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**Summary record of the 809th meeting**

Topic:  
**Special missions**

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rest of the article appeared to be already covered by other provisions of the draft. For example, paragraph 3 laid down a rule for nationals of the receiving State and persons permanently resident in its territory which was already laid down for all personal servants by paragraph 4 of article 32.

81. Mr. AMADO said that the Drafting Committee should consider carefully whether the word "unduly" should be retained in paragraph 4.

82. The CHAIRMAN, speaking as Special Rapporteur, said that the word was used in article 38 of the Vienna Convention on Diplomatic Relations and in article 71 of the Vienna Convention on Consular Relations. The participants in the Vienna Conferences had thought that some interference would have to be tolerated, and that too many difficulties might be raised if States were required not to interfere at all in the performance of the functions of the mission.

83. Mr. AMADO said that he always deferred to the decision of States and would therefore withdraw his suggestion.

84. Mr. TUNKIN said that article 33 of the draft went much further than article 38 of the Vienna Convention on Diplomatic Relations, which covered only diplomatic agents; article 33 applied not only to the head of the mission but also to members of the special mission and even to members of the staff, and he doubted whether States would be prepared to go so far as that.

85. Sir Humphrey WALDOCK said he was convinced that the only way to ensure acceptance of the draft articles by governments was to restrict the privileges and immunities of persons who were nationals of the receiving State, or permanently resident therein, as had been done in the Vienna Convention on Diplomatic Relations.

86. The CHAIRMAN, speaking as Special Rapporteur, said that his general approach, as reflected in several of the draft articles, had been that the entire staff of the special mission should enjoy the same protection as the head and members of that mission. The question to be decided was whether to recommend that States adopt that rule, or whether to confine such protection to the diplomatic staff. If the Commission chose the latter course, he would add the word "diplomatic" before the word "staff" in paragraph 1.

87. He agreed to the deletion of paragraph 2, as Mr. Reuter had suggested. Paragraph 3 should be retained, for in substance it reproduced the first sentence of paragraph 2 of article 38 of the Vienna Convention on Diplomatic Relations. The question of privileges granted by a decision of the receiving State would come up again in connexion with article 39 (Non-discrimination) of his draft.

88. As his intention had been that the entire staff of special missions should be in the same position, he had not reproduced paragraph 2 of article 37 of the Vienna Convention on Diplomatic Relations, which extended to administrative and technical staff certain privileges which the earlier articles of the Convention accorded to diplomatic staff only. If the Commission decided not to follow his idea and wished to reproduce exactly the provisions of the Vienna Convention on Diplomatic Relations, an

article covering administrative and technical staff would have to be added, possibly immediately before the article referring to the status of family members.

89. He suggested that he should redraft article 33 along the lines he had just indicated.

*It was so agreed.*<sup>9</sup>

The meeting rose at 1.10 p.m.

<sup>9</sup> For resumption of discussion, see 817th meeting, para. 93, and 819th meeting, paras. 94-96.

## 809th MEETING

*Wednesday, 23 June 1965, at 10 a.m.*

*Chairman* : Mr. Milan BARTOŠ

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

### Special Missions

(A/CN.4/179)

(continued)

[Item 3 of the agenda]

ARTICLES 34 (Duration of privileges and immunities) [37] and 35 (Death of the head or of a member of the special mission or of a member of its staff) [38]

#### Article 34

[37]

##### *Duration of privileges and immunities*

1. The head and members of the special mission, and the members of its staff and members of their families, shall enjoy facilities, privileges and immunities in the territory of the receiving State from the moment when they enter the territory of the receiving State for the purpose of performing the tasks of the special mission or, if they are already in its territory, from the moment when their appointment as members of the special mission is notified to the Ministry of Foreign Affairs.

2. The enjoyment of facilities, privileges and immunities shall cease at the moment when they leave the territory of the receiving State, upon the cessation of their functions with the special mission or upon the cessation of the activities of the special mission (article 12 of these rules).

#### Article 35

[38]

*Death of the head or of a member of the special mission or of a member of its staff*

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 who is not a national of or permanently resident in the receiving State, the receiving State shall be obliged to permit the removal of his remains to the sending State or decent burial in its own territory, at the option of the family

or of the representative of the sending State. It shall also facilitate the collection of the movable effects of the deceased, and shall deliver them to the representative of the family or of the sending State, permitting them to be exported without hindrance.

2. This provision shall apply also in the event of the death of a member of the family of the head of the special mission, of one of its members, or of a member of its staff, who has been allowed to accompany the person in question to the territory of the receiving State.

1. The CHAIRMAN invited the Commission to consider articles 34 and 35 together.

2. Speaking as Special Rapporteur, he said that articles 34 and 35 of his draft were based respectively, on paragraphs 1 and 2, and on paragraphs 3 and 4 of article 39 of the Vienna Convention on Diplomatic Relations; he had wished to deal with the case of death in a separate article.

3. Mr. PAL suggested that the Drafting Committee should be instructed to keep draft articles 34 and 35 in terms as close as possible to the language of article 39 of the Vienna Convention on Diplomatic Relations.

4. The CHAIRMAN suggested that the Commission should refer articles 34 and 35 to the Drafting Committee, with instructions to keep as closely as possible to the wording of article 39 of the Vienna Convention on Diplomatic Relations.

*It was so agreed.*<sup>1</sup>

ARTICLE 36 (Enjoyment of facilities, privileges and immunities while in transit through the territory of a third State) [39]

*Article 36* [39]

*Employment of facilities, privileges and immunities while in transit through the territory of a third State*

1. If the head or a member of the special mission or a member of its staff passes through or is in transit in the territory of a third State, which has granted him a passport visa if such visa was necessary, while proceeding to the place where he is to perform the functions assigned to the special mission or when returning from such place to his own country, the third State shall accord him such inviolability and immunities as may be required for his unhindered transit through its territory. The same shall apply in the case of family members who accompany the head or a member of the special mission, or a member of its staff.

2. During such transit, such persons shall enjoy the right to inviolability of official correspondence and of other communications in transit.

3. The third State shall be bound to comply with these obligations only if it has been informed in advance, either in the visa application or by notification, of the purpose of the special mission, and has raised no objection to such transit.

4. Subject to the provisions of the preceding paragraph, the State shall also accord the necessary guarantees and immunities to the courier of the special mission and to the bag of the special mission in which correspondence and other official communications in transit are carried,

in either direction, for the purpose of maintaining contact between the special mission and the Government of the sending State.

5. All the provisions set forth above shall also apply to the persons mentioned in paragraph 1 of this article, to the courier of the special mission and to the bag of the special mission if their presence in the territory of the third State is due to *force majeure*.

5. The CHAIRMAN, speaking as Special Rapporteur, said that article 36 of his draft was based on article 40 of the Vienna Convention on Diplomatic Relations. He had, however, added a new provision, which appeared in paragraph 3. The status of a diplomat or consular officer was evident from his passport, but the same was not true in the case of members of a special mission. Consequently the transit State could only be bound to comply with its obligations if it had received advance notice of the journey of such persons.

6. Mr. ROSENNE said that the new provision contained in paragraph 3 was necessary for special missions, and he fully supported it in substance; he would, however, suggest the deletion of the words "either in the visa application or by notification", since there might be other means by which the third State could be informed of the special mission. For example, by virtue of a series of agreements for the abolition of visas on diplomatic passports he could travel freely without a visa in many countries, but he would not enjoy or claim any privileges or immunities unless the State through which he was travelling had been officially informed in some way that his journey was for the purposes of a special mission.

7. Mr. ELIAS suggested that the point, which was not of fundamental importance, should be left to the Drafting Committee.

8. The CHAIRMAN, speaking as Special Rapporteur, said that some two thirds of all States still required visas and that the application for a visa generally stated the purpose of the visit. The essential point was that the transit State should have advance notice. He was therefore willing to regard the phrase quoted by Mr. Rosenne as not absolutely essential.

9. Speaking as Chairman he proposed that the Commission should, as Mr. Elias had suggested, refer article 36 to the Drafting Committee, with directions to follow as closely as possible the wording of article 40 of the Vienna Convention on Diplomatic Relations.

*It was so agreed.*<sup>2</sup>

ARTICLE 37 (Professional activity) [42]

*Article 37* [42]

*Professional activity*

The head and members of the special mission and the members of its staff shall not, during the term of the special mission, practise for personal profit any professional or commercial activity in the receiving State, and they may not do so for the profit of the sending State unless the receiving State has given its prior consent.

<sup>1</sup> For resumption of discussion, see 819th meeting, paras. 97-107.

<sup>2</sup> For resumption of discussion, see 819th meeting, paras. 108-113.

10. The CHAIRMAN, speaking as Special Rapporteur, said that article 37 of his draft was intended to strengthen the rule in article 42 of the Vienna Convention on Diplomatic Relations, because many States complained that occasionally members of special missions carried on, on behalf of the sending State, activities not consonant with the mission's terms of reference. That was why he had added the passage "and they may not do so for the profit of the sending State unless the receiving State has given its prior consent".

11. Mr. AMADO said that in the French version, he preferred the expression *en vue d'un gain personnel* which was used in article 42 of the Vienna Convention, to the expression *à leur propre profit*.

12. Mr. VERDROSS said he did not think that the additional passage was necessary, since the idea was in any case implied in the first part of the sentence. It would be enough to mention it in the commentary.

13. Mr. TUNKIN said that, as drafted, article 37 would cover members of the staff of the special mission who were nationals of the receiving State or permanently resident in its territory. It was quite unnecessary to require such persons to abandon all their ordinary professional activities if they were employed by a special mission; their employment by a special mission might last only a very short time.

14. Article 37 of the draft differed from article 42 of the Vienna Convention on Diplomatic Relations in that the latter confined the prohibition of all professional or commercial activity to diplomatic agents, whereas article 37 extended it to all the staff of the special mission, including members of the service staff. Although he was not necessarily against that extension, he would like to know on what grounds it was based.

15. He was opposed to the rigid rule embodied in the final proviso, prohibiting members of the special mission from engaging in any professional activity on behalf of the sending State without the prior consent of the receiving State. That rule was unnecessary and would hamper the smooth functioning of international relations; a member of a special mission, acting in the name of the sending State, could deal with the appropriate authorities of the receiving State on a matter outside the special mission's specific terms of reference, provided that the authorities concerned were empowered to discuss the matter. He saw no need to require a prior specific agreement between the sending State and the Ministry of Foreign Affairs of the receiving State for that purpose.

16. The CHAIRMAN, speaking as Special Rapporteur, said he could accept Mr. Tunkin's first suggestion that the rule in article 37 should not apply to nationals of or persons permanently resident in the receiving State.

17. Mr. Tunkin's second suggestion raised a more complicated question. The article on professional activity had been severely criticized at both the Vienna Conferences. Paragraph 1 of article 57 of the Vienna Convention on Consular Relations was modelled on article 42 of the Vienna Convention on Diplomatic Relations, while paragraph 2 of the said article 57 laid down that the privileges and immunities provided in the Convention should not be accorded to consular employees or to members of the service staff who carried on

any private gainful occupation in the receiving State. The reason was that, in practice, it was usually employees of that category who engaged in gainful private activities, sometimes of a reprehensible nature. Because the special mission was of short duration and because it was difficult to establish special rules for employees in that category attached to special missions, he had preferred to propose a rule applicable to the whole staff of the special mission, and Mr. Tunkin seemed prepared to accept that.

18. With regard to the final provision, he said the Commission would have to make up its mind whether it wished to curb the growing practice of special missions to engage, on behalf of the sending State, in activities which formed no part of their task, a practice which might raise objections from the receiving State. For instance, members of a special mission might buy goods which were very scarce in their own State. Or again, there was the case of the archaeological discoveries in Egypt. Shortly after the war, a member of a Yugoslav special mission had been declared *persona non grata* by the United States because he had bought, on behalf of his State, radar equipment which, although on sale freely, the receiving State had not wished to be exported at the time. He would not, however, press for the retention of that provision.

19. Mr. REUTER thought that the final provision was necessary. The representatives of certain States, notably those of the socialist States, could not act on their own behalf; they always acted on behalf of their States. He was quite prepared to admit that it should be open to members of special missions to approach the authorities of the receiving State to discuss, for instance, an economic question which did not come within the mission's terms of reference. But he gathered that the final provision in the article was meant to refer to contacts with private concerns in the receiving State. In countries with a private enterprise economy, the State did not carry on commercial activities. In France, for instance, the State neither bought nor sold unless specifically so authorized by law. A foreign State could hardly be allowed to do what the national State itself was not entitled to do. The system might be criticized, but it was logical. The problem was very serious and touched on the structure of society. Article 37 should forbid members of special missions to carry on commercial operations, buy shares, form companies—in short, to do any business locally without express permission.

20. Mr. ELIAS said he supported the principles laid down in both parts of article 37. It should be remembered that, in many cases, the members of a special mission were technical experts; and even the junior members of such a mission would, unlike the diplomats of a permanent mission, possess knowledge which could be exploited. The concluding proviso was therefore a useful and necessary addition to the text of the Vienna Convention on Diplomatic Relations.

21. Mr. TUNKIN pointed out that it was already laid down in article 2 that the "task of a special mission shall be specified by mutual consent of the sending State and of the receiving State". It would be going too far to forbid members of a special mission to do anything else on behalf of the sending State without an express supplementary agreement. In practice, it was an everyday experience for the members of a special mission to

engage in negotiations on some new matters. In the event of abuse, the receiving State would always be able to declare the member of the special mission *persona non grata* and thus easily put an end to his objectionable activities.

22. Any attempt to deal with the question of transactions with private firms would mean entering into a new and completely uninvestigated field. If such a transaction was not illegal under the laws of the receiving State, there was no reason to forbid an expert belonging to a special mission to discuss it with the firm in question. He saw no grounds for requiring the specific consent of the receiving State if such consent was not required by the laws of the country.

23. The CHAIRMAN, speaking as Special Rapporteur, said that the question of conversations between members of the special mission and authorities of the receiving State had been discussed in connexion with article 2, adopted at the previous session, the commentary to which indicated that the task of the special mission could be enlarged by mutual agreement. Article 37 referred to negotiations or operations carried on in the receiving State with individuals or bodies corporate not representing that State.

24. Mr. YASSEEN said that, in his opinion, article 37 fell into two distinct parts. The first part, up to the words "in the receiving State", concerned the personal activities, for profit, of the members of the special mission. The proposed provision was necessary, because the members of a special mission should confine themselves to their official task. Nevertheless, Mr. Tunkin's remark concerning nationals of the receiving State should be borne in mind, for it would be going too far to compel a national of the receiving State who was employed for a few days by a special mission of a foreign State to abandon his professional activities.

25. The second part of the article was connected, first, with article 2, concerning the definition of a special mission's task and, secondly with article 38,<sup>3</sup> concerning the obligation to respect the laws and regulations of the receiving State.

26. If a member of a special mission, in other words a person acting in a representative capacity carried on, in that capacity, activities unrelated to the special mission's task as defined by agreement between the two States, there were two possible cases to be considered. In one case, the activities in question would concern official relations between the two States; that case presented no difficulty, for the agreement defining the special mission's task could be amended by mutual agreement. The second agreement amending the first did not necessarily have to be express; it could be implied.

27. In the other case, the member of the mission, as such, entered into relations with individuals or private companies; that activity, for the profit of the sending State, should be supervised by the receiving State. There was no need, however, for any very strict rule on the subject, or to prohibit all activities of that kind; they should however, require the receiving State's permission.

If the receiving State refused its permission, there was nothing more to be done.

28. In short, if a member of a special mission acted, not in his personal capacity, but as a representative of his State, his acts should be either in conformity with the task assigned to the special mission, or in conformity with another task agreed to by the two States, or agreed to by the receiving State, or in conformity with the law of the receiving State. The last condition followed from article 38, paragraph 2.

29. Mr. VERDROSS said he thought that article 38 settled the problem along the lines indicated by Mr. Yasseen.

30. Mr. ELIAS said that he was in favour of article 37. Clearly, if a special mission which, for example, had entered the territory of the receiving State to help with an electrical installation, proceeded to engage in transactions for the supply of nuclear energy, the matter would come to the knowledge of the receiving State and a specific agreement would have to be concluded. The door should not be left open too wide for activities outside the terms of reference of the special mission, since otherwise members of the special mission might, under the pretext that there was no prohibition in the matter, engage in activities which were apparently innocuous but which could later become detrimental to the interests of the receiving State. A special mission had by definition a special character and should not exceed its terms of reference.

31. Mr. PAL said he was not in favour of any extension of the prohibition contained in article 42 of the Vienna Convention on Diplomatic Relations. If the laws of the receiving State prohibited certain transactions, the matter would be covered by the provisions of article 38 of the Special Rapporteur's draft. The question might also arise what bearing such transactions might have on the privileges and immunities of the members of the special mission; that point could be dealt with in the same way as in paragraph 2 of article 57 of the Vienna Convention on Consular Relations.

32. Mr. ROSENNE said that a strong case had been made out for a provision giving the receiving State some measure of protection in certain exceptional circumstances. One important safeguard was already provided by the article requiring compliance with local laws and regulations (article 38); an additional safeguard would be provided by the concluding passage of article 37 for which he preferred more flexible language, as suggested by Mr. Yasseen. To require the permission or consent of the receiving State would be sufficient.

33. Mr. YASSEEN said that the more he studied the question the more he could see that the two parts of the article dealt with entirely different matters. The first part concerned the professional activities of members of the special mission as individuals, and the second part dealt with the activities of the same persons, either as members of the special mission or at least as representatives of their State.

34. In his opinion, the second part of the article should be transferred elsewhere; perhaps a clause drafted on the following lines should be added to article 2 :

<sup>3</sup> See below, following paragraph 51.

“The members of the special mission may not practise, for the profit of the sending State, any activity exceeding the functions of the special mission, without the consent of the receiving State.”

35. Mr. REUTER expressed support for Mr. Yasseen's suggestion. Like Mr. Tunkin, he was convinced that international trade was beneficial and should be encouraged rather than obstructed.

36. He also agreed with Mr. Tunkin and Mr. Rosenne that very flexible language should be used. If a provision stipulating that the receiving State's permission was required was considered too strong, the Commission might say simply that, in relations between the members of the special mission and private undertakings in the receiving State, the members of the special mission should not engage in any business transaction unless the receiving State had been informed and had given its consent.

37. Sir Humphrey WALDOCK said he too agreed with Mr. Yasseen. Article 37, which dealt with the simple question of the prohibition of individual professional and commercial activities, was not the right context for a rule which related to the activities of members of a special mission acting on behalf of the sending State. A rule on that question would be more appropriately placed in the article dealing with the functions of the special mission.

38. Article 38 already contained useful and very strong safeguards in its paragraph 1, requiring all persons belonging to special missions to respect the laws and regulations of the receiving State, and in its paragraph 4, which prohibited the use of the premises of the special mission for purposes other than the exercise of its functions and the performance of its task. Those provisions did not perhaps cover all the matters which could arise, but they went a very long way towards providing security against abuse of their position by members of the special mission.

39. He did not disagree with Mr. Reuter's view that, since the receiving State accepted the special mission for a special purpose, it was entitled to insist that the mission should observe the limits of its functions. However, transactions between States must also be facilitated. He accordingly suggested that the Drafting Committee should be asked to try to find a less rigid formula than that used in the concluding provision of draft article 37; the provision, which would be placed in another article, would admit some possibility of the special mission going outside its terms of reference with the assent of the receiving State.

40. Mr. TUNKIN said he, too, agreed that the concluding provision of article 37 was not in its right place. Since the articles already adopted by the Commission provided that the functions of a special mission were to be specified by agreement between the receiving State and the sending State, it followed that any extension of those functions would also have to be agreed between those two States. So far as the activities of the mission were concerned, the matter was therefore already covered by previous articles. An additional safeguard was provided by paragraph 1 of article 38, which required the special mission to respect the laws and regulations of the receiving State.

41. The two safeguards in question, mutual consent with regard to functions and observance of the municipal law of the receiving State, were embodied both in the Vienna Convention on Diplomatic Relations and in the Vienna Convention on Consular Relations. It had not, however, been found necessary to state, in either of those Conventions, that a diplomatic agent or consular officer could not perform, on behalf of the sending State, without the prior consent of the receiving State, any act which was not related to the functions of the mission to which he belonged.

42. The CHAIRMAN proposed that article 37 should be referred to the Drafting Committee with instructions to retain only the first part of the article, up to and including the words “in the receiving State”, to redraft it along the lines of article 42 of the Vienna Convention on Diplomatic Relations and to explain in the commentary that in the Commission's opinion the question of the commercial or professional activities of members of the special mission for the profit of the sending State was adequately regulated by article 38. The Commission could not then be criticized for having overlooked a very topical problem which had attracted public notice in recent incidents. If such activities did not conflict with the laws and regulations of the receiving State, there could be no abuse.

43. Mr. AGO said he could accept the Chairman's proposal, since all matters connected with the activities carried on by members of the special mission in their official capacity were regulated by other articles.

44. With regard to the first part of article 37, which dealt with the activities of members of the mission in their individual capacity, he thought, that, in the case of special missions, 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 on any other professional activity; but a special mission might be composed of persons from very different walks of life, business men, 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. He had no strong opinion on the subject but merely wished to mention the point.

45. The CHAIRMAN, speaking as Special Rapporteur, said that, on Mr. Tunkin's proposal, the Commission had decided that the article should not apply to nationals or to permanent residents of the receiving State.

46. He pointed out that a delegation coming to negotiate a commercial treaty might, for example, include business men who would therefore be in a privileged position, owing to the opportunities of access and the privileges and immunities which they would enjoy, and who could prepare quota lists in such a way as to favour their own export and import interest and increase their sales. Cases of that kind had been reported and criticized in a number of parliaments.

47. Mr. AMADO said that in starting that lengthy but instructive discussion, he had approached the subject from the psychological standpoint: man could not divide

his mind into watertight compartments. Modern life was very complex and the members of a special mission had difficulty in confining themselves to the subject assigned to their mission, to the exclusion of all others.

48. The receiving State should, of course, be given every protection against malpractices, but article 38 seemed to provide an adequate safeguard for that purpose. Naturally, members of special missions must not take advantage of their position for business purposes, but he doubted whether the Commission could do more than lay down a few general rules to guard against possible abuses.

49. Mr. ROSENNE suggested that article 37 should follow the language of article 42 of the Vienna Convention on Diplomatic Relations with the addition of the words: "without the assent of the receiving State".

50. Sir Humphrey WALDOCK said it would be a grave mistake to include in article 37 anything more than the statement of the general rule contained in article 42 of the Vienna Convention on Diplomatic Relations. The statement of that rule would not exclude the possibility of agreement between the two States concerned.

51. The CHAIRMAN suggested that article 37 should be referred to the Drafting Committee, with the record of the discussion.

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

ARTICLE 38 (Obligation to respect the laws and regulations of the receiving State) [40 and 41]

*Article 38* [40 and 41]

*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 the receiving State.

2. The special missions of the sending State shall be requested to conduct all the official business entrusted to them by the sending State with the organ, delegation or representative of the receiving State which has been designated in the mutual agreement on the acceptance of the special mission or to which they have been referred by the Ministry of Foreign Affairs of the receiving State.

3. Special missions may not, as a general rule, communicate with organs of the receiving State other than those specified in the preceding paragraph, but it is the duty of the receiving State to designate the liaison organ or officer through whom the special mission may, if necessary, make contact with other organs of the receiving State.

4. The premises used by the special mission must not be used for purposes other than those which are necessary for the exercise of the functions and for the performance of the task of the special mission.

52. The CHAIRMAN, speaking as Special Rapporteur, said that if article 38 of his draft was compared with article 41 of the Vienna Convention on Diplomatic

Relations, it would be seen that the major difference occurred in paragraph 2; whereas permanent diplomatic missions had contact with the central authorities only, a kind of decentralization occurred in the case of special missions, which very often entered into relations not with the Ministry of Foreign Affairs but with another organ of the receiving State.

53. Paragraph 3 concerned communications between special missions and other organs of the receiving State. For the purpose of such contacts, which were peculiar to special missions, liaison officers were designated.

54. So far as the use of the premises was concerned he said he had been in two minds whether to reproduce the relevant clause in article 41 of the Vienna Convention on Diplomatic Relations or to propose some other general rule. If the premises belonged to the special mission, they could be used by no-one else; if they belonged to the permanent mission the rules in the two Vienna Conventions would apply.

55. Mr. ROSENNE said that, as article 38 dealt with two entirely separate matters, the obligation to respect the laws and regulations of the receiving State and the channels of communication with the authorities of that State, it should be divided into two articles, one consisting of paragraphs 1 and 4 and the other of paragraphs 2 and 3. Although that arrangement would mean a departure from the pattern of the Vienna Convention on Diplomatic Relations, it was both logical and consistent with the way in which the two matters were dealt with in the Vienna Convention on Consular Relations.

56. The CHAIRMAN, speaking as Special Rapporteur, said that he entirely agreed with Mr. Rosenne, but that he had followed the structure of the Vienna Convention on Diplomatic Relations. If the Commission wished to separate the provisions concerning the obligation to respect the laws and regulations of the receiving State from those concerning contacts with the authorities of that State in another, he would have no objection.

57. Mr. VERDROSS said that paragraphs 1 and 4 in fact corresponded to the relevant paragraphs of the Vienna Convention on Diplomatic Relations. Paragraphs 2 and 3 might be combined, since the latter expressed in a negative form what the former stated in a positive one.

58. He thought that it was wrong to speak of "the official business entrusted to them . . ." (paragraph 2), for the instructions received by a special mission from its own Government came under internal law and were of no concern to international law; international law was concerned only with what was agreed upon between the receiving State and the sending State.

59. The CHAIRMAN, speaking as Special Rapporteur, said that paragraphs 2 and 3 could certainly be merged.

60. With regard to the other question, he said that according to the commentary on article 2 the mission's task could be changed in the course of its existence. If the prior agreement related only to official business, then any act outside such official business, in the sense that the mission had exceeded its powers, could be treated as *ultra vires* and void. Accordingly, in order to avoid any contradiction, it would be better to delete the words "entrusted to them by the sending State".

<sup>4</sup> For resumption of discussion, see 819th meeting, para. 117.

61. Mr. TUNKIN said he was not in favour of dividing article 38 into two articles and would prefer it to follow the structure of article 41 in the Vienna Convention on Diplomatic Relations, though he could support Mr. Verdross's proposal for amalgamating paragraphs 2 and 3. Paragraph 4 should be redrafted to follow more closely the language of article 41, paragraph 3, since in substance the obligation laid down was the same.

62. Mr. AGO said he endorsed Mr. Verdross's proposal for amalgamating paragraphs 2 and 3 and so simplifying and shortening the text.

63. He thought that paragraph 2 should begin with the words "All the official business of the special missions of the sending State shall be conducted . . .", for the phrase "shall be requested to conduct" was ambiguous, in that it might be taken to mean that special missions were encouraged to do their best but that, if they did not quite succeed, they would not be infringing any obligation.

64. The fundamental rule stated by the Special Rapporteur was correct. The mutual agreement would designate the liaison organ; but if the agreement did not mention the matter, who would decide? The article should say that the liaison organ would be the Ministry of Foreign Affairs or some other organ designated by the Ministry.

65. As to paragraph 4, he was inclined to think, like Mr. Tunkin, that the Commission could not lay down more stringent rules for the premises of the special mission than applied to the premises of embassies. The special mission might conduct activities on its premises—such as film showings—which were not, perhaps, "necessary" for but were not "incompatible" with the performance of its functions. It would be best, therefore, to reproduce the wording used in the Vienna Convention on Diplomatic Relations concerning the premises of permanent missions.

66. The CHAIRMAN, speaking as Special Rapporteur, agreed that the words "compatible with" would be better than the words "necessary for". He suggested that article 38, together with the comments made in debate, should be referred to the Drafting Committee.

*It was so agreed.*<sup>5</sup>

## ARTICLE 39 (Non-discrimination)

### *Article 39*

#### *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.

67. The CHAIRMAN, speaking as Special Rapporteur, explained that article 39 reproduced, with the necessary changes, article 47 of the Vienna Convention on Diplomatic Relations, and article 72 of the Vienna Convention on Consular Relations. The question was whether such a provision should appear in the draft articles. In his own opinion, the rule was recognized in international law and should be retained.

68. Mr. ROSENNE said that paragraph 2 was acceptable but he was unable to understand the meaning of paragraph 1. Did the obligation arise when there were several special missions engaged on the same task, or was the obligation on the receiving State to treat all special missions in its territory at any given moment on the same footing, whatever their task? The latter proposition seemed to go too far.

69. The CHAIRMAN, speaking as Special Rapporteur, said that in his article 17 he had proposed that facilities should be offered in accordance with the task and nature of the special mission; that should answer Mr. Rosenne's question. No kind of discrimination could be made between special missions of like nature having like tasks.

70. Mr. YASSEEN said that he found it hard to understand the purport of the article. Did it deal with non-discrimination as between special missions which came from different States at the same time? Or did it mean non-discrimination as between special missions coming to a State one after another? Everything depended on the circumstances and, especially in the case of political missions, on the relations between the receiving State and the sending State. The most that could be required was that a receiving State should guarantee a minimum standard of treatment.

71. In the case of special missions taking part in the same negotiation in the same country, obviously discrimination would not be admissible.

72. The CHAIRMAN, speaking as Special Rapporteur, explained that the rule to be laid down was that the provisions concerning special missions would not be applied in a discriminatory way and that the receiving State would be under an obligation to enter into contact with all special missions on the same footing. The rule was obviously an amalgam of legal rules and protocol courtesy.

73. Mr. AGO said that the Special Rapporteur had shown admirable scrupulousness in mentioning the problem in order to follow the Vienna Conventions. But perhaps such an article was hardly necessary in the draft on special missions.

74. So far as permanent missions were concerned, the rule of equality of treatment was a logical rule reflecting principles which had become customary. In the case of special missions, however, the treatment would depend to a great extent on the agreement between the two States about the sending of the mission. There should be no attempt to tie the hands of States. Special missions at very different levels were not necessarily always treated in the same way. In order to defend the principle of equality of treatment, the Special Rapporteur had felt constrained to say in paragraph 2 (a) that the restrictive application of any of the provisions of the articles by the receiving State, because it was also applied to its mission in the sending

<sup>5</sup> For resumption of discussion, see 819th meeting, paras. 114-116.

State, was not discriminatory. But surely there was no reason to assume that the sending of the special mission to the receiving State was paralleled by the simultaneous sending of a special mission to the sending State. Special missions were very frequently sent in one direction only. The reciprocity would thus come into play between two special missions of a different level.

75. What the Commission had to do was to ensure that two or three special missions arriving in the receiving State with the same task should not receive different treatment; but that proposition was so self-evident that a provision to that effect would be out of place in a convention on special missions.

76. The CHAIRMAN, speaking as Special Rapporteur, explained that he had reproduced the article from the Vienna Conventions not automatically, but out of scruple. He could cite several cases in which special missions from different sending States had asked to visit factories; but not all had received permission to do so, because not all the sending States granted such permission to the receiving States.

77. In his opinion, it would be logical to include the article in the draft, but in view of the many possible counter-arguments he would not press for its retention, even though personally convinced that it stated a general rule of international law.

78. Mr. ELIAS said he thought it would be wiser to omit article 39; the matters it sought to cover should be regulated by other international agreements.

79. Mr. TUNKIN said he, too, was in favour of deleting the article, for the reasons already given by other speakers.

80. Mr. REUTER said he agreed with Mr. Tunkin. In any event, a thorough discussion of article 39 should be preceded by a discussion of article 40.

81. The CHAIRMAN suggested, in view of the wish of the majority of the Commission, that article 39 be deleted.

*It was so agreed.*

#### ARTICLE 40 (Relationship between the present articles and other international agreements)

##### *Article 40*

##### *Relationship between the present articles and other international agreements*

1. The provisions of the present articles shall not affect other international agreements in force as between States parties to those agreements.

2. Nothing in the present articles shall preclude States from concluding international agreements confirming or supplementing or extending or amplifying the provisions thereof.

82. The CHAIRMAN, speaking as Special Rapporteur, said that article 40 of his draft was based on article 73 of the Vienna Convention on Consular Relations, which had constituted an innovation.

83. Mr. REUTER said he doubted very much whether the article should form part of the draft on special missions. In connexion with many articles, the question had arisen whether the provisions being drafted were or

were not residual rules, and he had the impression that the Commission was inclined to think that they were. If the Commission should accept article 40, it would certainly have to re-examine all the articles and decide which should be redrafted in less categorical terms. States would be pleased with the draft convention, but would wish to adapt it to special situations and since, for that reason, they would like the draft to be elastic, article 40, if adopted, might seriously jeopardize the convention as a whole without any very great benefit.

84. It was understandable that, from the point of view of theory, there should be a certain liking for article 40, although he personally did not share the feeling of the majority, and doubted whether it stated a rule of *jus cogens*. Without wishing to begin a discussion on the substance, he did not consider that the rule contained in the article should be erected into a leading principle.

85. The CHAIRMAN, speaking as Special Rapporteur, said that the Netherlands delegation had put forward the same arguments at the Vienna Conference on Consular Relations and had asked the Conference to reconsider all the articles, on the ground that a question of principle was at stake, but the Conference had declined.

86. Mr. AGO said that, like Mr. Reuter, he doubted whether the article should appear in the draft. He could understand, without however being convinced that it was a sound provision, how such a provision had come to be included in the Convention on Consular Relations, the Conference having evidently wished to guarantee to consulates stable conditions, a sort of minimum ceiling which agreements could raise but not lower. In the case of the draft on special missions, however, the provision was surely unnecessary; after all, in many cases, a special mission might, by agreement between the two States, enjoy privileges and immunities less extensive than those provided for in the convention. It would be undesirable to lay down hard and fast rules in that respect, and because special missions were of a temporary nature, an article like article 40 should not be adopted.

87. Mr. TUNKIN said that paragraph 2 might be interpreted to mean that an agreement between States reached independently of the rules laid down in the draft would be regarded as void, which was tantamount to saying that those rules constituted *jus cogens*. States could not contract out of or derogate from rules of *jus cogens*, even by mutual agreement, and to transform the rules in the present draft into rules of *jus cogens* could only hamper the development of closer international relations and would run counter to present-day realities. The article, like article 73 of the Vienna Convention on Consular Relations, would be unworkable. Nothing could prevent States, by agreement, from supplementing or modifying the rules in the present draft.

88. The CHAIRMAN, speaking as Special Rapporteur, said that at the Vienna Conference on Consular Relations, the overwhelming majority had voted for the provision in question,<sup>6</sup> on the ground that the rules of

<sup>6</sup> The provision which subsequently became article 73 of the Vienna Convention on Consular Relations was adopted (as draft article 71) by the First Committee of the Conference by 54 votes to none, with 9 abstentions, and unanimously by the plenary Conference. See *United Nations Conference on Consular Relations, Official Records, Vol. I, p. 240 and p. 80.*

consular law were institutional and should constitute *jus cogens*. But either argument was tenable. The new States had argued that the consular rules should be institutional and should not be at the mercy of governments which wished to impose on others certain changes through reciprocal agreements. On the other hand, countries like Switzerland and the Netherlands had stated that the provision would make it impossible for them to ratify the Convention.

89. Mr. YASSEEN said that article 40 should be dropped, not because there was no *jus cogens* in the draft convention, but because the question should preferably be governed by the general principles of the law of treaties concerning conflicting treaty provisions. The Commission should not take sides in the draft convention, which was of a special kind and covered a field in which bilateral agreements were the rule.

90. Mr. PESSOU said that paragraph 2 of the article covered cases which actually occurred in practice. He had read in "*Le Monde*" a paragraph on a bilateral agreement concluded between the United Kingdom and the USSR concerning the Vienna Convention on Diplomatic Relations. He had sent the article to the Special Rapporteur (Mr. Bartoš), who had replied that it was normal practice for a bilateral agreement to be made for the purpose of confirming the rules established by the Vienna Conference. Should, therefore, article 40 be adopted?

91. Mr. ROSENNE said that he agreed with nearly everything that had been said in favour of dropping article 40. He had difficulty in understanding the corresponding provision in the Vienna Convention on Consular Relations, and it had no place in the present draft. In the light of the comments of governments, the Commission might consider including a clause to the effect that some of the provisions of the draft, particularly those from article 17 onwards, would apply in the absence of any agreement to the contrary between the States concerned.

92. Sir Humphrey WALDOCK said that article 40 should certainly not be retained in a draft concerned with a matter in which bilateral agreements played such a prominent part, even though some of its provisions were of fundamental importance such as the inviolability of members of a special mission and its archives. It would suffice to include a clause of the kind suggested by Mr. Rosenne.

93. The CHAIRMAN, speaking as Special Rapporteur, said that if the majority of the Commission so wished he would be prepared to redraft article 40 in terms stating that the provisions of the articles would apply except as otherwise agreed by the parties, even though he preferred the solution of article 73 of the Vienna Convention on Consular Relations.

94. The final provisions should, he suggested, be drafted by the Secretariat as was customary.

*It was so agreed.*

The meeting rose at 1 p.m.

## 810th MEETING

Thursday, 24 June 1965, at 10 a.m.

Chairman : Mr. Milan BARTOŠ

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

### Law of Treaties

(A/CN.4/175 and Add.1-4, A/CN.4/177 and Add.1 and 2, A/CN.4/L.107)

(resumed from the 803rd meeting)

[Item 2 of the agenda]

#### DRAFT ARTICLES PROPOSED BY THE DRAFTING COMMITTEE

1. The CHAIRMAN invited the Commission to resume its consideration of item 2 of the agenda and to take up the draft articles proposed by the Drafting Committee.
2. Sir Humphrey WALDOCK, Special Rapporteur, suggested that the definitions contained in paragraphs (b) to (g) and the provision in paragraph 2 of article 1<sup>1</sup> be left aside until the Drafting Committee had considered them.
3. It might also be preferable for the Drafting Committee to examine at a later stage his proposal for the insertion among the general provisions in section I of an article safeguarding the rules of international organizations, taking into account the arguments he had put forward in the section entitled "Article 3 (*bis*)" in his fourth report (A/CN.4/177).<sup>2</sup>
4. At some time the Commission would need to decide whether or not to include an article on the conclusion of treaties by one State on behalf of another, or by an international organization on behalf of a Member State; the matter had been discussed at the sixteenth session<sup>3</sup> and was examined in his fourth report immediately after article 4 (Authority to negotiate . . . a treaty).
5. Consideration of articles 8 and 9, which had given rise to much discussion<sup>4</sup> and were difficult to formulate in a manner which might obtain the support of a substantial majority, should be deferred until the Drafting Committee had put forward fresh proposals and when more members of the Commission were present. He had not yet transmitted any texts to the Drafting Committee, because he had not yet succeeded in devising a compromise that would bridge the gulf between the two opposing schools of thought. As yet, he had not been able to do more than prepare alternative texts for the two articles.

<sup>1</sup> For earlier discussion of article 1, see 777th and 778th meetings.

<sup>2</sup> For earlier discussion of the Special Rapporteur's proposal, see 780th meeting, paras. 17-26.

<sup>3</sup> *Yearbook of the International Law Commission, 1964*, Vol. I, 732nd and 733rd meetings.

<sup>4</sup> See 791st meeting, paras. 61 *et seq.*, and 792nd-796th meetings.