

Document:-  
**A/CN.4/SR.807**

**Summary record of the 807th meeting**

Topic:  
**Special missions**

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members of the staff of special missions the personal inviolability which, under article 29 of the Vienna Convention on Diplomatic Relations, was accorded only to diplomatic agents.

79. Similarly, in article 27 of his draft, he proposed that immunity from criminal jurisdiction should be granted to all members of the staff of the special mission for special missions included technical experts who were indispensable; the position of a special mission was quite different from that of a permanent mission.

80. Mr. CASTRÉN asked whether the expression "the members of its staff" also covered service staff. If so, the article went much further than the Vienna Convention on Diplomatic Relations, article 37, paragraph 3 of which granted only a limited degree of immunity to service staff.

81. The CHAIRMAN, speaking as Special Rapporteur, said that when the Commission had been preparing the draft convention on diplomatic relations, he had argued that full immunity should be granted to all members of the staff of diplomatic missions; that had also been the Commission's view. But the Vienna Conference had decided to grant immunity to service staff only in respect of acts performed in the course of their duties.

82. Mr. ROSENNE said that after listening to the Special Rapporteur's explanations, he inclined to the view that it would be better to embody in the draft articles provisions similar to those of articles 29 and 37 of the Vienna Convention on Diplomatic Relations. The question was one of principle and related to the categorization of staff, as approved by the Vienna Conference of 1961.

83. Mr. AMADO said that the Commission was preparing a draft for States; at both the Vienna Conferences, States had made it clear that they were not prepared to go as far as the Commission had proposed. Admittedly, special missions, which were becoming increasingly numerous and varied, carried out very complex tasks, and special functions called for special safeguards. Nevertheless, he felt impelled to advise the Commission to follow the Vienna Conventions as closely as possible and to propose only rules that would be acceptable to States.

84. The CHAIRMAN, speaking as Special Rapporteur, said that he had thought it advisable to broaden the rule laid down in the Vienna Conventions because, in his view, it was the Commission's duty to indicate the path which States should follow. It was for the Commission to decide whether to keep to the line which it had followed in preparing those Conventions or whether to be guided by what had occurred at the Vienna Conferences.

The meeting rose at 1.5 p.m.

## 807th MEETING

Monday, 21 June 1965, at 3 p.m.

Chairman : Mr. Milan BARTOŠ

*Present* : Mr. Ago, Mr. Amado, Mr. Briggs, Mr. Casttrén, Mr. Elias, Mr. Jiménez de Aréchaga, Mr. Pal, Mr. Pessou, Mr. Reuter, Mr. Rosenne, Mr. Ruda, Mr. Tunkin, Mr. Verdross, Sir Humphrey Waldock, Mr. Yasseen.

### Special Missions

(A/CN.4/179)

(continued)

[Item 3 of the agenda]

#### ARTICLE 25 (Personal inviolability) [24] (continued)<sup>1</sup>

1. The CHAIRMAN invited the Commission to continue its consideration of article 25.

2. Mr. PAL said that he wished to raise a general drafting point. It should be unnecessary to repeat throughout the articles the phrase "the head and members of the special mission and the members of its staff"; the possible composition of the special mission was given in article 6 with a note that definitions would be given later, presumably on the lines indicated in article 1 of the Vienna Convention on Diplomatic Relations. In most cases, the phrase "members of the special mission", which was likely to be comprehensive enough, should suffice.

3. As far as article 25 itself was concerned, he said that if the Commission considered that the rule concerning personal inviolability should be restricted to only certain members of the mission, the provision should say so expressly.

4. The CHAIRMAN, speaking as Special Rapporteur, said that in article 6 as adopted at the previous session the Commission had meant to distinguish the head and members of the special mission from the diplomatic staff, administrative and technical staff and service staff of the mission. The expression "members of the mission" did not cover the mission's staff. The members of the mission were negotiators, plenipotentiary representatives of States, whereas the staff of the mission consisted of assistants.

5. No member of the Commission seemed to dispute the idea that the members and the diplomatic staff of the special mission should enjoy personal inviolability, but very few were prepared to go further than that.

6. Mr. CASTRÉN said he thought that most members had accepted the principle of personal inviolability for technical and administrative staff as well, though not for the service staff, to whom the Vienna Convention on Diplomatic Relations granted only lesser privileges.

<sup>1</sup> See 806th meeting, following para. 75.

7. The CHAIRMAN, speaking as Special Rapporteur, said that a good case could be made out for granting personal inviolability to the technical and administrative staff of a special mission. For instance, it might happen that an expert, a technical agent serving on a special mission, had a more important part to play than those members of the mission who had the status of diplomatic agents. Most speakers, however, apparently considered that personal inviolability should be limited to the diplomatic staff.

8. Mr. TUNKIN said that the discussion had clearly indicated that most members were in favour of following closely the Vienna Convention on Diplomatic Relations in regard to privileges and immunities. Any departure from its detailed provisions, notably those set out in article 37, might lead to misinterpretation. In general, the scope of the immunities granted under the Convention was applicable to special missions. Likewise the same three categories as for members of a diplomatic mission — diplomatic, administrative and service staff — should be maintained.

9. The CHAIRMAN, speaking as Special Rapporteur, said that the Commission had a choice between two approaches: either it could take from the Vienna Convention on Diplomatic Relations all the passages which applied to special missions, or else it could study thoroughly the needs of special missions and draft rules based on those needs, without slavishly reproducing the provisions of the Vienna Convention.

10. He had chosen the second course because he thought it more in keeping with the recommendation by the Vienna Conference of 1961. Because a roving mission and a permanent mission worked under entirely different conditions, he had, in article 25 and again in article 27 of his draft, placed the members of the special mission and its staff, including the service staff, on the same footing. In his opinion, a special mission deprived of the services of a craftsman or mechanic, for instance, might be unable to perform its task.

11. The Commission should first consider and settle the substantive question, as there would be no point in borrowing from the Vienna Convention on Diplomatic Relations set phrases which did not reflect the circumstances of special missions.

12. Besides, some of the rules stated in the Vienna Convention were very controversial from the point of view of theory; and in practice, many States gave diplomatic status to agents who did not in fact perform any representative functions.

13. Mr. TUNKIN said that he had evidently failed to make himself clear. There was no real difference of opinion between himself and the Special Rapporteur. All he had wished to point out was that the scope of the privileges and immunities granted to diplomatic missions should be the same for special missions. The question to what particular categories of staff certain privileges would be granted was a different one. Once the issue of principle had been settled, the Commission could consider what was in effect a problem of presentation, namely, whether or not the best course would be to set out the rules for special missions by cross-reference

whenever possible, to the corresponding provisions of the Vienna Convention on Diplomatic Relations.

14. Mr. AGO said he was sure that there was no real difference of opinion in the Commission. In cases where the Commission found that the rules concerning special missions should differ from those concerning diplomatic missions, the difference, even if very small, should be clearly indicated. There was therefore a problem of substance to be discussed in connexion with each article. He agreed with the Chairman that the points on which the rules concerning special missions should depart from those concerning diplomatic missions were more numerous than appeared at first glance.

15. But in cases where the Commission thought that the rules applicable to special missions should be the same as those for diplomatic missions, it could either make a cross-reference to the Vienna Convention on Diplomatic Relations, as Mr. Tunkin had proposed, or else reproduce textually the relevant provision of that Convention. It was true that the Vienna Convention was sometimes criticized from the point of view of theory, but it was no less true that it had been adopted and was in process of ratification. Accordingly, that was hardly the time to try to revise it or to depart from its text. His own view was that in all cases where the Commission thought that the rule should be identical with a provision in the Vienna Convention on Diplomatic Relations, it should reproduce the terms of that Convention exactly; if it made the slightest change, the commentators comparing the texts would think that the differences of form reflected differences of substance.

16. Mr. CASTRÉN said that, in the case of draft article 25, the majority of the Commission wished to follow the system established by the Vienna Convention on Diplomatic Relations. That Convention, however, recognized the personal inviolability not only of diplomatic staff, in article 29, but also of administrative and technical staff, in article 37, paragraph 2. It was the extension of that inviolability to service staff which seemed excessive.

17. The CHAIRMAN, speaking as Special Rapporteur, said that at the 1961 Vienna Conference, article 37, paragraph 2, had been adopted only after a hard struggle.<sup>2</sup> It was not until the preceding articles had been adopted that the privileges and immunities referred to in articles 29 to 35 had, by virtue of that paragraph, been extended to members of the administrative and technical staff.

18. Mr. ROSENNE said he was quite unable to see what justification there could be for so many departures from the provisions of the Vienna Convention on Diplomatic Relations in respect of privileges and immunities. He had assumed that article 6, paragraph 2, adopted at the previous session had been adopted on the supposition that it would constitute a preface to the provisions on privileges and immunities, which could be so drafted as to refer back to that Convention, and for that very reason mention had been made of advisers

<sup>2</sup> See *United Nations Conference on Diplomatic Intercourse and Immunities, Official Records*, Vol. I, 32nd and 33rd meetings of the Committee of the Whole and 9th-12th plenary meetings (relevant provision discussed as article 36, para. 2).

and experts in paragraph (5) of the commentary to article 6. The Commission's task was to examine how far the special character of special missions warranted deviating from the system for diplomatic missions adopted by a two-thirds majority of States as recently as 1961.

19. He was quite unimpressed by the argument that some provisions of the Vienna Convention on Diplomatic Relations had been criticized in the literature: no international instrument was free from defects, and the Convention in question probably represented the most that would be accepted by a majority of States at the moment.

20. The Commission's real contribution to the subject of special missions probably lay in the first sixteen articles prepared at the previous session, in which it had set out the distinguishing features of such missions. That being so, and given the terms in which articles 1 and 2 had been drafted, his view was that at best the rules on privileges and immunities should be largely residual and should only apply in the absence of specific agreement between the States concerned; and that the residual rules should follow as closely as possible rules which had been already accepted. In that connexion, he attached considerable importance to article 40, which he could not accept in the form in which it was drafted.

21. Mr. PESSOU said that, in his view, the course suggested by Mr. Ago was the right one: the Commission should take from the Vienna Convention on Diplomatic Relations whatever rules were applicable to special missions and draft independent rules where they were necessary by reason of the peculiar position of special missions.

22. Article 25 was acceptable in substance so far as the head of the special mission was concerned.

23. Mr. YASSEEN said that the question of the scope of the privileges and immunities constituted the essence of the draft, since they departed most conspicuously from the ordinary law. Admittedly, it was possible to determine those privileges and immunities in the light of the function of the person concerned, whatever his rank; but in his opinion the nature of the special mission's task could hardly be the sole criterion. Special missions were very diverse; they might be either technical or political. But in any event, special missions could surely not be granted a status more advantageous than that provided by the Vienna Convention on Diplomatic Relations.

24. Article 37, paragraph 2, of the Vienna Convention on Diplomatic Relations, which extended to administrative and technical staff the privileges accorded to diplomatic agents, had not been adopted without difficulty, and some reservations had been entered to that provision. What had been difficult to secure for permanent diplomatic missions would be even more difficult to secure for special missions of a technical character.

25. He appreciated the Special Rapporteur's concern; owing to the unity of the special mission and the temporary nature of its task, a technician serving on a special mission might be more important than the head of the mission. But the problem was not insoluble; if the sending State thought it necessary, it could temporarily give to

the technician concerned a certain rank for the purpose of his service on the mission.

26. With regard to the form of the rules on special missions, he said the Vienna Convention on Diplomatic Relations provided a starting point. So far as possible, and where there was no difference of substance, the Commission should use the same language in order to avoid difficulties of interpretation. The text of the provisions taken from the Vienna Convention should, however, be reproduced; mere cross-references would not suffice, for the Commission's draft should form an independent whole and should not be dependent on what happened to another convention which might some day be amended.

27. The CHAIRMAN, speaking as Special Rapporteur, proposed, in the light of the comments of members, that the Commission should change its method of discussing the draft articles. It should quickly review each article and decide in what way it differed in substance from the corresponding provisions of the Vienna Convention on Diplomatic Relations. He would then redraft the articles accordingly and submit his redraft to the Drafting Committee.

28. Mr. ROSENNE said that he found the Special Rapporteur's proposal entirely acceptable.

29. Mr. AGO said that the extra work the Chairman was undertaking would undoubtedly speed the Commission's proceedings.

30. Mr. TUNKIN, supporting the Special Rapporteur's proposal, said that it would accelerate discussion of the succeeding articles.

*The Chairman's proposal was adopted.*

31. The CHAIRMAN, speaking as Special Rapporteur, said that so far as article 25 was concerned the Commission should, in the light of the terms of article 29 of the Vienna Convention on Diplomatic Relations, decide whether personal inviolability should be confined to the head and diplomatic staff of the special mission. In his opinion, it should cover also at least the administrative and technical staff of the special mission. If the Commission wished to take the Vienna Convention on Diplomatic Relations as a model, it should refer to the diplomatic staff in draft articles 25 and extend inviolability to the administrative and technical staff in a later article modelled on article 37 of the said Vienna Convention.

32. Mr. AGO said that, if the Commission took the view that, so far as personal inviolability was concerned, the rules concerning special missions should be identical with those laid down in the Vienna Convention on Diplomatic Relations, it should follow exactly the presentation in that Convention.

33. The CHAIRMAN, speaking as Special Rapporteur, said that he would have preferred a more logical presentation, but that was just a matter of drafting. He suggested that he should prepare a redraft of article 25, modelled *mutatis mutandis* on article 29 of the Vienna Convention on Diplomatic Relations.

*It was so agreed.<sup>3</sup>*

<sup>3</sup> For resumption of discussion, see 817th meeting, paras. 59-62.

## ARTICLE 26 (Inviolability of residence) [25]

*Article 26*

[25]

*Inviolability of residence*

The residences of the head and members of the special mission and of the members of its staff shall enjoy inviolability and the protection of the receiving State, whether they reside in a separate building, in certain parts of another building, or even in a hotel.

34. The CHAIRMAN, speaking as Special Rapporteur, explained that article 26 of his draft reproduced the idea expressed in article 30, paragraph 1, of the Vienna Convention on Diplomatic Relations, with the difference that, since special missions had not as a rule their own separate premises, his draft provided that the members of the special mission and of its staff might reside in certain parts of another building or even in a hotel.

35. The provisions corresponding to article 30, paragraph 2, of the Vienna Convention on Diplomatic Relations, which referred to property, appeared in article 24 of his draft, but could be transferred to article 26.

36. Mr. VERDROSS said he approved the reasons given by the Special Rapporteur in paragraph (2) of his commentary for extending the guarantee of inviolability to the residences of all members of the staff of a special mission; he suggested that, since special missions had no fixed premises, articles 19 and 26 might be amalgamated in order to avoid repetition.

37. Furthermore, under article 29 of the Vienna Convention on Diplomatic Relations, inviolability comprised two separate obligations: the duty not to arrest or detain the person concerned and the duty to protect him. In other words, protection was part of inviolability, and consequently the expression "inviolability and the protection" was not quite correct.

38. The CHAIRMAN, speaking as Special Rapporteur, pointed out that article 30, paragraph 1 of the Convention referred to "the same inviolability and protection".

39. Mr. VERDROSS, while not disputing the fact, said that article 30 of the Convention was not drafted according to the rules of logic, for it did not correspond to the definition of "inviolability" given in other articles of the same Convention.

40. Mr. AMADO said that article 30 of the Vienna Convention on Diplomatic Relations was concerned with the private residence; the Special Rapporteur's draft article should therefore speak of "the premises in which the special mission was accommodated".

41. The CHAIRMAN, speaking as Special Rapporteur, said that in article 19 the Commission had accepted the fiction that the special mission actually had "premises". Article 26 of his draft, like article 30 of the Vienna Convention on Diplomatic Relations, related to the private residence, and preferably the provisions concerning the private residence and those concerning the premises of the special mission should be kept distinct from each other.

42. Mr. TUNKIN said that if the Commission decided to follow the structure of the Vienna Convention on

Diplomatic Relations in regard to personal inviolability it should do likewise in regard to inviolability of residence, which should extend only to the residence of the head and of the administrative and technical staff of the special mission.

43. The CHAIRMAN, speaking as Special Rapporteur, said that the Commission had agreed that the draft provisions under discussion would deal only with the head and members of the special mission and its diplomatic staff, not with the administrative and technical staff, nor, of course, with the service staff.

44. Mr. YASSEEN said that, in his opinion, there would be nothing wrong in using the Vienna Convention on Diplomatic Relations as a model and stipulating that the residences of the head and members of a special mission should enjoy the same inviolability as the premises of the mission. The fact that some of its members lived in a hotel was not peculiar to the special mission. Many diplomats, even resident ones, lived in hotels.

45. The CHAIRMAN, speaking as Special Rapporteur, said that in many countries the courts drew a distinction between public premises, such as hotels, and private residences. Many difficulties followed from the distinction; for example, officials responsible for inspecting the premises claimed the right to enter hotel rooms occupied by members of special missions, because hotel staff were free to enter them at all times, and hence it seemed that such premises were not strictly inviolable. In the United States, a distinction was made for the purpose between a hotel "room" and a hotel "suite".

46. Mr. AGO said that articles 18 and 19 of the draft spoke of the special mission's premises, and article 19 provided for the case where the special mission might be accommodated in a hotel, adding that the premises should be identifiable. Those provisions already fully covered the point which caused concern to the Special Rapporteur.

47. Mr. AMADO said, in reply to the Special Rapporteur and for the benefit of the Drafting Committee, that the word "residence" connoted permanent quarters, whereas the distinctive characteristic of a special mission was its temporary character.

48. Mr. YASSEEN said that the provision should be so drafted as to recognize that, despite differences in law, the residence of members of a special mission should be equally inviolable whether they lived in a hotel or in a private house.

49. The CHAIRMAN said that, if the Commission agreed, he would prepare a redraft of article 26 for the Drafting Committee, taking into account the provisions of the Vienna Convention on Diplomatic Relations and the comments made during the meeting.

*It was so agreed.*<sup>4</sup>

## ARTICLE 27 (Immunity from jurisdiction) [26]

*Article 27*

[26]

*Immunity from jurisdiction*

1. The head and members of the special mission and the members of its staff shall enjoy immunity from the criminal jurisdiction of the receiving State.

<sup>4</sup> For resumption of discussion, see 817th meeting, para. 63.

2. 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.
50. The CHAIRMAN, speaking as Special Rapporteur, said that article 27 should be compared with article 31 of the Vienna Convention on Diplomatic Relations. Paragraph 1 was drafted in the same terms, but according to entirely different ideas.
51. With regard to paragraph 2, it would be for the Commission to decide whether the provision should grant to the members of the special mission complete immunity from civil and administrative jurisdiction or only "functional immunity" in respect of acts performed in the exercise of their functions. Personally, he did not think that the members of the special mission should enjoy complete immunity from civil and administrative jurisdiction.
52. Mr. VERDROSS said that he entirely agreed with the Special Rapporteur. According to the Convention on the Privileges and Immunities of the United Nations, the representatives of States enjoyed immunity from criminal jurisdiction only; why, then, should the special mission enjoy immunity from civil jurisdiction?
53. Cases in which a special mission might claim immunity from administrative jurisdiction could hardly arise, for the function of the administrative court was to protect the individual against the administration, and the individual could only be plaintiff and never the defendant in proceedings before such a court. Since, however, the terminology was taken from the Vienna Convention, he would not object to its use in the draft.
54. Mr. TUNKIN said that paragraph 2 of article 27 as proposed by the Special Rapporteur was more restrictive than article 31 of the Vienna Convention on Diplomatic Relations. It ran counter to the general trend of the draft articles, which was to broaden the scope of the immunities enjoyed by the members and staff of the special mission. Personally, he saw no reason to depart from the rules laid down in the Vienna Convention; neither the commentary to article 27 nor the comments of members led him to change that view.
55. The CHAIRMAN, speaking as Special Rapporteur, explained that he had been guided by the Convention on the Privileges and Immunities of the United Nations, where there was no provision concerning immunity from civil and administrative jurisdiction.
56. Mr. AGO thought it would not be right to adopt so restrictive a criterion with respect to special missions: they varied greatly in composition and sometimes included persons of very high rank who should not be treated differently from the head of a diplomatic mission.
57. Immunity from civil jurisdiction should apply to members of the special mission, for despite the mission's temporary character, it needed such immunity in the exercise of its functions.
58. The reason why immunity from administrative jurisdiction was mentioned in the Vienna Convention on Diplomatic Relations was that, owing to the diversity of the laws, cases might occur in which that immunity was necessary. He considered therefore that the article should provide for the immunity of special missions from civil and administrative jurisdiction.
59. Mr. ROSENNE said that he had no strong views regarding the rule to be stated in article 27, so long as it was stressed that it was a residual rule, which would apply only if there was no agreement to the contrary on the part of the two States concerned. States were free to choose the immunities to be accorded, and it was only where the agreement on the special mission was silent that the residual rule would apply.
60. Drawing attention to the footnote to article 1 as adopted at the Commission's sixteenth session,<sup>5</sup> he said that a definitions article, which should as far as possible follow the language of the Vienna Convention on Diplomatic Relations, should be included in the draft.
61. Mr. PAL said that he had drawn attention to the question of definitions earlier in the meeting.
62. Mr. VERDROSS said that even immunity from civil jurisdiction could not be justified by the functional theory. The theory of immunity was based on custom, dating from a time when independent courts had not yet come into existence. The modern tendency was to curtail privileges, not to enlarge them, as was shown by a comparison between the practice followed at the time of the League of Nations and that of the United Nations.
63. He noted that at the end of his second report, the Special Rapporteur proposed provisions concerning so-called "high-level" special missions. He fully agreed that such missions should be granted wider privileges and thought that the Commission should retain that important distinction between different kinds of special missions.
64. Mr. TUNKIN said that the Commission had decided to proceed on the basis that special missions would be treated in principle in the same way as permanent missions. It was now suggested that special missions should be treated like delegations to United Nations conferences. If the Commission adopted that criterion, it would have to apply it throughout the draft articles, not just in article 27. Personally, he saw no valid reason for treating special missions differently from permanent missions.
65. The CHAIRMAN, speaking as Special Rapporteur, said that in his opinion 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 not be 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. In any case, it was for the Commission to decide whether or not it wished to treat special missions on a par with resident missions.

<sup>5</sup> *Yearbook of the International Law Commission, 1964, Vol. II, p. 210.*

66. Mr. AGO said that each argument cut both ways : it was possible to question the need for granting immunity from civil jurisdiction where the stay lasted for a few days only, but it could also be argued that during such a brief stay it would rarely become necessary to institute judicial proceedings against the person concerned, whereas the situation was different in the case of a diplomat who lived in the receiving State for a longer period.

67. He did not think that a distinction should be drawn between ordinary special missions and so-called "high level" special missions : in making such a distinction the Commission would be treading on dangerous ground, since it might lead to different States being treated in different ways.

68. Mr. ELIAS suggested, as a compromise solution, that the principle embodied in paragraph 1 of article 27 should be retained and that paragraph 2 should provide that, unless otherwise agreed by the two States concerned, the head and members of the special mission would enjoy immunity from civil and administrative jurisdiction.

69. The CHAIRMAN, speaking as Special Rapporteur, said he was convinced that it was absolutely necessary to provide for immunity from criminal jurisdiction; immunity from civil and administrative jurisdiction was less indispensable, except where acts performed in the course of official duties were concerned. It might be possible to formulate a residual rule.

70. Mr. AGO said that, by special agreement, the receiving State and the sending State might even dispense with immunity from civil and administrative jurisdiction in the case of the members of a special mission.

71. Mr. Elias's proposition was self-evident, but it would be dangerous to draft a rule on those lines : it might be construed to mean that it was impossible to derogate from it by special agreement in the case of a permanent mission.

72. The CHAIRMAN, speaking as Special Rapporteur, said he did not think that States could, by mutual agreement, waive rules which entailed a form of discrimination; he referred to article 47 of the Vienna Convention on Diplomatic Relations in that connexion.

73. Mr. ROSENNE said that, in the light of the discussion, he thought it would be better if paragraph 2 was drafted in language close to that of the corresponding provision of the Vienna Convention on Diplomatic Relations, but making it clear that it was possible for States to derogate from the rules in that provision. The difficulty arose from the text proposed by the Special Rapporteur for paragraph 2 of article 40, which laid down the right of States to conclude agreements "confirming or supplementing or extending or amplifying" the provisions of the draft articles, but did not mention the right to derogate from the rules laid down in the draft articles. That right should be clearly stated.

74. Mr. TUNKIN said that he did not favour the inclusion of a provision under which States would be able to derogate from the rules laid down in the draft articles. That right always existed; States could, by

mutual agreement, derogate even from the rules laid down in the Vienna Convention of 1961. It would, however, be unwise to state that fact in article 27, because it could give the mistaken impression that States could not derogate from rules set out in other articles, which contained no such proviso.

75. The CHAIRMAN, speaking as Special Rapporteur, said that the idea that States could not derogate from those rules was contained in the Vienna Convention on Consular Relations : States could develop the rules and widen their scope, but they could not curtail them. That was an established rule of international law which had been accepted by more than seventy States.

76. Mr. TUNKIN pointed out that he had been referring to the Vienna Convention on Diplomatic Relations, not to the Vienna Convention on Consular Relations.

77. Mr. ROSENNE said that the difficulty arose largely from the excessive variety of special missions; it was difficult to have the same rule for a mission which lasted three days as for another which lasted ten years. The wisest course would be to follow the rules of the 1961 Convention and to make it clear that States could derogate from the provisions of articles 17 to 39.

78. Mr. TUNKIN said that there undoubtedly were provisions of international law which marked a progressive development and from which States should not withdraw. However, with regard to Mr. Rosenne's proposal, he did not believe that the draft articles should contain any provision to the effect that States could, or could not, derogate from the rules they stated. There were certainly some rules from which it was undesirable that States should derogate. In practice, special missions were often sent in great haste, and States would rely on the provisions of the future convention.

79. The CHAIRMAN, speaking as Special Rapporteur, suggested that he should redraft paragraph 1 to provide for immunity from criminal jurisdiction, and that in paragraph 2 and the subsequent paragraphs he should follow *mutatis mutandis* the text of article 31 of the Vienna Convention on Diplomatic Relations, with the addition of a sentence to the effect that those provisions would be applicable except as otherwise agreed. In the commentary, he would mention the opinion held by some members of the Commission that immunity from civil and administrative jurisdiction should be confined to acts performed by members of the special mission in the course of their official duties and he would add that there was a difference of views in the Commission, some members favouring complete immunity as a safeguard against interference by the receiving State, while others considered that there should be immunity from civil and administrative jurisdiction only in respect of acts performed in the course of duty, with a view to safeguarding as far as possible the sovereignty of the territorial State.

*It was so agreed.*<sup>6</sup>

80. Mr. AGO said he agreed that both of the two opinions voiced in the Commission should be set out

<sup>6</sup> For resumption of discussion, see 817th meeting, paras. 64-83.

in the commentary. It might then however, be stated that the Commission had preferred to follow the example of the Vienna Convention on Diplomatic Relations and use the broader formulation, although it would, of course, be open to States to adopt the other arrangement by bilateral agreement.

The meeting rose at 6.5 p.m.

## 808th MEETING

Tuesday, 22 June 1965, at 10 a.m.

Chairman : Mr. Milan BARTOŠ

*Present* : Mr. Ago, Mr. Amado, Mr. Briggs, Mr. Elias, Mr. Jiménez de Aréchaga, Mr. Pal, Mr. Pessou, Mr. Reuter, Mr. Rosenne, Mr. Tunkin, Mr. Verdross, Sir Humphrey Waldoock, Mr. Yasseen.

### Special Missions

(A/CN.4/179)

(continued)

[Item 3 of the agenda]

#### ARTICLE 28 (Exemption from social security legislation) [28]

##### Article 28 [28]

###### *Exemption from social security legislation*

1. The head and members of the special mission and the members of its staff shall be exempt, while in the territory of the receiving State for the purpose of carrying out the tasks of the special mission, from the application of the social security provisions of that State.

2. The provisions of paragraph 1 of this article shall not apply to nationals or permanent residents of the receiving State regardless of the position they may hold in the special mission.

3. Locally recruited temporary staff of the special mission, irrespective of nationality, shall be subject to the provisions of social security legislation.

1. The CHAIRMAN, speaking as Special Rapporteur, said that article 28 of his draft was based on article 33 of the Vienna Convention on Diplomatic Relations but had been abridged because of the temporary nature of special missions. What remained was the provision in paragraph 1, under which the members of the special mission and its staff were exempt, while in the receiving State, from the social security provisions of that State.

2. Paragraph 2 provided that the provisions of paragraph 1 should not apply to nationals or permanent residents of the receiving State, from among whom many persons employed by special missions, and not only service staff, were recruited. Since the task of a special

mission was very often dangerous and might result in death or disability, the application of social security provisions was more important in that case than in the case of permanent missions.

3. The question of temporary staff, referred to in paragraph 3, was different from that arising in connexion with permanent missions, since the special mission generally engaged such staff for a few days only. He had drafted paragraph 3 with that consideration in mind and in conformity with the general trends of international labour legislation.

4. Mr. ROSENNE said that the divergence from the Vienna Conventions was justifiable and he could accept the Special Rapporteur's formula for article 28.

5. Mr. TUNKIN said he agreed that some deviation from the Vienna Conventions was inevitable. The Drafting Committee would need to consider whether paragraph 3 was necessary at all. Locally recruited temporary staff would be covered by the provision in paragraph 2 that nationals or permanent residents of the receiving State were not exempt from social security legislation.

6. Mr. ELIAS said that either paragraphs 2 and 3 could be amalgamated or the former could be redrafted so as to cover locally recruited temporary staff, possibly by substituting the words "persons ordinarily resident in" for the words "permanent residents of".

7. The CHAIRMAN, speaking as Special Rapporteur, said there was some doubt as to the meaning of the term "ordinarily resident". International law distinguished between temporary residents and permanent residents, and France and the United Kingdom, for example, made a distinction between permanent residents and privileged residents.

8. Mr. ELIAS pointed out that the phrase "ordinarily resident in" often appeared in legislative enactments of many common law countries and the context would indicate what it meant. Alternatively, the phrase "or persons permanently or temporarily resident in the receiving State" could be used in paragraph 2, and paragraph 3 would then be unnecessary.

9. The CHAIRMAN, speaking as Special Rapporteur, said that the reference to permanent residence had been introduced into the Vienna Convention on Diplomatic Relations at the request of the Commonwealth countries.

10. Mr. ROSENNE said that both the Vienna Conventions contained the phrase "nationals of or permanently resident in the receiving State"; its meaning was well-known, and there was no reason for using another form of words to express the same idea.

11. The CHAIRMAN, speaking as Special Rapporteur, said that the question which expression was the more usual had been considered at both Vienna Conferences. The expression "permanent residents" or a similar one had been used in the Convention relating to the Status of Stateless Persons<sup>1</sup> and in the Convention relating to the Status of Refugees.<sup>2</sup>

<sup>1</sup> United Nations *Treaty Series*, Vol. 360, p. 130.

<sup>2</sup> *Ibid.*, Vol. 189, p. 137.