending of special missions by two or more States in order to deal with a question of common interest)[11]

69. Mr. AGO, Acting Chairman of the Drafting Committee proposed the following titles and texts for articles 5, 5 *bis* and 5 *ter:*

Article 5 [4]

"*Sending of the same special mission to two 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."

Article 5 bis [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."

Article 5 ter [6]

"*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."

70. Article 5 covered not only the case of a special mission sent to two or more States in succession but also that of a special mission which was sent to several States at the same time and whose seat would have to be determined.

71. Mr. REUTER said that articles 5, 5 *bis* and 5 *ter* made it clear that the consent of the receiving State was essential. In the circumstances, the provisions of article 3 might perhaps seem too weak to those who already hesitated to accept that article.

72. Mr. CASTRÉN said he could accept the new articles 5 *bis* and 5 *ter*. With regard to article 5, he had already expressed the view that it was unnecessary and was open to a variety of interpretations. He would, however, abide by the decision of the majority.

73. The CHAIRMAN said that, if there were no objection, he would consider that the Commission agreed to approve articles 5, 5 *bis* and 5 *ter* in principle.

It was so agreed.[12]

ARTICLE 6 (Composition of the special mission) [9][13]

74. Mr. AGO, Acting Chairman of the Drafting Committee, said that the Drafting Committee proposed the following text for article 6:

"1. The special mission may consist 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 functions in the permanent diplomatic mission.

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

75. The terminology which had been adopted was in full conformity with that of the Vienna Convention on Diplomatic Relations, except that special missions, unlike diplomatic missions, did not always have a head. Since the expression "members of the special mission" covered all the persons who formed part of the special mission, the Drafting Committee had ultimately adopted the expression "representatives of the sending State in the special mission" to designate the persons who headed the special mission.

76. Paragraph 3 had been placed in square brackets because some members of the Commission had taken the view that it was not essential.

77. The CHAIRMAN suggested that the opening words of paragraph 1, "The special mission may consist ..."

[8] For earlier discussion, see 902nd meeting, paras. 46-77.

[9] For resumption of discussion, see 930th meeting, paras. 43-45.

[10] For earlier discussion, see 902nd meeting, paras. 78-85, 903rd meeting, paras. 8-86, and 904th meeting, paras. 3-14.

[11] New article.

[12] For resumption of the discussion on these three articles, see 930th meeting, paras. 46-50.

[13] For earlier discussion, see 904th meeting, paras. 15-70.

should be amended to read "The special mission consists ...".

78. Mr. AGO, Acting Chairman of the Drafting Committee, said he could accept that change.

79. Mr. KEARNEY said that in article 6 the word "representative" was used in a somewhat different sense from that of a person who constituted a special mission all by himself—the meaning given to the term in the Commission at an earlier stage. In article 6, the term meant any person authorized to act on behalf of the sending State. It was important, therefore, that a precise definition of the term should be included in the draft articles. It must be made clear, for example, whether the term meant a person who had full powers to bind the sending State in negotiations with another State. If that were the meaning, article 6 would exclude from the concept of special missions two types of visits by government officials: first, informal exploratory missions and secondly, missions of a purely technical character which did not affect inter-governmental relations.

80. Mr. AGO, Acting Chairman of the Drafting Committee, said that in all probability a definition of the term "representative" would have to be included in the draft articles. As far as article 6 was concerned, if the mission consisted of a single person, that person would automatically be a representative of the sending State under the terms of paragraph 1 of the article. Where the mission consisted of several persons, the sending State would have to indicate whether one or more of those persons had the status of representatives. There was a clear need for elasticity in the provisions of article 6.

81. Mr. REUTER asked whether the Chairman's suggested wording "The special mission consists of one or more representatives..." was intended as a first step towards the definition of a special mission.

82. The CHAIRMAN, speaking as a member of the Commission, said that, in making his proposal, he had had the question of the definition of "special mission" very much in mind. Some distinction would have to be made between a special mission and an unofficial visit. The concept of a special mission being headed by one or more representatives of the sending State was a useful one in that connexion. It was not necessary that the representatives should be empowered to conduct negotiations; a special mission could be sent merely for the purpose of exchanging information. However, a special mission had essentially an official character which gave it a representative function.

83. Mr. AGO said that the example given by Mr. Ustor, of persons representing railway administrations, illustrated one of the negative elements which the Commission would have to take into account in defining the notion of "special mission".

84. Mr. BARTOŠ, Special Rapporteur, said that in his opinion the expression "special mission" applied only to a mission which represented a State and expressed the sovereign will of the sending State.

85. The CHAIRMAN pointed out that a provision on the lines of paragraph 3 appeared in article 11 of the Vienna Convention on Diplomatic Relations and in article 20 of the Vienna Convention on Consular Relations.

86. Mr. AGO, Acting Chairman of the Drafting Committee, said that the Vienna Conventions did not require advance information to be given of the number of members of the mission, so that the provisions of paragraph 3 were all the more necessary.

87. Mr. USHAKOV said that he had pointed out on several occasions that paragraph 3 was unnecessary, since article 3 already provided that the receiving State could object to the number of members of the special mission.

88. Mr. BARTOŠ, Special Rapporteur, said that the number of members of a special mission might be regarded as acceptable at a given time but not acceptable later. Moreover, from the strictly legal point of view, he did not believe that the receiving State should be the sole judge of the size of a mission. It was in order to take into account the wishes of the small and medium States that the Vienna Conference had included in the Convention on Diplomatic Relations the clause which appeared in paragraph 3. If the Commission decided to maintain that paragraph, the text should be placed in square brackets; if it decided to delete it, it could explain in the commentary that the paragraph had been considered unnecessary following the adoption of article 3.

89. Mr. JIMÉNEZ de ARÉCHAGA said he was in favour of deleting paragraph 3.

90. Mr. YASSEEN said that article 3 contained already sufficient safeguards for small countries; paragraph 3 of article 6 could therefore be dropped.

91. Mr. BARTOŠ, Special Rapporteur, said that the receiving State could always terminate a special mission.

92. Mr. USHAKOV said that paragraph 3 should be deleted.

93. Mr. CASTRÉN and Mr. RAMANGASOAVINA said that paragraph 3 should be retained in order to cover possible developments.

94. Mr. CASTAÑEDA said that paragraph 3 gave the receiving State a useful instrument for purposes of negotiation and should therefore be kept.

95. Mr. KEARNEY said he also favoured the retention of paragraph 3.

96. Mr. USTOR said that, under the amended version of article 3, it was open to the receiving State to terminate the special mission. Paragraph 3 of article 6 was consequently redundant.

97. The CHAIRMAN, speaking as a member of the Commission, said that the provisions in article 8, on the notification of changes in the composition of the special mission, were also relevant. However, if paragraph 3 were dropped from article 6, the result would be that a receiving State which objected to the size of a special mission would have only two courses open to it. The first was to object to certain individual members of the special

mission under article 4; the second was to threaten to terminate the special mission unless the size of its staff were reduced. Neither of those courses was satisfactory and there would therefore be some usefulness in retaining paragraph 3.

98. Speaking as Chairman, he suggested that a final decision on the retention or deletion of paragraph 3 be deferred until the final adoption of the draft articles, and that article 6 be approved in principle on that understanding.

It was so agreed.[14]

The meeting rose at 1 p.m.

[14] For resumption of discussion, see 930th meeting, paras. 51-53.

927th MEETING

Thursday, 22 June 1967, at 11.45 a.m.

Chairman: Sir Humphrey WALDOCK

Present: Mr. Ago, Mr. Bartoš, Mr. Castañeda, Mr. Castrén, Mr. Jiménez de Aréchaga, Mr. Kearney, Mr. Ramangasoavina, Mr. Reuter, Mr. Tammes, Mr. Ushakov, Mr. Ustor, Mr. Yasseen.

Special Missions

(A/CN.4/193 and Addenda; A/CN.4/194 and Addenda)

(continued)

[Item 1 of the agenda]

DRAFT ARTICLES PROPOSED BY THE DRAFTING COMMITTEE *(continued)*

ARTICLE 7 (Authority to act on behalf of the special mission) [14][1]

1. Mr. AGO, Acting Chairman of the Drafting Committee, said that the Committee proposed the following text for article 7:

"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.

"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."

2. The Drafting Committee had made some purely formal changes in article 7 and had taken into account the two possible cases in which either the sending State appointed a head of mission, or one of the representatives of the sending State was authorized to act on behalf of the special mission and to address communications to the receiving State.

3. The CHAIRMAN suggested that, in paragraph 2, the word "substitute" be replaced by the word "deputize".

4. In paragraph 1, the second sentence seemed too strong, since the permanent diplomatic mission was sometimes used as a channel of communication with the special mission.

5. Mr. AGO said that the eventuality to which the Chairman had referred was probably covered by the general rule that the parties could always agree on a procedure different from that set forth in the various draft articles.

6. Mr. USTOR said that paragraph 1 was unduly narrow, because a member of the diplomatic staff of the special mission other than a representative might be authorized by the sending State to address communications to the receiving State.

7. Mr. BARTOŠ, Special Rapporteur, said that although the permanent diplomatic mission of the sending State might serve as an intermediary through which the special mission could receive communications from the receiving State, it could not act as a substitute for the special mission itself and send communications to the receiving State on behalf of that mission.

8. Mr. AGO, replying to Mr. Ustor's remark, said that if an ambassador was a member of the special mission, he was usually regarded as a representative of the sending State, not as a mere member of the diplomatic staff of the special mission.

9. Mr. CASTRÉN suggested that, in the French version, the words "*au chef de la mission*" in the second sentence of paragraph 1 be replaced by the words "*au chef de celle-ci*".

10. The CHAIRMAN said that the corresponding change in the English text would be to replace the words "the head of the mission" by "its head".

11. Mr. AGO, Acting Chairman of the Drafting Committee, asked whether the word "its" might not be ambiguous.

12. Mr. KEARNEY said that if the words "the head of the mission" were altered to "its head" in paragraph 1, the same change would have to be made in paragraph 2 and perhaps elsewhere in the draft.

13. The CHAIRMAN said that, in English, there was no inelegance in the use of the expression "the head of the mission" immediately after "the special mission", so that the text could be retained as it stood.

[1] For earlier discussion, see 905th meeting, paras. 1-26.

14. If there were no objection, he would consider that the Commission agreed to approve article 7 in principle, subject to minor drafting changes.

It was so agreed.[2]

ARTICLE 8 (Notification) [11][3]

15. Mr. AGO, Acting Chairman of the Drafting Committee, said that the Committee proposed the following text for article 8:

"1. The Ministry of Foreign Affairs of the receiving State, or such other organ as may have been agreed on, shall be notified of:

" (*a*) The composition of the special mission and any subsequent changes;

" (*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 persons in private service;

" (*e*) The designation of the head of the special mission or, if there is none, of the representative referred to in paragraph 1 of article 7 and of any substitute for them.

"2. Whenever possible notification of arrival and final departure must be given in advance".

16. The obligation of the sending State to inform the receiving State of the number and identity of the persons it intended to appoint had now been provided for in article 3, as a preliminary to appointing them, and the Drafting Committee considered that that obligation should not be confused with the notifications set out in article 8.

17. Mr. BARTOŠ, Special Rapporteur, said that, in the French text, the word "*organisme*" in paragraph 1 should be replaced by the word "*organe*".

18. Mr. Yasseen said he preferred the former wording of article 8 because it provided that notification should be made not to "the Ministry of Foreign Affairs of the receiving State, or such other organ as may have been agreed on", but to "the State", without specifying a particular organ or authority.

19. Mr. KEARNEY said that, where special missions were concerned, it seemed desirable to specify the need to notify the Ministry of Foreign Affairs, which would have to deal with such problems as immunities and visas for members of the special mission.

20. Mr. REUTER said he did not think there could be any confusion between the notification procedure provided for in article 8 and the obligation to supply information which appeared in article 3. As Mr. Yasseen had pointed out, article 8 contained a reference to the Ministry of Foreign Affairs or such other organ as might have been agreed on, whereas article 3 only mentioned the receiving State. The Commission should bring the two texts into line.

21. Mr. CASTRÉN said he was not sure whether a person authorized to address communications on behalf of the special mission or to perform certain specific acts could be regarded as a substitute. He suggested that the words "of the persons referred to in paragraphs 1(*b*) and 1(*c*)" be inserted after the words "final departure" in paragraph 2.

22. Mr. CASTAÑEDA said that, at the Vienna Conference on Diplomatic Intercourse and Immunities, the representatives of the small countries had urged that the notifications provided for in article 10 of the Convention on Diplomatic Relations should be addressed to the Ministry of Foreign Affairs or "such other ministry as may be agreed". In his opinion, the Ministry of Foreign Affairs was the appropriate organ of the receiving State where special missions were concerned and the reference to it in article 8 should therefore be retained.

23. Mr. BARTOŠ, Special Rapporteur, said that in practice the notifications listed in article 8 had often been addressed to the embassy of the receiving State in the sending State. The procedure provided for in article 3 was designed to enable the receiving State to be informed by whatever diplomatic channel was available and to give it an opportunity of objecting to the proposed size of the special mission or to the intention of appointing a particular person as a member, whereas the purpose of article 8 was to enable the Ministry of Foreign Affairs or another organ of the receiving State to make all necessary arrangements for extending facilities, privileges and immunities to members of the special mission and for ensuring their safety.

24. Mr. JIMÉNEZ de ARÉCHAGA said that some objective criteria were necessary to define special missions and the concept of "representative" provided a useful criterion. The requirement that the Ministry of Foreign Affairs should be notified was linked with that concept and should be retained.

25. Mr. USTOR said that while, from the theoretical point of view, he agreed with Mr. Yasseen that it was not necessary to refer to the Ministry of Foreign Affairs, from the practical point of view the reference should be retained in the interests of good administration. He was in favour of introducing into article 3 the idea that the information there mentioned should be conveyed through the diplomatic channel.

26. Sooner or later the Commission would have to consider the problem of the consequences of failure to make the required notification, and the position that would arise for a special mission if the provisions of article 8 were disregarded.

27. Mr. AGO said he did not agree that a reference to the Ministry of Foreign Affairs should be inserted in article 3, as Mr. Reuter had suggested, since in practice members of special missions could be appointed without reference to that Ministry. On the other hand, the purpose of the notifications listed in article 8 was to bring the system of facilities, privileges and immunities into operation, and that was a matter which normally fell within the jurisdiction of the Ministry of Foreign Affairs.

[2] For resumption of discussion, see 930th meeting, paras. 54-57.

[3] For earlier discussion, see 905th meeting, paras. 27-65.

28. Mr. USHAKOV proposed that the words "in its membership" be added at the end of paragraph 1(*a*).

29. Mr. REUTER said that in France certain diplomatic communications and despatches were addressed with absolute priority to the Minister for Foreign Affairs and sometimes to the Head of State. Technical ministries had a tendency to take direct action at the international level, but that was a regrettable practice, since it was the Ministry of Foreign Affairs which held the archives and had the necessary information to enable it to decide whether the receiving State could accept a given person as a member of a special mission.

30. Mr. YASSEEN said he did not think that the Commission should specify the organ of the receiving State to which notifications should be addressed: that was a matter to be settled by the constitutional law of the receiving State.

31. Mr. USHAKOV said he could accept either wording. Under article 10 of the Vienna Convention on Diplomatic Relations, notifications were to be addressed to "the Ministry for Foreign Affairs of the receiving State, or such other ministry as may be agreed".

32. The CHAIRMAN said that the majority of members wished to retain the references to the Ministry of Foreign Affairs and to "such other organ as may have been agreed on", which were based on the corresponding text in article 10 of the Vienna Convention on Diplomatic Relations. The text would thus emphasize that the Ministry of Foreign Affairs was the natural channel of communication. Personally, he had no objection to following the example of the Vienna Convention in article 8.

33. He suggested that the Commission approve article 8 in principle, subject to rewording by the Drafting Committee in the light of the suggestions made during the discussion.

It was so agreed.[4]

ARTICLE 9 (Rules concerning precedence) [16][5]

34. Mr. AGO, Acting Chairman of the Drafting Committee, said that the Committee proposed the following title and text for article 9:

"*Rules concerning precedence*"

"1. Where two or more special missions meet on the territory of the receiving State, precedence among the missions shall be determined, in the absence of a special agreement, by the alphabetical order of the names of the States used by the protocol of the receiving State.

"2. Precedence between the members of the same special mission shall be notified to the appropriate organs of the receiving State.

"3. 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."

35. The only important change made in the article was the deletion of any reference to precedence among heads of missions. Paragraph 1 dealt only with precedence among the missions.

36. Mr. BARTOŠ, Special Rapporteur, pointed out that the words "in order to carry out a common task" had also been deleted from paragraph 1.

37. Mr. AGO said that the Committee had decided to delete those words because the provision was applicable even in cases where special missions did not in fact meet to carry out a common task.

38. Mr. CASTRÉN asked what the term "precedence among the missions" could mean if the paragraph did not relate to missions which were carrying out the same task.

39. Mr. AGO said that, although missions usually met because they had to carry out a common task, they might also meet for other reasons.

40. Mr. BARTOŠ, Special Rapporteur, suggested that the words "among the missions" in paragraph 1 be replaced by the words "among these missions".

41. Mr. YASSEEN said that article 9 should be reworded. For instance, in paragraph 1 in the French version, the words "*par l'ordre alphabétique*" should be replaced by "*d'après l'ordre alphabétique*" and in paragraph 3 the words "*par le protocole en vigueur*" should be replaced by the words "*selon le protocole en vigueur*".

42. The CHAIRMAN said that, in paragraph 1 of the English text, the word "by" in the phrase "by the alphabetical order" should be replaced by the words "according to".

43. He suggested that the Commission approve article 9 in principle, subject to modification in the light of comments made during the discussion.

It was so agreed.[6]

ARTICLE 10 (Precedence among special ceremonial and formal missions) [—][7]

44. Mr. AGO, Acting Chairman of the Drafting Committee, said that article 10 had been deleted.

ARTICLE 11 (Commencement of the functions of a special mission) [13][8]

45. Mr. AGO, Acting Chairman of the Drafting Committee, said that the Committee proposed the following text for article 11:

"1. The functions of a special mission shall commence as soon as the mission enters into official contact with the Ministry of Foreign Affairs of the receiving State or with another appropriate organ designated by the receiving State.

"2. The commencement of the functions of a special mission shall not depend upon presentation by the

[4] For resumption of discussion, see 930th meeting, paras. 59-74.

[5] For earlier discussion of articles 9 and 10, see 905th meeting, paras. 66-77, and 906th meeting, paras. 1-39.

[6] For resumption of discussion, see 930th meeting, paras. 75-91.

[7] See footnote 5.

[8] For earlier discussion, see 906th meeting, paras. 40-68.

permanent diplomatic mission of the sending State or upon the submission of letters of credence or full powers."

46. Only a few drafting changes had been made to article 11. Speaking as a member of the Commission, he proposed that the words "or with another... organ" in paragraph 1 should be replaced by "or with the other... organ".

47. The CHAIRMAN said that there was a slight difference between the English and French texts of paragraph 1. The English text referred to "another appropriate organ" whereas the French text referred to "*un autre organe compétent*".

48. Mr. AGO said that the wording of article 11 should be brought into line with that of article 8.

49. Mr. CASTRÉN said that when article 11 was being considered, some members had proposed the deletion of paragraph 2. Since paragraph 1 determined the commencement of the functions of a special mission in a positive manner, it seemed pointless to add a clause containing a negative provision. In his opinion, paragraph 2 could be included in the commentary.

50. Mr. BARTOŠ, Special Rapporteur, said he was in favour of retaining paragraph 2. Several members had thought it necessary from the psychological point of view to specify that the commencement of the functions of a special mission did not depend upon presentation of the mission by the permanent diplomatic mission of the sending State or upon the submission of letters of credence or full powers, since certain countries placed obstacles in the way of the functioning of special missions. Paragraph 2 was therefore necessary, and could be very useful, despite its negative form.

51. Mr. AGO thought that the final phrase of paragraph 1 should read "or with the other appropriate organ agreed on".

52. Mr. BARTOŠ, Special Rapporteur, said that in some countries it was not the Ministry of Foreign Affairs that dealt with military, trade or cultural missions. In his opinion, the word "designated" could be deleted, but the words "or with the other appropriate organ in the receiving State" should be retained.

53. Mr. USHAKOV suggested that the expression used in article 8, "or such other organ as may have been agreed on", should also be used in article 11.

54. The CHAIRMAN said that the English text might be amended to read "... contact with the Ministry of Foreign Affairs or other agreed organ of the receiving State".

55. He suggested that the Commission approve article 11 in principle and refer it to the Drafting Committee for final rewording.

It was so agreed.[9]

The meeting rose at 1 p.m.

[9] For resumption of discussion, see 930th meeting, paras. 92-102.

928th MEETING

Friday, 23 June 1967, at 10.45 a.m.

Chairman: Sir Humphrey WALDOCK

Present: Mr. Ago, Mr. Bartoš, Mr. Castañeda, Mr. Castrén, Mr. Jiménez de Aréchaga, Mr. Kearney, Mr. Ramangasoavina, Mr. Reuter, Mr. Tammes, Mr. Ushakov, Mr. Ustor, Mr. Yasseen.

Organization of Future Work

(A/CN.4/195, 196; A/CN.4/L.119)

(resumed from the 917th meeting)

[Item 6 of the agenda]

1. The CHAIRMAN said that the Officers of the Commission had reached no final conclusions on the organization of future work, but had asked him to communicate their preliminary views to the Commission. The two main problems were to secure work for the Commission's next session and to establish a general pattern for the future. The Officers had considered the state of the material before the Commission. Mr. El-Erian had submitted his second report on relations between States and inter-governmental organizations (A/CN.4/195), but had not yet submitted a set of draft articles. A letter would be sent to Mr. El-Erian asking him whether there was any likelihood of his being able to provide a set of draft articles for the Commission's next session. Mr. Ago had been asked whether there was any possibility of his providing some general articles on State responsibility as a basis for discussion, but had said that that would be difficult and he would prefer to submit a fuller report, with articles, in 1969.

2. As Chairman of the Sub-Committee on Succession of States and Governments and before being appointed Special Rapporteur, Mr. Lachs had submitted a preliminary report on State succession, which was annexed to the Commission's report on its fifteenth session.[1] The General Assembly was urging the Commission to proceed with its work on that subject, which was particularly important because there were so many new States. The Commission should therefore appoint a new Special Rapporteur on State succession in place of Mr. Lachs, who had been elected to the International Court. The Officers had noted that the Sub-Committee, in its 1963 report, had advised that the subject should be dealt with under three broad headings: succession in respect of treaties, succession in respect of rights and duties resulting from sources other than treaties, and succession in respect of membership of international organizations.[2] Moreover, Mr. Lachs had repeated that opinion in a recent conversation with him (the Chairman). Although there were no hard and fast lines of demarcation between the three topics, the Officers had concluded that they should be treated separately, but with close co-ordination to

[1] *Yearbook of the International Law Commission, 1963*, vol. II, p. 260.

[2] *Ibid.*, p. 261, para. 13.

prevent differences in approach. They had considered it advisable to leave aside for the time being the topic of succession in respect of membership of international organizations, because it had affinities with the topic on which Mr. El-Erian was to report. Succession in respect of treaties, which had close connexions with the law of treaties, should be dealt with first, since that priority had been emphasized in the Sixth Committee of the General Assembly. Succession in respect of rights and duties resulting from sources other than treaties was a much broader topic, which would take longer to complete and should therefore be given second priority.

3. A telegram had been received from Mr. Bedjaoui saying that he would be prepared to act as Special Rapporteur on State succession and to submit a report at the next session. The Officers had asked him (the Chairman), as the former Special Rapporteur on the law of treaties, to act as Special Rapporteur on succession in respect of treaties, and he had agreed to submit a report with articles at the next session. The Officers had further suggested that Mr. Bedjaoui should be invited to be Special Rapporteur for the second topic, namely, State succession in respect of rights and duties resulting from sources other than treaties.

4. He invited members to comment on those preliminary suggestions by the Officers of the Commission and to give their general views on the future work of the Commission.

5. Mr. TAMMES said he had given much thought to new topics for the Commission's consideration, in the belief that a discussion on the Commission's future work was, in fact, a discussion on the future of the Commission itself; for the long-term codification and progressive development of international law should remain the prerogative of the International Law Commission, and should not be assigned to other bodies less well equipped for the task. Discussions in the General Assembly had shown that delegations were looking forward to the mention of some new topics, even though the completion of those already on the Commission's agenda might take several years. In its search for promising areas for practical work, and in taking stock of what had already been accomplished, the Commission should try to explore the whole field of public international law.

6. So far as the sources of international law were concerned, the Commission had recently completed a very far-reaching and comprehensive draft on the law of treaties, and it would be difficult to suggest another source of international law that was as wide in scope. A limited counterpart to the law of treaties could, however, be found in the topic of unilateral acts, concerning which ample research and practice were available and which greatly needed clarification and systematization. The topic covered recognition as a positive act acknowledging a given situation to be a legal situation and, conversely, protests rejecting changes in a legal situation. It also included the principle of estoppel applied by the International Court of Justice. Other unilateral acts which might possibly be dealt with in a systematic draft were proclamations, waivers and renunciations.

7. The subjects of international law had at one time been suggested as a topic in itself, but since part of the subject-matter came within the scope of relations between States and inter-governmental organizations and another part within the scope of human rights, there did not seem to to be much left for new work by the Commission.

8. The study of the functions of international law would lead the Commission to the question of delimitation of the jurisdiction of States by prohibitive rules, which had been the main concern of international law before the modern law of co-ordination, co-operation, co-existence and protection had developed. What might be termed the spatial dimensions of national jurisdiction and international régimes such as the law of the sea, Antarctica, and outer space, had either already been dealt with or were being considered. Similarly, the delimitation of State jurisdiction *ratione personae* had, so far as its most urgent aspect was concerned, been reflected in the Commission's work on statelessness; but the delimitation of jurisdiction *ratione materiae*, which raised the question whether acts of foreign States could, under international law, be indirectly subjected to the judgement and scrutiny of national courts, might well be studied. The delimitation of jurisdiction *ratione temporis* was a very broad and important topic, but was largely covered by State succession. The utilization of international rivers was a topic in which territorial sovereignty and international co-operation were equally involved, and it might be appropriate to lend the authority of the Commission and of plenipotentiary conferences to what had already been done by such private bodies as the International Law Association.

9. The keystone of international law was the whole system of methods, legal remedies and sanctions covered by the term "implementation". The Commission was not in a position to do much work on arbitration, because rules on arbitral procedure had already been prepared elsewhere. Nevertheless, a specific question of practical significance had arisen in connexion with the South West Africa case, and the Commission might well take up the problem of enabling the United Nations and other international organizations to have the status of litigating parties in cases before the International Court of Justice. The legal and institutional aspects of implementation as a whole, and the consequences of legal acts, were referred to in the report of the Sub-Committee on State Responsibility quoted in Mr. Ago's note on that topic (A/CN.4/196).

10. He thought it would not be contrary to the Commission's terms of reference for it to draw up a statute for a new auxiliary body of the United Nations to study, for instance, methods of fact-finding, which the General Assembly had unanimously decided to place on the agenda for its twenty-second session. The Commission might well give the General Assembly guidance on certain underlying legal and institutional principles of fact-finding, as a contribution to the instrumentality of peace entirely independent of the other means of peaceful settlement, such as arbitration, conciliation and judicial settlement, referred to in Article 33 of the Charter.

11. Finally, pending the completion of its work on broad topics, the Commission might usefully consider less comprehensive, though important, subjects which would

not take up so much time. For instance, some aspects of the massive programme on State responsibility might be suitable for more limited, separate consideration, on the understanding that the final results would be systematized in a single codification. Incidentally, it might be wise to consider a new name for the whole undertaking, since the term "State responsibility" laid too much emphasis on the consequences of an illegal act, as against the legality of the act itself, with which most of the questions included in the programme were concerned.

12. Mr. CASTRÉN said that the two very extensive topics—State responsibility and the succession of States and Governments—included in the programme of work would occupy the Commission for several years. Other topics, such as relations between States and inter-governmental organizations, for which Mr. El-Erian was Special Rapporteur, the right of asylum and the juridical régime of historic waters, to which priority was to have been given, had not yet been taken up, apart from an introductory report on relations between States and intergovernmental organizations. The first part of Mr. El-Erian's second report (A/CN.4/195) had already been circulated, but when completed, that report would not be sufficient to provide work for the whole of the 1968 session.

13. In his view, the Commission should undertake as soon as possible a detailed study of the question of State succession in respect of treaties, as a separate topic for which a special rapporteur would be appointed. It seemed to him that Sir Humphrey Waldock, who had already examined certain aspects of the question when Special Rapporteur on the law of treaties, was particularly well qualified for that task.

14. A certain amount of preparatory work had already been done on succession of States and Governments. In 1963, the Sub-Committee on that topic had submitted a report in which it had stated that special attention should be paid to problems of succession arising as a result of the birth of new States after the Second World War, to contemporary needs and to the principles of the United Nations Charter.[3] The objectives proposed in the report had been a survey and evaluation of the state of the law and practice on succession and the preparation of draft articles. The Secretariat had prepared three studies on the subject: a memorandum on the succession of States in relation to membership in the United Nations,[4] a document on succession of States in relation to general multilateral treaties of which the Secretary-General is the depositary,[5] and a digest of the decisions of international tribunals relating to State succession.[6] The Sub-Committee had subsequently requested the Secretariat[7] to prepare three other documents: (*a*) an analytical restatement of the material furnished by Governments in accordance with requests already made by the Secretariat; (*b*) a working paper covering the practice of specialized agencies and other international organizations in the field of succession; (*c*) a revised version of the digest of the decisions of international tribunals relating to State succession. Those documents should be brought up-to-date and completed, so as to facilitate the work of the future special rapporteur.

15. The Commission might request the Secretariat to draft, in consultation with the future special rapporteur, a questionnaire for all governments, which might consist of the following questions: (1) Within what limits is State succession in respect of treaties accepted? (2) Should treaties be divided into multilateral and bilateral treaties or differentiated in some other way? (3) In what circumstances did the State in question come into being and accede to independence? (4) Is the consent of the other party to a treaty required in the event of succession? (5) What is the treaty position where a State has lost some of its territory? (6) How are treaty problems affected by the creation or dissolution of unions of States? (7) What practice will be followed by the Government or State itself as regards succession in respect of treaties? The Secretariat might also ask international organizations for information about recent practice in the matter of succession in respect of treaties.

16. The programme was so extensive that the Special Rapporteur might perhaps submit a preliminary report on questions of principle, if he had not completed his draft of articles in time for the next session.

17. He was in favour of the proposal by the Officers of the Commission that the third item of the agenda for the next session should be "Succession in respect of rights and duties resulting from sources other than treaties". A special rapporteur for that topic should be appointed at once and he fully approved the appointment of Mr. Bedjaoui.

18. Mr. REUTER said it was the custom of the General Assembly to refer broad general topics to the Commission; the two topics on its programme would keep the Commission busy for years. In the past, the Commission had followed a different policy and had confined itself to drawing up what might be called guides or models of an optional character. Admittedly, such guides did not excite so much interest as the far-reaching work which the Commission was now undertaking, but the question arose whether it was right to abandon the former system in order to prepare draft conventions to which some States hesitated to accede for technical reasons or because the atmosphere was not propitious. It might be advisable for the Commission to undertake each year, in addition to those ambitious projects which it should in no circumstances lay aside, some more modest task such as the draft convention on special missions, which was of limited scope and almost certain to be brought into force.

19. Mr. BARTOŠ said he was in full agreement with Mr. Castrén. The Secretariat prepared documentation on all the subjects which the Commission was to consider, but if the topic was only taken up three or four years later, circumstances had changed; there had been developments in case law and new factors had made their

[3] *Ibid.*, p. 261, para. 6.

[4] *Yearbook of the International Law Commission, 1962*, vol. II, p. 101.

[5] *Ibid.*, p. 106.

[6] *Ibid.*, p. 131.

[7] *Yearbook of the International Law Commission, 1963*, vol. II, p. 262, para. 16.

appearance. The Commission should therefore ask the Secretariat, despite the extra work entailed, to carry out further research and to send a questionnaire to States and to inter-governmental organizations. The questionnaire should be drawn up with the assistance of each of the Special Rapporteurs, who would find useful information for their reports in the replies received. Members of the Commission, for their part, should make themselves acquainted with recent developments in the subjects included in the programme of future work and examine the new factors which had arisen in practice or case law.

20. There appeared to be two schools of thought in the Commission about the long-term programme. Mr. Reuter had adopted a cautious attitude and stressed that the Commission should be wary of taking up certain topics; the members of the Sixth Committee, on the other hand, had more ambitious views and were urging the Commission to draw up rules that would help to solve the problems troubling the world. The old rules were, indeed, inadequate and new rules based on requirements or personal views had not yet crystallized. It was the duty of the International Law Commission to codify those rules, which, though legal in form, tended to produce political effects. The Commission should therefore continue its work on codification, not for reasons of prestige but in order to fulfil its obligations to the international community.

21. Mr. RAMANGASOAVINA said he approved of the proposals made by the Officers of the Commission regarding its future work. He was particularly glad that Mr. Bedjaoui had been appointed Rapporteur for the topic of succession of States and Governments. Mr. Bedjaoui's abilities were well known to the Commission and he belonged to a country which had recently become independent; consequently, he was better equipped than anyone else to consider all the aspects of the problem, which was of interest to the new States.

22. Mr. USHAKOV said that the three topics—relations between States and inter-governmental organizations, State responsibility, and succession of States and Governments—would provide an amply sufficient programme of work for the next few years.

23. He would like to know exactly what work had been entrusted to the Chairman and Mr. Bedjaoui in connexion with the preparation of the report on the succession of States and Governments.

24. The CHAIRMAN explained that the intention of the Officers was that he himself should submit to the Commission, at its next session, a report with draft articles on State succession in respect of treaties. The Special Rapporteur for the second topic of the succession of States and Governments would have to examine a wide variety of questions; the intention was that Mr. Bedjaoui should submit a general report to the Commission at its next session. The Commission would discuss that report and issue directives as to particular aspects of the subject which should be covered in the second topic.

25. Mr. USHAKOV said that the Commission should obtain Mr. Bedjaoui's consent before asking him to submit a general report at the next session.

26. Mr. JIMÉNEZ de ARÉCHAGA explained that Mr. Bedjaoui would be free to determine the scope of the report which he would submit to the Commission at its next session. The recommendation of the Officers was not intended to restrict his authority dealing with the topic, but merely to give him some indication of what the Commission expected from him for the following year.

27. Mr. KEARNEY expressed his appreciation to the Chairman for having agreed to act as Special Rapporteur for succession of States and Governments in respect of treaties. The Chairman's willingness to accept that task after his extensive work on the law of treaties over the past five years was of great importance to the Commission and would ensure that it had before it sufficient material to occupy the whole of its next session.

28. The over-all proposals made by the Officers of the Commission seemed to him to show a very reasonable approach to its work. As to the Commission's procedures on the scheduling of its work, however, he wished to express his concern in the light of the experience of the present session. The Commission should so arrange its work as to ensure that it always had a sufficient backlog of material on which to work at any given moment.

29. Mr. AGO said that, although some of the suggestions made were very attractive, members of the Commission should resign themselves to drawing up an order of priorities for the subjects to be included in the long-term programme. The codification of international law was a long-term task. The Commission should take into account the new situation resulting from the wholesale entry into the international community of new States which rightly or wrongly called in question the content of classical international law. Those new States had the impression that they had not played a sufficient part in the formation of international law and it was therefore necessary to review its basic rules so that it might gain general acceptance. With that end in view, the Commission should concentrate on the main branches of international law and if necessary leave aside certain questions which, though of great interest, were less important. It was encouraging to know that the General Assembly fully supported that programme. Despite the understandable misgivings of certain States, the Commission should also for the time being abandon its traditional method of drawing up model rules and instead devote itself to the codification of international law by means of international conventions, with a view to adapting international law to the needs of the contemporary world.

30. The General Assembly had frequently recommended the Commission to consider the topic of State responsibility. In the reports and in the draft initially submitted,[8] however, the question had been considered from the point of view of the treatment of aliens and of the responsibility of States for injuries on their territory to the person or property of aliens, and that had given rise to serious difficulties. In 1962 the Commission had decided to consider the general principles of international responsibility proper, in other words the situation resulting from

[8] See volume II of the *Yearbook of the International Law Commission* for the years 1956-1961.

the infringement of an international obligation of whatever kind. The Commission had adopted unanimously the conclusions submitted to it by the Sub-Committee it had set up to study the question.[9] Now that the Commission had a new membership, he would like to know whether it confirmed the instructions then given to the Special Rapporteur, so that he would be sure of continuing his work on the topic with the full support of the other members.

31. The Commission had decided[10] that, after completing its study of the law of treaties, it would give priority to State responsibility and State succession. In his view those two topics should still have absolute priority.

32. Later, the Commission should also turn its attention to other topics, such as relations between States and intergovernmental organizations. Another topic that should be borne in mind was that of unilateral acts, to which Mr. Tammes had referred. The Commission might also be requested by an appropriate organ of the United Nations to give its opinion on topics such as international bays, international rivers and international straits. In any case, the future programme could be reviewed at meetings from time to time.

33. So far as the short-term programme was concerned, his view was that in 1968 the Commission should consider the topic of State succession in respect of treaties. As that topic was linked with the problem of codifying the law of treaties, the Commission should prepare a report on it with a view to the two forthcoming international conferences on the law of treaties, and he was particularly grateful to the Chairman for having undertaken to prepare such a report.

34. He hoped to submit his report on State responsibility in 1969. Mr. Bedjaoui's report on State succession might also be included in the programme for 1969. If Mr. Bedjaoui wished, he could of course submit in March 1968 a first report on that part of the law of State succession which he had been asked to study. The Commission would then make a preliminary study of it and give Mr. Bedjaoui instructions for the preparation of the final report to be submitted in 1969.

35. Mr. USHAKOV drew attention to paragraph 6 of Mr. Ago's note on State responsibility (A/CN.4/196) in which it was stated that the questions set out in the programme of work "were intended solely to serve as an *aide-mémoire* for the Special Rapporteur when he came to study the substance of particular aspects of the definition of the general rules governing the international responsibility of States, and that the Special Rapporteur would not be obliged to pursue one solution in preference to another in that respect". He personally had some doubts about the programme of work and he therefore thought it would be preferable to consider the report rather than the programme itself, as the programme was merely an *aide-mémoire*.

36. With regard to paragraph 5 of Mr. Ago's note, he agreed with those members of the Commission who had felt that emphasis should be placed on State responsibility in the maintenance of peace.

37. As far as the report on State succession was concerned, he would once more urge the Commission to consult Mr. Bedjaoui before coming to a final decision.

38. Mr. BARTOŠ said that the new topics proposed by members of the Commission should be mentioned in the report.

39. The CHAIRMAN said that the Officers of the Commission might, at a forthcoming meeting, explain in greater detail the proposed division of the topic of succession of States and Governments.

40. When the Commission resumed consideration of item 6 of the agenda, it would also be called upon to confirm the directives it had given to the Special Rapporteur on State responsibility, concerning the general manner of dealing with that topic.

41. He suggested that Mr. Tammes should also take that opportunity of submitting more definite proposals on possible new topics, giving some indication of his own preferences and the reasons for giving priority to one or more of those new topics.

42. For the time being, he understood that the proposals put forward by the Officers of the Commission had been found broadly acceptable.

43. A letter would be written to Mr. Bedjaoui informing him of the views of the Officers of the Commission and requesting him to say whether he accepted the proposal that he should be Special Rapporteur on the second topic. The Commission would resume its discussion of item 6 of the agenda after it had received a reply from him.[11]

The meeting rose at 12.35 p.m.

[9] *Yearbook of the International Law Commission, 1963*, vol. II, p. 224, para. 55.

[10] *Yearbook of the International Law Commission, 1966*, vol. II, document A/6309/Rev. 1, part II, para. 74.

[11] For resumption of discussion, see 929th meeting, paras. 62-81.

929th MEETING

Tuesday, 27 June 1967, at 10.5 a.m.

Chairman: Sir Humphrey WALDOCK

Present: Mr. Bartoš, Mr. Castañeda, Mr. Castrén, Mr. Eustathiades, Mr. Jiménez de Aréchaga, Mr. Kearney, Mr. Ramangasoavina, Mr. Tabibi, Mr. Tammes, Mr. Ushakov, Mr. Ustor, Mr. Yasseen.

Special Missions

(A/CN.4/193 and Addenda; A/CN.4/194 and Addenda)

(resumed from the 927th meeting)

[Item 1 of the agenda]

DRAFT ARTICLES PROPOSED BY THE DRAFTING COMMITTEE *(resumed from the 927th meeting)*

1. The CHAIRMAN invited the Second Vice-Chairman to introduce the Drafting Committee's proposals for

articles 12-15 in the absence of the Chairman of that Committee.

ARTICLE 12 (End of the functions of a special mission) [20][1]

2. Mr. USTOR, Second Vice-Chairman, said that the Drafting Committee proposed the following text for article 12:

"1. The functions of a special mission shall come to an end, *inter alia*, upon:
" (*a*) The mutual 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 explicitly 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.

"2. The severance of diplomatic or consular relations between the sending State and the receiving State shall not automatically have the effect of terminating special missions existing at the time of the severance of relations."

3. The Drafting Committee had slightly amplified the earlier text of article 12, which had become paragraph 1 of the new text, by adding an additional sub-paragraph (*a*); a few minor drafting changes had also been made in the other sub-paragraphs.

4. The Committee had introduced a new paragraph 2, the provisions of which had been taken from the former paragraph 2 of article 44.

5. Mr. CASTRÉN said that he found the new text a great improvement on the old. In particular, the new paragraph 1 (*a*), providing that the functions of a special mission would come to an end by agreement of the States concerned, was entirely appropriate. The transposition of the two following sub-paragraphs also helped to make the article more satisfactory. Paragraph 1 (*d*) might be simplified by saying "that it is recalling the special mission" instead of "that it is terminating or recalling the special mission".

6. The adverb "automatically" in paragraph 2 might well be replaced by the expression "in itself", which the Commission had already used, for instance, in its draft on the law of treaties. The expression "terminating special missions existing" seemed to be too general; it would be more correct to say "terminating their special missions to each other".

7. Mr. YASSEEN said that he too considered the new wording better and clearer than the old. Paragraphs 1 (*d*) and (*e*) very properly emphasized the fact that either party was entitled to terminate a special mission.

8. The word "mutual" in paragraph 1 (*a*) was unnecessary. He agreed with Mr. Castrén that it would be better to replace the adverb "automatically" in paragraph 2 by some such expression as "in itself", "*ipso facto*" or, in the French text, "*de plein droit*".

9. Subject to those comments, he accepted the new wording.

10. Mr. BARTOŠ, Special Rapporteur, said that he agreed to the deletion of the word "mutual" in paragraph 1 (*a*), which might be redrafted to read "Agreement between the States concerned". He was also prepared to substitute the words "*de plein droit*" for "*automatiquement*" in the French text of paragraph 2.

11. On the other hand, it seemed to him essential to maintain, in paragraph 1 (*d*), the distinction between cases where the sending State terminated the special mission and cases where it recalled it. Both actions produced the same effect, but the causes were slightly different; if the sending State terminated the special mission, it was giving expression to its view that the mission had ceased to serve any purpose, whereas, if it recalled the mission, it usually did so because of some external event or of a change in the relationship between the two States which made it impossible for the special mission to continue its task.

12. Mr. CASTRÉN said he would not press his proposal that paragraph 1 (*d*) should be reworded.

13. The CHAIRMAN noted that there had been no objection to the suggestion that the word "mutual" should be deleted in paragraph 1 (*a*). It also seemed to be the general feeling that the word "automatically" in paragraph 2 was inappropriate. The Special Rapporteur had suggested as an alternative the phrase "*de plein droit*", for which it was difficult to find an English equivalent, although the Latin *ipso jure* might be used.

14. Mr. EUSTATHIADES suggested "*nécessairement*".

15. Mr. KEARNEY said that he would prefer to avoid using a technical legal term in the English text; he therefore suggested "of itself" or "in itself".

16. Mr. BARTOŠ, Special Rapporteur, said that he would have no objection to the words "*en soi*" being used in the French text.

17. The CHAIRMAN, speaking as a member of the Commission, said that the concluding words "existing at the time of the severance of relations" in paragraph 2 were too vague, since the paragraph dealt with two separate hypotheses: the severance either of diplomatic or of consular relations. He therefore suggested that the phrase should read: "existing at the time of such severance".

18. Mr. USTOR thought that the whole phrase could perhaps safely be deleted.

19. Mr. BARTOŠ, Special Rapporteur, said it was necessary to make it clear that the special missions referred to in paragraph 2 were those which existed at the time of the severance of relations.

20. The CHAIRMAN proposed that the various drafting suggestions which had been made, particularly those relating to the word "automatically" and to the concluding phrase of paragraph 2, should be referred to the

[1] For earlier discussion, see 906th meeting, paras. 69-92.

Drafting Committee. The Commission would take a final decision on article 12 when the Drafting Committee submitted a definitive text.

It was so decided.[2]

ARTICLE 13 (Seat of the special mission) [17][3]

21. Mr. USTOR, Second Vice-Chairman, said that the Drafting Committee proposed the following text for article 13:

"1. A special mission shall have its seat at the place agreed upon by the States concerned.

"2. In the absence of agreement, the special mission shall have its seat in the place where the Ministry of Foreign Affairs of the receiving State is situated.

"3. If the special mission's functions involve travel or are performed by different sections or groups, the special mission may have more than one seat; one of such seats may be chosen as its principal seat".

22. Paragraph 1 stated a self-evident principle. Paragraph 2 introduced a new idea, while paragraph 3 was very similar to the former paragraph 2.

23. The Drafting Committee had considered a suggestion that article 13 should mention the case of a special mission which was sent to more than one State, but it had felt that no such mention was necessary because that case was implicitly covered by the text of article 13 as now proposed.

24. Mr. KEARNEY thought that the words "involve travel or are performed by different sections or groups" in paragraph 3 were rather ambiguous.

25. The CHAIRMAN, speaking as a member of the Commission, said that he did not think the use of the word "place" was very happy in paragraph 2 to render the French "*localité*", for it would almost seem to suggest that the special mission of the sending State must be sited in the same building as the Ministry of Foreign Affairs of the receiving State. He suggested that a more satisfactory term should be found and should also be used in paragraph 1.

26. Mr. TABIBI said that the words in paragraph 2 "shall have its seat" were too strong; normally, when a State agreed to receive a special mission, it would also consent to the seat. He suggested that the words should be toned down to read: "may have its seat".

27. Mr. BARTOŠ, Special Rapporteur, said that, in order to meet Mr. Kearney's criticism, he would propose that the words "involve travel or" be omitted from paragraph 3, which would then refer only to cases where the mission had more than one seat at the same time. The ambiguity would thus be removed.

28. With regard to Mr. Tabibi's remark, he wished to point out that paragraph 1 stated the general rule that the seat of the special mission should be agreed upon by the States concerned. By providing that, in the absence of agreement, the special mission should have its seat in the place where the Ministry of Foreign Affairs of the receiving State was situated, the article precluded a unilateral decision by the receiving State, a decision which would infringe the principle of the sovereign equality of States and might make the presence of the special mission inconvenient or unacceptable. The Drafting Committee had preferred to state that residual rule in positive form rather than to use some such expression as "it is assumed that the special mission will have its seat...".

29. He once again wished to emphasize that agreement on the seat of the special mission did not necessarily have to be reached in advance.

30. Mr. CASTRÉN said that, if paragraph 3 were altered as suggested by the Special Rapporteur, it would be better to insert the words "stationed in different places" after the words "sections or groups", as it was also possible that several groups of the special mission might be operating in the same place.

31. Mr. EUSTATHIADES, supporting Mr. Castrén's remark about paragraph 3, suggested that the passage should be worded "... in several places by different sections or groups". In paragraph 2, it would be better to say "town" than "place".

32. The CHAIRMAN noted the proposal to drop the words "involve travel or". In that connexion, the question arose whether the Drafting Committee had intended those words to cover a situation different from that envisaged in the main provision "If the special mission's functions... are performed by different sections or groups". They might be taken to refer to the case where the special mission as a whole performed its functions successively in several places; the provision would then mean that the special mission changed its seat when it travelled from one place to another to perform its functions. If the words "involve travel or" were omitted, the seat of the special mission would be unaffected by mere travel; that seat would normally remain in the capital of the receiving State or at the main headquarters of the mission, regardless of any journeys made by the mission during the performance of its functions.

33. Mr. BARTOŠ, Special Rapporteur, said he had no objection to saying "town" instead of "place" in paragraph 2, but it was important not to use the word "capital" because there were cases where the Ministry of Foreign Affairs was situated elsewhere than in the capital.

34. He could accept either Mr. Castrén's or Mr. Eustathiades's suggestions for paragraph 3.

35. The CHAIRMAN proposed that the Drafting Committee should be invited to consider the various suggestions which had been made regarding the use of the term "place" *(localité)*, the suggestion to drop the words "involve travel or" and the other drafting amendments proposed to paragraph 3.

It was so agreed.[4]

[2] For resumption of discussion, see 931st meeting, paras. 64-67.

[3] For earlier discussion, see 907th meeting, paras. 1-49.

[4] For resumption of discussion, see 931st meeting, paras. 68-77.

ARTICLE 14 (Nationality of the members of the special mission) [10][5]

36. Mr. USTOR, Second Vice-Chairman, said that the Drafting Committee proposed the following title and text for article 14:

"*Nationality of the members of the special mission*"

"1. The representatives of the sending State and members of the diplomatic staff in the special mission should in principle be of the nationality of the sending State.

"2. Nationals of the receiving State may not be appointed to a special mission except with the consent of that State, which may be withdrawn at any time.

"3. The receiving State may reserve the right provided for in paragraph 2 with regard to the nationals of a third State who are not also nationals of the sending State."

37. Apart from the title and a drafting change in the introductory phrase of paragraph 1, the text of article 14 was similar to the text which had been referred to the Drafting Committee by the Commission.

38. Mr. YASSEEN said it would be preferable to use the word "*nationaux*" rather than "*ressortissants*" in the French text of paragraphs 2 and 3.

39. Mr. BARTOŠ, Special Rapporteur, said that the majority of the members of the Drafting Committee, including Mr. Ago, had opposed that change in the French text because they considered it advisable not to depart from the terminology used in the two Vienna Conventions. It had also been pointed out that there were still people who were "*ressortissants*" of a State without, strictly speaking, possessing its nationality; that appeared to be the position of the Puerto Ricans, who were "*ressortissants*" of the United States, and of the Tahitians, who were "*ressortissants*" of France. In his opinion, both terms were acceptable; the matter was one of minor importance, especially since the word used in the English text was "nationals", which was also taken from the Vienna Conventions.

40. Mr. USHAKOV said that, in his view, the word "*nationaux*" would be better in the French text, for one reason because it was nearer to the word used in English. It seemed to him that the French words "*nationaux*" and "*ressortissants*" were practically synonymous, the term "*nationaux*" being wider in scope than "*citoyens*".

41. Mr. BARTOŠ, Special Rapporteur, said that, in the Drafting Committee, Mr. Ago had maintained that the word "*nationaux*" had an essentially ethnic connotation, whereas "*ressortissants*" was a legal term. In Yugoslavia, a distinction was drawn between the word "people", which had a sociological and legal meaning, and the word "nationality", which had an ethnological meaning.

42. Mr. RAMANGASOAVINA said he too wished to emphasize that the Drafting Committee had preferred to retain the French word "*ressortissants*" in order to allow for the fact that there were still people who did not possess the full citizenship of the State to which they belonged. That was the position, for instance, of the inhabitants of the Comoro Islands or of the French Territory of the Afars and the Issas, the former French Somaliland; when they went abroad, they were given a French passport and they stated, when asked, that they were French nationals, but they did not possess all the civic rights associated with French nationality. The Drafting Committee had therefore feared that the use of the word "*nationaux*" might prevent the appointment of certain persons as members of special missions.

43. Mr. KEARNEY pointed out that Puerto Ricans were nationals of the United States who, by their own choice and for a variety of reasons, including fiscal advantages, had opted for a separate form of government.

44. The CHAIRMAN said that the difficulty which had arisen in connexion with paragraph 2 was due to the use in both Vienna Conventions of the French word "*ressortissants*" to render the English "nationals". Mr. Yasseen had suggested, for reasons of principle, that the French text should be brought into line with the English, but it had been objected that the French term "*ressortissants*" was intended to cover the case of certain persons who were not full nationals. Since the suggestion involved a departure from the language used in the two Vienna Conventions, the Commission would have to take a formal decision on the matter. He therefore suggested that the point should be settled later when the Commission took a final decision on article 14.

45. Mr. BARTOŠ, Special Rapporteur, said that he favoured Mr. Yasseen's proposal but, in view of Mr. Ago's absence, he would abstain if there was a vote.

46. The CHAIRMAN, drawing attention to the use in paragraph 1 of the expression "members of the diplomatic staff", said that the Drafting Committee should consider the definition of that expression, together with the other definitions, before the Commission itself was called upon to take a decision on the articles as a whole.

47. Mr. BARTOŠ, Special Rapporteur, said that in any case there would be a definition of "diplomatic staff" in the article on the composition of the special mission. In defining the expression "diplomatic staff", which would include the advisers, experts and secretaries of the special mission, he proposed to base himself on the text of the Convention on the Privileges and Immunities of the United Nations.[6] The expression would also be included in his proposed article on definitions which he wished to revise before sending it to the Drafting Committee and then submitting it to the Commission for its approval.

48. Mr. EUSTATHIADES said that the expression "the representatives... and members of the diplomatic staff *in* the special mission" did not appear to him to be very well chosen. He would prefer "*of* the special mission" or "forming part of the special mission".

[5] For earlier discussion, see 907th meeting, paras. 50-87.

[6] United Nations, *Treaty Series*, vol. 1, page 16.

49. Mr. BARTOŠ, Special Rapporteur, said that on the previous day the Drafting Committee had decided to use the wording "the representatives of the sending State in the special mission and the members of its diplomatic staff". The text of that amendment had not yet been circulated.

50. The CHAIRMAN suggested that the Drafting Committee should be invited to consider the various suggestions made with regard to article 14.

It was so agreed.[7]

ARTICLE 15 (Right of special missions to use the flag and emblem of the sending State) [19][8]

51. Mr. USTOR, Second Vice-Chairman, said the Drafting Committee proposed that article 15 should be deleted. After some discussion, the members of that Committee had come to the conclusion that, in view of the character of special missions, it was unnecessary to make specific provision for their right to use the flag and emblem of the sending State. The deletion of the article would not, of course, mean that a special mission could not make use of that flag or emblem; there would in fact be instances in which, by reason of the representative character of a special mission, the receiving State would allow such use.

52. Mr. BARTOŠ, Special Rapporteur, said that all the members of the Drafting Committee had agreed that article 15 should be deleted. Many small special missions of a technical character had no need to display a flag or emblem, although it was true that there were other special missions, such as those engaged on frontier demarcation or operating in frontier zones, which needed to have that right owing to the nature of their work. That was a question which could be settled on the spot or in advance by agreement between the States concerned. Moreover, whereas the use of the flag and emblem might be an essential safeguard in the case of a permanent diplomatic mission, that was not so in the case of a special mission which indeed often had good reason for remaining incognito.

53. The Drafting Committee's decision to recommend the deletion of article 15 should be mentioned in the commentary on article 18, on accommodation, so as to make it clear that the Commission had considered the matter but had decided that it was unnecessary to give detailed reasons for dropping the article.

54. Mr. EUSTATHIADES said that, by deciding to delete article 15, the Commission would be going from one extreme to the other. Although there was no need to stress the right to use the flag and emblem of the sending State, it nevertheless had to be borne in mind that, in certain circumstances, it was most desirable that the special mission should have that right. The Commission should decide either to retain article 15 and make it optional—the right to use the flag and emblem being dependent on an agreement between the States concerned—or to mention the right to use the flag or emblem in the text of the commentary on the article on accommodation. If the second solution were adopted, the commentary would not confine itself to mentioning the Drafting Committee's decision to recommend the deletion of article 15 but would state that, although the Commission had not drafted a separate article on the matter, it recognized that there should be a right to use the flag and emblem if circumstances made it necessary.

55. Mr. CASTRÉN said that he fully supported the second solution. In his view, it would also be necessary to give some reasons for the deletion of article 15 in the text of the commentary on the article on the accommodation of special missions.

56. Mr. BARTOŠ, Special Rapporteur, suggested tha he should reconsider the matter with the Drafting Committee. It might be best to adopt Mr. Ushakov's suggestion[9] that, in the absence of a special agreement on the point, the use of the flag and emblem of the sending State should be governed by the practice in force in the receiving State. Reference would thus be made to the problem, the solution to which would be made dependent on practice or on arrangements concluded between the States concerned.

57. Mr. USHAKOV said that, in principle, he had no objection to the retention of article 15, but it seemed to him to be difficult to enunciate a general rule on the point. According to article 20 of the Vienna Convention on Diplomatic Relations, only the head of mission had the right to use the flag and emblem on his means of transport; in the case of special missions, however, it was impossible to restrict that right to the head of the mission. Again, although it might be necessary for the special mission to be able to display the flag of the sending State, there were occasions when it might be a source of danger to the mission. Any general rule on the point would, therefore, be inapplicable in practice.

58. The CHAIRMAN, speaking as a member of the Commission, said he would hesitate to drop article 15 because the omission of a provision which appeared in the two Vienna Conventions might be construed to mean that a special mission had no right to use the flag and emblem of the sending State. He favoured retaining the article, provided that a satisfactory, more facultative formula could be devised. However, if no article on the subject was ultimately retained in the draft, it would be essential for the commentary to include some explanation of the omission.

59. Mr. USTOR said that, at the Vienna Conference of 1961, there had been some discussion on the question whether the faculty to use the flag and emblem of the sending State constituted a privilege or a right. Since the 1961 Vienna Convention on Diplomatic Relations was not subdivided into chapters, the relationship was not clear between article 20, dealing with the right of a permanent mission to use the flag and emblem of the sending State, and paragraph 1 of article 41, which required all persons enjoying privileges and immunities "to respect the laws and regulations of the receiving

[7] For resumption of discussion, see 931st meeting, paras. 78-84.

[8] For earlier discussion, see 908th meeting, paras. 1-37.

[9] See 908th meeting, para. 19.

State". It was thus a matter of interpretation whether, under the 1961 Vienna Convention, a permanent mission would have to abide by the laws and regulations of the receiving State in such matters as the limitation of the right to display the flag to certain days in the year. His own belief was that those laws and regulations would have to be observed, on the understanding that they did not have the effect of frustrating the right set forth in article 20 of the 1961 Vienna Convention.

60. Mr. YASSEEN said that the Chairman's arguments had convinced him. Not to mention the difficulty in the draft might cause misunderstanding, but to oblige the sending State to comply with the regulations of the receiving State, as Mr. Ustor had suggested, did not seem to be satisfactory. It was necessary to state clearly that the Commission had not intended to refuse the special mission the right to use the flag or emblem but had wished the scope of that right to be determined by agreement between the States concerned.

61. The CHAIRMAN suggested that the Drafting Committee should be invited to consider the possibility of drafting article 15 on slightly different lines and to report to the Commission, which would then decide whether or not to include an article on the use of the flag and emblem of the sending State by a special mission.

It was so agreed.[10]

Organization of Future Work

(A/CN.4/195, 196; A/CN.4/L.119)

(resumed from the 928th meeting)

[Item 6 of the agenda]

62. The CHAIRMAN invited the Commission to continue its consideration of the organization of its future work.

63. Mr. TAMMES said he was speaking in response to the request made by the Chairman at the previous meeting[11] that he should state his preferences among the new topics he had mentioned during that meeting. There had been some positive reactions to his statement. Thus, Mr. Ago had endorsed the suggestion that unilateral acts as a source of international law might be the subject of a systematized draft, which would, in a limited degree, become a counterpart to the draft on the law of treaties. A study of the interrelationship between positive and negative unilateral acts, such as recognition, confirmation, statements at international meetings and conferences, rejections, renunciations, waivers and protests would serve to clarify the legal significance of those acts and would contribute to the codification of international law.

64. Mr. Reuter had supported the idea that the Commission could do useful work on institutional development, in contrast to preparing draft conventions. He (Mr. Tammes) had quoted as an example of such work the preparation of a draft statute for a fact-finding body. The question of setting up such a body was, admittedly, still before the General Assembly, but the Assembly might well wish to have a draft statute before it took its final decision. Work on such a statute would, of course, be much more limited than the preparation of a draft on unilateral acts.

65. Another limited though highly important topic was that of granting the United Nations the status of a possible party in cases before the International Court of Justice. That work would entail amendment of the Statute of the Court, which was an integral part of the United Nations Charter. The problem had often been discussed in the past, but had been left in abeyance because no strong practical need had been felt for action in the matter; in modern times, however, in view of the many questions of great interest to the international community which were being referred to the Court, for instance in connexion with human rights and with the principle of non-discrimination, it was widely considered that the United Nations should be able to take public action in cases of that kind.

66. Accordingly, he would suggest that those three topics, of which only the first was a long-term undertaking, might be considered by the Commission for its future programme. They would not compete with the topics the Commission already had before it or with such new topics as that of international rivers.

67. Mr. CASTAÑEDA said that, like the other members of the Commission, he considered that the two main topics in the Commission's programme of work for the future were State responsibility and succession of States and Governments.

68. A re-reading of the records of the discussions at the fifteenth and sixteenth sessions of the Sixth Committee and of the General Assembly, had convinced him that most of the subjects that were ripe for codification had already been dealt with or were included in the programme of work for the future. The question of friendly relations and co-operation among States, which was essentially political rather than legal, had been referred to the Special Committee on Principles of International Law relating to that subject, which was to hold its third session in 1967.

69. There had been several references to the criteria which the Commission should apply in selecting topics for inclusion in its programme and it had been urged that to achieve useful results, it should in the main choose topics that were ready for codification. In his view, the best criterion was whether the topic was one on which a set of rules was required. For instance, there was the question of the continental shelf: that was a matter on which there had been no uniform practice, nor any treaties which might have assisted codification, yet the Convention on the Continental Shelf[12] had been adopted by the United Nations Conference on the Law of the Sea in 1958 and a sufficient number of instruments of ratification or accession had been deposited to enable it to come into force. The same was true of the Convention on Fishing and Conservation of the Living Resources

[10] For resumption of discussion, see 933rd meeting, paras. 90-102.

[11] Para. 41.

[12] United Nations Conference on the Law of the Sea, *Official Records*, vol. II, p. 142.

of the High Seas, also adopted by that Conference in 1958.[13] On the other hand, it might have been thought that, after the end of the war and the establishment of the Nuremberg Tribunal, international criminal law was ready for codification, but States had displayed little interest in that matter and no action had been taken on the proposal for codification.

70. Another matter which the Commission should consider in the distant future was the law of international economic co-operation, which was continually developing within the United Nations, the specialized agencies and the regional and world-wide economic organizations. But it was necessary to wait until practice had become established and ideas on the subject had crystallized.

71. The Commission had prepared draft conventions on the topics submitted to it, but in the future it should perhaps be less ambitious and devote one or two years to a systematic study of the basic factors of a problem. That was a task it could undertake with greater authority than an institute or academy of international law.

72. Mr. EUSTATHIADES said that the Commission should take two factors into account: the advisability of establishing a set of rules on certain topics, and what had already been known in the days of the League of Nations as the ripeness of those topics. But, whichever of those factors predominated, the fact remained that estimation of the time required was all-important for the Commission's future work. State responsibility and the succession of States and Governments were topics of major importance, and would take up much time, so that it would be difficult for the Commission to include in its programme other major subjects that nevertheless were unquestionably important, such as the use of international rivers.

73. The Commission might, subject to the time at its disposal, take up some topics of more limited scope. For instance, without considering the principles of peaceful co-existence as a whole, it might perhaps study one aspect of that topic, namely, the peaceful settlement of disputes—a subject which the United Kingdom intended to propose to the General Assembly—and pay particular attention to some matter arising out of that aspect, such as commissions of inquiry. Or again, the Commission might consider drawing up a set of model rules on conciliation, on the same lines as the model draft on arbitral procedure which it had adopted at its tenth session in 1958.[14]

74. Mr. TABIBI said that the Commission's approach to the organization of its future work should be based on the fact that it was an organ of the General Assembly and, as such, should follow the instructions of its superior body. Accordingly, priority should be given to topics suggested by the Assembly itself, such as the right of asylum and the juridical régime of historic waters, including historic bays.

75. He agreed with Mr. Castañeda that the Commission should consider topics which were ripe for codification and the codification of which was required by the community of nations. Perhaps the Commission's Officers could form a group which would select such topics and report back to the Commission. It should also be borne in mind that bodies other than the United Nations, such as the International Law Association and the Institute of International Law, had been dealing with certain topics for a considerable time.

76. There was also a category of topics in which the General Assembly had taken a great interest in the early years of the United Nations, but had since left in abeyance, such as the rights and duties of States, on which a tentative draft had already been prepared, the establishment of an international criminal jurisdiction, which was in a similar situation, and the codification of offences against mankind, on which valuable work had already been done.

77. He wished to draw particular attention to the question of duplication between the Commission's work and that of other United Nations organs. It might be wise to stress in the Commission's annual report that every effort should be made to avoid such duplication: for example, the Legal Sub-Committee of the United Nations Committee on the Peaceful Uses of Outer Space was currently dealing with matters which were properly the responsibility of the Commission, and the question of the right of asylum had been examined by the Third Committee of the General Assembly before it had finally been referred to the Sixth Committee.

78. Lastly, he wished to advocate a rather drastic departure from the Commission's traditional approach to codification. In his opinion, the Commission was the proper body to deal with topics having a political connotation, since its members acted in their private capacity and could probably succeed where governmental bodies had failed to reach final conclusions on a number of interesting topics.

79. Mr. JIMÉNEZ de ARÉCHAGA said he had only one small point to make in connexion with the organization of the Commission's future work. An idea which he had put forward at earlier sessions, but which had not been accepted by the Special Rapporteur on the law of treaties or by the majority of the Commission was that two or three articles on the legal aspects of the most-favoured-nation clause should be incorporated in the draft on the law of treaties. Those articles should, of course, not refer to the economic questions raised by the application of the clause, particularly in multilateral trade, such as the question whether most-favoured-nation treatment called for a reciprocal concession by the recipient State and whether the granting of such treatment was subject to certain exceptions; all those matters were related to the rules of law governing international trade, which were being studied actively by regional bodies in Europe and Latin America. Nevertheless, some specific legal issues involved in the operation of the clause had been raised and discussed in recent cases before the International Court of Justice, such as the *Case concerning rights of nationals of the United States of America in Morocco*[15]

[13] *Ibid.*, p. 139.

[14] *Yearbook of the International Law Commission, 1958*, vol. II, p. 12.

[15] *I.C.J. Reports, 1952*, p. 176.

and the *Anglo-Iranian Oil Co.* case.[16] Failure to deal with the matter would leave a gap in the codification of the law of treaties with respect to such points as the extent to which the revocation of a stipulation could deprive a third State of most-favoured-nation treatment, the extent to which the renunciation of benefits arising from the operation of the clause would deprive private persons of benefits derived from international arrangements and the type of benefits which were attracted by the clause. Those were precise technical legal problems and lay within the sphere of the law of treaties, and particularly of the rules of interpretation which were part of the Commission's draft.

80. Mr. KEARNEY suggested that the Commission's difficulties in drawing up its programme for the following session might be minimized by introducing the system of a five-year plan for the consideration of topics, to be revised annually in the light of developments. If the consideration of topics already on the Commission's agenda could be fitted into a general plan with greater precision, it would be easier for the Commission to assess the possibility of undertaking additional work. Where new topics were concerned, he considered that the question of international rivers was in urgent need of, and ripe for, codification, in the sense that a considerable amount of background knowledge was now available.

81. The CHAIRMAN, speaking as a member of the Commission, said that, in drawing up a plan for its work, the Commission must take into account the amount of work it could do in ten weeks as well as the need to avoid dissipating its energies in too many directions. The Commission could not obtain useful results and maintain its position as a codifying body unless it completed the study of the topics it undertook to consider. Generally speaking if a major topic was under active consideration, the best procedure was to treat that topic as the main item, and to hold one or two more limited topics in reserve for consideration during periods when the main topic could not be dealt with. [17]

The meeting rose at 1 p.m.

[16] *I.C.J. Reports, 1952*, p. 93.

[17] For resumption of the discussion of this agenda item, see 938th meeting, paras. 74-88.

930th MEETING

Wednesday, 28 June 1967, at 10 a.m.

Chairman: Sir Humphrey WALDOCK

Present: Mr. Ago, Mr. Bartoš, Mr. Castañeda, Mr. Castrén, Mr. Eustathiades, Mr. Jiménez de Aréchaga, Mr. Kearney, Mr. Ramangasoavina, Mr. Tabibi, Mr. Tammes, Mr. Ushakov, Mr. Ustor, Mr. Yasseen.

Special Missions

(A/CN.4/193 and Addenda; A/CN.4/194 and Addenda)

(resumed from the previous meeting)

[Item 1 of the agenda]

DRAFT ARTICLES PROPOSED BY THE DRAFTING COMMITTEE ON SECOND READING

1. The CHAIRMAN invited the Commission to consider the articles adopted by the Drafting Committee on second reading, which would be introduced by Mr. Ustor, as Acting Chairman of the Drafting Committee. He pointed out that there was no quorum, so that the Commission would have to accept the articles provisionally, to enable the Special Rapporteur to prepare his commentaries.

ARTICLE 1 (Sending of special missions) [2 and 7][1]

2. Mr. USTOR, Acting Chairman of the Drafting Committee, said that the Drafting Committee proposed the following text for article 1:

> "1. A State may, for the performance of a specific task, send a [temporary] special mission to another State with the consent of the latter.
>
> "2. The existence of diplomatic or consular relations is not necessary for the sending or reception of special missions.
>
> "3. A State may send a special mission to a State, or receive one from a State, which it does not recognize."

3. The text remained practically unchanged, except that the word "temporary" had been placed in square brackets, to show that it might be deleted from the paragraph if the temporary nature of special missions was mentioned in the article containing definitions.

4. Mr. BARTOŠ, Special Rapporteur, said he was not in favour of deleting the word "temporary". There were specialized diplomatic missions which had a particular task, such as the recruitment of labour, but they were permanent and were not special missions in the sense of the draft articles.

5. It was not at all certain that a definition of a special mission would be given in the definitions article; indeed no convention contained a definition of the institution that was its subject. Consequently, the characteristics of a special mission should be stated in the substantive articles, and the essential characteristic of such a mission was that it was temporary.

6. Mr. USTOR said he agreed that the word "temporary" was very important in the context of the draft, but its inclusion in paragraph 1 of article 1 and its omission from all the subsequent articles might imply that that paragraph referred to a kind of mission different from those mentioned elsewhere in the draft.

7. The CHAIRMAN observed that a final decision on the question would have to be deferred until the Commission came to consider the article containing definitions.

[1] For earlier discussion, see 926th meeting, paras. 2-22.

8. Mr. TABIBI said that he endorsed that procedure, but he also supported the Special Rapporteur's view that the qualification should appear somewhere in the draft, since there were a number of cases of permanent special diplomatic missions.

9. Mr. CASTRÉN suggested that in paragraph 1 the words "and temporary" should be inserted between the words "specific" and "task".

10. Mr. RAMANGASOAVINA said he took the same view as Mr. Ustor. Under the provisions of article 12, the functions of a special mission ended with the "expiry of the duration assigned for the special mission", a formula which left no doubt about its temporary character.

11. Mr. YASSEEN said that if a special mission was not to be defined in the definitions article, the qualifying word "temporary" should be retained in paragraph 1 of article 1.

12. Mr. BARTOŠ, Special Rapporteur, referring to the suggestion made by Mr. Castrén, pointed out that the task of a special mission was not always temporary. He proposed that in paragraph 1, the word "temporarily" should be inserted after the words "special mission".

13. The CHAIRMAN said that the question was now one of drafting only. The title of the draft, "Special Missions", was broad enough to cover all special missions, so that the draft must specify both the special nature of the tasks and the temporary nature of the missions to which it related.

14. Speaking as a member of the Commission, he suggested that it would be more consistent with the rest of the text to refer to "a special mission" in the singular in paragraph 2.

15. Mr. USHAKOV, supported by Mr. YASSEEN and Mr. EUSTATHIADES, urged that paragraph 3 should be more clearly drafted.

16. The CHAIRMAN suggested that the exact wording of the French text should be reviewed and that the article should be approved in principle.

It was so agreed.[2]

ARTICLE 2 (Field of activity of a special mission) [3][3]

17. Mr. USTOR, Acting Chairman of the Drafting Committee, said that the Drafting Committee proposed that the text of article 2 should remain unchanged. It read:

> "The field of activity of a special mission shall be specified by the consent of the sending State and of the receiving State".

18. The CHAIRMAN, speaking as a member of the Commission, said that the word "consent" might well be replaced by "agreement".

19. Mr. YASSEEN said he thought the Commission should specify in the text of article 2 that the consent must be mutual.

20. Mr. BARTOŠ, Special Rapporteur, agreed with that view, for to have legal effect, the consent must emanate from both parties.

21. Mr. KEARNEY said he did not think that the term "mutual consent" was as satisfactory as "agreement".

22. The CHAIRMAN, speaking as a member of the Commission, observed that the argument in favour of using the term "mutual consent" was to indicate that consent might be tacit and more informal than agreement. Nevertheless, the term "agreement" had been used to cover tacit consent in the draft on the law of treaties.

23. Mr. RAMANGASOAVINA supported the suggestion made by Mr. Yasseen and the Special Rapporteur.

24. Mr. BARTOŠ, Special Rapporteur, said he preferred the word "consent" to the word "agreement", for consent could be tacit or could be implied by a *de facto* situation, without any express manifestation of will.

25. The CHAIRMAN noted that the consensus of the Commission was that the word "mutual" should be inserted before the word "consent". He suggested that in the English text the phrase should read "by the mutual consent of the sending and the receiving State" and that the article should be approved as amended.

It was so agreed.[4]

ARTICLE 3 (Appointment of the members of the special mission) [8][5]

26. Mr. USTOR, Acting Chairman of the Drafting Committee, said that the Drafting Committee proposed the following text for article 3:

> "Subject to the provisions of articles..., the sending State may freely appoint the members of the special mission after having informed the receiving State of [the number and] the identity of the persons it intends to appoint."

27. That article also remained unchanged, except that the words "the number and" had been placed in square brackets, since the Commission would have to decide whether it intended to delete paragraph 3 of article 6, in which case those words should be retained in article 3.

28. Mr. BARTOŠ, Special Rapporteur, said that the words "the number and" had been added to article 3 at the request of Mr. Ushakov, who thought that the receiving State should be informed of the number of members of the special mission in order to be able to raise objections if it considered that number excessive. If the Commission decided to retain those words in article 3, then paragraph 3 of article 6 would become superfluous. His own suggestion was that the Commission should retain the words provisionally and reconsider the

[2] For resumption of discussion, see 931st meeting, paras. 86-100, when it was decided that paragraphs 2 and 3 should become a separate article numbered 1 *bis*. Articles 1 and 1 *bis* were adopted at that meeting (paras. 97 and 100).

[3] For earlier discussion, see 926th meeting, paras. 23-49.

[4] For resumption of discussion and adoption of article 2, see 931st meeting, paras. 101-105.

[5] For earlier discussion, see 926th meeting, paras. 50-66.

question when it examined article 6, paragraph 3. If it finally decided to delete that paragraph, the reason should be given in the commentary.

29. Mr. USHAKOV explained that he had wished to take into account the situation that would arise if a special mission arrived in the territory of the receiving State and that State informed it that it considered the mission too large. The special mission would then be unable to carry out its task, and the sending State might consider itself insulted. In order to avoid that danger he had suggested that the number of persons forming the special mission should be mentioned in article 3, but that amendment might perhaps not be sufficient, and he therefore proposed that an article 3 *bis* be added to the draft which would read: "The size of the special mission shall be determined by the mutual agreement of the sending and receiving States".

30. Mr. BARTOŠ, Special Rapporteur, said he was willing to accept the amendment proposed by Mr. Ushakov, and consequently to delete article 6, paragraph 3.

31. Mr. USHAKOV said that he himself regarded the reference to the number of persons in article 3 as sufficient. His idea in proposing the new text was to take into account the views of those members of the Commission who wished for a more explicit provision.

32. Mr. YASSEEN observed that the substance of article 3 was not in dispute, and he wondered whether the solution might not be to redraft article 6, paragraph 3 to read: "The size of the special mission shall be determined by agreement between the sending and receiving States".

33. Mr. JIMÉNEZ de ARÉCHAGA said that the draft under discussion, as well as both the Vienna Conventions, was based on the principle of reciprocity. In view of that basic understanding, which might be said to apply even more to the draft on special missions than to the Vienna Conventions, there was no need to include references to the mutual consent of the sending and receiving States at every step. Moreover, the determination of the size of special missions seldom took place on the basis of previous consent, and the insertion of such a provision would be contrary to existing practice.

34. Mr. RAMANGASOAVINA said that the text proposed by Mr. Ushakov might be added at the end of paragraph 1 of article 6. The words in square brackets in article 3 could then be deleted, and the words "the identity of the persons it intends to appoint" could be replaced by the words "the membership of the special mission".

35. Mr. EUSTATHIADES said that, in his view, the essential point was that article 3 should lay down the rule of the free choice of the sending State as to the number and identity of the persons making up the special mission. In fact, the size of the special mission could easily be seen from the list of the names of its members, so that the reference to the number of persons in article 3 appeared unnecessary. Moreover, if the Commission wished to retain the reservation in article 6, paragraph 3, it was clear that that provision should immediately follow article 3.

36. Mr. BARTOŠ, Special Rapporteur, said that the Drafting Committee had concluded that it was for the Commission to decide whether it wished to retain the words "the number and" in article 3, or whether article 6, paragraph 3 should be retained.

37. In addition, the Commission had before it a new amendment submitted by Mr. Ushakov; if that amendment was approved, it would be referred to the Drafting Committee.

38. He himself favoured the retention of the words "the number and" in article 3 and the deletion of paragraph 3 of article 6. The reason why those words had been put in square brackets was that the Drafting Committee had not wished to prejudge the Commission's decision.

39. The CHAIRMAN, speaking as a member of the Commission, pointed out that Mr. Ushakov's new suggestion ran counter to the trend of earlier discussions on the article. The Commission had shown a desire not to place undue restriction on the sovereignty of the sending State, but that would be the result if the provision called for agreement between the sending State and the receiving State. Perhaps the difficulty could be mitigated to some extent if the last phrase was altered to read: "after having informed the receiving State of its size and the persons it intends to appoint".

40. Mr. YASSEEN thought that the French text should read "*de l'effectif de la mission et de l'identité des personnes...*".

41. Mr. USHAKOV pointed out that Mr. Ago was opposed to the use of the word "*effectif*", although it was used in both the Vienna Conventions.

42. THE CHAIRMAN suggested that, as opinion was divided on the retention of article 6, paragraph 3, the Commission should provisionally approve article 3 as it stood and request the Drafting Committee to consider the minor changes suggested during the debate.

It was so agreed.[6]

ARTICLE 4 (Persons declared *non grata* or not acceptable) [12][7].

43. Mr. USTOR, Acting Chairman of the Drafting Committee, said that the Drafting Committee proposed the following text for article 4:

"1. The receiving State may, at any time and without having to explain its decision, notify the sending State that [any representative or any member of the diplomatic staff of the special mission] 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 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

[6] For resumption of discussion and adoption of article 3, see 931st meeting, paras. 106-117.

[7] For earlier discussion, see 926th meeting, paras. 67 and 68.

paragraph 1 of this article, the receiving State may refuse to recognize the person concerned as a member of the special mission."

44. No change had been made in the article, but he proposed that the phrase "any representative or any member of the diplomatic staff of the special mission" should be amended to read "any representative of the sending State in the special mission or any member of its diplomatic staff," which was the wording the Commission had agreed on for article 14.[8]

45. The CHAIRMAN suggested that article 4, as amended, should be approved.

It was so agreed.[9]

ARTICLE 5 (Sending of the same special mission to two or more States) [4]

ARTICLE 5 *bis* (Sending of a joint special mission by two or more States) [5]

ARTICLE 5 *ter* (Sending of special missions by two or more States in order to deal with a question of common interest) [6]

46. Mr. USTOR, Acting Chairman of the Drafting Committee, said that the Drafting Committee proposed the following texts for articles 5, 5 *bis* and 5 *ter*:[10]

Article 5 [4]

"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 the special mission."

Article 5 bis [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."

Article 5 ter [6]

"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."

47. Those three articles remained unchanged.

48. The CHAIRMAN, speaking as a member of the Commission, observed that it was perhaps not quite clear from the second sentence of article 5 whether refusal by one State to receive the special mission would affect that State only.

49. Mr. BARTOŠ, Special Rapporteur, said he thought it was correct to say that any State could refuse to receive the special mission; those which did not refuse would still be able to receive the special mission—a situation which, incidentally, was mentioned in the commentary.

50. The CHAIRMAN suggested that the Commission should approve articles 5, 5 *bis* and 5 *ter*.

It was so agreed.[11]

ARTICLE 6 (Composition of the special mission)[9][12]

51. Mr. USTOR, Acting Chairman of the Drafting Committee, said that the Drafting Committee proposed the following text for article 6:

"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 functions in the permanent diplomatic mission.

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

52. The article remained unchanged, except that the first word of paragraph 1 had been altered from "The" to "A" in the English text only.

53. The CHAIRMAN suggested that article 6 should be approved.

It was so agreed.[13]

ARTICLE 7 (Authority to act on behalf of the special mission) [14][14]

54. Mr. USTOR, Acting Chairman of the Drafting Committee, said that the Drafting Committee proposed the following text for article 7:

"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 directly 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

[8] See 929th meeting, para. 49.

[9] For adoption of article 4, see 931st meeting, paras. 118 and 119.

[10] For earlier discussion of articles 5, 5 *bis* and 5 *ter*, see 926th meeting, paras. 69-73.

[11] For adoption of these articles, see 931st meeting, paras. 121, 122 and 123 respectively.

[12] For earlier discussion, see 926th meeting, paras. 74-98.

[13] For resumption of discussion, see 931st meeting, paras. 124-139.

[14] For earlier discussion, see 927th meeting, paras. 1-14.

representative, or to perform particular acts on behalf of the mission."

55. The article remained unchanged, except that the words "either directly or through the permanent diplomatic mission" had been added at the end of paragraph 1.

56. Personally, he rather doubted whether the words "a member" should be used at the beginning of paragraph 2, since, in his opinion, only a representative of the sending State could be authorized to substitute for the head of the mission.

57. Mr. BARTOŠ, Special Rapporteur, said that, on the contrary, paragraph 2 in his view covered all the members of the special mission, including administrative, technical and other staff. The case contemplated could arise when the head of the mission and his deputies were absent, or when it was necessary to perform some particular act which a head of mission or other person of high rank did not wish to perform. The sending State had full latitude in that respect.

58. The CHAIRMAN suggested that the Commission should approve article 7.

It was so agreed.[15]

ARTICLE 8 (Notification) [11][16]

59. Mr. USTOR Acting Chairman of the Drafting Committee, said that the Drafting Committee proposed the following text for article 8:

"1. The Ministry of Foreign Affairs of the receiving State, or such other organ as may have been agreed on, shall be notified of:

"(*a*) The composition of the special mission and any subsequent changes;

"(*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 persons in private service;

"(*e*) The designation of the head of the special mission or, if there is none, of the representative referred to in paragraph 1 of article 7, and of any substitute for them;

"(*f*) The address and the location of the premises occupied by the special mission.

"2. Whenever possible, notification of arrival and final departure must be given in advance."

60. The article remained unchanged except for the addition of a new sub-paragraph (*f*) in paragraph 1.

61. Mr. BARTOŠ, Special Rapporteur, referring to the differences of opinion among governments and members of the Commission on that point, said that the words "detailed description of the premises" and "identification of the premises" had been suggested, but the Drafting Committee had finally adopted the phrase "the address and the location of the premises".

62. Mr. USHAKOV said he thought that the Drafting Committee should reconsider the use of the word "location", which was not entirely satisfactory.

63. Mr. KEARNEY said that the English text had been left deliberately vague so that the provision could be applied to the many different circumstances that could arise. Perhaps the word "the" before "premises" might be replaced by the word "any", in order to cover, for instance, the case of the residence of members of the mission, if such premises were to be granted inviolability under the convention.

64. Mr. EUSTATHIADES said that the Commission should either delete the word "location", which in his opinion added nothing to "address" or, if a description was wanted, replace it by the term "description". In the latter case, he proposed that the wording should be "the address and description of the premises".

65. The CHAIRMAN, speaking as a member of the Commission, observed that "address" and "location" in fact had the same meaning.

66. Mr. YASSEEN thought that it would be sufficient to say "the address of the premises".

67. Mr. BARTOŠ, Special Rapporteur, pointed out that the premises might be in a large sixty-storey building, in which case the address alone would be insufficient.

68. Mr. YASSEEN proposed the words "the detailed address of the premises".

69. The CHAIRMAN and Mr. USTOR suggested that the words "as may have been agreed on" in the introductory part of paragraph 1 should be replaced by "as may be agreed", in order to conform with article 41 of the Vienna Convention on Diplomatic Relations.

70. Mr. EUSTATHIADES inquired whether article 8 should not also include temporary departures of members of the special mission.

71. Mr. BARTOŠ, Special Rapporteur, said that in practice such departures were frequent and seldom raised any problems. He had in fact referred to the matter in his first draft, but on reflection he thought it better not to make the obligation to notify too burdensome.

72. The CHAIRMAN, speaking as a member of the Commission, said that, since members of permanent missions were not obliged under the Vienna Conventions to notify the receiving State of their temporary departure, it was hardly necessary to introduce such a provision for temporary missions.

73. Mr. BARTOŠ, Special Rapporteur, added that as a general rule visas were granted to members of special missions; moreover, in the few countries where visas were still required, they were valid for several entries and exits. In any case the members of those missions were not asked to give an account of their comings and goings.

[15] For resumption of discussion and adoption of article 7, see 932nd meeting, paras. 22-24.

[16] For earlier discussion, see 927th meeting, paras. 15-33.

74. The CHAIRMAN suggested that article 8 should be approved, subject to minor drafting amendments.

It was so agreed.[17]

ARTICLE 9 (Rules concerning precedence) [16][18]

75. Mr. USTOR, Acting Chairman of the Drafting Committee, said that the Drafting Committee proposed the following text for article 9:

"1. Where two or more special missions meet on the territory of the receiving 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 receiving State.

"2. Precedence between the members of the same special mission shall be notified to the appropriate organs of the receiving State.

"3. 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."

76. The Drafting Committee had not made any changes in the text referred to it by the Commission. Paragraph 3 dealt with the question of precedence among special ceremonial and formal missions; in consequence of its inclusion in article 9, the former article 10 had been deleted.

77. Speaking as a member of the Commission, he proposed that in paragraph 2 the word "organs" should be replaced by the word "organ".

78. Mr. BARTOŠ, Special Rapporteur, accepted that amendment.

79. Mr. AGO observed that the article did not state any rule of precedence for the nevertheless very important case in which special missions met on the territory of a third State that was not participating in the negotiations. That gap should be filled.

80. Mr. BARTOŠ, Special Rapporteur, said that the draft established a balance between the sending and the receiving State. The case of special missions which met on the territory of a third State was dealt with in a separate article, article 16, which authorized the third State to impose conditions, and to assume the rights and obligations of a receiving State only to the extent that it so indicated. He would prefer not to change the system and to leave the third State its freedom of action.

81. Mr. AGO agreed that article 16 laid down a wise rule on the privileges and immunities to be granted to special missions in that case. Nevertheless, the great latitude left to the third State was less justified where precedence was concerned; it would be strange if the third State could impose whatever rule of precedence it wished on the special missions. He therefore proposed that the first phrase of paragraph 1 be amended to read: "Where two or more special missions meet on the territory of the receiving State or of a third State" and that the words "the receiving State" be replaced throughout the article by the words "the State on whose territory the special missions meet".

82. Mr. USHAKOV said he was not sure that the amendment proposed by Mr. Ago was acceptable, for questions of precedence between special missions in the case under consideration depended on the States that were negotiating rather than on the third State.

83. Mr. YASSEEN thought that the question of the precedence of special missions meeting on the territory of a third State had two aspects. In the case of activities or ceremonies in which the receiving State took part, it would be normal for the protocol of that State to apply, but where activities were confined to the special missions, there would be no reason to impose on them an order of precedence dictated by the protocol of the third State, for example, French alphabetical order for special missions of Arab States meeting in Geneva.

84. The CHAIRMAN explained that there would be no question of imposing any rule on the States concerned; it was always open to them to agree on the rules of protocol they found convenient. The intention was simply to lay down a rule that would apply in the absence of agreement between the interested parties. For the purposes of such a rule, it was convenient to refer to a neutral order of precedence, namely, that of the third State which acted as host.

85. Mr. KEARNEY said that if the special missions were accompanied by protocol officers, those officers would certainly be able to solve any problems of precedence that might arise. If there were no protocol officers, it was unlikely that questions of precedence would be raised.

86. Mr. AGO pointed out that in the example given by Mr. Yasseen, the special missions would use the same language, so that the order of precedence should be fairly easy to determine; but that was an exceptional case. If the special missions did not use the same language, it would be rendering them a service to suggest the alphabetical order used in the protocol of the receiving State.

87. Mr. YASSEEN said there was much in what Mr. Ago said.

88. Mr. BARTOŠ, Special Rapporteur, said he wished to stress that article 9 laid down a residuary rule, from which the States concerned could always depart by special agreement.

89. Mr. YASSEEN thought that in the French text of paragraph 3, the expression "*manifestation protocolaire*" was not very felicitous.

90. After a brief discussion, Mr. AGO proposed that in the French text of paragraph 3 the following wording should be used:"...*qui se rencontrent pour une cérémonie ou pour une occasion solennelle*...".

91. The CHAIRMAN said that, if there were no further comments, he would assume that the Commission agreed in principle to approve article 9, with Mr. Ago's

[17] For resumption of discussion and adoption of article 8, see 932nd meeting, paras. 25-61. See also paragraph 103 below.

[18] For earlier discussion, see 927th meeting, paras. 34-43.

amendment inserting a reference to the case in which a third State acted as host, and his rewording of the French text of paragraph 3.

It was so agreed.[19]

ARTICLE 11 (Commencement of the functions of a special mission) [13][20]

92. Mr. USTOR, Acting Chairman of the Drafting Committee, said that the Drafting Committee proposed the following text for article 11:

"1. The functions of a special mission shall commence as soon as the mission enters into official contact with the Ministry of Foreign Affairs of the receiving State or with another organ of the receiving State as may have been agreed on.

"2. The commencement of the functions of a special mission shall not depend upon presentation by the permanent diplomatic mission of the sending State or upon the submission of letters of credence or full powers."

93. In accordance with a suggestion made during the 927th meeting, the words "or with another appropriate organ designated by the receiving State" at the end of paragraph 1 had been replaced by the words "or with another organ of the receiving State as may have been agreed on".

94. Speaking as a member of the Commission, he proposed that those words be amended to read: "or with such other organ of the receiving State as may be agreed". That change would bring the article into line with the wording already approved for article 8 and also with that used in article 10 of the Vienna Convention on Diplomatic Relations.

95. Mr. AGO supported Mr. Ustor's proposal. The French text should read: "*ou avec tel autre organe dont il aura été convenu*".

96. Mr. EUSTATHIADES proposed that the word "other" be deleted. Under some constitutions a ministry was not regarded as an "organ"; only a minister could be so regarded. That question did not arise in connexion with article 10 of the Vienna Convention, the wording of which was: "The Ministry of Foreign Affairs of the receiving State, or such other ministry as may be agreed".

97. Mr. USHAKOV supported that proposal.

98. Mr. USTOR said that the Drafting Committee had unanimously adopted the term "organ" in article 8. The use of that term was intended to cover organs of the receiving State other than ministries. It was advisable to use the same wording in article 11 as in article 8.

99. Mr. AGO said that the Drafting Committee had considered various expressions such as "authority", "department" and "body", but had finally chosen the term "organ", which had become part of legal language.

100. Mr. BARTOŠ, Special Rapporteur, observed that the proposal by Mr. Eustathiades to delete the word "other" would not alter the meaning of the sentence in any way, but would have the merit of preventing any dispute of a theoretical or constitutional nature.

101. The CHAIRMAN said that, in English usage, it would be quite proper to refer to the Ministry of Foreign Affairs or "such other organ of the receiving State": that Ministry was certainly an organ of the receiving State.

102. If there were no further comments, he would assume that the Commission agreed to approve article 11 with the amendment proposed by Mr. Ustor, but without the word "other", in order to take into account the objection raised by Mr. Eustathiades; the concluding words of paragraph 1 would then read "or with such organ of the receiving State as may be agreed".

It was so agreed.[21]

ARTICLE 8 (Notification) [11] *(resumed)*

103. The CHAIRMAN said that, as a result of the change made in article 11, it was necessary to delete the word "other" from paragraph 1 of article 8.[22] If there were no objections, he would assume the Commission agreed to make that change.

It was so agreed.

DRAFT ARTICLES PROPOSED BY THE DRAFTING COMMITTEE ON FIRST READING

(resumed from the previous meeting)

ARTICLE 16 (Activities of special missions in the territory of a third State) [18][23]

104. Mr. BARTOŠ, Special Rapporteur, said that he and Mr. Ushakov were thinking of submitting to the Drafting Committee a new provision, to be added to article 16, in order to supplement paragraph 3 of that article and make it clear that the sending States had certain obligations towards the third State concerning information and notification. Even if the third State did not assume all the rights and obligations of a receiving State, it should be informed of certain facts.

105. Mr. USHAKOV said that all the articles would have to be reviewed at a later stage to determine what were the rights and obligations of a receiving State that could devolve on the third State under the terms of article 16. For example, could the third State declare a person *non grata*?

106. The CHAIRMAN noted that Mr. Bartoš and Mr. Ushakov might later propose an addition to paragraph 3 of article 16. Meanwhile, he invited the Commission to consider that article, for which the Drafting Committee proposed the following text:

[19] For resumption of discussion and adoption of article 9, see 932nd meeting, paras. 62-65.

[20] For earlier discussion, see 927th meeting, paras. 45-55.

[21] For resumption of discussion and adoption of article 11, see 932nd meeting, paras. 66-70.

[22] See paragraph 59 above.

[23] For earlier discussion, see 908th meeting, paras. 38-76, and 909th meeting, paras. 3-26.

"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 in question may impose conditions which shall be observed by the sending States.

"3. 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."

107. Mr. USHAKOV questioned whether it was accurate to use the term "sending States" for States whose special missions met on the territory of a third State.

108. The CHAIRMAN, speaking as a member of the Commission, proposed the deletion of the words "in question" in paragraph 2.

109. Mr. EUSTATHIADES supported that proposal; in paragraph 3, the expression used was simply "the third State". The words "in question" were therefore superfluous.

110. Mr. BARTOŠ, Special Rapporteur, accepted that proposal.

111. Mr. AGO said that he also accepted that change.

112. The CHAIRMAN said that, if there were no objection, he would assume that the Commission agreed to approve article 16 in principle, with the deletion of the words "in question".

It was so agreed.[24]

ARTICLE 17 (General facilities) [22][25]

113. Mr. USTOR, Acting Chairman of the Drafting Committee, said that the Drafting Committee proposed the following text for article 17:

"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."

114. The Drafting Committee had made only one change: it had replaced the words "full facilities" by "the facilities required".

115. The CHAIRMAN said that, if there were no comments, he would assume that the Commission agreed to approve article 17 in principle.

It was so agreed.[26]

ARTICLE 18 (Accommodation of the special mission and its members) [23][27]

116. Mr. USTOR, Acting Chairman of the Drafting Committee, said that the Drafting Committee proposed that article 18 be redrafted to read:

"The receiving State shall assist the special mission if it so requests in obtaining the necessary premises and suitable accommodation for its members".

117. A number of changes had been made in the original text. The Drafting Committee had introduced the words "if it so requests" and had replaced the words "appropriate premises" by "the necessary premises". It had also deleted the concluding words of the original text: "and, if necessary, ensure that such premises and accommodation are at their disposal".

118. Mr. CASTRÉN asked if any substantive amendment to the article had been made by deleting the words "and staff" after the words "for its members".

119. Mr. BARTOŠ, Special Rapporteur, replied that in the new terminology adopted by the Drafting Committee the expression "members of the special mission" included the representatives and the staff of the mission. That terminology was based on the Vienna Convention on Diplomatic Relations. Hence it would only be necessary to mention the staff if a particular category was meant, for example, the diplomatic staff.

120. The CHAIRMAN proposed two drafting changes to bring the English text into line with the French: first, a comma should be introduced after "the special mission" and another comma after "if it so requests"; secondly, the words "in obtaining the necessary premises and suitable accommodation" should be replaced by "in procuring the necessary premises and in obtaining suitable accommodation".

121. If there were no objection, he would assume that the Commission agreed to approve article 18 in principle, with those drafting changes.

It was so agreed.[28]

The meeting rose at 1 p.m.

[24] For resumption of discussion and adoption of article 16, see 933rd meeting, paras. 87-89.

[25] For earlier discussion, see 912th meeting, paras. 45-74, and 913th meeting, paras. 1-40.

[26] For adoption of article 17, see 936th meeting, para. 9.

[27] For earlier discussion, see 913th meeting, paras. 41-78.

[28] For adoption of article 18, see 936th meeting, para. 10.

931st MEETING

Friday, 30 June 1967, at 10.5 a.m.

Chairman: Sir Humphrey WALDOCK

Present: Mr. Ago, Mr. Bartoš, Mr. Castañeda, Mr. Castrén, Mr. Eustathiades, Mr. Jiménez de Aréchaga, Mr. Kearney, Mr. Ramangasoavina, Mr. Tabibi, Mr. Tammes, Mr. Ushakov, Mr. Ustor, Mr. Yasseen.

Special Missions

(A/CN.4/193 and Addenda; A/CN.4/194 and Addenda)

(continued)

[Item 1 of the agenda]

DRAFT ARTICLES PROPOSED BY THE DRAFTING COMMITTEE *(continued)*

1. The CHAIRMAN invitde the Commission to consider articles proposed by the Drafting Committee on

first reading and called upon the Acting Chairman of the Drafting Committee to introduce the texts.

ARTICLE 19 (Inviolability of the premises) [25][1]

2. Mr. USTOR, Acting Chairman of the Drafting Committee, said that the Committee proposed the following text for article 19:

"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.

"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."

3. He pointed out that at Mr. Kearney's request, a footnote had been added to the Drafting Committee's text stating that, during the discussion in the Commission, some members had favoured the addition of the following sentence: "Such consent may be assumed in case of fire or other disaster requiring prompt protective action."

4. Mr. KEARNEY said that the footnote should be considered when the article was put to the vote.

5. Mr. BARTOŠ, Special Rapporteur, said he did not think that the Commission should linger over article 19, as it had already been discussed at length. The views expressed by the minority would be set out in his report.

6. The CHAIRMAN pointed out that, as a result of the minor amendments made in the article, it was now practically identical with the corresponding provision—article 22—of the Vienna Convention on Diplomatic Relations. He suggested that the Commission should approve the text in principle.

It was so agreed.[2]

ARTICLE 39 (Transit through the territory of a third State) [43][3]

7. Mr. USTOR, Acting Chairman of the Drafting Committee, said that the Committee proposed the following text for article 39:

"1. If a representative of the sending State in a 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, and of members of their families, through their territories.

"3. Third States shall accord to official correspondence and other official communications in transit, including messages in code or cipher, the same freedom and protection as is accorded by the receiving State. Subject to the provisions of paragraph 4, they shall accord to the couriers and bags of the special mission in transit the same inviolability and protection as the receiving State is bound to accord.

"4. The third State shall be bound to comply with the obligations mentioned in the foregoing three paragraphs only if it has been informed in advance, either in the visa application or by notification, of the transit of the special mission, and has raised no objection to it.

"5. The 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 bags of the special mission, when the use of the territory of the third State is due to *force majeure*."

8. The Special Rapporteur would inform the Commission of the changes that had been made.

9. Mr. BARTOŠ, Special Rapporteur, said that except for the addition of paragraph 4, article 39 reproduced, *mutatis mutandis*, the provisions of article 40 of the Vienna Convention on Diplomatic Relations. The additional paragraph was intended to specify the manner in which a third State had to be informed in advance of the special mission's transit through its territory and provided for the possibility of that State's raising an objection to such transit.

10. The CHAIRMAN pointed out that paragraph 4 had already been considered by the Commission. The text was practically identical with the one previously considered, except for the deletion of the words "subject to the provisions of paragraph 4" from paragraph 1.

11. Mr. USHAKOV suggested that the words "of persons belonging to the special mission" should be substituted for the words "of the special mission" in paragraph 4. The adoption of his suggestion would make the text of paragraph 4 more uniform, as there was a reference in the French version to the "*obligations à l'égard des personnes mentionnées dans les trois paragraphes précédents*", whereas further on the phrase used was "*transit de la mission spéciale*", which was, in his view, too abstract.

[1] For earlier discussion, see 913th meeting, paras. 79-90, and 914th meeting, paras. 3-63.

[2] For resumption of discussion and adoption of article 19, see 936th meeting, paras. 11-21.

[3] For earlier discussion, see 909th meeting, paras. 27-87.

12. The CHAIRMAN drew attention to a discrepancy between the English and French texts of paragraph 4, the English text of which referred only to the obligations mentioned in the foregoing paragraphs, whereas the French text referred to the obligations in respect of the persons mentioned in those paragraphs.

13. Mr. BARTOŠ, Special Rapporteur, said he saw no objection to accepting Mr. Ushakov's proposal.

14. Mr. CASTRÉN proposed the wording "*de leur transit*" for the French text.

15. The CHAIRMAN pointed out that some difficulty might arise in connexion with paragraph 3, which related not only to the transit of persons, but also to that of correspondence and other official communications.

16. Mr. KEARNEY said he thought that the reference to the transit of the special mission had been deliberately included in paragraph 4 so as to ensure that the third State extended transit facilities to individuals in their capacity of members of the special mission. If reference was made to persons, the text should make it clear that that was their capacity.

17. Mr. BARTOŠ, Special Rapporteur, thought that the Commission might ask the Drafting Committee to re-examine the text of article 39 with particular reference to paragraph 4.

18. The CHAIRMAN suggested that the Commission should refer the point raised to the Drafting Committee and should approve the article in principle.

It was so agreed.[4]

ARTICLE 40 *bis* (Non-discrimination) [50][5]

19. Mr. USTOR, Acting Chairman of the Drafting Committee, said that the Committee proposed the following text for article 40 *bis*:

"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 provisions of the present articles;

"(*c*) Where States agree among themselves to reduce reciprocally the extent of the facilities, privileges and immunities for their special missions, although such a limitation does not exist with regard to other States."

20. Paragraphs 1 and 2 of the article corresponded to the Special Rapporteur's original text. The Drafting Committee had deleted the words "in general or for particular categories of their special missions" in paragraph 2 (*c*) and the whole of paragraph 3, in view of the Commission's decision not to distinguish between different categories of special missions.

21. The CHAIRMAN suggested that article 40 *bis* should be approved in principle.

It was so agreed.[6]

ARTICLE 20 (Inviolability of archives and documents) [26][7]

22. Mr. USTOR, Acting Chairman of the Drafting Committee, said that the Committee proposed the following text for article 20:

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

23. The text was identical with that already considered by the Commission and was taken from the corresponding provision (article 24) of the Vienna Convention.

24. The CHAIRMAN suggested that the Commission should approve article 20 in principle.

It was so agreed.[8]

ARTICLE 21 (Freedom of movement) [27][9]

25. Mr. USTOR, Acting Chairman of the Drafting Committee, said that the Committee proposed the following text for article 21:

"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 freedom of movement and travel on its territory to the extent that this is necessary for the performance of the functions of the special mission."

26. The article remained unchanged except that the words "unless otherwise agreed" had been deleted, because the Committee had thought it undesirable to lay special emphasis on the possibility of other procedures.

27. The CHAIRMAN suggested that the Commission should approve article 21 in principle.

It was so agreed.[10]

ARTICLE 22 (Freedom of communication) [28][11]

28. Mr. USTOR, Acting Chairman of the Drafting Committee, said that the Committee proposed the following text for article 22:

"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, the diplomatic missions, the consular posts and other special missions of the sending State, or with

[4] For resumption of discussion and adoption of article 39, see 933rd meeting, paras. 103-106.

[5] For earlier discussion, see 910th meeting, paras. 1-59.

[6] For adoption of article 40 *bis*, see 937th meeting, para. 5.

[7] For earlier discussion, see 915th meeting, paras. 1-6.

[8] For adoption of article 20, see 935th meeting, para. 40.

[9] For earlier discussion, see 915th meeting, paras. 8-35.

[10] For resumption of discussion and adoption of article 21, see 935th meeting, para. 41.

[11] For earlier discussion, see 915th meeting, paras. 36-59.

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."

29. The only paragraph that had been changed was paragraph 1, the Drafting Committee having amplified the second sentence to cover all the necessary channels of communication.

30. The CHAIRMAN, speaking as a member of the Commission, inquired whether it was appropriate to refer to diplomatic missions in the plural in paragraph 1.

31. Mr. BARTOŠ, Special Rapporteur, replied that the expression "the diplomatic missions" had been used in the plural because the special mission might have to communicate not only with the permanent diplomatic mission accredited to the receiving State but also with permanent diplomatic missions situated in the territory of neighbouring States.

32. Mr. EUSTATHIADES thought that the definition of the expression "official correspondence" in paragraph 2 might perhaps be better placed in the definitions article.

33. Mr. BARTOŠ, Special Rapporteur, observed that the official correspondence mentioned in that paragraph was the official correspondence sent or received by the special mission, not the official correspondence of the sending State and its various organs. In the Vienna Convention on Diplomatic Relations, the definition of official correspondence was similarly given in the text of article 27, not in article 1—the definitions article.

34. Mr. RAMANGASOAVINA suggested that paragraph 2 might be drafted in a single sentence, reading: "The official correspondence of the special mission, which includes all correspondence relating to the special mission and its functions, shall be inviolable."

35. The CHAIRMAN said that, in view of the obvious analogy with the corresponding provision, article 27, of the Vienna Convention and of the fact that the Vienna Convention did not place the provision in its article on definitions, it would be better not to make any changes.

36. Mr. BARTOŠ, Special Rapporteur, read out article 27, paragraph 2, of the Vienna Convention on Diplomatic Relations, the text of which was identical with that of article 22, paragraph 2, of the draft articles on special missions. The Commissions had reproduced from the Vienna Conventions those provisions which were applicable to special missions; it had not thought it proper to make drafting changes, even where it considered that the style was unsatisfactory.

37. Mr. KEARNEY suggested that the term "diplomatic missions" in paragraph 1 should be qualified by the adjective "permanent". Since the phrase "the other missions" in article 27, paragraph 1 of the Vienna Convention mainly referred to permanent diplomatic missions, there was no reason why the Commission should not use a term which would clarify the text of the article under consideration.

38. Mr. BARTOŠ, Special Rapporteur, said he did not think that the Commission should insert the qualifying adjective "permanent" before "diplomatic missions", for, although there were permanent diplomatic missions which were specialized missions, there were also special diplomatic missions which were not permanent.

39. Mr. EUSTATHIADES observed, in support of the Special Rapporteur's remark, that a diplomatic mission sent by one State to another State to which it accorded *de facto* recognition was not a permanent diplomatic mission.

40. The CHAIRMAN suggested that article 22 should be approved in principle, but that the text should be referred back to the Drafting Committee for rewording in the light of the debate.

It was so agreed.[12]

ARTICLE 23 (Exemption of the special mission from taxation) [24][13]

41. Mr. USTOR, Acting Chairman of the Drafting Committee, said that the Committee proposed the following text for article 23:

"1. The Sending State and the members of the special mission acting on its behalf shall be exempt

[12] For resumption of discussion and adoption of article 22, see 935th meeting, paras. 42-52.

[13] For earlier discussion, see 915th meeting, paras. 60-85.

from all national, regional or municipal dues and taxes in respect of the premises of the special mission, other than such as represent payment for specific services rendered.

"2. The exemption from taxation referred to in this article shall not apply to such dues and taxes payable under the law of the receiving State by persons contracting with the sending State or with a member of the special mission."

42. The title of the article did not indicate the important fact that the exemption in question related solely to the premises of the special mission. The words "acting on its behalf" had been inserted after "members of the special mission" in paragraph 1.

43. Mr. BARTOŠ, Special Rapporteur, said he wished to explain that, having regard to cases where, for example, a mission was not authorized to conclude a treaty or where such authorization was given to a person acting on its behalf, the Drafting Committee had thought if preferable to adopt the expression "*agissant pour le compte de la mission*" instead of "*agissant au nom de la mission*" in the French version of the text.

44. Mr. USHAKOV said he wished to revert to an objection he had already put forward in the Drafting Committee. In this opinion, the provision was too broad if it was applicable to all members acting on behalf of the special mission. Article 23 of the Vienna Convention on Diplomatic Relations granted exemption from taxation only to the sending State and the head of the mission.

45. Mr. USTOR said he did not think that the insertion of the words "acting on its behalf" made any real change in the meaning of the article. The purpose of the phrase was to specify the persons on whom the receiving State could levy taxes in respect of the mission's premises had no provision been made for exemption: it was scarcely conceivable that any and every member of the special mission would be liable for such taxes. In any event, the article must exempt all members of the mission from taxation in respect of the premises, while, under article 23 of the Vienna Convention, only the head of the mission was regarded as being liable for such taxation.

46. Mr. BARTOŠ, Special Rapporteur, agreed with Mr. Ustor. The word "head" had been included in the earlier text, but, having regard to the fact that, as emphasized in draft article 7, missions did not necessarily have a head, the Commission had substituted the expression now under consideration. It would be equally possible to say: "the sending State and the member of the special mission authorized to act on the mission's behalf".

47. It should also be borne in mind that the article did not deal with personal privileges, but with privileges in respect of the premises of the special mission, and that the legal transactions in question related to such matters as purchases, sales and leases. In any event, the meaning of article 23 was identical with that of article 23 of the Vienna Convention on Diplomatic Relations.

48. Mr. EUSTATHIADES suggested the wording: "the sending State and the persons referred to in article 7", since the provision was strictly applicable to them alone.

49. Mr. BARTOŠ, Special Rapporteur, said that he accepted the proposal of Mr. Eustathiades and suggested that it should read: "the sending State and the member of the special mission referred to in article 7", or, even better, "the member of the special mission authorized under article 7 to act on behalf of the mission".

50. Mr. USTOR said it was important to prevent any misinterpretation of the text by national fiscal authorities, which might construe it to mean that members of a special mission acting on behalf of the sending State under article 7 were immune from taxation in respect of the premises of the mission, while the other members were not. It was essential to retain the idea that no member of the special mission was liable to taxes in respect of the premises.

51. Mr. CASTRÉN said that if Mr. Eustathiades's proposal was accepted the latter part of paragraph 2 would also have to be amended.

52. Mr. TABIBI pointed out that paragraph 2 might be interpreted as contradicting the exception provided for in the last phrase of paragraph 1.

53. The CHAIRMAN said that the same difficulty had arisen in connexion with the Vienna Convention and had been discussed in the Commission. The general conclusion had been that, although the problem dealt with in paragraph 2 played an unimportant part in the law of many countries, it was a matter of concern to some others. The wording of article 23 of the Vienna Convention had therefore been followed.

54. Mr. EUSTATHIADES observed that paragraph 1 in the English text ended with the words "specific services rendered" and in the French text with "*services particuliers rendus*". It might perhaps be better to refer to "*services spéciaux*", the term used in various other contexts, for instance in connexion with river commissions.

55. The CHAIRMAN pointed out that, in the English text, the word "its" in the phrase "acting on its behalf" might relate either to the sending State or to the special mission. He suggested that the Drafting Committee should be asked to consider modifying the text in that respect and also to examine the suggestion by Mr. Eustathiades; on that understanding the Commission might approve article 23 in principle.

It was so agreed.[14]

ARTICLE 24 (Personal inviolability) [29][15]

56. Mr. USTOR, Acting Chairman of the Drafting Committee, said that the Committee proposed the following wording for article 24:

"The person 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

[14] For resumption of discussion and adoption of article 23, see 935th meeting, paras. 53-55.

[15] For earlier discussion, see 916th meeting, paras. 1-60.

State shall treat them with due respect and shall take all appropriate steps to prevent any attack on their person, freedom or dignity."

57. The text remained unchanged, except for the substitution of the phrase "of the representatives of the sending State in the special mission and of the members of its diplomatic staff" for "of the head and members of the special mission and of the members of its diplomatic staff". The text was practically identical with the corresponding provision (article 29) of the Vienna Convention.

58. The CHAIRMAN suggested that the Commission should approve article 24.

It was so agreed.[16]

ARTICLE 25 (Inviolability of the private accommodation) [30][17]

59. Mr. USTOR, Acting Chairman of the Drafting Committee, said that the Committee proposed the following text for article 25:

"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, subject to the proviso in article 26, paragraph 4, their property shall likewise enjoy inviolability."

60. The text largely corresponded to the Special Rapporteur's original proposal and to article 30 of the Vienna Convention, except that the word "accommodation" was used instead of "residence". Paragraph 2 had been amplified by a reference to article 26, paragraph 4, which provided for exceptions from immunity in respect of matters in which measures of execution could be taken.

61. Mr. BARTOŠ, Special Rapporteur, said that a slight change had been made in paragraph 2, the possessive adjective "their" having been substituted for the definite articles before "documents", "correspondence", and "property". It had been decided to retain the word "*biens*" in the French text, as it was entirely appropriate in that context.

62. The CHAIRMAN pointed out that the English text of the proviso in paragraph 2 departed from the wording of article 30, paragraph 2, of the Vienna Convention, the corresponding phrase of which read "except as provided in paragraph 3 of article 31". The difficulty lay in the fact that the provision of article 26, paragraph 4, of the draft was itself expressed negatively; it would be better to follow the wording of the Vienna Convention.

63. He suggested that the Commission should approve article 25 in principle.

It was so agreed.[18]

[16] For adoption of article 24, see 935th meeting, para. 56.

[17] For earlier discussion, see 916th meeting, paras. 61-97.

[18] For resumption of discussion and adoption of article 25, see 935th meeting, paras. 57-59.

DRAFT ARTICLES PROPOSED BY THE DRAFTING COMMITTEE ON SECOND READING *(continued)*

ARTICLE 12 (End of the functions of a special mission) [20][19]

64. Mr. USTOR, Acting Chairman of the Drafting Committee, said that the Drafting Committee proposed the following text for article 12:

"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 explicitly 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.

"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."

65. In paragraph 1 (*a*), the Drafting Committee had deleted the word "mutual", which had appeared before "agreement" in the previous version of the article.

66. In paragraph 2, the Drafting Committee had replaced the word "automatically" by "of itself". It had also replaced the words "existing at the time of the severance of relations" by "existing at the time of such severance".

67. The CHAIRMAN said that, in the absence of any objection, he would assume that the Commission approved article 12.

It was so agreed.[20]

ARTICLE 13 (Seat of the special mission) [17][21]

68. Mr. USTOR, Acting Chairman of the Drafting Committee, said that the Drafting Committee proposed the following text for article 13:

"1. A special mission shall have its seat in the locality agreed upon 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."

69. In paragraphs 1 and 2 of the English text the words "at the place" appearing in the earlier text had been replaced by "in the locality". In paragraph 3, the reference to the special mission's functions involving travel or being performed by different sections or groups had been

[19] For earlier discussion, see 929th meeting, paras. 2-20.

[20] For adoption of article 12, see 936th meeting, para. 2.

[21] For earlier discussion, see 929th meeting, paras. 21-35.

dropped and had been replaced by a reference to those functions being "performed in different localities". That wording would cover all possible situations.

70. The CHAIRMAN suggested the deletion of the word "upon" from the English text of paragraph 1.

71. Mr. KEARNEY supported that proposal.

72. Mr. EUSTATHIADES said he was doubtful about the use of the word "*localité*" in the French text.

73. The CHAIRMAN pointed out that the Drafting Committee had not altered the French text; it had only replaced the word "place" in the English text by the broader and more suitable term "locality".

74. Mr. EUSTATHIADES urged that the more appropriate term "*ville*" should be used in the French text. In the extremely rare event of the Ministry of Foreign Affairs not being in a town or city, any difficulty that might arise could be solved by means of an agreement between the two States concerned.

75. Mr. USHAKOV said that the Drafting Committee had discussed the problem of the use of the word "*localité*" in the French text, but had preferred to retain it because it was the term used in article 12 of the 1961 Vienna Convention on Diplomatic Relations.

76. The CHAIRMAN pointed out that the word "localities" was used in the English text of the 1961 Vienna Convention.

77. If there were no further comments, he would assume that the Commission approved article 13, subject to the deletion of the word "upon" from paragraph 1.

It was so agreed.[22]

ARTICLE 14 (Nationality of the members of the special mission) [10][23]

78. Mr. USTOR, Acting Chairman of the Drafting Committee, said that the Committee proposed the following text for article 14:

"1. The representatives of the sending State in the special mission and 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 the nationals of a third State who are not also nationals of the sending State."

79. In paragraph 1, the opening words had been brought into line with the terminology used in other articles of the draft.

80. Mr. EUSTATHIADES questioned the adequacy of the expression "may reserve" in paragraph 3. That expression seemed to suggest that, in order to make use of the right set forth in paragraph 3, the State concerned would have to make an express reservation to the future convention. The real intention of paragraph 3 was to state the right of the receiving State to make use, with regard to the nationals of a third State, of the faculty set forth in paragraph 2.

81. Mr. USHAKOV pointed out that the wording of paragraph 3 had been taken from article 8, paragraph 3, of the Vienna Convention on Diplomatic Relations.

82. The CHAIRMAN said that the expression "may reserve" was admittedly not very satisfactory because of the technical meaning of the term "reservation". There was, of course, no intention of referring to a reservation in that sense; paragraph 3 simply meant that the receiving State could invoke the right provided for in paragraph 2 with regard to the nationals of a third State. It was, however, undesirable to depart from the language already used in the 1961 Vienna Convention.

83. Mr. BARTOŠ, Special Rapporteur, said he recognized that the expression "may reserve the right" was perhaps not very satisfactory, but it had a very precise meaning: whereas the receiving State had an absolute right of refusal with respect to the persons referred to in paragraph 2, the analogous right relating to the persons referred to in paragraph 3 could not be exercised unless the receiving State declared that it wished to exercise it. That meaning had been clearly specified at the 1961 Vienna Conference, and the same expression was to be found in article 22, paragraph 3, of the Vienna Convention on Consular Relations.

84. The CHAIRMAN said that, in the absence of any objection, he would assume that the Commission approved article 14.

It was so agreed.[24]

DRAFT ARTICLES PROPOSED BY THE DRAFTING COMMITTEE ON THIRD READING

85. The CHAIRMAN invited the Commission to consider articles adopted by the Drafting Committee on third reading. In accordance with its usual practice, the Commission would vote on those articles, subject to any drafting changes that might be necessitated by the Commission's decisions on other articles.

ARTICLE 1 (Sending of special missions) [2][25]

86. Mr. AGO, Acting Chairman of the Drafting Committee, said that the Drafting Committee proposed the following text for article 1:

"A State may, for the performance of a specific task, send a [temporary] special mission to another State with the consent of the latter."

87. The article now consisted of only one paragraph, the former paragraphs 2 and 3 having become article 1 *bis*.

[22] For resumption of discussion and adoption of article 13, see 936th meeting, paras. 3-6.

[23] For earlier discussion, see 929th meeting, paras. 36-50.

[24] For adoption of article 14, see 936th meeting, paras. 7 and 8.

[25] For earlier discussion, see 930th meeting, paras. 2-16.

88. The only remaining question was whether the word "temporary" should be retained or deleted and a decision on it could be postponed until the Commission had adopted the article on definitions.

89. Mr. EUSTATHIADES said his recollection was that no imperative reason for retaining the word "temporary" had been brought out during the previous discussion of the matter.

90. Mr. USTOR said he fully realized that all the special missions covered by the draft articles were temporary in character. That fact would have to be stated somewhere in the draft articles, but it was necessary to find the most suitable wording for that purpose.

91. The CHAIRMAN said that the matter depended on the definition of "special mission". It was of course necessary to emphasize the temporary character of special missions, but if the definition of a special mission left no room for doubt on that point, it would be inelegant to repeat the adjective "temporary" in article 1, bearing in mind that the title of the draft convention would be "Convention on special missions" and not "Convention on temporary special missions".

92. Once a special mission was defined as being of a temporary character, it was clear that, for purposes of the draft articles, the term "special mission" always referred to missions of a temporary character. It would therefore be appropriate simply to refer to "special missions" throughout the text.

93. He therefore suggested that the Commission should adopt article 1, reserving a decision on the use of the word "temporary" until after it had considered the definition of "special mission".

94. Mr. AGO said that he supported the Chairman. The main purpose of the article was to stress the fact that a special mission could be sent only with the consent of the receiving State, not to emphasize the temporary character of a special mission. If its temporary character was brought out in the definition of "special mission", there was no need to mention the point again in article 1.

95. Mr. BARTOŠ, Special Rapporteur, said that, in his view, it was essential to draw attention in some part of the draft to the temporary character of special missions. Article 1 might be put to the vote without the word "temporary", on the understanding that there would be a reference to the temporary character of special missions in the definition of "special mission".

96. Mr. EUSTATHIADES said he agreed with the Chairman. As the draft was to be entitled "special missions", it would be odd to qualify the reference to "a special mission" in article 1 with the word "temporary". If the temporary character of special missions was not ultimately mentioned in the definition, the word "temporary" could be restored in article 1, but in that case it should be included in the part of the article between commas, which would then read "for the performance of a specific and temporary task".

97. The CHAIRMAN put article 1 to the vote, without the adjective "temporary", on the understanding that that characteristic of special missions would be mentioned in the definition of the term "special mission".

Article 1 was adopted unanimously.

ARTICLE 1 *bis*. (Non-existence of diplomatic or consular relations and non-recognition) (new article) [7]

98. Mr. AGO, Acting Chairman of the Drafting Committee, said that the Drafting Committee proposed the following title and text for article 1 *bis*:

"*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."

99. Article 1 *bis* consisted of the two paragraphs detached from article 1 and would probably be placed elsewhere in the draft.

100. The CHAIRMAN said that he too considered that the article should be placed later in the draft.

Article 1 bis was adopted unanimously.

ARTICLE 2 (Field of activity of a special mission) [3][26]

101. Mr. AGO, Acting Chairman of the Drafting Committee, said that the Drafting Committee proposed the following text for article 2:

"The field of activity of a special mission shall be determined by the mutual consent of the sending and receiving State."

102. The Drafting Committee had made no change in the French text.

103. The CHAIRMAN explained that the English text of article 2 had been improved: the word "specified" had been replaced by "determined" and the adjective "mutual" had been inserted before "consent".

104. Mr. TAMMES said that, in voting for article 2, he wished to make a reservation regarding the decision which would be ultimately taken on the crucial articles "Y" and "Z".

105. The CHAIRMAN explained that article 2 could be adopted at that stage, although it might be affected by other articles to be adopted later.

Article 2 was adopted unanimously.

ARTICLE 3 (Appointment of the members of the special mission) [8][27]

106. Mr. AGO, Acting Chairman of the Drafting Committee, said that the Drafting Committee proposed the following text for article 3:

"Subject to the provisions of articles..., the sending State may freely appoint the members of the special

[26] For earlier discussion, see 930th meeting, paras. 17-25.

[27] For earlier discussion, see 930th meeting, paras. 26-42.

mission after having informed the receiving State of its size and of the persons it intends to appoint."

107. At the final stage, the numbers of the articles referred to in the initial proviso would have to be inserted.

108. In accordance with a suggestion by the Chairman, the Drafting Committee had added the reference to the size of the mission, which would make it possible to omit paragraph 3 of article 6.

109. Mr. CASTAÑEDA said that he would abstain in the vote on the article because, in his view, it should contain an express reference to the receiving State's right to refuse to accept a given person as a member of the special mission without having to explain its decision.

110. Mr. AGO inquired whether it would satisfy Mr. Castañeda if there were a reference in the commentary to the fact that the purpose of requiring the sending State to submit the information was to enable the receiving State to object, if it wished, to certain persons whom it was intended to appoint.

111. Mr. YASSEEN said that he had raised the same question during the earlier discussion, but he was sure that the real purpose of the article was to enable the receiving State to make comments which would have to be taken into account by the sending State. Where special missions were concerned, it was entirely a question of agreement between the parties: if one State did not accept what the other State proposed, there would be no special mission.

112. Mr. USHAKOV said that he, too, thought that Mr. Castañeda's idea was implied in the text of article 3. He agreed that the idea should be mentioned in the commentary.

113. Mr. EUSTATHIADES said it seemed to him that the words "the persons it intends to appoint" and the proximity of article 4, under which the receiving State was given an opportunity to declare a person *non grata* or not acceptable, made the text of article 3 sufficiently clear. He would have no objection to the precise meaning of the article being brought out in the commentary.

114. Mr. AGO said that the reaction of the receiving State to the list of names communicated to it under article 3 was a different matter from the much more formal procedure provided for in article 4. The whole purpose of the information required under article 3 was to provide for the possibility of an arrangement which would make it unnecessary to resort later to the procedure laid down in article 4.

115. Mr. CASTAÑEDA said he shared the view that the situation contemplated in article 4 was altogether different from the one he had mentioned in connexion with article 3. It was better that the receiving State should be able to object to only one person, as a result of the information provided under the article, instead of being compelled to object to the special mission as a whole. It was true, however, that the idea to which he had referred was implied in the article and he would not therefore press the point, on the understanding that it would be mentioned in the commentary.

116. Mr. BARTOŠ said that he too considered that Mr. Castañeda's idea was implied in the article and could be developed in the commentary. But it was important not to confuse the provisions of articles 3 and 4. Under article 3, prior information was required which would enable the receiving State to make its comments in advance, whereas the procedure provided for in article 4 had to be used by the receiving State after the members of the special mission had been appointed. It had to be remembered that the two articles would be further apart in the final text of the draft.

117. The CHAIRMAN put article 3 to the vote, on the understanding that the purpose of the article, namely, to enable the receiving State to raise objections in connection with the information communicated to it by the sending State, would be explained in the commentary.

Article 3 was adopted unanimously.[28]

ARTICLE 4 (Persons declared *non grata* or not acceptable) [12][29]

118. Mr. AGO, Acting Chairman of the Drafting Committee, said that the Drafting Committee proposed the following text for article 4:

"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 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."

119. The article was based on the corresponding article of the Vienna Convention on Diplomatic Relations and had already been fully discussed.

Article 4 was adopted unanimously.

ARTICLE 5 (Sending of the same special mission to two or more States) [4][30]

120. Mr. AGO, Acting Chairman of the Drafting Committee, said that the Drafting Committee proposed the following text for article 5:

"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."

[28] See 941st meeting, paras. 1 and 2.

[29] For earlier discussion, see 930th meeting, paras. 43-45.

[30] For earlier discussion of articles 5, 5 *bis* and 5 *ter*, see 930th meeting, paras. 46-50.

121. As in the case of articles 5 *bis* and 5 *ter*, no further change had been made in article 5, which reflected the Commission's views.

Article 5 was adopted unanimously.

ARTICLE 5 *bis* (Sending of a joint special mission by two or more States) [5][31]

122. Mr. AGO, Acting Chairman of the Drafting Committee, said that the Drafting Committee proposed the following text for article 5 *bis:*

"Two or more States may send a joint special mission to another State unless that State, which shall be consulted beforehand, objects thereto."

Article 5 bis *was adopted unanimously.*

ARTICLE 5 *ter* (Sending of special missions by two or more States in order to deal with a question of common interest) [6][32]

123. Mr. AGO, Acting Chairman of the Drafting Committee, said that the Drafting Committee proposed the following text for article 5 *ter:*

"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."

Article 5 ter *was adopted unanimously.*

ARTICLE 6 (Composition of the special mission) [9][33]

124. Mr. AGO, Acting Chairman of the Drafting Committee, said that the Drafting Committee proposed the following text for article 6:

"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 functions in the permanent diplomatic mission."

125. The terminology used in the article to designate the different categories of persons forming a special mission had been brought into line with that used in the other articles.

126. Paragraph 3 of the original text[34] had been omitted, as the size of the special mission was now mentioned in article 3 as one of the matters on which it was necessary to inform the receiving State in advance. After considering the matter at length, the Drafting Committee had come to the conclusion that the addition of those words to article 3 made paragraph 3 of article 6 superfluous. If it were decided to restore that paragraph, the text adopted for article 3 would have to be changed.

127. Mr. CASTRÉN said he did not think that the alteration made in article 3 justified the omission of paragraph 3 of article 6. As the Special Rapporteur and several members of the Commission had pointed out, the situation might change during the time the special mission was carrying out its task and it might become necessary to reduce the mission's size. He therefore proposed that paragraph 3 should be restored.

128. Mr. EUSTATHIADES supported Mr. Castrén's proposal.

129. The CHAIRMAN put to the vote the proposal to restore paragraph 3.

The proposal was rejected by 6 votes to 2, with 5 abstentions.

130. The CHAIRMAN invited the Commission to consider the text of article 6 as submitted by the Drafting Committee.

131. Mr. EUSTATHIADES said that he doubted whether the adjective "permanent" in paragraph 2 was really necessary.

132. Mr. BARTOŠ, Special Rapporteur, said that the mission referred to in paragraph 2 was the diplomatic mission accredited to the receiving State. The adjective "permanent" was absolutely necessary in order to distinguish that mission from the other diplomatic missions of the sending State, namely, a mission to an international organization or a permanent specialized mission, which was also a diplomatic mission.

133. Mr. YASSEEN said that in his view the passage could only refer to the diplomatic mission accredited to the receiving State, and it therefore made little difference whether the word "permanent" was deleted or left where it was.

134. Mr. EUSTATHIADES said he fully understood that the word "permanent" had been included in order to distinguish the mission in question from the special mission, which was essentially temporary. But would paragraph 2 as at present worded apply to the members of a diplomatic mission sent to a State which had only been accorded *de facto* recognition? Some writers held that a diplomatic mission of that type was temporary and subject to recall so that it could not be regarded as a permanent diplomatic mission.

135. Mr. BARTOŠ, Special Rapporteur, replying to Mr. Eustathiades, said that in such a case there were no diplomatic relations in the true sense; missions sent to a State which had been accorded *de facto* recognition were not accredited to that State within the meaning of the Vienna Convention. Consequently, the omission of the word "permanent" would in no way make it possible to apply the provisions of paragraph 2 to the members of such a mission. His own view was that the adjective "permanent" should be retained; the expression "permanent diplomatic mission" was in common use. Moreover, there might be other specialized diplomatic missions which were not permanent diplomatic missions accredited in accordance with the Vienna Convention.

[31] See footnote 30.

[32] See footnote 30.

[33] For earlier discussion, see 930th meeting, paras. 51-53.

[34] See 904th meeting, para. 15.

136. Mr. KEARNEY said that a great many special missions were diplomatic in character. Since such missions were essentially temporary, it was appropriate for paragraph 2 of article 6 to describe the diplomatic mission accredited to the receiving State as the "permanent diplomatic mission".

137. Mr. USTOR explained that the purpose of paragraph 2 was not merely to state that members of the permanent diplomatic mission could be included in the composition of the special mission; it was intended to make it clear that if such persons were included in the composition of the special mission, they would retain their status as members of the permanent diplomatic mission. It would not rule out the inclusion in the special mission of members of another mission.

138. Mr. AGO said that, after thinking the matter over, he wondered whether it would not be necessary to specify in the last half of the sentence that the persons in question retained their status, in other words their privileges and immunities as diplomats, rather than their "functions" in the permanent diplomatic mission. He proposed that the article should be referred to the Drafting Committee for consideration of that particular point.

139. The CHAIRMAN said that, in the absence of any objection, he would assume that the Commission approved Mr. Ago's proposal that article 6 should be referred back to the Drafting Committee for the submission of a final text, bearing in mind the Commission's decision not to include paragraph 3.

It was so agreed.[35]

The meeting rose at 1.5 p.m.

[35] For resumption of discussion and adoption of article 6, see 933rd meeting, paras. 84-86.

932nd MEETING

Tuesday, 4 July 1967, at 10.5 a.m.

Chairman: Sir Humphrey WALDOCK

Present: Mr. Ago, Mr. Bartoš, Mr. Castañeda, Mr. Castrén, Mr. Eustathiades, Mr. Ignacio-Pinto, Mr. Kearney, Mr. Nagendra Singh, Mr. Ramangasoavina, Mr. Tabibi, Mr. Tammes, Mr. Ushakov, Mr. Ustor, Mr. Yasseen.

Also present: Mr. Rizvi, Observer for the Asian-African Legal Consultative Committee.

Co-operation with Other Bodies

(resumed from the 911th meeting)

[Item 5 of the agenda]

1. The CHAIRMAN invited Mr. Rizvi, the observer for the Asian-African Legal Consultative Committee, to address the Commission.

2. Mr. RIZVI (Observer for the Asian-African Legal Consultative Committee) expressed the regret of the Chief Justice of Thailand, the President of the Asian-African Legal Consultative Committee for 1967, at his inability to attend the Commission's session because of unavoidable engagements in his Court. At the President's request, and with the agreement of the Government of Pakistan, he himself had the honour to represent the Committee.

3. He had been much impressed by the work of the International Law Commission in devising ways and means of promoting world peace and understanding. All the subjects on the Commission's agenda had one common factor—the desire to establish fellowship among different States in accordance with the principle of living honourably and letting others live honourably.

4. The subject of special missions could be traced back to the earliest days of known history. Permanent diplomatic missions constituted a stage in the evolution of that ancient institution. However, the powers of such missions were not sufficiently broad to cover the very wide range of questions arising in the relations between States; hence the need to evolve a legal system placing temporary special missions on an international basis. The Commission was engaged at the current session in formulating just such a system, which would prove a very useful means of promoting world fellowship. The Asian and African countries would derive particular benefit from that system, because most of them could not afford to maintain permanent missions in a large number of countries and had to deal with their problems through the machinery of special missions. He therefore wished to express the gratitude of his Committee for the work the Commission had done on the topic.

5. He would like to suggest to the Commission that the definition of "special mission" should be wide enough to include the members of an arbitral tribunal or the mediators who might be appointed by different countries to settle outstanding disputes or bring about a compromise.

6. The sphere of activity of the Asian-African Legal Consultative Committee was very similar to that of the Commission. At its tenth session at Bangkok in 1966, the Committee had adopted a final draft on the rights of refugees, including the right of asylum, the right to compensation and the right of repatriation. The Committee had been greatly assisted in its work by the advice and guidance given on a number of intricate questions by Mr. Yasseen, the representative of the Commission.

7. In view of the importance of its work, the Committee's membership would probably be enlarged in the near future. The subjects before it included the law of treaties; in 1966, it had appointed a special rapporteur for that subject and his report would be considered at the Committee's next session early in 1968. On the instructions of the Government of Pakistan, he himself had requested the Committee to include in its agenda the important question of the use of river waters on a territorial basis.

8. The Secretary of the Committee had already sent the Commission an invitation to participate in its next session. Since that session would be held at Karachi, he wished

to add his own personal invitation to the Commission. In view of the importance of the subjects to be discussed and the Committee's earnest desire to benefit from the Commission's guidance, he very much hoped that the invitation would be accepted.

9. Mr. YASSEEN said that he first wished to thank the President, Secretary, and all members of the Asian-African Legal Consultative Committee for their warm welcome and to express his appreciation of the generous hospitality extended by the Government of Thailand.

10. He also wished to lay particular stress on the importance of contacts with that Committee, which manifestly wished to co-operate with the Commission. Under article 3 (*a*) of its statutes, one of the Committee's purposes was to examine "questions that are under consideration by the International Law Commission, and to arrange for the views of the Committee to be placed before the said Commission". Furthermore, at its fifth session at Rangoon, the Committee had decided to add to that article the words: "to consider the reports of the Commission and to make recommendations thereon to the Governments of the participating countries".

11. One of the items on the agenda of the Bangkok session had been the consideration of the reports of the International Law Commission on the work of its seventeenth and eighteenth sessions and matters arising out of the Commission's work. The Committee had given special attention to the question of the attitude of Governments towards the draft convention on the law of treaties, a question on which he himself had been asked to speak. After stressing the importance of co-operation by regional organizations with the Commission, he had requested the Committee to make a thorough study of the articles of the draft convention and to inform the Governments of all participating countries of its opinion, in order to facilitate the work of the plenipotentiary conference which the General Assembly of the United Nations had decided to convene. Having regard to the importance of the task incumbent upon it, the Committee had decided to appoint a special rapporteur for the subject: he was to examine the draft convention from the Asian-African viewpoint and to consult the Governments of the participating countries with a view to reaching conclusions that would reflect the attitude of the African and Asian States.

12. He (Mr. Yasseen) would be submitting to the Commission a detailed report on the work of the eighth session of the Asian-African Legal Consultative Committee.[1]

13. Mr. TABIBI said that the Commission had developed the sound tradition of maintaining close contact and co-operation with regional bodies. Those relations were particularly important in the case of the Asian-African Legal Consultative Committee in view of the influence exerted by the new nations of Asia and Africa on the formulation of the new principles of the law of nations.

14. The Committee, which had originally been an Asian body, and had subsequently extended its activities to Africa, was doing extremely useful work. Its members were outstanding jurists occupying such posts as Chief Justice or Minister of Justice in their respective countries; its recommendations therefore enjoyed the full support of the Governments concerned. For that reason, he thought that the Commission should carefully examine the Committee's past reports, especially in connexion with the agenda item "Organization of future work."

15. He also wished to pay a tribute to the outstanding work of the Committee's secretariat and to urge that, in addition to the exchange of observers, the International Law Commission and the Asian-African Legal Consultative Committee should co-operate more closely through their secretariats, in particular through the exchange of documents.

16. Mr. NAGENDRA SINGH said he whole-heartedly supported the remarks of Mr. Yasseen and Mr. Tabibi, particularly with regard to the position and importance of the Asian-African Legal Consultative Committee. He fully agreed that the Commission should maintain the closest possible relationship with that regional body.

17. The CHAIRMAN thanked the observer for the Asian-African Legal Consultative Committee for his statement and for his invitation to the Commission to send an observer to the Committee's next session at Karachi.

18. The Commission desired to associate itself with the thanks just expressed by Mr. Yasseen for the hospitality extended to him as the Commission's representative during the Committee's tenth session at Bangkok.

19. The Commission also endorsed Mr. Yasseen's remarks on the particular importance of its contacts with the Committee as part of its continuing co-operation with all regional bodies concerned with the codification of international law. The Asian-African Legal Consultative Committee was required by its statute to examine the Commission's reports and to make recommendations thereon to the Governments of member countries. It was therefore essential that there should be the fullest understanding between the two bodies with regard to the Commission's work.

20. In conclusion, he stressed the value which the Commission attached to the presence at its sessions of observers from the regional bodies dealing with the codification of international law. The necessarily short statements made by those observers in the Commission were supplemented by all the information obtained by its members in informal contacts outside the Commission's meetings.

Special Missions

(A/CN.4/193 and Addenda; A/CN.4/194 and Addenda)

(resumed from the previous meeting)

[Item 1 of the agenda]

Draft Articles proposed by the Drafting Committee on Third Reading

(resumed from the previous meeting)

21. The CHAIRMAN invited the Commission to resume consideration of the draft articles adopted by the Drafting Committee on third reading.

[1] Subsequently issued as document A/CN.4/197.

ARTICLE 7 (Authority to act on behalf of the special mission) [14][2]

22. Mr. AGO, Acting Chairman of the Drafting Committee, said that the Committee proposed the following text for article 7:

"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 directly 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."

23. Mr. BARTOŠ, Special Rapporteur, said that the words "or, if the sending State has not appointed a head, one of the representatives of the sending State designated by the latter" had been inserted in paragraph 1 to show that the sending State was not obliged to appoint a head of mission.

24. Mr. USHAKOV said that the phrase "or through the permanent diplomatic mission" had been added at the end of paragraph 1 on the Chairman's suggestion.

Article 7 was adopted unanimously.

ARTICLE 8 (Notification) [11][3]

25. Mr. AGO, Acting Chairman of the Drafting Committee, said that the Committee proposed the following text for article 8:

"1. The Ministry of Foreign Affairs of the receiving State, or such other organ as may be agreed, shall be notified of:

"(*a*) The composition of the special mission and any subsequent changes;

"(*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 persons in private service;

"(*e*) The designation of the head of the special mission or, if there is none, of the representative referred to in paragraph 1 of article 7, and of any substitute for them;

"(*f*) The address of the premises occupied by the special mission and any necessary information concerning them.

"2. Whenever possible, notification of arrival and final departure must be given in advance."

26. The Drafting Committee had thought it best to set out in a single article all the matters on which the receiving State had to be notified. That was the reason for the addition of sub-paragraph (*f*), dealing with the premises, as the end of paragraph 1.

27. Mr. USTOR pointed out that the form of words used in the introductory phrase of paragraph 1: "The Ministry of Foreign Affairs of the receiving State, or such other organ as may be agreed..." differed from that used in paragraph 1 of article 11 to convey the same idea.

28. The CHAIRMAN, speaking as a member of the Commission, proposed that that opening sentence should be amended to read: "The Ministry of Foreign Affairs or such other organ of the receiving State as may be agreed...".

29. If the Commission adopted that proposal, he would suggest at a later stage that identical wording should be used in paragraph 1 of article 11.

30. Mr. KEARNEY said that the purpose of paragraph 1 (*f*) was to enable the receiving State to discharge its responsibilities connected, in particular, with inviolability. Since under article 25 the receiving State was responsible for ensuring the inviolability of the private accommodation of the representatives of the sending State in the special mission and of the members of its diplomatic staff, it seemed desirable that paragraph 1 (*f*) should also stipulate the need to notify the address of such private accommodation.

31. Mr. BARTOŠ, Special Rapporteur, explained that, in the Drafting Committee's opinion, it would be going too far to require notification of all changes of address of members of a special mission, who often stayed at a hotel. In any event, as the members of the mission had to respect the regulations in force in the receiving State, they would fill up a police registration form on their arrival at a hotel if the regulations in force so required.

32. Mr. USHAKOV said he agreed with Mr. Kearney that the private accommodation of the members of a special mission should be protected. He doubted, however, whether it was really necessary to require that the addresses of all members of the mission should be notified to the organ concerned. The Vienna Convention on Diplomatic Relations included no such requirement. In his opinion, the phrase "and any necessary information" was therefore sufficient.

33. Mr. KEARNEY pointed out that the system of filling in police registration forms did not exist in many countries, of which the United States was one.

34. He did not feel very strongly about his suggestion, but thought that unless provision was made for notification of private addresses, it would be impossible to rule out a breach of the inviolability of a hotel room occupied by a representative of the sending State or a member of the diplomatic staff of the special mission.

35. The CHAIRMAN, speaking as a member of the Commission, said that he found the words "any necessary

[2] For earlier discussion, see 930th meeting, paras. 54-58.

[3] For earlier discussion see 930th meeting, paras. 59-74.

information concerning them" rather obscure. If those words were to be retained, the commentary would have to make it clear whether the information was required for purposes of identification or for purposes of protection.

36. Mr. BARTOŠ, Special Rapporteur, said that various expressions had been proposed, such as "description" and "identification of the premises". The Drafting Committee had ultimately decided in favour of the wording "any necessary information".

37. Mr. CASTRÉN said that although the wording of sub-paragraph (*f*) was admittedly somewhat vague, in the light of the explanations just given he thought it could be accepted as it stood.

38. Mr. KEARNEY agreed with the Chairman's criticism of the vagueness of the words "and any necessary information concerning them". He suggested that they should be replaced by the phrase "and any additional information necessary to identify them", which was more precise.

39. Mr. AGO, Acting Chairman of the Drafting Committee, supported that suggestion.

40. Mr. BARTOŠ, Special Rapporteur, said that he too accepted it.

41. Mr. USHAKOV said that he was not in favour of the proposed amendment, as it would be preferable to leave the two States completely free to settle the point between themselves. There would be no objection, however, to explaining in the commentary that the expression "any necessary information concerning them" meant the information necessary for identifying the premises.

42. Mr. USTOR suggested that if the adjective "full" or "detailed" was inserted before the word "address", the final phrase might be dispensed with.

43. Mr. YASSEEN said it seemed to him that the word "address" was enough in itself, since it normally included all the information necessary to ensure that a communication reached the person for whom it was intended. There was no reason, however, why the expression "full address" should not be used.

44. Mr. RAMANGASOAVINA said that he was in favour of leaving sub-paragraph (*f*) as it was. The Drafting Committee had chosen the expression "any necessary information concerning them" after considerable thought and it was deliberately very broad; in some cases, it might be necessary to give information going beyond mere identification.

45. Mr. NAGENDRA SINGH supported Mr. Kearney's suggestion; the present wording of the second part of paragraph 1 (*f*) was very vague.

46. The CHAIRMAN, speaking as a member of the Commission, said that since paragraph 1 (*f*) was intended to create a legal obligation connected with inviolability, it was necessary to clarify the purpose of the provision. He suggested, therefore, that the end of paragraph 1 (*f*) should be reworded as follows: "and any additional information that may be necessary to indentify them". That wording would make it clear that the address of the premises would normally suffice but that, if any additional information proved to be necessary, it must be supplied.

47. Mr. EUSTATHIADES said that, during the previous discussion of the point, the consensus of opinion in the Commission had been that the notification concerning the special mission's premises should give all the necessary details for their precise identification: floor, staircase number, number of rooms and so forth.

48. Mr. BARTOŠ, Special Rapporteur, said that the information to be given to the receiving State was not merely a postal address but the precise place where the premises occupied by the special mission were situated.

49. Mr. AGO said that the use of the word "address" perhaps gave rise to some difficulty; it was not merely a question of an address in the sense of the place to which mail might be sent, but of information identifying the premises actually occupied by the special mission. It might perhaps be desirable to substitute "the situation" for "the address".

50. Mr. EUSTATHIADES, supported by Mr. YASSEEN, suggested the use of the word "site".

51. Mr. RAMANGASOAVINA said that he preferred the word "situation", but could accept the word "site".

52. Mr. USHAKOV said that he preferred the word "site".

53. Mr. NAGENDRA SINGH said that the word "address" was sufficiently precise to cover all that was required.

54. Mr. KEARNEY agreed; the proposed alternative wording seemed unnecessarily complicated.

55. The CHAIRMAN, speaking as a member of the Commission, said that the word "address" would be adequate if paragraph 1 (*f*) were limited to the opening clause; if, however, the concluding phrase were to be retained, it would be desirable to replace the word "address" by "site". He therefore proposed that paragraph 1 (*f*) should be reworded to read: "The site of the premises occupied by the special mission and any information that may be necessary to identify them".

56. Mr. USTOR pointed out that the expression "the premises occupied by the special mission" was used for the first time in article 8. In all other articles, the expression "the premises of the special mission" was used. He therefore proposed that the latter expression should be adopted for paragraph 1 (*f*) of article 8.

57. Mr. AGO said that there was a difference in that respect between permanent diplomatic missions and special missions. It was logical to speak of the mission's premises in referring to permanent diplomatic missions, but he would have preferred to use the expression "premises occupied by the special mission" throughout in referring to special missions. The important point, of course, was to use the same term in all the articles.

58. Mr. BARTOŠ, Special Rapporteur, agreed with Mr. Ago. The expression "premises occupied by the special mission" denoted an actual situation; it also gave some indication of the time involved: the reference was to the premises during the period of their occupation by the special mission.

59. Mr. USTOR pointed out that since a special mission was by definition temporary, its premises would necessarily also be temporary. There was no need to stress that temporary character by using the words "occupied by". He therefore urged that the expression "the premises of the special mission" should be used in paragraph 1 (*f*).

60. The CHAIRMAN suggested that it should be left to the Drafting Committee to choose one of the two expressions—"premises of the special mission" and "premises occupied by the special mission"—and use it throughout the draft articles in the interests of consistency.

The Chairman's suggestion was adopted unanimously.

61. The CHAIRMAN invited the Commission to vote on article 8 with the amendments he had proposed to the opening sentence of paragraph 1 and to the text of paragraph 1 (*f*).

Article 8 was adopted unanimously with those two amendments.

ARTICLE 9 (Rules concerning precedence) [16][4]

62. Mr. AGO, Acting Chairman of the Drafting Committee, said that the Committee proposed the following text for article 9:

"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 between 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.

"3. Precedence between 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."

63. The article had been amended to provide for the case of special missions meeting on the territory of a third State.

64. Paragraph 2 had been improved by the addition of the words "that which is" before the word "notified".

65. Paragraph 3 was the former article 10.

Article 9 was adopted unanimously.

ARTICLE 11 (Commencement of the functions of a special mission) [13][5]

66. Mr. AGO, Acting Chairman of the Drafting Committee, said that the Committee proposed the following text for article 11:

"1. The functions of a special mission shall commence as soon as the mission enters into official contact with the Ministry of Foreign Affairs of the receiving State 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 presentation by the permanent diplomatic mission of the sending State or upon the submission of letters of credence or full powers."

67. The words "of the receiving State" should be deleted after the words "the Ministry of Foreign Affairs" in order to bring the article into line with article 8.

68. Mr. EUSTATHIADES asked whether the Drafting Committee had expressly rejected the suggestion he had made at the 930th meeting[6] that the word "other" should be deleted before the word "organ" in article 11, paragraph 1.

69. Mr. AGO replied that the Drafting Committee had studied that suggestion by Mr. Eustathiades, which also affected article 8. The Committee had considered that the deletion of the word "other" gave rise to a further difficulty: the phrase "or with such organ of the receiving State" could be understood as referring exclusively to a physical person, whereas the expression "or with such other organ of the receiving State" clearly showed that the reference was to an administrative organ analogous to a ministry.

70. Mr. EUSTATHIADES said that that difficulty could have been overcome by replacing the word "Ministry" by the word "Minister". However, he appreciated that the Commission wished to follow the model of the Vienna Convention as closely as possible and would not therefore press the point.

Article 11 was adopted unanimously.

PROVISIONAL DEFINITION OF THE TERM "SPECIAL MISSION" PROPOSED BY THE DRAFTING COMMITTEE[7]

71. Mr. AGO, Acting Chairman of the Drafting Committee, said that the Committee had adopted the following provisional definition of the term "special mission":

"A 'special mission' is a temporary mission of a representative character sent by one State to another State [to discuss specific questions with it] [for the performance of a specific task in that State]."

72. The problem before the Committee had been to reconcile two concepts, that of important special missions which, though not permanent diplomatic missions, had a quasi-diplomatic character, and that of small groups of technicians or other specialists sent from one country to another which did not possess all the characteristics

[4] For earlier discussion, see 930th meeting, paras. 75-91.

[5] For earlier discussion, see 930th meeting, paras. 92-102.

[6] Para. 96.

[7] For earlier discussion, see 897th meeting, paras. 5-47.

of the representation of States. After considerable deliberation, it had been decided that the only solution was to submit a restrictive definition, stating that a special mission had a representative character and the capacity to treat with the other State at the international level. That restrictive definition would leave States free to extend the régime to other groups not having a representative character; the important point was that they were not obliged to do so. Thus, special missions differed from permanent diplomatic missions in two respects: they were temporary in character and they had specific tasks to perform. The Drafting Committee's difficulty had been to find a definition which was not a description. The wording of the clause could certainly be improved, but the Commission should now decide whether it agreed with the underlying principle of the definition. That principle was based on the articles on privileges and immunities that had already been approved, and it went without saying that if the Commission did not agree with the Drafting Committee's ideas, its approach to those articles would have to be revised.

73. Mr. USHAKOV said that the definition proposed followed from the articles already adopted. He personally approved the text without reservation.

74. Mr. RAMANGASOAVINA noted with satisfaction that the proposed text faithfully reflected the trend of the discussion during the session.

75. Far from being mutually exclusive, the two solutions envisaged at the end of the sentence were complementary. Some special missions expected active participation by the receiving State, whereas others looked only for its goodwill and protection. In the former case, the word "discuss" was more appropriate, and in the latter, the word "performance". He therefore proposed that both the ideas expressed in square brackets in the text should be retained, and linked by the word "or".

76. Mr. BARTOŠ, Special Rapporteur, said he agreed that the two ideas submitted by the Drafting Committee concerning the purpose of the special mission were not mutually exclusive, but he would prefer to link them by the word "and" rather than by the word "or". He would use that definition in the introductory article he was to submit.

77. Mr. EUSTATHIADES said that the text proposed had the merit of clarity, since it gave a specific indication of the régime envisaged for special missions; it was also useful, since it met the desire of certain Governments to have a definition.

78. If a choice had to be made between the two phrases between square brackets at the end of the text, he would prefer the second, which in his view covered all the tasks that might be assigned to the special mission, from negotiation to conclusion of a treaty. He did not think it was necessary to combine the two phrases.

79. If the Commission adopted the second phrase, the words "in that State" could be deleted, since they were rendered superfluous by the words "sent by one State to another State". Moreover, the performance of the task would not necessarily take place in the receiving State.

80. Furthermore, if the Commission opted for the first phrase, the retention of the word "representative" might create certain difficulties, since the proposed formula: "to discuss specific questions with it" implied that some missions were not of a representative character. In that case it would be necessary for the commentary to define the exact meaning of the word "representative".

81. Mr. NAGENDRA SINGH said he fully supported the substance of the provisional definition, since it incorporated the three distinguishing characteristics of special missions—their temporary nature, their specific tasks and their representative character. With regard to the first phrase in square brackets, however, he considered that the term "to discuss with" was too vague; it was also inaccurate to state that a special mission performed a specific task in another State, for its task might relate to a number of States or even to the world at large. In his opinion, it would be enough to say that a special mission meant a mission of a representative and temporary character "with a special task, sent by one State to another State".

82. Mr. IGNACIO-PINTO said he approved the proposed text and welcomed the fact that the definition emphasized the representative character of the special mission.

83. With regard to the alternatives proposed at the end of the text, the phrase "to discuss specific questions with it" covered some cases and not others, and did not overlap with the phrase beginning with the words "for the performance of". Both ideas were sound and should therefore be retained in the definition.

84. Mr. TAMMES said that the word "representative" was not legally precise and could be improved upon; but in his view that word or a similar term should be retained in the definition in order to remind the parties of the need to agree in advance on the nature and perhaps on the level of the mission for the purpose of determining whether or not the provisions on privileges and immunities were applicable. The definition was thus an important contribution to the practical value of the draft.

85. Although he had no strong views on the alternatives in square brackets, he had a certain preference for the second, since the first did not seem to cover the wide range of functions summarized by the Special Rapporteur in his reports.

86. Mr. CASTRÉN noted that the text proposed involved two changes in the definition submitted by the Special Rapporteur in his fourth report (A/CN.4/194/Add.2, article 0). The first was the omission of a reference to the consent of the receiving State, a reference which was in fact unnecessary since it already appeared in article 1. The second was the inclusion of a very important new element, which was the representative character of the special mission. It would, however, be advisable to clarify that notion in the commentary, as Mr. Eustathiades had proposed.

87. With regard to the alternatives proposed in the last part of the text, the second phrase appeared preferable

because it was more general. He would not, however, be opposed to adopting a combination of the two.

88. Mr. CASTAÑEDA said he welcomed the new restrictive definition of the special mission, which made it possible to distinguish between true special missions and those which were not special missions within the meaning of the draft. The addition of the word "representative" was essential. Admittedly, the legal meaning of that word did not emerge clearly from the text, but it was unnecessary to go into that point in the definition.

89. If a choice had to be made between the two phrases proposed at the end of the text, he would prefer the first, which he considered was broader and would make it easier to take account of the heterogeneous character of special missions.

90. Mr. KEARNEY said he agreed with preceding speakers that it was wise to introduce the idea of the representative character of special missions into the definition, which thus covered missions which represented the State as a whole in dealings with other States, but did not cover visits to other countries by groups of government officials concerned with limited technical matters not involving representation of the State.

91. With regard to the two variants in the last part of the definition, he considered that the first reflected the representative character of the special mission more satisfactorily than the second, for certain groups making official visits which did not have a representative character nevertheless performed specific tasks, and the retention of the second variant might to some extent negate the term "representative character". The best solution might be to combine the alternatives to read "to deal with the latter regarding specific tasks".

92. Mr. USTOR said that the great merit of the provisional definition was that it clearly stated what a special mission was and what it was not. The term "representative character" obviously meant that the special mission must represent the State as a whole, and that groups of government officials which only represented certain interests of the State were not special missions. The definition would help to dispel the misgivings that had been expressed in the Sixth Committee of the General Assembly and would clearly indicate the Commission's stand on the question of privileges and immunities: it would be quite obvious that special missions, as defined in the clause, must be granted full diplomatic privileges and immunities.

93. Mr. TABIBI also supported the Drafting Committee's definition, which covered all the essential aspects of special missions. He agreed with Mr. Nagendra Singh that the two variants regarding specific questions and tasks would only confuse the issue, and that it would suffice simply to state that a special mission had a specific task.

94. The CHAIRMAN, speaking as a member of the Commission, said that, earlier in the session, he had pointed out that the representative character of a special mission must be an essential element of the Commission's concept of such missions, for otherwise it would be almost impossible to draw any line between a mission ranking as a special mission for the purposes of the draft articles and a mere visit by officials or experts serving official purposes but not intended to be a "mission". He therefore welcomed the provisional definition submitted by the Drafting Committee.

95. Speaking as Chairman, he suggested that the Drafting Committee should be asked to reconsider the clause in the light of the suggestions made.

It was so agreed.[8]

The meeting rose at 1.5 p.m.

[8] For resumption of discussion and adoption of the definition of a special mission, see 937th meeting, paras. 16-18.

933rd MEETING

Wednesday, 5 July 1967, at 3.10 p.m.

Chairman: Sir Humphrey WALDOCK

Present: Mr. Ago, Mr. Bartoš, Mr. Castañeda, Mr. Castrén, Mr. Eustathiades, Mr. Ignacio-Pinto, Mr. Kearney, Mr. Nagendra Singh, Mr. Ramangasoavina, Mr. Tabibi, Mr. Tammes, Mr. Ushakov, Mr. Ustor, Mr. Yasseen.

Special Missions

(A/CN.4/193 and Addenda; A/CN.4/194 and Addenda)

(continued)

[Item 1 of the agenda]

DRAFT ARTICLES PROPOSED BY THE DRAFTING COMMITTEE *(continued)*

1. The CHAIRMAN invited the Commission to resume consideration of articles adopted by the Drafting Committee on first reading.

ARTICLE 26 (Immunity from jurisdiction) [31][1]

2. Mr. AGO, Acting Chairman of the Drafting Committee, said that the Drafting Committee proposed the following text for article 26:

"1. The representatives of the sending State on 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;

[1] For earlier discussion, see 917th meeting, paras. 1-69.

"(*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 on 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 on 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 residence.

"5. The immunity from jurisdiction of the representative of the sending State on the special mission and of the members of its diplomatic staff does not exempt them from the jurisdiction of the sending State."

3. The Drafting Committee had adopted for article 26 the system supported by the majority of the members of the Commission, namely, the system which provided full immunity from criminal jurisdiction and limited immunity from civil and administrative jurisdiction. Like the Vienna Convention on Diplomatic Relations, the text included a list of the cases in which the latter form of immunity was denied, some of the exceptions being more or less traditional. Paragraph 2(*d*) introduced a new element which would certainly make the article easier to accept.

4. While it had drawn largely on the corresponding article of the Vienna Convention on Diplomatic Relations (article 31), the Drafting Committee had borne in mind that the Commission favoured a limited conception of the special mission, immunity from jurisdiction being granted only to the representatives of the sending State on the special mission and the members of its diplomatic staff.

5. Mr. NAGENDRA SINGH said that article 26 was very close to the corresponding provision of the Vienna Convention on Diplomatic Relations; the Commission had already approved the only addition to that article.

6. Mr. EUSTATHIADES asked whether, when restricting immunity from jurisdiction to the representatives of the sending State and the members of the diplomatic staff, the Drafting Committee had taken into consideration article 6 of the draft, on the composition of the special mission, which provided that a special mission might consist of a head and one or more representatives—who might be numerous.

7. Mr. AGO replied that the number of representatives obviously depended on the size of the special mission, but there were not usually more than two or three of them in addition to the diplomatic staff. The administrative and technical staff was subsidiary.

8. The CHAIRMAN, speaking as a member of the Commission, asked if he was right in assuming that the members of the diplomatic staff referred to in paragraph 1 were to be treated on an equal footing with the "members of the diplomatic staff" who were defined in article 1(*d*) of the Vienna Convention as "the members of the staff of the mission having diplomatic rank". That would mean that if the sending State wished to provide immunity from jurisdiction for an eminent scientist on the special mission, it would presumably have to give him diplomatic rank or appoint him as a representative.

9. Mr. BARTOŠ, Special Rapporteur, replied that such persons did not have diplomatic rank, but were assimilated to representatives of the sending State. That was, moreover, what was provided in section 16 of the Convention on the Privileges and Immunities of the United Nations.[2]

10. The CHAIRMAN, speaking as a member of the Commission, said he thought that the English text of the definition he had cited might be more equivocal than the French. In any case, the sending State could give persons it wished to enjoy immunity the rank or character of diplomats.

11. Mr. AGO said that when an eminent scientist was a member of a special mission there were three possibilities: first, the scientist could be a member of the special mission's technical or administrative staff; second, he could be appointed by the sending State as its representative or head of the special mission; third, he could be given diplomatic rank for the purposes of the mission.

12. Mr. BARTOŠ, Special Rapporteur, said that France did not give any diplomatic rank to commercial attachés, but put them on the diplomatic list, contrary to the practice of the United States and the United Kingdom.

13. The CHAIRMAN suggested that article 26 should be approved in principle.

It was so agreed.[3]

ARTICLE 27 (Waiver of immunity) [41][4]

14. Mr. AGO, Acting Chairman of the Drafting Committee, said that the Committee proposed the following text for article 27:

"1. The sending State may waive the immunity from jurisdiction of its representatives on the special mission and of the members of its diplomatic staff.

"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

[2] United Nations, *Treaty Series*, vol. 1, p. 16.

[3] For adoption of article 26, see 936th meeting, para. 22.

[4] For earlier discussion, see 918th meeting, paras. 3-47.

to imply waiver of immunity in respect of the execution of the judgement, for which a separate waiver shall be necessary.

"[5. The sending State shall waive the immunity of persons referred to in paragraph 1 of this article in all cases where it considers that such immunity would prevent justice from being done and where it can be waived without prejudice to the purpose for which it is granted.]"

15. Article 27 was closely linked with article 26 and was based on the corresponding article of the Vienna Convention on Diplomatic Relations (article 32). In drafting paragraph 5, the Drafting Committee had tried to formulate a kind of recommendation, which contained nothing in the nature of an obligation. For it would be unthinkable to have one article granting an immunity to a State and another obliging it to waive the immunity, without leaving it free to appraise the facts. Thus paragraph 5 had, in fact, been included only as a matter of form.

16. If the Commission decided to make a recommendation on waiver of immunity in certain specific cases, it should appear in the commentary, not in the text of the article.

17. Mr. BARTOŠ, Special Rapporteur, observed that Mr. Ago's opinion on paragraph 5 reflected that of all the members of the Drafting Committee. In that paragraph the Committee had reproduced certain phrases from section 14 of the Convention on the Privileges and Immunities of the United Nations, although it recognized that very few States had so far complied with the General Assembly's recommendation on the subject.

18. Mr. YASSEEN said he recognized that article 27, paragraph 1, specifying that it was the State, not the individual, that could waive immunity from jurisdiction, was useful and fully justified. As to paragraph 5, the idea which it expressed was correct, but any commentary on paragraph 1 would lead to the same conclusion; thus paragraph 5 introduced nothing new and it could be deleted.

19. Mr. USHAKOV said he thought that paragraphs 1 and 5 duplicated each other, but he would not oppose the retention of paragraph 5 if the Commission decided to retain it.

20. Mr. CASTRÉN said that after much hesitation, he had come to regard paragraph 5 as very useful, as its terms were much stricter than those of paragraph 1. The provision would no doubt have little effect in practice, but it must be presumed that States acted in good faith and would, if the need arose, comply with the obligation laid down. The Commission should therefore retain paragraph 5, if only to show the future conference that it had tackled the problem.

21. Mr. EUSTATHIADES observed that paragraph 5 laid down an obligation to waive immunity when it would prevent justice from being done and could be waived without prejudice to the purpose for which it was granted, whereas paragraph 1 authorized the sending State to waive immunity for any reason. It might, therefore, be asked whether reasons other than those set out in paragraph 5 could justify a waiver. The article was not sufficiently clear on that point.

22. Mr. TAMMES said he welcomed paragraph 5 because it was a further slight concession to the functional principle set out in article 17. He would like to know, however, whether that paragraph applied to article 26, paragraph 3, and whether it was proposed to extend it to inviolability. In the latter connexion, it should be borne in mind that article 45 of the Vienna Convention on Consular Relations provided that the sending State might waive any of the privileges and immunities provided for in articles 41, 43 and 44 of that Convention, and article 41 related to inviolability.

23. Mr. AGO said that article 26, paragraph 3, on giving evidence as a witness, related to a situation that seldom arose in practice.

24. The problem of inviolability was a more serious one. It seemed amply sufficient to be able to waive immunity from jurisdiction, and it would really be going too far to provide for a waiver of inviolability, the importance of which could not be overrated.

25. Mr. TAMMES said that a waiver of inviolability was relevant to the phrase in paragraph 5: "in all cases where it considers that such immunity would prevent justice from being done".

26. Mr. KEARNEY endorsed Mr. Tammes's view. Although the decision whether or not to waive immunity rested exclusively with the sending State, paragraph 5 had the effect of at least a moral obligation to waive immunity if the course of justice would be promoted by doing so. He believed, however, that the provision was more valuable in connexion with civil jurisdiction than with criminal jurisdiction, for although it was basically desirable to punish criminals, the consequences of failure to punish them were borne by the State, whereas such civil offences as failure to pay debts affected private persons. It would therefore be wise to stress the civil aspect of a waiver of immunity.

27. Mr. AGO, replying to Mr. Tammes, observed that although article 45 of the Vienna Convention on Consular Relations did make it possible to waive personal inviolability and exemption from the obligation to give evidence, it did not place the sending State under any obligation to waive immunity of any kind. On the other hand, as paragraph 5 of the article under discussion purported to state an obligation, if the provision were extended to personal inviolability and exemption from the duty to give evidence, a special mission would be in a position inferior to that of a consular post, which would be abnormal. In any case, it would be a delusion to believe that paragraph 5 really stated an obligation; as the sending State was given discretion to decide whether to waive immunity or not, the clause was, in fact, purely optional.

28. Mr. YASSEEN endorsed Mr. Ago's last remark. The probable effect of paragraph 5 was so tenuous that the idea expressed in it was not worth putting into a legal provision.

29. The CHAIRMAN, speaking as a member of the Commission, said that an action had been brought against him in his capacity as chairman of the European Commission of Human Rights. The question of immunity had immediately been raised, in accordance with the European Agreement on Privileges and Immunities, which contained provisions similar to those of the United Nations Convention and other instruments on the privileges and immunities of international officials. The Secretary-General of the Council of Europe had been asked whether he wished to waive immunity in that case, and it had been stated in the proceedings before the court that he did not. It was therefore mistaken to think that paragraph 5 had no legal effect; unlike paragraph 1, it laid a positive obligation on the sending State to consider whether immunity should be waived in each individual case.

30. The Drafting Committee's text went beyond the recommendation in the resolution on consideration of civil claims adopted by the Vienna Conference on Diplomatic Intercourse and Immunities,[5] which was limited to civil claims. He agreed with Mr. Kearney that the provision would be more generally acceptable if it was so limited.

31. Mr. YASSEEN said he would not be opposed to the provision in paragraph 5 or some similar provision appearing in a resolution of the plenipotentiary conference; but it should certainly not be a paragraph in an article of the convention.

32. The CHAIRMAN reminded members that at the 918th meeting[6] Mr. Jiménez de Aréchaga had drawn attention to the recommendation in the resolution of the Vienna Conference, and had proposed that a similar provision should be inserted in the draft convention itself. The Commission now had to decide whether it should include such a clause or should simply recommend the adoption of a resolution similar to that of the Vienna Conference.

33. Mr. BARTOŠ, Special Rapporteur, said that he had submitted to the Drafting Committee, together with the text of paragraph 5, a draft resolution modelled on resolution II of the 1961 Vienna Conference. The Drafting Committee had preferred paragraph 5, despite certain reservations, but if the Commission deleted that paragraph, the Drafting Committee could reconsider the draft resolution.

34. Mr. NAGENDRA SINGH said that the use of the word "may" in paragraph 1 and of the word "shall" in paragraph 5 led him to agree with Mr. Yasseen that the sending State would in any case do what it thought best in the circumstances. Nevertheless, he appreciated the developmental aspect of paragraph 5 and considered that it should be retained in article 27, rather than be relegated to a resolution.

35. Mr. CASTAÑEDA said that he too would prefer paragraph 5 to be retained. It was certainly not a very common practice, but it was not so very unusual either, to incorporate in a treaty a provision establishing an obligation, the fulfilment of which was left to the discretion of the party on which it devolved. A provision of that kind constituted a guide and, like all the other provisions, should be interpreted in good faith. As the Chairman had observed, paragraph 5 added something to article 27, but it would certainly be more acceptable to States if it was limited to immunity from civil jurisdiction. Only paragraph 1 should apply to criminal jurisdiction.

36. Mr. USTOR said he thought that the corresponding provisions of the Vienna Conventions could be interpreted to mean that the sending State could waive not only immunity from jurisdiction, but also other immunities, such as tax exemption.

37. In his opinion, paragraph 5 did not impose a legal obligation on the same level as other provisions of the draft. A possible solution might be to place the provision in the preamble; the draft preamble submitted by the Special Rapporteur (A/CN.4/194/Add.2) already contained a paragraph on privileges and immunities, which might be amplified to embody the idea set out in paragraph 5.

38. Mr. AGO said that the Commission had a choice between two rather different systems. On the one hand, the system of diplomatic relations included, on the point under discussion, a recommendation embodied in a resolution and limited to civil actions brought by private persons. On the other hand, the Convention on the Privileges and Immunities of the United Nations dealt with the matter in an article and laid down the duty to waive immunity not only when that could be done without prejudice to the performance of functions, but also when a State was convinced that immunity would impede the course of justice. The last condition, reproduced in paragraph 5 of the article under discussion, was not included in the resolution of the Vienna Conference; but on the other hand the resolution recommended that, if the State did not waive immunity, it should contribute in some other way to bringing about a settlement of the claims. The Commission must therefore decide which of the two systems was the more appropriate for special missions.

39. The CHAIRMAN pointed out that the Commission had to choose between two inconsistencies. If it decided to include paragraph 5 in article 27, the result would be different treatment for persons holding diplomatic rank in special missions and members of the diplomatic staff referred to in article 1(*d*) of the Vienna Convention on Diplomatic Relations; if it deleted paragraph 5, that would have the effect of differentiating between the treatment of members of special missions and that of persons attending international conferences.

40. Mr. EUSTATHIADES said that although paragraph 5 was worded in the form of an obligation, what it really established was an option. It certainly went a little further than paragraph 1, in that it invited the sending State to exercise that option, or at least seriously to consider any reasons for not doing so. But, in the last

[5] United Nations Conference on Diplomatic Intercourse and Immunities, *Official Records*, vol. II, p. 90.

[6] Para. 10.

resort, the sending State was left full discretion to decide whether to waive immunity.

41. In order to help the Commission out of the difficulty, he suggested that paragraphs 1 and 5 might be combined: the words "in particular where it considers" would be added at the end of paragraph 1 as it stood and followed by that part of paragraph 5 which came after the word "considers" in the text proposed by the Drafting Committee. That would strengthen paragraph 1, without dissociating two things which were not in fact separate.

42. Mr. AGO stressed that despite its apparently more attenuated formulation, the recommendation in resolution II of the Vienna Conference was in reality more effective for the protection of private interests which might be injured, because it recommended States not only to waive immunity, but also to use their best endeavours to bring about a just settlement of claims—which might be much more important.

43. There was yet another reason why the Commission should not depart from the system adopted by the Vienna Conference: a special mission might include both diplomats coming from the sending State and diplomats serving on the permanent mission of the sending State in the receiving State; under the terms of the draft, the latter would retain their status as members of the permanent mission. It would be strange if the two classes of person were given different treatment.

44. Mr. BARTOŠ, Special Rapporteur, said that section 14 of the Convention on the Privileges and Immunities of the United Nations, which had been the model for paragraph 5, covered all privileges and immunities and was intended to facilitate international relations. On the other hand, resolution II of the Vienna Conference, on which he had modelled the draft resolution he had prepared for the Drafting Committee, was confined to immunity from civil jurisdiction, because the Vienna Conference had been mainly concerned to protect the interests of private persons. In his opinion, the Commission had better not depart from the system adopted by the Vienna Conference.

45. Moreover, paragraph 5 was not only bad law, it was also inconsistent with paragraph 1; for immunities were granted to the State, not to persons, and it might be to the advantage of the State either to waive or not to waive immunities.

46. Furthermore, if the Commission decided to restrict paragraph 5 to immunity from civil jurisdiction, it would arrive at a system which was neither that of the Vienna Conference nor that of the Convention on the Privileges and Immunities of the United Nations.

47. He therefore proposed that the Commission should delete paragraph 5 and ask the Drafting Committee to re-examine the possibility of preparing a draft resolution for the future plenipotentiary conference.

48. The CHAIRMAN pointed out that the Commission had not always followed the example of the Vienna Conventions. Indeed, article 26 which it had just approved contained a provision which did not appear in those instruments.

49. Mr. USTOR said that paragraph 5 referred only to representatives on the special mission and the members of its diplomatic staff, not to administrative and technical staff or members of the family. If the paragraph was retained in the article, similar paragraphs would have to be added to articles 32 and 35, or a separate reference would have to be made to all the persons to whom a waiver of immunity applied.

50. Mr. CASTRÉN said he saw no inconsistency between paragraphs 1 and 5; under both provisions it was the State which waived or did not waive immunity. Mr. Eustathiades's proposal, however, would change the article's meaning entirely, because it would eliminate all obligation and leave only an option.

51. As to preparing a draft resolution for the future conference, he did not think that was the Commission's task.

52. He proposed that paragraph 5 be retained—the conference could always delete it—and requested that the matter be put to the vote.

53. The CHAIRMAN put the retention of paragraph 5 to the vote.

The retention of paragraph 5 in article 27 was approved by 8 votes to 5, with 2 abstentions.

54. Mr. CASTAÑEDA suggested that the Commission should also ask the Drafting Committee to include in paragraph 5 the idea expressed at the end of the operative paragraph of resolution II of the Vienna Conference, namely, that the sending State should use its best endeavours to bring about a just settlement.

55. Mr. AGO said he thought the best solution would be to re-cast paragraph 5 to include all the elements in the operative paragraph of resolution II of the Vienna Conference. In that form the provision would be much more effective. The Commission might perhaps prefer to make a separate article of it, when it had considered all the possible kinds of waiver.

56. The CHAIRMAN suggested that article 27 should be approved in principle, and that the Drafting Committee should be asked to submit a new version of paragraph 5, limited to civil claims.

It was so agreed.[7]

ARTICLE 28 (Exemption from social security legislation) [32][8]

57. Mr. AGO, Acting Chairman of the Drafting Committee, said that the Drafting Committee proposed the following text for article 28:

> "1. Subject to the provisions of paragraph 3 of this article, representatives of the sending State on the special mission and the members of its diplomatic staff shall with respect to services rendered for the

[7] For resumption of discussion and adoption of paragraphs 1-4 of article 27, see 936th meeting, paras. 23, 48, 49 and 51. The Drafting Committee proposed a new version of paragraph 5 as article 27 *bis* (Settlement of civil claims), which was discussed at the 936th meeting (paras. 24-48, 50 and 52) and adopted.

[8] For earlier discussion, see 918th meeting, paras. 48-81.

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 on 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 on 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."

58. Mr. USTOR questioned the need for paragraph 5, since its subject-matter would be covered by the proposed general article "Y" on the relationship between the draft articles and other international agreements (A/CN.4/194/Add.2).

59. Mr. AGO said that the question was too wide to be fully covered by article "Y".

60. The CHAIRMAN said he was inclined to agree with Mr. Ago. The provisions of the proposed article "Y" were in general terms; the agreements mentioned in paragraph 5 of article 28, however, were of a rather special character and it was perhaps desirable to retain that limited measure of duplication, as had been done in the 1961 Vienna Convention.

61. Mr. USTOR withdrew his objection.

62. The CHAIRMAN said that, if there were no further comments, he would assume that the Commission agreed to approve article 28 in principle.

It was so agreed.[9]

ARTICLE 29 (Exemption from dues and taxes) [33][10]

63. Mr. AGO, Acting Chairman of the Drafting Committee, explained that the Drafting Committee had proposed two alternatives for article 29. In order to meet the Commission's wishes, it had first prepared a very short version which constituted the first alternative:

First alternative

"The representatives of the sending State on the special mission and the members of its diplomatic staff shall be exempt from all dues and taxes, national, regional or municipal, in the receiving State on the salaries and other emoluments attaching to their functions with the special mission."

64. After considering the matter, the Drafting Committee had come to the conclusion that that text was inadequate and might lead to rather absurd interpretations. It had therefore decided to submit a second alternative which followed article 34 of the Vienna Convention on Diplomatic Relations:

Second alternative

"The representatives of the sending State on the special mission and the members of its diplomatic staff shall be exempt from all dues and taxes, personal or real, national, regional or municipal, except:

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

"(*b*) Dues and taxes on private immovable property situated in the territory of the receiving State, unless they hold 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 paragraphs 2 and 3 of article 38;

"(*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 23."

65. Mr. BARTOŠ, Special Rapporteur, said that he preferred the first alternative, although he appreciated the weight of the arguments in favour of the second.

66. Mr. KEARNEY said that it was not easy to choose between the two alternatives. On the whole, he preferred the first, because the second would involve additional labour for the officials of the receiving State, who would have to work out the various exemptions for the large number of persons forming the staff of special missions.

67. Mr. USHAKOV said he did not see why special missions, which were temporary, should be placed in a more difficult and delicate position than permanent diplomatic missions. It was precisely because they were usually of short duration that special missions should have the same privileges as permanent diplomatic missions. He therefore supported the Drafting Committee's second alternative.

68. Mr. AGO explained that the text of the second alternative was long because it enumerated the cases in which exemption was not granted. In all cases not specified, members of special missions were exempt from all dues and taxes, personal or real, national, regional or municipal.

[9] For adoption of article 28, see 936th meeting, para. 53.

[10] For earlier discussion, see 919th meeting, paras. 1-61.

69. The CHAIRMAN, speaking as a member of the Commission, supported the views put forward by Mr. Ago and Mr. Ushakov. The first, or short, version was not absolutely safe. For example, if a member of the staff of a special mission died while in the receiving State, it would not be clear whether his heirs would be exempted from estate duty.

70. There was no reason to impose the risk of being required to pay taxes upon members of special missions who were present in the receiving State in the interests of the two States concerned; those persons should, on the contrary, be given every protection.

71. Mr. TABIBI said he also favoured the second alternative. The first would not protect the receiving State from possible abuses, a matter which was of great importance to the smaller States. Much better protection was afforded by the provisions of the second alternative, which gave detailed guidance on tax exemption.

72. Mr. NAGENDRA SINGH said he supported the second alternative, which exhausted all the possibilities and closely followed the corresponding provision of the 1961 Vienna Convention.

73. Mr. KEARNEY withdrew his objection to the second alternative, in view of the strong support that text had received.

74. The CHAIRMAN said that, since the Drafting Committee had recommended the adoption of the second alternative, he would put that text to the vote first.

The second alternative for article 29 was adopted by 14 votes to none, with 1 abstention.[11]

ARTICLE 30 (Exemption from personal services and contributions) [34][12]

75. Mr. AGO, Acting Chairman of the Drafting Committee, said that the Drafting Committee proposed the following text for article 30:

"The receiving State shall exempt the representatives of the sending State on 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."

76. The article corresponded to article 35 of the Vienna Convention and raised no problem.

77. The CHAIRMAN suggested that the Commission approve article 30 in principle.

It was so agreed.[13]

ARTICLE 31 (Exemption from customs duties and inspection) [35][14]

78. Mr. AGO, Acting Chairman of the Drafting Committee, said that the Drafting Committee proposed the following text for article 31:

"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 on 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 on 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."

79. The article reproduced article 36 of the Vienna Convention on Diplomatic Relations, with a few changes making it more restrictive. For instance, in the first sentence, the words "in accordance with" had been replaced by "within the limits of". Again, in paragraph 1(*b*), the words "members of his family forming part of his household" had been replaced by "the members of their family who accompany them". The words "including articles intended for his establishment" had been omitted, because special missions were temporary.

80. Mr. CASTRÉN said he was not sure whether the words "or of the members of their family who accompany them" in paragraph 1(*b*) were necessary, as there was a separate article—article 35— dealing with members of the family of members of special missions.

81. Mr. BARTOŠ, Special Rapporteur, pointed out that paragraph 1(*b*) concerned articles for the personal use of members of the family, and that matter was not covered by article 35.

82. The CHAIRMAN suggested that the Commission approve article 31 in principle.

It was so agreed.[15]

83. The CHAIRMAN invited the Commission to take a decision on articles 6, 16, 15 and 39.

ARTICLE 6 (Composition of the special mission [9][16]

84. Mr. AGO, Acting Chairman of the Drafting Committee, said that the Drafting Committee proposed the following new text for paragraph 2 of article 6:

[11] For resumption of discussion and adoption of an amended text of article 29, see 936th meeting, paras. 54-57.

[12] For earlier discussion, see 919th meeting, paras. 62-78.

[13] For adoption of article 30, see 936th meeting, para. 58.

[14] For earlier discussion, see 919th meeting, paras. 79-89, and 920th meeting, paras. 1-53.

[15] For resumption of discussion and adoption of article 31, see 936th meeting, paras. 59-72.

[16] For earlier discussion, see 931st meeting, paras. 124-139.

"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."

85. The Drafting Committee had considered that the word "functions" in the phrase "while retaining their functions in the permanent diplomatic mission" used in the previous text was liable to be misunderstood and had replaced it by the words "privileges and immunities."

86. The CHAIRMAN invited the Commission to vote on article 6 with the amended wording for paragraph 2.

Article 6, as amended, was adopted unanimously.

ARTICLE 16 (Activities of special missions in the territory of a third State) [18][17]

87. The CHAIRMAN invited the Commission to resume consideration of article 16. The Drafting Committee proposed that the words "in question" in paragraph 2 should be deleted.

88. Mr. EUSTATHIADES said he supported the Drafting Committee's proposal.

89. The CHAIRMAN put article 16 to the vote with the change proposed by the Drafting Committee.

Article 16, as amended, was adopted unanimously.

ARTICLE 15 (Right of special missions to use the flag and emblem of the sending State) [19][18]

90. Mr. AGO, Acting Chairman of the Drafting Committee, said that the Drafting Committee proposed the following text for article 15:

"1. A special mission shall have the right to use the flag and emblem of the sending State on the premises of 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."

91. The CHAIRMAN reminded the Commission that during the previous discussion on article 15, it had been proposed that no article on the right to use the flag and emblem of the sending State should be included in the draft. However, many members of the Commission had thought that the omission of such a provision, contrasting with its inclusion in both Vienna Conventions, could lead to misunderstanding, and the Commission had therefore requested the Drafting Committee to prepare a draft of article 15. The text adopted by the Drafting Committee on second reading was based on the corresponding provision of the Vienna Convention on Consular Relations (article 29).

92. Mr. AGO, Acting Chairman of the Drafting Committee, said that the effect of paragraph 2 was to restrict the exercise of the right to use the flag and emblem of the sending State.

93. Mr. CASTAÑEDA said he would prefer the exercise of the right to display the flag or emblem of the sending State on the premises occupied by the mission and on its means of transport to be entirely confined to cases in which circumstances or the task of the mission required it.

94. Mr. YASSEEN said he fully approved the Drafting Committee's text. He noted that the exercise of the right granted by article 15 was subject to the laws, regulations and usages of the receiving State.

95. Mr. EUSTATHIADES thought that article 15 presented no danger, since the effect of paragraph 2 was to withdraw from the mission the right granted to it by paragraph 1.

96. The CHAIRMAN said that the provisions of paragraph 2 had been taken from the corresponding article of the 1963 Vienna Convention; although they weakened to some extent the right stated in paragraph 1, they did not withdraw it altogether.

97. Mr. BARTOŠ, Special Rapporteur, confirmed that paragraph 2 reproduced word for word the text of article 29, paragraph 3 of the Vienna Convention on Consular Relations. He had himself submitted to the Drafting Committee Mr. Castañeda's suggestion that article 15 should include the words "if the circumstances or the task of the mission require it", but the Drafting Committee had considered that the words "when used on official business" were sufficient. He would accept whatever view the Commission took.

98. Mr. YASSEEN emphasized that the provisions of paragraph 2 were not tantamount to a withdrawal of the right granted by paragraph 1: they simply stipulated that the right could be exercised only in certain circumstances. In his view, the wording proposed by the Drafting Committee was most satisfactory.

99. Mr. AGO said that the receiving State could lay down certain conditions for the exercise of the right, but could not withdraw it from the mission. If the receiving State enacted a law prohibiting a special mission from using the flag or emblem of the sending State, that law would infringe the convention.

100. In reply to Mr. Castañeda's remarks, he pointed out that the words "if the circumstances or the task of the mission require it" would unduly restrict the right to use the flag and emblem of the sending State; for the task of a mission certainly did not make it necessary to display a flag on the premises occupied by the mission or on its means of transport.

101. Mr. CASTAÑEDA said he would not press his suggestion to a vote.

102. The CHAIRMAN invited the Commission to vote on the proposed text of article 15.

Article 15 was adopted by 13 votes to none, with 1 abstention.

[17] For earlier discussion, see 930th meeting, paras. 106-112.

[18] For earlier discussion, see 929th meeting, paras. 51-61.

[19] For earlier discussion, see 931st meeting, paras. 7-18.

ARTICLE 39 (Transit through the territory of a third State) [43][19]

103. Mr. AGO, Acting Chairman of the Drafting Committee, said that the Drafting Committee had revised paragraph 4 of article 39 to read:

"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."

104. The new wording met the objection made to the former text of paragraph 4 of article 39, that it only mentioned the transit of the special mission as such and did not cover the case of transit by a member of the special mission.

105. Mr. EUSTATHIADES said he found the new text acceptable as it included the words "of those persons" which he had suggested earlier.

106. The CHAIRMAN put article 39 to the vote as amended.

Article 39, as amended, was adopted unanimously.

The meeting rose at 5.20 p.m.

934th MEETING

Thursday, 6 July 1967, at 10.10 a.m.

Chairman: Sir Humphrey WALDOCK

Present: Mr. Ago, Mr. Bartoš, Mr. Castañeda, Mr. Castrén, Mr. Eustathiades, Mr. Ignacio-Pinto, Mr. Kearney, Mr. Nagendra Singh, Mr. Ramangasoavina, Mr. Tabibi, Mr. Tammes, Mr. Tsuruoka, Mr. Ushakov, Mr. Ustor, Mr. Yasseen.

Special Missions

(A/CN.4/193 and Addenda; A/CN.4/194 and Addenda)

(continued)

[Item 1 of the agenda]

DRAFT ARTICLES PROPOSED BY THE DRAFTING COMMITTEE *(continued)*

ARTICLE 32 (Administrative and technical staff) [36][1]

1. The CHAIRMAN invited the Acting Chairman of the Drafting Committee to introduce article 32.

2. Mr. USTOR, Acting Chairman of the Drafting Committee, said that the Drafting Committee proposed the following text for article 32:

"Members of the administrative and technical staff of the special mission shall enjoy the privileges and immunities specified in articles 24 to 31, except that the immunity from civil and administrative jurisdiction of the receiving State specified in paragraph 2 of article 26 shall not extend to acts performed outside the course of their duties."

3. The Commission had decided that the representatives in a special mission and members of its diplomatic staff should have diplomatic privileges similar to those provided for by the 1961 Vienna Convention on Diplomatic Relations.

4. Articles 32 to 34 related to other classes of staff of the special mission. Article 32 dealt with the privileges and immunities of members of the administrative and technical staff.

5. Mr. CASTRÉN observed that, as Mr. Nagendra Singh had already pointed out at the 920th meeting[2], article 32, by referring to articles 24-31, granted wider privileges and immunities in regard to exemption from customs duties and inspection than did article 37 of the Vienna Convention on Diplomatic Relations. In particular, that Convention did not provide that the baggage of administrative and technical staff should be exempt from inspection. It therefore seemed more correct to say "shall enjoy the privileges and immunities specified in articles 24 to 30", or possibly "in articles 24 to 30 and in article 31, paragraph 1".

6. The CHAIRMAN said that article 37, paragraph 2 of the 1961 Vienna Convention gave members of the administrative and technical staff of a permanent diplomatic mission a privilege which was not granted by article 32 to members of such staff of special missions: article 37, paragraph 2, of the Vienna Convention provided that members of the administrative and technical staff "shall also enjoy the privileges specified in article 36, paragraph 1, in respect of articles imported at the time of first installation".

7. Mr. USTOR, Acting Chairman of the Drafting Committee, said that the Drafting Committee had examined the whole question and had come to the conclusion that, in view of the temporary character of special missions, the question of extending customs privileges in respect of first installation did not arise.

8. Mr. NAGENDRA SINGH said that it was true that article 32, as proposed by the Drafting Committee, gave the members of the administrative and technical staff of a special mission greater privileges than the corresponding article of the 1961 Vienna Convention. Article 32 provided that "Members of the administrative and technical staff of the special mission shall enjoy the privileges and immunities specified in articles 24 to 31...", and those articles corresponded to articles 29 to 36 of the 1961 Vienna Convention. But since article 37, paragraph 2, of the Vienna Convention only referred to articles 29 to 35, it granted less extensive privileges than the article under discussion.

9. Unless the words "specified in articles 24 to 31" were amended to read "specified in articles 24 to 30",

[1] For earlier discussion, see 920th meeting, paras. 54-77.

[2] Para. 8.

as he himself had repeatedly urged in the earlier discussions, the administrative and technical staff of a special mission would enjoy greater privileges than those granted by the 1961 Vienna Convention to staff of the same category serving a permanent diplomatic mission.

10. Mr. BARTOŠ, Special Rapporteur, said it was correct that members of the administrative and technical staff should enjoy the privileges and immunities specified in articles 24 to 30, and not 24 to 31, if article 32 was to conform with the corresponding provision of the Vienna Convention on Diplomatic Relations (article 37, paragraph 2). The reference to article 31 had been made in error.

11. The exemption from customs duties of articles imported at the time of first installation had not been mentioned in the draft articles on special missions because such missions were not really installed in the territory of the receiving State.

12. Mr. KEARNEY said he wished to raise a more general issue. In view of the temporary nature of special missions, it would be appropriate to restrict the customs privileges of the representatives of the sending State in a special mission and the members of its diplomatic staff to articles brought into the receiving State on their first entry into that State.

13. He had expressed that view in the Drafting Committee, but it had been explained that the receiving State could restrict the customs privileges of such persons by virtue of the words "Within the limits of such laws and regulations as it may adopt" in article 31, paragraph 1,[3] which were modelled on a similar proviso in article 36, paragraph 1, of the 1961 Vienna Convention. In view of that explanation, he had not pressed the matter further, but article 36 of the Vienna Convention was ambiguous and the relationship between the proviso in question and other clauses in that Convention was not at all clear. Unfortunately, article 31 of the draft on special missions, which the Commission had adopted in principle at the 933rd meeting, contained similarly ambiguous language.

14. Mr. USTOR, Acting Chairman of the Drafting Committee, said that if the enumeration in article 32 were limited to articles 24 to 30, members of the administrative and technical staff of a special mission would be completely excluded from the benefits of article 31: they would therefore have no customs exemption whatsoever, even in respect of their personal baggage brought into the receiving State on first entry.

15. Mr. NAGENDRA SINGH said that the point made by Mr. Ustor was a valid one; it could be met by giving the administrative and technical staff of special missions the same privileges as similar staff of permanent diplomatic missions enjoyed under the 1961 Vienna Convention, but not more.

16. The CHAIRMAN said that the Commission had perhaps been unnecessarily cautious with regard to the application of the concept of first installation to special missions; some special missions stayed for a long time in the receiving State and, in any case, it would not be inappropriate to describe as "first installation" the first arrival of a member of a special mission in the receiving State to take up his duties. He therefore suggested that, on the question of first installation, article 32 should follow the model of the Vienna Convention.

17. Mr. BARTOŠ, Special Rapporteur, said that there was no need for any special exemption for articles for personal use, but he had no objection to including a reference to article 31, paragraph 1 as well. It must, however, be recognized that that would not give the administrative and technical staff wider privileges and immunities than were provided for by the Vienna Convention on Diplomatic Relations. Moreover, if the administrative and technical staff were to enjoy advantages on first installation, the representatives and diplomatic staff would, of course, have to enjoy them too, contrary to what had been previously agreed. He saw no need to make such a change.

18. Mr. USHAKOV urged that the Commission should express its opinion on the matter quite clearly. A reference to article 31, paragraph 1 would give the technical and administrative staff wider privileges and immunities than were accorded by the Vienna Convention in article 37, paragraph 2. Was that really the Commission's intention?

19. Mr. USTOR suggested that article 32 should be referred back to the Drafting Committee.

20. The CHAIRMAN invited comments on his suggestion that provision should be made in article 32 for extending to the administrative and technical staff the privileges specified in article 31, paragraph 1, but only in respect of articles imported at the time of first installation.

21. Mr. CASTRÉN proposed that in order to reconcile the different views, article 32 and article 31, on which a vote had not yet been taken, should be recast to make them conform as closely as possible with the corresponding provisions of the Vienna Convention on Diplomatic Relations. After all, though diplomatic missions were permanent, their staff changed frequently so that its position was not unlike that of members of a special mission.

22. Mr. AGO said he doubted whether the word "installation" or "establishment" should be used in connexion with a special mission, which was temporary by definition and usually of brief duration.

23. Mr. IGNACIO-PINTO agreed with Mr. Ago that because of its temporary role a special mission should not be given the same advantages as a permanent mission; only the latter really had to "install" or "establish" itself.

24. Mr. RAMANGASOAVINA said he considered that, on the contrary, article 31, paragraph 1 should be amended to bring it into line with the corresponding provision of the Vienna Convention on Diplomatic Relations. Customs exemption should not, however, be limited to the provisions of article 31, paragraph 1 alone; to omit the exemption from baggage inspection provided

[3] See 933rd meeting, para. 78.

for in paragraph 2 might be regarded as a vexatious measure against the administrative and technical staff.

25. The CHAIRMAN suggested that the Drafting Committee should be asked to find a better expression than "first installation" to describe the situation in regard to special missions. The purpose was simply to give the staff concerned the necessary privileges and immunities to cover their first needs on arrival in the receiving State.

26. Mr. AGO agreed that the matter should be referred back to the Drafting Committee.

27. The CHAIRMAN said that, if there were no objection, he would assume that the Commission agreed to refer back to the Drafting Committee not only article 32, but also article 31, which the Commission had only approved in principle at its previous meeting.

It was so agreed.[4]

ARTICLE 33 (Members of the service staff) [37][5]

28. Mr. AGO, Acting Chairman of the Drafting Committee, said that the Drafting Committee proposed the following text for article 33:

"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 and 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 28."

29. The Drafting Committee had added, at the end of the article, a clause providing that members of the service staff of a special mission enjoyed exemption from social security legislation as provided in article 28.

30. The CHAIRMAN said that, in the English text, the word "and" before the words "exemption from dues and taxes" should be deleted and replaced by a comma.

Article 33, with that amendment to the English text, was adopted unanimously.

ARTICLE 34 (Private staff) [38][6]

31. Mr. AGO, Acting Chairman of the Drafting Committee, said that the Drafting Committee proposed the following text for article 34:

"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."

32. The Drafting Committee had made drafting changes in the first sentence corresponding to those made in other articles. The article was modelled on article 37, paragraph 4 of the Vienna Convention on Diplomatic Relations.

Article 34 was adopted unanimously.

ARTICLE 35 (Members of the family) [39][7]

33. Mr. AGO, Acting Chairman of the Drafting Committee, said that the Drafting Committee proposed the following text for article 35:

"1. The members of the families of representatives of the sending State on the special mission and of members of its diplomatic staff shall, if they are not nationals of the receiving State, enjoy the privileges and immunities specified in articles 24 to 31.

"2. Members of the families of the administrative and technical staff of the special mission shall, if they are not nationals of or permanently resident in the receiving State, enjoy the privileges and immunities specified in article 32."

34. The references to articles 24 to 31 and article 32 would have to be carefully checked if articles 31 and 32 were amended as a result of the discussion which had just taken place on article 32.

35. Article 35 was modelled on the Vienna Convention. However, under article 37 of that Convention the members of the family of a diplomatic agent enjoyed privileges and immunities if they were not nationals of the receiving State, whereas members of the families of persons on the administrative and technical staff, in order to enjoy privileges and immunities, must be neither nationals of the receiving State nor permanently resident in that State. He doubted whether that distinction, which might possibly be accepted for permanent missions, should be maintained with regard to special missions: it would be extraordinary if a person who was permanently resident in the receiving State were to change his status while a special mission was there, merely because he was related to one of the representatives of the sending State on the special mission or to a member of its diplomatic staff. He therefore proposed that the words "or permanently resident in" be inserted after the words "nationals of" in paragraph 1.

36. Mr. YASSEEN supported Mr. Ago's proposal.

37. Mr. BARTOŠ, Special Rapporteur, said he accepted the addition proposed by Mr. Ago.

38. Mr. CASTRÉN said he had no objection to the proposed addition, but asked that the reasons for it should be explained in the commentary.

39. The CHAIRMAN put article 35 to the vote with the addition of the words "or permanently resident in" in paragraph 1.

Article 35, as amended, was adopted unanimously.

[4] For resumption of discussion and adoption of article 32, see 937th meeting, paras. 1-4.

[5] For earlier discussion, see 921st meeting, paras. 1-28.

[6] For earlier discussion, see 921st meeting, paras. 29-41.

[7] For earlier discussion, see 921st meeting, paras. 42-79.

ARTICLE 36 (Nationals of the receiving State and persons permanently resident in the territory of the receiving State) [40][8]

40. Mr. AGO, Acting Chairman of the Drafting Committee, said that the Drafting Committee proposed the following text for article 36:

"1. Except in so far as additional privileges and immunities may be recognized by the receiving State, the representatives of the sending State on 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 over those persons in such a manner as not to interfere unduly with the performance of the functions of the special mission."

41. Only drafting changes had been made to the article; the substance was identical with the corresponding provision of the Vienna Convention (article 38).

42. Mr. USHAKOV observed that the words "special agreement or by decision of" had been omitted after the words "recognized by" in paragraph 1.

43. Mr. BARTOŠ, Special Rapporteur, explained that the reference to a special agreement had been deleted because that question would be dealt with in a general way in the article on derogations.

44. Personally, he still had some doubt about the feasibility of making a distinction between official acts and other acts where personal inviolability was concerned. He appreciated, however, that the Drafting Committee had not wished to change that provision, which appeared in the Vienna Convention.

45. Furthermore, he considered that the expression "official acts performed in the exercise of their functions" was pleonastic; but there again the Drafting Committee had not wished to change the form of words used in the Vienna Convention.

46. Mr. CASTRÉN drew attention to the fact that the expression "*qui ont la nationalité*" was used in paragraph 1, whereas the term "*ressortissants*" was used in the title and in paragraph 2.

47. Mr. AGO said that the words "*qui ont la nationalité*" in paragraph 1 should be replaced by the words "*sont ressortissants*", as the Commission had used the term "*ressortissants*" throughout.

48. Furthermore, the word "recognized" in paragraph 1 (in French "*reconnus*") should be replaced by the word "granted" (in French "*accordés*"), a more correct term which was used in article 38, paragraph 1 of the Vienna Convention.

It was so agreed.

Article 36, as amended, was adopted unanimously.

ARTICLE 37 (Duration of privileges and immunities) [44][9]

49. Mr. AGO, Acting Chairman of the Drafting Committee, said that the Drafting Committee proposed the following text for article 37:

"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."

50. Paragraph 3 was the former paragraph 1 of article 38; the new arrangement was more logical because the paragraph concerned the duration of privileges and immunities.

Article 37 was adopted unanimously.

ARTICLE 38 (Property of a member of the special mission or of a member of his family in the event of death) [45][10]

51. Mr. AGO, Acting Chairman of the Drafting Committee, said that the Drafting Committee proposed the following title and text for article 38:

"*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

[8] For earlier discussion, see 922nd meeting, paras. 1-53.

[9] For earlier discussion, see 922nd meeting, paras. 66-79.

[10] For earlier discussion, see 922nd meeting, paras. 80-85.

the deceased as a member of the special mission or as one of the family of a member of the mission."

52. Mr. CASTRÉN said he noted that there was a difference of substance between that article and the corresponding provision in article 39, paragraph 4 of the Vienna Convention, for the words "or of a member of his family", in paragraph 1, preceded the words "if the deceased was not a national of or permanently resident in the receiving State" instead of following them. It would be better not to change the system established by the Vienna Convention, for the right provided for in paragraph 1 should be granted in the event of the death of a member of the family, even if the deceased was a national of, or permanently resident in, the receiving State.

53. Mr. AGO said that Mr. Castrén was right. The opening words of the paragraph might be altered to read: "In the event of the death of a member of the special mission not a national of, or permanently resident in, the receiving State or of a member of his family..."

54. Mr. KEARNEY pointed out that if that change were made, the result would be contrary to all the normal rules of private international law on the disposal of private property. The disposal of the property of a person who was permanently resident in the receiving State would normally be governed by the laws of that State.

55. Article 39, paragraph 4 of the Vienna Convention on Diplomatic Relations was very poorly drafted and he opposed the suggestion now being made to introduce that defective wording into article 38, paragraph 1 as adopted by the Drafting Committee.

56. Mr. BARTOŠ, Special Rapporteur, said he agreed with Mr. Kearney. The provision adopted in the Vienna Convention was contrary to the principles of private international law—which, in such cases, took nationality or residence as the criterion—and constituted an unwarrantable interference with the sovereign rights of States.

57. Mr. USTOR supported the views expressed by Mr. Kearney and Mr. Bartoš. It was essential that the words "not a national of, or permanently resident in, the receiving State" should qualify not only "a member of the special mission" but also "a member of his family".

58. The CHAIRMAN noted that the suggestion by Mr. Kearney, Mr. Bartoš and Mr. Ustor was that the language proposed by the Drafting Committee for article 38, paragraph 1 should be retained.

59. Mr. AGO said he had come round to the view put forward by Mr. Kearney, Mr. Bartoš and Mr. Ustor about the placing of the words "or of a member of his family". It would be better to rectify the anomaly in the Vienna Convention.

60. He suggested that, in the French text of paragraph 1, the future tense "*permettra*" be replaced by the present tense "*permet*", as all the provisions of the draft were expressed in the present tense.

61. Mr. RAMANGASOAVINA said he would prefer to keep the future tense in that particular case, because it had a different shade of meaning: the receiving State would permit the withdrawal of the property when asked to do so.

62. The CHAIRMAN said that the point of substance which had been raised was an important one and justified a departure from the corresponding text of the Vienna Convention. It was to be hoped that the improved draft on special missions now before the Commission would conduce to a liberal interpretation of the defective text of article 39, paragraph 4 of the 1961 Vienna Convention.

63. He then put to the vote article 38 as proposed by the Drafting Committee, without amendment.

Article 38 was adopted by 14 votes to none, with 1 abstention.

ARTICLE 43 (Right to leave the territory of the receiving State) [46][11]

64. Mr. AGO, Acting Chairman of the Drafting Committee, said that the Drafting Committee proposed the following text for article 43:

"1. The receiving State must, even in 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."

65. Paragraph 2 had no equivalent in the corresponding article of the Vienna Convention (article 44), but it was necessary because of the temporary nature of special missions.

66. Mr. KEARNEY said that the burden imposed on the receiving State by paragraph 1 should only be imposed in the case of armed conflict or some other serious breach. He saw no reason for applying that provision in normal circumstances, and he therefore questioned the need for the word "even".

67. The CHAIRMAN pointed out that the word "even" appeared in article 44 of the 1961 Vienna Convention; the purpose was to stress that the obligation stated in article 44 was a general one, while emphasizing that it also applied in the case of armed conflict.

68. Mr. KEARNEY said it seemed excessive to require the receiving State to meet a demand for embarkation on the very first ship or aircraft even if there was no urgency.

69. Mr. TSURUOKA said he would prefer the concluding words of paragraph 2 of the French text to read "*pour retirer les archives de la mission spéciale du territoire de l'État de réception*", in order to avoid any misunderstanding about the meaning of the words "*son territoire*".

[11] For earlier discussion, see 922nd meeting, paras. 54-65.

70. Mr. AGO said that the wording proposed by Mr. Tsuruoka would have the advantage of making the English and French texts of paragraph 2 correspond exactly.

71. Mr. YASSEEN said that, grammatically, there could be no doubt about the meaning of the adjective "*son*", since the receiving State was the subject of the main clause.

72. Mr. KEARNEY asked whether the words "is required to grant" in paragraph 2 implied a free grant.

73. The CHAIRMAN said that they did not.

Article 43 was adopted unanimously.

State Responsibility
(A/CN.4/196)

[Item 3 of the agenda]

74. The CHAIRMAN invited the Commission to consider item 3 of the agenda.

75. Mr. AGO, Special Rapporteur, introducing his note on State Responsibility (A/CN.4/196), said that the report of the Sub-Committee on State Responsibility and the outline programme it contained had been approved by the Commission in 1963;[12] it had been on that basis that he, as Special Rapporteur, had been instructed to prepare a report. As the membership of the Commission had changed in 1966, he wished to know whether the Commission confirmed his appointment and the instructions it had previously given to him.

76. Mr. RAMANGASOAVINA said that, in his view, the programme set out in Mr. Ago's note included everything necessary for the study of the subject. A report based on that programme would be most valuable.

77. Mr. TAMMES said that the Sub-Committee on State responsibility had taken an important step in deciding unanimously on a new approach to the topic—that of separating the elements of the illegal act and its consequences from the substantive rules, violation of which made an act illegal. It was true that much might be learned about the existence of a rule from international reactions to the violation of an alleged rule, and a study of the mass of existing material on disputes concerning such rules would undoubtedly be useful. Nevertheless, it would be a considerable advantage for the Commission not to be hampered in its future work on State responsibility by being obliged first to formulate substantive rules on such matters as nationalization and Charter principles, or, in its practical work of codification, by having to await the completion of work on State responsibility in the widest sense, which might be regarded as the keystone of international law.

78. In his opinion, the term "State responsibility" was tinged with the nineteenth-century conception of international disputes and conflicts as, so to speak, large-scale civil proceedings, and he had suggested at the 928th meeting,[13] during the discussion on the organization of future work, that the title of the topic might be changed. The Special Rapporteur was fully aware of the old-fashioned connotation of the term, but considered that a change might create confusion, so he would not press his suggestion. Nevertheless, remnants of the traditional conception subsisted in the Sub-Committee's outline programme, which dealt very fully with the passive subject of responsibility, or subject of international law held responsible for violating a substantive international rule. Perhaps there was still room for study of the collective subject of responsibility, arising from a situation in which a number of States were engaged in a joint enterprise and incurred joint liability for damage to third States; but such situations had so far arisen only in connexion with the law of outer space, after the outline had been drafted; moreover, the Sub-Committee had decided to leave aside the question of the responsibility of international organizations.

79. The outline programme did not deal with some wider questions concerning the active subject of responsibility, or subject of international law—usually the State—which set the process of imputation of responsibility in motion. Was that subject the injured State? Was it a State having a direct interest in seeing the legal situation restored, if possible? Did the individual interest of any party to a treaty in ensuring strict observance of that treaty in itself warrant initiating an action to impute responsibility, as was expressly provided in a number of instruments? Or was there a collective interest of a community of parties in the integrity of a treaty and, consequently, a collective active subject of responsibility? Such questions might have been regarded as theoretical when the programme had been drawn up but no one could take that view now, and the Commission could hardly leave those questions unanswered in the context of its work on State responsibility, especially the second point of the programme: "The forms of international responsibility".

80. The CHAIRMAN, replying to a question by Mr. TABIBI, said he had announced at the 928th meeting[14] that Mr. Ago hoped to be able to submit a report with draft articles to the Commission in 1969.

81. Mr. USHAKOV, referring to paragraph 5 of the note on State responsibility (A/CN.4/196), said that he agreed with those members of the Commission who had thought that the emphasis should be placed in particular on the study of State responsibility in the maintenance of peace.

82. There was no reference in the programme to the question of the subject of international law entitled to assert the responsibility of a State which had committed a wrongful act. For example, the injured State would assert the responsibility of a State which had violated the régime of the high seas; but other States should also intervene, because an international rule had been broken.

83. With regard to the forms of international responsibility, it seemed to him that sanction should be mentioned

[12] *Yearbook of the International Law Commission, 1963*, vol. II, document A/5509, para. 55.

[13] Para. 10.

[14] Para. 1.

before reparation. In Russian, the expressions corresponding to "imputation of the wrongful act" and "imputation of responsibility" belonged to the terminology of criminal law; he was not sure that they could be used in international law.

84. Mr. EUSTATHIADES said that in two passages —in paragraph 4 of the note and in paragraph 5 of the extract from the report of the Sub-Committee which it contained—attention was drawn to the need to pay "careful attention... to the possible repercussions which new developments in international law may have had on responsibility", but he did not see which of the items on the programme that remark applied to. As far as the programme as a whole was concerned, he thought it would take several years to carry out, for it covered an extremely wide field. For instance, the question of the responsibility of legislative, administrative and judicial organs, referred to in paragraph (2) of the first point of the outline programme, could form the subject of a convention by itself. Consequently, he wondered whether it would not be possible to leave certain questions aside for the time being and deal with them separately later on. It would be very difficult to consider so many important problems simultaneously.

85. Referring to a question which Mr. Tammes had also raised, he said that in his view it would be preferable to use some expression other than "active subject" which did not correspond to the complex character of the topic. The expression meant subjects capable of setting in motion the process of imputing the international responsibility of States. In that connexion he wished to draw attention to the need for considering the procedures for imputing responsibility. That was a matter which belonged to the topic of responsibility and would have to be studied by the Commission, otherwise its work on the codification of international responsibility would be incomplete.

86. Lastly, the programme contained no reference to the important question of the exhaustion of internal remedies, which was not in all cases associated solely with the rules of procedure for imputing responsibility; it might affect the actual substance of responsibility.

87. Mr. NAGENDRA SINGH expressed his satisfaction with the proposed outline programme as a basis for the Commission's work. In view of its great importance for both developing and developed countries, the topic should be dealt with in all its aspects. If the Commission could bring about the adoption of a convention on State responsibility, it would be making a great contribution to the establishment of the rule of law in the international community.

88. Mr. KEARNEY said he considered that the outline programme represented a reasonable organization of efforts to codify the topic of State responsibility. An attempt to define general problems from the outset had much to recommend it; State responsibility was as broad a general subject as could be found in international law and was hard to reduce to a few well-ordered rules.

89. He had a few general comments to make on the programme in document A/CN.4/196. In the first place, the distinction between objective and subjective elements in paragraph (2) of the first point seemed to be an unduly psychological approach to the definition of a wrongful act. Secondly, it was difficult to distinguish, as was done in paragraph (3), between wrongful acts arising from conduct alone and those arising from events. He agreed with Mr. Eustathiades's views on the problem of the exhaustion of local remedies. On the other hand, he was not sure that Mr. Ushakov's idea of dealing with sanction first was the logical approach, for sanction was the result of a wrongful act; it was probably wiser to begin by defining an international wrongful act and to deal later with such consequential and procedural questions as sanction. Finally, references to the procedural aspects of responsibility were scattered throughout the programme; the Special Rapporteur might consider whether procedure could not be dealt with in a separate section of the draft.

90. Mr. CASTAÑEDA said he fully approved of the proposed programme of work. He welcomed the decision to make a distinction between the problem of international responsibility and the problem of determining the obligations a breach of which might involve responsibility. The adoption of that procedure would enable the Commission to overcome the difficulty confronting it. Once the general rules of responsibility had been established, the Commission could deal with the matters arising from them.

The meeting rose at 1 p.m.

935th MEETING

Thursday, 6 July 1967, at 3 p.m.

Chairman: Sir Humphrey WALDOCK

Present: Mr. Ago, Mr Bartoš, Mr. Castrén, Mr. Eustathiades, Mr. Ignacio-Pinto, Mr. Kearney, Mr. Nagendra Singh, Mr. Ramangasoavina, Mr. Tabibi, Mr. Tammes, Mr. Ushakov, Mr. Ustor, Mr. Yasseen.

State Responsibility
(A/CN.4/196)
(continued)

[Item 3 of the agenda]

1. The CHAIRMAN invited the Commission to continue its discussion of item 3 of the agenda.

2. Mr. USTOR said that State responsibility was a topical subject, for with the development of international society, international delinquencies had not disappeared, but on the contrary were to be witnessed every day. In deciding to depart from the approach adopted by the previous Special Rapporteur and to explore the possibility of finding general criteria for codifying the topic, the Commission had adopted a satisfactory solution, both

from the theoretical and from the practical point of view. Nevertheless, it was clear that when the Commission had avoided the Scylla of an approach fraught with political implications, it had met with the Charybdis of an enormous number of highly complex theoretical problems; for instance: whether *culpa* or *dolus* were necessary for the establishment of responsibility, or in what cases the results alone would give rise to responsibility; what were the boundaries of objective responsibility; and whether the intention or motive underlying certain acts played a part in the establishment of responsibility and the duty to make reparation. Moreover, the point raised by Mr. Ushakov, that of the nature of legal interest, or who had *locus standi* in cases of international delinquency and in what cases there should be something in international law similar to *actio publica* in Roman law, was a burning question, especially in the light of the *South West Africa* cases. The Commission had made a wise choice in appointing Mr. Ago as Special Rapporteur, and could have every confidence in his capacity to deal with the difficult problems that arose.

3. Mr. IGNACIO-PINTO said he fully approved of the programme proposed by Mr. Ago and believed that the new approach to the problem would make it possible to codify the international law on State responsibility.

4. Mr. AGO, Special Rapporteur, said he wished to reply to the very interesting comments made at the 934th meeting.

5. In the first place, referring to Mr. Tammes's suggestion that account should be taken not only of "passive subjects" of responsibility but also of "active subjects", he thought that it might be preferable to speak, not of "active subjects of responsibility" but of "subjects entitled to assert the responsibility of States", which were referred to in several places in the report, for instance in connexion with sanctions.

6. Mr. Ushakov had asked whether, in considering the possibility of sanction, the possibility of a public action could be accepted in international law. Had the time come to draw away from the classical idea that the only subject of law entitled to assert the responsibility of a State was the person injured and to recognize that there might be exceptional cases in which the international community as such was entitled to assert that responsibility? He thought that that was a very important question and should be taken into consideration in preparing the draft convention.

7. Mr. Tammes had raised the question of collective responsibility. Did collective responsibility arise in consequence of a collective wrongful act or was there a series of individual responsibilities arising from a series of individual wrongful acts? That question, too, should be gone into thoroughly, as it was important both from the point of view of conduct and imputation and from that of the consequences, in other words the responsibility itself.

8. Referring to Mr. Ushakov's proposal that the order of the forms of international responsibility should be reversed and that sanction should be mentioned before reparation, he said that in the enumeration in his note he had followed the usual order. Everything depended on one's ideas on the relationship between sanction and reparation. According to Kelsen, sanction was the normal consequence of responsibility and reparation was merely an offer made by the guilty subject of law in order to avoid the sanction. According to that line of reasoning, sanction should precede reparation. Other writers, however, held that reparation was not a substitute for sanction, but the perfectly normal consequence of a wrongful act. The Commission should study that question and pay particular attention to international practice when working out the theory of it.

9. Mr. Kearney had expressed some doubt about the distinction between the subjective and objective elements of the wrongful act. Those terms were, of course, only used for guidance in the report: they would not appear in a draft of articles. Its clauses would deal with certain kinds of conduct, certain kinds of violation and the imputation of responsibility for such violations to a subject of international law. The difference between a wrongful act arising from conduct and a wrongful act arising from events could be illustrated by the following examples: if a State violated the territorial sea of another State, it committed an international delinquency of conduct; if a State failed to fulfil the international obligation to protect the embassy of a foreign country, especially during disturbances, there would be a wrongful act only if the embassy was attacked, and it was that which led to the idea of a wrongful act arising from events.

10. The question of exhausting internal remedies raised by Mr. Eustathiades was in his (Mr. Ago's) opinion related to the origin of responsibility. It was, therefore, a question of substance, not of procedure. It was not mentioned in the programme of work for the simple reason that, essentially, the rules relating to that question applied only to acts injuring private individuals. But it would be dealt with in connexion with the responsibility of the State for acts committed by its organs.

11. With regard to questions relating to the procedure in cases of responsibility, it would be preferable for the time being to consider only the general rules of international responsibility. A decision on their inclusion in the draft convention could be taken during the second stage of the work.

12. In conclusion, he said it was difficult to give an opinion on the scope of the topic at that stage. It would be better to proceed pragmatically and to decide as the work progressed whether the topic ought to be dealt with in a succession of reports and, if so, how that should be done.

13. The CHAIRMAN, speaking as a member of the Commission, said he had been most interested in the suggestions made during the debate, particularly those concerning the possibility of taking public action to secure observance of international law. That problem raised extremely delicate questions, as had been shown by the *Corfu Channel* case[1] in 1947, when an argument of the United Kingdom before the International Court of Justice on those lines had proved unsuccessful.

14. Speaking as Chairman, he pointed out that the Commission had always adhered to the principle that,

[1] *I.C.J. Reports, 1949*, p. 4.

although it was necessary to give a Special Rapporteur general directives, it was unwise to bind him too strictly in advance. Experience had shown that, even in the case of subjects with which members were quite familiar, close examination of draft articles brought out points that had not been fully appreciated before. He was sure that when Mr. Ago came to prepare his report, he would find it necessary to make certain departures from the order and substance of the outline programme drawn up by the Sub-Committee on State Responsibility. He suggested that the Commission should confirm Mr. Ago's appointment as Special Rapporteur on State responsibility and endorse the general outline of the directives he had been given in 1963, wishing him success in a very arduous and important task, the accomplishment of which would make a major contribution, not only to the science of international law, but also to the foundations of international peace.

The Chairman's suggestion was adopted unanimously.

Special Missions

(A/CN.4/193 and Addenda; A/CN.4/194 and Addenda)

(resumed from the previous meeting)

[Item 1 of the agenda]

Question of Derogation from the Provisions of the Articles

15. The CHAIRMAN invited the Special Rapporteur to introduce the text of the article on derogation which was to be submitted to the Drafting Committee. In his own opinion, it would be more expedient for the Drafting Committee to consider the proposals and to make recommendations to the Commission, before the Commission discussed them in detail, but the Special Rapporteur might wish to seek guidance before that course was taken.

16. Mr. BARTOŠ, Special Rapporteur, said that in light of the Commission's discussions he had prepared for the Drafting Committee, to replace articles 17 *bis* and "X" (A/CN.4/194/Add. 2), a draft article "Z" reading:

"*Derogation from the provisions of the present articles*"

"1. The parties to the present draft articles may not derogate from the provisions of articles...

"2. Derogations from any other provisions of the present draft may be made only by express agreement between the parties which intend to derogate from them and shall have effect only between those parties."

17. For the time being, he proposed to mention, in paragraph 1, articles 1, 2 and 3—all of which would probably have other numbers in the final draft—and the Commission might perhaps wish to add some others.

18. Mr. YASSEEN said that since article "Z" had been prepared for the Drafting Committee on the basis of guidance given by the Commission, it had better be considered by the Drafting Committee first.

19. Mr. USHAKOV said he did not think the Commission had decided to include an article such as article "Z" in its draft.

20. It was already laid down in article 40 *bis*, paragraph 2(*b*), that States parties to the future convention might extend to each other, by custom or agreement, more favourable treatment than was required by the provisions of the articles. And under paragraph 2(*c*), States could agree among themselves to reduce reciprocally the extent of the facilities, privileges and immunities for their special missions. Consequently, either article "Z" merely repeated what was said elsewhere and was unnecessary, or its effect was to extend to draft articles other than those concerning facilities, privileges and immunities the right to make derogations in the narrow sense, in which case it conflicted with article 40 *bis*, paragraph 2 (*c*).

21. The CHAIRMAN agreed that there might be some advantage in asking the Drafting Committee to examine the proposed article in conjunction with the provisions to which it related. Nevertheless, the discussion would give the Drafting Committee some guidance for formulating its proposals, and it would probably be wise to refer the text to the Committee forthwith.

22. Mr. KEARNEY pointed out that the Commission had never taken any decision on the principle of including derogation clauses in the draft. It should be borne in mind that the Vienna Conventions contained no such clauses.

23. The CHAIRMAN said that certain views had been expressed during the debate which made it necessary for the Drafting Committee to consider the proposed article. The decision whether or not to include derogation clauses would depend on the enumeration of the articles from which no derogation was permitted; moreover, the Special Rapporteur's wishes should be respected.

24. Mr. YASSEEN said that the Commission could not discuss article "Z" until the blank in paragraph 1 had been filled in. He himself did not rule out in advance the possibility that the convention might lay down both rules of *jus cogens* and certain rules of *jus dispositivum* from which the parties would agree that they could not derogate.

25. Mr. BARTOŠ, Special Rapporteur, reminded the Commission that his original intention had been to draft a convention, the provisions of which would have contained firm commitments by the parties; his idea had been that possibilities of derogation would have been the exception and would always have been stated expressly, article by article. But at its eighteenth session, in view of the comments submitted by Governments, the Commission had decided that "the provisions of the draft articles on special missions could not in principle constitute rules from which the parties would be unable to derogate by mutual agreement".[2] That decision had been approved by the General Assembly.

26. At the present session the members of the Commission would have noted that the texts of a large number of articles of the draft—about two-thirds of them—contained a clause such as "unless otherwise agreed" or "in the absence of any special agreement". Following a suggestion

[2] *Yearbook of the International Law Commission, 1966*, vol. II, document A/6309/Rev.1, Part II, para. 60.

by Mr. Reuter,[3] the Commission had considered that it would be better to delete that proviso from the articles in which it stood and replace it by a general article stating that, with very few exceptions, the provisions would be open to derogation by agreement between the parties. As a jurist, he had little liking for that solution, which left much uncertainty, but it would be difficult to turn back at that stage. He greatly hoped, therefore, that the Commission would give an opinion on the basic principle of article "Z" and that, if it decided to include such an article in the draft, it would help the Special Rapporteur to fill in the blank in paragraph 1, in other words, to decide which articles could not be derogated from by the parties.

27. He wished to point out that some of the Governments which, in the General Assembly or in their written comments, had opposed the idea that the convention on special missions should contain provisions from which derogations *inter se* were not permissible, seemed to have given the term *jus cogens* a meaning different from that which the Commission had intended to give it in its draft on the law of treaties.

28. Mr. EUSTATHIADES said he did not wish to enter into the controversy about *jus cogens*, but he was firmly convinced that a provision such as article "X" or article "Z" had no place in an international convention. The Commission would do better to delete that provision at once, and replace it with an article giving the parties the right to make reservations to certain articles. The Commission might also indicate by an express clause in certain articles that the régime established admitted of other arrangements or could be modified by the parties *inter se*.

29. The CHAIRMAN said that he himself was not anxious to have a derogation clause in the draft, but he understood the Special Rapporteur's wish that the Commission should consider the question of providing that certain articles were beyond any possibility of derogation. The Commission might not adopt such a clause, but it could not take a final decision without knowing which articles of the draft would be involved.

30. Mr. CASTRÉN agreed with the Chairman. He had been opposed to article "X", but the Special Rapporteur had already withdrawn that article. The Commission could hardly take a decision on the proposed new article "Z" because it was not complete. To save time, the Commission should ask the Drafting Committee to consider whether the draft should or should not contain a provision replacing article "X".

31. Mr. BARTOŠ, Special Rapporteur, replying to Mr. Eustathiades, observed that in the case-law of the International Court of Justice the question of reservations had become very complicated.

32. Mr. USHAKOV said that, at the previous session, the Commission had decided to provide in several cases for the possibility of derogating by special agreement from the rules set out in the draft articles.[4] As the Special Rapporteur had since put that decision into effect, article "X", now article "Z", was unnecessary.

33. Mr. YASSEEN said that, also at the eighteenth session, the Commission had made provision for the possibility of derogating by agreement from a treaty, provided that the derogation was neither incompatible with a rule of *jus cogens* nor expressly or impliedly prohibited by the treaty itself.[5] Consequently, an article such as article "Z" could not be accepted or rejected until all the rules in the draft had been examined.

34. In his opinion the draft articles on special missions did not contain rules of *jus cogens* in the strict sense. The question was whether they nevertheless contained some rules from which no derogation should be permitted.

35. Mr. AGO said he thought article "Z" was based on the idea that there might be peremptory clauses in the draft, although personally he doubted it. The notion of a peremptory rule or rule of *jus cogens* had two aspects: first, the rule did not admit of derogation and any treaty conflicting with that principle was void; secondly, it must be materially possible to derogate from the rule. There were certain rules in the present draft from which it was not materially possible to contemplate derogation, but which were not consequently rules of *jus cogens*. One example was the rule that a special mission was sent by one State to another State with that State's consent; it would be illogical to say that the latter State could give its consent to a special mission's being sent to it without its consent.

36. The notion of *jus cogens* was, moreover, very restricted, and depended on the practice of States. It varied with the period and with the political and social conditions prevailing in the international community. Hence it would be a mistake to decide in advance that certain rules in the draft were rules of *jus cogens*. In any case, where derogation from a rule was possible by special agreement, there was no need to say so. Consequently, article "Z" was superfluous.

37. Mr. BARTOŠ, Special Rapporteur, observed that he had never used the term "*jus cogens*" in connexion with draft articles on a topic to which the notion was foreign. Be that as it might, if the Commission decided to omit article "Z", the proviso "unless specially agreed" would have to be reintroduced into a great many provisions.

38. Mr. AGO said that, in his opinion, that was not necessary.

39. The CHAIRMAN suggested that article "Z" be referred to the Drafting Committee, on the understanding that the Commission had not taken any decision on the principle of including a derogation clause.

It was so agreed.[6]

[3] See 923rd meeting, para. 23.

[4] *Yearbook of the International Law Commission, 1966*, vol. II, *loc. cit.*

[5] *Ibid.*, following para. 38.

[6] On the recommendation of the Drafting Committee, it was subsequently decided to delete article "X" (and thus article "Z"). See 937th meeting, para. 81.

DRAFT ARTICLES PROPOSED BY THE DRAFTING COMMITTEE (*resumed from the previous meeting*)

ARTICLE 20 (Inviolability of archives and documents) [26] [7]

40. The CHAIRMAN put to the vote article 20 which the Commission had already approved in principle.

Article 20 was adopted unanimously.

ARTICLE 21 (Freedom of movement) [27][8]

41. The CHAIRMAN drew attention to a change in the English text of article 21, which had been approved in principle by the Commission. The Drafting Committee had decided to replace the words "freedom of movement and travel on its territory to the extent that this is necessary for the performance of the functions of the special mission" by the words "such freedom of movement and travel on its territory as is necessary for the performance of the functions of the special mission".

Article 21, as amended, was adopted unanimously.

ARTICLE 22 (Freedom of communication) [28][9]

42. The CHAIRMAN invited the Commission to consider the text of article 22 proposed by the Drafting Committee. The text which the Commission had approved in principle at the 931st meeting had not been changed; the Drafting Committee had considered the proposal to insert the adjective "permanent" before "diplomatic missions" in the second sentence of paragraph 1, but had decided not to recommend that addition.

43. Mr. AGO, Acting Chairman of the Drafting Committee, said that besides the permanent diplomatic mission there might be other missions of a diplomatic character, which would not necessarily be permanent missions. The difficulty might perhaps be overcome by amending the passage to read: "In communication with the government and with the permanent diplomatic mission, consular posts and the other special missions of the sending State...".

44. Mr. BARTOŠ, Special Rapporteur, drew attention to the definitions in sub-paragraphs (*b*) and (*c*) of the preliminary article[10] and said he considered it preferable to retain the expression "diplomatic missions", which covered the various kinds of mission of a diplomatic character.

45. Mr. AGO said he thought that the system of definitions proposed by the Special Rapporteur (A/CN.4/194/Add.2, article O) had the defect of confining the term "permanent diplomatic mission" to the mission accredited to a State, to the exclusion of other diplomatic missions which were equally permanent.

46. Furthermore, the plural, "diplomatic missions", used in article 22, paragraph 1 was dangerous because it might be taken to refer to the diplomatic missions of States other than the sending State.

47. The CHAIRMAN said that the Special Rapporteur had pointed out, during the earlier discussions on article 22, that a special mission might well need to communicate with the permanent diplomatic missions of the sending State in countries other than the receiving State.

48. Mr. KEARNEY said he would not favour any alteration of the language used in the opening phrase of the second sentence of paragraph 1; the text as it stood made it perfectly clear that the reference was to the diplomatic missions and consular posts of the sending State.

49. Mr. YASSEEN agreed with Mr. Ago; it should be specified in the text that only missions of the sending State were meant.

50. Mr. AGO proposed that the passage in question should read "In communicating with the government of the sending State, its diplomatic missions, its consular posts and its other special missions". That wording would also prevent any confusion between the sending State and the receiving State.

51. Mr. USHAKOV, while acknowledging that Mr. Ago's proposal was an improvement, pointed out that the corresponding provision (article 27, paragraph 1) of the Vienna Convention on Diplomatic Relations was much less elaborate.

52. The CHAIRMAN invited the Commission to vote on article 22, the beginning of the second sentence of paragraph 1 being amended as proposed by Mr. Ago.

Article 22 was adopted with that amendment.

ARTICLE 23 (Exemption of the premises of the special mission from taxation) [24][11]

53. The CHAIRMAN said that the Drafting Committee proposed a slight change in the English text of article 23 which the Commission had already approved in principle. In paragraph 1, the words "acting on its behalf" should be replaced by "acting on behalf of the mission".

54. Mr. AGO, Acting Chairman of the Drafting Committee, said that the Committee proposed two changes in the article. First it proposed a new title: "Exemption of the premises of the special mission from taxation"; and, secondly, the adoption in paragraph 1 of the words "in respect of the premises occupied by the special mission", instead of "in respect of the premises of the special mission".

55. The CHAIRMAN put article 23 to the vote with the amendments proposed by the Drafting Committee and the change in the English text he had mentioned.

Article 23 was adopted unanimously with those amendments.

[7] For earlier discussion, see 931st meeting, paras. 22-24.

[8] For earlier discussion, see 931st meeting, paras. 25-27.

[9] For earlier discussion, see 931st meeting, paras. 28-40.

[10] For the text of the preliminary article, see 937th meeting, para. 7.

[11] For earlier discussion, see 931st meeting, paras. 41-55.

[12] For earlier discussion, see 931st meeting, paras. 56-58.

ARTICLE 24 (Personal inviolability) [29][1][2]

56. The CHAIRMAN said that no changes were proposed in the text of article 24 which the Commission had already approved in principle.

Article 24 was adopted unanimously.

ARTICLE 25 (Inviolability of the private accommodation) [30][13]

57. The CHAIRMAN invited the Commission to consider article 25. During the previous discussion he had suggested that in the English text of paragraph 2 the words "subject to the proviso in article 26, paragraph 4", should be replaced by "except as provided in article 26, paragraph 4", to bring the wording into line with the corresponding provision of the 1961 Vienna Convention.

Article 25, as thus amended, was adopted unanimously.

58. Mr. KEARNEY pointed out that the provisions of article 25 were governed by those of article 19, which dealt with the inviolability of the premises of the special mission, and which the Commission had not yet finally adopted. When the Commission came to vote on article 19, he intended to propose[14] that the text be amended so as to bring it into line with that of the corresponding provision of the 1963 Vienna Convention on Consular Relations. If the Commission amended article 19 in that manner, the operation of article 25 would be affected.

59. The CHAIRMAN said he had taken note of that remark, which did not affect the actual wording of article 25.

The meeting rose at 5.30 p.m.

[13] For earlier discussion, see 931st meeting, paras. 59-63.

[14] See 936th meeting, para. 12.

936th MEETING

Monday, 10 July 1967, at 3.15 p.m.

Chairman: Sir Humprey WALDOCK

Present: Mr. Ago, Mr. Bartoš, Mr. Castañeda, Mr. Castrén, Mr. Eustathiades, Mr. Ignacio-Pinto, Mr. Jiménez de Aréchaga, Mr. Kearney, Mr. Nagendra Singh, Mr. Reuter, Mr. Tabibi, Mr. Tammes, Mr. Ushakov, Mr. Ustor, Mr. Yasseen.

Special Missions

(A/CN.4/193 and Addenda; A/CN.4/194 and Addenda)

(continued)

[Item 1 of the agenda]

DRAFT ARTICLES PROPOSED BY THE DRAFTING COMMITTEE *(continued)*

1. The CHAIRMAN invited the Commission to undertake a final examination of articles 12 to 14, 17 to 19, and 26 to 31 proposed by the Drafting Committee.

ARTICLE 12 (End of the functions of a special mission) [20][1]

2. The CHAIRMAN put article 12 to the vote.

Article 12 was adopted unanimously.

ARTICLE 13 (Seat of the special mission) [17][2]

3. The CHAIRMAN said that the word "upon" should be deleted from the English text of paragraph 1 of article 13.

4. Mr. EUSTATHIADES said it was his understanding that the Commission had decided to replace the word "*localité*" in paragraph 2 of the French text by the word "*ville*".

5. Mr. USHAKOV explained that the Drafting Committee had preferred to keep the word "*localité*", which was used in article 12 of the Vienna Convention on Diplomatic Relations.

6. The CHAIRMAN put to the vote article 13, without amendment, except for the deletion of the word "upon" in the English text of paragraph 1.

Article 13 was adopted unanimously.

ARTICLE 14 (Nationality of the members of the special mission) [10][3]

7. The CHAIRMAN drew attention to the fact that the opening word in paragraph 2 should read: "Nationals".

Article 14 was adopted by 14 votes to none, with 1 abstention.

8. Mr. EUSTATHIADES said that he had abstained because of the retention of the words "which may be withdrawn at any time" in paragraph 2. He had explained his views on that point at the 907th meeting.[4]

ARTICLE 17 (General facilities) [22][5]

9. The CHAIRMAN put article 17 to the vote.

Article 17 was adopted unanimously.

ARTICLE 18 (Accommodation of the special mission and its members) [23][6]

10. The CHAIRMAN said that when the Commission had approved article 18 in principle, it had been decided that the words "in obtaining the necessary premises and suitable accommodation" in the English text should be amended to read: "in procuring the necessary premises and obtaining suitable accommodation".

Article 18, with that amendment to the English text, was adopted unanimously.

[1] For earlier discussion, see 931st meeting, paras. 64-67.

[2] For earlier discussion, see 931st meeting, paras. 68-77.

[3] For earlier discussion, see 931st meeting, paras. 78-84.

[4] Para. 67.

[5] For earlier discussion, see 930th meeting, paras. 113-115.

[6] For earlier discussion, see 930th meeting, paras. 116-121.

ARTICLE 19 (Inviolability of the premises) [25][7]

11. The CHAIRMAN recalled that, during the earlier discussion of article 19, some members had favoured the insertion of a provision which would cover emergency situations by creating a presumption of consent to enter the premises of the special mission in such situations.

12. Mr. KEARNEY proposed that the following sentence should be added at the end of paragraph 1: "Such consent may be assumed in case of fire or other disaster requiring prompt protective action."

13. The 1963 Vienna Conference had inserted a similar phrase in the corresponding provision of the Convention on Consular Relations[8] in order to fill a gap which had been left in the 1961 Vienna Convention on Diplomatic Relations. As a result of that gap, the situation regarding remedial action in the event of an emergency was not clear so far as permanent diplomatic missions were concerned. It would be a retrograde step not to incorporate in the present article 19 the improvement introduced in 1963.

14. Mr. EUSTATHIADES supported Mr. Kearney's proposal. If it were rejected, he would request that the idea it expressed should be mentioned in the commentary.

15. Mr. USHAKOV said that, as article 19 was based on article 22 of the Vienna Convention on Diplomatic Relations, in which there was no reference to assumed consent, the inclusion of such a provision in article 19 would be contrary to the purpose of the article.

16. Mr. AGO, Acting Chairman of the Drafting Committee, said that the point had been considered in the Drafting Committee. It had been because of the analogy with permanent diplomatic missions that the Drafting Committee had not proposed the inclusion of that provision in article 19 and had preferred to re-submit the question to the Commission. Most of the members of the Drafting Committee had been of the opinion that, in practice, consent was in fact assumed in cases of *force majeure*. An express provision to that effect was therefore unnecessary and might indeed be rather dangerous.

17. The CHAIRMAN put to the vote Mr. Kearney's proposal for the insertion of the following sentence in paragraph 1 : "Such consent may be assumed in case of fire or other disaster requiring prompt protective action".

The proposal was adopted by 6 votes to 5, with 4 abstentions.

18. Mr. TABIBI expressed regret that the Commission should have adopted by so narrow a majority a provision which might lend itself to abuse. He proposed that a passage should be inserted in the commentary explaining that there had been a division of opinion in the Commission regarding the insertion of that additional sentence in paragraph 1.

19. Mr. AGO said that, although he had no objection to that suggestion, it was desirable for the commentary not to give the impression that there had been a serious division of opinion in the Commission on the point. In point of fact, some members would simply have liked to include such a provision in the article, whereas others had been of the opinion that the idea it expressed was self-evident. He himself had abstained in the vote because he regarded both solutions as equally satisfactory.

20. Mr. BARTOŠ, Special Rapporteur, said that many members of the Commission had raised the question, both at the current session and at previous sessions, and had based their views on arguments of substance which showed that the question was not a purely technical one. An objective explanation of how the Commission had reached its decision might be given in the commentary in such a way as to avoid suggesting that it was a controversial matter.

21. The CHAIRMAN invited the Commission to vote on article 19 as a whole, as amended by Mr. Kearney.

Article 19 as a whole, as amended, was adopted by 11 votes to 3, with 1 abstention.

ARTICLE 26 (Immunity from jurisdiction) [31][9]

22. The CHAIRMAN said that, in paragraph 1 of the English text of article 26, the word "on" in the expression "the representatives of the sending State on the special mission" should be replaced by "in"; the same change would also be made in article 27 and wherever else that expression appeared.

Article 26 was adopted unanimously.[10]

ARTICLE 27 (Waiver of immunity) [41][11]

23. The CHAIRMAN recalled that the Commission's approval of article 27 in principle at the 933rd meeting had been limited to the first four paragraphs. It had been decided that the subject-matter of paragraph 5 should be transferred to a separate article (article 27 *bis*), the text of which would be modelled on that of Resolution II of the 1961 Vienna Conference.

Article 27, as amended, was adopted unanimously.[12]

ARTICLE 27 *bis* (Settlement of civil claims) (New article) [42]

24. Mr. AGO, Acting Chairman of the Drafting Committee, said that the Drafting Committee proposed that article 27 *bis* should read:

"*Settlement of civil claims*"

"The sending State shall waive the immunity of one of the members of the special mission in respect of civil claims of persons 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".

25. The article had been provisionally numbered 27 *bis* but its final place in the draft would be decided when the

[7] For earlier discussion, see 931st meeting, paras. 2-6.

[8] United Nations Conference on Consular Relations, *Official Records*, vol. II, p. 180, article 31, para. 2.

[9] For earlier discussion, see 933rd meeting, paras. 2-13.

[10] See 938th meeting, paras. 66 and 69.

[11] For earlier discussion, see 933rd meeting, paras. 14-56.

[12] For amendment to the text of article 27, see below, paras. 49 and 51.

Commission had adopted all the articles dealing with the immunities of all the members of the special mission; the obligation laid down in article 27 *bis* related not only to the immunity dealt with in article 27, which was concerned with representatives of the sending State in the special mission and the members of its diplomatic staff, but to all the immunities enjoyed by the special mission.

26. Mr. BARTOŠ, Special Rapporteur, said that he took the contrary view: the waiver of civil immunity could refer only to the immunity of representatives of the sending State and of the members of the diplomatic staff. The immunity of members of the special mission belonging to other categories was restricted to acts performed in the course of their duties and could not be affected by the new provision in article 27 *bis*.

27. Mr. REUTER said that the word "*obtenir*" in the French text of the article did not correspond exactly to the English words "bring about". It might be better to say "*aboutir à un règlement équitable du litige*".

28. Mr. AGO pointed out that article 27 *bis* reproduced almost word for word the terms of Resolution II of the Vienna Conference.[13] The question was therefore whether the Commission wished to depart from a translation which had already been adopted officially.

29. Mr. BARTOŠ, Special Rapporteur, supported Mr. Reuter's suggestion. The article was based on a resolution of the Conference, not on an article of the Convention, and the Commission therefore had greater liberty to change the wording.

30. Mr. CASTRÉN said that the expression "of persons in the receiving State" was not very clear. Did it refer to persons residing in the receiving State, to persons domiciled there permanently, or to persons who were nationals of that State ?

31. Mr. AGO urged the Commission not to clarify the meaning of the expression more precisely, in order to prevent any possibility of discrimination.

32. The CHAIRMAN explained that the Drafting Committee's intention had been that the text of the article should be applicable to any person bringing a claim in the receiving State.

33. Mr. USTOR said that, in his view, the text of article 27 *bis* would cover civil claims made in the receiving State by persons living outside that State.

34. Mr. REUTER said that the words "of persons" seemed to him to be superfluous, as civil claims could be brought only by natural or legal persons.

35. Mr. CASTRÉN proposed that the words should be deleted.

36. Mr. AGO said that he had no objection to their being deleted. He proposed that in the French text the words "*appliquera tous ses efforts à*" should be replaced by the words "*s'efforcera d'*".

37. Mr. BARTOŠ, Special Rapporteur, said that there was some danger that article 27 *bis* might open the door to abuses, since it did not state clearly that the obligation to waive immunity related only to civil claims brought in connexion with events that had taken place in the territory of the receiving State.

38. Mr. JIMÉNEZ de ARÉCHAGA said he did not think that there was any possibility of abuse, because the sending State always had the option of not waiving the immunity.

39. The CHAIRMAN said that the receiving State would be very unlikely to exert any pressure for the waiver of immunity in respect of a claim which had not arisen in its territory.

40. Mr. EUSTATHIADES suggested that article 27 *bis* should be entitled "Waiver of immunity in civil proceedings and the just settlement of claims". Such a title would form a logical continuation of the title of article 27 (Waiver of immunity).

41. Mr. CASTRÉN said that the new title proposed by Mr. Eustathiades was more accurate than the existing one, but was too long.

42. Mr. AGO said that he had already thought of inserting the word "just" before the word "settlement" as proposed by Mr. Eustathiades, but there was no need to do so in cases where immunity was waived and which became subject to normal proceedings.

43. Mr. USHAKOV said that there seemed to be no point in repeating the title of article 27 in article 27 *bis*.

44. Mr. YASSEEN said that, although he did not object to the substance of the article, he thought it would be better for its provisions to take the form of a recommendation by the conference rather than that of an article of the convention.

45. The CHAIRMAN recalled that the question had been discussed at the 933rd meeting and that the majority had favoured an article on the subject of the settlement of civil claims. If the Commission were now to decide against the inclusion of such an article, that decision would not rule out the possibility of a recommendation.

46. Mr. REUTER said that, in addition to supplementing paragraph 2(*d*) of article 26 (Immunity from jurisdiction), article 27 *bis* created what might be described as an obligation of honour, for it would be out of the question for the special mission to leave the territory of the receiving State without having first discharged all its responsibilities towards that State.

47. The CHAIRMAN put to the vote article 27 *bis* subject to the deletion of the words "of persons" and to the drafting changes to be made in the French text.

Article 27 bis *was adopted by 12 votes to none, with 4 abstentions.*[14]

[13] See United Nations Conference on Diplomatic Intercourse and Immunities, *Official Records*, vol. II, p. 90.

[14] For amendment to the text of article 27 *bis*, see below, paras. 50 and 52.

Amendment to articles 27 and 27 bis

48. The CHAIRMAN said that the Special Rapporteur had drawn his attention to the fact that articles 27 and 27 *bis* referred only to representatives of the sending State on the special mission and to the members of the diplomatic staff of the mission. It had been suggested that the gap should be filled by the addition of another article, but that seemed a rather clumsy solution.

49. Mr. AGO, Acting Chairman of the Drafting Committee, explained that paragraph 1 of article 27 as now worded did not relate to the administrative and technical staff, the service staff, the private staff or the members of the family, whereas the corresponding provision in article 32, paragraph 1, of the Vienna Convention on Diplomatic Relations, by referring to "persons enjoying immunity under article 37,", included persons in all those categories. The same arrangement might therefore be adopted in article 27, in which case the French text of paragraph 1 would read "*L'Etat d'envoi peut renoncer à l'immunité de juridiction de ses représentants dans la mission spéciale, des membres du personnel diplomatique de celle-ci et des autres personnes qui bénéficient de l'immunité en vertu des articles 32 à 35*".

50. It would also be necessary to make a slight change in article 27 *bis* so as to include the members of the family. The French text of that article might read "*L'Etat d'envoi renoncera à l'immunité de l'une des personnes mentionnées au paragraphe 1 de l'article 27...*". The whole question of waiver of immunity would then be dealt with in those two articles only and there would be no need to revert to the matter.

51. The CHAIRMAN said that the English text of paragraph 1 of article 27 would now read as follows:

> "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 the persons enjoying immunity under articles 32 to 35."

The amendment was adopted unanimously.

52. The CHAIRMAN said that with the amendment proposed by Mr. Ago, the English text of the opening phrase of article 27 *bis* would now read: "The sending State shall waive the immunity of any of the persons mentioned in paragraph 1 of article 27 in respect of civil claims in the receiving State...".

The amendment was adopted unanimously.

ARTICLE 28 (Exemption from social security legislation) [32][15]

53. The CHAIRMAN put article 28 to the vote.

Article 28 was adopted unanimously.

ARTICLE 29 (Exemption from dues and taxes) [33][16]

54. The CHAIRMAN recalled that, at the 933rd meeting, the Commission had chosen the second of the two alternative texts prepared by the Drafting Committee.

55. Mr. USTOR noted the reference in paragraph (*c*) to "the provisions of paragraphs 2 and 3 of article 38". In fact, the final text of article 38[17] had only two paragraphs. Article 29 corresponded to article 34 of the Vienna Convention on Diplomatic Relations, paragraph (*c*) of which referred to paragraph 4 of article 39 of that Convention. The latter paragraph corresponded to paragraphs 1 and 2 of article 38 of the draft on special missions and he therefore suggested that paragraph (*c*) should simply refer to "the provisions of article 38".

56. Mr. BARTOŠ, Special Rapporteur, said it was debatable whether it was preferable to include a proviso referring to article 38 as a whole or one referring only to paragraph 2 of that article, which was the one particularly concerned. But if the Commission wished the immunity to be wider in scope, it would be better to use the formula "subject to the provisions of article 38" in article 29, paragraph (*c*).

57. The CHAIRMAN put to the vote the second alternative text for article 29, with the amendment proposed by Mr. Ustor to paragraph (*c*).

Article 29, as amended, was adopted unanimously.

ARTICLE 30 (Exemption from personal services and contributions) [34][18]

58. The CHAIRMAN put article 30 to the vote.

Article 30 was adopted unanimously.[19]

ARTICLE 31 (Exemption from customs duties and inspection) [35][20]

59. The CHAIRMAN said that the Drafting Committee recommended no change in article 31 in view of the modification it was proposing in article 32 in order to cover the situation of administrative and technical staff.[21]

60. Mr. AGO, Acting Chairman of the Drafting Committee, referring to paragraph 1 (*b*), said that some members of the Commission had thought it necessary to reproduce the text of article 36 of the Vienna Convention on Diplomatic Relations and to add at the end of the sub-paragraph the words "including articles intended for their establishment". Other members had held that those additional words were unnecessary in the case of special missions, which were usually of short duration. The Drafting Committee had finally decided that it was in fact unnecessary to include those words in article 31, which related to the representatives of the sending State and the members of the diplomatic staff of the special mission. On the other hand, at the end of article 32, which related to the administrative and technical staff, the Drafting Committee had added a sentence making it clear that such staff enjoyed the privileges mentioned in paragraph 1 of article 31 "in respect of articles imported at the time of their first entry into the receiving State".

[15] For earlier discussion, see 933rd meeting, paras. 57-62.

[16] For earlier discussion, see 933rd meeting, paras. 63-74.

[17] See 934th meeting, para. 51.

[18] For earlier discussion, see 933rd meeting, paras. 75-77.

[19] See 938th meeting, para. 66.

[20] For earlier discussion, see 933rd meeting, paras. 78-82.

[21] See 934th meeting, paras. 20-27, and 937th meeting, paras. 1 and 2.

61. Mr. REUTER said that he found the drafting of paragraph 1 of article 31 unsatisfactory. In particular, the words "the receiving State shall permit entry of and grant exemption from all customs duties" did not seem to be clear.

62. Mr. YASSEEN said that it was surely not essential to follow the provisions of the Vienna Convention to the letter. He too thought that the drafting of paragraph 1 should be improved.

63. Mr. CASTRÉN said that he still thought that the words "or of the members of their family who accompany them" in paragraph 1 (*b*) were unnecessary, since members of the family were dealt with in article 35.

64. Mr. AGO pointed out that article 35 contained no reference to articles intended for the personal use of members of the family. As those articles might be contained in the baggage of the representatives of the sending State or of the members of the diplomatic staff of the special mission, it was necessary that article 31 should also mention members of the family.

65. Mr. BARTOŠ, Special Rapporteur, said that the Commission was not obliged slavishly to reproduce the text of the Vienna Convention. Furthermore, the words "Within the limits of such laws and regulations" in paragraph 1 did not express the Commission's intention, which was that the receiving State should be obliged to grant customs exemption. In his view, the text of paragraph 1 could be improved; perhaps Mr. Reuter would suggest a different wording.

66. Mr. REUTER said that article 31 as at present drafted stated a purely discretionary rule and was therefore pointless. If the intention was to impose an obligation on the receiving State, the text of paragraph 1 should be revised.

67. Mr. JIMÉNEZ de ARÉCHAGA thought that the language of paragraph 1 could be changed, provided that no alteration was made in the substance. The future convention should not give special missions wider privileges than those granted to permanent diplomatic missions.

68. Mr. USHAKOV said that in his view the words "within the limits" did not mean that the receiving State could refuse to grant customs exemption.

69. Mr. KEARNEY said that the type of situation the provision was intended to cover was illustrated by the experience of the United States. The United States Government had, in fact, taken steps to prevent any member of the Foreign Service or of a permanent diplomatic mission from taking advantage of the economic situation in a foreign country. For example, if a member of such a mission was deemed to have made an undue profit from the sale of an automobile, he was obliged under an official regulation to turn the profit over to charity.

70. The CHAIRMAN pointed out that the Commission had discussed the purpose of the provision in detail on an earlier occasion and that the only objection to the article had been the retention of the words "in accordance with such laws and regulations as it may adopt" used in the corresponding provision (article 36) of the Vienna Convention. Mr. Jiménez de Aréchaga had rightly pointed out that, in view of the principle of reciprocity involved, it was most unlikely that any State would enact unreasonable laws and regulations in that respect.

71. After a brief discussion, Mr. REUTER proposed that the French text of paragraph 1 should read:

"*Dans les limites des dispositions législatives et réglementaires qu'il peut adopter, l'Etat de réception autorise l'entrée et accorde l'exemption de droits de douane, taxes et autres redevances connexes autres que frais d'entreposage, de transport et frais afférents à des services analogues, en ce qui concerne:*"

72. The CHAIRMAN said that no change was required in the English text, and invited the Commission to vote on article 31.

Article 31, with the changes made in the French text, was adopted unanimously.[22]

The meeting rose at 6.5 p.m.

[22] See 938th meeting, paras. 66-68.

937th MEETING

Tuesday, 11 July 1967, at 3.15 p.m.

Chairman: Sir Humphrey WALDOCK

Present: Mr. Ago, Mr. Bartoš, Mr. Castañeda, Mr. Castrén, Mr. Eustathiades, Mr. Ignacio-Pinto, Mr. Jiménez de Aréchaga, Mr. Kearney, Mr. Nagendra Singh, Mr. Reuter, Mr. Tabibi, Mr. Tammes, Mr. Ushakov, Mr. Ustor, Mr. Yasseen.

Special Missions

(A/CN.4/193 and Addenda; A/CN.4/194 and Addenda)

(continued)

[Item 1 of the agenda]

DRAFT ARTICLES PROPOSED BY THE DRAFTING COMMITTEE *(continued)*

ARTICLE 32 (Administrative and technical staff) [36][1]

1. Mr. AGO, Acting Chairman of the Drafting Committee, said that the Committee proposed the following text for article 32:

"Members of the administrative and technical staff of the special mission shall enjoy the privileges and immunities specified in articles 24 to 30, except that the immunity from civil and administrative jurisdiction of the receiving State specified in paragraph 2 of article 26 shall not extend to acts performed outside the course of

[1] For earlier discussion, see 934th meeting, paras. 1-27.

their duties. They shall also enjoy the privileges mentioned in paragraph 1 of article 31 in respect of articles imported at the time of their first entry into the receiving State."

2. In accordance with the Commission's wishes, the Committee had aligned the article as closely as possible with the corresponding provision of the Vienna Convention on Diplomatic Relations. It had therefore added a final sentence similar to the final sentence in article 37, paragraph 2, of the Vienna Convention, the sole difference being that it had used the expression "first entry into the receiving State" instead of "first installation", which would hardly be appropriate to a special mission.

3. Mr. USHAKOV pointed out that the reference to articles 24 to 31 in the first sentence had been replaced by a reference to articles 24 to 30.

4. Mr. BARTOŠ, Special Rapporteur, said that the articles would be renumbered in the final draft and the cross-references from one article to another would be revised and concorded with the new numbering.

Article 32 was adopted unanimously.

ARTICLE 40 *bis* (Non-discrimination) [50][2]

5. Mr. AGO, Acting Chairman of the Drafting Committee, said that the Committee proposed the following text for article 40 *bis*:

"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 provisions of the present articles;

"(*c*) Where States agree among themselves to reduce reciprocally the extent of the facilities, privileges and immunities for their special missions, although such a limitation does not exist with regard to other States."

Article 40 bis *was adopted unanimously.*

INTRODUCTORY ARTICLE (Use of terms) [1]

6. The CHAIRMAN pointed out that the article on the use of terms was being examined on first reading and invited the Acting Chairman of the Drafting Committee to introduce the text.

7. Mr. AGO, Acting Chairman of the Drafting Committee, said that the Committee proposed the following text for the introductory article:

"*Use of terms*"

"For the purposes of the present articles, the following expressions shall have the meanings hereunder assigned to them:

"(*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 a specific task in relation to the latter;

"(*b*) A 'permanent diplomatic mission' is a diplomatic mission sent by one State to another State and having the character provided for in the Vienna Convention on Diplomatic Relations;

"(*c*) A 'diplomatic mission' is a permanent diplomatic mission, a diplomatic mission to an international organization, or a specialized diplomatic mission having a permanent character;

"(*d*) A 'consular post' is any consulate-general, consulate, vice-consulate or consular agency;

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

"(*f*) A 'representative of the sending State in the special mission' is any person on whom the sending State has conferred that capacity;

"(*g*) 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;

"(*h*) 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;

"(*i*) The 'members of the diplomatic staff' are the members of the staff of the special mission who have diplomatic status;

"(*j*) 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;

"(*k*) 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;

"(*l*) The 'private staff' are persons employed exclusively in the private service of the members of the special mission."

8. The Committee had considered that the definitions should be limited to those which were essential. The draft contained many expressions whose meaning was indicated implicity or explicitly by the articles themselves.

9. Mr. REUTER said that the title of the article in French was not satisfactory and did not exactly correspond to the title in English.

10. Mr. AGO suggested that the article should be entitled in French: "*Emploi des termes*".

11. Mr. YASSEEN observed that the title "*Emploi des termes*" would perhaps not be appropriate if the word "*expression*" were retained in the body of the article.

12. Mr. REUTER proposed that the French version of the article should be entitled "*Terminologie*".

It was so agreed.

13. Mr. CASTRÉN said that there was a rather inelegant repetition in the French text in that, after the preliminary paragraph, stating that "the following expressions shall

[2] For earlier discussion, see 931st meeting, paras. 19-21.

have the meanings hereunder assigned to them", each sub-paragraph in the French text began with the words "*L'expression ... s'entend*". It was true that that wording was borrowed from article 1 of the Vienna Convention on Diplomatic Relations, but it should be possible to simplify it.

14. The CHAIRMAN suggested that Mr. Castrén's point might be met by using the wording of the corresponding provision of the draft articles on the law of treaties.[3] A colon would thus be placed after the word "articles" in the preliminary paragraph and the rest of the sentence would be deleted.

It was so agreed.

15. The CHAIRMAN suggested that the Commission should adopt each definition separately.

Sub-paragraph (a)

16. Mr. AGO, Acting Chairman of the Drafting Committee, said that the Commission had already considered, at its 932nd meeting,[4] a provisional version of the definition of special mission. In the light of the opinions expressed during that discussion, the Drafting Committee had worded the definition so as to indicate that the special mission could deal with the receiving State on specific questions or perform a specific task in relation to it.

17. The proposed definition had the restrictive character which the Commission had intended to give it.

18. The CHAIRMAN suggested that the last phrase of sub-paragraph (*a*) should be rearranged to read: "or to perform in relation to the latter a specific task".

It was so agreed.

Sub-paragraph (a), *as amended, was adopted unanimously.*

Sub-paragraph (b)

19. Mr. AGO proposed that the word "*caractère*" in the French text should be in the plural.

20. The CHAIRMAN suggested that the word "characteristics" should be substituted for "character "in the English text.

It was so agreed.

21. Mr. EUSTATHIADES said that during the discussion of several articles, the Commission had decided either to delete or to add the word "permanent". All the articles should therefore be carefully reviewed in the light of the definitions in sub-paragraphs (*b*) and (*c*).

22. Mr. AGO said that that had already been done by the Drafting Committee.

23. The CHAIRMAN said that the term "provided for in the Vienna Convention" implied that permanent diplomatic missions had not existed prior to the signature of that Convention. He suggested that the word "specified" would be more suitable.

24. Mr. YASSEEN suggested that sub-paragraph (*b*) should be redrafted to read: "A 'permanent diplomatic mission' is a diplomatic mission provided for in the Vienna Convention on Diplomatic Relations".

25. Mr. AGO said that the permanent diplomatic mission was an institution recognized by general international law. Not all the States that became parties to the future convention on special missions would necessarily be parties to the Vienna Convention on Diplomatic Relations. The shortened definition suggested by Mr. Yasseen would therefore be dangerous.

26. The CHAIRMAN pointed out that although permanent diplomatic missions were not defined in the Convention on Diplomatic Relations, "consular post" was defined in the Convention on Consular Relations. That was a further argument for using the word "specified" instead of the words "provided for".

27. Mr. AGO proposed the following wording: "and having the characteristics specified in the Vienna Convention on Diplomatic Relations".

It was so agreed.

Sub-paragraph (b), *as amended, was adopted unanimously.*

Sub-paragraph (c)

28. Mr. AGO, Acting Chairman of the Drafting Committee, said that that sub-paragraph had been included in the introductory article, not in order to give a "definition" of a "diplomatic mission", but because the Commission needed to use a general term in certain articles to designate either the permanent diplomatic mission accredited by the sending State to the receiving State or—regardless of whether such a permanent diplomatic mission existed or not—other missions of a diplomatic character, such as a mission to an international organization having its headquarters in the receiving State or a specialized diplomatic mission having a permanent character, which could not therefore be equated with a special mission.

29. Mr. JIMÉNEZ de ARÉCHAGA suggested that to define a diplomatic mission as a diplomatic mission to an international organization might prejudge the conclusions of Mr. El-Erian's report on the topic of relations between States and inter-governmental organizations. He would also like to know exactly what was meant by "a specialized mission having a permanent character".

30. Mr. AGO said that he himself had been exercised by the problem Mr. Jiménez de Aréchaga had just raised. However, sub-paragraph (*c*) did not deal in any way with the question of missions to international organizations; its primary purpose was to clarify the meaning of article 22, under which the receiving State was required to ensure the special mission's freedom of communication with the government of the sending State, with the permanent diplomatic mission of the sending State to the receiving State and, if need be, with other missions of the sending State. For example, the special mission of a European State to the United States must be able to communicate freely with the permanent mission of the sending State to the United Nations in New York or with a specialized diplomatic mission of that State to the United States.

[3] *Yearbook of the International Law Commission, 1966*, vol. II, document A/6309/Rev.1, part II, following paragraph 38.

[4] Paras. 71-95.

31. Mr. BARTOŠ, Special Rapporteur, said that the provisions of article 22 were particularly important because the severence of diplomatic relations was becoming an increasingly common practice in the modern world. Thus some dozen countries had at present severed their diplomatic relations with the United States of America but maintained their missions to the United Nations in New York. The Drafting Committee had carefully weighed the importance of sub-paragraph (*c*) in the introductory article; in the draft, the expression "diplomatic mission" designated the organs of the sending State in general.

32. Mr. JIMÉNEZ de ARÉCHAGA said he was not entirely convinced that the inclusion of such a definition was warranted in order to take into account the entirely secondary question of freedom of communication between a special mission and a mission to an international organization, especially since its inclusion would have the effect of prejudging, without prior study, the important issues that might arise in connexion with the status of such missions. The Commission might well decide to equate those missions with diplomatic missions in all respects, but it would be rash, to say the least, to take such a decision before Mr. El-Erian's report had been examined, for the relationship between traditional diplomatic law and any special conventions governing the status of the missions might thereby be affected.

33. Referring to the missions described in the third phrase of the sub-paragraph, he asked if any members could give him examples of such missions which were neither special missions nor diplomatic missions.

34. Mr. USHAKOV observed that the article began with the words "for the purposes of the present articles". Sub-paragraph (*c*) was not, therefore, stating a universally valid definition.

35. Mr. BARTOŠ, Special Rapporteur, explained that there were many diplomatic missions having specialized functions and a permanent character—such as missions to the North Atlantic Treaty Organization and industrial co-operation and labour recruitment missions—whose diplomatic character was recognized, even though such missions were generally placed in an annex to the official list of diplomatic missions. Other examples were the missions which the United States had sent to Europe under the Marshall Plan and the missions exchanged by the member States of the European Economic Community.

36. The CHAIRMAN suggested that Mr. Jiménez de Aréchaga's point might to some extent be met if the second phrase of the paragraph was revised to read "a permanent mission to an international organization". In any event, as Mr. Ushakov had pointed out, the definitions were being drawn up solely for the purposes of the articles of the draft convention.

37. Mr. KEARNEY said that, since the problem arose only in connexion with paragraph 1 of article 22 on freedom of communication, Mr. Jiménez de Aréchaga's difficulty might be eliminated by slightly altering the second sentence of that paragraph to read "In communicating with the Government, the diplomatic missions, the consular posts and other missions of the sending State...".

38. Mr. AGO acknowledged that sub-paragraph (*c*) was hardly satisfactory, especially as it followed immediately on sub-paragraph (*b*). He therefore proposed that sub-paragraph (*c*) of the introductory article should be deleted and that the second sentence of article 22, paragraph 1, should be amended as suggested by Mr. Kearney.

39. Mr. BARTOŠ, Special Rapporteur, said that he was firmly opposed to a solution which was tantamount to denying an already established juridical fact, namely, that missions to international organizations and embassies of a specialized character were diplomatic missions. If Mr. Ago's proposal was put to the vote, he himself would not participate in the voting, as he considered that substance and form were so closely interrelated as to be inseparable.

40. Mr. USHAKOV said he shared Mr. Ago's view that it was hardly necessary to define in the introductory article an expression which was used in only one article of the draft. He therefore agreed to the deletion of sub-paragraph (*c*). But, in his opinion, to amend article 22, paragraph 1, as suggested by Mr. Kearney, would give rise to ambiguity. It would be better to leave article 22 as it was and to explain in the commentary to that article how the Commission intended it to be interpreted.

41. The CHAIRMAN reiterated his suggestion that the word "diplomatic" in the second phrase should be changed to "permanent".

42. Mr. AGO said that sub-paragraph (*c*) was not acceptable, for the definition it gave was incompatible with the one given in sub-paragraph (*b*). Although the purpose of sub-paragraph (*c*) was to distinguish the diplomatic mission from the permanent diplomatic mission, defined in the preceding sub-paragraph, it again used the adjective "permanent".

43. Mr. CASTAÑEDA said that not all the diplomatic missions sent to an international organization were permanent missions. One example was a mission sent to the Economic and Social Council. He therefore proposed the following wording: "mission accredited to an international organization".

44. The CHAIRMAN pointed out that the purpose of the definition was to give meaning to article 22, paragraph 1. He doubted whether the phrase in question could be interpreted as anything more than a reference to permanent missions to international organizations.

45. Mr. JIMÉNEZ de ARÉCHAGA said he had no intention of questioning the diplomatic character of such missions, but merely wished to stress the undesirability of prejudging Mr. El-Erian's report in order to meet such a limited need. Mr. Ushakov's point might perhaps be met by using the term "other diplomatic missions" in article 22, paragraph 1.

46. Mr. AGO suggested that sub-paragraph (*c*) should be deleted and that article 22, paragraph 1, should be retained as adopted; all categories of missions would then be covered.

47. Mr. BARTOŠ, Special Rapporteur, said that he was not opposed to deleting sub-paragraph (*c*). He could not, however, in any circumstances agree to its being amended, since that would distort the meaning of the definition, which was based on doctrine.

48. Mr. USHAKOV asked that the significance of the term "diplomatic mission" should be explained in the commentary to article 22.

49. The CHAIRMAN invited the Commission to vote on the retention of sub-paragraph (*c*).

Sub-paragraph (c) *was rejected unanimously by the members participating in the vote.*

50. Mr. BARTOŠ, Special Rapporteur, confirmed that he had not taken part in the vote.

Sub-paragraph (d)

51. Mr. AGO, Acting Chairman of the Drafting Committee, explained that sub-paragraph (*d*) was an almost exact reproduction of article 1, paragraph (*a*), of the Vienna Convention on Consular Relations.

Sub-paragraph (d) *was adopted unanimously.*

Sub-paragraph (e)

52. Mr. AGO, Acting Chairman of the Drafting Committee, said that the definition dealt with a very simple matter which did not call for any explanation.

Sub-paragraph (e) *was adopted unanimously.*

Sub-paragraph (f)

53. Mr. AGO, Acting Chairman of the Drafting Committee, said that that sub-paragraph, like the previous one, presented no problem of interpretation.

Sub-paragraph (f) *was adopted unanimously.*

Sub-paragraphs (g) to (l)

54. Mr. AGO, Acting Chairman of the Drafting Committee, said that sub-paragraphs (*g*) to (*l*) might be considered together, as they were complementary. The definitions they contained followed very closely those of article 1, paragraphs (*b*), (*c*) and (*d*), and (*f*), (*g*) and (*h*), of the Vienna Convention on Diplomatic Relations. Servants came into the category of "private staff".

55. Mr. CASTRÉN pointed out that the word "exclusively" in sub-paragraph (*l*) did not appear in the corresponding provision of the Vienna Convention on Diplomatic Relations.

56. Mr. AGO explained that that word had been used deliberately in order to make it clear that where a person was employed in a dual capacity, being simultaneously on the service staff of a special mission and also on the private staff of a member of the special mission, it was his status as member of the service staff which prevailed.

57. Mr. USHAKOV said that the word "exclusively" appeared in article 1, paragraph (*i*), of the Vienna Convention on Consular Relations.

Sub-paragraphs (g) *to* (l) *were adopted unanimously.*

58. The CHAIRMAN asked members whether they wished to suggest any further expressions for inclusion in the introductory article.

59. Mr. CASTRÉN pointed out that archives were defined in detail in article 1, sub-paragraph (*k*) of the Vienna Convention on Consular Relations and suggested that a similar definition should be included in the introductory article of the draft, since special missions were, generally speaking, more akin to consular posts than to diplomatic missions.

60. Mr. BARTOŠ, Special Rapporteur, thought that, in view of the diversity of special missions, it would be impossible to list the contents of their archives.

61. Mr. AGO said that in his view it was not really necessary to define the archives of special missions. The purpose of the introductory article was to explain the meaning attributed to certain expressions the interpretation of which was necessarily to some extent arbitrary. But the word "archives" could only be defined in the ordinary sense of the term, in which case there seemed to be no reason why a definition of other terms such as "property", "premises" and so forth should not also be included.

62. Mr. NAGENDRA SINGH said that he was inclined to agree with Mr. Ago that it was inadvisable to include a definition of the term "archives".

63. The CHAIRMAN, speaking as a member of the Commission, said that any such definition was liable to be interpreted restrictively.

64. Speaking as Chairman, he said that, if there were no further comments, he would consider that the Commission did not wish to include a definition of "archives".

It was so agreed.

65. Mr. CASTRÉN said that the Special Rapporteur's first proposal for the introductory article[5] had contained definitions of "sending State" and "receiving State". As the meaning of the term "receiving State" had given rise to discussion, the obvious conclusion was that its meaning was implicit in the articles themselves and that there was no longer any need to make the distinction between "third State" and "receiving State".

66. Mr. AGO explained that the Drafting Committee had indeed taken the view that the text of the articles was sufficiently clear to leave no room for confusion on that point and had decided not to define "sending State" and "receiving State", as a definition was always liable to create difficulties of interpretation.

67. The CHAIRMAN said that, if there were no further comments on the introductory article, he would assume that the Commission agreed to adopt that article.

It was so agreed.

ARTICLE 17 *quater* (Status of the Head of State and persons of high rank) [21][6]

68. The CHAIRMAN said that, before inviting the Acting Chairman of the Drafting Committee to introduce the revised text of article 17 *quater* proposed by that

[5] Document A/CN.4/194/Add.2, article 0.

[6] For earlier discussion, see 923rd meeting, paras. 1-37, 924th meeting, paras. 1-47, and 925th meeting, paras. 1-30.

Committee, he wished to remind the Commission of its decision not to create a special category of high-level missions but merely to formulate a general provision dealing with the special status of certain dignitaries.

69. Mr. AGO, Acting Chairman of the Drafting Committee, said that the Committee proposed the following title and text for article 17 *quater:*

"*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 or other persons of high rank, when they take part in a special mission from 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 to them by international law."

70. The whole draft dealt with special missions which, although not high-level missions, were nevertheless important missions having a representative character, and so could be accorded a status and granted privileges and immunities. There was thus no need to deal separately with high-level missions. But if the members of a mission included the Head of State or some other person of high rank, there was a risk of their being granted less than was accorded to them by general international law. The Drafting Committee therefore proposed article 17 *quater*, under which such persons enjoyed, over and above what was provided by the draft articles, the privileges and immunities accorded to them by general international law.

71. Mr. JIMÉNEZ de ARÉCHAGA said that he had misgivings, not about what article 17 *quater* said, but about what it omitted to say. The text now proposed made reference to the facilities, privileges and immunities accorded by international law to Heads of State on an official visit. General international law also accorded certain privileges to the suite of a Head of State and, if no reference were made to those privileges, article 17 *quater* might be liable to misinterpretation.

72. Mr. AGO, Acting Chairman of the Drafting Committee, explained that the Committee had pondered the problem raised by Mr. Jiménez de Aréchaga and had come to the conclusion that the privileges and immunities accorded in the draft convention were quite sufficient and in conformity with what was accorded to members of the suite by general international law. Cases in which the suite of a Head of State included persons of a very high rank were covered by paragraph 2 of the article.

73. Mr. USHAKOV said that, under the terms of the preamble, the rules of customary international law remained in force, and that was sufficient.

74. In reply to a question by Mr. REUTER, Mr. AGO said that it would be difficult to combine the two paragraphs of article 17 *quater* into a single paragraph. As the Special Rapporteur had explained to the members of the Drafting Committee, international law accorded exceptional privileges to the Head of State on an official visit, but not to other persons of high rank in similar circumstances.

75. Mr. JIMÉNEZ de ARÉCHAGA said he was quite satisfied by the explanations given by Mr. Ago and Mr. Ushakov. He noted, in particular, that the provisions of article 17 *quater* would not affect existing international law and that the provisions of paragraph 2 also covered the suite of a Head of State.

Article 17 quater *was adopted unanimously.*

ARTICLE 17 *bis* (Derogation by mutual agreement from the provisions of part II) [—][7]

76. The CHAIRMAN invited the Commission to give its views on the Drafting Committee's recommendation that article 17 *bis*, which had originated in a proposal by the Government of Pakistan, should be deleted.

77. Mr. AGO, Acting Chairman of the Drafting Committee, explained that the Drafting Committee proposed the deletion of article 17 *bis*, which was unnecessary because the draft did not rule out the possibility of the conclusion of special agreements.

78. Mr. BARTOŠ, Special Rapporteur, pointed out that the right of derogation was adequately safeguarded by the terms of paragraphs 2 (*b*) and (*c*) of article 40 *bis*.

79. The CHAIRMAN said that, if there were no further comments, he would assume that the Commission agreed to adopt the Drafting Committee's proposal to drop article 17 *bis*.

The proposal was adopted unanimously.

ARTICLE 17 *ter* (Difference between categories of special missions) [—][8]

80. The CHAIRMAN said that the Drafting Committee now proposed to drop article 17 *ter* because it had been rendered superfluous by other decisions taken by the Commission.

The proposal to delete article 17 ter *was adopted unanimously.*

ARTICLE "X" (Legal status of the provisions) [—]

81. The CHAIRMAN said that the Drafting Committee had found that article "X" (A/CN.4/194/Add.2) was not consistent with the general economy of the draft articles adopted by the Commission; it therefore proposed its deletion.

The proposal to delete article "X" was adopted unanimously.

ARTICLE "Y" (Relationship between the present articles and other international agreements) [—]

82. Mr. AGO, Acting Chairman of the Drafting Committee, said the Drafting Committee considered that,

[7] For earlier discussion of articles 17 *bis* and 17 *ter*, see 925th meeting, paras. 31-53.

[8] See footnote 7.

with the Commission's adoption of the draft convention on the law of treaties, article "Y" (A/CN.4/194/Add.2) was no longer needed, and accordingly proposed its deletion.

83. Mr. EUSTATHIADES said that he saw no conclusive reason for deleting article "Y". It was conceivable that the parties to the convention on special missions might not be parties to the convention on the law of treaties. Moreover, paragraph 2 contained a provision which would be of assistance in applying the provisions of the draft. He was therefore reluctant to accept the proposal that article "Y" should be deleted.

84. Mr. CASTRÉN said he thought it would be preferable to delete article "Y", not merely because paragraph 1 was too restrictive, but also because the provision in paragraph 2 conflicted with article 40 *bis*.

85. Mr. USTOR said he also supported the proposal to delete article "Y". Paragraph 1 of that article was innocuous but would not serve any very useful purpose because there were very few agreements between States on the subject of special missions. Paragraph 2, on the other hand, was in contradiction with article 40 *bis*. Furthermore, difficulties had arisen with regard to the application of article 73, paragraph 2, of the 1963 Vienna Convention on Consular Relations on which paragraph 2 of article "Y" was based; in particular, in the event of an *inter se* agreement being concluded between two States parties to the 1963 Vienna Convention in contravention of article 73, paragraph 2, of that Convention, the actual rights of other parties vis-à-vis those two States were not entirely clear.

86. For those reasons, he believed that the inclusion of an article on the lines of article "Y" would create more problems than it would solve.

87. The CHAIRMAN said the essential objection to article "Y" was that the provisions of its paragraph 2 were too restrictive and hence inconsistent with those of article 40 *bis* on the right of derogation by agreement.

The Drafting Committee's proposal to delete article "Y" was adopted unanimously.

ARTICLE 40 (Obligation to respect the laws and regulations of the receiving State) [48][9]

88. Mr. AGO, Acting Chairman of the Drafting Committee, said that the Drafting Committee proposed the following text for article 40:

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

"2. The premises of the special mission must not be used in any manner incompatible with the functions of the special mission."

89. Mr. JIMÉNEZ de ARÉCHAGA said that he had not participated in the earlier discussions on article 40 and therefore wished to know whether the departure in paragraph 2 from the language used in the corresponding paragraph 3 of article 41 of the Vienna Convention on Diplomatic Relations was deliberate. In fact, in the text now before the Commission, the important concluding portion of the paragraph had been omitted. In the text of the Vienna Convention, the words "the functions of the mission" were qualified by the concluding phrase "as laid down in the present Convention or by other rules of general international law or by any special agreements in force between the sending and the receiving State".

90. The Commission had added that concluding phrase to the text in 1958 during its examination of the draft articles on diplomatic intercourse and immunities in order to reserve the question of the right of asylum in the premises of diplomatic missions.[10] That was a question to which great importance was attached by its Latin American members because of the existence in their part of the world of international agreements on the subject of diplomatic asylum.

91. Mr. AGO said that article 3 of the Vienna Convention on Diplomatic Relations laid down the functions of a diplomatic mission. That was why article 41, paragraph 3, of that Convention specified that the reference was to the functions of the mission "as laid down in the present Convention". As the Commission had recognized that it was impossible to define the functions of a special mission, the Drafting Committee had thought it preferable not to add the words "as laid down in the present Convention".

92. Mr. JIMÉNEZ de ARÉCHAGA said that the technical reasons advanced by Mr. Ago were not sufficient grounds for omitting the important passage he had just quoted. That omission could be construed as a denial of the validity of the existing rules of general international law in the Latin American region.

93. Moreover, he saw no harm in referring to general international law, since the preamble to the draft articles would contain a reference to the rules of international law and since the functions of special missions were governed by such rules.

94. He therefore proposed that the words he had quoted from article 41, paragraph 3 of the 1961 Vienna Convention should be added at the end of paragraph 2. Unless that proposal were adopted, he would feel obliged to reconsider his position with regard not only to article 40 but also to the whole of the draft on special missions. The matter was one of great importance and the omission of the passage in question could be construed as a decision against the right of diplomatic asylum.

95. Mr. KEARNEY explained that the Drafting Committee had adopted the shorter text for paragraph 2 solely in the interests of good drafting; there had been no intention of prejudging the question of the right of asylum. Thus, although he thought it unlikely that the question of asylum in the premises of special missions would arise, he was prepared to support the proposal by Mr. Jiménez de Aréchaga in order to meet the difficulty he had raised.

[9] For earlier discussion, see 910th meeting, paras. 72-81.

[10] *Yearbook of the International Law Commission, 1958*, vol. II, p. 104, paragraph (4) of commentary to article 40.

96. Mr. AGO said that while a special mission could grant the right of asylum, if the need arose, under the terms of a special agreement, the granting of the right of asylum could scarcely be regarded as one of the functions of a special mission.

97. Mr. JIMÉNEZ de ARÉCHAGA said that there was no intention of imposing the right of diplomatic asylum, which was an institution peculiar to the Latin American States. On the other hand, it was essential not to exclude that right and that would be the effect of omitting the concluding proviso which he had proposed. That proviso had originally been introduced in order to take account of the final sentence of paragraph 1: "They also have a duty not to interfere in the internal affairs of that State", a sentence which would be construed as excluding the right of diplomatic asylum.

98. The CHAIRMAN invited the Acting Chairman of the Drafting Committee and Mr. Jiménez de Aréchaga to consult together and propose a mutually satisfactory text for paragraph 2.

99. Mr. AGO, Acting Chairman of the Drafting Committee, proposed that article 40, paragraph 2, should be drafted to read as follows:

> "The premises of the special mission shall not be used in any manner incompatible with the functions of the special mission, as envisaged in the present convention, in the rules of general international law or in any special agreements in force between the sending and the receiving State".

100. Mr. EUSTATHIADES said that he did not find the new text very satisfactory and it would perhaps be necessary to give some explanation in the commentary. However, if that text met Mr. Jiménez de Aréchaga's wishes, he was prepared to accept it.

101. Mr. JIMÉNEZ de ARÉCHAGA said that he was fully satisfied with the text read out by Mr. Ago. The Latin American treaties on the subject of asylum provided for the right of asylum in any premises which enjoyed diplomatic immunities; by virtue of the provisions of those treaties, the right of asylum had been applied to special missions.

102. Mr. EUSTATHIADES, referring to paragraph 1, said that he preferred the English term "belonging" to the expression "*qui entrent dans la composition*" used in the French text.

103. Mr. REUTER asked whether the words "all persons belonging to special missions" used in paragraph 1 meant "the members of the special mission" and "the private staff", the definition of which was given in the introductory article. If so, it would probably be better to use those two terms.

104. Mr. BARTOŠ, Special Rapporteur, replied that those two terms could not be used, as the members of the family of members of the special mission also enjoyed those privileges and immunities.

105. The CHAIRMAN put to the vote article 40 with the following amendments:

106. Firstly, the words "all persons belonging to special missions and enjoying these privileges and immunities" would be replaced by "all persons enjoying these privileges and immunities under the present articles". That change would meet the point raised by Mr. Eustathiades and Mr. Bartoš.

107. Secondly, the full stop at the end of paragraph 2 would be replaced by a comma and the following words would be added: "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 State".

Article 40, as amended, was adopted unanimously.

The meeting rose at 5.40 p.m.

938th MEETING

Wednesday, 12 July 1967 at 10.10 a.m.

Chairman: Sir Humphrey WALDOCK

Present: Mr. Ago, Mr. Bartoš, Mr. Castrén, Mr. Ignacio-Pinto, Mr. Jiménez de Aréchaga, Mr. Kearney, Mr. Nagendra Singh, Mr. Reuter, Mr. Tabibi, Mr. Tammes, Mr. Ushakov, Mr. Ustor, Mr. Yasseen.

Special Missions

(A/CN.4/193 and Addenda; A/CN.4/194 and Addenda)

(continued)

[Item 1 of the agenda]

1. The CHAIRMAN, said that, before inviting the Commission to consider the draft preamble which the Drafting Committee proposed for annexation to the draft articles, he wished to announce that a telegram had been received from Mr. Ruda expressing his regret at having been prevented from attending the present session of the Commission because he was representing his country in the Security Council. A letter had previously been received from Mr. Rosenne, expressing his regret at being prevented by his official duties from returning to Geneva to participate in the Commission's work.

Draft preamble proposed by the Drafting Committee

2. Mr. AGO, Acting Chairman of the Drafting Committee, said that the Committee proposed the following text for the preamble to a convention on special missions:

"*The States parties to this Convention.*

"*Recalling* that the need of according a particular status to special missions of States has always been recognized,

"*Bearing in mind* the Purposes and Principles of the Charter of the United Nations relating to 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:"

3. The Committee had worked on the basis of a first draft submitted by the Special Rapporteur (A/CN.4/194/Add.2). The most important parts of the text proposed by the Committee were the third, and more particularly the fourth, paragraphs. The text was to be annexed to the draft convention which the Commission was to submit to the General Assembly.

4. Mr. BARTOŠ, Special Rapporteur, said that he had not originally been in favour of the Commission's placing a preamble at the beginning of the draft, which was indeed contrary to its practice. But at the eighteenth session several members had expressed the view that a preamble was important, as it sometimes contained certain legal elements; the majority of the Commission had concurred in that view and had instructed the Special Rapporteur to draft a preamble.[1]

5. The text proposed by the Drafting Committee was modelled on the preamble to the Vienna Convention on Diplomatic Relations and especially on the second, fifth and sixth paragraphs of that Convention.

6. Mr. YASSEEN said that, despite the procedure adopted by the Commission in the past, it might usefully adopt the practice of preparing a preamble as well as draft articles.

7. He accepted the proposed text, which was well-balanced, but pointed out that, in the fifth paragraph, the expression "*les buts*" in the French text should be in the singular.

8. Mr. USHAKOV said that another error had crept into the French text of the same phrase: the words "*et immunités*" should be inserted after the word "*privilèges*".

9. The CHAIRMAN suggested that the English text of the paragraphs which were intended to be identical with certain paragraphs of the preambles to the two Vienna Conventions should reproduce the exact wording used in those two Conventions. For example, in the second paragraph, the opening words "Bearing in mind" should be replaced by "Having in mind" and the words "relating to" by "concerning".

10. If there were no further comments, he would consider that the Commission approved the text of the proposed preamble on the understanding that the Secretariat would check the English text and bring it into line with that of the two Vienna Conventions.

On that understanding, the draft preamble was adopted unanimously.

11. The CHAIRMAN invited the Commission to vote on the proposal by the Drafting Committee that the draft preamble should not be placed at the beginning of the draft articles, but should be annexed to them.

The Drafting Committee's proposal was adopted unanimously.

TITLES OF SECTIONS AND ORDER OF ARTICLES PROPOSED BY THE DRAFTING COMMITTEE

12. Mr. AGO, Acting Chairman of the Drafting Committee, said that the Committee proposed the following rearrangement of the order of the articles:

Part I

Special Missions in General

Introductory article. Use of terms.
Article 1. Sending of special missions
Article 2. Field of activity of a special mission
Article 5. Sending of the same special mission to two or more States.
Article 5 *bis*. Sending of a joint special mission by two or more States
Article 5 *ter*. Sending of special missions by two or more States in order to deal with a question of common interest.
Article 1 *bis*. Non-existence of diplomatic or consular relations and non-recognition
Article 3. Appointment of the members of the special mission.
Article 6. Composition of the special mission
Article 14. Nationality of the members of the special mission
Article 8. Notification
Article 4. Persons declared *non grata* or not acceptable
Article 11. Commencement of the functions of a special mission
Article 7. Authority to act on behalf of the special mission
Article 41. Organ of the receiving State with which official business is conducted
Article 9. Rules concerning precedence
Article 13. Seat of the special mission
Article 16. Activities of special missions in the territory of a third State
Article 15. Right of special missions to use the flag and emblem of the sending State
Article 12. End of the functions of a special mission

[1] *Yearbook of the International Law Commission, 1966*, vol. II, document A/6309/Rev.1, part II, para. 67.

Part II

Facilities, Privileges and Immunities

Article 17 *quater*. Status of the Head of State and persons of high rank
Article 17. General facilities
Article 18. Accommodation of the special mission and its members
Article 19. Inviolability of the premises
Article 20. Inviolability of archives and documents
Article 21. Freedom of movement
Article 22. Freedom of communication
Article 23. Exemption of the premises of the special mission from taxation
Article 24. Personal inviolability
Article 25. Inviolability of the private accommodation
Article 26. Immunity from jurisdiction
Article 28. Exemption from social security legislation
Article 29. Exemption from dues and taxes
Article 30. Exemption from personal services and contributions
Article 31. Exemption from customs duties and inspection
Article 32. Administrative and technical staff
Article 33. Members of the service staff
Article 34. Private staff
Article 35. Members of the family
Article 27. Waiver of immunity
Article 27 *bis*. Settlement of civil claims
Article 36. Nationals of the receiving State and persons permanently resident in the receiving State
Article 39. Transit through the territory of a third State
Article 37. Duration of privileges and immunities
Article 38. Property of a member of the special mission or of a member of his family in the event of death
Article 43. Right to leave the territory of the receiving State
Article 44. Consequences of the cessation of the functions of the special mission

Part III

General Clauses

Article 40. Obligation to respect the laws and regulations of the receiving State
Article 42. Professional activity
Article 40 *bis*. Non-discrimination

13. The plenipotentiary conference which adopted the convention would certainly add final clauses: they might either form a separate part IV or be added to part III, which would then be entitled "General and final clauses".

14. Mr. BARTOŠ, Special Rapporteur, said that final clauses were always drafted at the final stage by the conference secretariat, which ensured that such clauses were uniform in all international conventions.

15. The CHAIRMAN invited the Commission first to consider the titles of the three parts of the draft.

16. Mr. REUTER suggested that the word "provisions" should be substituted for the word "clauses" in the title of part III.

17. Mr. AGO said that he would prefer the title "General clauses" to be retained so that the conference could add the final clauses in part III; the term "clauses" was traditionally used in the case of final clauses.

18. Mr. BARTOŠ, Special Rapporteur, supported Mr. Reuter's suggestion. It would be preferable for the final clauses to be placed in a part IV left blank by the Commission.

19. Mr. AGO observed that the title "General provisions" would not be very satisfactory for part III, since the true general provisions concerning special missions were in part I. The term "clauses", which was more limited, was appropriate to the few articles of secondary importance which were brought together in part III.

20. Mr. YASSEEN said that, in his view, the three articles in part III stated general rules which might very well be placed in part I.

21. The CHAIRMAN, speaking as a member of the Commission, said that the difficulty arose largely from the title proposed for part I, in which the word "general" was used. That part dealt in fact with the sending of special missions and their activities. Part III contained a number of provisions which, in the draft on the law of treaties, had been included under the heading of "Miscellaneous provisions."

22. Mr AGO suggested that part I should be entitled: "Sending and functions of special missions". Another solution would be to include in part I the three articles which the Drafting Committee had proposed should be placed in part III.

23. Mr. BARTOŠ, Special Rapporteur, said that the latter suggestion could, if necessary, be applied to articles 40 *bis* and 42, but not to article 40, since the rule stating the obligation to respect the laws and regulations of the receiving State also applied to all the rules in part II.

24. Mr. IGNACIO-PINTO suggested that part I might be entitled simply: "Special missions", as the phrase "in general" gave the impression that the draft went on to deal with special missions in particular.

25. Mr. REUTER supported Mr. Ago's first suggestion concerning the title of part I. The term "sending" was well chosen, as it reappeared in the titles of several articles in that part. The term "functions" was also suitable. An alternative wording might be: "Sending and activities of special missions".

26. Mr. YASSEEN proposed the title "Sending and conduct of special missions".

27. The CHAIRMAN pointed out that chapter I, section I of the Vienna Convention on Consular Relations was entitled "Establishment and conduct of consular relations".

28. Mr. USTOR said that article 40 (Obligation to respect the laws and regulations of the receiving State) and article 42 (Professional activity) corresponded to articles 55 and 57 of the Vienna Convention on Consular Rela-

tions, to be found in chapter II, section II of that Convention, which dealt with facilities, privileges and immunities. It might be possible to adopt that same system in the present draft.

29. The CHAIRMAN said that, if there were no further comments, he would put to the vote the titles proposed for the three parts, namely, part I: "Sending and conduct of special missions"; part II: "Facilities, privileges and immunities" and part III: "General provisions".

The proposed titles were adopted unanimously.

30. The CHAIRMAN said that, if there were no comments, he would consider that the Commission approved the order proposed by the Drafting Committee for the articles in part I.

It was so agreed.

31. The CHAIRMAN invited the Commission to consider the order proposed by the Drafting Committee for the articles in part II.

32. Mr. AGO said that he would prefer article 23 (Exemption of the premises of the special mission from taxation) to be placed later in the text, so as to avoid interrupting the series of articles concerning freedom of movement and communication, personal inviolability and inviolability of the private accommodation. That article would be better placed among the articles concerning exemption from dues and taxes, customs duties and inspection, and so forth.

33. Mr. BARTOŠ, Special Rapporteur, suggested that article 23 should rather be placed after 19 (Inviolability of the premises) or after article 18 (Accommodation of the special mission and its members). The three articles concerning the premises would then be grouped together. In any event, it would be better not to place article 23 with the articles laying down the exemptions granted to persons.

34. Mr. CASTRÉN said that if article 23 was moved, he would prefer article 19 (Inviolability of the premises) not to be separated from article 20 (Inviolability of archives and documents).

35. Mr. USHAKOV observed that in the Vienna Convention on Diplomatic Relations, articles 21, 22 and 23 formed a series dealing with the premises of the mission and the accommodation of its members, the inviolability of the premises and the exemption of the premises from taxation. That model should be followed; in other words, article 23 should be placed after article 19, as the Special Rapporteur had proposed.

36. Mr. AGO said that he preferred the Special Rapporteur's second suggestion, namely, that article 23 should be placed after article 18.

37. The CHAIRMAN said that, if there were no further comments, he would consider that the Commission had decided to place article 23 after article 18.

It was so agreed.

38. Mr. JIMÉNEZ de ARÉCHAGA proposed that article 27 (Waiver of immunity) and article 27 *bis* (Settlement of civil claims) should be moved up to come immediately after article 26 (Immunity from jurisdiction). That order would be more logical than the one proposed by the Drafting Committee and would facilitate a correct interpretation of the scope of articles 27 and 27 *bis*.

39. Mr. CASTRÉN pointed out that the question raised by Mr. Jiménez de Aréchaga had already been discussed; the Commission had concluded that the article concerning waiver of immunity (article 27) should follow the articles concerning the immunities granted to the different categories of staff.

40. Mr. JIMÉNEZ de ARÉCHAGA said it would be dangerous to separate the article on waiver of immunity (article 27) from the article on immunity from jurisdiction (article 26) to which it was directly related. Any such separation might create the erroneous impression that waiver of immunity could apply to other privileges as well. With regard to article 27 *bis* on the settlement of civil claims, that article related exclusively to the question of immunity from civil jurisdiction; it was therefore essential that it should come immediately after articles 26 and 27.

41. Mr. BARTOŠ, Special Rapporteur, proposed that articles 27 and 27 *bis* should come after article 36 (Nationals of the receiving State and persons permanently resident in the receiving State), since the State might also either waive immunity or endeavour to bring about a just settlement of claims in the case of the persons referred to in that article.

42. Mr. USHAKOV said he shared the view of Mr. Jiménez de Aréchaga. In the Vienna Convention on Diplomatic Relations, the article on waiver of immunity (article 32), which followed the article on immunity from jurisdiction, was placed before the provision relating to members of the family, members of the administrative and technical staff, members of the service staff and private servants (article 37). The same system should be adopted in the present draft.

43. Mr. AGO said he did not agree. In his opinion, it was the titles of the articles which were misleading. Article 26 dealt solely with immunity from jurisdiction for representatives and members of the diplomatic staff, whereas articles 32, 33, 34 and 35 in fact dealt with the same problem in the case of the categories of persons covered by those articles.

44. The CHAIRMAN said it was quite logical to propose an arrangement different from that adopted in the 1961 Vienna Convention. The waiver of immunity dealt with in article 27 related not only to article 26, dealing with the immunity from jurisdiction of representatives and members of the diplomatic staff, but also to a number of other articles, such as article 32 (Administrative and technical staff), article 33 (Members of the service staff), article 34 (Private staff) and article 35 (Members of the family).

45. Mr. JIMÉNEZ de ARÉCHAGA said that the important point was the link between the subject-matter of articles 27 and 27 *bis* and that of article 26, not the

secondary question of the persons who enjoyed privileges and immunities under articles other than article 26, which was the basic article.

46. Mr. BARTOŠ, Special Rapporteur, observed that article 27 related not merely to immunity in respect of civil proceedings but to immunities in general, whereas article 27 *bis* dealt only with civil claims.

47. Mr. USHAKOV said he still did not see why the Commission should depart from the order followed in the Vienna Convention on Diplomatic Relations.

48. The CHAIRMAN said that both the proposals made with regard to the placing of articles 27 and 27 *bis* produced the same legal result, although the order adopted in the 1961 Vienna Convention arrived at that result more obliquely.

49. Mr. JIMÉNEZ de ARÉCHAGA said he was still firmly convinced that it would be misleading to separate articles 27 and 27 *bis* from article 26, which was the basic provision on immunity from jurisdiction. The proposal to place articles 27 and 27 *bis* after articles 32, 33, 34, 35 and 36 would not improve the presentation of the draft. The arrangement of the corresponding articles in the 1961 Vienna Convention was infinitely more logical, because it grouped together articles which had a substantive link between them. The present proposal would have the effect of separating articles which were linked in substance in order to take account of other links of a secondary character.

50. The CHAIRMAN pointed out that there was no danger of misunderstanding with regard to the scope of article 27, because the text of that article[2] specified that the sending State could waive "the immunity from jurisdiction". It was therefore perfectly clear that the possibility of waiver for which provision was made in article 27 related solely to immunity from jurisdiction and not to other privileges.

51. He invited the Commission to vote on the Drafting Committee's proposal, as amended by the Special Rapporteur, to place articles 27 and 27 *bis* immediately after articles 28 to 36.

That proposal was adopted by 9 votes to 1, with 3 abstentions.

52. The CHAIRMAN asked whether members of the Commission had any further comments on the order of the articles in part II.

53. Mr. AGO said it would be more logical to group together articles 19 and 20 (Inviolability of the premises and Inviolability of archives and documents), on the one hand, and articles 24 and 25 (Personal inviolability and Inviolability of the private accommodation), on the other.

54. Mr. BARTOŠ, Special Rapporteur, said he did not agree. The inviolability of the premises, of archives and documents, as well as freedom of movement and communication concerned the conduct of the special mission, whereas personal inviolability and inviolability of the private accommodation were part of the personal immunities.

55. Mr. AGO said that he would not press his suggestion.

56. The CHAIRMAN said that if there were no further comments he would consider that the Commission approved the order proposed by the Drafting Committee for the articles in parts II and III, subject to the amendments adopted in the course of the discussion on part II.

It was so agreed.

Draft Articles proposed by the Drafting Committee

(resumed from the previous meeting)

Article 41 (Organ of the receiving State with which official business is conducted) [15][3]

57. Mr. AGO, Acting Chairman of the Drafting Committee, pointed out that the only change related to the last phrase, which now read: "or with such other organ of the receiving State as may be agreed".

Article 41 was adopted unanimously.

Article 42 (Professional activity) [49][4]

58. Mr. AGO, Acting Chairman of the Drafting Committee, explained that the Drafting Committee had decided against the addition of a clause stipulating that the members of a special mission might practice certain professional or other activities with the special permission of the receiving State, since if that question were raised, it would normally be dealt with in the special agreement between the two States. The general rule was therefore sufficient.

Article 42 was adopted unanimously.

Article 44 (Consequences of the cessation of the functions of the special mission) [47][5]

59. Mr. AGO, Acting Chairman of the Drafting Committee, said that the Committee proposed the following title and text for article 44:

"*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."

[2] See 933rd meeting, para. 14.

[3] For earlier discussion, see 910th meeting, paras. 105-112.

[4] For earlier discussion, see 910th meeting, paras. 82-104.

[5] For earlier discussion, see 912th meeting, paras. 1-44.

60. The wording of the article had given rise to some problems because the consequences of the cessation of the functions of a special mission were not the same as those of the cessation of the functions of a permanent diplomatic mission. The Drafting Committee had taken into account Mr. Kearney's observation regarding the sending State's obligation to withdraw its property and archives within a reasonable time so that the receiving State should not be committed beyond a certain period.

61. The CHAIRMAN said that he was not altogether satisfied with the term "allocated", which was used in paragraph 1 to render the French "*affectés*" in connexion with the premises of the special mission.

62. Mr. KEARNEY said that the Drafting Committee had experienced some difficulty with regard to the choice of the appropriate English term. The term "allocated" had the disadvantage of having an official connotation that was not altogether suitable for most of the premises to which article 44 would relate. The Committee had considered the possibility of using the word "assigned" but that word had a similar connotation and was even stronger than "allocated".

63. Mr. REUTER suggested that, for ease of translation into English, the French text should describe the premises as being "*à la disposition de la mission*" rather than "*affectés*". However, the word "*affectés*" better conveyed the idea that the premises were definitely recognized as those of the special mission.

64. Mr. AGO agreed that "*affectés*" was a better term to express the rule that the premises remained those of the special mission after its departure, as long as the property and archives had not been withdrawn.

65. The CHAIRMAN noted that, in the light of the explanations given in the course of the discussion, there was no need to modify the Drafting Committee's text for article 44.

Article 44 was adopted unanimously.

Miscellaneous Drafting Points

66. Mr. JIMÉNEZ de ARÉCHAGA said that, in concording the Spanish text of the articles with the originals, it had been noted that there were some discrepancies between the English and French texts or that the terms used had varied from one article to another. Thus, in article 26, paragraph 4,[6] the word "residence", which corresponded to the wording of the Vienna Convention, had been used, although the Commission had decided to avoid that word in article 25 where reference was made to "accommodation". The English and French versions of the title of article 30 did not correspond, for the English title read "Exemption from personal services and contributions", and the French "*Exemption des prestations personnelles*". The French text of article 31, paragraph 1,[7] was clumsy because of the repetition of the word "*autres*". Finally, there was a discrepancy between the use of the singular and the plural in the phrase denoting the members of the family in article 31, paragraph 1, and article 39, paragraph 2.[8]

67. Mr. AGO, Acting Chairman of the Drafting Committee, said that in the French text of article 31, paragraph 1, the word "*autres*" preceding "*redevances*" should be deleted so that the phrase would read: "*taxes et redevances connexes autres que*".

68. In sub-paragraph (*b*) of that paragraph the expression "*les familles*" should be in the singular, and the whole phrase should read: "*des membres de leur famille qui les accompagnent*".

69. The CHAIRMAN suggested that the word "accommodation" should be used in article 26 to bring it into line with article 25.

It was so agreed.

70. Mr. AGO suggested that in the French text the last sentence of paragraph 1 of article 6 (Composition of the special mission)[9] should be replaced by the following: "*Elle peut comprendre en outre un personnel diplomatique, un personnel administratif et technique ainsi qu'un personnel de service*", for the wording as it stood gave the impression that the diplomatic staff and the administrative and technical staff made up a single category.

71. The CHAIRMAN said that the Special Rapporteur and the Secretariat would no doubt find other small drafting points which would have to be adjusted in the final text.

72. On the occasion of the completion of the Commission's substantive work on special missions, he wished to congratulate the Special Rapporteur on the successful accomplishment of his arduous task. It was the enthusiasm, hard work and outstanding legal gifts of the Special Rapporteur which had made that happy situation possible.

73. Mr. BARTOŠ, Special Rapporteur, said he was deeply grateful to all the members of the Commission, and especially to Mr. Ago, for their collaboration, advice and interest, which had enabled him to complete his task. He expressed his thanks to the Chairman for the wisdom and intelligence with which he had conducted the debates. He would also like to thank the members of the Secretariat, the interpreters and the précis-writers; he had greatly appreciated the professional conscientiousness and care with which they had faithfully rendered the views which had been expressed.

Organization of Future Work

(A/CN.4/195, 196; A/CN.4/L.119)

(resumed from the 929th meeting)

[Item 6 of the agenda]

74. The CHAIRMAN, summing up the position with regard to the Commission's future work, said that, after considering item 3 of its agenda concerning State respon-

[6] For text, see 933rd meeting, para. 2.

[7] For text, see 933rd meeting, para. 78.

[8] For text, see 931st meeting, para. 7.

[9] For text, see 931st meeting, para. 124.

sibility, the Commission had confirmed Mr. Ago in the office of Special Rapporteur on that topic and had reaffirmed in general terms the instructions given to him as Special Rapporteur in 1963.[10] It had also noted that Mr. Ago would submit a substantive report on the topic to the Commission at its twenty-first session in 1969.

75. Mr. El-Erian had submitted his second report on relations between States and inter-governmental organizations (A/CN.4/195). He had indicated in a letter that the first half of his set of draft articles was already completed[11] and that he would be in a position to submit the second half in time for the Commission's twentieth session.

76. During the discussion of its future work at the 928th and 929th meetings, the Commission had generally shared the view of its officers that priority should be given to the topic of State succession. It had been proposed that he himself should act as Special Rapporteur for State succession in respect of treaties and that Mr. Bedjaoui should be invited to act as Special Rapporteur on State succession in respect of rights and duties resulting from sources other than treaties. He had agreed to undertake the work, and had received a letter from Mr. Bedjaoui also accepting the office, but suggesting that a general debate might be held on the broad topic assigned to him, to see whether one Special Rapporteur would suffice and to obtain general directives from the Commission on the way in which the topic should be handled.

77. He invited the Commission to approve that general outline for the programme of its twentieth session.

The general programme was approved unanimously.

78. The CHAIRMAN said that a useful discussion had been held on new topics which the Commission might consider. Thus, Mr. Tammes had suggested the topic of unilateral acts,[12] which was a vast subject, comparable in interest and importance to those which the Commission was already considering. Accordingly, all that the Commission could do for the time being was to note the suggestion. Mr. Tammes had also suggested that the Commission might offer to undertake an investigation of institutional procedures, such as fact-finding;[13] but that subject, like the topic of international rivers, was too extensive to be undertaken at the same time as the Commission's current work.

79. On the other hand, the topic of the most-favoured-nation clause, mentioned by Mr. Jiménez de Aréchaga,[14] was more limited in scope and might well be taken up during the fourth or fifth year of the current term of office of the Commission's members. The subject had been raised in connexion with the law of treaties, but had not been discussed in relation to the effect of treaties on third States because it had been thought that such a course might lead to complications. The Commission's budget did not, however, preclude the appointment of another Special Rapporteur, and it would be useful to have such a limited topic in reserve to discuss at the convenient points during the Commission's deliberations.

80. Mr. JIMÉNEZ de ARÉCHAGA pointed out that another reason for dealing with the topic during the current term of office of the Commission's members was that the United Nations was undertaking a study of the law of international trade: the Special Rapporteur might take advantage of the conclusions of that study in preparing his draft.

81. Mr. BARTOŠ said that the Sixth Committee of the General Assembly had criticized the International Law Commission for failing to include in its programme the questions to which that Committee gave priority. The Commission had, for instance, declined to take up the topic of international trade law, the study of which had been recommended by the General Assembly, because it had thought that it did not have the necessary time. It could hardly now include new topics on its programme. Furthermore, the General Assembly had never proposed the topic of international rivers for study, since the developing countries regarded the formulation of rules for navigation on such waterways as likely to infringe their sovereignty. The Commission should not reject topics recommended by the General Assembly and accept topics which had been rejected by it. It already had too many items on its agenda; if it nevertheless added yet another item, it would be preferable to choose unilateral acts, which bore some relation to the law of treaties.

82. Mr. TABIBI said that in his view the Commission should not take any hasty decision on new topics for its future work. It was essential to study topics which corresponded to the modern requirements of the world at large and of various regions, and also to comply with the instructions of the General Assembly. Since the programme for the forthcoming session had already been established, it might be wise to set up a subsidiary body of the Commission to study the wishes of the General Assembly, the topics which had been given some consideration and then left in abeyance, and perhaps even the possibility of altering the Commission's Statute. Another important point which such a body should examine was duplication of work: subjects which should properly be dealt with by the Commission were gradually being encroached upon by other United Nations bodies.

83. Mr. YASSEEN agreed that the Commission should proceed very cautiously and, above all, should take proposals by the General Assembly into account before placing any fresh topic on its agenda. In that connexion, he recalled that when the Sixth Committee had adopted the resolution recommending the study of the topic of the right of asylum,[15] several delegations had wished to insert in the operative part a paragraph requesting that priority should be given to the topic. The Chairman of the International Law Commission had then pointed out that such an addition was not necessary, as the Commission took into account any wish expressed by the Sixth

[10] See 935th meeting, para. 14.

[11] Document A/CN.4/195/Add.1.

[12] See 928th meeting, para. 6.

[13] *Ibid.*, para. 10.

[14] See 929th meeting, para. 79.

[15] General Assembly resolution 1400 (XIV).

Committee of the General Assembly.[16] The Commission had not, however, so far tackled that topic.

84. Mr. AGO thought that the Commission should begin by drawing a distinction between very broad topics and topics of more limited scope. With regard to the former, the Commission had already placed on its agenda succession of States and State responsibility. As the term of office of members of the Commission expired in four years' time, it was useless to contemplate studying another topic of that magnitude; it was questionable whether the Commission would be able to complete the codification of those two topics. On the other hand, it was desirable that the Commission should always have on its agenda more limited topics which it could take up, if necessary, in the absence of the special rapporteur responsible for a broader topic.

85. He himself feared that a codification of the question of the right of asylum might disturb the balance which seemed to have established itself in practice. As to the question of historic bays, also proposed by the General Assembly, its codification would perhaps complete the law of the sea, but it was not an urgent problem.

86. On the other hand, the question of the most-favoured-nation clause was of great importance and was connected with international trade, the study of which had been recommended by the General Assembly. Indeed, the Commission had touched on that topic in preparing the draft convention on the law of treaties, and had expressed the view that a special study should be devoted to it. It would therefore be logical to place it on the agenda.

87. Mr. NAGENDRA SINGH also thought that the Commission should complete its work on the topics already before it before adopting new ones. Perhaps it was because the Commission took so long to complete its work that the General Assembly was tempted to entrust topics to other bodies.

88. The CHAIRMAN pointed out that there was no question of including any more major topics in the Commission's programme for the time being. Indeed, work on relations between States and inter-governmental organizations, State succession and State responsibility was likely to take up the remainder of the term of office of the Commission's members and possibly another five years. It was useful, however, to have in reserve a more limited topic which could be discussed in the intervals when the Special Rapporteur and the Drafting Committee were preparing texts on a major topic. The subject of the most-favoured-nation clause, which was complementary to the law of treaties, was not urgent, but might be completed during those intervals.

The meeting rose at 1.5 p.m.

[16] For discussion of this subject in the Sixth Committee, see *Official Records of the General Assembly, Fourteenth Session, Sixth Committee*, 602nd-612th meetings.

939th MEETING

Thursday, 13 July 1967, at 10.10 a.m.

Chairman: Sir Humphrey WALDOCK

Present: Mr. Ago, Mr. Bartoš, Mr. Castañeda, Mr. Castrén, Mr. Ignacio-Pinto, Mr. Jiménez de Aréchaga, Mr. Kearney, Mr. Nagendra Singh, Mr. Reuter, Mr. Tabibi, Mr. Tammes, Mr. Ushakov, Mr. Ustor, Mr. Yasseen.

Organization of Future Work

(A/CN.4/L.119)

(continued)

[Item 6 of the agenda]

1. The CHAIRMAN said he wished to assure Mr. Tabibi and other speakers that the Commission had always been careful to respect the wishes of the General Assembly. The working paper on the organization of future work (A/CN.4/L.119) showed the position with regard to the various topics in the Commission's general programme, including those proposed by the General Assembly, and he himself had drawn the Commission's attention at the 896th meeting[1] to the report of the Sixth Committee to the General Assembly at its twenty-first session.[2] The Commission's earlier discussions had shown that all its members were aware of the importance of the General Assembly's directives; indeed, the Commission's current programme had been handed down to it from its previous members, and the decision to give priority to State succession in respect of treaties had been taken in response to the Assembly's instructions.

2. It should be borne in mind, however, that the Commission's programme was very heavy and that even if all the Special Rapporteurs submitted reports and draft articles in time and could be at the Commission's disposal when required, the programme was likely to take not only the current five-year period, but also the next, to complete. That could be used as an argument against adding any further topics to the programme, but it was wise to have a limited topic in reserve for consideration during periods when the major topic could not be discussed because the Special Rapporteur was unavoidably absent or had not completed his report in time.

3. While he fully appreciated Mr. Tabibi's wish to have the whole question of the Commission's work studied by a subsidiary body of the Commission, it should be remembered that the choice of any major topic would commit the Commission far into the future. Care must be taken not to give the General Assembly the impression that there was any possibility of adding new topics to the Commission's present programme or to arouse undue expectations.

4. Mr. NAGENDRA SINGH said he considered that Mr. Jiménez de Aréchaga's proposal for the inclusion of

[1] Para. 4.

[2] *Official Records of the General Assembly, Twenty-first Session, Annexes*, agenda item 84, document A/6516.

a subsidiary topic in the programme was a wise one, particularly as the subject of the most-favoured-nation clause met the four basic requirements for such a topic. The first was that it must be subsidiary in character, the second, that it must not interfere with considerations of the main topic, the third, that it could be taken up only when time was available, and the fourth, that it must be one of those proposed for study by the Sixth Committee. The subject of the most-favoured-nation clause had been raised during the twenty-first session of the General Assembly, since such clauses were being included in trade agreements between developed and developing countries, and no agreement had yet been reached on their specific wording. He believed that the Special Rapporteur on the subsidiary topic should be someone who was not obliged to devote much time to any of the main topics.

5. The CHAIRMAN said that the relevant passage of the Sixth Committee's report on that question read: "With respect to the most-favoured-nation clause, certain representatives suggested that the question should be considered in the Sixth Committee or at the future conference of plenipotentiaries on the law of treaties. Others were prepared to support any proposal that the Commission should study the most-favoured-nation clause without linking it to the general codification of the law of treaties. In their opinion, the adoption of a convention on the law of treaties would facilitate the study by the International Law Commission of the problems arising in connexion with that clause".[3]

6. Mr. JIMÉNEZ de ARÉCHAGA said it would be advisable for the Commission to appoint a fifth Special Rapporteur to begin work on a limited topic which could be completed within the remaining four years of the term of office of the Commission's existing members. The budgetary appropriations provided for five Special Rapporteurs, and that number had proved convenient, in view of the many circumstances which might interfere with a Special Rapporteur's work, both before and during sessions of the Commission. Thus, during the current session, the Commission had been placed in a most difficult position, from which it had been able to extricate itself only thanks to the devotion and industry of the Special Rapporteur on special missions.

7. It was obvious that the fifth topic could not be a major one, for the Commission already had too many broad subjects on its agenda. He could not agree with Mr. Ago that the topic of relations between States and inter-governmental organizations was a limited one; the voluminous and complex documentation submitted by the Secretariat bore witness to its wide scope. Similarly, the topic of State succession in respect of treaties would need much research and study, even though the number of articles mature for codification was not large. It was therefore more than doubtful whether the study of those two topics could be completed in four years.

8. Mr. Ago had rightly pointed out that it would be inappropriate to take up the two more limited topics indicated by the General Assembly, the right of asylum and the juridical régime of historic waters, since the former was already included in the agenda of the General Assembly for its twenty-second session and was not mature for codification on a world-wide basis, while it would not be proper to take up the latter in the existing political situation.

9. In the course of its work on the law of treaties, the Commission had been confronted with an important subject related to the law of trade, that of the legal aspects and application of the most-favoured-nation clause. Rather than request the Special Rapporteur on the law of treaties to include relevant articles in his draft, the Commission had thought it preferable that the topic should form the subject of a special study at a later date.[4] A number of representatives in the General Assembly had also referred to the advisability of a study of the matter, the most general opinion having been that the Commission itself was the most appropriate body to deal with the topic.

10. The appointment of a special rapporteur on the topic would in no way be tantamount to disregarding the decisions of the General Assembly. When the Commission had begun its work on the law of treaties, in compliance with instructions from the General Assembly, it had naturally retained a certain scientific freedom of discussion and the right to isolate certain questions arising in the course of its examination of the main topic. Furthermore, the Assembly itself had set up a body to study all the legal rules governing international trade; the most-favoured-nation clause was used mainly in trade agreements, and the Commission's work on that subject would contribute to that of the new body. Conversely, the Commission would profit by discussions in the new organ, and it would therefore be wise to appoint as special rapporteur a member of the Commission who was already taking part in the work of the Commission on International Trade Law.

11. Mr. CASTRÉN said he adhered to the views he had previously expressed on the need for the Commission to concentrate on the two major topics—succession of States and Governments and State responsibility—and also on relations between States and inter-governmental organizations. He thought, however, that the question of the most-favoured-nation clause, which was related to the law of treaties and which undoubtedly came within the Commission's terms of reference could be included as a secondary topic in the programme of future work. He also recognized that treaties and unilateral acts were generally studied in succession and were to some extent complementary.

12. Mr. REUTER said he had some comments to make on the question whether the Commission should include the most-favoured-nation clause in the agenda for its twentieth session.

13. Firstly, he welcomed the Chairman's decision to submit draft articles on succession in respect of treaties at the next session, since that would considerably ease the situation as far as the Commission's work programme was concerned, and in the light of that fact, he would agree to the appointment of a new special rapporteur for the topic of the most-favoured-nation clause. Secondly, it had to be

[3] *Ibid.*, para. 47.

[4] *Yearbook of the International Law Commission, 1964*, vol. II, p. 176, para. 21.

borne in mind that although the Commission was subject to the directives of the General Assembly, both the latter and its Sixth Committee were highly appreciative of any suggestions it might put forward, particularly through those of its members who participated in the work of the Sixth Committee. Thirdly, in order to comply with the spirit of the Charter of the United Nations and the Statute of the International Court of Justice, the selection of rapporteurs must, of course, be made with due regard for geographical and political distribution. That should not, however, obscure the fact that the work of those members of the Commission was done in a personal capacity, and that they should not be regarded as representatives of States. The Commission should first find out which members were prepared to undertake the work and should take account of the views of the other members of the Commission in considering the possibility of dividing the work if the topic to be studied was too broad.

14. Lastly, he urged that there should be a restriction of public debate and an increase in the number of closed meetings. That would enable the Commission to achieve more in the way of practical results and to act more effectively.

15. Mr. TABIBI said that he wished to make it clear that, in his statement at the preceding meeting, he had in no way intended to imply that the Commission was not following the directives of the General Assembly; indeed, the Commission's report was annually praised and completely endorsed by the Sixth Committee, and the Assembly was fully aware of the valuable services already rendered by the Commission in promoting international co-operation for observance of the rule of law. Nevertheless, times had changed since the Commission had been established twenty years before and the new Members of the United Nations were constantly raising topics to which they attached capital importance. The Commission might believe that certain topics were not yet mature for consideration, but Member States might hold other views; for example, the Commission had not considered that the topic of land-locked countries was ready for codification, but a Convention on the subject was nevertheless now in force. Further consideration should, therefore, be given to the Commission's general approach to its work, to its methods, to world-wide requirements and to the position of Special Rapporteurs: it might even be thought advisable to appoint two Special Rapporteurs to deal with the same topic.

16. Although he agreed with the Chairman that the General Assembly's expectations should not be raised, he wished to point out that if the Commission failed to include certain topics in its long-term programme, other organs might be called upon to deal with them, and it would then be too late for the Commission to study the legal aspects, with which it was best equipped to deal. He therefore urged that an over-all review of the Commission's work should be undertaken for the purpose of drawing up a list of new topics, on the understanding that they would not be considered until the topics currently under study had been completed.

17. Mr. USHAKOV thought that the three major topics included in the Commission's agenda would amply suffice to occupy it throughout its twentieth session. However, he recognized that the most-favoured-nation clause was not a new topic, and that it followed on and complemented the law of treaties; it was also fairly limited in scope. Thus, the Commission might include it in its agenda for the twentieth session, while giving priority to the three topics already selected.

18. Mr. KEARNEY said that he personally would also prefer the Commission to include in its agenda certain important topics such as the juridical régime of historic waters and the utilization of international rivers. Nevertheless, he agreed on the need to include a subject which could be handled within the confines of the Commission's current work, and supported the proposal to include the topic of the most-favoured-nation clause in the programme of work.

19. He also agreed with Mr. Tabibi that a serious over-all study should be made of the long-term programme. The Commission's twentieth anniversary would be an appropriate time for a full-scale review of its agenda, operation and procedures.

20. Mr. BARTOŠ said he was in favour of continuing the work on the law of treaties by a study of the most-favoured-nation clause, which was fully compatible with the recommendations of the United Nations General Assembly. That subject was among the first of the secondary questions relating to the law of treaties that remained to be studied separately. It had many aspects, some of which touched on political mattters. The topic came under the heading of the progressive development of international law, and should therefore be studied under article 16 of the Commission's Statute. It called for the appointment of a special rapporteur as well as the formulation of a plan of work and of a questionnaire for circulation to Governments.

21. He further considered that the Commission should also include in its work programme the question of a possible revision of its Statute and its internal procedure. In the twenty years since the Statute had been drafted and adopted, major changes had occurred in international relations as well as in the composition of the international community and of the United Nations; in fact, the actual meaning of some expressions had altered. In view of the inevitable delays involved in work of that kind, the revised or supplemented version of the Statute could enter into force when the membership of the Commission was renewed in 1972.

22. Mr. YASSEEN said that in view of the practical arguments put forward, he agreed that it would be advisable to include in the work programme a study of the most-favoured-nation clause; the Commission could take up that topic as a reserve, when it had a little time at its disposal between the stages of its work on the main topics. The subject in question was one of topical interest to the international community and called for a detailed study from a new standpoint.

23. The question of the most-favoured-nation clause was already well known from certain standpoints and thus in one sense came under the heading of codification. But as it was necessary to take account of new trends, Mr. Bartoš

had rightly suggested that the Commission should study the question under article 16 of its Statute.

24. Thus, although he recognized the merits of the proposal by Mr. Jiménez de Aréchaga so far as the present situation was concerned, he maintained the position he had taken at the previous meeting regarding the selection of topics for the future. That choice should be made more methodically, and the members of the Commission should have more time to reflect on the matter.

25. Mr. AGO thought that the Commission should in future disregard the distinction made in the Statute between the codification of international law and its progressive development, since that distinction had ceased to have any justification. There was hardly a single subject in which those two aspects did not overlap, and even the written instruments themselves automatically evolved under the influence of events.

26. The CHAIRMAN said he fully agreed with Mr. Bartoš that the Commission should proceed in accordance with article 16, rather than article 18, of its Statute. The situation was somewhat unusual in that the question had been referred to the Commission by the General Assembly and could have been dealt with in connexion with the law of treaties. He had thought, however, that a study of the most-favoured-nation clause in the context of the draft articles would have taken the general codification too far, so that the work could not have been completed within the five-year period in question. Nevertheless, it should be made clear that the Commission was not undertaking a new topic, but was developing a subject already under study.

27. He invited the Commission to vote on the proposal to include the topic of the most-favoured-nation clause in its agenda.

The proposal was adopted unanimously.

28. The CHAIRMAN said he had consulted the Officers of the Commission on the choice of a Special Rapporteur for the topic of the most-favoured-nation clause, and proposed that the Commission should appoint Mr. Ustor, who was eminently fitted for the office by his special interest in the law of trade and its codification and by his high qualities as a jurist.

Mr. Ustor was appointed Special Rapporteur by acclamation.

29. Mr. USTOR thanked the Commission for the confidence it had shown in him and said he would do his best to bring the work entrusted to him to a successful conclusion.

30. The CHAIRMAN observed that the Commission seemed to be agreed on the need to include in the agenda of its next session a study on topics likely to contribute to the codification and progressive development of international law as well as on the relationship between its work and the legal activities of other United Nations organs, its methods of work and the possible revision of its rules of procedure and its Statute. He invited the Commission to vote on the proposal to include such a study in its agenda.

The proposal was adopted unanimously.

Other Business

[Item 8 of the agenda]

Programme of Publications by the Secretariat

31. The CHAIRMAN invited the Secretary to the Commission to give a brief account of certain aspects of the programme of publications of the Office of Legal Affairs for the remainder of 1967 and for 1968.

32. Mr. MOVCHAN (Secretary to the Commission) said that one of the Secretariat's most urgent tasks was to produce the necessary advance documentation for the United Nations Conference on the Law of Treaties. As it had done for the previous codification conferences, the Secretariat had prepared a "Guide" to the history of the draft articles, giving the references to all proposals, amendments, discussions and decisions relating to each article in the Commission's final draft on the law of treaties. That document was expected to be reproduced in provisional form in time for the discussion of the law of treaties in the Sixth Committee at the next session of the General Assembly.[5] The Secretariat was also preparing a bibliography on the law of treaties, containing an up-to-date list of books and articles published on the topic in as many countries as possible, and it hoped that it would be ready in time for the discussion in the Sixth Committee.

33. In 1957, the Secretariat had published a *Handbook of Final Clauses* (ST/LEG/6) and a *Summary of the Practice of the Secretary-General as Depositary of Multilateral Agreements* (ST/LEG/7), two publications which were cited in the commentaries to the draft articles on the law of treaties. Since both publications were by now considerably out of date, the Secretariat had thought it useful to prepare new editions for the use not only of the Conference on the Law of Treaties but also of other conferences which were called upon to draft conventions. The preparation of those revised texts was well advanced, and the inclusion in the Commission's report of a recommendation on the desirability of their publication would help to overcome certain difficulties in the way of such publication.

34. With regard to the future work of the Commission, the priorities which had been fixed made it advisable for the Secretariat to concentrate on publications relating to succession of States. In response to a request by the Secretariat, Member States had furnished it some years previously with extensive material relating to the succession of States as it affected countries which had gained their independence since the Second World War; on the basis of that material, a printed volume would appear in the *United Nations Legislative Series* not later than October 1967.

35. With regard to the subject of succession of States in respect of treaties, the Secretariat had already prepared in 1962 a memorandum on the practice of the Secretary-General entitled "Succession of States in relation to general multilateral treaties of which the Secretary-General is the depositary".[6] More up to date information

[5] Document A/C.6/376.

[6] *Yearbook of the International Law Commission, 1962*, vol. II, pp. 106-131.

on that aspect of the subject would be included in the revised version of the *Summary of the Practice of the Secretary-General as Depositary of Multilateral Agreements.*

36. The Secretariat had also been preparing for a number of years a series of studies on the practice relating to succession of States in respect of multilateral conventions concluded under the auspices of international organizations other than the United Nations. As many of those studies as possible would be published as Commission documents before the opening of its next session.

37. In 1967, a study entitled "The practice of the United Nations, the specialized agencies and the International Atomic Energy Agency concerning their status, privileges and immunities" (A/CN.4/L.118 and Add. 1 and 2) had appeared in provisional form. The Secretariat proposed to publish that somewhat voluminous study in a more permanent form in 1968, with all the necessary corrections and additions.

38. In view of the large number of inquiries which the Secretariat had received, it had considered it desirable to bring up to date the collections of laws, regulations and treaties on the law of the sea[7] which had been published for the use of the two United Nations Conferences on the Law of the Sea held in 1958 and 1960. It had therefore requested Member States to supply it with the most recent legal material at their disposal concerning control over the sea and the sea bed and sub-soil outside the limits of territorial waters. That material would be published in 1968 in a printed volume of the *United Nations Legislative Series.*

39. The Secretariat was at present engaged in collecting material for a further volume of the *Reports of International Arbitral Awards*; that volume would contain awards which had been handed down in recent years and the text of which had not yet appeared in other standard collections. In order to enable the Secretariat to prepare that volume, he appealed to members of the Commission who had served on recent arbitral tribunals to do everything they could to help it to obtain the text of the awards of those tribunals for publication.

40. The *United Nations Juridical Yearbook* would be issued as usual; the volume for 1966 would be published in due course.

41. That programme of publications was somewhat ambitious in view of the small size of the staff of the Office of Legal Affairs and the limited time available for research because of the need to attend sessions of the International Law Commission and various committees, including the Sixth Committee of the General Assembly, but the Secretariat would make every effort to carry it out.

42. The CHAIRMAN congratulated the Secretariat on its remarkable programme and expressed the hope that it would be expanded still further in view of the great value of those publications. He suggested that the Commission should recommend the Secretariat to publish revised editions of the two handbooks mentioned by the Secretary; as the Special Rapporteur on the topic of the law of treaties, he could testify to the great value of those two publications, which were bound to be particularly useful to all those who would participate in the Conference on the Law of Treaties; the two studies in question provided a quick insight into practice and usage in the matter.

43. Mr. TABIBI noted that the information supplied by Governments on the subject of succession of States would be published before the Commission's next session. He asked the Secretary to confirm that the information in question would be given to the Special Rapporteurs concerned.

44. Mr. MOVCHAN (Secretary to the Commission) replied that some of the material which had been received had been communicated to Mr. Lachs, the previous Special Rapporteur; it would now be made available to the new Special Rapporteurs, Sir Humphrey Waldock and Mr. Bedjaoui, who had been designated to deal with the two aspects of the topic of succession of States and Governments.

45. The CHAIRMAN said that, if there were no further comments, he would consider that the Commission agreed to include in its report a passage recommending the publication of revised editions of the *Handbook of Final Clauses* (ST/LEG/6) and the *Summary of the Practice of the Secretary-General as Depositary of Multilateral Agreements* (ST/LEG/7).

It was so decided.

Draft Report of the Commission on the Work of its Nineteenth Session

(A/CN.4/L.124 and Addenda)

CHAPTER II: SPECIAL MISSIONS

Part I. Sending and conduct of special missions

COMMENTARIES TO ARTICLE 1 (Sending of special missions) [2] (A/CN.4/L.124/Add. 1) AND TO THE INTRODUCTORY ARTICLE (Use of terms) [1] (A/CN.4/L.124/Add. 7)

46. The CHAIRMAN invited the Commission to consider the draft report on the work of its nineteenth session, beginning with the commentary to article 1.

47. In his opinion, paragraphs (2) (*b*) and (*d*) of that commentary were tantamount to an explanation of the concept of a special mission. Since the Commission had now decided to include a definition of "special mission" in the introductory article, those passages could with advantage be transferred to the commentary to that article.

48. Mr. AGO supported the Chairman's suggestion. Originally article 1 had been the only article in which it was stated what a special mission was. But the Commission had since adopted an introductory article, which would precede article 1 and which stressed the representative and temporary character of special missions; that representative and temporary character was not reiterated in article 1

[7] *Laws and Regulations on the Regime of the High Seas*, vol. I. (ST/LEG/SER.B/1) (United Nations publication, Sales No: 1951.V.2) and vol. II (ST/LEG/SER.B/2) (Sales No: 1952.V.1) and *Laws and Regulations on the Regime of the Territorial Sea* (ST/LEG/SER.B/6) (Sales No: 1957.V.2).

(the future article 2), which emphasized the question of consent. The draft as a whole would therefore certainly gain in clarity if paragraphs (2) (*b*) and (*d*) of the commentary to article 1 were transferred to the commentary to the introductory article.

49. Mr. BARTOŠ, Special Rapporteur, said that the commentary to article 1 set forth the essential characteristics of the special mission. If certain sub-paragraphs of that commentary were transferred to the commentary to another article, the commentary to article 1 would not give a complete picture of the special mission. The introductory article, which was concerned with definitions, did not lay down any legal rules in the strict sense, and article 1 retained its overriding importance. He would therefore prefer not to truncate the commentary to article 1. If the Commission nevertheless adopted the Chairman's suggestion, it would be better to transfer the whole of paragraph (2) of the commentary on article 1 to the commentary on the introductory article, so that the latter article gave a full picture of the special mission.

50. Mr. AGO pointed out that the expression "substantive rule" in paragraph (2) of the commentary to the introductory article was not very suitable since a substantive rule generally laid down rights and obligations. What the Commission wished to say was that the definition of the special mission constituted an essential rule.

51. Mr. REUTER proposed that the words "substantive rule" should be replaced by the words "fundamental rule".

It was so agreed.

52. Mr. CASTRÉN said that paragraph (3) of the commentary to article 1 seemed merely to repeat what had already been said in paragraph (2).

53. Mr. BARTOŠ, Special Rapporteur, said that paragraph (3) was of great importance. Some Governments in fact maintained that the consent of the State to which it was proposed to send a special mission should be express. The Commission had, however, considered that consent should always be given in such a way as to indicate a genuine willingness without necessarily being express.

54. Mr. CASTRÉN pointed out that the question of consent was already dealt with in paragraph (2) (*c*). That paragraph could be expanded, but the same question should not be dealt with in two separate places.

55. Mr. BARTOŠ, Special Rapporteur, proposed that in order to satisfy Mr. Castrén, the idea contained in the first sentence of paragraph (3) should be added to paragraph (2) (*c*) and that paragraph (2) (*c*), thus expanded, should be retained in the commentary to article 1.

56. The CHAIRMAN suggested that paragraph (2) (*c*) should be retained in the commentary to article 1, but should be combined with paragraph (3) of that commentary.

It was so agreed.

57. Mr. KEARNEY suggested that the words "the United States" should be deleted from paragraph (2) (*d*). According to the present practice, not all United States missions for economic co-operation constituted permanent specialized missions.

58. The CHAIRMAN suggested that the words "the Australian" should be deleted before "immigration missions" and the words "of the socialist countries"after "the industrial co-operation missions".

59. Mr. BARTOŠ, Special Rapporteur, agreed to the deletion of the names of countries in paragraph (2) (*d*), which would simply read: "Examples of permanent specialized missions are missions for economic co-operation and assistance to certain States, immigration missions, industrial co-operation missions, trade missions or delegations which are of a diplomatic nature, etc."

60. Mr. REUTER thought that the last sentence of paragraph (2) (*b*) could be deleted, since it merely repeated what had been stated previously. He also wished to propose some purely drafting changes.

61. The CHAIRMAN suggested that members should submit to the Secretariat any suggestions for drafting changes in the commentaries to article 1 and the introductory article, and that the Secretariat should endeavour to submit at the next meeting a revised text of those commentaries incorporating the various proposals adopted during the discussion.

It was so agreed.[8]

COMMENTARY TO ARTICLE 1 *bis* (Non-existence of diplomatic or consular relations and non-recognition) [7] (A/CN.4/L.124/Add. 1).

Paragraph (1)

62. Mr. AGO said that in paragraph (1), as in paragraph (2), it seemed to him that it was not for the Commission to rule on whethers pecial missions were useful or necessary: it should simply confine itself to noting that, in certain circumstances, such missions had proved useful or necessary. He inquired whether the Special Rapporteur would agree to amend the end of the last sentence of paragraph (1) to read: "... because it considers that even where such relations do not exist, special missions have been sent and have proved particularly useful".

63. Mr. REUTER thought it preferable not to refer to the Commission's views in the commentaries. He therefore proposed that the words: "The Commission considered it useful to stress in its draft article" at the beginning of the last sentence of paragraph (1) should be deleted and that the text should read "The existence of diplomatic and consular relations is not a prerequisite for the sending and reception of special missions. International practice has shown that special missions can be particularly useful where such relations do not exist".

64. Mr. BARTOŠ, Special Rapporteur, urged that the words "The Commission considered it useful to stress in its draft article" should be retained, because the last sentence of paragraph (1) expressed the Commission's view.

[8] For resumption of discussion, see 941st meeting, paras. 30-59.

Furthermore, delegates to international conferences generally wished to know what that view was.

65. Mr. AGO said that, as he understood it, the idea the Special Rapporteur had sought to convey was as follows: when two States maintained regular diplomatic relations, the sending of special missions was unnecessary because the task envisaged could be entrusted to the permanent mission; where, however, diplomatic relations did not exist, the sending of special missions was necessary.

66. The CHAIRMAN, speaking as a member of the Commission, said that in his view the second and third sentences of paragraph (1) were not very well placed, and broke the logical continuity of the argument.

67. Speaking as Chairman, he proposed that, in the light of the discussion, the second sentence of paragraph (1) should be deleted.

It was so agreed.

68. The CHAIRMAN said that, if there were no further comments, he would consider that the Commission agreed to leave the first part of the last sentence of paragraph (1) unchanged and to replace the concluding part of that sentence by the text suggested by Mr. Ago.

It was so agreed.

Paragraph (1), as amended, was approved.

Paragraph (2)

69. Mr. AGO proposed that the second sentence of paragraph (2) should be amended to read: "The Commission considered that absence of recognition was not a bar to the sending of a special mission, and it dealt with this point in paragraph 2 of article 1 *bis*".

70. Mr. KEARNEY noted that, according to the concluding sentence of paragraph (2) of the commentary, the Commission had not examined the question whether the sending or reception of a special mission prejudged the question of recognition. That sentence did not constitute a full statement of the Commission's decision; as he recalled it, that decision had been not to include a provision on the subject in the draft articles because, in the Commission's view, it lay outside the scope of the topic of special missions.

71. Mr. CASTRÉN said that he also believed that the Commission had in fact examined the question whether the sending or reception of a special mission prejudged the question of recognition.[9] He therefore proposed that the words "examine the question" should be replaced by the words "decide the question".

72. Mr. BARTOŠ, Special Rapporteur, proposed that the last sentence of paragraph (2) should be redrafted to read: "The Commission did not, however, decide the question whether the sending or reception of a special mission prejudges the solution of the problem of recognition, as that problem lies outside the scope of the topic of special missions".

[9] For discussion of this question, see 899th meeting, paras. 22 *et seq.*, and 900th meeting, paras. 1-46.

73. The CHAIRMAN suggested that the last sentence of paragraph (2) should be amended on the lines suggested by Mr. Bartoš.

It was so agreed.

Paragraph (2), as amended, was approved.

The commentary to article 1 bis as a whole, as amended, was approved.

COMMENTARY TO ARTICLE 2 (Field of activity of a special mission) [3] (A/CN.4/L.124/Add. 1)

Paragraph (1)

74. Mr. AGO said that paragraph (1) was not sufficiently precise. He suggested it should state that, in view of the nature of special missions, the Commission had not thought it possible to list the functions of such missions and, for that reason, had adopted for the article a wording which differed from that of the corresponding article of the Vienna Convention.

75. Mr. BARTOŠ, Special Rapporteur, agreed to the amendment of paragraph (1) in that sense.

Paragraph (1), as amended, was approved.

Paragraph (2)

76. Mr. KEARNEY said that paragraph (2) did not draw a clear distinction between the special mission's task and its field of action, assuming that they were, in fact, two different things.

77. Mr. BARTOŠ, Special Rapporteur, pointed out that there was a difference between the task and the field of action. The task might be more extensive than the field of action. It often happened that the receiving State agreed to the task of a special mission, but restricted its field of action.

78. Mr. REUTER thought that Mr. Kearney's comments should be taken into account. Paragraphs (2) and (3) were somewhat unexpected and posed a rather difficult problem of presentation.

79. Mr. USHAKOV, referring to the first sentence of paragraph (2), said that the special mission's task was also determined by the mutual consent of the sending and receiving States.

80. Mr. AGO suggested that paragraph (2) should be redrafted to read:

> "2. The Commission thought it should distinguish between the task of the special mission and its field of action, which determines the limits within which the special mission must carry on its activities, and sometimes also the means it must use to perform its task".

81. Mr. JIMÉNEZ de ARÉCHAGA suggested that the first sentence should be redrafted so as not to deal with the purely internal matter of the relations between a special mission and the sending State.

82. Mr. BARTOŠ, Special Rapporteur, proposed that the text should merely state that "the field of activity is determined by mutual consent of the sending and receiving States" and that "the field of activity determines the limits ...".

83. The CHAIRMAN said that if there were no further comments, he would consider that the Commission agreed to approve paragraph (2) in the form just proposed by Mr. Bartoš.

It was so agreed.

84. The CHAIRMAN suggested that a passage should be added to explain that the Commission had not thought it necessary to include an article on the subject because the question depended on the circumstances in each individual case.

Paragraph (3)

85. Mr. JIMÉNEZ de ARÉCHAGA proposed that the concluding sentence of paragraph (3) should be deleted. Article 3 provided for the mutual consent of the States concerned and such agreement could be arrived at subsequently.

86. Mr. BARTOŠ, Special Rapporteur, replying to an objection raised by Mr. AGO, proposed that the whole of paragraph (3) should be deleted, since its effect was, after all, to draw attention to the possibility of following an undesirable course of action.

87. Mr. REUTER said he agreed to the deletion of the whole of paragraph (3). However, if the Commission decided to retain it, he suggested that the words "have gone beyond their field of action" should be replaced by the words "had in fact extended their field of action".

88. The CHAIRMAN said that, if there were no objection, he would consider that the Commission agreed to delete paragraph (3), which dealt with an extremely delicate legal question and was not absolutely necessary.

It was so agreed.

Paragraph (4)

89. Mr. AGO pointed out that the word "*mutuel*" should be deleted in the last line of the French text of paragraph (4).

Paragraph (4), as amended, was approved.

Paragraph (5)

90. Mr. YASSEEN proposed that the words "the internal organization of" in the second sentence of paragraph (5) should be deleted, so that the text read "this was a matter for the sending State, which alone had the power to resolve such a conflict".

Paragraph (5), as amended, was approved.

Paragraph (6)

91. Mr. KEARNEY suggested that paragraph (6) should be reworded so as not to enter into questions of the internal procedures of the sending State.

92. Mr. BARTOŠ, Special Rapporteur, said that in the case of frontier incidents, for example, the permanent diplomatic mission of the sending State accredited to the receiving State did not have the power to resolve the question. In such circumstances, the two States concerned had to establish special missions. He himself would prefer to delete paragraph (6).

93. The CHAIRMAN noted that there was general agreement to dispense with paragraph (6). When the special mission's activity or existence came to an end, the effect of that termination was determined in accordance with the rules in force; its tasks would be entrusted to a permanent diplomatic mission under the operation of diplomatic law, unless treaty law provided otherwise.

94. If there were no further comments, he would consider that the Commission agreed to drop paragraph (6).

It was so agreed.

The commentary to article 2, as amended, was approved.

The meeting rose at 1.10 p.m.

940th MEETING

Thursday, 13 July 1967, at 3.15 p.m.

Chairman: Sir Humphrey WALDOCK

Present: Mr. Ago, Mr. Bartoš, Mr. Castañeda, Mr. Castrén, Mr. Ignacio-Pinto, Mr. Jiménez de Aréchaga, Mr. Kearney, Mr. Nagendra Singh, Mr. Reuter, Mr. Tabibi, Mr. Tammes, Mr. Ushakov, Mr. Ustor, Mr. Yasseen.

Draft Report of the Commission on the Work of its Nineteenth Session

(A/CN.4/L.124 and Addenda)

(continued)

CHAPTER II: SPECIAL MISSIONS

(continued)

Part I. Sending and conduct of special missions (continued)

COMMENTARY TO ARTICLE 3 (Appointment of the members of the special mission) [8] (A/CN.4/L.124/Add.1 and Corr.1)

Paragraph (1)

1. Mr. AGO suggested that the beginning of the second sentence of paragraph (1) should be amended to read "In the first place, the rule laid down in article 3 applies to all the members of the Special Mission, including the head of the Special Mission if there is one".

It was so agreed.

Paragraph (1), as amended, was approved.

Paragraph (2)

Paragraph (2) was approved.

Paragraph (3)

2. The CHAIRMAN drew the Commission's attention to the new version of paragraph (3) (A/CN.4/L.124/Add.1/Corr.1).

3. Mr. USHAKOV said that although he had no objection to the new version of paragraph (3), he thought that the reference to objections in the second sentence was rather similar to the reference to objections in the last sentence of paragraph (2).

4. Mr. BARTOŠ, Special Rapporteur, said he had been asked to include a specific reference to the right of the receiving State to raise objections, as distinct from the opportunity to raise objections referred to in paragraph (2).

The new text of paragraph (3) was approved.

Paragraph (4)

5. Mr. AGO asked if paragraph (4) was necessary.

6. Mr. BARTOŠ, Special Rapporteur, said he thought it was necessary to point out that there were other forms of objection.

Paragraph (4) was approved.

Paragraph (5)

7. The CHAIRMAN said he thought the last sentence of paragraph (5) was too categorical and suggested that the words "is obsolete and that it" should be deleted.

It was so agreed.

Paragraph (5), as amended, was approved.

The commentary to article 3, as amended, was approved.

COMMENTARY TO ARTICLE 4 (Persons declared *non grata* or not acceptable) [12] (A/CN.4/L.124/Add.1)

Paragraph (1)

Paragraph (1) was approved.

Paragraph (2)

8. Mr. KEARNEY suggested that in paragraph (2) the reference should be to acceptance of the members of the mission, and not of the mission itself.

9. Mr. BARTOŠ, Special Rapporteur, said that even where a Special Mission had been accepted in accordance with the provisions of article 3, the receiving State was still entitled at any time to declare a member of it *persona non grata*. Nevertheless, he was prepared to accept Mr. Kearney's proposal.

10. The CHAIRMAN suggested that the text should indicate that even after the receiving State had accepted the mission, it had the right to declare any member of it *persona non grata*.

11. Mr. BARTOŠ, Special Rapporteur, proposed that the text should read: "Even when the receiving State has raised no objection to the membership of the Special Mission, it unquestionably has the right...".

12. Mr. AGO agreed that that wording made it clear that the situation referred to was that in which the receiving State had raised no objection when it received the necessary prior information about the membership and size of the Special Mission.

13. Mr. BARTOŠ, Special Rapporteur, said that many States wished to know whether, if they had already given any kind of approval to a proposed Special Mission, they were still entitled to declare a member of it *persona non grata*. The receiving State could do so at any time, even after acceptance of the mission.

Paragraph (2), as amended, was approved.

Paragraph (3)

Paragraph (3) was approved.

Paragraph (4)

14. Mr. USTOR thought that the example given in the second part of paragraph (4) was not really a declaration of a person as *non grata*.

15. Mr. CASTRÉN suggested that the second part of paragraph (4) should be deleted, as it was unnecessary.

16. Mr. BARTOŠ, Special Rapporteur, said that the second part of that paragraph had only been included as an illustration, and he would agree to its deletion.

17. The CHAIRMAN suggested that the second sentence of paragraph (4) should be redrafted in the English version.

Paragraph (4), as amended, was approved, subject to drafting changes in the English text.

Paragraph (5)

18. The CHAIRMAN said that paragraph (5) raised the question whether the fact that a Head of State, Head of Government or Minister for Foreign Affairs participating in a special mission could not be declared *persona non grata* could be regarded as a privilege or immunity. He thought not.

19. Mr. JIMÉNEZ de ARÉCHAGA thought that paragraph (5) could be deleted. It was clear that a receiving State had the right to declare *non grata* even a person of high rank, in accordance with the provisions of the article.

20. Mr. AGO said that there should be a reference to the question in the commentary.

21. Mr. BARTOŠ, Special Rapporteur, said that if the person declared *non grata* was in fact the only person qualified to carry out a particular function in relation, for example, to a treaty, the declaration would prevent the treaty from being executed. That was why the commentary referred not to "high rank" but to "a certain rank or qualifications."

22. Mr. JIMÉNEZ de ARÉCHAGA said that there seemed to be some confusion as to the effect of declaring a person *non grata*. It merely meant that the declaring State refused to deal further with that person; his status in his own country was not affected. He thought it would be preferable to delete the paragraph.

23. Mr. AGO said he still thought that there should be a reference to the matter in the commentary, though perhaps not in the form adopted in paragraph (5). Perhaps the commentary could merely state that the Commission believed it necessary to point out that, in accordance with a well-established practice, a declaration of *persona non grata* did not apply to persons such as

a Head of State, Head of Government or Minister of Foreign Affairs, if they participated in a special mission.

24. Mr. BARTOŠ, Special Rapporteur, said that the text he had submitted was based on the proposals of various Governments, which did not wish it to be permissible for other governments to declare *non grata* persons occupying certain posts, especially when the arrangements between States provided that those persons should carry out duties as members of a special mission. He was prepared to accept Mr. Ago's suggestion.

25. Mr. JIMÉNEZ de ARÉCHAGA said he thought the Commission need not deal with the question. States had sometimes been known to refuse to continue negotiating with a Head of State. A State always had the right to stop dealing with a particular person, whatever his status in his own country.

26. The CHAIRMAN said that article 4 used language that was inappropriate to the case of a Minister for Foreign Affairs. A Head of State or Minister for Foreign Affairs would not be declared *persona non grata*, but relations between the receiving State and the special mission would be broken off. He himself would prefer the solution proposed by Mr. Ago to the existing text; a reference without undue stress would be harmless. He did not think that the case was really covered by the language of article 4.

27. Mr. BARTOŠ, Special Rapporteur, said that if the receiving State had been notified that the head of the mission would be the Minister for Foreign Affairs, and then proceeded to declare him *persona non grata*, he thought such an action would, from the standpoint of international courtesy, overstep the limits permissible under international law.

28. The CHAIRMAN said that in the case of a Minister for Foreign Affairs the principle would not apply, since the case would be disposed of by some means other than declaring him *persona non grata*, as Mr. Ago had suggested.

29. Mr. JIMÉNEZ de ARÉCHAGA said it was rare for a State to take the formal action of declaring a person *non grata* in so many words. The right referred to in article 4 would be exercised within the limits of courtesy and of the diplomatic usage applicable to all missions.

30. The CHAIRMAN said that where a Head of State or Minister for Foreign Affairs was concerned, the States themselves were face to face, whereas in other situations it was not the States themselves but junior officials who were involved. Consequently, in the first case, the procedure would not be to declare the official *persona non grata*, but to break off the mission.

31. Mr. JIMÉNEZ de ARÉCHAGA said that very diplomatic terms were used for declaring persons *non grata*, even if they were only junior officials.

32. Mr. USHAKOV said that he knew of no case in which a Head of a State or Head of Government had been declared *persona non grata*; he thought the Commission should do as Mr. Ago had suggested.

33. Mr. AGO said that declarations of *persona non grata* were usually rather specific, and the article in question was also specific. In such cases the sending State was obliged to recall the person concerned and replace him, and if it did not, the receiving State was entitled not to regard him as a member of the special mission any longer. Clearly that procedure applied to specific persons, and was not the same as breaking off relations because the Head of State or some other person was regarded as *non grata.*

34. He proposed that paragraph (5) should be redrafted to show that although the Commission had not considered it necessary to include a specific reference to the question in the text of the article, it had thought fit to point out that, in accordance with a well-established practice, the procedure of declaring persons *non grata* did not apply to such persons as a Head of State, Head of Government or Minister for Foreign Affairs, if they participated in a special mission.

35. Mr. BARTOŠ, Special Rapporteur, said he agreed to that proposal, since it corresponded to what had been suggested by some Governments, although it had not been thought appropriate to include such a reference in the text.

Paragraph (5), as amended, was approved.

The commentary to article 4, as amended, was approved.

COMMENTARY TO ARTICLE 5 (Sending of the same special mission to two or more States) [4] (A/CN.4/L.144/Add.2)

Paragraph (1)

Paragraph (1) was approved.

Paragraph (2)

Paragraph (2) was approved.

Paragraph (3)

36. Mr. USTOR, referring to the last sentence in paragraph (3) (*a*), said it was not clear to him why the words "simultaneously or successively" were appropriate, since if several missions were sent they need not be sent simultaneously, and if only one was sent its visits would have to be successive.

37. Mr. BARTOŠ, Special Rapporteur, said that in the French text the title of the article and the first sentence of paragraph (3) (*a*) made the situation quite clear by the use of the expression "*auprès de*". A single mission could negotiate with the diplomatic mission of several other States all situated in the territory of a single State.

38. Mr. JIMÉNEZ de ARÉCHAGA questioned whether sub-paragraphs (*b*) and (*c*) of paragraph (3) were necessary.

39. The CHAIRMAN said that if sub-paragraph (*b*) was maintained, he would like to see a change in the second sentence, as he thought the reference to the discourtesy of circular appointments went beyond what was necessary.

40. Mr. JIMÉNEZ de ARÉCHAGA said he thought that the end of paragraph (3) (*a*) could well be followed by paragraph (4), sub-paragraphs (*b*) and (*c*) being deleted.

41. Mr. AGO said he thought the word "*accréditement*" in the second sentence of paragraph (3) (*b*) was inappropriate, as it should be applied only to diplomatic missions. In his opinion it was unnecessary for the Commission to deal with questions of courtesy and paragraph (3) (*b*) should consist only of the first sentence.

It was so agreed.

42. Mr. YASSEEN suggested that in the French text of paragraph (3) (*c*) the expression "*s'abstenir d'*", in the first sentence, should be replaced by the words "*ne pas*".

Paragraph (3), as amended, was approved.

Paragraph (4)

Paragraph (4) was approved.

The commentary to article 5, as amended, was approved.

COMMENTARY TO ARTICLE 5 *bis* (Sending of a joint special mission by two or more States) [5] (A/CN.4/L.124/Add.2)

Paragraph (1)

43. Mr. YASSEEN said that the reference at the end of paragraph (1) to avoiding certain expenses was unsatisfactory, because there might be other reasons why a joint mission was desirable.

44. Mr. BARTOŠ, Special Rapporteur, suggested that the end of the sentence should read "the institution of joint missions has certain advantages for them".

Paragraph (1), as amended, was approved.

Paragraph (2)

Paragraph (2) was approved.

Paragraphs (3) and (4)

45. Mr. CASTRÉN said that paragraph (4) dealt with an incontestable fact referred to in paragraph (3).

46. The CHAIRMAN suggested that the two paragraphs should be combined.

47. Mr. KEARNEY proposed that in the English version of paragraph (4) the words "being a member of" should be replaced by the words "participating in".

Paragraphs (3) and (4), as amended and combined, were approved as paragraph (3).

Paragraph (5)

Paragraph (5) was approved.

Paragraph (6)

48. Mr. BARTOŠ, Special Rapporteur, proposed that the words "The Government of Israel" should be amended to read "One Government". The end of the second sentence of paragraph (6) might read "... that was a matter which belonged essentially to the topic of relations between States and inter-governmental organizations and which could appropriately be dealt with in that context".

*The commentary to article 5*bis, *as amended, was approved.*

COMMENTARY TO ARTICLE 5 *ter* (Sending of special missions by two or more States in order to deal with a question of common interest) [6] (A/CN.4/L.124/Add.2)

*The commentary to article 5*ter *was approved.*

COMMENTARY TO ARTICLE 6 (Composition of the special mission) [9] (A/CN.4/L.124/Add.2 and Corr.1)

49. The CHAIRMAN drew the Commission's attention to the amendments proposed in document A/CN.4/L.124/Add.2/Corr.1.

Paragraph (1)

Paragraph (1) was approved.

Paragraph (2)

50. Mr. AGO said that the term "representative" should be explained. He proposed that the first sentence should read: "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". It was essential to mention the person to whom the sending State assigned the task of being its representative in the special mission, for in a more general sense all the members of a special mission were representatives of the sending State.

Paragraph (2), as amended, was approved.

Paragraph (3)

51. Mr. JIMÉNEZ de ARÉCHAGA thought that both paragraphs (3) and (4) were out of place in the commentary on article 6 and, if retained, should be transferred to the commentary on article 9.

52. Mr. CASTRÉN suggested that paragraph (3) might be deleted, as it was not relevant to article 6. Paragraph (4) could be retained.

It was decided to delete paragraph (3).

Paragraph (4)

53. Mr. AGO thought that the first sentence of paragraph (4) was satisfactory, but the rest should be deleted. Paragraph (2) was rather specific, but the second sentence of paragraph (4) seemed to reopen the question of the composition of the special mission.

54. Mr. BARTOŠ, Special Rapporteur, suggested that the first sentence of paragraph (4) should read: "In practice, the sending State often appoints a head of the special mission and a deputy head".

Paragraph (4), as amended, was approved.

Paragraph (5)

55. Mr. KEARNEY said he thought the last sentence of paragraph (5) should be deleted. The question referred to was one to be decided by the sending State alone. An expert might or might not have diplomatic status, according to the nature of the special mission.

56. The CHAIRMAN said he agreed that the last sentence of paragraph (5) was too categorical and was

not consistent with the position the Commission had taken in the article. The question whether an expert had diplomatic status or was merely a technical expert was one for the sending State. It would therefore be preferable to delete the sentence.

57. Mr. BARTOŠ, Special Rapporteur, agreed that the last sentence should be deleted.

58. The CHAIRMAN said that the end of the second sentence of paragraph (5) was not quite satisfactory: the reference to advisers and experts gave the impression that they were part of the diplomatic staff.

59. Mr. AGO said that the Commission could only recognize two categories of staff, diplomatic staff, and administrative and technical staff. Experts and advisers of a special mission would have to be included in one or other of those categories.

60. Mr. BARTOŠ, Special Rapporteur, suggested that paragraph (5) should be deleted, since it did not appear to be consistent with the statement in the preceding paragraph that the composition of a special mission and the titles of its members were matters within the exclusive competence of the sending State.

61. The CHAIRMAN suggested that the first sentence and the first part of the second sentence of paragraph (5) should be retained; the remainder of the paragraph, beginning with the words "but it pointed out" should be deleted.

It was so agreed.

Paragraph (5), as amended, was approved.

Paragraph (6)

62. Mr. BARTOŠ, Special Rapporteur, drew attention to the corrections to the last sentence (A/CN.4/L.124/Add.2/Corr.1) by which the words "without loss of status by a member of the permanent diplomatic mission" were amended to read "by a member of the permanent diplomatic mission without loss of the privileges and immunities he enjoys as such". He pointed out that some States considered the two functions in question incompatible because of the obligations of career diplomats vis-à-vis the receiving State.

63. Mr. AGO proposed that the third sentence should be amended to read "Opinions differ on this point".

It was so agreed.

Paragraph (6), as amended, was approved.

Paragraph (7)

64. The CHAIRMAN drew attention to the correction to paragraph (7) contained in the corrigendum (A/CN.4/L.124/Add.2/Corr.1)

Paragraph (7), as amended by the corrigendum, was approved.

Paragraph (8)

65. Mr. BARTOŠ, Special Rapporteur, proposed that paragraph (8) should be deleted.

It was so agreed.

The commentary to article 6, as amended, was approved.

COMMENTARY TO ARTICLE 7 (Authority to act on behalf of the special mission) [14] (A/CN.4/L.124/Add.2)

Paragraphs (1) and (2)

Paragraphs (1) and (2) were approved.

Paragraph (3)

66. The CHAIRMAN suggested that the last sentence of paragraph (3) should be amended to read: "The legal status of this representative is similar to that of a head of special mission".

It was so agreed.

Paragraph (3), as amended, was approved.

Paragraph (4)

Paragraph (4) was approved.

Paragraph (5)

67. Mr. JIMÉNEZ de ARÉCHAGA asked whether the last two sentences were necessary.

68. Mr. BARTOŠ, Special Rapporteur, said that the practice of having a *chargé d'affaires ad interim* was not universal.

69. Mr. CASTRÉN said he favoured the retention of those sentences, since the practice did exist and should be referred to in the commentary.

70. The CHAIRMAN suggested that it would be sufficient to retain the penultimate sentence.

Paragraph (5) was approved without amendment.

Paragraph (6)

Paragraph (6) was approved.

Paragraph (7)

71. Mr. KEARNEY proposed the deletion of the final phrase "... or, in the absence of diplomatic relations, through the mission of the State protecting the sending State's interests". Those words gave the impression that the special mission would handle its correspondence through the mission of a third State, which he did not think would happen in practice.

72. Mr. BARTOŠ, Special Rapporteur, and the CHAIRMAN said that they had no objection.

Mr. Kearney's proposal was adopted.

Paragraph (7), as amended, was approved.

The commentary to article 7, as amended, was approved.

COMMENTARY TO ARTICLE 8 (Notification) [11] (A/CN.4/L.124/Add.2)

Paragraphs (1) and (2)

Paragraphs (1) and (2) were approved.

Paragraph (3)

73. Mr. AGO said he had certain reservations on the commentary to article 8, because the question of prior notice had already been dealt with in article 3.

74. Mr. BARTOŠ, Special Rapporteur, said it was necessary to make a clear distinction between the prior notice and the second, regular notification which was usually sent to the Ministry of Foreign Affairs of the receiving State.

75. Mr. AGO proposed that the first thirteen lines of the paragraph, ending with the words "in article 8", should be deleted and replaced by the following words: "The notifications referred to in this article should not be confused with the prior notice provided for in article 3".

76. Mr. BARTOŠ, Special Rapporteur, said that in that case the following sentence should begin with the words: "They are usually sent ...".

It was so agreed.

Paragraph (3), as amended, was approved.

Paragraph (4)

77. Mr. USTOR proposed that paragraph (4) should be deleted, since, inasmuch as notification was generally informal, it might give the impression that the Commission was introducing an innovation.

78. Mr. BARTOŠ, Special Rapporteur, said that he had had much experience as a member of special missions; although prior notification of departure to the receiving State was not always necessary in practice, absence of notification gave rise to misunderstanding, since it was not known whether the members of the special mission had left or not.

79. Mr. USTOR said he did not think it was the Commission's intention to introduce a provision making it obligatory for the special mission to deliver an official note to the receiving State concerning its departure. He therefore pressed his proposal.

80. Mr. REUTER said he considered it desirable that the special mission should give formal notification of its departure.

81. Mr. CASTRÉN agreed with Mr. Reuter that notification should be a formal act and that a reference to that fact should be included in the commentary.

82. The CHAIRMAN thought that the language of article 8 showed the need for a certain formality, but the question was whether the point should be stressed in paragraph 4 of the commentary. He pointed out that a similar provision had been included in the Vienna Convention on Diplomatic Relations, but that if States considered it inappropriate in a convention on special missions, they would be free to reject it.

83. Mr. USHAKOV said that since the text of article 8 was the same as the corresponding text in the Vienna Convention, the commentary should also be the same.

84. The CHAIRMAN said that when the Commission had adopted article 8, it had obviously considered that it should be open to an interpretation such as that given in the last sentence of paragraph (4).

85. Mr. JIMÉNEZ de ARÉCHAGA thought the difficulty could be overcome by deleting the first sentence and retaining the last.

86. Mr. YASSEEN said he did not think that the article was of a peremptory character; some such wording as "ought to be given" might be used.

87. The CHAIRMAN pointed out that the wording of the English text of article 8, paragraph 1, "shall be notified", was very strong.

88. Mr. KEARNEY agreed with the Chairman. The receiving State should be formally notified of the departure of the special mission, since otherwise it would be unable to take the appropriate action with respect to the special mission's premises, archives and the like.

89. Mr. BARTOŠ, Special Rapporteur, said that the receiving State should be notified of the departure as well as of the arrival of the special mission, so that its appropriate organs, in particular, its Ministry of Foreign Affairs, would know whether their responsibilities with respect to the special mission had ceased or not.

90. The CHAIRMAN thought that the Commission could accept paragraph (4) if the wording was toned down. In particular, the word "customary" in the first line should be avoided. He suggested that the first and second sentences should be combined and reworded to read: "In many cases, notice is not given of the departure of the special mission, as the members of the mission merely communicate verbally and informally ...".

91. Mr. BARTOŠ supported that suggestion.

Paragraph (4), as thus amended, was approved.

Paragraph (5)

92. Mr. BARTOŠ, Special Rapporteur, pointed out that in many countries, like his own, the members of a special mission could remain there after the termination of the mission, but that in others their visas were only valid so long as the purpose for which they had been issued still existed. Consideration should also be given to the duration of the privileges and immunities of the members of the special mission after the mission had completed its task.

93. The CHAIRMAN suggested that paragraph (5) should be deleted, since no similar paragraph was contained in the corresponding commentaries on the two Vienna Conventions.

It was so agreed.

Paragraph (6)

Paragraph (6) was approved.

The commentary to article 8, as amended, was approved.

COMMENTARY TO ARTICLE 9 (Rules concerning precedence) [16] (A/CN.4/L.124/Add.3)

Paragraph (1)

94. Mr. AGO proposed that the word "meet" in paragraph (1) should be changed to "are together", since it

was always possible that members of two or more special missions might meet unexpectedly, for example, at a reception given by the Head of State.

It was so agreed.

Paragraph (1), as amended, was approved.

Paragraph (2)

95. Mr. JIMÉNEZ de ARÉCHAGA thought that the whole of paragraph (2) should be deleted.

96. The CHAIRMAN suggested that the paragraph should be revised to read as follows; "In relations between a single special mission and the representatives of the receiving State, the matter is one of courtesy rather than 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".

It was so agreed.

Paragraph (2), as amended, was approved.

Paragraph (3)

97. The CHAIRMAN suggested that paragraph (3) should be revised to read as follows: "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".

It was so agreed.

Paragraph (3), as amended, was approved.

Paragraph (4)

98. The CHAIRMAN suggested that the reference to "certain writers" in the second sentence should be deleted.

It was so agreed.

99. Mr. BARTOŠ, Special Rapporteur, said that the sentence could be redrafted to read: "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". He proposed that the following three sentences should be deleted.

It was so agreed.

Paragraph (4), as amended, was approved.

Paragraphs (5) to (11)

Paragraphs (5) to (11) were approved.

The commentary to article 9, as amended, was approved.

COMMENTARY TO ARTICLE 11 (Commencement of the functions of a special mission) [13] (A/CN.4/L.124/Add.3)

Paragraphs (1) to (5)

Paragraphs (1) to (5) were approved.

Paragraph (6)

100. Mr. AGO proposed that paragraph (6) should be redrafted to read: "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 this régime enters into force as soon as the person concerned arrives in the territory of the receiving State, or, in the case of a person who is already there, as soon as he is appointed to the special mission".

It was so agreed.

Paragraph (6), as amended, was approved.

The commentary to article 11, as amended, was approved.

COMMENTARY TO ARTICLE 12 (End of the functions of a special mission) [20] (A/CN.4/L.124/Add.3)

Paragraph (1)

Paragraph (1) was approved.

Paragraph (2)

101. Mr. AGO thought that the first sentence would be clearer if it was redrafted on the following lines: "In 1960, the Commission decided that the reasons for termination of the functions of special missions were the same as those given in its draft on diplomatic relations for termination of the functions of diplomatic agents".

It was so agreed.

Paragraph (2), as amended, was approved.

Paragraph (3)

102. Mr. AGO said that it was for the States concerned to note, rather than decide, that a special mission had ceased to exist.

103. The CHAIRMAN suggested that the first sentence should be revised to read: "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".

It was so agreed.

Paragraph (3), as amended, was approved.

Paragraph (4)

Paragraph (4) was approved.

Paragraph (5)

104. Mr. BARTOŠ, Special Rapporteur, proposed that the beginning of the third sentence should be amended to read: "Some governments and some writers ...".

It was so agreed.

Paragraph (5), as amended, was approved.

Paragraph (6)

Paragraph (6) was approved.

The commentary to article 12, as amended, was approved.

COMMENTARY TO ARTICLE 13 (Seat of the special mission) [17] (A/CN.4/L.124/Add.4)

Paragraph (1)

105. The CHAIRMAN said he thought the final clause of the second sentence was incorrect; a special mission would not necessarily have its seat where it was working.

106. Mr. AGO said that that was very often the case, nevertheless. To make the situation clear, he proposed that the words "in many cases" be substituted for the word "normally".

It was so agreed.

Paragraph (1), as amended, was approved.

Paragraphs (2) and (3)

Paragraphs (2) and (3) were approved.

Paragraph (4)

107. Mr. JIMÉNEZ de ARÉCHAGA questioned whether it was worth mentioning the United Nations Charter in the third sentence, in connexion with such a small point.

108. Mr. BARTOŠ, Special Rapporteur, said that the reference had been included because there had been a specific case in which a sending and a receiving State involved in litigation had both invoked the principle of the sovereign equality of States laid down in the Charter. Nevertheless, he would not object to the deletion of the words "the United Nations Charter concerning".

It was so agreed.

Paragraph (4), as amended, was approved.

The commentary to article 13, as amended, was approved.

COMMENTARY TO ARTICLE 14 (Nationality of the members of the special mission) [10] (A/CN.4/L.124/Add.4)

Paragraphs (1)-(3)

Paragraphs (1), (2) and (3) were approved.

Paragraph (4)

109. The CHAIRMAN said that the first sentence was incomplete, for it did not make clear that the question arose when a special mission was in a third State. He suggested that the words "nationality of the sending State" should be replaced by the words "nationality either of a third or of the sending State".

110. Mr. BARTOŠ, Special Rapporteur, objected that it was only the sending State that was in question.

111. Mr. AGO proposed that the sentence should be amended to read "... the members of a special mission can have the nationality of a third State".

It was so agreed.

112. Mr. BARTOŠ, Special Rapporteur, said that the last sentence of paragraph (4) was not clear and should be redrafted.

113. The CHAIRMAN suggested that the matter should be left to the Special Rapporteur.

It was so agreed.

Paragraph (4), as amended, was approved.

Paragraph (5)

Paragraph (5) was approved.

Paragraph (6)

114. Mr. USTOR questioned whether paragraph (6) was really necessary. It merely drew attention to something the Commission had not done.

115. Mr. BARTOŠ, Special Rapporteur, said that the reference to refugees and stateless persons had been included at the request of the High Commissioner for Refugees. That question was referred to in the two Vienna Conventions and it had been mentioned in the Commission; the sentence showed that the Commission had given some consideration to the matter.

116. Mr. REUTER said it was going rather too far to say that there was no need for special rules on the question. It would be better to amend the second sentence to read: "It concluded that it was not for the Commission to propose special rules ..."

117. Mr. AGO thought that the wording should be as general as possible. The status of refugees and stateless persons would be covered by the general rules of international law.

118. The CHAIRMAN said that in his view the Commission should state that there was no rule in either of the Vienna Conventions. It might then add that it was for that reason that the matter had to be left to general practice.

119. Mr. AGO said he feared that that solution might give the impression that the Commission did not wish stateless persons to be placed on the same footing as nationals of another country, which was not the case.

120. Mr. BARTOŠ, Special Rapporteur, suggested that the Commission's conclusion should be that the matter should be settled according to the general rules of international law.

121. The CHAIRMAN suggested that the words "special rules on this question" should be replaced by the words "relevant rules of international law." A reference to the two Vienna Conventions should also be included, so that the second sentence would read: "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."

It was so agreed.

Paragraph (6), as amended, was approved.

Paragraph 7

Paragraph 7 was approved.

The commentary to article 14, as amended, was approved.

COMMENTARY TO ARTICLE 16 (Activities of special missions in the territory of a third State) [18] (A/CN.4/L.124/Add.4)

Paragraph (1)

Paragraph (1) was approved.

Paragraph (2)

122. Mr. CASTRÉN proposed that the words "between the sending States" should be deleted from the end of

the first sentence of paragraph (2), as the sentence did not refer to sending States only.

123. Mr. BARTOŠ, Special Rapporteur, said that it did in fact refer only to sending States, but the wording might be amended to read "the States concerned".

Paragraph (2), as amended, was approved.

Paragraph (3)

124. Mr. JIMÉNEZ de ARÉCHAGA proposed that the words "*la médiation, les bons offices ou simplement d'offrir son hospitalité*" in the French text of the first sentence of paragraph (3), should be replaced by "*sa médiation, d'offrir ses bons offices ou simplement d'accorder l'hospitalité*".

It was so agreed.

Paragraph (3), as amended, was approved.

Paragraph (4)

125. Mr. AGO said he considered it inadvisable to mention a State by name and pass judgement on its actions. He therefore proposed that the words "for example, Switzerland during the war" should be deleted and that the word "third" should be inserted between the words "some" and "States" in the first line.

It was so agreed.

Paragraph (4), as amended, was approved.

Paragraph (5)

126. Mr. CASTRÉN said that paragraph (5) should not refer only to withdrawal of consent, for the receiving State might change the conditions on which it was willing to receive a special mission, and the mission might be withdrawn on that account.

127. The CHAIRMAN suggested that the paragraph should be deleted.

It was so agreed.

Paragraph (6)

128. Mr. AGO proposed that the last part of the first sentence, from the word "activities" to the end, should be replaced by the words "relations between the special missions of two States in the territory of a third State ...", which would remove all ambiguity.

It was so agreed.

Paragraph (6), as amended, was approved.

Paragraphs (7)-(9)

Paragraphs (7), (8) and (9) were approved.

The commentary to article 16, as amended, was approved.

Part II. Facilities, privileges and immunities

GENERAL CONSIDERATIONS (A/CN.4/L.124/Add.5)

Paragraphs (1) and (2)

Paragraphs (1) and (2) were approved.

Paragraph (3)

129. Mr. AGO said that it was not correct to say that those who had opposed the Commission's taking the Vienna Convention on Diplomatic Relations as the basis for the draft on special missions had done so "on the grounds that such missions were not of a representative character". They had merely maintained that special missions did not have the same character as diplomatic missions.

130. Mr. KEARNEY said that the problem might also be whether special missions had a diplomatic character. Some Governments did not wish to accord diplomatic status to all official or special missions. He thought it would be dangerous to include any reference to the discussion that had taken place in the Commission unless it was considerably amplified.

131. The CHAIRMAN suggested that the last part of the last sentence, from the words "*on the grounds that*" to the end, should be deleted.

It was so agreed.

Paragraph (3), as amended, was approved.

Paragraph (4)

132. The CHAIRMAN said that the first sentence did not seem to be accurate.

133. Mr. AGO suggested that it be amended to read: "The majority of the Commission considered that, subject to certain restrictions, special missions should be granted the same facilities, privileges and immunities as permanent diplomatic missions".

134. Mr. BARTOŠ, Special Rapporteur, said that the last part of the second sentence, from the words "each individual special mission" to the end, could be added to the first sentence.

135. Mr. USTOR pointed out that paragraphs (2) and (3) related to events in 1958 and 1960, whereas paragraph (4) related to 1967, but that was not clear from the text.

136. The CHAIRMAN suggested that the paragraph should start with the words "At the present session, the Commission ...".

137. Mr. AGO proposed the wording: "The Commission considered that each individual special mission should be granted everything which may be essential for the regular performance of its functions, having regard to its nature and task".

138. Mr. REUTER proposed that the order of the two sentences should be reversed.

139. Mr. AGO proposed that the two sentences be redrafted to read: "At the present session, 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."

140. Mr. USTOR thought that there should be some reference to the representative character of special missions.

141. Mr. BARTOŠ, Special Rapporteur, said that he did not agree with that view.

142. Mr. YASSEEN drew attention to the fact that opinion had been divided in the Commission about the meaning of "representative character".

143. Mr. AGO pointed out that in order to avoid controversial issues, the Commission had decided on a very specific text.

144. The CHAIRMAN said that the Commission had taken a clear stand by making the representative character of a mission the basis for granting privileges and immunities. As the point was dealt with elsewhere in the draft, it was not essential to mention it in paragraph (4).

Paragraph (4), as amended by Mr. Ago, was approved.

Paragraph (5)

145. Mr. REUTER proposed that the word "accordingly", in the first sentence, should be deleted.

It was so agreed.

146. Mr. AGO proposed that the second sentence should be replaced by the following wording: "It had departed from that convention only on particular points for which a different solution was required".

It was so agreed.

Paragraph (5), as amended, was approved.

The section entitled "General considerations", as amended, was approved.

COMMENTARY TO ARTICLE 17 (General facilities) [22] (A/CN.4/L.124/Add.5)

Paragraph (1)

Paragraph (1) was approved.

Paragraph (2)

147. The CHAIRMAN suggested the words "each special mission" should be replaced by the words "special missions", which would be more correct in a general statement.

It was so agreed.

Paragraph (2), as amended, was approved.

Paragraph (3)

148. Mr. KEARNEY proposed that the words "It is only a minority of special missions", at the beginning of the third sentence, should be replaced by "There are only a few special missions".

149. Mr. BARTOŠ, Special Rapporteur, said that the cases in which more extensive facilities were needed were indeed very few. The last sentence was merely an amplification and could be deleted. In drafting article 17, he had had in mind the Commission's considered view that special missions could not claim the same facilities and privileges as diplomatic missions.

150. The CHAIRMAN said that the last two sentences could be deleted as the point was clearly made in the second sentence.

151. Mr. AGO agreed. The second sentence could then be reworded to read: "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."

It was so agreed.

Paragraph (3), as amended, was approved.

The commentary to article 17, as amended, was approved.

Adoption of the Draft Articles on Special Missions

152. The CHAIRMAN invited the Commission to vote on the draft articles as a whole.

The draft articles on special missions, as a whole, were adopted unanimously.

153. The CHAIRMAN congratulated the Special Rapporteur on the excellent work he had done, and proposed that the Commission adopt the following draft 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."

154. Mr. AGO supported the draft resolution, which did justice to the outstanding capacities of the Special Rapporteur. His knowledge was profound, but his attitude remained flexible and he had constantly shown his willingness to accept amendments proposed by members of the Commission.

The draft resolution was adopted unanimously.

155. Mr. BARTOŠ, Special Rapporteur, thanked the Commission for the tribute it had paid him. His task had given him great pleasure.

The meeting rose at 6 p.m.

941st MEETING

Friday, 14 July 1967, at 9.55 a.m.

Chairman: Sir Humphrey WALDOCK

Present: Mr. Ago, Mr. Bartoš, Mr. Castañeda, Mr. Castrén, Mr. Ignacio-Pinto, Mr. Jiménez de Aréchaga, Mr. Kearney, Mr. Nagendra Singh, Mr. Reuter, Mr.

Tabibi, Mr. Tammes, Mr. Ushakov, Mr. Ustor, Mr. Yasseen.

Special Missions

(A/CN.4/193 and Addenda; A/CN.4/194 and Addenda)

(resumed from the 938th meeting)

[Item 1 of the agenda]

ARTICLE 3 (Appointment of the members of the special mission) [8][1]

1. The CHAIRMAN said that, when the Commission had adopted article 3, the opening phrase "Subject to the provisions of articles ..." had not included the numbers of the articles referred to.

2. The Special Rapporteur had now informed him that the reference was to articles 4 and 14. He therefore invited the Commission to note that article 3, in its final form, read:

> "Subject of the provisions of articles 4 and 14, 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."

Draft Report of the Commission on the Work of its Nineteenth Session

(A/CN.4/L.124 and Addenda)

(resumed from the previous meeting)

CHAPTER II: SPECIAL MISSIONS
(continued)

Part II. Facilities, privileges and immunities (continued)

COMMENTARY TO ARTICLE 18 (Accomodation of the special mission and its members) [23] (A/CN.4/L.124/Add. 5)

Paragraph (1)

Paragraph (1) was approved.

Paragraph (2)

3. The CHAIRMAN suggested that in paragraph (2) the opening words "The essential difference between these two provisions ..." should be amended to read: "The essential difference between article 18 of the present draft and article 21 of the Vienna Convention on Diplomatic Relations ...".

It was so agreed.

Paragraph (2), as amended, was approved.

Paragraph (3)

4. The CHAIRMAN suggested that in paragraph (3) the concluding words of the first sentence "to move quickly and often" should be amended to read "to move quickly as and when necessary".

It was so agreed.

Paragraph (3), as amended, was approved.

Paragraph (4)

Paragraph (4) was approved.

Paragraph (5)

5. The CHAIRMAN suggested that the words "to defray the whole or part of the expenses" should be amended to read "to defray any of the expenses".

It was so agreed.

Paragraph (5), as amended, was approved.

The commentary to article 18, as amended, was approved.

COMMENTARY TO ARTICLE 19 (Inviolability of the premises) [25] (A/CN.4/L.124/Add. 5 and Corr. 1)

Paragraph (1)

The text of paragraph (1) as given in document A/CN.4/L.124/Add. 5 and Corr. 1 was approved.

Paragraphs (2) and (3)

Paragraphs (2) and (3) were approved.

Paragraph (4)

6. The CHAIRMAN said he found the drafting of the second sentence of paragraph (4) (A/CN.4/L.124/Add. 5 Corr. 1) inadequate. He suggested, first, that the reference to "the majority of the Commission" should be deleted, since it was the Commission itself which took the decision; and secondly, that the statement that the provision had been "criticized" by several members should be replaced by wording to the effect that the provision had been opposed by several members of the Commission on the ground that it might lead to abuses.

It was so agreed.

Paragraph (4), as amended, was approved.

The commentary to article 19, as amended, was approved.

COMMENTARY TO ARTICLE 20 (Inviolability of archives and documents) [26] (A/CN.4/L.124/Add. 5)

COMMENTARY TO ARTICLE 21 (Freedom of movement) [27] (A/CN.4/124/Add. 5)

COMMENTARY TO ARTICLE 22 (Freedom of communication) [28] (A/CN.4/124/Add. 5 and Corr. 1)

The commentaries to articles 20, 21 and 22 were approved.

COMMENTARY TO ARTICLE 15 (Right of special missions to use the flag and emblem of the sending State) [19] (A/CN.4/124/Add. 6)

Paragraphs (1) and (2)

Paragraphs (1) and (2) were approved.

Paragraph (3)

7. The CHAIRMAN suggested that in paragraph (3) the words "The Commission thought it useful to include in article 15 the provisions of article 29, paragraph 3 of the Vienna Convention on Consular Relations" should be amended in two ways. First, the reference should be to the inclusion of a provision similar to that paragraph of the

[1] For earlier discussion, see 931st meeting, paras. 106-117.

Vienna Convention on Consular Relations. Secondly, some description of the contents of that paragraph should be given for the benefit of those who were not familiar with the text of the 1963 Vienna Convention.

It was so agreed.

Paragraph (3), as amended, was approved.

The commentary to article 15, as amended, was approved.

COMMENTARY TO ARTICLE 23 (Exemption of the premises of the special mission from taxation) [24] (A/CN.4/L.124/Add. 6)

The commentary to article 23 was approved.

COMMENTARY TO ARTICLE 24 (Personal inviolability) [29] (A/CN.4/L.124/Add. 6)

8. The CHAIRMAN observed that the drafting of the English text needed adjustment. Since the same was true of the commentaries to a number of other articles, he suggested that the Secretariat should be authorized to make stylistic changes in the English text of all the commentaries, where necessary.

9. Mr. USHAKOV drew attention to the need to replace the opening words of paragraph (2) "The majority of the Commission considered ..." by the words "The Commission considered ...". The same correction would have to be made in a number of other commentaries.

10. The CHAIRMAN said that if, there were no objection, he would assume that the Commission agreed to authorize the Secretariat to make the drafting changes to which Mr. Ushakov and he himself had referred, throughout the text of the commentaries.

It was so agreed.

The commentary to article 24, as amended, was approved.

COMMENTARY TO ARTICLE 25 (Inviolability of the private accommodation) [30] (A/CN.4/L.124/Add. 6)

COMMENTARY TO ARTICLE 26 (Immunity from jurisdiction) [31] (A/CN.4/L.124/Add. 6)

COMMENTARY TO ARTICLE 27 (Waiver of immunity) [41] (A/CN.4/L.124/Add. 6)

The commentaries to articles 25, 26 and 27 were approved.

COMMENTARY TO ARTICLE 27 *bis* (Settlement of civil claims) [42] (A/CN.4/L.124/Add. 6)

11. Mr. JIMÉNEZ de ARÉCHAGA proposed that it should be explained in the second sentence that the Commission had included the article in its draft in order to give concrete expression to a principle stated in the preamble, namely, that the purpose of immunities was to protect the interests of the sending State and not those of persons.

12. Mr. AGO said that the commentary should also specify that the Commission had drafted an article on the subject, not a recommendation.

13. In the French text, there was a mistake in the last phrase which needed to be corrected: the words "*État d'envoi*" should be replaced by "*État de réception*". In addition, the words "settlement of civil claims brought" were not appropriate; it was necessary also to cover the case of settlement out of court.

14. After a brief discussion, the CHAIRMAN suggested that the commentary should be reworded to read:

"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 the 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."

The commentary to article 27 bis, *as thus amended, was approved.*

COMMENTARY TO ARTICLE 28 (Exemption from social security legislation) [32] (A/CN.4/L.124/Add. 6)

The commentary to article 28 was approved.

COMMENTARY TO ARTICLE 29 (Exemption from dues and taxes) [33] (A/CN.4/L.124/Add. 6)

Paragraph (1)

Paragraph (1) was approved.

Paragraph (2)

15. Mr. TAMMES said that the word "discrimination" used in the last sentence of paragraph (2) was unsatisfactory. It was not a question of discrimination; the Commission had not wished to establish a different régime for special missions.

16. Mr. BARTOŠ, Special Rapporteur, proposed that the last sentence of paragraph (2) be deleted.

It was so agreed.

Paragraph (2), as amended, was approved.

The commentary to article 29, as amended, was approved.

COMMENTARY TO ARTICLE 30 (Exemption from personal services and contributions) [34] (A/CN.4/L.124/Add. 6)

The commentary to article 30 was approved.

COMMENTARY TO ARTICLE 31 (Exemption from customs duties and inspection) [35] (A/CN.4/L.124/Add. 6)

Paragraph (1)

Paragraph (1) was approved.

Paragraph (2)

17. Mr. AGO said that the last sentence of paragraph (2) should be amended, since the expression "make it necessary" was not justified.

18. Mr. KEARNEY said he found the last sentence difficult to understand. Since special missions were temporary,

it might be thought that, on the contrary, the members did not need to be accompanied by members of their family.

19. Mr. BARTOŠ, Special Rapporteur, stressed that the last sentence contained the words "persons of their family who do not normally form part of their household". The Commission had considered that, in view of the temporary character of special missions, their members might include persons who, because of age or poor health, were not accustomed to travel and might need to be accompanied by members of their family who did not form part of their household.

20. The CHAIRMAN proposed the deletion of the words in brackets "(sister, married daughter, etc.)"

21. Mr. AGO proposed that the last sentence of paragraph (2) should be redrafted to read:

"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."

It was so agreed.

Paragraph (2), as amended, was approved.

Paragraph (3)

Paragraph (3) was approved.

Paragraph (4)

22. Mr. REUTER proposed that, in the French text of paragraph (4), the word "*exigé*", in the first sentence, should be replaced by "*réclamé*".

It was so agreed.

23. Mr. JIMÉNEZ de ARÉCHAGA proposed that in the last sentence of the same paragraph the words "in each particular case" should be deleted.

It was so agreed.

Paragraph (4), as amended, was approved.

The commentary to article 31, as amended, was approved.

COMMENTARY TO ARTICLE 32 (Administrative and technical staff) [36] (A/CN.4/L.124/Add. 6)

24. Mr. BARTOŠ, Special Rapporteur, proposed that, in paragraph (3), it should be specified that the reference in the first sentence was to article 37 of the Vienna Convention, and in the second sentence to article 32 of the draft.

It was so agreed.

The commentary to article 32, as amended, was approved.

COMMENTARY TO ARTICLE 33 (Members of the service staff) [37] (A/CN.4/L. 124/Add. 6)

The commentary to article 33 was approved.

COMMENTARY TO ARTICLE 34 (Private staff) [38] (A/CN.4/L.124/Add. 6)

The commentary to article 34 was approved.

COMMENTARY TO ARTICLE 35 (Members of the family) [39] (A/CN.4/L.124/Add. 6)

25. Mr. BARTOŠ, Special Rapporteur, said he had intentionally omitted to point out that certain Governments considered that members of the family required an authorization from the receiving State. The Commission had been against such a requirement, and it was preferable not to draw the attention of the conference to that point.

The commentary to articles 35 was approved.

COMMENTARY TO ARTICLE 36 (Nationals of the receiving State and persons permanently resident in the territory of the receiving State) [40] (A/CN.4/L.124/Add. 6)

Paragraph (1)

Paragraph (1) was approved.

Paragraph (2)

26. Mr. AGO said that in the last sentence of paragraph (2) the term "its jurisdiction" was ambiguous, and should be replaced by the words "the application of its laws".

27. The CHAIRMAN proposed that the last sentence of paragraph (2) should be deleted, since the Commission was not called upon to make a formal pronouncement on the matter; it was sufficient to specify that the Commission had followed the corresponding provisions of the Vienna Convention.

It was so agreed.

Paragraph (2), as amended, was approved.

The commentary to article 36, as amended, was approved.

COMMENTARY TO ARTICLE 37 (Duration of privileges and immunities) [44] (A/CN.4/L.124/Add. 6)

28. Mr. AGO, supported by Mr. BARTOŠ, Special Rapporteur, proposed that in the second sentence of the French text the word "*régime*" should be replaced by the word "*traitement*".

It was so agreed.

The commentary to article 37, as amended, was approved.

COMMENTARY TO ARTICLE 38 (Property of a member of the special mission or of a member of his family in the event of death) [45] (A/CN.4/L.124/Add.6)

The commentary to article 38 was approved.

COMMENTARY TO ARTICLE 39 (Transit through the territory of a third State) [43] (A/CN.4/L.124/Add. 6)

Paragraph (1)

Paragraph (1) was approved.

Paragraph (2)

29. The CHAIRMAN proposed that, in the first sentence of paragraph (2), the words "are new" should be replaced by "are not in the Vienna Convention".

It was so agreed.

Paragraph (2), as amended, was approved.

The commentary to article 39, as amended, was approved.

Part. I. Sending and conduct of special missions (resumed)

COMMENTARY TO THE INTRODUCTORY ARTICLE (Use of terms) [1] (A/CN.4/L.124/Add. 10)[2]

Paragraph (1)

30. Mr. AGO, observing that the Commission preferred to avoid the use of the word "definition", proposed that the last part of paragraph (1) should be redrafted to read: "... the Commission has specified in the introductory article of the draft the meaning of the expressions most frequently used in it".

It was so agreed.

Paragraph (1), as amended, was approved.

Paragraph (2)

31. Mr. AGO proposed that, in the second sentence of paragraph (2), the words "regarded as" should be inserted before the words "a special mission in the sense used in the draft".

32. Mr. TAMMES proposed that the words "a substantive rule" at the end of paragraph (2) should be replaced by "an essential element".

33. Mr. YASSEEN supported that proposal and proposed that the words "of the concept of a special mission" should be added after "an essential element."

34. Mr. KEARNEY said it would be rather inappropriate to say in paragraph (2) that the conditions to be fulfilled by a special mission constituted an essential element of the concept of a special mission; in fact, those conditions constituted a complete definition and not just one of the elements of that definition.

35. The CHAIRMAN pointed out that paragraph (3) of the commentary specified some of the other characteristics of a special mission.

36. Mr. AGO proposed that paragraph (2) should be redrafted as follows:

"Sub-paragraph (*a*) of the introductory article 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".

It was so agreed.

Paragraph (2), as amended, was approved.

Paragraph (3)

37. Mr. AGO proposed that the opening words of the second sentence of paragraph (3) (*a*) should be reworded to read: "Special missions in the sense in which the term is used in the draft cannot be considered ...". He further proposed that the opening words of the last sentence of paragraph (3) (*a*) should be amended to read: "Consequently, the Commission did not consider that it should deal in its draft ...".

38. Mr. KEARNEY proposed the deletion of the word "special" before the word "missions" in the last sentence of paragraph (3) (*a*).

It was so agreed.

39. Mr. AGO expressed the view that paragraph (3) (*b*) should go into rather more detail, since the representative character of a special mission was an essential element of the draft.

40. The CHAIRMAN said that paragraph (3) (*b*) of the commentary was rather inadequate. In one short sentence, it made the bare statement that one of the essential characteristics of a special mission was the fact that it represented the sending State. It was essential to amplify that passage, which dealt with a crucial point; the Commission had revised its whole draft on the basis of the representative character of special missions, which distinguished those missions from mere visits by government officials.

41. Mr. USTOR said that the idea could perhaps be clarified by giving the example of visits by officials who represented national interests and not the State as a whole, such as representatives of a national bank.

42. The CHAIRMAN said that it would be dangerous to give actual examples which would commit the Commission to a particular interpretation. He suggested that a sentence, couched in general terms, should be added to paragraph (3) (*b*) of the commentary in order to explain the idea expressed in the present single sentence of that paragraph. Readers of the earlier reports prepared by the Special Rapporteur and by the Commission itself would want some explanation of the Commission's change of approach, which had taken place at the present session and was based precisely on the emphasis now placed on the representative character of the special mission. The Commission had abandoned all attempts to draw any distinctions between different categories of special missions; a special mission, provided it has a representative character would always receive the same treatment.

43. Mr. JIMÉNEZ de ARÉCHAGA supported the Chairman's proposal and agreed that it would be dangerous to give examples.

44. Mr. KEARNEY said he also supported the Chairman's views. The additional sentence proposed by the Chairman could perhaps state that the representative character of a special mission was an essential element which distinguished a special mission from visits by officials who did not have that representative character.

45. Mr. YASSEEN said it would be better not to stress the representative character of special missions too much. A special mission must be representative, it was true, but it did not necessarily have to represent the whole of the State; it might only represent the State for part of its competence. For example, in a country in which the central bank was regarded as an organ of the State, the director of the central bank might, as the head of a special mission, represent the State within the limits of the bank's competence.

[2] For earlier discussion of the commentaries to the introductory article and to article 1, see 939th meeting, paras. 46-61.

46. Mr. USHAKOV said that if a mission was to be a special mission in the sense used in the draft, it must include at least one person representing the sending State. If the director of the central bank was appointed representative of the State in a mission sent to a foreign State, the mission would be a special mission; if not, it would not be a special mission.

47. Mr. CASTAÑEDA proposed that its hould be specified in paragraph (3) (*b*) that the special mission must be representative, in the sense that its members officially represented the sending State.

48. The CHAIRMAN, replying to Mr. Yasseen, said that the competence of the representative of the sending State was not necessarily limited to his competence as an organ under the constitutional law of that State. The representative of the State might be vested with special powers.

49. Mr. YASSEEN said he acknowledged that a representative's competence might be extended. But even if his representative character was recognized only to the extent of his competence, he would still be the representative of the State. That concept did not conflict with the representative character of the special mission.

50. Mr. JIMÉNEZ de ARÉCHAGA suggested that the idea put forward by the Chairman and Mr. Kearney, namely, that special missions were distinguished from official visits by their representative character, should be added in paragraph (3) (*b*). That would show the minimum requirement of the draft.

51. Mr. AGO proposed that sub-paragraph (*b*) should read:

"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."

It was so agreed.

52. Mr. AGO proposed that in the first sentence of paragraph (3) (*c*) the words "precisely" and "but need not necessarily be very limited" should be deleted, and that in the French text the word "*mais*" should be replaced by "*et*".

It was so agreed.

53. Mr. JIMÉNEZ de ARÉCHAGA said he feared that the examples given in the last sentence of paragraph (3) (*d*) were not conclusive, for special missions too could be missions for assistance or for economic and industrial co-operation, immigration missions, and so on.

54. The CHAIRMAN suggested that, to meet that objection, the word "permanent" might be inserted, in the last sentence of paragraph (3) (*d*), between the words "are" and "missions".

It was so agreed.

Paragraph (3), as amended, was approved.

Paragraph (4)

55. Mr. AGO proposed that in paragraph (4) the word "defines" should be replaced by the word "describes"; the words "the character prescribed" should be replaced by the words "the characteristics specified"; and the last sentence should be deleted.

It was so agreed.

Paragraph (4), as amended, was approved.

Paragraph (5)

56. Mr. AGO proposed that in paragraph (5) the words "of the introductory article" should be inserted after the words "sub-paragraph (*a*)" in the first sentence. In the French text of the same sentence, the words "*considérée comme*" should be inserted before "*une mission spéciale*", the word "*est*" should be replaced by "*figure*" and the words "*au regard*" should be deleted.

It was so agreed.

Paragraph (5), as amended, was approved.

Paragraph (6)

57. Mr. AGO proposed that the last sentence of paragraph (6) should be deleted and the two remaining sentences worded as follows:

"Sub-paragraph (*c*) of the introductory article 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."

It was so agreed.

Paragraph (6), as amended, was approved.

The commentary to the introductory article, as amended, was approved.

COMMENTARY TO ARTICLE 1 (Sending of special missions) [2] (A/CN.4/L.124/Add. 10)[3]

Paragraph (1)

58. After an exchange of views, Mr. REUTER proposed that in paragraph (1) of the French text the words "*à moins de s'y être engagés préalablement*" should be replaced by the words "*sauf s'il s'agit de l'exécution d'un engagement préalable*".

It was so agreed.

Paragraph (1), as amended, was approved.

Paragraph (2)

59. After a brief discussion, Mr. AGO proposed that paragraph (2) should be redrafted to read:

"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."

It was so agreed.

Paragraph (2), as amended, was approved.

The commentary to article 1, as amended, was approved.

[3] See footnote 2.

COMMENTARY TO ARTICLE 41 (Organ of the receiving State with which official business is conducted) [15] (A/CN.4/L.124/Add. 9)

The commentary to article 41 was approved.

Part II. Facilities, privileges and immunities (resumed)

Part III. General provisions

COMMENTARY TO ARTICLE 40 (Obligation to respect the laws and regulations of the receiving State) [48] (A/CN.4/L.124/Add. 9)

COMMENTARY TO ARTICLE 42 (Professional activity) [49] (A/CN.4/L.124/Add. 9)

COMMENTARY TO ARTICLE 43 (Right to leave the territory of the receiving State) [46] (A/CN.4/L.124/Add. 9)

The commentaries to articles 40, 42 and 43 were approved.

COMMENTARY TO ARTICLE 44 (Consequences of the cessation of the functions of the special mission) [47] (A/CN.4/L.124/Add. 9)

Paragraph (1)

Paragraph (1) was approved.

Paragraph (2)

60. The CHAIRMAN suggested that the words "merely contemplates the possibility" in the first sentence of paragraph (2) should be amended to read "necessarily contemplates only the case".

It was so agreed.

Paragraph (2), as amended, was approved.

Paragraph (3)

Paragraph (3) was approved.

The commentary to article 44, as amended, was approved.

COMMENTARY TO ARTICLE 17 *quater* (Status of the Head of State and persons of high rank) [21] (A/CN.4/L.124/Add.7)

Paragraph (1)

61. Mr. KEARNEY suggested that the last phrase of paragraph (1), after the words "privileges and immunities", should be amended to read "which he retains on becoming a member of a special mission".

It was so agreed.

62. The CHAIRMAN suggested that the second and third sentences of paragraph 1 should be combined to read "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".

It was so agreed.

Paragraph (1), as amended, was approved.

Paragraphs (2) and (3)

Paragraphs (2) and (3) were approved.

The commentary to article 17 quater, *as amended, was approved.*

COMMENTARY TO ARTICLE 40 *bis* (Non discrimination) [50] (A/CN.4/L.124/Add. 7)

The commentary to article 40 bis *was approved.*

The commentaries to the draft articles on special missions, as a whole, as amended, were approved, subject to drafting changes.

I. HISTORICAL BACKGROUND (A/CN.4/L.124/Add. 8)

Paragraphs 1 to 23

63. The CHAIRMAN said that the Commission need not consider paragraphs 1 to 23 of chapter II as the passage on the historical background of the subject of special missions had been submitted to it at previous sessions.

Paragraph 24

Paragraph 24 was approved.

Section I of chapter II was approved.

II. RECOMMENDATION OF THE COMMISSION

64. The CHAIRMAN said that the Commission would have to make a recommendation to the General Assembly on how the draft articles should be dealt with. The analogous recommendation concerning the draft articles on the law of treaties[4] stated that the Commission had decided, in conformity with article 23, paragraph 1 (*d*) of its Statute, to recommend that the General Assembly should convene an international conference of plenipotentiaries to study the Commission's draft articles on the law of treaties and to conclude a convention on the subject. The Commission had gone on to express the hope that the titles given to parts, sections and articles of its draft, which it considered helpful for an understanding of the structure of the draft and for promoting ease of reference, would be retained in any convention which might be concluded in the future on the basis of the draft articles.[5] The latter part of the recommendation should be restated in the recommendation on special missions, and all members would agree that the draft articles should form a convention. The only doubtful point was whether the convention should be adopted at a plenipotentiary conference or whether the United Nations might adopt some other procedure, such as consideration of the draft in the Sixth Committee of the General Assembly and subsequent adoption and signature in the usual way.

65. He thought that three possibilities were open to the Commission: first, to follow the example of the recommendation on the law of treaties; second, to recommend two variants, mentioning the possibility of a conference or some other United Nations procedure; or third, to make a general recommendation that the draft articles should be converted into a convention, without stating any specific method.

[4] *Yearbook of the International Law Commission, 1966*, vol. II, document A/6309/Rev.1, part II, para. 36.

[5] *Ibid.*, para. 37.

66. Mr. AGO said that the Chairman had summed up the situation very well. The Commission's aim was to see that the draft articles were converted into a convention, but it was for the General Assembly to decide how that should be done.

67. Mr. TABIBI said he too thought it would be wise to leave the matter to the General Assembly to decide. It should be borne in mind, however, that the General Assembly prepared its calender of conferences some years in advance, and it would be advisable to say that the possibility of a conference should be provided for in the future.

68. Mr. CASTAÑEDA thought it would be advisable to say that the draft articles should be discussed by eminent and specialized jurists, so that Member States would be forewarned to send representatives of the necessary calibre to represent them in the Sixth Committee, if it was decided that that body should deal with the convention.

69. Mr. USHAKOV suggested that the Commission adopt the usual formula, which was to recommend that the General Assembly should convene a plenipotentiary conference, so that States might accept the convention without discussion.

70. Mr. BARTOŠ urged that the Commission should confine itself to expressing the wish that the draft articles should become a convention and should leave it to the General Assembly to find the appropriate method.

71. Mr. TABIBI said that, if the Commission considered it a matter of urgency to supplement the Vienna Conventions with a convention on special missions, it should recommend that the General Assembly convene a plenipotentiary conference. Moreover, unless the Commission stressed the importance it attached to the conclusion of a convention, the subject might merely be given routine consideration in the Sixth Committee, and the quality of the work might be inferior to that of a plenipotentiary conference.

72. Mr. YASSEEN thought that the Commission should decide whether it wished to recommend the General Assembly to convene a plenipotentiary conference or to leave it to the Assembly to take that decision.

73. Mr. NAGENDRA SINGH said in his view the recommendation should be as flexible as possible. A conference would have been essential if the subject had been an independent one, but since the draft articles were so largely based on the Vienna Conventions, it seemed appropriate to leave it to the General Assembly to decide whether the question should be dealt with in the Sixth Committee or by other means. Moreover, insistence on a conference might delay the adoption of the convention, because of the expense and time involved.

74. Mr. USTOR said that the wisest course would be to recommend the convening of a conference, for experience had shown that to entrust General Assembly Committees with the drafting of legal texts was not a satisfactory solution. The Commission should not hesitate to follow the recommendation it had adopted on the law of treaties; in any case its recommendations were not binding on the General Assembly.

75. Mr. AGO thought that it would be better to follow the usual practice of convening a plenipotentiary conference. Nevertheless, it was for the General Assembly to take the decision. What should be avoided was an ambiguously worded recommendation which might give the General Assembly or the Sixth Committee the impression that the International Law Commission did not attach due importance to the draft articles and that they could be adopted without being made into a formal convention.

76. Mr. KEARNEY pointed out that the time factor militated against holding a conference on special missions. It was proposed to hold two conferences on the law of treaties in 1968 and 1969, and there was a very strong movement in the United Nations to cut down the number of conferences as much as possible. He would not oppose a recommendation to convene a conference, but he thought that the difficulties involved should be borne in mind.

77. Mr. STAVROPOULOS (Legal Counsel) said he agreed with Mr. Tabibi that representatives on the Sixth Committee were not all eminent jurists; many of the delegations to the Assembly did not include such persons. Nevertheless, the Sixth Committee might welcome the opportunity of being able to adopt an international instrument, and the subject of special missions, which was an auxiliary part of diplomatic law, seemed particularly appropriate for the purpose. Moreover, if enough advance publicity was given to the draft articles, Member States were likely to send qualified representatives.

78. The CHAIRMAN suggested that the opening passage of the recommendation should read: "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".

That proposal was adopted by 9 votes to none, with 5 abstentions.

79. Mr. USHAKOV said he had abstained because he still thought that the Commission should have recommended the General Assembly to convene a plenipotentiary conference.

80. Mr. TABIBI said he had abstained from voting because the recommendation failed to draw the General Assembly's attention to the importance of sending qualified representatives to the Sixth Committee for the adoption of the convention.

81. Mr. BARTOŠ pointed out that in 1966 the Commission had recommended the General Assembly to convene a plenipotentiary conference.

82. Mr. REUTER said that, generally speaking, the Commission should not confine itself to preparing texts for conventions and should adopt a more flexible attitude. However, when it was obvious that the only course to follow with regard to a particular topic was to adopt a diplomatic convention, the Commission should not

hesitate to say so. It was for those reasons that he had abstained.

83. Mr. YASSEEN said that he had voted for the proposed recommendation as it did not preclude the convening of a plenipotentiary conference. The Commission's idea had been to leave it to the General Assembly to consider ways and means in the light of practical considerations.

84. The CHAIRMAN said he would make it clear, when representing the Commission in the Sixth Committee, that the Commission considered it very important for the convention to be adopted as soon as possible. In view of the very heavy calendar of conferences of the United Nations, the adoption of the convention would be substantially delayed if a conference had to be convened.

85. Mr. AGO explained that he had voted for the recommendation in the hope that it would lead to the convening of a plenipotentiary conference. The danger of excessive delay was a real one, but so was the danger that would be incurred if the draft convention was submitted to a body whose members were not necessarily qualified to approve a text of that kind.

CHAPTER I: ORGANIZATION OF THE SESSION (A/CN.4/L.124)

86. Mr. JIMÉNEZ de ARÉCHAGA suggested that the word "and" in the last sentence of paragraph 5 should be replaced by "or".

It was so agreed.

Chapter I, as amended, was approved.

CHAPTER III: OTHER DECISIONS AND CONCLUSIONS OF THE COMMISSION (A/CN.4/L.124/Add. 11)

Paragraph 1

87. The CHAIRMAN suggested that the words "a group of members consisting of" in the second sentence of paragraph 1 should be deleted.

It was so agreed.

Paragraph 1, as amended, was approved.

Paragraph 2

Paragraph 2 was approved.

Paragraph 3

88. The CHAIRMAN suggested that the reference to "Judge Lachs" in the last sentence should read "Mr. Lachs".

It was so agreed.

Paragraph 3, as amended, was approved.

Paragraphs 4 to 6

Paragraphs 4 to 6 were approved.

Paragraph 7

89. Mr. YASSEEN, referring to the second sentence, observed that it was not the Commission's practice to confirm a Special Rapporteur in his office. There was a long-standing decision by the Commission that a special rapporteur who was re-elected retained his position as special rapporteur.

90. The CHAIRMAN suggested that the second sentence should read "The Commission confirmed the instructions given to Mr. Ago at the fifteenth session ...".

It was so agreed.

Paragraph 7, as amended, was approved.

Paragraphs 8 to 10

Paragraphs 8 to 10 were approved.

Paragraph 11

91. Mr. AGO suggested that the enumeration of unilateral acts given in brackets in the first sentence should be deleted.

It was so agreed.

Paragraph 11, as amended, was approved.

Paragraph 12

Paragraph 12 was approved.

Paragraph 13

92. In reply to a question by Mr. JIMÉNEZ de ARÉCHAGA, the CHAIRMAN said that the words "the topic of most-favoured-nation clauses in the law of treaties" in the penultimate sentence had been used to make it clear that that topic was being taken up in connexion with a subject already referred to the Commission by the General Assembly.

Paragraph 13 was approved.

Paragraph 14

Paragraph 14 was approved.

Paragraph 15

93. Mr. STAVROPOULOS (Legal Counsel) said that the only ten-week period that could be assigned to the Commission for its twentieth session was from 27 May to 2 August 1968, since the Conference on the Law of Treaties was almost certain to take place from 26 March to 24 May 1968. The Secretary-General had recently received an invitation from the Government of Austria to hold both Conferences on the Law of Treaties in Vienna. All Member States had been notified of the invitation and had been requested to send their comments.

Paragraph 15 was approved.

Paragraphs 16 to 21

94. Mr. BARTOŠ said that it was the practice to include in the report the names of the members of the Commission who attended sessions of other bodies.

95. Mr. JIMÉNEZ DE ARÉCHAGA thought it should be explained that the Commission had sent members to attend sessions of the Asian-African Legal Consulative Committee and the European Committee on Legal Co-operation because the agendas for those sessions included subjects of interest to the Commission.

96. The CHAIRMAN suggested that the two sections referred to by Mr. Jiménez de Aréchaga should be amplified.

It was so agreed.

Paragraphs 16 to 21, as amended, were approved.

Paragraphs 22 and 23

Paragraphs 22 and 23 were approved.

Paragraph 24

97. Mr. BARTOŠ suggested that the two members of the Secretariat referred to in the fourth sentence should be mentioned by name, since they had acted in their personal capacity during the Seminar.

It was so agreed.

Paragraph 24, as amended, was approved.

Paragraphs 25 and 26

Paragraphs 25 and 26 were approved.

Paragraph 27

98. The CHAIRMAN suggested that the square brackets enclosing the last sentence should be removed.

It was so agreed.

Paragraph 27, as amended, was approved.

Chapter III of the draft report was adopted as amended.

The draft report of the Commission on the work of its nineteenth session (A/CN.4/L.124 and Add. 1 to 11), as approved, was adopted.

Closure of the Session

99. The CHAIRMAN said that the session had been a disturbed one in some ways, for several members had been unable to be present, including two officers of the Commission. It had, moreover, been necessary to leave aside the work of one Special Rapporteur. Nevertheless, the session had been most interesting and had made a definite and valuable contribution to the codification and progressive development of international law. Owing to the efforts and enthusiasm of the Special Rapporteur on special missions, the Commission had been able to complete its draft articles, thereby adding a stone to the edifice of diplomatic law. He wished to reiterate his thanks to the Special Rapporteur for his devotion to duty and the extraordinary learning and practical knowledge he had brought to bear on all the subjects under discussion. Despite the tenacity with which he held to his views, Mr. Bartoš had shown great loyalty to the Commission and it was largely due to his willingness to appreciate the need for a consensus that the session had passed so smoothly and ended so successfully.

100. He was sure that members who had not served on the Drafting Committee would wish to express their appreciation of that body's excellent work, and, particularly, of Mr. Ago's devotion and skill.

101. His thanks were also due to Mr. Ustor, who had ably supported him as Second Vice-Chairman and who was to be congratulated on his appointment as Special Rapporteur on the topic of most-favoured-nations clauses.

102. He also expressed his deep appreciation of the work of the Commission's Secretariat, which had been particularly smooth and effective during the nineteenth session. His thanks were also due to all the other members of the Secretariat who had assisted the Commission.

103. In conclusion, he thanked all the members of the Commission for their unfailing courtesy, co-operation and friendship, which had made his task so easy and had enabled the Commission to produce work which would stand comparison with instruments prepared at other sessions and would again redound to its credit.

104. Mr. AGO said that the previous year the Commission had warmly congratulated Sir Humphrey Waldock on his remarkable work as Special Rapporteur. During the present session it had had occasion to appreciate the wisdom, intelligence and authority with which he had discharged the duties of Chairman. The Chairman's task had been a particularly delicate one that year because the Commission's membership had just been changed. But thanks to the friendly atmosphere he had created, the old and new members had worked closely together and had even come to feel that they belonged to a single family.

105. Mr. JIMÉNEZ de ARÉCHAGA, speaking on behalf of Mr. Castrén and Mr. Castañeda as well as himself, expressed his great appreciation of the courtesy, seriousness of purpose and devotion to duty with which the Chairman had conducted the session. The Special Rapporteur had made a very important contribution to the Commission's traditions. As the foremost authority on special missions, Mr. Bartoš had nevertheless had the patience to listen carefully to the views of much less experienced colleagues and, even when he disagreed with them, had reported their views loyally to the Drafting Committee. The procedure of submitting summaries to the Drafting Committee for the formulation of final proposals was an excellent one, which should be followed in the future, although it placed a heavy burden on the Secretariat. The articles adopted reflected a laudable spirit of compromise, and, thanks to the work of the Drafting Committee, were excellently worded.

106. Mr. TABIBI, speaking for himself and Mr. Nagendra Singh, said that the Chairman had long set a splendid example to all members of the Commission, who looked up to him as a symbol of strength, wisdom and patience, and above all of hard work and excellent use of time. He agreed with Mr. Ago that the Commission had established a unique atmosphere of unity and friendship, which was unparalleled in other organs of the United Nations. That atmosphere was largely due to such old members as the Chairman and Mr. Bartoš, whose experience and authority enabled members to co-operate in producing excellent results. He associated himself with the thanks expressed to the Secretariat.

107. Mr. YASSEEN commended the courtesy, great moral qualities and learning displayed by the Chairman in conducting the debates. He also expressed his admiration for Mr. Bartoš, who had undertaken the delicate task of preparing a draft convention on special missions with outstanding success. Lastly, he congratulated Mr. Ustor,

the Second Vice-Chairman of the Commission, and Mr. Ago, the Acting Chairman of the Drafting Committee, whose work had contributed very greatly to the success of the session. He associated himself with the Chairman's commendation of the members of the Secretariat.

108. Mr. BARTOŠ congratulated Sir Humphrey Waldock on the outstanding success with which he had presided over the Commission's work, and thanked him for agreeing to act once again as Special Rapporteur. He took the opportunity of expressing his gratitude to all members of the Secretariat. As Special Rapporteur he had been able to appreciate the remarkable organization of the Secretariat, thanks to which the work could be perfectly co-ordinated.

109. Mr. TAMMES said that, as a new member of the Commission, he had learned a great deal from the Chairman's consummate mastery of the English language, from the great devotion to duty of the Special Rapporteur and from the care, patience and skill of the Acting Chairman of the Drafting Committee. His first experience of a session of the Commission had been unforgettable.

110. Mr. USHAKOV, said that, as a new member of the Commission, he wished to thank the Chairman, the Special Rapporteur and all the senior members for their invaluable collaboration and their kindness to him.

111. Mr. IGNACIO-PINTO associated himself with the congratulations and thanks expressed to the Chairman, the General Rapporteur, the Acting Chairman of the Drafting Committee, the members of the Commission and all the members of the Secretariat.

112. Mr. KEARNEY expressed his thanks to the Chairman, the Special Rapporteur and the Secretariat for making his first period of service on the Commission such an enjoyable and rewarding experience.

113. Mr. USTOR expressed his deep appreciation of the Chairman's masterly conduct of the Commission's work and his congratulations to the Special Rapporteur, whose great wisdom had contributed so largely to the success of the session. His first appearance as a member of the Commission had been a great event for him, particularly as he had been elected Second Vice-Chairman and appointed Special Rapporteur for the topic of most-favoured-nation clauses; he would do his best to prove worthy of the trust that had been placed in him. In conclusion, he thanked all the members of the Secretariat for their help during the session.

114. Mr. STAVROPOULOS (Legal Counsel) expressed his regret at having been prevented from attending the Commission's earlier meetings by the crisis which had compelled four members to be absent. Nevertheless, he considered himself fortunate to have attended a meeting at which the Commission had concluded its work on an important subject.

115. The Commission's decisions on additional topics fully corresponded to the wishes of the General Assembly, which considered it desirable for a text to be submitted to it every five years.

116. Over the years, he had come to the conclusion that the Commission's work would be facilitated if the Secretariat was entrusted with the task of preparing an initial draft for the Special Rapporteur. It was well known that not all Special Rapporteurs had the time to do the necessary preparatory work, which would, of course, be concerned with the collection of data, not with opinions. That could not be made a rule, however, since the wishes of individual Special Rapporteurs must be respected.

117. In conclusion, he expressed his appreciation of the many compliments that had been addressed to the Secretariat.

118. The CHAIRMAN thanked the members of the Commission for their kind words and declared the nineteenth session of the International Law Commission closed.

The meeting rose at 1.30 p.m.

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