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Summary record of the 909th meeting

Topic:
Special missions

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Appointment of Drafting Committee

77. The CHAIRMAN said that the Commission's officers proposed that the Drafting Committee should consist of the two Vice-Chairmen, Mr. Ruda and Mr. Ustor; the General Rapporteur, Mr. El-Erian; the Special Rapporteurs, Mr. Bartoš and Mr. Ago; Mr. Albónico, Mr. Kearney, Mr. Ramangasoavina, Mr. Reuter, Mr. Rosenne, Mr. Ushakov and Mr. Yasseen. Mr. Albónico might not be able to attend the whole session, in which case another Spanish-speaking member would be co-opted. It was hoped that the Committee would begin its work the following week. The tempo of its work would be partly determined by the speed of production of the summary records.

It was so agreed.

The meeting rose at 1 p.m.

909th MEETING

Monday, 29 May 1976, at 3 p.m.

Chairman: Sir Humphrey WALDOCK

Present: Mr. Ago, Mr. Albónico, Mr. Bartoš, Mr. Castañeda, Mr. Castrén, Mr. Ignacio-Pinto, Mr. Jiménez de Aréchaga, Mr. Kearney, Mr. Nagendra Singh, Mr. Ramangasoavina, Mr. Tammes, Mr. Tsuruoka, Mr. Ushakov, Mr. Ustor, Mr. Yasseen.

Special Missions

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

(resumed from the previous meeting)

[Item 1 of the agenda]

ARTICLE 16 (Activities of special missions in the territory of a third State) [18]
*(resumed from the previous meeting)*¹

1. The CHAIRMAN said that a telegram of good wishes had been received from Mr. Tunkin, a former member of the Commission. He welcomed Mr. Nagendra Singh to the Commission.

2. Mr. NAGENDRA SINGH said it was a great privilege to join the Commission. He was glad to be able to take part in the present discussion and regretted that his arrival had been delayed.

3. The CHAIRMAN said that in the course of the debate on article 16, the question had arisen of the legal régime applicable in the cases envisaged in that article and the legal obligations of the host State in those cases.

4. The further question had also arisen of the possible difference between the case where the host State had invited the participants to a meeting of special missions and the

case where the State merely tolerated the use of its territory for the purposes of such a meeting. He invited the Special Rapporteur to give his views on those points.

5. Mr. BARTOŠ, Special Rapporteur, said that, on reflection, he had the following suggestions to make on article 16. The words "which may be withdrawn at any time" should be added to paragraph 1; paragraph 2 should remain unchanged, and a new paragraph 3 should be added, to read:

"In the absence of any special agreement, the third State is required to guarantee to special missions the privileges and immunities necessary for the performance of their task."

That formula would provide an adequate guarantee and at the same time it was flexible since the States concerned would be free to determine by agreement what privileges and immunities special missions should enjoy. The Drafting Committee could, of course, make whatever drafting changes it saw fit.

6. Mr. YASSEEN said he welcomed the Special Rapporteur's suggestions. In particular, the addition to paragraph 1 of the phrase "which may be withdrawn at any time" would obviate many difficulties.

7. He asked whether the new paragraph 3 suggested by the Special Rapporteur meant that special missions performing their functions in the territory of a third State were to enjoy all the privileges and immunities provided for in the draft articles, or whether the expression "necessary for the performance of their task" had a restrictive meaning. It was arguable that some of the privileges and immunities provided for in the draft articles were not essential to the performance of the functions of special missions and were based rather on the theory of representation.

8. Mr. BARTOŠ, Special Rapporteur, said that in his opinion the only privileges and immunities which the third State was required to grant were those essential to the functioning of the special mission. The third State was making a sacrifice even by admitting special missions to its territory; it could not be expected to assume any responsibilities beyond those essential to enable the special missions to perform their task. In other words, he did not think that article 16 should place the third State on exactly the same footing as a receiving State, for there was a considerable difference between the two situations. A third State for the purpose of article 16 was a host State which lent its good offices, and it should be put to the least possible inconvenience by doing so.

9. He had considered whether article 16 should specify what privileges and immunities were necessary, but had concluded that it was better to leave that to be settled by practice.

10. Mr. YASSEEN said he agreed with the Special Rapporteur that a State which invited the special missions of two other States to meet in its territory should not, except as specially agreed, be obliged to grant such special missions any privileges or immunities beyond those necessary for the performance of their task. It was nevertheless

¹ See 908th meeting, para. 38.

extremely difficult to draw the dividing line between privileges and immunities which were essential and those which were not. He hoped the Drafting Committee would be able to find some form of words which would settle the matter.

11. Mr. USHAKOV said that the article would serve no purpose if it did not specify what privileges and immunities the host State was required to grant to special missions. If the Commission considered that the privileges and immunities in question should always be determined by prior agreement between the States sending the special missions and the States in whose territory the special missions met, that should be clearly stated. Another solution would be to specify which articles of the draft were applicable in the case under consideration.

12. Mr. AGO said that article 16 raised a delicate question. The expression "privileges and immunities necessary for the performance of their task" was open to conflicting interpretations. Sending States could claim that all the privileges and immunities provided for in the convention were essential to the performance of their special missions' task, while the State in whose territory the special missions were meeting could maintain that very few of them were essential. That might create serious difficulties.

13. Furthermore, article 16 would apply to very different cases. For instance, the State in whose territory the missions met might itself have taken the initiative of inviting the parties; and since the meeting was being held under its auspices, it would be natural for it to grant the widest privileges and immunities. But there were other cases where, from considerations of mere convenience, the parties might have requested the hospitality of the third State; there would then be far less of an obligation to grant privileges and immunities.

14. Like Mr. Ushakov, he was inclined to think that the question of privileges and immunities in such cases should be settled by agreement between the States concerned, but it remained to be seen whether the Commission ought to propose a residual rule. In any event, the word "necessary" was not very helpful. The Commission should state its intention clearly before the article was referred to the Drafting Committee.

15. Mr. BARTOŠ, Special Rapporteur, pointed out that his suggested paragraph 3 included the proviso "In the absence of any special agreement". The special missions referred to in article 16, because they performed their functions in the territory of a third State, needed more privileges and immunities than were provided for in article 40 of the Vienna Convention on Diplomatic Relations and article 54 of the Vienna Convention on Consular Relations, which dealt only with transit through the territory of a third State.

16. He had no objection to Mr. Ushakov's suggestion that the articles of the draft which were applicable should be enumerated, so as to indicate the minimum obligations which the third State had to assume in all cases. The Drafting Committee could undertake that enumeration.

17. The problem was of great political importance. Cases occurred where two special missions could not negotiate in the territory of either of the States concerned, so that

the agency of the third State was vital to the future relations between those two States and even to the maintenance or restoration of peace between them. Article 16 was not concerned merely with technical questions relating to privileges and immunities; it involved several major principles of international law.

18. Mr. USTOR said that the 1961 Vienna Convention on Diplomatic Relations laid down two different régimes of privileges and immunities: the general régime of a permanent mission and the régime applicable in a transit State. Article 16 on special missions envisaged a third category of cases and it was for the Commission to decide what régime had to be applied in those cases.

19. Personally, he was inclined to think that the situation of the "third State" under article 16 was very much closer to that of a receiving State than to that of a transit State. Probably, the third State was bound to give almost all the privileges and immunities extended by a receiving State.

20. He agreed with the Special Rapporteur that the various provisions on privileges and immunities should be reviewed in detail before the Commission decided whether any of those privileges and immunities were not essential to a special mission in the situations envisaged in article 16. When that review had been completed, it would be possible for the Commission to reach a decision on the text of article 16.

21. Mr. CASTRÉN said he feared there might be some contradiction between paragraph 2, under which the third State could impose conditions, and paragraph 3, which would require the third State to guarantee to special missions the necessary privileges and immunities. If the Commission accepted the Special Rapporteur's suggestions, those two paragraphs should perhaps be combined into one, which might read:

"The third State may impose conditions which must be observed by the sending State, but in any event it shall guarantee to special missions the privileges and immunities necessary for the performance of their functions."

22. Mr. BARTOŠ, Special Rapporteur, said that he had no objection to Mr. Castrén's suggestion.

23. The CHAIRMAN, summing up the discussion, said that there was general agreement to accept the proposal put forward by a number of Governments for the inclusion in paragraph 1 of a provision regarding the withdrawal of consent. The Drafting Committee would also have to consider whether the consent of the receiving State to admit a special mission should be required to be an express consent.

24. Consideration would equally have to be given, first, to the question whether the privileges and immunities were to attach in all cases or only in those where the third State had deliberately placed itself in the position of a receiving State and, secondly, to the question whether in any event some distinction should be made between the latter case and the case in which the third State merely tolerated the presence of the special missions on its territory.

25. Finally, the Drafting Committee would have to decide whether a definition of "third State" should be included in the draft. No such definition appeared in the Vienna Convention on Diplomatic Relations but a definition of "Third State" had been included in article 2, paragraph 1(h), of the Commission's draft articles on the law of treaties.²

26. All those questions would involve problems of drafting, and the Commission should reserve its final opinion until it received a text from the Drafting Committee. He therefore suggested that article 16 be referred to the Drafting Committee for consideration in the light of the discussion.

*It was so agreed.*³

ARTICLE 39 (Transit through the territory of a third State)
[43]

27. *Article 39* [43]
Transit through the territory of a third State

1. Subject to the provisions of paragraph 4, if the head or a member of the special mission or a member of its diplomatic staff passes through or is in the territory of a third State, while proceeding to take up his functions in a special mission performing its task in a foreign State, or when returning to his own country, the third State shall accord him inviolability and such other immunities as may be required to ensure his transit or return. The same shall apply in the case of any members of his family enjoying privileges or immunities who are accompanying the person referred to in this paragraph, or travelling separately to join him or to return to their country.

2. In circumstances similar to those specified in paragraph 1 of this article, third States shall not hinder the transit of members of the administrative and technical or service staff of the special mission, and of members of their families, through their territories.

3. Third States shall accord to official correspondence and other official communications in transit, including messages in code or cipher, the same freedom and protection as is accorded by the receiving State. Subject to the provisions of paragraph 4, they shall accord to the couriers and bags of the special mission in transit the same inviolability and protection as the receiving State is bound to accord.

4. The third State shall be bound to comply with the obligations mentioned in the foregoing three paragraphs only if it has been informed in advance, either in the visa application or by notification, of the transit of the special mission, and has raised no objection to it.

5. The obligation of third States under paragraphs 1, 2 and 3 of this article shall also apply to the persons mentioned respectively in these paragraphs, and to the official communications and bags of the special mission, whose presence in the territory of the third State is due to *force majeure*.

28. The CHAIRMAN said that the Special Rapporteur wished to introduce at that point article 39 which dealt with the comparable problem of the transit State.

29. The Special Rapporteur's proposals for article 39 were contained in paragraph 13 of the section of his fourth report (A/CN.4/194/Add.2) dealing with that article and in his additional comments on article 39 in document A/CN.4/194/Add.4.

30. Mr. BARTOŠ, Special Rapporteur, said that article 39 was based on article 40 of the Vienna Convention on Diplomatic Relations, but the two articles differed particularly on one point, namely, that article 39 referred not only to the diplomatic agent of the special mission but also to members of the special mission passing through the territory. Generally speaking, however, the tenor of the two articles was substantially the same.

31. As Mr. Ushakov had said, the primary consideration in drafting article 39 had been to guarantee freedom of transit in general; certain privileges and immunities had then been enumerated in order to explain what freedom of transit meant.

32. Although the text of article 39 did not present any major difficulties at the present stage of the discussion, it should be noted that articles 16 and 39 differed considerably in certain respects. Whereas article 16 dealt with a third State which had consented to certain activities of other States taking place in its territory, under article 39 the presence of a special mission in the territory of the third State meant one of two things: either the third State had given permission for transit, or the special mission found itself obliged to pass through the territory of the third State even without permission. Cases of *force majeure* dealt with in the last paragraph of article 39—for example, diversion from the route originally planned—were considered to fall within the second category.

33. In short, articles 16 and 39 laid down two different rules and article 39 offered two variants, the first being stated in paragraphs 1 to 4 and the second in paragraph 5.

34. The Commission's idea in drafting article 39 had been to take over article 40 of the Vienna Convention on Diplomatic Relations without change. It was essential to make provision for the transit of the special mission through the territory of a third State, because it often occurred in practice. Special missions generally passed through the territory of other States, which—quite apart from any privileges and immunities they might grant—endeavoured to facilitate their passage. It should be noted that the meetings involved were often courtesy meetings. The transit of special missions through the territory of a third State was sometimes extremely important, as history had shown, and he considered it a necessity that the provisions of article 40 of the Vienna Convention on Diplomatic Relations should be applied to special missions.

35. Mr. TAMMES said he noted that, under the provisions of paragraph 4 of article 39, the third State was bound to grant privileges and immunities "only if it has been informed in advance... of the transit of the special mission and has raised no objection to it". That provision did not appear in the corresponding article 40 of the Vienna Convention on Diplomatic Relations, under which privileges and immunities were always extended to diplomats in transit and absence of objection to transit was not laid down as a prior condition. The commentary to article 39 of the draft articles on special missions, as adopted by the Commission in 1965,⁴ merely recorded that essential difference between the two texts but did not explain

² See *Yearbook of the International Law Commission, 1966*, vol. II, document A/6309/Rev.1, Part II, chapter II.

³ For resumption of discussion, see 930th meeting, paras. 104-112.

⁴ *Yearbook of the International Law Commission, 1965*, vol. II, p. 189.

why there was a deviation from the system of the Vienna Convention.

36. The Special Rapporteur stated in paragraph 13(4) of his comments in his fourth report (A/CN.4/194/Add.2): "In principle, the provision contained in this article should be generally compulsory in the absence of a special agreement between the sending State and the third State concerned." It was therefore necessary to explain clearly the reasons for the departure from the system embodied in article 40 of the Vienna Convention on Diplomatic Relations.

37. Furthermore, since paragraph 4 of article 39 left the question of objection entirely to the discretion of the third State, he suggested that the concluding words "and has raised no objection to it" be amended so as to specify that objection could only be made in exceptional cases or on reasonable grounds. A qualification of that type, to be interpreted and applied in good faith, would make it possible to prevent the whole purpose of article 39 from being frustrated by the use of the discretionary rights recognized in paragraph 4.

38. Mr. USHAKOV said he wished to make a few comments purely on matters of drafting. First, under paragraph 4, the third State could object to free transit through its territory, as prescribed in paragraphs 1, 2 and 3; that included the free transit of messages in code or cipher as prescribed in paragraph 3. It was out of the question that such messages should be exposed to the risk of objection, and he therefore proposed that paragraph 4 be amended so as to preclude any such interpretation.

39. Secondly, the expression "receiving State", in paragraph 3, needed careful consideration. The discussion on article 16 had led the Commission to the conclusion that a State giving hospitality to special missions should not be regarded as a receiving State. Paragraph 3 should also take into account the position of a State providing hospitality on its soil for two or more special missions for the purposes of article 16. That point needed clearing up.

40. In paragraph 2, it might be appropriate to mention the case of a special mission presided over by a Head of State, Prime Minister or Minister for Foreign Affairs, in other words, of a high-level mission. In that case, any administrative, technical and service staff in the suite of the high-ranking diplomatic agent should perhaps be granted the same diplomatic privileges and immunities as the head of the mission.

41. Lastly, paragraph 1 used the expression "third State". There had already been some discussion on that subject during the consideration of article 16. If the Commission used the expression "third State" in article 16 to denote a State which provided one or more special missions with hospitality, it seemed to him that the third State, or transit State, referred to in article 39 was, in a sense, a "third State" in relation to the third State mentioned in article 16.

42. Mr. BARTOŠ, Special Rapporteur, said he did not think that paragraph 4, which had not been taken from the Vienna Convention on Diplomatic Relations, was well worded; indeed, it had been criticized a great deal. The question was whether the third State was entitled to object to the transit of the special mission through its territory,

or was in duty bound to allow the special mission to pass. The Commission could not leave such an important question unanswered.

43. Mr. Tammes had not gone as far as the Netherlands Government, which proposed that the article should be dispensed with altogether. In his view article 39 was needed, and the only passage which could be dispensed with was the phrase "and has raised no objection to it". Several Governments had observed that the third State could be under no obligation if it had not been informed of the transit of the special mission. Paragraph 4 went some way towards conveying that idea, and if the phrase "and has raised no objection to it" were deleted, the paragraph would come close to stating that the third State was under a duty to allow the special mission to pass.

44. Mr. Ushakov wanted the notion of the third State more clearly defined. He (the Special Rapporteur) had done a great deal of research on that point but to no avail. Perhaps Mr. Ushakov could enrich legal terminology by finding an expression to denote a host State which had no direct relationship with the special mission. It was true that the use of the term "third State" in both article 16 and article 39 might create confusion. Article 16 referred to the activities of special missions in the territory of the third State; article 39 dealt with the transit of the special mission through the territory of the third State, in other words with the case of a mission which was in transit and which was not authorized to engage in activities in the territory of the State traversed *en route*. He was prepared to consider any proposal which a member might submit with a view to clarifying the notion of the third State.

45. The comments made by Governments included many on paragraph 4. The Governments of Belgium, Chile and Israel thought that the third State should be informed, and the Government of Chile thought further that the third State should be free to object to the transit. The United States Government had raised the question of vehicular accidents which might occur *en route*. The same question had been raised by the Netherlands delegation at both Vienna Conferences, but the proposal that immunities should be restricted in such circumstances had been rejected. In practice the question was already settled, for most States required a certificate of insurance for the vehicle whether the occupants enjoyed diplomatic immunities or not.

46. The Netherlands Government suggested that the article should be omitted altogether. The United Kingdom Government proposed that third States should be entitled to permit the transit of a special mission without at the same time granting it immunities. That meant, first, that the permission of the third State was necessary for transit, and secondly that the third State could permit transit without granting privileges or immunities. In his opinion the United Kingdom Government's proposal called into question the Commission's entire system, and even that of the two Vienna Conventions.

47. Mr. ALBÓNICO said that three types of case could arise concerning the position of a special mission in relation to a third State. The first was that contemplated in article 16, where the privileges and immunities granted to the special mission would be those agreed by the States

concerned; the Drafting Committee could devise a residual rule for the case where no specific agreement on that question was concluded.

48. The second was the case of a special mission whose presence in the territory of a third State was due to *force majeure*, the case contemplated in article 39, paragraph 5. As far as that case was concerned, there was every justification for granting the special mission all the rights specified in paragraphs 1, 2 and 3 of the article.

49. The third was the case of the transit of a special mission to and from the receiving State. For that case, paragraph 4 specified certain obligations for the third State, on the sole condition that notification was made and that no objection was raised by the third State.

50. But paragraphs 1, 2 and 3 of article 39 laid down a very wide range of privileges. Those privileges affected several categories of persons: the head of the special mission, members of the mission, members of its diplomatic staff, members of the families of those persons, members of the administrative and technical or service staff and members of their families. Provision was also made for privileges for "official correspondence and other official communications in transit, including messages in code or cipher" and for "couriers and bags of the special mission in transit". It was difficult to accept such a broad range of privileges for the benefit of special missions which were merely in transit.

51. He would like finally to clarify a comment by the Chilean Government, which had proposed the amendment of paragraph 4 so as to cover all methods of information about the transit of the special mission. The text as it stood made provision only for a visa application and a formal notification; but the information in question could well be conveyed in some other manner. Whatever the means whereby the third State was informed, article 39 would apply only if the third State raised no objection to the transit of the special mission. He himself favoured the change of wording proposed by the Chilean Government.

52. Mr. KEARNEY said he agreed with Mr. Albónico that it was undesirable to grant an unduly wide range of privileges and immunities, even on a temporary basis, to special missions in transit. It should be remembered that transit of special missions involved a much larger number of persons than transit by members of permanent missions to and from their duty stations, which was covered by article 40 of the Vienna Convention on Diplomatic Relations. Article 39 therefore involved a correspondingly greater burden on countries of transit than article 40 of the Vienna Convention, while problems such as the difficulties arising out of traffic accidents would be much greater. He therefore considered that a much less rigid system would have to be adopted.

53. Mr. USTOR said he noted from paragraph (2) of the commentary that the Commission considered "that a third State is not bound to accord to its nationals who form part of a foreign special mission passing through its territory the privileges and immunities which the receiving State is not bound to guarantee to its nationals who are members of a foreign special mission (see article 36 of the draft)". He agreed with that statement and considered

that it was in accord with the Vienna Convention on Diplomatic Relations. The position should, however, be made clear in the text of the article itself and not merely in the commentary.

54. On one point paragraph 3 of article 39 differed from the corresponding paragraph of article 40 of the Vienna Convention on Diplomatic Relations: in the second sentence, after the word "couriers", the words "who have been granted a passport visa if such visa was necessary" had been omitted. He wished to know whether that omission was intentional, and, if so what was the reason.

55. Mr. TAMMES said that the Netherlands Government had not proposed the deletion of the whole article but had wished to point out that the system of privileges and immunities depended upon consent being given to transit. Unless some criterion were laid down for justifying refusal to give consent, then it considered that the article ought to be dropped. In his opinion such criteria could be found, and consent could only be withheld in exceptional cases. Clauses of that kind had been inserted in the Conventions on the law of the sea.

56. Mr. BARTOŠ, Special Rapporteur, said that although he would prefer an objective criterion to one which employed terms such as "reasonable" or "extreme" which, where there was no court of appeal, left it to one party to decide whether the rule was applicable or not, he was prepared to accept Mr. Tammes's suggestion and word paragraph 4 in such a way that the third State would be able to object to transit only in extreme cases. The rule would not be based on a legal criterion but would impose a moral obligation.

57. He could not accept the United Kingdom Government's proposal, which would oblige States sending special missions to apply for permission for transit through the territory of the third State. He assumed that such permission would be granted or withheld through the grant or denial of a visa by the third State.

58. The United States Government's comments and the remarks by Mr. Kearney and Mr. Albónico raised the question of restrictions on freedom of transit. The Commission could reconsider that question when the article came back from the Drafting Committee; it could then decide whether certain restrictions should be placed on freedom of transit and on the grant of privileges and immunities.

59. In the Vienna Convention a distinction had been drawn for that purpose between diplomatic staff and their families on the one hand and technical and administrative staff and members of their families on the other, thus obviating many difficulties. If, in the case of special missions, passage in transit was not subject to any restrictions, complaints might be heard from transit States that special missions were constantly travelling to and fro. That situation was not covered by the Vienna Convention, and he had to admit that he had not considered it either.

60. In general, the article should not depart from the Vienna Convention on the main point; the other questions were minor ones and could be left to the Drafting Committee.

61. Mr. JIMÉNEZ de ARÉCHAGA said that in some respects article 39 conferred wider privileges and immunities than were normally accorded to diplomats in transit, but with respect to heads of special missions it did not go as far as some international treaties, such as the Inter-American Convention on Diplomatic Officers,⁵ which dealt with both permanent and special missions. Its provisions concerning privileges and immunities were applicable to both.

62. Paragraph 4 would be too drastic if it were interpreted as meaning that States that were reluctant to grant immunities would have to deny the special mission transit. It would be more reasonable to give them discretion to allow transit while refusing immunities.

63. He could not agree with the Special Rapporteur that the United Kingdom proposal undermined the whole system of special missions. Possibly the denial of immunities might affect the status of certain special missions, but in those cases the missions would probably travel by some other route. Normally they would pass through the country even if they were not granted immunities. In his opinion the United Kingdom proposal would give a measure of flexibility that would help to solve certain practical difficulties and should be considered by the Drafting Committee.

64. Mr. TSURUOKA said that article 39 should be drafted in the most flexible terms possible. However, the Commission should leave no room for uncertainty in the interpretation of the provisions, and a paragraph should perhaps be added to the commentary explaining the meaning of the passage in the first sentence of paragraph 1 which read: "the third State shall accord him inviolability and such other immunities as may be required to ensure his transit or return".

65. The special mission was granted privileges and immunities only because it needed to travel in transit through the territory of a third State, and the enjoyment of those privileges and immunities should be limited in time and space. The purpose of the convention was to facilitate international relations, and if the Commission wished a large majority of States to accept the text it should avoid making the provisions of the convention so strict that some States would refuse to ratify it or would do so only with reservations.

66. Mr. NAGENDRA SINGH said that, in the interests of promoting international co-operation, the Commission should *de lege ferenda* treat special missions on the same footing as permanent missions, particularly in those instances when the former were carrying out functions of equal importance.

67. Mr. YASSEEN said that the Commission should be guided by existing practice. Article 39 imposed no obligation on a third State to allow a special mission to travel in transit through its territory or to grant the members of that special mission privileges and immunities.

68. The United Kingdom proposal that third States should be entitled to permit transit without also granting immunities to a special mission seemed calculated to facilitate international relations; if the proposal was not adopted, the only choice open to a third State would be between denying a special mission transit through its territory and granting it the privileges and immunities prescribed by the convention.

69. Mr. BARTOŠ, Special Rapporteur, said he hoped that the Commission would make a definite choice between the text suggested by the United Kingdom Government and that of the present draft. His own view was that paragraph 4 of the present draft left the third State free to object to the transit of a special mission and, in the case of a prior agreement, to deny the special mission the enjoyment of privileges and immunities in its territory.

70. The CHAIRMAN invited the Commission to comment on the United Kingdom proposal that the transit State should have the option of allowing passage, without granting privileges and immunities to the special mission.

71. Mr. CASTRÉN said the terms of paragraph 4 were too strict and he would prefer the wording suggested by Mr. Tammes, to the effect that the third State could not object to the transit of a special mission through its territory except in extreme cases.

72. Mr. USHAKOV said that, in his opinion, the problem raised by the United Kingdom Government was already solved in paragraph 4 of the article: if the third State could deny the special mission transit through its territory, it could always deny it privileges and immunities.

73. The provision requiring third States to accord the special mission freedom of official communication, including messages in code or cipher, and inviolability for its couriers should be mandatory.

74. Mr. USTOR said that if the sending State had to apply for visas for members of the special mission, the transit State might either grant them, or grant them subject to special conditions, or refuse them completely. A problem would, however, arise if nationals of the sending State were permitted freely to travel through the transit State without having to obtain visas.

75. He agreed with Mr. Ushakov that the question of correspondence and communication was a separate problem and that third States could not refuse correspondence and communication in transit.

76. Mr. RAMANGASOAVINA said that he understood the reasons for the United Kingdom Government's comment. That country was in a special position inasmuch as special missions sent by the Governments of English-speaking African countries often had to pass through London in order to catch their airline connexions to the territory of the receiving State; missions from French-speaking African countries were in a similar position, and had to travel to Paris first in order to reach their destination. Paris and London were junctions, and both the United Kingdom Government and the French Government often had occasion to issue transit visas, but they might feel some reluctance to grant privileges and immunities at the same time.

⁵ Convention regarding Diplomatic Officers, adopted by the Sixth International American Conference and signed at Havana on 20 February 1928: League of Nations, *Treaty Series*, vol. CLV, p. 261.

77. The problem was totally different when a special mission was obliged to travel through the territory of an intermediate country in order to perform its task, and the Commission should include in the article some special provisions adapted to the needs of the various countries of transit.

78. Mr. CASTAÑEDA said that there was no real discrepancy between the system of the Vienna Convention on Diplomatic Relations and the United Kingdom proposal, but he considered paragraph 4 preferable to the United Kingdom proposal because the latter might have a restrictive effect on the granting of privileges and immunities.

79. Permission to send official correspondence and communications through a third State could not be withheld, as it was vitally important for the international community that there should be no restriction in that respect.

80. The CHAIRMAN said that there seemed to be some division of opinion in the Commission. Although the option proposed by the United Kingdom Government was not excluded by the existing text of article 39, the latter was inspired by a somewhat different point of view. In the opinion of the Special Rapporteur, once a transit State allowed a special mission passage through its territory, privileges and immunities were granted automatically.

81. However, although he had no responsibility for interpreting the United Kingdom Government's observation, he presumed that it had in mind the possibility of a State's not wishing to allow passage to a special mission as such, but being willing for its members to travel as private individuals. In his opinion the United Kingdom proposal was designed to facilitate international relations and to render the draft convention more acceptable to States, because so many parliaments were averse to extending privileges and immunities.

82. Mr. TSURUOKA, reverting to his previous remarks, said he wondered whether the Commission, without departing from the system based on article 40 of the Vienna Convention on Diplomatic Relations, could not set some limits of time and space to the régime of privileges and immunities.

83. Mr. BARTOŠ, Special Rapporteur, said that if the Commission wished to ensure the development of international relations, it must guarantee a special mission freedom of transit. Special missions sent by some countries, such as Nepal or Afghanistan, were always compelled, for geographical reasons, to pass through the territory of a third State. Moreover, if freedom of transit was not guaranteed, a special mission would have no assurance that it would be able to perform its task.

84. The problem was extremely important and, in view of the fundamental differences between the United Kingdom proposal and draft article 39, he was afraid the Drafting Committee would have the utmost difficulty in submitting a compromise solution to the Commission. Perhaps the Drafting Committee could prepare two texts, and the Commission would have to choose between them.

85. Mr. YASSEEN said that he did not think there was any difference in principle between draft article 39 and the wording suggested by the United Kingdom Government; the difference was one of emphasis.

86. Article 39, paragraph 4, in no way obliged the third State to grant a special mission freedom of transit through its territory. He personally would have no objection to imposing such an obligation on third States, but he wondered whether a plenipotentiary conference meeting to examine the draft convention would take the same view.

87. The CHAIRMAN said he agreed with Mr. Yasseen that perhaps the divergence of view in the Commission was not very wide. The Drafting Committee might succeed in finding an intermediate solution. He accordingly suggested that the article be referred to the Drafting Committee for reconsideration in the light of the discussion.

*It was so agreed.*⁶

The meeting rose at 6 p.m.

⁶ For resumption of discussion, see 931st meeting, paras. 7-18.

910th MEETING

Tuesday, 30 May 1967, at 10 a.m.

Chairman: Sir Humphrey WALDOCK

Present: Mr. Ago, Mr. Albónico, Mr. Bartoš, Mr. Castañeda, Mr. Castrén, Mr. Ignacio-Pinto, Mr. Jiménez de Aréchaga, Mr. Kearney, Mr. Nagendra Singh, Mr. Ramangasoavina, Mr. Tammes, Mr. Tsuruoka, Mr. Ushakov, Mr. Ustor, Mr. Yasseen.

Special Missions

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

(continued)

[Item 1 of the agenda]

ARTICLE 40 *bis* (Non-discrimination) [50]

1. *Article 40 bis* [50]
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;

(c) Where States agree among themselves to reduce reciprocally the extent of the facilities, privileges and immunities for their special missions in general or for particular categories of their special missions, although such a limitation does not exist with regard to other States.