

Document:-
A/CN.4/SR/724

Summary record of the 724th meeting

Topic:
<multiple topics>

Extract from the Yearbook of the International Law Commission:-
1964, vol. I

*Downloaded from the web site of the International Law Commission
(<http://www.un.org/law/ilc/index.htm>)*

one State to another and delegations to international conferences seemed to him to be greater than the differences between delegations to conferences convened by States and delegations to conferences convened by international organizations.

The meeting rose at 1 p.m.

724th MEETING

Thursday, 14 May 1964, at 10 a.m.

Chairman: Mr. Roberto AGO

Welcome to Mr. Reuter

1. The CHAIRMAN welcomed Mr. Reuter and congratulated him on his election to fill the casual vacancy caused by the resignation of Mr. Gros.

Special Missions

(A/CN.4/166)

(resumed from the previous meeting)

[Item 4 of the agenda]

2. The CHAIRMAN invited the Commission to resume consideration of the report on special missions (A/CN.4/166).

3. Mr. EL-ERIAN said that, in accordance with the request made at the previous meeting,¹ Mr. Bartoš and he had discussed the question of how the status of delegations to conferences should be handled. In view of the complexity of the matter and the different opinions on it expressed in the Commission, they had concluded that for the time being Mr. Bartoš' report should be confined to inter-State special missions and his own report should deal with the status of delegations to conferences convened by international organizations. They considered that the Commission should wait until it had examined both reports before deciding how to deal with the status of delegations to conferences convened by States.

4. Mr. TSURUOKA said he wished first of all to congratulate the Special Rapporteur on his masterly report and draft. As a career diplomatist of more than thirty years' standing, he (Mr. Tsuruoka) would like to make a few practical comments. The Commission should not lose sight of its objective, which was to facilitate international co-operation. The special mission was an adaptation of diplomatic machinery to changed conditions; it was thus a part of diplomacy and, like permanent diplomacy, was designed to pro-

mote the interests of the country represented, in collaboration with the other countries concerned.

5. The special mission had two distinctive characteristics. First, in bilateral relations, whereas the resident mission was permanent and general, the special mission was occasional and partial. The Special Rapporteur had brought out that distinction very well. Secondly, whereas classical diplomacy was bilateral by definition, the special mission was often concerned with multilateral or collective relations.

6. The existence of those two forms of diplomacy raised a question of responsibility. There might be conflict between the permanent diplomatic mission and a special mission of a State in another State. However, the presumption must always be that the will of the States was one: both missions had the same purpose and the special mission became part of permanent diplomacy. A visit by a head of State, a head of government or a minister might have a very general purpose, but it nevertheless retained an occasional character; in the longer term, the responsibility still rested with the ambassador. The Commission should therefore draft the rules concerning special missions very carefully, without detracting from the role of permanent diplomacy.

7. The distinction between political and technical missions was not very important in practice. In Japan, the decision to send a special mission was taken by the Ministry of Foreign Affairs, and it was the ambassador on the spot who was responsible for ensuring its success.

8. Another point very clearly brought out in the report was that the principle of autonomy of the will of the parties prevailed. The Commission was to draft rules which would, of course, permit certain exceptions; it should confine itself to essentials, in other words, to considering the normal situation, and should not include rules relating only to details and special cases.

9. With regard to the discussion procedure, he would have preferred the Commission to examine the draft article by article.

10. Mr. CASTRÉN congratulated the Special Rapporteur on his excellent report, which seemed very complete; the ideas in it were progressive, and the solutions proposed sound and practical. With regard to the definition of special missions, they could certainly perform all sorts of official functions. As several speakers had said, the rules governing special missions might vary with their functions.

11. The questions of State and ceremonial visits had been set aside; it was certainly worth examining in greater detail, and the comments by Mr. El-Erian and Mr. Yasseen had already thrown much light on it.

12. Opinions were divided on the subject of delegations to international conferences and congresses. In strict logic, as Mr. Yasseen had said at the previous meeting,² such delegations were in fact entrusted with

¹ Paragraphs 78 and 80.

² Paragraph 74.

special missions ; but there was no reason why a part of the subject — namely, the legal status of representatives to conferences held within an inter-governmental organization or convened by such an organization — should not be dealt with in the draft concerning relations between States and inter-governmental organizations. Nevertheless, a distinction based on the purely formal criterion of who convened a conference was a rather artificial one. For example, in what category would conferences convened jointly by an inter-governmental organization and by one or more States be placed ? But after all, the question which draft would deal with delegations to conferences was of minor importance. He was inclined to accept the joint proposal of the two Special Rapporteurs, as presented by Mr. El-Erian. The essential point, as Mr. Verdross had said, was that the Commission should leave no gaps in the codification of diplomatic law.

13. Mr. TUNKIN said that the Special Rapporteur, in dealing with a new, very complex and little studied topic, had successfully identified the problems and outlined possible solutions.

14. With regard to the definition of a special mission, the first question that had arisen was whether a distinction should be made between political missions and so-called technical missions. He agreed with the general view that it was immaterial whether a mission was to carry out a political or a technical task ; the essential point was that it should represent the State in its relations with another State. As Mr. Tsuruoka had said, special missions formed part of diplomacy ; the position of special missions was analogous to that of ordinary diplomatic missions in that both were organs of the State.

15. It had been said that the second characteristic of a special mission was that its task was limited ; but that was not in accordance with the facts. Special missions had very varied tasks, some of which might be of a very general kind. For instance, a mission led by a deputy foreign minister could discuss with another government all matters within the competence of the permanent mission.

16. The third characteristic of a special mission was that it was temporary, and that was essential from the theoretical viewpoint — so much so that it might perhaps be better to drop the term "special mission" in favour of "temporary mission".

17. Most of the members of the Commission seemed to agree that missions led by a head of State, head of government or minister constituted special missions. If that were so, it might be asked why such visits should not be dealt with. His first reaction to Mr. Yasseen's remarks at the previous meeting was that for practical reasons the Commission should deal with such visits in its draft ; there would always be time later on to decide whether they fitted in or not.

18. With regard to delegations to conferences, he was of the opinion that, as Mr. de Luna had observed, the nature of a conference was the same whether it was convened by an international organization or by States ; for even if a conference was convened by an organi-

zation, it was still a conference of States ; the two cases should therefore be dealt with together.

19. The rules concerning international conferences could perhaps be treated as a separate branch of international law, so Mr. Yasseen's suggestion that a third Special Rapporteur might be appointed was worth considering. It seemed hardly likely that the question of conferences could be fully dealt with in the draft concerning relations between States and inter-governmental organizations. The Commission could, of course, as the two Special Rapporteurs had suggested, defer taking a decision on where that matter was to be dealt with, but it would have to take a decision of some kind sooner or later.

20. Mr. AMADO said that the Special Rapporteur deserved all the praise that had been lavished on his report : he had succeeded in extracting rules from veritable chaos. Diplomacy was the whole body of the acts and processes which regulated contacts between sovereign States — permanent contacts through regular missions and temporary contacts through special missions. The members of the Commission were right in not wishing to place technical missions in a separate class, for sovereignty now found expression in technical matters as well as in the traditional processes of politics.

21. The rules derived by the Special Rapporteur were the most that the Commission could aspire to for the time being ; it must go forward step by step. The Commission would be wise to defer any decision to extend its study to special missions concerned with multilateral relations.

22. The CHAIRMAN, speaking as a member of the Commission, said it seemed to him that special missions concerned with bilateral relations formed a subsidiary question related to the subject-matter of the Vienna Conventions, whereas the question of delegations to conferences was subsidiary to that of relations between States and inter-governmental organizations ; there was no great difference between the case of conferences convened by international organizations and the now exceptional case of conferences convened direct by States. It should be remembered too that some conferences were in fact the constitutional bodies of organizations. The problem was therefore a complex one and hard to delimit.

23. Mr. CADIEUX said that the second question put by the Special Rapporteur raised three other subsidiary questions. First, as to substance, what was the legal basis of the rules to be formulated, and how, in practice, could the support of governments best be secured ? Secondly, was the question of delegations to conferences an independent or a subsidiary one ? Thirdly, should the Commission deal with that question now or later ? If it was considered to be an independent question, it could easily be deferred, but if it was regarded as subsidiary, the rules to be drawn up might take the form of an extension of existing rules. The two Special Rapporteurs concerned were in the best position to guide the Commission ; he hoped they would think the matter over in the course of their work and submit their suggestions to the Commission.

24. Mr. BARTOŠ, Special Rapporteur, said he was grateful for the kind remarks which had been made about his report; he would reply to some of the comments on it. First, with regard to the question of the responsibility of diplomats and the unity of the will of the State, he had had access to the chancery reports of eleven States, and had found evidence of numerous conflicts between ambassadors at the head of permanent mission and heads of special missions: the former feared that the latter would infringe their prerogatives, while the latter accused the former of hindering them in the performance of their duties. For example, the head of a special mission might receive instructions direct from the cabinet, which were not communicated to the ambassador first. A high-level political mission sometimes changed the line of approach decided on earlier, and initiated a new policy. A mission of economic or financial experts, for example, might be given a free hand to establish new relations between two States, to settle a problem, or to seek a friendly settlement. In every case, it was necessary to maintain the unity of the State's will; but that was a matter which should be settled within each State, not at the international level. The question which arose in connexion with relations between States was that of the binding force of acts performed by special missions; in that respect it was necessary to create a presumption that all powers were vested in the permanent mission except those temporarily and expressly conferred on the special mission.

25. He fully agreed with Mr. Tunkin that the essential characteristic of the special mission was that it was temporary. Its task was limited in time but not always in subject-matter; its terms of reference might be very broad and go so far as establishing new bases for the relations between two States.

26. He also agreed that missions led by a head of State, a head of government or a minister, were special missions, despite the theoretical objection that a head of State could not himself lead a mission, because the characteristic of a mission was that it held its powers by authority of the head of State.

27. As Mr. Cadieux had said, it was important to decide whether the question of delegations to international conferences was an independent or a subsidiary one; if it was an independent question, it could, as Mr. Tunkin had suggested, be brought within the general framework of the "law of conferences". The two Special Rapporteurs were willing to study the question and propose a solution to the Commission.

28. He would like, at that stage, to submit a third question to the members of the Commission: that of the privileges and immunities to be granted to special missions. He had been guided in that matter by the functional theory, and had consequently made a great difference between what was granted to diplomatic agents and what should be granted to special missions. The Commission must decide whether privileges and immunities should be fixed according to the task assigned to the special mission rather than its representative character. As Mr. Rosenne had pointed out, some special missions had duties ordinarily performed by

consular missions.³ It would therefore be unfair to grant them greater advantages than consular agents. He was mainly concerned over criminal matters, for there had been cases of a member of a special mission being falsely charged with a crime in order to prevent him from carrying out his task. Special missions must be safeguarded in that respect.

29. Mr. TSURUOKA agreed that safeguarding the unity of the State's will was largely an internal matter. Nevertheless, it also had an international aspect, for the will of the States was expressed in two different ways, that might affect relations between two States and international law relating to special missions should endeavour to prevent such conflicts, taking full account of the fact that the permanent mission assumed responsibility for maintaining good relations between its own country and the receiving country.

30. The CHAIRMAN observed that the two questions put to the Commission by the Special Rapporteur really related to two entirely separate matters.

31. With regard to the privileges and immunities to be granted to members of special missions, the Special Rapporteur had clearly shown that two contradictory requirements had to be reconciled: first, States did not seem prepared to treat special missions and permanent missions on an equal footing, and secondly, special missions should have at least the minimum of privileges and immunities essential for the performance of their tasks.

32. As to the will to be attributed to a State when the will expressed by its special mission differed from that expressed by its permanent mission, that was a very delicate question, especially as a special mission was often made up of members of other departments whose relations with the ministry of foreign affairs were not always of the best. The problem was connected with that considered by the Commission at its previous session, regarding the attribution to the State of the will expressed by its representative.

33. He suggested that for the time being the Commission should consider only the question of privileges and immunities.

34. Mr. YASSEEN said that special missions were so varied that it would be impossible to draft uniform rules for all of them. Accordingly, the Commission should try to find criteria by which special missions could be differentiated according to their importance and their tasks, with a view to drafting rules that would differ in certain respects. That was not a new method; the Vienna Convention on Diplomatic Relations gave different status to different classes of persons in "resident" diplomacy — diplomatic agents, administrative and technical staff, service staff and private servants.⁴

35. With regard to the second question, his view was

³ *Yearbook of the International Law Commission, 1963, Vol. I, 711th meeting, para. 77.*

⁴ *United Nations Conference on Diplomatic Intercourse and Immunities, Official Records, Vol. II, pp. 85-86.*

that the functional theory should be followed, without excessive restrictions. For example, the Commission should not confine itself to proclaiming the immunity of members of special missions in respect of offences committed in the course of their duties. Members of special missions should be protected against every activity designed to interfere, directly or indirectly, with the performance of their task; and it should not be forgotten that they might be exposed to blackmail or to an obstructive attitude on the part of the State or private persons. Such protection seemed necessary in the interest of the function performed.

36. Mr. ROSENNE said it seemed to him that the Special Rapporteur had put the question of what privileges and immunities should be granted to special missions in too abstract a form. He would have thought that the matter was one of detail to be taken up under article 26 of the draft. In view of the decision reached by the Commission at its previous session, and recorded in the last sentence of paragraph 62 of its report to the General Assembly,⁵ he was inclined to favour following the provisions of the two Vienna Conventions as closely as possible where privileges and immunities were concerned.

37. He would be interested to know whether, at the present stage, the Special Rapporteur wished the Commission to express an opinion on the form his work of codification should take: once that major issue had been decided, it would be easier to see how numerous problems of detail should be solved.

38. Mr. ELIAS said that in the main he agreed with the comments made by Mr. Yasseen. It would not be easy to assimilate the status of members of special missions to that of consuls, because special missions differed so widely in their composition. The rules to be devised would have to take account of different categories of special missions, which might be broadly classified as special missions led by heads of State, heads of government or ministers for foreign affairs; special missions led by persons with the rank of permanent secretary or head of department, special missions composed of more junior officials and technical missions. Special provisions would have to be made for subordinate members of special missions.

39. Concern was growing in a number of countries, including his own, at the increasing number of persons attached to embassies for whom privileges and immunities were claimed by the sending State. There was a strong feeling against any further extension of privileges and immunities.

40. Mr. VERDROSS said that the present general tendency was to restrict rather than to widen the privileges and immunities of temporary diplomats. For example, the immunities granted to United Nations delegates and officials were more limited than those granted in the days of the League of Nations. It must be recognized that even the immunity of permanent

diplomats in civil matters was not based strictly on the functional theory, but rather on the need to give diplomats the feeling that they were completely free in the receiving State; that was justified in the case of diplomats residing permanently in a State, but not in the case of diplomats staying there only temporarily. In principle, therefore, it would be right to restrict the privileges and immunities of temporary diplomats to those accorded by the 1946 Convention on the Privileges and Immunities of the United Nations.⁶ There were exceptions, however, and he agreed with Mr. Yasseen that different rules were justified.

41. Mr. de LUNA said he agreed with Mr. Verdross. The privileges and immunities of temporary missions were based on law and not on the comity of nations. States were not prepared to grant any more privileges than necessary. Mention had sometimes been made of the principle of reciprocity, which might attenuate that tendency, but reciprocity was not always possible. Hence he did not think that members of temporary special missions could be granted full and unlimited immunities, but only those necessary for the performance of their functions. According to the functional theory, members of a special mission carrying out the same functions were only entitled to the same privileges and immunities. True, it sometimes happened that a head of mission was also a head of State; in that case, his special privileges derived not from his functions but from international custom, which granted him the right to additional privileges and immunities. When considering the same function, the practice of international organizations, which had already been tested, should be taken into account. If the Commission tried to go further, it might be objected that limitations were accepted in normal practice without hindering the accomplishment of special missions.

42. Mr. LIANG, Secretary to the Commission, commenting on the practice of international organizations, said that heads of State, heads of government and ministers for foreign affairs often attended meetings of the principal organ of the United Nations, namely, the General Assembly, and it was clearly envisaged in Article 28, paragraph 2, of the Charter, that members of governments would attend periodic meetings of the Security Council as representatives. However, such representation had never been equated to special missions, either in the work of any learned writer or in United Nations practice, nor would any international lawyer describe a minister for foreign affairs as a diplomat. The very concept of a diplomatic mission, whether permanent or special, implied an authorization or a mandate. A head of State visiting another State would be regarded as discharging State functions not diplomatic functions.

43. The Commission would be wise to bear in mind the clear distinction made by Oppenheim between relations between States and diplomatic relations;⁷ he regarded the latter as but one aspect of the former.

⁵ *Official Records of the General Assembly, Eighteenth Session, Supplement No. 9*, p. 37.

⁶ *United Nations Treaty Series*, Vol. 1, p. 16.

⁷ See Oppenheim, L., *International Law*.

44. The discussion had not yet thrown any light on the precise nature of special missions and, in particular, its bearing on the privileges and immunities they should enjoy. He feared that the concept of special missions might be unduly enlarged; if that enlargement were carried to the extreme, theoretically it might even encompass permanent missions, and special missions might have more extensive functions than permanent missions. It would then be very difficult to decide what privileges and immunities should be granted to special missions and the precedents to be found in the practice of international organizations would not be helpful.

45. He was pleased to note that the Special Rapporteur seemed to be following the same line of approach as that outlined at the previous session by the present Chairman, who had put forward the view that diplomatic law could be divided into three branches: permanent missions, special missions and relations between States and international organizations. He (Mr. Liang) wished to emphasize that the subject of special missions should be confined within the framework of diplomatic law and should not be identified with some of the multifarious functions of the State itself, such as visits to another country by heads of State, heads of government or ministers for foreign affairs, who were the authorities entitled to send missions, either permanent or special.

46. Mr. CADIEUX said he thought that there was general agreement in the Commission that it was impossible to envisage a single uniform status for all categories of special mission. Hence the problem would be to establish criteria for determining what types of special mission might receive treatment as far as possible analogous to that already accorded to certain categories of State agents operating abroad. There might perhaps be certain special cases to which the rules already drawn up did not apply; that was where the Special Rapporteur would have to break new ground.

47. With regard to the criteria to be established, the first distinction that must be made was between State agents and their assistants; that would make it possible to apply existing rules to a large group of persons. The second distinction related to the rank of agents; he thought that the distinction usually made between ambassadors and agents of lower rank could be applied *mutatis mutandis* to special missions. A third distinction could be made, though not absolutely, according to the functions of agents. For in certain cases ministers and agents of senior rank might be entrusted with general political missions which clearly involved the will of the State in a very wide field. Moreover, in the case of technical operations involving the will of the State, a distinction could be drawn between technical missions on a very high level whose members should enjoy a special treatment, and technical missions on a lower level, which did not commit the State to the same extent and so did not call for the same privileges.

48. Mr. EL-ERIAN said he would like the Special Rapporteur to state his position on the question whether the topic of special missions should or should not include the status and immunities of a visiting

head of State or government or a minister for foreign affairs. He noted that Mr. Tunkin appeared to favour a study of that question, though he agreed that the decision whether to cover it in the draft articles might be left until later.

49. At the previous meeting, he had expressed doubts regarding the advisability of including the question of heads of State or government and ministers for foreign affairs in the topic of special missions.⁸ His doubts had increased after listening to the interesting observations of the Secretary to the Commission. In international relations, a head of State or a minister for foreign affairs could not be said to be acting as a representative; they were themselves State organs. The reason for associating them with diplomatic representatives was probably that they were usually treated together in traditional text-books. A typical example was to be found in the work of the Italian writer Anzilotti, who in connexion with his theory of individual and collective representation, had included in his scheme, in the following order, heads of State, ministers for foreign affairs, commanders-in-chief for the purposes of an armistice or other military convention — and last, diplomatic and consular officers.⁹ There was, however, a fundamental difference between a head of State and a minister for foreign affairs, on the one hand, and the members of a diplomatic mission, whether permanent or special, on the other.

50. At the previous meeting, the Chairman had suggested that the fact that the status of a head of State or government was governed by general international law was not an argument for not codifying the matter.¹⁰ He agreed with that view, but wished to point out that the status of such personages was fundamentally different from that of members of special missions and therefore did not come within the scope of the topic. The position of the suites of such visiting personages, however, certainly needed to be regulated.

51. Mr. TUNKIN said that the Vienna Conference on Diplomatic Relations had based its conclusions not only on the functional theory, but also on the representative theory; that was clear from the fourth paragraph of the preamble to the Convention.¹¹

52. He did not think it possible to discuss the subject of special missions, without first considering their nature. It was the nature of special missions, not the choice between two theories, which should govern the Commission's conclusions. A special mission, like a permanent diplomatic mission, was a State organ representing one State vis-à-vis another. Its status should enable it to carry out its functions in the territory of a foreign State.

53. With regard to the rank of special missions, in addition to missions led by a head of government,

⁸ 723rd meeting, para. 45.

⁹ Anzilotti, D., "Cours de droit international", trans. Gidel, Paris, 1929, *Recueil Sirey*, chapter II.

¹⁰ 723rd meeting, para. 55.

¹¹ *United Nations Conference on Diplomatic Intercourse and Immunities, Official Records, Vol. II, p. 82.*

minister or head of State, there were many kinds of special missions at very different levels. The diversity of temporary missions was therefore a matter which must be taken into account.

54. In his earlier remarks, he had touched on the question of the functions of special missions. Practice had shown that they could be entrusted with the most varied functions. A diplomatic mission was a representative organ of a State in all spheres of its relations with another State; the situation with regard to special missions, was different. As the Special Rapporteur had pointed out, most special missions had a limited and special function, but others, though equally temporary in character, had very wide functions. In any discussion of limitations on privileges and immunities, the problem of functions must therefore be taken into consideration.

55. It might prove difficult to draft a single text covering every category of special mission; if so, it might be better to distinguish between the various categories and to give them different status, but he preferred not to take a definite stand at that early stage.

56. Sir Humphrey WALDOCK said he agreed with Mr. Tunkin on the need to adopt a practical approach and to avoid taking a definite stand on theoretical issues at so early a stage in the discussion. Special missions could be very different in character, both as to the level of representation and as to the functions entrusted to them.

57. Like Mr. Elias and M. Jiménez de Aréchaga, he thought that the Commission should not lose sight of the position of the receiving State, for which the privileges and immunities of members of a special mission were something of a burden. He was in favour of giving the maximum protection necessary for the efficient performance of the functions of a special mission, but the privileges granted to such a mission should be kept within reasonable limits. There was a strong feeling in many countries, including the United Kingdom, that privileges and immunities must be kept within bounds. If the Commission were to lose sight of that feeling, its proposals might meet with resistance.

58. The CHAIRMAN, speaking as a member of the Commission, said that the Commission would have to discuss the question from a practical standpoint and would be making a serious mistake if it looked either to the functional or to the representative theory for a solution. The elements of a solution must be sought in the essential character of special missions and be based mainly on their temporary and occasional nature. In the Vienna Convention, certain privileges and immunities were based on the fact that the mission was established permanently on foreign territory. Or course, the essential was that the special mission should be able to carry out its task, but it would be absurd to try to grant it privileges which were essentially those of permanent missions.

59. Nor should the Commission, in the desire to distinguish between the status of permanent diplomats

and that of temporary missions, draw dangerous analogies with the position of consular missions. Special missions bore no relation to consular missions, whose functions were chiefly concerned with municipal law.

60. The only difference between diplomatic missions and special missions was that special missions were temporary and occasional; both were concerned with relations between States. In addition, as several previous speakers had pointed out, regular diplomatic missions were generally uniform in character. Special missions on the other hand were of very diverse kinds ranging from the missions led by heads of State to those led by heads of minor departments. But there again, the status of the head of the mission should not be given too much weight. True, some distinctions should be made on that account, but it would be difficult to set limits, and hasty conclusions on the subject should be avoided.

61. The present debate could hardly enable the Commission to adopt a final position, but the exchange of views at least had the advantage of giving the Special Rapporteur a general idea of the Commission's opinion on the questions he had put to it.

62. Mr. AMADO said that from the outset of the discussion he had opposed the idea of taking the rules on consular immunities as a model. The Commission's duty was, precisely, to take into account the development of modern diplomacy, which was characterized by the numerous and rapid journeys of heads of State and other leading persons. It must be remembered that a head of State was not an envoy; he travelled in his capacity as head of State.

63. After listening to the comments of Mr. Cadieux, Mr. Elias and Sir Humphrey Waldock, he wished to stress especially that States were always mainly concerned with their own interests. They would certainly take the necessary steps to ensure that difficulties relating to the status of special missions responsible for conducting negotiations of vital interest to themselves did not prejudice the result of the negotiations. Preliminary rules for that purpose had already taken shape, and articles had been drafted in sufficiently clear terms; that in itself was a valuable achievement, and it would always be possible to make improvements later.

64. Mr. ROSENNE said that at the previous session he had pointed out that "special missions fulfilled a variety of functions, some diplomatic or quasi-consular in character; for example, they dealt with migration problems, many of which were now covered by the Vienna conventions".¹² He would now like to clarify that statement, in the light of the remark in paragraph 29 of the Special Rapporteur's report that he had "also adopted, in part, the argument put forward at the meetings of the Commission by Mr. Rosenne, that although special missions represent sovereign States in international relations they cannot, because

¹² *Yearbook of the International Law Commission, 1963, Vol. I, 711th meeting, para. 77.*

of their functions, always be treated as diplomatic missions but must, in some cases, be treated as consular missions." When speaking at the previous session, he had not had in mind any separate recognition for special missions which fulfilled quasi-consular functions. He had not wished to suggest that there should be two sets of regulations for special missions, to parallel the two Vienna conventions. His purpose had merely been to point out that, for the purpose of drafting the substantive provisions on special missions, the Commission could not only draw inspiration from the Convention on Diplomatic Relations, but could also bear in mind the contents of the Convention on Consular Relations.

65. Attention had been very aptly directed by Mr. Tunkin to the fourth paragraph of the preamble to the 1961 Vienna Convention which stated that the purpose of diplomatic privileges and immunities was "to ensure the efficient performance of the functions of diplomatic missions as representing States".¹³ It was interesting to compare that language with the words used in the corresponding preambular paragraph of the 1963 Vienna Convention: "to ensure the efficient performance of functions by consular posts on behalf of their respective States".¹⁴ There was clearly a difference between the members of a diplomatic mission which represented the State and officials who acted on behalf of their State. An examination of the various types of special mission included in the Special Rapporteur's list in paragraph 86 of his report showed that many of them could properly be said to act "on behalf of" their State rather than as "representing" it. However, that distinction would not necessarily have a bearing on the question of privileges and immunities. His own view was that the legal regulation of privileges and immunities should follow a single pattern, and draw a distinction between the different categories of staff of a mission, along the lines of both the Vienna conventions.

66. Mr. BARTOŠ, Special Rapporteur, said he did not regard the functional theory as meaning that privileges and immunities should apply only to acts performed by international agents, but that such agents should be able to carry out their tasks in full liberty and under conditions safeguarding the prestige and dignity of the State they represented. For it was impossible to limit the acts of members of special missions to certain acts they performed in the exercise of their functions. The functional theory should accordingly be taken as a basis, but the representative character of special missions should also be taken into account to some extent.

67. Moreover, while it was true that there were many kinds of special mission, the decisive factor in his opinion was not the rank of the head of the mission, but the task assigned to the mission. The essential consideration was the full powers granted to agents

representing a State. On that point, he had for the time being based his work on the Vienna Convention which had, with some exceptions, abolished the former distinctions between diplomatic staff of higher rank and subordinate administrative and technical staff of diplomatic missions. Thus special missions could be divided into several categories according to their functions and according to the functions of the various members of the same mission, but rank could not be taken as the criterion for doing so.

68. The debate had revealed certain weaknesses in his report and he would bear them in mind. With regard to the point which the Secretary to the Commission had rightly drawn attention to, he himself had also drawn certain conclusions from United Nations practice; that was a theoretical basis, but the practical object was to ensure that members of special missions were free to perform their functions.

The meeting rose at 12.55 p.m.

725th MEETING

Friday, 15 May 1964, at 10 a.m.

Chairman: Mr. Herbert W. BRIGGS

Special Missions

(A/CN.4/166)

(continued)

[Item 4 of the agenda]

1. The CHAIRMAN invited the Commission to continue consideration of item 4 of the agenda.

2. Mr. BARTOŠ, Special Rapporteur, said he would first put a preliminary question to the Commission, namely, whether the rules governing special missions should be rules of international comity or rules of law. In his opinion they should be rules of law. From that followed a second question: whether the draft should take the form of an additional protocol to the Vienna Convention on Diplomatic Relations or of a separate convention. The study he had just made had led him to the conclusion that the difference between special missions and resident diplomacy was too great for an additional protocol to be adequate. He was therefore in favour of drafting a separate instrument, to be linked to the Vienna Convention by a cross-reference, which would contain a body of residual rules but would leave States free to conclude bilateral agreements. The draft should not contain *jus cogens* rules, except perhaps a few broad substantive rules concerning, for instance, the need for a State's consent to receive a mission and the freedom of a mission to perform its functions.

¹³ *United Nations Conference on Diplomatic Intercourse and Immunities, Official Records, Vol. II, p. 82.*

¹⁴ *United Nations Conference on Consular Relations, Official Records, Vol. II, p. 175.*