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Summary record of the 910th meeting

Topic:
Special missions

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

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.

3. Discrimination also shall not be regarded as taking place where there is inequality in the treatment of special missions which belong to different categories or are received in different circumstances.

2. The CHAIRMAN invited the Commission to consider the Special Rapporteur's proposal contained in his fourth report (A/CN.4/194/Add.2) for an article 40 *bis*.

3. Mr. BARTOŠ, Special Rapporteur, said that the Commission, after having at first decided not to include in the draft a rule prohibiting discrimination, had eventually instructed the Special Rapporteur to submit a draft article on the subject based on article 47 of the Vienna Convention on Diplomatic Relations and article 72 of the Vienna Convention on Consular Relations. The course of events was described in his fourth report (A/CN.4/194, paras. 251-259).

4. The article 40 *bis* he was submitting was based on those articles, but it also contained new elements.

5. First, paragraph 2 (*c*) rendered the non-discrimination rule inoperative where States had agreed among themselves to accord their special missions less favourable treatment than provided for in the draft articles. He regarded that provision as just and in keeping with the Commission's thinking on the subject, because privileges and immunities belonged to States, not to persons, and it was States which were best qualified to decide what conditions were necessary.

6. The purpose of paragraph 3 was to express the view which the Commission had always held, that special missions in different categories and charged with different tasks could not be treated in exactly the same way. It was obvious, for example, that a political mission negotiating a treaty of alliance would receive more attention than a small technical mission; that sort of thing should not be regarded as discriminatory.

7. In short, the non-discrimination rule was founded on the sovereign equality of States, but that did not mean that all special missions should be treated absolutely alike.

8. The General Assembly had approved the Commission's last report and Governments had raised no objections to the general rule; in fact the Government of Gabon in its comments (A/CN.4/193) had emphasized its importance. The Government of the United States (A/CN.4/193) had merely questioned the usefulness of a rule of non-discrimination in regard to the mode of reception of special missions, a matter not covered by article 40 *bis*.

9. Mr. CASTRÉN said that on the whole he approved both the substance and the form of the new article, which the Special Rapporteur had drafted in accordance with the wishes and general instructions of the Commission.

10. Paragraph 1 and paragraphs 2 (*a*) and (*b*), which were taken from the Vienna Conventions, laid down reasonable general rules which were equally applicable to special missions.

11. The principle enunciated in paragraph 2 (*c*) was also just, but he wondered whether it was necessary. How could such measures as those described constitute discrimination if they were based on agreements between the States concerned and were not detrimental to other States? He was not against retaining that provision, but whether or not it was necessary would also depend on the Commission's decision concerning a general clause on the right of derogation.

12. Paragraph 3 was not only extremely useful but also necessary, in order to complete the preceding provisions, and it would probably have the approval of Governments. The whole of the beginning of the sentence was clear, but the last part, "or are received in different circumstances", needed clarification. Although the report gave no hint that such was the case, the clause appeared to refer primarily to high-level special missions. If so, that should be stated in the article itself, which should also make clear in what other cases the rule of non-discrimination did not apply.

13. Mr. TAMMES suggested that the prohibition of discrimination should not be confined to the receiving State. A transit State, for example, should also avoid discrimination in the application of article 39. Paragraph 1 of article 40 *bis* should therefore read: "The parties to the present article shall not discriminate..."

14. The fact that such a wording would represent a departure from the system of the two Vienna Conventions should not deter the Commission from adopting that proposal; the Commission had already deviated from the provisions of the Vienna Conventions in connexion with other articles of the draft on special missions, such as article 39.

15. For the rest, he shared the doubts expressed by some Governments regarding the usefulness of the whole article. An article on non-discrimination was necessary in a convention on permanent diplomatic missions or consulates, because such missions and consulates were uniform institutions. Special missions, on the other hand, took many different forms; differences of treatment would be applied on all kinds of relevant and reasonable grounds. There were many provisions, such as those of article 4, which give States the faculty to take discretionary action without having to give reasons.

16. In such circumstances, there would be a danger that a State applying a reasonable differentiation might be accused of objectionable discrimination.

17. Mr. USHAKOV said he fully approved of the substance of the article but wished to make a few suggestions of a purely formal character in order that the article should reflect the thinking of the Special Rapporteur more closely.

18. Basically, there were three situations in which differential treatment should not be regarded as discriminatory. The first was in the case of reciprocity, which was dealt with in paragraph 2 (*a*). The second was the situation resulting from prior agreement, or established custom, between the sending State and the receiving State, as provided for in paragraph 2 (*b*), under which more favourable treatment could be granted than the draft articles required.

19. The third situation arose from the fact that most of the articles of the draft were dispositive articles from which States could derogate by special agreement. Paragraph 2(*c*) could be worded to read: "any special agreement between

the sending State and the receiving State derogating from the dispositive articles of this Convention". Thus worded, it would apply not only where States agreed to extend more favourable treatment to each other, but also where they decided to accord each other less favourable treatment. Incidentally, the correct expression was definitely "special agreement" and not "mutual agreement".

20. If paragraph 2 were worded in that way, paragraph 3 would not be necessary.

21. Mr. CASTAÑEDA said he supported both the substance and the form of article 40 *bis*.

22. It was no doubt difficult to apply the principle of non-discrimination in a matter which was largely left to the will of the receiving State. A special mission could not even be sent without the agreement of the receiving State, and that State could make its consent subject to conditions without giving any grounds.

23. It was perhaps precisely because of the discretion left to the receiving State that an article on the lines of article 40 *bis* was necessary. The article expressed an aspiration of contemporary international society. Its provisions would naturally have to be applied and interpreted in good faith; they would then constitute an effective instrument to prevent the more flagrant acts of discrimination.

24. Mr. KEARNEY said he agreed that the relationship between article 40 *bis* and special agreements with regard to special missions needed clarification.

25. The expression "as between States", which was used in paragraph 1, would also need clarification, since it was unclear whether it referred only to States parties to the future convention. The same expression was to be found in other articles of the draft.

26. Mr. YASSEEN said that the justification for article 40 *bis* was that discrimination should be eliminated everywhere. It was a well-balanced article which began by stating the principle and went on the specify various circumstances which were not to be regarded as evidence of discrimination, namely, reciprocity and agreements extending or limiting the privileges and immunities provided for in the draft articles.

27. Special missions being extremely varied, it was obvious that the same treatment could not be applied to all of them, and that slight modifications dictated by the nature or level of a special mission should not be regarded as discriminatory.

28. There was one point which might usefully be emphasized by the Commission, namely that discrimination could be particularly serious when several special missions were in the territory of the same State at the same time to discuss a question together. The discrimination problem could still arise, although less conspicuously, even without the coincidence of time. Relations between States evolved as the months and the years went by, with the consequence that some differences in treatment or reception, for example, could not be regarded as contravening the rule of non-discrimination.

29. Mr. JIMÉNEZ de ARÉCHAGA said he supported the principle of non-discrimination as applied to the privileges and immunities of special missions, but article 40 *bis*, as at present drafted, had an unduly wide application, since it began with the words "In the application of the provisions of the present articles". That general formula would cover such matters as the manner of reception of special missions. The United States Government, in its comments on article 11 (A/CN.4/193), had stated that it was neither necessary nor desirable that all special missions should be received in the same manner. And as Mr. Yasseen had pointed out, the manner of reception would depend on such matters as the existence of close relations between the States concerned and the position held by the leader of the mission.

30. For those reasons, he did not support the idea of erecting into a legal rule the principle of non-discrimination in matters other than privileges and immunities. As far as privileges and immunities were concerned, however non-discrimination was already covered by the Special Rapporteur's proposed new article 17 *ter* (A/CN.4/194/Add.2).

31. Mr. ALBÓNICO said he favoured the retention of the basic rule in article 40 *bis* but would urge the Commission to be extremely cautious in the granting of privileges, immunities and facilities to special missions.

32. He therefore suggested that the article be confined to the contents of paragraph 1. He had no objection to the rule in paragraph 2 (*b*) relating to the agreement between States, but the provision was not essential because States could always agree to extend to each other more favourable treatment than was required by the provisions of the draft articles.

33. On the other hand, he was opposed to the inclusion of paragraphs 2 (*a*), 2 (*c*) and 3, which specified cases in which discrimination was possible. At the present stage of development of international law, it would be most undesirable to specify grounds of discrimination in that manner.

34. Article 40 *bis* should be reworded on some such lines as:

> "In the application of the provisions of the present articles, States shall not discriminate in any way except by special agreement".

35. Mr. USTOR said that, even if article 40 *bis* were not included, the principle of non-discrimination would still apply: the general rule that a convention was equally binding on all its signatories implied non-discrimination. That being so, he could support the inclusion of an article on the subject.

36. As proposed, article 40 *bis* contained a number of basic ideas. The first idea was that embodied in paragraph 1, supplemented by paragraph 3, that special missions of the same nature should be treated without discrimination.

37. The second idea was that of restrictive application by way of reciprocity, the clause in paragraph 2 (*a*). That clause appeared in the 1961 Vienna Convention on Diplomatic Relations as paragraph 2 (*a*) of article 47, but it had been the subject of much criticism in the Commission when it was proposed to include it also in the draft articles on consular relations.

38. During that discussion Mr. Padilla Nervo had said that:

> "In his opinion, it was quite the most regrettable provision in the whole of the Vienna Convention, because it allowed some latitude of application, whereas in fact what what was required was strict compliance with the precise terms of the Convention. It seemed a great mistake to imply that States could avoid fulfilling the obligations of the Convention on the ground that they were taking retaliatory action."[1]

In the course of the same discussion, Mr. Bartoš had pointed out that "the participants in the Vienna Conference had included paragraph 2 (*a*) for political, rather than for juridical reasons. The result was something which could not be regarded as desirable in international law; no jurist could recommend opening the door to what amounted to reprisals."[2]

39. For those reasons, the Commission had not included the clause in its draft on consular relations. The 1963 Vienna Conference, however, had overruled the Commission and had introduced into the Convention on Consular Relations a provision similar to that which appeared as paragraph 2 (*a*) of article 47 of the 1961 Vienna Convention on Diplomatic Relations.

40. Once again, the Commission was called upon to decide the same issue, on the present occasion in connexion with special missions, and he for one could hardly support a provision which could not fail to prove distasteful to most jurists.

41. The third idea was that of possible agreements between States, to which reference was made in paragraphs 2 (*b*) and (*c*). The contents of those provisions seemed to him more suitable for inclusion in the article which dealt with the relationship between the draft articles on special missions and other bilateral and multilateral instruments.

42. But as far as article 40 *bis* was concerned, he would be in favour of confining it to the contents of paragraph 1, supplemented by parts of paragraph 3, with a possible cross-reference to the article dealing with the relationship between the draft articles and other conventions.

43. Mr. YASSEEN, replying to Mr. Ustor, said that a few years previously he had himself spoken in favour of strict application of the articles without any possibility of extending or restricting the facilities, privileges and immunities provided for. Since then, after experience acquired at large plenipotentiary conferences where States expressed their views direct, he had changed his opinion and he was now glad that the Commission had kept an open mind for every eventuality.

44. Mr. BARTOŠ, Special Rapporteur, said he noted with satisfaction that all the members of the Commission agreed on the need for a rule laying down the principle of non-discrimination as stated in paragraph 2 of the present text of article 40 *bis*. That paragraph contained three rules, based on three different principles.

45. In paragraph 2 (*a*), the dominant idea was that of retaliation, based on the spirit of reprisals. That attitude had been dictated by the signs of bad faith on the part of certain States in their interpretation of conventional rules. It was true, as Mr. Ustor had said, that at the Vienna Conference on Consular Relations the principle of retaliation had not been accepted in committee; in plenary, however, the political and diplomatic viewpoints had prevailed, and the principle had been adopted. Moreover, it was the International Law Commission which had asked the Special Rapporteur to reproduce the provisions adopted by the two Vienna Conferences, and that was why the first sub-paragraph of paragraph 2 was based on the principle of good faith, according to which no State could claim more favourable treatment than that which it accorded to the other parties to the convention. It would be for the Commission to take a decision on that point, however.

46. It might be asked whether it was possible to invoke the most-favoured-nation clause in connexion with paragraph 2 (*b*). It was not; for although States could grant each other additional privileges and immunities, what was guaranteed to all States was the minimum laid down in the convention.

47. Sub-paragraph (*c*) dealt with the converse principle. States could agree between themselves to reduce the extent of the privileges, immunities and facilities granted. If they did so, they could not subsequently complain of discriminatory measures. States could not demand full application of the convention when, by *inter se* agreements or arrangements, they had agreed to restrict the privileges and immunities provided for. If article 17 *ter* was compared with the present text of article 40 *bis*, it would be seen that they were two different ways of expressing one and the same principle. Under the terms of article 17 *ter* States could, by mutual agreement, derogate from the rules applicable, whereas according to article 40 *bis*, discrimination was not regarded as taking place when States agreed between themselves to grant each other more favourable or less favourable treatment than was required by the provisions of the draft.

48. Turning to paragraph 3, he explained that it had been at the request of the Australian and other Governments that the Commission had provided for the possibility of applying different treatment to missions in different categories. In order to decide whether privileges and immunities should be reduced for special missions in certain categories, it would be necessary to make a careful examination of part II of the draft. The phrase "or are received in different circumstances", at the end of the paragraph, had been the subject of much controversy. The fact was, however, that special missions could be received very favourably, for example, when the States participating in the negotiations were on very friendly terms, whereas conditions could be less favourable when the receiving State was in a difficult situation, through disaster or peril, for example. Mention should also be made of the case where economic and trade relations between States had just improved, with the consequence that the special mission was received with exceptional friendliness.

49. There was, of course, a dividing line between legal treatment and courtesy. The text might perhaps require

[1] *Yearbook of the International Law Commission, 1961*, vol. I, 608th meeting, para. 46.

[2] *Ibid.*, para. 52.

revision or amplification. Was it necessary to add certain explanations or to put them in the commentary, or should the provision be retained as it stood? In any case, he was not opposed to the deletion of the phrase "or are received in different circumstances", if the Drafting Committee thought it advisable.

50. It would be remembered that technical, quasi-technical and semi-technical missions, and semi-political missions as well, had asked to be received on the same footing as missions of great political importance. It seemed clear, however, that a mission with a more restricted task could not claim the same treatment as one responsible for concluding a treaty of alliance or of general co-operation; he therefore considered that only special missions in the same category could claim to be received in an identical manner.

51. Mr. Tammes's proposal would improve the text, but the Commission should not adopt it until it had taken a decision on the preceding article. If its decision was favourable to the idea that the transit State had a duty to grant the usual privileges and immunities to a mission passing through its territory, Mr. Tammes's proposal, assimilating the transit State to the receiving State, should be considered.

52. He hoped that he had also answered the comments made by Mr. Ushakov. With regard to the questions raised by Mr. Ustor, he was willing to delete paragraph 2 (*a*), although it was based on general international law, whatever certain States might think.

53. Mr. NAGENDRA SINGH said he favoured the retention of paragraphs 1, 2 (*a*) and 2 (*b*). The deletion of any of those paragraphs, or the introduction of any change in their text, could give rise to difficulties of interpretation. He also favoured the retention of paragraph 2 (*c*) *ex abundanti cautela*. He saw no strong reasons, on the other hand, for retaining paragraph 3. In particular, he had doubts with regard to the concluding phrase, "or are received in different circumstances". If the circumstances were different, it would seem that the question of discrimination did not arise.

54. The CHAIRMAN, speaking as a member of the Commission, said that he shared the doubts which had been expressed with regard to paragraph 3, at any rate in its present form. He noted that the Special Rapporteur was prepared to consider the deletion of the concluding words "or are received in different circumstances"; if they were retained, they would take much of the substance out of the article by opening too wide a door to interpretation. As pointed out by Mr. Yasseen, except where there was a real unity in time, the circumstances in which special missions were received would tend to differ.

55. The other idea contained in paragraph 3, the question of special missions of different categories, was an important one but involved the difficulty of determining what those categories were. It was true that some examples were given in the commentary, but an explanation in that form was not sufficient, since the commentary would later disappear and only the article would remain.

56. The Drafting Committee should consider whether the point embodied in paragraph 3 was so much part of the essence of special missions that it should be included in paragraph 1, which could then be recast to state that: "States may not discriminate as between special missions of a similar category."

57. The question had also been raised of extending the provisions of article 40 *bis* to a transit State, as well as to the receiving State. Consideration should also perhaps be given to extending the provisions of the article to a State which merely permitted the conduct of business on its territory by special missions. The Drafting Committee would have to consider the possibility of formulating wording which would cover all those points.

58. Mr. AGO said he shared the Chairman's doubts regarding paragraph 3 of the present text of article 40 *bis*. If the convention was to contain a separate chapter on high-level missions to which a special régime was applicable, any differentiation between other categories of special missions would amount to discrimination. Moreover, the phrase "or are received in different circumstances" at the end of paragraph 3, opened the way for all sorts of abuses and subjective judgements, so much so that there would be every advantage in deleting paragraph 3 from the draft.

59. The CHAIRMAN suggested that article 40 *bis* be referred to the Drafting Committee for consideration in the light of the discussion.

It was so agreed.[3]

60. Mr. AGO said he wished to make a comment which related to the whole group of articles already considered at the present session. On the whole, the standpoint of those articles was essentially bilateral. Nevertheless, they made provision for some cases of plurality. For instance, the Commission had dealt with the case of a special mission which negotiated successively or even simultaneously with several States. Following a suggestion by the Belgian Government, the Commission also proposed to deal with the case in which several States sent a joint special mission to another State to negotiate with it. Finally, article 16 dealt with the case in which special missions sent by different States met in the territory of a third State, either at its invitation or because the States concerned had asked its permission. It should be noted that in the latter case the terminology adopted by the Commission was no longer entirely suitable. There was not a sending State and a receiving State, but several sending States and one third State, which received the special missions in its territory.

61. In his opinion the Commission should also deal with the increasingly frequent case in which several States simultaneously sent to the capital of another State special missions responsible for multilateral negotiations in which the State in whose territory they met was also taking part. An example was the conversations then taking place in Rome between missions from the six members of the European Economic Community. In that case, he thought that the terms of reference and the task of the special missions should be discussed in advance and settled, not bilaterally between each sending State and the State in whose territory the meeting was to be held, but between all the States concerned. There should be special provi-

[3] For resumption of discussion, see 931st meeting, paras. 19-21.

sions in the draft to take account of that situation, so that the articles would deal with special missions not only as instruments for bilateral relations, but also as instruments for collective negotiation.

62. Mr. BARTOŠ, Special Rapporteur, replying to Mr. Ago's comment, said that he had raised that question in 1963 and the Commission had asked the two special rapporteurs appointed to study, respectively, special missions and relations between States and inter-governmental organizations, to consult each other in order to determine whether the question came within the scope of either topic. In his opinion, if the meeting was convoked by States, then the question related to special missions. Unfortunately the two special rapporteurs had never had an opportunity of consulting each other on the point, and Mr. El-Erian was now absent. He was willing to examine the question and submit a proposal to the Commission.

63. Mr. CASTRÉN said that the problem raised by Mr. Ago was most important. Although some aspects of it, at least, had already been dealt with under article 16, there was no reason why the Commission should not examine the matter more thoroughly.

64. Mr. RAMANGASOAVINA said he also agreed that the concepts of "sending State" and "receiving State", as defined in the draft, might be inadequate in certain circumstances, particularly where several States sent special missions to another State for a conference. The term "receiving State" might be reserved for the case of bilateral negotiations. When several special missions met in the territory of a third State, which was not itself a party to the negotiations, that State could be called the "host State".

65. Mr. JIMÉNEZ de ARÉCHAGA said that at its twelfth session the Commission had decided "not to deal with the privileges and immunities of delegates to congresses and conferences as part of the study of special missions, because the topic of diplomatic conferences was connected with that of relations between States and intergovernmental organizations."[4] At the fifteenth session the question had been raised again, with particular reference to conferences convened by States, and most members had expressed the opinion, that for the time being the terms of reference of the Special Rapporteur should not cover the question.[5] The Commission should abide by that decision.

66. The CHAIRMAN suggested that the matter be left aside for the time being, particularly as it would be interesting to hear Mr. El-Erian's views. Mr. El-Erian had considered the point in connexion with the relationship between his report on the relations between States and inter-governmental organizations and the report on special missions.

67. To avoid clumsy drafting, definitions might be needed of the receiving State, the third State and any other State that might be concerned with the application of the draft convention.

68. Mr. YASSEEN said that the case referred to by Mr. Ago was an extreme one: it was neither a conference proper, nor a meeting convoked by an international organization.

69. The CHAIRMAN said that it would all depend on what was meant by the expression "international conference".

70. Mr. USTOR pointed out that the Commission had not dealt with the case where a State sent several different special missions to the same receiving State at the same time, when questions of precedence might arise.

71. Mr. AGO said that the conversations which he had in mind were neither a meeting convoked by an international organization nor a diplomatic conference in the strict sense. What he wished was that the Commission should cover a case similar to that dealt with in article 16, but where the State on whose territory the meeting took place was itself a party to the negotiation. He welcomed the Special Rapporteur's proposal that he should report on the matter without awaiting the return of Mr. El-Erian, who was dealing with an entirely different subject.

ARTICLE 40 (Obligation to respect the laws and regulations of the receiving State) [48]

72. *Article 40* [48

Obligation to respect the laws and regulations of the receiving State

1. Without prejudice to their privileges and immunities, it is the duty of all persons belonging to special missions and enjoying these privileges and immunities to respect the laws and regulations of the receiving State. They also have a duty not to interfere in the internal affairs of that State.

2. The premises of the special mission must not be used in any manner incompatible with the functions of the special mission as laid down in these articles or by other rules of general international law or by any special agreements in force between the sending and the receiving State.

73. The CHAIRMAN invited the Commission to consider article 40. The Special Rapporteur's views were given in paragraph 4 of the section dealing with that article in his fourth report (A/CN.4/194/Add.2).

74. Mr. BARTOŠ, Special Rapporteur, said that paragraph 1 reproduced *mutatis mutandis* article 41, paragraph 1, of the Vienna Convention on Diplomatic Relations and article 55 of the Vienna Convention on Consular Relations. Paragraph 2 reproduced article 41, paragraph 3, of the Vienna Convention on Diplomatic Relations.

75. No government had offered any comments on the article and he did not think it was necessary to alter either the text or the commentary.

76. Mr. YASSEEN said he approved the text of the article but might later wish to question the placing of paragraph 2.

77. There seemed to be no real point in retaining the last part of paragraph 2, from the words "as laid down..." onwards. Since the Commission had defined the functions of the special mission in other articles, it was sufficient to stipulate that the premises of the special mission should not be used in any manner incompatible with its functions.

[4] See *Yearbook of the International Law Commission, 1963*, vol. II, document A/5509, para. 63.

[5] *Ibid.*

78. Mr. BARTOŠ, Special Rapporteur, said that Mr. Yasseen's comment was justified and he would delete that part of the sentence.

79. Mr. NAGENDRA SINGH said that he was in favour of retaining article 40 and the commentary on it without change.

80. The CHAIRMAN, commenting on the proposed amendment to article 40, observed that in general the Commission preferred to keep to the wording of the Vienna Convention on Diplomatic Relations, unless there were good reasons of substance for not doing so.

81. He suggested that article 40 be referred to the Drafting Committee.

It was so agreed.[6]

ARTICLE 42 (Professional activity) [49]

82. *Article 42* [49]

Professional activity

The head and members of the special mission and the members of its diplomatic staff shall not practise for personal profit any professional or commercial activity in the receiving State.

83. The CHAIRMAN invited the Commission to consider article 42, the Special Rapporteur's proposals for which were contained in paragraph 11 of the section dealing with that article in his fourth report (A/CN.4/194/Add.2) and in his additional comments in document A/CN.4/194/Add.4.

84. Mr. BARTOŠ, Special Rapporteur, said that article 42, which reproduced *mutatis mutandis* the text of article 42 of the Vienna Convention on Diplomatic Relations, had been the subject of comments by several Governments.

85. The Belgian Government proposed replacing the words "shall not practise", in the second line, by the words "shall not carry on", which appeared in article 57, paragraph 1, of the Vienna Convention on Consular Relations. It also proposed supplementing the article by the addition of provisions similar to those of article 57, paragraph 2, of that Convention, which laid down that members of the families of the persons referred to in article 42 should be prohibited from practising for personal profit any professional or commercial activity in the receiving State. He saw no objection to the first proposal, which was a question of form; with regard to the second, however, although he would not oppose it, he wondered whether the Commission should go into details of that kind.

86. The Turkish delegation had made certain comments during the discussions in the Sixth Committee of the General Assembly[7] and he had asked it to provide him with certain explanations, but had received no reply to his request.

87. The Netherlands Government had proposed adding the words "and they may not do so for the profit of the sending State unless the receiving State has given its prior consent" at the end of the article. When considering that point, the Commission had decided to keep to the formula used in the Vienna Convention on Diplomatic Relations.[8] He did not think the Commission should change its view, since under article 40, paragraph 1, the members of special missions were under an obligation to respect the laws and regulations of the receiving State.

88. The Government of Israel had proposed adding the words "without the express prior permission of that State" at the end of the article because it considered that in particular instances the members of a special mission ought to be allowed to engage in some professional or other activity whilst in the receiving State.

89. The Government of Canada had observed that article 42 "does not cover members of special missions who, on behalf of the sending State, might carry on activities not consonant with the mission's terms of reference".

90. He noted that the general trend was to restrict the freedom of members of a special mission to exercise a professional activity, even where the activity was not carried on for personal profit. He personally favoured retaining the text of article 42 and was prepared to accept the formal amendment proposed by Belgium that the words "shall not practise" should be replaced by the words "shall not carry on".

91. Mr. AGO said he saw no reason why the Commission should depart from the formula adopted in the Vienna Convention on Diplomatic Relations. If, in exceptional circumstances, the members of the special mission were to carry on a professional or commercial activity in the territory of the receiving State, such cases could be regulated by bilateral agreement between the sending State and the receiving State.

92. The Commission should therefore keep to the existing wording of article 42, as formally amended by the Belgian Government and the Special Rapporteur. The article would then read: "The members and the diplomatic staff of the special mission shall not carry on for personal profit any professional or commercial activity in the receiving State".

93. Mr. CASTRÉN said he agreed with Mr. Ago. If any difficulty arose, it would be better to settle it by reference to the provisions of the Vienna Convention on Diplomatic Relations rather than to those of the Convention on Consular Relations, which laid down a slightly different system.

94. It would be enough to mention the Canadian Government's observation in the commentary.

95. Mr. NAGENDRA SINGH said that, while he agreed that as a general principle the Commission should follow the wording of the Vienna Convention on Diplomatic Relations, he was in favour of the Belgian Government's proposal to substitute the words "shall not carry on" for the words "shall not practise", which was a rather clumsy phrase in English.

[6] For resumption of discussion, see 937th meeting, paras. 88-107.

[7] See *Official Records of the General Assembly, Twentieth Session, Sixth Committee*, 847th meeting, para. 24.

[8] *Yearbook of the International Law Commission, 1965*, vol I, 809th meeting, paras. 10-51.

96. The Israel Government's proposal to add the words "without the express prior permission of that State" was justified. If that change were made, the word "personal" in the present text of article 42 should be deleted, since professional activity could result in group profit.

97. He favoured the proposal made by the Special Rapporteur in his report (A/CN.4/194/Add.2) to substitute the words "The members and diplomatic staff of the special mission" for the words "The head and members of the special mission and the members of its diplomatic staff."

98. Mr. TSURUOKA pointed out that the States concerned could always, if circumstances demanded, conclude an agreement authorizing the members of a special mission to carry on professional activities.

99. Mr. JIMÉNEZ de ARÉCHAGA said that article 42 should be approved as it stood; he was opposed to incorporating the Israel Government's amendment.

100. The discussion on that subject at the seventeenth session, at the 809th meeting, shed light on the scope of article 42 and particularly on the character of the prohibition against the exercise of professional or commercial activity. One member had expressed the view that "it was hardly necessary to lay down rules as stringent as those applicable to permanent missions. It was right that diplomats and consular officers should not be allowed to carry an any other professional activity; but a special mission might be composed of persons from very different walks of life, businessmen, for example, who might even be established in the receiving State. If such a person was forbidden to carry on any activity for his own account so long as the mission lasted, governments might have difficulty in securing the services of competent persons."[9] On that occasion Sir Humphrey Waldock had argued that States were not precluded from reaching agreement on a less stringent rule.

101. Mr. BARTOŠ, Special Rapporteur, said he agreed that the possibility of the States concerned concluding an agreement to enable the members of a special mission to carry on professional activities should be mentioned in the text of the article. He suggested that the Commission refer article 42 to the Drafting Committee.

102. Mr. USTOR said he would like to know exactly what was meant by the expression "professional activity". Would it, for example, include the writing of a newspaper article, which might not be paid for, or any kind of artistic performance? Perhaps some explanation was needed in the commentary.

103. Mr. BARTOŠ, Special Rapporteur, said that some members of the Commission had thought that the members of a special mission should be allowed to carry on professional or commercial activities, and even to avail themselves for that purpose of their status as members of a special mission. Others had taken the opposite view and contended that businessmen who were members of economic special missions could, on the strength of their official duties, secure advantages in the host country to the detriment even of their compatriots.

104. The CHAIRMAN said that there seemed to be general support for the Belgian Government's amendment to substitute the words "shall not carry on" for the words "shall not practise". He suggested that the article be referred to the Drafting Committee.

It was so agreed.[10]

ARTICLE 41 (Organ of the receiving State with which official business is conducted) [15]

105. *Article 41* [15]

Organ of the receiving State with which official business is conducted

All official business with the receiving State entrusted to the special mission by the sending State shall be conducted with or through the Ministry for Foreign Affairs of the receiving State or such other organ, delegation or representative as may be agreed.

106. The CHAIRMAN invited the Commission to consider article 41. The Special Rapporteur's proposals were contained in paragraph 7 of the section on that article in his fourth report (A/CN.4/194/Add.2) and in his additional comments in document A/CN.4/194/Add.4.

107. Mr. BARTOŠ, Special Rapporteur, said that article 41 had originally formed part of article 40 and was based on article 41, paragraph 2, of the Vienna Convention on Diplomatic Relations. The general rule stated in article 41 was that all official business should be conducted with the Ministry of Foreign Affairs. The rule could be modified in cases where special missions had to deal with organs of the receiving State specifically responsible for the matters of interest to the missions.

108. The Canadian Government had suggested that, in the commentary, emphasis should be placed on the need for the prior agreement of the receiving State "to the communication by the special mission with other of its own organs than its Foreign Ministry." He personally would prefer that the Drafting Committee should be asked to submit either the wording used in the article, namely, "... as may be agreed", or the wording "...to which the Ministry for Foreign Affairs directs the special mission".

109. The Belgian Government had proposed replacing the word "organ" by the word "authority", but from the legal point of view an organ was merely a representative of the authority and did not necessarily possess its powers. He could agree to add the word "authority" to the list at the end of the article, but thought the word "organ" should be retained.

110. The question whether article 41 should be incorporated in article 40 remained open, but he would prefer to keep the two articles separate.

111. Mr. AGO said he agreed with the Special Rapporteur. The Drafting Committee could decide whether or not article 41 should be retained as a separate article.

[9] *Ibid.*, para. 44.

[10] For resumption of discussion, see 938th meeting, para. 58.

112. The CHAIRMAN suggested that article 41, which, in the absence of comment he presumed was generally acceptable, be referred to the Drafting Committee.

It was so agreed.[11]

The meeting rose at 12.50 p.m.

[11] For resumption of discussion, see 938th meeting, para. 57.

911th MEETING

Wednesday, 31 May 1967, at 11.30 a.m.

Chairman: Sir Humphrey WALDOCK

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

Also present: Sir Gerald Fitzmaurice, Mr. Lachs, Mr. Žourek, Mr. Caicedo Castilla, Observer for the Inter-American Juridical Committee.

Statements by Sir Gerald Fitzmaurice, Mr. Lachs and Mr. Žourek

1. The CHAIRMAN welcomed three former members of the Commission, Sir Gerald Fitzmaurice, Mr. Lachs and Mr. Žourek. He said it was a special pleasure to greet Sir Gerald who, in the years 1955 to 1960, had been special rapporteur on the law of treaties and who in that capacity had prepared five reports containing profound studies on many aspects of that branch of the law, which had been of the greatest value in furthering the Commission's work and of the greatest help to his successor.

2. As a member of the Commission, he had worked for a year with Mr. Žourek, whose excellent reports on consular relations had found fruition in the Vienna Convention on that subject.

3. He thanked Mr. Lachs for his contributions to the discussion on the law of treaties in the Commission and for his work in the Drafting Committee.

4. Sir Gerald FITZMAURICE said that the President of the International Court of Justice was to have met the Secretary-General in Geneva that week to discuss matters of common interest and had intended to visit the Commission on that occasion to convey his best wishes for the continued success of its work, already so impressive and of such moment to the community of nations. However, the planned meeting had been postponed and the President had deputed to him the task of visiting the Commission.

5. Despite the obvious difference of functions, there were close links between the Court and the Commission and a number of members of the latter had become Judges of the Court. In both cases members were elected by governments, not as representatives of countries but in their personal capacity as jurists, and they had a scientific task to perform in accordance with their consciences.

6. The two bodies had a community of interest and a common legal foundation. The Court had to declare the law, not as an arbitrary process but in accordance with the provisions of Article 38, paragraph 1, of its Statute. The Commission's task was less circumscribed, for it was the main international codifying agency, but it still had to take into account the elements laid down in that article. The work of each influenced the other and they had a joint obligation to make every effort to promote the law.

7. As a former special rapporteur on the law of treaties he wished to pay his tribute to the Commission's remarkable achievements on that topic.

8. The CHAIRMAN asked Sir Gerald to convey the Commission's thanks to the President of the Court for his message. The codification, elucidation and progressive development of the law was often said to be an essential prerequisite for extending the acceptance of the Court's jurisdiction and for its successful operation as a judicial instrument, and the process was certainly an indispensable condition for the peace and welfare of the international community.

9. He also wished to mention the feelings of personal friendship which existed between the Judges of the Court and members of the Commission.

10. Mr. LACHS said that the mutual respect that existed between the Court and the Commission was a hopeful aspect in the development of international law, and though their members came from different parts of the world with differing legal philosophies there was a considerable degree of understanding between them.

11. Mr. ŽOUREK said he was very glad of the opportunity of seeing his former colleagues in the Commission again and meeting the new members. Although he no longer took part in the work of the Commission, he still continued to follow its activities out of scientific and professional interest. During his many travels he had always endeavoured to make better known the part played by the Commission, whose work for the codification of international law contributed to the development of relations between all peoples. For instance, in the course of a symposium held in West Berlin he had recently delivered a lecture on the activities of the Commission.

12. The draft articles on the law of treaties had been successfully completed and the codification of important rules of international law had been carried through, thanks in large measure to the authority and skill of Sir Humphrey Waldock, whose merits the Commission had very properly recognized by electing him Chairman. The documents of the Commission were a valuable source of information to him and enabled him to maintain a sort of spiritual contact with the Commission.

Co-operation with other Bodies

(resumed from the 898th meeting)

[Item 5 of the agenda]

13. The CHAIRMAN invited the observer for the Inter-American Juridical Committee to address the Commission.