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Summary record of the 912th meeting

Topic:
Special missions

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33. The CHAIRMAN thanked the observer for the Inter-American Juridical Committee for his very full and informative statement on the legal work being done in the Organization of American States. He said it was particularly interesting to learn that the Committee would be studying State responsibility and the succession of States, since those two topics were on the Commission's own agenda. As Mr. Caicedo Castilla had himself been present at the 898th meeting, when item 5 had been discussed, there was no need for him to repeat what he had said about the importance of developing links with regional legal organizations and of preventing an undue divergence in the development of legal philosophies.⁴ The inter-American Organization had been a pioneer in the codification and harmonization of law on a regional plane.

34. Mr. CASTAÑEDA said that 1966 had been a fruitful year in the Latin-American continent with the completion of agreements on economic integration and the amendment of the Charter of the Organization of American States. Mr. Caicedo Castilla had taken part in the latter process and was particularly well qualified to make his statement. In addition, he was the author of a study on collective action and non-intervention.

35. He reserved his right to comment on Mr. Caicedo Castilla's statement once he had had the opportunity to study it, particularly in regard to strengthening the links between the Inter-American Juridical Committee and the Commission.

The meeting rose at 12.45 p.m.

⁴ See 898th meeting, para. 23.

912th MEETING

Thursday, 1 June 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. Reuter, 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 910th meeting)

[Item 1 of the agenda]

ARTICLE 44 (Cessation of the functions of the special mission) [47 and 20, para. 2]

1. *Article 44* [47 and 20, para. 2]

Cessation of the functions of the special mission

1. When a special mission ceases to function, the receiving State must respect and protect its property and archives, and must allow the permanent diplomatic mission or the competent consular post of the sending State to take possession thereof.

2. The severance of diplomatic relations between the sending State and the receiving State shall not automatically have the effect of terminating special missions existing at the time of the severance of relations, but each of the two States may terminate the special mission.

3. In case of absence or breach of diplomatic or consular relations between the sending State and the receiving State and if the special mission has ceased to function,

(a) The receiving State must, even in case of armed conflict, respect and protect the property and archives of the special mission;

(b) The sending State may entrust the custody of the property and archives of the mission to a third State acceptable to the receiving State.

2. The CHAIRMAN invited the Commission to consider article 44, the Special Rapporteur's proposals for which were contained in paragraph 13 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.

3. Mr. BARTOŠ, Special Rapporteur, said that the cases when the functions of special missions came to an end were listed in article 12 and that the purpose of article 44, which corresponded to article 45 of the Vienna Convention on Diplomatic Relations, was to set out rules on the consequences of cessation of functions.

4. The Belgian Government considered that paragraph 2 of article 44 would be better placed in article 12, and that the final words, "but each of the two States may terminate the special mission", were superfluous. He was quite willing to transfer the provisions of paragraph 2, but saw no strong reason for putting them in one of the two articles rather than the other. On the other hand, he considered that the final words of the paragraph were useful, for although it was true that the severance of diplomatic relations did not entail cession of the functions of the special mission, each State must nevertheless have the right to terminate the special mission if relations were broken off. Such action should not be considered an arbitrary act. Even if, for instance, the two States had previously agreed to hold conversations through special missions at given intervals, in the event of severance of diplomatic relations each of them would be able to release itself from that undertaking.

5. Referring to the first two comments by the Government of Israel (A/CN.4/188) he confirmed, first of all, that if the sending State had no permanent diplomatic mission or consular post in the receiving State, paragraph 1 of article 44 did not, of course, apply. It would be for the Commission to decide whether it wished to retain that provision or not. Similarly, paragraph 3 (b) could not apply if no third State agreed to take charge of the property and archives of the special mission; but the same was true of article 45 (c) of the Vienna Convention on Diplomatic Relations. The sending State could not compel another State to protect its interests. In his view the receiving State was responsible for protecting the property and archives of the special mission so long as they had not been taken over by a third State.

6. The third comment by the Government of Israel was justified; the Commission should consider whether it was advisable to ensure that the sending State could remove

its archives. The archives of a State were inviolable and their removal should not be obstructed.

7. The comment by the United Kingdom Government (A/CN.4/188/Add.1) raised a two-fold question. Was it necessary to add to the draft the institution of inviolability of the premises of the special mission after the cessation of its functions, by inserting a provision similar to article 45 (a) of the Vienna Convention on Diplomatic Relations? And, if so, should that inviolability be limited to "a reasonable period"? In his opinion, special missions were in a different position in that respect from permanent diplomatic missions: since the premises of special missions were premises necessary to them during the performance of their functions, it was questionable whether the inviolability of those premises should be extended after the mission had ceased to function. If the Commission decided to add to the draft a provision on inviolability of the premises of the special mission after it had ceased to perform its functions, he thought that inviolability should not continue indefinitely, since in the long run it might place too great a burden on the receiving State, particularly if it was faced with a shortage of accommodation. "A reasonable period" in such circumstances would be the time needed to move the property and archives to other premises or out of the territory of the receiving State, but it was always very difficult to decide what was "a reasonable period".

8. With regard to the proposal by the Canadian Government that the article be "broadened to cover specifically the routine conclusion of functions due to the fulfilment of the objects of a special mission", that idea was more appropriate in article 12, where it was already expressed in a slightly different form in sub-paragraph (b).

9. He suggested that the Commission confine itself to considering the third comment by the Government of Israel, regarding the need to make express provision in article 44 for the removal of the archives from the territory of the receiving State.

10. Mr. YASSEEN said that in his opinion the provisions of paragraphs 1 and 3 were indispensable. Paragraph 2, on the other hand, did not seem necessary. The main idea in that paragraph was that the severance of diplomatic relations between the sending State and the receiving State did not automatically have the effect of terminating special missions existing at the time of the severance; that idea was correct, but to express it, it would be sufficient to add a few words to paragraph 2 of article 1, making it provide that the existence of diplomatic or consular relations was not necessary for the sending or reception of special missions or for the continuance of their functions.

11. The final phrase of paragraph 2 also stated a correct idea: when diplomatic relations were broken off between the sending and the receiving State, each of those two States had the right to terminate the special mission. But that was true at any time, even when diplomatic relations had not been broken off between the two States. A special mission could only carry on its activities if the two States agreed that it should do so; one of them could not impose the continuation of those activities on the other. The final phrase was therefore not indispensable.

12. With regard to the comment by the United Kingdom Government, he did not think it advisable to introduce the idea of a "reasonable period" in that context, where good faith in implementing the convention should be sufficient. In practice, States agreed on what was to be done with the property and archives of the special mission after it had ceased to function; if an armed conflict broke out between them, they relied on the good offices of a third State. It would be better to abide by the general principle of respect for the property and archives of the special mission, without going into too much detail; to introduce the idea of a "reasonable period" might weaken the rule and engender controversy.

13. Mr. KEARNEY said he agreed with Mr. Yasseen that paragraph 2 was somewhat out of place in an article which dealt with the practical steps to be taken in connexion with the cessation of a special mission.

14. The approach adopted in article 44 was rather one-sided; it placed the whole emphasis on the obligations of the receiving State instead of on those of the sending State. The article also betrayed a tendency to overlook the temporary nature of special missions.

15. The provisions of the article were unduly influenced by the rules adopted in the 1961 Vienna Convention with regard to permanent missions. It should be remembered that the cessation of the functions of a permanent mission was not a normal occurrence; the mission would, in the normal course of events, be reopened. In the case of a special mission, the functions were of a temporary nature and were normally intended to terminate after a period of time.

16. In the circumstances, when a special mission left the receiving State, it should be under an obligation either to take its papers with it and dispose of its property, or to make suitable arrangements to leave everything with the permanent mission or consulate of the sending State.

17. He therefore suggested that the article should make provision for the obligations of the sending State, while at the same time specifying those of the receiving State, in the unusual circumstances mentioned in the article.

18. Mr. USHAKOV said he approved of the substance of article 44, but wished to make two comments.

19. First, he wondered whether it had been intended to make a distinction between "cessation of functions" and "termination" of the special mission. In his view, the two expressions described the same situation.

20. Secondly, paragraph 1 appeared to refer to the ordinary cases of cessation of functions of the special mission, namely, expiry of the duration assigned for the special mission and completion of its task, which were provided for in article 12, as well as cessation of the functions of the special mission by mutual agreement between the States concerned, which was also an ordinary case. He saw no need to state in article 44 a rule applicable to ordinary cases of the cessation of functions of the special mission. Like article 45 of the Vienna Convention, article 44 of the draft should be reserved for exceptional cases, namely, that of the severance of diplomatic or consular relations and that of armed conflict. Thus the real substance of article 44 was in paragraph 3.

21. Mr. USTOR said he agreed with those speakers who considered that paragraph 2 was not in its right place in article 44 and should be moved to some other place in the draft. In the 1963 Vienna Convention on Consular Relations, the matter was dealt with in article 27, entitled "Protection of consular premises and archives and of the interests of the sending State in exceptional circumstances". A title on those lines should be adopted for article 44. The present title was much too similar to that of article 12, "End of the functions of a special mission". A change of title could be made if paragraph 2 were moved somewhere else.
22. To some extent, he agreed with Mr. Kearney that the case envisaged in article 44 was much more exceptional than those for which provision was made in article 45 of the Vienna Convention on Diplomatic Relations and article 27 of the Vienna Convention on Consular Relations. When diplomatic or consular relations were severed, the departing diplomats or consuls could not take with them all their archives and belongings; a special mission, on the other hand, did not normally leave anything behind.
23. There was also the possibility that a special mission might, on departure, leave its task to be continued by a diplomatic mission or a consulate of the sending State.
24. Mr. IGNACIO-PINTO said that, like other members of the Commission, he had the impression that article 44 to some extent duplicated article 12. The titles of the two articles were so similar that it was hard to see what difference there was between them. Since article 44 dealt with the consequences and the steps to be taken in the cases envisaged, it should be possible to link the two articles, perhaps by changing the title of article 44.
25. In view of what was stated in article 1, paragraph 2, article 44, paragraph 2 did not seem to be indispensable. Moreover, it was obvious that each of the two States concerned was at liberty to terminate the special mission when it considered that it should not continue. He therefore agreed with Mr. Yasseen and supported the Belgian Government's suggestion.
26. His view on the question of the obligation of the receiving State to protect the property and archives of the special mission for an indefinite period of time was the same as Mr. Kearney's. A special mission was by nature provisional and temporary; it had no need to amass a quantity of archives and it was hard to conceive its owning property.
27. He hoped that he would have an opportunity of supporting an article confined to essential matters connected with the consequences of the cessation of the functions of a special mission.
28. Mr. CASTRÉN said that he was prepared to accept article 44, subject to drafting changes. The proposals by the Governments of Israel and the United Kingdom would mean going into too much detail; the questions they raised could be dealt with in the commentary. Nor did he see any reason for altering the article's position in the draft.
29. It might be that paragraph 2 was not absolutely necessary and that article 1 of the draft could be expanded in the way suggested by Mr. Yasseen, but he had no objection to that aspect of the question of diplomatic relations being dealt with separately in article 44.
30. There was no reason why paragraph 1 should not be given general scope, although, as Mr. Ushakov had pointed out, it was mainly concerned with exceptional cases.
31. Mr. NAGENDRA SINGH said he agreed that it was the duty of the sending State to dispose of the property of the special mission and clear its premises on the conclusion of the mission's operations.
32. Like article 45 of the Vienna Convention on Diplomatic Relations, article 44 dealt with the protection of the property and archives of the special mission but unlike that article 45, it said nothing about the premises. That gap could give rise to doubts.
33. Article 12 of the draft provided for termination of a special mission by notification. Since notification of that type could be very abrupt, some time lag was essential to allow the sending State to wind up the affairs of its special mission. He therefore suggested that consideration be given to the United Kingdom's suggestion for a reasonable time-limit in the matter. It was true that the 1961 Vienna Convention did not contain any such rule, but that Convention dealt with permanent missions, whereas special missions were essentially of a temporary character.
34. Mr. BARTOŠ, Special Rapporteur, said that the meaning would be brought out better if paragraph 2 of article 44 were dropped and a new paragraph inserted in article 12 providing that "where diplomatic or consular relations have been severed, States may terminate the special mission", the severance of diplomatic relations being regarded as a special situation. That amendment, which corresponded to the proposal by the Belgian Government, could be referred to the Drafting Committee. But he was not in favour of dealing with the matter in article 1, as Mr. Yasseen had proposed, for then the consequences of the severance of diplomatic relations on an already existing special mission would not be made clear.
35. In considering paragraphs 1 and 3, it was necessary to differentiate between three entirely different sets of circumstances. In the first case, referred to in paragraph 1, the special mission ceased to function or terminated in a normal way. It often happened that a special mission left its property and archives scattered in various places in the receiving State where it had been carrying out its work. That could happen, for example, if a frontier delimitation mission left its technical equipment behind on the spot. Who was entitled to take possession of it? The obvious answer seemed to be that the permanent diplomatic mission or a consular post of the sending States should do so. On the other hand, he agreed with Mr. Kearney that, when the special mission had completed its work, the sending State should, as a general rule, take possession of its archives and property as soon as possible. A situation might arise, however, where a mission had come to an end and the sending State and the receiving State had broken off diplomatic or consular relations or had no such relations. In that situation, as the Government of Israel had pointed out, the receiving State should permit the sending State to remove its property. In case of confiscation or blockade,

the receiving State was required to respect the property and archives of the special mission. A third possibility was that the sending State might place the property and archives of the special mission under the protection of a third State.

36. Mr. Ushakov had pointed out that article 44 dealt both with normal cessation of the functions of the special mission and with cessation for special reasons, whereas article 45 of the Vienna Convention on Diplomatic Relations dealt only with exceptional circumstances, cases where diplomatic relations between two States had been broken off. But article 45 of the Vienna Convention also referred to a situation in which "a mission is permanently or temporarily recalled"; that was not a special case, for a State might decide to close an embassy or consulate for economic, administrative or other reasons without diplomatic or consular relations being severed.

37. Mr. Ustor had mentioned a situation which, as he had described it, did not arise either in practice or in theory: the case of a special mission which withdrew and handed over its task to a consular post or other organ. A special mission never had any authority to transfer its functions to a consular post or other organ remaining on the spot. In practice, the sending State recalled the special mission and then gave one of the organs—whether diplomatic or consular—representing it on a permanent basis the necessary authority to continue the task of the special mission. Indeed, tasks of that kind very often formed part of the duties of such an organ. That did not mean that special missions were unnecessary. In many instances, their purpose was to deal with a particular problem and it was left to the permanent mission to put the finishing touches and to go into points of detail. In other words, a special mission was often entrusted with the preparatory work in connexion with a given matter, after which the sending State instructed its permanent diplomatic mission or consular post to perform the "final act". It should be made clear that, when a special mission entrusted its property and archives to the permanent diplomatic mission or consular post, that was an internal matter for the sending State. In short, his proposal was that article 44, paragraph 2, should be incorporated in article 12 and that, in the case of paragraphs 1 and 3, the Drafting Committee should take into account all the suggestions made by the members of the Commission.

38. With regard to the United Kingdom Government's proposal concerning the inviolability of the special mission's premises for a reasonable period, that aspect of the matter could perhaps best be dealt with, not in the article itself, but in the commentary, as Mr. Castrén had suggested; for it had to be remembered that the receiving State might regard property and archives left on the spot by the special mission for an indefinite period of time as an encumbrance.

39. Mr. USHAKOV said that the Special Rapporteur had made a convincing case and he would withdraw his comments on draft article 44 and article 45 of the Vienna Convention on Diplomatic Relations. But he still considered it unfortunate that draft articles 12 and 44, which dealt with two different subjects, should have been given similar titles.

40. Mr. BARTOŠ, Special Rapporteur, said that in that case he would propose that the existing title of article 44 be reworded to read "Consequences of the cessation of the functions of the special mission".

41. Mr. ALBÓNICO suggested that paragraph 1 of article 44 be moved to article 12, which was entitled "End of the functions of the special mission", since it dealt with the fate of the property and archives of the special mission when the mission ended its functions. The other two paragraphs of article 44 should form a new article, to be placed immediately after article 12.

42. The CHAIRMAN said there was almost complete agreement in the Commission that paragraph 2 was not well placed in article 44. He personally strongly supported the suggestions for its removal somewhere else in the draft.

43. Some of the difficulties which had arisen were due to article 44 having been placed in part III (Miscellaneous clauses) instead of in part II (Facilities, privileges and immunities), where it properly belonged.

44. He suggested that article 44 should be referred to the Drafting Committee for consideration in the light of the discussion.

*It was so agreed.*¹

ARTICLE 17 (General facilities) [22]

45. *Article 17* [22]
General facilities

The receiving State shall accord to the special mission full facilities for the performance of its functions, having regard to the nature and task of the special mission.

46. The CHAIRMAN invited the Commission to consider article 17, the Special Rapporteur's proposals for which were contained in paragraph 7 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.

47. Mr. BARTOŠ, Special Rapporteur, said he wished first to make a few general remarks about the facilities, immunities and privileges dealt with in part II of the draft, to which he had also referred in paragraphs 1-18 of his report (A/CN.4/194/Add.2).

48. The problem was to decide on what principle the system of facilities, privileges and immunities should be based. In his first report on special missions² he had advocated the functional theory, which was the basis for the Convention on the Privileges and Immunities of the United Nations³ and of the Vienna Convention on Diplomatic Relations. According to that theory, privileges and immunities attached to the function and not to the individual, and the recipients enjoyed them when acting in their official capacity.

49. Some members of the Commission had thought that the system of privileges and immunities should apply not

¹ For resumption of discussion, see 938th meeting, paras. 59-65.

² *Yearbook of the International Law Commission, 1964*, vol. II, document A/CN.4/166.

³ United Nations, *Treaty Series*, vol. I, p. 17.

only to the head and members of a special mission but also to its administrative and technical staff, and the majority had decided accordingly. But States were reluctant to extend the application of the system to too many persons, and members of the Commission had expressed the same concern. The General Assembly tended to treat special missions like permanent diplomatic missions in that respect. Consideration had also been given to dividing special missions into categories, such as technical, political and high-level, with privileges and immunities commensurate with the nature and importance of the mission. It had also been suggested that the relevant factor was the composition of the special mission, and that privileges and immunities should be granted to certain of its members only. His own observations on the subject were to be found in his fourth report (A/CN.4/194/Add.2).

50. The written comments of the Swedish Government had repeated the argument put forward by its delegation in the Sixth Committee of the General Assembly, where the Swedish representative had drawn attention to the problem of granting immunities and privileges to a great number of people; he had also pointed out that, while the great quantity of special missions "makes a codification desirable, it also makes it difficult, for immunities and privileges granted to a few may not meet insurmountable obstacles, but the same immunities and privileges given to many may cause a real problem".⁴

51. The Nigerian representative thought that privileges and immunities should be granted to members of special missions on the basis of their functions and not of their personal status.⁵

52. The Netherlands Government or its delegation had repeatedly stressed how difficult it would be for national parliaments to ratify a convention which provided for too extensive a system of privileges and immunities. He did not think anyone would dispute the need to keep the system within reasonable limits, but the question was how to define those limits.

53. Before embarking on its examination of the articles constituting part II of the draft, the Commission should decide in general terms whether it intended to alter its view, which was based on the three principles that facilities, privileges and immunities were accorded *ex jure* and not by virtue of the comity of nations; that States were bound to apply the criteria of the Vienna Convention on Diplomatic Relations and grant benefits accordingly; and that it was for the sending State and the receiving State to decide on the extent to which they wished, in the interests of their relationship, to grant privileges and immunities to special missions. The set of rules laid down on the subject constituted a sort of model system from which States could derogate, although in his opinion there were some rules which they must always observe, such as for example those concerning the personal freedom of members of special missions.

54. The point was, should the Commission change its view or should it take into consideration certain comments such as those put forward by the Canadian Government, which thought that "the grant of such privileges and immunities should be strictly controlled by considerations of functional necessity and should be limited to the minimum required to ensure the efficient discharge of the duties entrusted to special missions", or by the Greek Government, whose view was that the privileges and immunities granted should be "kept within the limits strictly necessary for the work of the mission."

55. Mr. TAMMES said that his answer to the Special Rapporteur's question, directed particularly to new members of the Commission, as to whether the Commission should opt for the representative or the functional principle, was that he had no hesitation in choosing the latter as a basis for the provisions on privileges and immunities. Modern international law favoured the functional theory, though not in a restrictive sense; in fact, as had been pointed out at the seventeenth session, certain types of special missions such as high-level or frontier demarcation missions might enjoy wider facilities than those granted to permanent missions when that was necessary for the performance of their functions.

56. When submitting its final draft on diplomatic intercourse and immunities, the Commission had indicated that there were three theories that had influenced the development of privileges and immunities. The first was the "extra-territoriality" theory, which personally he considered to be obsolete; the second was the "representative character" theory, and the third, which appeared to be gaining ground in modern times, was the "functional necessity" theory, which justified privileges and immunities as being necessary to enable the mission to perform its functions.⁶

57. As it had stated in its report to the General Assembly, the Commission had been guided by the third theory in solving problems on which practice gave no clear pointers, while also bearing in mind the representative character of the head of the mission and of the mission itself. The considerations set out in that report were even more applicable to the present draft. Practice was developing rapidly but there was no special customary law that could serve as a guide.

58. He had concluded from the Commission's report on the first part of its seventeenth session⁷ that it favoured the functional theory, in which case the principle should be clearly expressed in article 17.

59. The final phrase in the present text of article 17, reading "having regard to the nature and task of the special mission", was not satisfactory and might be read as meaning that missions of different kinds should be granted facilities of varying scope, but that matter was dealt with in article 17 *ter*. The text should be modified on some such lines as "The receiving State shall accord to the special mission such facilities as may be necessary, having regard

⁴ See *Official Records of the General Assembly, Twentieth Session, Sixth Committee*, 844th meeting, para. 10, and the comments by the Swedish Government in document A/CN.4/188.

⁵ *Official Records of the General Assembly, Twentieth Session, Sixth Committee*, 847th meeting, para. 17.

⁶ *Yearbook of the International Law Commission, 1958*, vol. II, p. 95.

⁷ *Yearbook of the International Law Commission, 1965*, vol. II, document A/6009.

to its nature and task". Such wording would be consistent with Article 105 (2) of the Charter.

60. Mr. ALBÓNICO said that the legal basis of privileges and immunities was an important matter and affected the scope and content of the articles under discussion. The modern functional principle should be followed, though some exceptions might occur in practice in the form of concessions to the representative principle.

61. It was important to note that nine Governments, three in the Sixth Committee and six in their written comments, had shown themselves so reluctant to accord privileges and immunities to special missions that there was some ground for doubting whether they would sign the convention.

62. He was particularly anxious to state his views because he would not be present when the Commission came to approve the articles finally. In his opinion, full privileges and immunities should only be granted to ceremonial special missions headed by Heads of State, Heads of Government or Ministers for Foreign Affairs or to high-level political missions even when not led by persons in that category. They should only be given to the head of the mission or to members of the diplomatic staff of the next lower rank who were indispensable to the performance of the missions's functions and only in respect of official acts. Thus he entirely rejected the line taken by the Vienna Convention on Diplomatic Relations.

63. He fully supported the development of special missions and the grant to them of all the safeguards and privileges they required for the successful discharge of their important functions, which would be to the advantage of great Powers and developing States alike. But it was important to facilitate the work of those responsible for social order in the receiving State, such as judges, who had to take into consideration not only the privileges and immunities of permanent missions, but also those of international officials, which were already numerous, and of persons working under some special agreement between the sending and receiving States. International relations would benefit from the provision of a minimum standard of privileges and immunities, and an approach on those lines would increase the chances of the convention's being accepted by governments.

64. Mr. CASTRÉN said he favoured the functional theory, which had been the basis for the Vienna Convention on Diplomatic Relations and accorded with modern tenets of international law. However, since special missions could differ in nature, composition and task, it seemed necessary to supplement the functional theory with the theory of representation, at least with respect to high-level special missions or those performing important tasks.

65. Although the Commission had generally tried to model its draft articles concerning privileges and immunities on the provisions of the two Vienna Conventions, particularly the Convention on Diplomatic Relations, it was not always possible to do so. The Commission could depart from them either to restrict or to extend the scope of privileges and immunities.

66. Several Governments seemed to be advocating a restrictive approach; in his opinion, the Commission

should take account of their comments and amend the articles at the second reading, but only to the extent compatible with the requirements of the functional theory and the theory of representation, and taking due care that special missions were not hampered in the proper performance of their duties.

67. The Commission should also consider the possibility of restricting the scope of the privileges and immunities granted to certain kinds of special mission, as well as the classes of person accorded the benefit of such privileges and immunities. The problem would be of particular importance where there was a peremptory rule, as the Swedish Government had pointed out.

68. Mr. JIMÉNEZ de ARÉCHAGA said that, of the two alternatives of granting full diplomatic privileges and immunities including immunity for personal acts, or of granting privileges and immunities only in respect of official acts necessary for the exercise of official functions on the lines of the provisions of Article 105 (2) of the Charter, Governments clearly favoured the latter. However, difficulty would arise with high-level missions if Heads of State or important ministers were not accorded the same privileges and immunities as an ambassador. One solution would be to provide the right degree of flexibility in the articles allowing States to reach agreement in advance on the scope of the privileges and immunities to be accorded. In the absence of prior agreement, the rules laid down in the convention would apply. Possibly the wise course would be to provide for minimum privileges and immunities required for the performance of the functions of the special mission, in the absence of agreement to the contrary between the States concerned. That would not close the door to the possibility of full privileges and immunities for high-level missions, including immunities in respect of personal acts.

69. Mr. AGO said that, in general, he agreed with the Special Rapporteur that the Commission's main pre-occupation in deciding on the scope of the privileges and immunities should be what the special mission needed in order to be able to perform its functions.

70. He nevertheless wished to remind the Commission that its task was not to decide in favour of a particular theory but to formulate concrete rules; those rules should be established in the light of State practice, where it existed, and of whatever progressive development might require. In other words, the Commission should adopt a pragmatic attitude and leave it to future publicists to decide which theory formed the basis of any particular article.

71. Some Governments had shown themselves inclined to limit the system of privileges and immunities; he himself agreed that the Commission should exercise a degree of caution. It had to avoid going too far in either direction; but in his view it was perhaps inadvisable to draw too rigid a distinction between the needs of a special mission and those of a permanent mission. In any case, the question as to whether privileges and immunities should be granted to members of special missions only in respect of acts performed by them in the exercise of their duties or of a wider nature should be examined on its merits;

the Commission should not adopt an *a priori* attitude based on one or the other theory.

72. Mr. RAMANGASOAVINA said that the Special Rapporteur had rightly drawn the Commission's attention to the advantages of the functional theory, for privileges and immunities attached to the function and not to the individual, except in the circumstances referred to by Mr. Castrén.

73. It was easy to understand why Governments tended to restrict the privileges and immunities granted to members of special missions; the Commission had therefore to aim at establishing the minimum of privileges and immunities to be regarded as mandatory. It was a delicate problem, because the receiving State could not be left to decide on its own to what extent it would apply the system provided for in the convention; members of special missions might find themselves in a position of uncertainty, which would hardly facilitate the performance of their task. The Commission should therefore work out a fairly flexible formula requiring the receiving State to guarantee certain privileges and immunities to special missions.

74. Mr. USHAKOV said his opinion was, as the Special Rapporteur had stated in the draft preamble (A/CN.4/194/Add.2), that "the status, privileges and immunities to be conferred on special missions are not accorded for the benefit of persons but for the purpose of assuring the effective exercise of the functions of special missions in so far as they represent States". The Commission's decision on the scope of the system of privileges and immunities should be deferred until it had settled the drafts of the various articles and came to consider the preamble.

The meeting rose at 1.5 p.m.

913th MEETING

Friday, 2 June 1967, at 10 a.m.

Chairman: Sir Humphrey WALDOCK

Present: Mr. Ago, Mr. Albónico, Mr. Bartoš, Mr. Castañeda, Mr. Castrén, Mr. Eustathiades, Mr. Ignacio-Pinto, Mr. Jiménez de Aréchaga, Mr. Kearney, Mr. Nagendra Singh, Mr. Ramangasoavina, Mr. Reuter, Mr. Tammes, 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 17 (General facilities) [22] (continued)¹

1. The CHAIRMAN invited the Commission to continue its consideration of article 17. He reminded members

that it was not intended to be a general article on privileges and immunities but was of a limited character.

2. Mr. YASSEEN said he did not think that the Commission had to concern itself with either the basis or the nature of the obligation to grant facilities, privileges and immunities. Once the Commission had decided to propose drafting a general convention on special missions, the basis of the obligation was going to be found in legal rules, the source of which was an international convention. The Commission, however, should decide what theory it intended to be guided by in its investigations, for it was the duty of the legislator to define clearly the theory on which he relied in formulating legal rules.

3. He would again like to argue in favour of the functional theory, for in his opinion what justified facilities, privileges and immunities and determined their scope was function. If it adopted that principle, the Commission would be able to decide what facilities the special mission needed in order to carry out its task in the conditions and atmosphere most favourable to good international relations. The representative theory should not be completely rejected, of course, since it must be applied to high-level special missions, particularly to those led by a Head of State. In the latter case, moreover, the privileges and immunities granted to such an important personage were not alien to his function.

4. Mr. REUTER said he hoped that the Commission could now get on with the drafting of the articles without spending any more time on the distinction between the functional theory and the representative theory which, as had just been said, must be based on presumption.

5. Mr. NAGENDRA SINGH said that the practical and administrative problems raised by the article were as important as the legal ones. The number of special missions and of persons composing them was so great that the scope of the privileges and immunities to be granted them must be limited. He agreed with the functional principle and that the privileges and immunities should be restricted to those required for the performance of the mission's task. The important matter of high-level missions led by Heads of States was covered in article 17 *quater*. That type of mission would have to be covered by a special agreement between the States concerned.

6. Mr. USTOR said he favoured a pragmatic approach. He considered that the functional necessity theory was the most widely accepted, but it failed to indicate when the "necessity" began or ended. Of course the representative character theory could not be entirely set aside, particularly where high-level missions were concerned.

7. Mr. KEARNEY said that, after listening to the arguments of his colleagues, he had come to the conclusion that he was a representational functionalist rather than a functional representationist.

8. The CHAIRMAN, speaking as a member of the Commission, said that the conflict between the two theories should not be exaggerated. It was more a question of emphasis than of choice. The whole basis of privileges and immunities was the representative character of the persons concerned and, on the other hand, even the repre-

¹ See 912th meeting, para. 45.