

Document:-  
**A/CN.4/SR.897**

**Summary record of the 897th meeting**

Topic:  
**<multiple topics>**

Extract from the Yearbook of the International Law Commission:-  
**1967, vol. I**

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## 897th MEETING

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

Chairman: Sir Humphrey WALDOCK

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

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

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

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

**Special Missions**

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

[Item 1 of the agenda]

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

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

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

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

"A special mission is one:

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

20. Mr. USTOR said he agreed with the Special Rapporteur that the Commission should deal first with the definition of "special mission" proposed by the United

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

33. Mr. USHAKOV said he thought that the United States proposal referred to the draft provisions prepared

by the Special Rapporteur concerning so-called high-level special missions. It would therefore be more practical for the Commission to discuss that proposal when it took up those draft provisions.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

47. The CHAIRMAN said that the general opinion in the Commission appeared to be that certain important matters of substance raised by the United States Government comments should not be set aside altogether but that the Commission should proceed with the discussion

of the draft articles one by one, bearing in mind that at some later stage it would have to go into those matters. The Commission would then have to consider the question of the definition and the problem of the different categories of special mission; it would also have to examine the whole question of consent. The debate had produced a useful clarifying discussion but the Commission had not reached any definite conclusion on the matters raised by the United States Government's proposal.

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

The meeting rose at 1 p.m.

## 898th MEETING

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

*Chairman:* Sir Humphrey WALDOCK

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

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

## Co-operation with Other Bodies

[Item 5 of the agenda]

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

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

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