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Topic:
Special missions

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71. He himself did not believe either that there were any rules of *jus cogens* relating directly to special missions. There were only reflections of certain rules of *jus cogens*, such as the sovereign equality of States, which lay outside the scope of the draft.

72. He was grateful to Mr. Tunkin for drawing a distinction between rules of *jus cogens* and other rules of international law which did not have the character of *jus cogens* and among which there was a certain hierarchy. For example, no one would maintain that the Vienna Convention on Consular Relations was a compendium of rules of *jus cogens*; that Convention contained some treaty rules and some rules which the parties could modify between themselves.

73. The draft on special missions would be even less stringent than the Vienna Convention on Consular Relations; it might contain only one or two articles stating rules which could not be modified by the parties. He therefore thought it would be well to insert at the end of the draft a special article providing that the parties could, by mutual agreement, substitute their own rules for those stated in the convention, with the exception of certain articles in which the actual institution of special missions would be defined.

74. He recommended the Commission not to mention the concept of *jus cogens* either in the articles or in the commentary; he felt sure that all the members would agree with him on that point. Even the requirement of consent need not be said to be a rule of *jus cogens*; his own view was that that rule derived from the principle of State sovereignty. The rule was a general contractual one which the parties were obliged to apply unless the convention was modified, and from which no derogation could be made except by another treaty having equal status.

The meeting rose at 1.5 p.m.

878th MEETING

Monday, 27 June 1966, at 3.10 p.m.

Chairman: Mr. Mustafa Kamil YASSEEN

Present: Mr. Ago, Mr. Amado, Mr. Bartoš, Mr. Briggs, Mr. Castrén, Mr. El-Erian, Mr. Jiménez de Aréchaga, Mr. Paredes, Mr. Pessou, Mr. Reuter, Mr. Rosenne, Mr. Ruda, Mr. Tsuruoka, Mr. Tunkin, Sir Humphrey Walcock.

Special Missions

(A/CN.4/188 and Add.1 and 2, A/CN.4/189 and Add.1)

(continued)

[Item 2 of the agenda]

1. The CHAIRMAN welcomed Mr. Stavropoulos, the Legal Counsel of the United Nations, and Mr. Koel-

meyer, the Observer for the Asian-African Legal Consultative Committee.

2. He invited the Commission to continue its discussion of the first of the preliminary questions raised by the Special Rapporteur, in Chapter II of his report (A/CN.4/189), namely, the nature of the provisions relating to special missions.

3. Mr. BRIGGS said that, no matter whether there were any *jus cogens* rules among the rules relating to special missions or whether such rules were to be found in the underlying principle of equality of States, he agreed with the view that the Commission should make no attempt to identify any rules of *jus cogens* in connexion with special missions until it had completed its draft.

4. It should be borne in mind that the Commission's purpose was to clarify any customary rules of international law on special missions that might be found to exist and to incorporate those rules which it considered appropriate and desirable in a draft convention on special missions. All those rules would be legally binding on the parties to the convention as rules of international law, though some of them might take the form of residuary rules, in other words, rules that were legally binding on the parties provided that they did not otherwise agree among themselves.

5. Sir Humphrey WALDOCK said that his view was much the same as Mr. Ago's. The Commission would have to exercise great care over the question of *jus cogens* or it would find itself in serious drafting difficulties. It was essential to keep clear the distinction between rules of general international law, which could be departed from by the will of the parties, and general rules of international law which, because of their substantive content, were rules of *jus cogens* from which no derogation was permissible. The topic which the Commission was studying was closely related to the Vienna Convention on Diplomatic Relations: if too much emphasis was placed on *jus cogens* in connexion with that Convention, much confusion would arise over such matters as the power of a State to waive or derogate from any particular rule which it contained. The Commission should put aside the question of *jus cogens* for the time being and feel free to specify which rules were residuary rules, without any implication that a rule which was not a residuary rule was necessarily a rule of *jus cogens*.

6. Mr. BARTOŠ, Special Rapporteur, restated the conclusions he had formulated at the end of the previous meeting.

7. In the Sixth Committee, several delegations, including that of Sweden, had expressed dissatisfaction at the use of the term *jus cogens* in the draft on the law of treaties (A/CN.4/188). Mr. Briggs had found that the Commission tended to seek out matters into which it could introduce the concept of *jus cogens*; that suggested that there was some confusion about the term. As understood by the Commission, rules of *jus cogens* were general peremptory rules of public international law which were binding in themselves, irrespective of the form in which they were introduced into international law, and even if they were not embodied in a treaty.

8. The Swedish delegation had made no distinction between treaty provisions which were contractual, not of *jus cogens*, and binding on the parties by virtue of the principle *pacta sunt servanda*, and treaty provisions which were residuary. A treaty contained some provisions which were binding on the parties which had accepted it, and others from which the parties could derogate by mutual agreement. The provisions of the Convention on Consular Relations were binding on the parties, but no one had ever assumed that those provisions had the character of *jus cogens*. They could be amended at any time by a stipulated majority, according to the appropriate procedure and, besides, the parties were authorized to derogate by mutual agreement from certain rules, even if they were in force.

9. What the Commission appeared to wish was that the rules laid down in the draft on special missions, though binding on the parties to some extent, should nevertheless be flexible, and that most of them should be applicable between the parties, unless other rules departing from the rules of the convention were established by mutual agreement.

10. In the first place, therefore, the Commission did not, in principle, perceive any rules of *jus cogens* in the draft on special missions. If *jus cogens* was to be found there, it was only as an echo of, for example, the principle of equality of States.

11. Secondly, the rules stated in the instrument would be binding on the parties, in so far as they did not leave the parties free to agree otherwise.

12. Thirdly, the Commission sought to allow States as much freedom as possible to derogate from those rules, as from the rules of treaty law, and to convert them into residuary rules, with the exception of two or three cases in which it would state that no derogation from the rule was permissible, though that would not make it a rule of *jus cogens*.

13. He was therefore convinced that there should be no mention of *jus cogens* in the draft. It should be expressly stated in the report that the Commission did not intend the rules which would become binding on the parties under the future convention on special missions to be rules of *jus cogens*, but intended most of the rules to be residuary.

14. Mr. ROSENNE said that the Special Rapporteur should reflect carefully on his statement that the Commission was not creating rules of *jus cogens* in the draft articles on special missions. It would be better if the report, in dealing with the point, did not use the expression *jus cogens* at all, but left the nature of the rules to be inferred from their general trend and from the way in which the report and commentary were put together.

15. The CHAIRMAN, speaking as a member of the Commission, said he agreed that the phrase "rules from which no derogation is permissible" should be used instead of the term "*jus cogens*". Whether those rules had the character of *jus cogens* or not, it would be better for the Commission not to tackle the problem immediately. It would, of course, be possible to prohibit derogations from certain provisions of the convention on special missions by a separate agreement, but whether

those provisions would thereby acquire the character of *jus cogens* was debatable.

16. It would therefore be much wiser to leave the question aside until the final stage of the work on special missions; that course would avoid any difficulty over the conflicting views on controversial points.

17. Mr. REUTER said he fully endorsed the clear and sensible statement just made by Mr. Bartoš.

18. The CHAIRMAN said he did not think that the Commission's attitude was altogether clear. He would like Mr. Bartoš to explain whether the ideas he had just outlined meant that no rules of *jus cogens* could exist with respect to special missions, or only that the Commission intended to state that there might perhaps be rules from which no derogation was permissible.

19. Mr. BARTOŠ, Special Rapporteur, said that in his view international law was an integral system and concepts of international law could not be introduced into the law of special missions without a solid foundation on which the Commission would also be obliged to establish rules of *jus cogens*. For example, by providing in article 1 that the consent of the parties was required for a special mission, the Commission meant that States were sovereign and could not be compelled to send or to receive a special mission. The rule of State sovereignty was certainly now a rule of *jus cogens*, but the law of special missions was not its *sedes materiae*. In reality, the rule stated in article 1 and certain other articles of the draft on special missions were echoes or reflections of rules of *jus cogens*. Of course, if a rule was already *jus cogens* and was also applicable to special missions, it would not thereby lose its character of *jus cogens*.

20. That was why he had immediately endorsed the ingenious solution put forward by Mr. Ago, who had proposed stating at the end of the draft that the parties to the instrument could not derogate from certain articles, without specifying whether those articles stated rules of *jus cogens* or treaty rules safeguarding the unity of the instrument. As for the other rules, the Commission would leave States free to amend them by agreement *inter se*, as residuary rules.

21. He would therefore refrain from stating categorically that there were no rules of *jus cogens* in the draft, but he thought it undoubtedly contained rules which were absolutely necessary for the very institution of special missions: there were only four or five such rules, and the Commission should be sparing in its choice.

22. Mr. TUNKIN said that the discussion had been largely concerned with the general question whether rules of *jus cogens* were to be found not only in the body of contemporary international law, but also in specific branches of international law such as the rules on diplomatic immunity, the law of the sea and special missions. That very general question had little to do with the practical problem before the Commission, which was whether, at that stage of its work on special missions, it should decide in advance that there might be rules from which derogation was not permissible. The answer was simple: until the Commission had established the rules, such a decision could not be taken. Accordingly, the

Commission should proceed on the assumption that, if there were rules from which derogation was not permitted, it would say so either when it had formulated the rule or when the draft was complete.

23. Mr. REUTER said it was clear from Mr. Bartoš' explanations that, whether or not there was any rule of *jus cogens* relating to special missions, no such rule would be created by the Commission's draft: either it existed independently of the draft or it did not exist at all.

24. Mr. BARTOŠ, Special Rapporteur, said he agreed that at the final stage of its work, when it had drawn up the provisions of the draft, the Commission should decide whether there were any rules from which no derogation was permissible. He thought the discussion could be regarded as closed for the time being.

25. Mr. EL-ERIAN said there seemed to be general agreement that it was impossible to reach a definitive position until the rules had been formulated. There were, however, other aspects of the matter. For instance, in chapter II of his third report (A/CN.4/189) the Special Rapporteur had raised the question of the distinction between the different kinds of special mission; the legal status of Heads of State and Ministers for Foreign Affairs who went on high-level political missions, might have a *jus cogens* character. The whole question was not merely one of *jus cogens*; but of the relationship between the draft articles and other agreements, between general international law and particular international law. There might be rules of general international law which would be applicable as residuary rules if the parties did not agree on a particular rule to govern a certain situation.

26. The question was difficult to consider in the abstract; the Commission should confine itself to taking a provisional position and defer its decision.

27. Mr. AGO observed that really peremptory rules of international *jus cogens*, from which no derogation was permissible in general international law, should not be confused with treaty rules which the parties might decide were not subject to derogation, but in a purely limited and temporary sense.

28. The Commission was not at present engaged in codifying fundamental customary rules indispensable to the life of the international community. It was drawing up rules on what was largely a new subject, and it might well be that parties to a future convention on special missions would ultimately decide that no derogation could be made by mutual agreement from rules A, B, C and D, for example, without meaning to say that those rules would become rules of *jus cogens*.

29. *Jus cogens* met a vital need of the international community; derogation from its rules was not allowed by the general law of the international community and had special consequences. Breach of a purely treaty rule involved a breach of international law and responsibility was incurred, but that did not make the act void, as did breach of a rule of *jus cogens*.

30. He would hesitate to discern any rule of *jus cogens* in the draft on special missions. As Mr. Bartoš had said, it might contain an indirect reflection of one or two rules of *jus cogens*, but nothing more. Parties to the future convention might not wish to allow derogations

from that general convention by special agreements, but that did not automatically convert the provisions of the general convention into rules of *jus cogens*. Mr. Tunkin had mentioned various kinds of international rules which should be borne in mind. It was important to distinguish clearly between general rules of *jus cogens* and purely treaty rules from which the parties did not wish to allow derogations under rules that were also treaty rules.

31. Sir Humphrey WALDOCK said that if the Commission took a different view it would be departing from the position it had so recently adopted in connexion with the law of treaties, when it had not held that a provision in a convention from which the parties did not permit derogation would invalidate a subsequent treaty.

32. Mr. TUNKIN said it was not correct to say that a treaty could in no way influence the development of rules of *jus cogens*; the application of a rule in a treaty could lead to the development of a *jus cogens* rule of general international law.

33. Mr. JIMÉNEZ de ARÉCHAGA said he agreed with Mr. Ago and Sir Humphrey Waldeck. It would be very difficult to find a rule of *jus cogens* relating to special missions; indeed, it might be that any of the rules on special missions, including those dealing with privileges and immunities, could be changed by the will of the parties.

34. Members had made their points of view clear and the best course would be to wait and see whether the Special Rapporteur's proposals expressed the consensus of opinion in the Commission.

35. The CHAIRMAN noted that agreement seemed to have been reached, if not on the substance, at least on the method to be adopted. He proposed that the Commission should do what the Special Rapporteur had suggested, and reserve its opinion on the admissibility of derogations from the rules in the draft until it had established the text of the articles.

It was so decided.

36. The CHAIRMAN invited the Commission to consider the second general question before it, namely, that of the distinction between the different kinds of special missions.

37. Mr. BARTOŠ, Special Rapporteur, pointed out that the Commission had already discussed the question whether the concept of a special mission should include technical as well as political missions. It had reached the conclusion that special missions represented the will of a sovereign State as signified to another sovereign State, irrespective of whether that will had political or technical action as its object.

38. He summarized the views on that subject expressed in the Sixth Committee by the delegations of Brazil, Czechoslovakia, Mali and Finland. In its written comments, the Czechoslovak Government (A/CN.4/188) had made a distinction between various kinds of special mission; missions of a political character should be governed by diplomatic law, while other missions should have a different legal status depending on their functions.

39. The United Kingdom Government (A/CN.4/188/Add.1) had raised the question whether, in view of the

increasing number of special missions, privileges and immunities should be granted to all such missions, and had taken a different view of the problem from that of the Commission. When he (the Special Rapporteur) had proposed that the functional factor should be taken into account and that members of a special mission should be granted the privileges and immunities necessary for the performance of their functions, the Commission had rejected that idea and had decided by a large majority that special missions should be assimilated to diplomatic missions, in accordance with the provisions of the Vienna Convention on Diplomatic Relations.

40. The delimitation of the rights of special missions also formed the subject-matter of the general comments by the Austrian Government, (A/CN.4/188/Add.2) which was in favour of granting to purely diplomatic missions the privileges and immunities provided for in the Vienna Convention on Diplomatic Relations, whereas the facilities granted to other missions would be limited by functional requirements. Mr. Verdross himself had explained to the Commission that he was not inclined to extend diplomatic privileges and immunities to a large number of people.¹ That view had been upheld by several States, which considered the Commission's draft prejudicial to their sovereignty and freedom of action.

41. He regretted that States had not indicated the kind of technical missions to which they thought that privileges and immunities might be extended. He had given some thirty examples of such missions, but no State had expressly indicated that it was unnecessary to grant diplomatic privileges and immunities to a particular type of mission.

42. Several solutions emerged from the statements and comments of governments. In the first place, the Commission might follow the recommendation of the Czechoslovak Government and decide that full privileges and immunities should be granted to special missions of a diplomatic character. But what was a diplomatic mission? It was by no means obvious.

43. Secondly, the Commission might adopt the functional theory and provide that such privileges and immunities should be granted as would enable special missions to perform their tasks quickly and efficiently. No doubt each concrete case would give rise to disputes, not of a legal nature, but purely factual, concerning the conditions necessary for the task to be performed quickly and efficiently.

44. Thirdly, technical missions might be excluded and States left to derogate by mutual agreement from the rules governing privileges and immunities. To allay the anxieties of certain governments, he had proposed that the Commission should insert in article 17 a new paragraph reading: "The facilities, privileges and immunities provided for in part II of these articles shall be granted to the extent required by these articles, unless the receiving State and the sending State agree otherwise". He agreed with Mr. Jiménez de Aréchaga that those privileges and immunities were not sacrosanct, that they were unnecessary in certain cases and that in those

cases States could derogate from the rules on which they had agreed. Moreover, the granting of such privileges and immunities depended on the receiving State. The receiving State might be prepared to grant diplomatic privileges and immunities to the special missions of one particular sending State but not to those of another, despite the principle of equality of States. That was a political question—a question of confidence. On the other hand, the performance of certain functions was more difficult for the special missions of some sending States than for those of others, whose missions had to be very careful not to exceed their terms of reference.

45. The Commission was thus again faced with the question whether special missions should be divided into political missions, which would be granted the full privileges and immunities provided for in the Vienna Convention on Diplomatic Relations, and technical missions, which would enjoy the guarantees necessary for the quick and efficient performance of their task. Alternatively, the privileges and immunities granted in the Vienna Convention could be taken as a model, though States would have the right to derogate from them by mutual agreement.

46. He had expected more positive assistance from States and had hoped that they would specify that certain privileges and immunities were unnecessary for certain special missions. But the only specific point they had made was that tax exemption should not be granted to subordinate officials. In short, States did not seem very willing to ratify a convention that would give special missions extensive privileges and immunities. The Czechoslovak Government had stated that it would have difficulty in obtaining parliamentary ratification of such a convention, and other governments were no doubt in the same position.

47. Mr. AGO said he saw no reason why the Commission should depart from the conclusion it had reached during its former discussion of the question; moreover, that seemed to be the opinion of the Special Rapporteur himself. It was undesirable and, indeed, impossible to distinguish between political special missions and technical special missions; even if such a distinction were possible, there would be missions of greater or lesser importance in both categories, so that a technical mission might be more important than a political one. By attempting to make such a distinction, the Commission would be opening the way for innumerable disputes in cases where the sending State and the receiving State did not agree on the character of the special mission and hence on the privileges and immunities to be granted to it.

48. If it maintained the system that had been adopted, the Commission would have two safeguards. First, the rules formulated in the draft would be rules from which the parties could derogate as much as they wished; derogations would certainly occur, whether or not they were authorized. Secondly, when the Commission came to examine the substance of the articles, it would do well to be cautious and rather strict with regard to the privileges and immunities of special missions, for public opinion certainly did not welcome the increase in the number of privileged persons going from one country

¹ *Yearbook of the International Law Commission, 1964*, vol. I, p. 12.

to another to perform tasks for which such privileges and immunities were not altogether essential. The Commission would run less risk of provoking unfavourable reactions on the part of States if it allowed special agreements to extend rather than restrict the privileges and immunities provided for in the draft.

49. Mr. ROSENNE said he was in general agreement with the Special Rapporteur's approach in chapter II, paragraph 10, of his report; the new paragraph he proposed to insert in article 17 could be examined in greater detail when the Commission came to discuss that article.

50. He thought that the difficulties mentioned in the Sixth Committee and in the comments by governments were partly due to the fact that the Commission's 1965 report had been somewhat bald. In his first report,² the Special Rapporteur had included a remarkable introduction which had placed the whole topic in a practical context; it would be useful if such an introduction could be included in the Commission's own report. The best answer to the comments by governments was to be found in the wide variety of special missions; if some of their views were accepted, it would be necessary to draw up a whole series of different sets of rules for the different kinds of special mission—a procedure quite inappropriate to a general statement of the law, which was in any case subject to mutual agreement between the parties.

51. Mr. TUNKIN said there was much practical value in the Czechoslovak Government's suggestion that special missions should be divided into two categories.

52. The rules on special missions drafted by the Commission, particularly those relating to privileges and immunities, were rules from which it was always possible for States to derogate. It was for the two States concerned to decide what facilities and privileges would be granted to a particular special mission. In practice, however, the two States concerned rarely had an opportunity of going into the question of privileges and immunities at the time when the decision to send the special mission was taken. The question usually arose in connexion with some specific problem relating to one of the members of the special mission.

53. The task of States would therefore be facilitated if the Commission, in its draft articles, divided special missions into two categories. States would then be able to choose the category in which they wished to place a particular mission. Even if they did not make that choice before the mission was despatched, the division into two categories would make it easier to solve any particular problems which might arise later.

54. In view of the great variety of special missions, which ranged from diplomatic missions of great importance to small missions dealing with secondary questions, States would, in practice, inevitably make some distinction between the different kinds of mission. Thus, despite the practical difficulties involved, he believed that, in order to assist States, the Commission should attempt to make a distinction on the lines suggested by the Czechoslovak Government.

55. Mr. CASTRÉN said that the question whether a distinction between the various kinds of special mission should be made in the draft was of great importance.

The nature and tasks of such missions varied widely, and that fact should be taken into account in determining their legal status. In view of their great diversity, however, it was hardly possible to deal separately with all the categories of special missions in a general convention. Moreover, some special missions were both technical and political in character, and it might be hard to say which of the two elements was predominant. The Commission had therefore been right to formulate general rules applicable to all special missions.

56. Article 17 of the draft³ provided that the facilities accorded by the receiving State to a special mission of another State depended on the "nature and task of the mission". That proviso was probably not sufficient to satisfy a number of governments which wished to limit the privileges and immunities of certain special missions, especially those of a purely technical nature. He therefore accepted the Special Rapporteur's proposal to insert a provision recognizing the right of the sending State and the receiving State freely to determine by agreement the facilities, privileges and immunities of special missions. But a provision should be inserted at the beginning of part II of the draft as a separate article which might read: "Articles 17 to 44 shall be applicable unless the States concerned agree otherwise". It should be borne in mind that the States concerned were not only the sending State and the receiving State, but also third States which accorded the right of transit through their territory, a question dealt with in article 39. Before inserting a general proviso of that kind in the draft, however, it would be necessary to re-examine each article of part II to see whether derogations were permissible or not.

57. Mr. BRIGGS said he agreed with Mr. Ago that the Commission should not go back on the decision it had taken in 1965. There was no satisfactory practical criterion for distinguishing between the many and varied special missions.

58. He therefore urged that article 17 should be retained as adopted in 1965, without the additional paragraph now proposed by the Special Rapporteur in chapter II, paragraph 10 of his third report (A/CN.4/189). The contents of that additional paragraph were already implicit in the existing text of article 17. With regard to the proviso "unless the receiving State and the sending State agree otherwise", he failed to see why the two States concerned should agree that full facilities should not be granted to special missions.

59. Article 25 of the Vienna Convention on Diplomatic Relations stated that "the receiving State shall accord full facilities for the performance of the functions of the mission" and article 17 of the draft articles on special missions set forth the same rule, with the addition of the words "having regard to the nature and task of the special mission".

60. Article 25 of the Vienna Convention on Diplomatic Relations and the corresponding article 28 of the Vienna Convention on Consular Relations had not given rise to any difficulty over the meaning of the words "full facilities". He therefore supported the retention of article 17 without the proposed additional paragraph.

² *Op. cit.*, vol. II, p. 67.

³ *Official Records of the General Assembly, Twentieth Session, Supplement No. 9*, p. 27.

61. Mr. REUTER said he agreed with the previous speakers. If the Commission was preparing the text of a convention, it should adhere to the system it had already adopted. The addition of a provision specifying that the rules stated in the draft were applicable unless the parties agreed otherwise was a matter of drafting which could not be settled forthwith.

62. Generally speaking, the Commission preferred to draw up conventions rather than codes. He did not wish to reopen discussion on that point, but he thought it might be of practical assistance to States to describe two typical situations, A and B, corresponding to large missions and small missions, not to serve as a guide, but to enable governments to clarify their position in relation to one or other of those situations. That would simplify the consultations which should take place before a special mission was despatched, but which often did not take place owing to lack of time, so that difficulties arose after the special mission had already been sent. He asked the Special Rapporteur whether, with his wide experience in the matter, he thought it would be possible to prepare two, or perhaps three, models of that kind to be attached to the draft, perhaps as an annex.

63. Mr. JIMÉNEZ de ARÉCHAGA said that, in view of the great variety of special missions, it would not be possible to classify them in two main categories. He thought the suggestion of such a division was prompted by concern about the scope of the privileges and immunities to be granted. He therefore agreed with the Special Rapporteur's proposal that governments should be given a choice as to the extent of the facilities and privileges to be granted to a particular special mission.

64. As Mr. Tunkin had pointed out, however, the question of the privileges of special missions was rarely dealt with before the mission was sent; it usually arose after the mission was already in the receiving State.

65. It would not be advisable to present the draft articles on special missions in the form of a guide; they were intended to supplement the 1961 Convention on Diplomatic Relations, which dealt with permanent missions. It was therefore essential that the articles should take the form of a convention or of a protocol to the 1961 Convention.

66. He suggested that it might be useful to explore the possibility of dividing privileges and immunities into two categories. The first category would consist of the minimum privileges and immunities which would be granted to all special missions and the second of the further privileges and immunities which would be extended to the more important, or so-called political, special missions. Unless otherwise agreed, the minimum privileges and immunities would be recognized.

67. Mr. RUDA supported the approach adopted by the Special Rapporteur. It was difficult to draw a distinction between political and technical missions. The situation varied from country to country and in one and the same country, according to the circumstances. For instance, negotiations on a country's foreign debt might be a purely technical matter at one period in its history, but constitute a political problem at another.

68. He drew attention to the statement in paragraph (2)(b) of the Commission's commentary on

article 1 that "the task of a special mission is in any case specified and it differs from the functions of a permanent diplomatic mission, which acts as a general representative of the sending State". The commentary added that: "In the Commission's view, the specified task of a special mission should be to represent the sending State in political or technical matters".⁴

69. Thus the conclusion reached by the Commission in 1965 had been that the characteristic feature of a special mission was the "specified" nature of its task and that a special mission could be political or technical in character.

70. The Commission had adopted a similar approach to the question of the facilities to be extended to special missions and had said in paragraph (3) of its commentary to article 17: "It is undeniable that the receiving State has a legal obligation to provide a special mission with all facilities necessary for the performance of its functions. In the literature, this rule is generally criticized on the ground that it is vague. The Commission is convinced that its content changes according to the task of the mission in question, and that the facilities to be provided by the receiving State vary. Consequently, the assessment of the extent and content of the above-mentioned obligation is not a question of fact; the obligation is an *ex jure* obligation, whose extent must be determined in the light of the special mission's needs, which depend on the circumstances, nature, level and task of the specific special mission".⁵

71. The Special Rapporteur's proposed addition to article 17 would thus merely introduce in the article itself an idea already expressed in the commentary. He therefore supported that proposal.

72. The CHAIRMAN, speaking as a member of the Commission, said he appreciated the logic of the comments by governments which wished to differentiate between special missions according to their nature. In practice, however, it was not easy to do so, for the importance of a mission depended not only on its nature, but also on the rank of its members and on certain other factors. For instance, if a technical mission was headed by the chancellor of a university and a political mission by a secretary of embassy, it would be difficult to agree that the latter should enjoy more extensive privileges and immunities than the former. The difficulty in making such a distinction lay in the meaning of the term "political" at a time when international relations were extremely varied and covered wider and wider fields.

73. The functional theory provided a way out, which the Commission had used in principle. The draft might state that all international missions, whether political or technical, should have a certain status and should enjoy the privileges and immunities necessary for the performance of their tasks. The Commission had not adhered strictly and exclusively to the functional theory, but had used it as a guide. On the basis of that theory, it would be possible to allay the anxieties of governments which feared that very extensive privileges and immunities

⁴ *Ibid.*, p. 13.

⁵ *Ibid.*, p. 27.

might be granted to an ever-increasing number of members of special missions. The Commission might specify that the status required was the irreducible minimum for the accomplishment of any special mission; governments could, of course, grant more. That solution would relieve the Commission of the heavy burden of having to distinguish between different kinds of special mission.

74. Mr. REUTER explained that he had merely suggested that two typical kinds of special mission should be described, in some form or another—in the commentary if necessary—to facilitate the work of governments. Mr. Jiménez de Aréchaga and the Chairman had gone further by suggesting that the convention itself should specify a minimum régime and a broader régime, which would, in a way, amount to establishing two classes of special mission. If the Commission defined a minimum régime and a régime of additional privileges, States would automatically consider that the minimum privileges were granted as of right and that additional advantages could be granted only by special agreement. His own suggestion was less far-reaching, namely, that the Commission should simply formulate a few important rules and draw attention to certain problems; apart from that it would leave States free to do whatever they wished, but would offer them two typical régimes as a guide.

75. The Commission should decide whether to adopt the idea of including the two régimes in the convention itself. If it rejected that idea, he still thought it might be useful, in order to facilitate the work of chancelleries, for an expert to outline two typical régimes, the elements of which would be judiciously graded.

76. Mr. JIMÉNEZ de ARÉCHAGA expressed his regret at having misunderstood Mr. Reuter and asked the Special Rapporteur whether the privileges in part II could not perhaps be divided into two categories, the first representing an irreducible minimum, the second consisting of privileges which went beyond that minimum. With such a division it would be possible, instead of inserting the Special Rapporteur's additional paragraph in article 17, to state the rule as follows: first, that the minimum privileges would be granted unless the receiving State and the sending State agreed otherwise; second, that the wider privileges would be granted to a special mission where the two States concerned so agreed.

77. Mr. BARTOŠ, Special Rapporteur, replying to Mr. Jiménez de Aréchaga, pointed out that the situation would be different once the Commission had decided whether or not to insert in the draft an article in which, as he had suggested at the previous meeting, it would specify the articles from which derogation by agreement between the parties was not permitted. Once it had taken that decision, the Commission would see which privileges and immunities were always necessary and would place the articles in which those privileges and immunities were defined among those from which no derogation was permissible.

78. He did not believe, however, that it was possible to establish degrees of privileges and immunities; for example, inviolability of the person and the secrecy of archives were indivisible and could not be graded. True, the Vienna Conventions had established two categories of immunity from jurisdiction, a "minor"

immunity limited to official acts and a "major" immunity covering all acts whatsoever. One of the most delicate questions was that of exemption from taxation; ministries of finance were usually less inclined to be liberal about it than ministries of the interior. He confessed that he could not say what were the minimum privileges and immunities which should be granted to special missions.

79. The Commission might limit the privileges and immunities of special missions to what was necessary. The best course would no doubt be for it to examine the draft article by article and indicate in each case what it considered indispensable; for example, the correspondence of special missions might be inviolable only when sent to the nearest diplomatic mission.

80. Nor did he think it possible to define two régimes—a first class and a second class régime as it were to be submitted as models. He would prefer to define certain indispensable immunities and to propose them to States as treaty rules.

81. At the General Assembly, the Netherlands delegation had been the only one to express the view that the Commission should prepare a code; all the other delegations had advocated a draft convention. Moreover, as Mr. Jiménez de Aréchaga had pointed out, international standards submitted as models had little significance. The Commission's drafts in code form had not met with much success; the General Assembly had merely taken note of them and recommended States to use them as a guide, but in fact the rules laid down in them had never been applied or even mentioned as sources in works on international law. He did not think it would serve any useful purpose to include models in the commentary, as Mr. Reuter had suggested. At the two Vienna Conferences and at the Geneva Conferences on the Law of the Sea, the commentaries attached to the articles had not been regarded as an integral part of the proposals to be discussed; participants had sometimes drawn arguments from those commentaries to support their contentions, but the only arguments that really counted had been those based on the articles themselves, particularly where there had been several successive versions of the text. He did not think chancelleries would be grateful to the Commission for proposing such models; they would be more inclined to think that an attempt was being made to interfere in matters within their competence and to limit their freedom of action.

82. He hoped that the Commission would take a decision on the questions he had raised in his previous statement. All the members seemed to agree that it was almost impossible to establish criteria for distinguishing between technical special missions and political special missions.

83. He also invited the Commission to consider a more serious question: if it decided to insert a provision prohibiting derogation from certain rules laid down in the draft, it would have to define very carefully the privileges and immunities which were indispensable for special missions.

84. Mr. TUNKIN suggested that a distinction should be made between certain rules on privileges and immunities which applied to all special missions, such

as the rule on the inviolability of archives, and other rules in respect of which a distinction could be made between political missions and administrative or technical missions. With regard to the latter type of rule, political missions would benefit from practically the same privileges as those extended to permanent missions by the Vienna Convention on Diplomatic Relations. Where administrative or technical missions were concerned, it could be agreed that they should benefit only from those privileges and immunities necessary for the performance of their functions.

85. That approach would leave open the question of determining which missions should be considered political and which administrative or technical. It would be left to the States concerned to decide in each case how a particular special mission would be treated.

86. Mr. AMADO said he was surprised that Mr. Tunkin found it possible to distinguish between a political mission and a technical mission. He did not see how that distinction could be made, since political questions were always bound up with technical questions; the very word "State" implied interests, and multiple interests at that. The Commission should not depart from the rules it had first formulated, which laid down minimum requirements, always bearing in mind that special missions, however important, were temporary in character and were appointed, as their name implied, to deal with special problems. Moreover, the Vienna Convention on Diplomatic Relations should be followed as closely as possible.

87. The functional theory was an easy one for the Commission, but not for States. It was not the rank of the persons concerned that counted. Some missions headed by very high ranking persons, which appeared to be of very great importance, gave rise to nothing more than a general exchange of views and settled no specific problems. The only criterion that the Commission could adopt for special missions was precisely their special, specialized and "secondary" character —the term "secondary" having no pejorative sense.

88. He wished it were possible to define two régimes, but he did not see how it could be done. In his opinion the Commission should specify the minimum of privileges and immunities necessary and possible to enable a special mission to perform its task and produce the desired results, and that should be done very cautiously, allowing States as much freedom as possible.

89. The CHAIRMAN, speaking as a member of the Commission, said he had maintained that the Commission's work on special missions was based on the functional theory. Mr. Amado also supported that theory, for indispensable privileges and immunities were precisely those which the special mission required in order to perform its functions.

90. Mr. BARTOŠ, Special Rapporteur, pointed out that he had originally proposed basing the Commission's work on the functional theory, but at the suggestion of Mr. Tunkin and in the light of the preamble to the Vienna Convention on Diplomatic Relations, the Commission had rejected that proposal.⁶ It had con-

sidered that the representational and functional elements were combined and that even in the case of a purely technical mission, certain questions of prestige and the determination to safeguard certain political interests always underlay the technical aspects. Most of the delegations to the General Assembly had accepted that combination of the two elements; only a few governments had stressed the functional character of special missions. Hence it could hardly be said that, on the whole, States favoured the functional theory.

91. The CHAIRMAN, speaking as a member of the Commission, stressed that he had referred to the functional theory as one of the bases, but not the only basis, for the Commission's work. In his opinion, that theory was an essential basis of the draft, as it had been an essential basis of the two Vienna Conventions.

92. Mr. CASTRÉN pointed out that the Special Rapporteur had originally proposed fairly extensive privileges for special missions and the Commission had considered it necessary to restrict those privileges to some extent. Generally speaking, governments had approved the position taken by the Commission. The majority of the Commission supported the functional theory, and the Special Rapporteur had also upheld the representational theory.

93. Mr. BARTOŠ, Special Rapporteur, said that, on the contrary, it was he who had upheld the functional theory, according to which immunitiess were granted to the extent required by the official acts to be performed. But the Commission had rejected that point of view and instructed him to bring the draft into line with the Vienna Convention on Diplomatic Relations. A few States were now coming back to the opinion which he had upheld at the outset.

94. Mr. AMADO urged the Commission to leave the theoretical question aside, for, in any case, elements of the various theories were intermingled in the topic of special missions.

The meeting rose at 6.5.p.m.

879th MEETING

Tuesday, 28 June 1966, at 11.20 a.m.

Chairman: Mr. Mustafa Kamil YASSEEN

Present: Mr. Ago, Mr. Amado, Mr. Bartoš, Mr. Briggs, Mr. Castrén, Mr. El-Erian, Mr. Jiménez de Aréchaga, Mr. Paredes, Mr. Pessou, Mr. Reuter, Mr. Rosenne, Mr. Ruda, Mr. Tsuruoka, Mr. Tunkin, Sir Humphrey Waldock.

Law of Treaties

(resumed from the 876th meeting)

[Item 1 of the agenda]

PROPOSED CODIFICATION CONFERENCE ON THE LAW OF TREATIES (ILC(XVIII)MISC.1)

1. The CHAIRMAN invited the Legal Counsel of the United Nations to introduce the Secretariat memorandum

⁶ Yearbook of the International Law Commission, 1964, vol. I, p. 13, paras. 51 et seq.