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Topic:
Special missions

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916th MEETING

Wednesday, 7 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. Ushakov, Mr. Ustor, Mr. Yasseen.

Special Missions

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

(continued)

[Item I of the agenda]

ARTICLE 24 (Personal inviolability) [29]

1. *Article 24* [29]

Personal inviolability

The person of the head and members of the special mission and of the members of its diplomatic staff shall be inviolable. They shall not be liable to any form of arrest or detention. The receiving State shall treat them with due respect and shall take all appropriate steps to prevent any attack on their person, freedom or dignity.

2. The CHAIRMAN invited the Commission to consider article 24, the Special Rapporteur's proposals for which were contained in paragraph 14 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.

3. Mr. BARTOŠ, Special Rapporteur, said that the article reproduced *mutatis mutandis* article 29 of the Vienna Convention on Diplomatic Relations. It was one of the articles in the draft which raised the question of the conditions necessary for the functioning of the special mission.

4. The Belgian Government considered that the personal inviolability granted to members of special missions should be limited to acts performed in the exercise of their functions. The Netherlands Government was of the same opinion, but proposed the addition of a paragraph stipulating that, at the request of the sending State, and provided the receiving State did not object, personal inviolability should be granted for all acts. The same Government had also proposed the addition, after article 24, of a new article based on articles 40, 41 and 42 of the Vienna Convention on Consular Relations.

5. The United Kingdom Government, in its comments on articles 24, 25 and 26 of the draft, suggested that inviolability and immunity should be restricted to official acts and official documents.

6. He also drew the Commission's attention to the comments by the Canadian Government (A/CN.4/193).

7. The Commission should take a decision on the question whether to maintain in the article the principle of the general inviolability of persons, as embodied in the Vienna

Convention on Diplomatic Relations. He himself was in favour of retaining that principle, because it was difficult to distinguish between acts which were performed in the exercise of official functions and acts which were not. But the inviolability of persons, that was to say, the fact that they could not be arrested or detained, did not necessarily mean that they were not subject to the laws and jurisdiction of the receiving State. The question of immunity from jurisdiction was independent of that of inviolability and would be discussed in connexion with article 26.

8. He would leave aside for the time being the question of extending inviolability to the whole staff of the special mission, which had been raised by the Government of Israel (A/CN.4/188).

9. Mr. AGO said that the Commission should not amend article 24 on a point which, in his opinion, was essential. The needs of a special mission, with respect to personal inviolability, were exactly the same as those of a diplomatic mission. Quite apart from any representational or functional theory, a special mission certainly could not be assured of freedom to perform its task if its members were in danger of arrest or detention pending trial at any time. They must be protected from that danger even in respect of acts performed in their private capacity.

10. Mr. TAMMES said that both the remarks of previous speakers and the written comments of the United Kingdom Government called for certain observations which went beyond article 24. The United Kingdom Government had pointed out that the scale of immunity and inviolability prescribed in articles 24, 25 and 26 appeared "excessive, and inappropriate to the character and functions of special missions" and had expressed a preference for "a restriction of immunity and inviolability to official documents and official acts".

11. It was significant that almost all the Governments which had expressed their views, either in written comments or in statements in the Sixth Committee of the General Assembly, had adopted a similar approach. Some of them had indicated a general preference for the functional principle; others had made specific proposals to introduce restrictions or qualifications in some of the articles on privileges and immunities.

12. The Commission itself had discussed that approach in connexion with article 17 and had decided to give the provisions of that article a limited effect by restricting them to the question of facilities.¹ Since the only facility for which provision was made in the draft articles was that of accommodation, in article 18, the effect of article 17 was very limited indeed.

13. In the case of other articles, however, the general tendency in the Commission had been to adhere to the basic proposition that special missions should be equated, as far as practicable, with permanent missions. Personally, he had been disturbed to note that tendency, which differed markedly from the trend apparent in government comments. It was difficult to see how governments could be made to change their position, unless the Commission

¹ For discussion of article 17, see 912th meeting, paras. 45-74, and 913th meeting, paras. 1-40.

could demonstrate that they were mistaken on legal grounds.

14. It was of course easier to apply a system of full inviolability and immunity than a system based on the functional principle. That principle raised the question who was to have the last word in the qualification of a situation. It would be necessary in each specific case to determine whether a particular act was necessary for the performance of the functions of a special mission, and that would have to be decided in the last resort by the parties themselves, acting in good faith. In most cases, it would be the views of the receiving State, as the territorial sovereign with power to terminate the special mission, which would prevail. If the Commission could devise specific rules to avoid leaving the matter entirely to the judgement of the receiving State, it would be performing a great service to governments.

15. Mr. REUTER said he endorsed Mr. Ago's comments. No form of interference with the physical liberty of members of a special mission could be tolerated. The distinction which some writers sought to draw between acts performed in the exercise of functions and other acts raised an insoluble problem. For purely practical reasons, it must be assumed that the members of a special mission were engaged exclusively in the performance of their task. It would be unthinkable that the receiving State should have the right, on the basis of more or less arbitrary evidence and very fragile criteria of time and place, to arrest a person who had come for the sole purpose of negotiating on behalf of the sending State.

16. The question whether a person was acting as the representative of a State arose in several branches of international law, in particular, in that of State responsibility. International law recognized that all acts by armed forces engaged the responsibility of the State to which they belonged.

17. The Commission would not contribute to the solution of the problems which might arise by proposing that personal inviolability be restricted to acts performed in the exercise of official functions. If the receiving State considered that it had cause for complaint concerning acts by a member of a special mission, it could ask the sending State to recall him.

18. Mr. NAGENDRA SINGH said that the problem would be simple if all special missions were of the same category. In fact, every special mission was a category in itself.

19. For a special mission which was political in character, general inviolability for its members was undoubtedly necessary. For special missions of a technical, economic, cultural or social character, he would be inclined to agree with the United Kingdom Government's view that their needs were adequately served if inviolability were to be restricted to official documents and official acts.

20. Since, however, it was impossible to make provision for each type of special mission separately, he was driven to the conclusion that article 24 must remain in its present form and he therefore agreed with the Special Rapporteur's proposals for the article. He would suggest, however, that the first sentence be shortened. The Special

Rapporteur had already proposed the deletion of the words "head and" but the words "and of the members of its diplomatic staff" should also be dropped as redundant, since the definition of "members of the special mission" should include members of the diplomatic staff, as was the case in article 1(b) and (c) of the Vienna Convention on Diplomatic Relations. The sentence would then read: "The person of the members of the special mission shall be inviolable".

21. Mr. CASTRÉN said he accepted article 24 as drafted. While he understood the concern expressed by Mr. Tammes and the Governments which had criticized the article, he did not think that it should be amended. Moreover, several Governments had approved of the draft.

22. As Mr. Nagendra Singh had pointed out, the difficulty was due to the fact that special missions differed very widely and it was not possible to divide them into categories and formulate rules for each category. Consequently, he saw no other solution than to propose a residuary rule, a standard applicable to all special missions—perhaps a higher standard than was required for some of them—and to authorize States to conclude special agreements to apply a stricter rule to some special missions of a technical character.

23. Mr. JIMÉNEZ de ARÉCHAGA said that, as he understood it, the intention of the Commission was to formulate a set of average rules applicable to all special missions, and to allow for the possibility of granting more extensive privileges to high-level missions.

24. The provisions of article 24 did not represent a standard suitable for all special missions, but rather an extensive measure of inviolability more suitable for high-level missions.

25. He supported the idea of confining personal inviolability to official acts. A wider provision on inviolability would deter governments from adopting the draft articles. Governments would have to obtain the consent of their parliaments for the approval of the draft articles, and there was a general resistance in national parliaments to the granting of privileges and immunities to broad categories of persons. In the United Kingdom Parliament there had been considerable opposition to granting certain privileges and immunities to international officials, even though those privileges were limited to official acts.

26. The lack of homogeneity of special missions constituted an argument in favour of average, or limited, privileges rather than of the extreme privileges proposed by the Special Rapporteur. The Commission should adopt a flexible provision along the lines proposed by the Netherlands Government and incorporated in article 17 ter.

27. Mr. KEARNEY said that he was in full agreement with the previous speaker. When the Commission had discussed the choice between the functional and the representational approach, the majority of members had expressed support for the functional principle. Articles 24, 25 and 26 provided the real test for the application of that principle. The present discussion, however, had revealed that certain members who had previously expressed support for the functional view now adopted an approach

which equated a special mission with a permanent mission of a representative character.

28. Full personal inviolability was essential to members of a permanent mission because they had to remain in the country in order to maintain relations with the receiving State. Members of a special mission, on the other hand, were in the receiving State merely to perform a particular task for a limited period of time; if there were no special mission, the tasks performed by it would normally be carried out by the permanent mission.

29. There should be no difficulty in applying a rule which limited personal inviolability to acts performed in exercise of a mission's functions. He had heard of few cases in which a special mission had been prevented from carrying out its task because of the absence of absolute personal inviolability for its members. That was precisely the situation at present: there were in many countries large numbers of special missions carrying out their duties satisfactorily without the special requirements embodied in article 24 and the following articles. He for one could not accept the view that it was essential to grant extreme privileges and immunities on the ground that the absence of such extreme privileges might give the receiving State an opportunity to bring pressure to bear on the special mission. Naturally, a special mission of a representational character would require all manner of privileges and immunities; otherwise, it would not be able to perform its representative function.

30. For those reasons, he supported the suggestion of the United Kingdom Government to adopt as the standard rule a limitation of personal inviolability to official acts, and to adjust the position for missions of an especially high level.

31. Mr. ALBÓNICO said he must repeat his view that it was essential to adopt a restrictive criterion when granting privileges and immunities to members of special missions. A realistic approach of that kind would promote the codification of international law.

32. The measure of privileges and immunities to be extended should depend on the composition and the functions of the special mission as well as on the nature of the acts performed by the mission. In view of the diversity of special missions in those three respects it would be very difficult to lay down a general rule applicable to all of them.

33. He accordingly favoured laying down in the draft articles a minimum standard of privileges and immunities for all special missions, while leaving the door open for the granting of full diplomatic privileges to certain types of mission. In the case of personal inviolability, the appropriate minimum standard was inviolability limited to official acts.

34. He would support the retention of article 24, subject to the limitation of inviolability to official acts and to the addition of a proviso on the possibility of specific agreements.

35. Mr. RAMANGASOAVINA said that he was in favour of maintaining article 24 as it stood. It was true that, where privileges and immunities were concerned, the

Commission had considered it necessary in certain cases to distinguish between special missions and diplomatic missions. But it was very difficult to say whether a person was acting in the exercise of his official functions or privately. There was a risk that the Commission would achieve nothing if it tried to establish such a differentiation.

36. Admittedly, it was proposed in article 17 *ter* to distinguish between different categories of special missions, and article 27 provided that the sending State could waive certain privileges and immunities. Nevertheless, in view of the wide variety of special missions, it seemed to him to be difficult to decide what privileges and immunities should be granted to a particular category of special missions. Of course, States were always at liberty to settle the question of privileges and immunities in whatever way they liked by means of an agreement; but, from the psychological point of view, it had to be remembered that members of permanent missions and members of special missions often had to deal with the same matter together, and that it would then seem odd that some persons should enjoy certain privileges and immunities whereas others did not.

37. If, on the basis of the functional theory, the Commission tried to lay down a rule restricting the privileges and immunities of special missions, that rule should follow directly after the definition of a special mission, in order to prevent any comparison with permanent missions.

38. Mr. USHAKOV said that he was in favour of leaving article 24 unchanged, because it reflected what was generally accepted practice in international affairs. The rule contained in the article was, for instance, already part of Soviet law.

39. In certain special cases, it would always be open to the States concerned to come to an agreement that a mission sent by one of those States to the other was not a "special mission" as defined in the future convention.

40. Mr. USTOR said that he shared the view that personal inviolability was necessary for persons who acted for the sending State in the territory of the receiving State. The personal inviolability specified in article 24 represented not a major privilege but a standard one. Personal inviolability meant freedom from arrest or detention; it did not affect the question of jurisdiction, a matter which was dealt with in article 26, on immunity from jurisdiction. Acceptance of article 24 did not preclude divergences of views among members over article 26.

41. Article 24 raised the important question of the relationship between personal inviolability and notification. In connexion with the inviolability of the premises of the special mission, the Commission had agreed on the duty of the sending State to identify the premises which would enjoy inviolability. That point would no doubt be considered by the Drafting Committee when formulating article 8. A similar problem arose with regard to the personal inviolability of the members of the special mission, and he would like to know whether a receiving State which failed to observe the personal inviolability of a member of a special mission could invoke as an excuse the fact that it had not been duly notified of the composition of the special mission.

42. Mr. BARTOŠ, Special Rapporteur, said that, before the last war, members of special or ordinary missions travelled on *laissez-passer* and many mistakes were thereby avoided. In modern times, that requirement had practically disappeared and even visas had been abolished between certain States.

43. Mr. Ustor's question raised a serious problem. Mr. Kearney, like other members of the Commission and some Governments, considered that a special mission should give prior notice to the State on whose territory it intended to stay or through which it intended to travel. But even if that precaution were taken, mistakes could be made with regard to the identity of members of the mission. It was therefore essential, in his view, that members of special missions should carry a diplomatic passport or some other document attesting to their rank and profession and bearing the visa of the embassy of the receiving State or of the State of transit.

44. That was clearly a question which the Commission had not considered with sufficient thoroughness.

45. The CHAIRMAN, speaking as a member of the Commission, said that he was inclined to share the views expressed by Mr. Jiménez de Aréchaga. The problem would have been easier if the Commission had made some progress on the subject of high-level missions before embarking on a discussion of articles 24, 25 and 26. The Commission would undoubtedly provide for full diplomatic privileges and for a broad category of high-level missions and in the case of a mission headed by a Head of State, the privileges would be even more extensive.

46. In article 24, the intention was to deal with the common or day-to-day special mission, whether of a technical or of a political character. For such missions, the functional approach should be adopted.

47. He was disturbed at the suggestion by some members that the functional principle was unworkable. The Commission could not possibly take that view because that principle was being applied daily by international organizations with respect to the privileges and immunities of their officials. There was therefore no reason for not adopting the functional principle in the present context, although it could of course lead to difficulties in marginal cases.

48. Instead of the system of full personal inviolability, which had been taken from article 29 of the 1961 Vienna Convention on Diplomatic Relations, the Commission could adopt a more limited system, such as that embodied in article 41, paragraph 1, of the 1963 Vienna Convention on Consular Relations, which specified that "Consular officers shall not be liable to arrest or detention pending trial, except in the case of a grave crime and pursuant to a decision by the competent judicial authority".

49. If the Commission were to provide for full diplomatic privileges and immunities for the average special mission, he feared that the draft articles would not prove acceptable to Governments. He therefore hoped that a more flexible rule would be adopted, which would attract the consent of a large number of States.

50. Speaking as Chairman, however, he said that he

could only note that the general trend of the Commission was in favour of adopting the diplomatic standard.

51. Mr. JIMÉNEZ de ARÉCHAGA pointed out that some members who favoured full diplomatic privileges had been thinking in terms of high-level missions. He therefore urged that the Drafting Committee be given a broad mandate, in the hope that it would formulate article 24 in flexible terms that would attract general support.

52. Mr. REUTER said that he wished first of all to make it clear that, in regulating the question of personal inviolability now before it, the Commission was not deciding questions of immunity, which would be settled later.

53. It was impossible to rely on the practice of the international organizations; when the question arose of suspending the inviolability of a member of a mission, the international organization which had sent the mission was always consulted. The problem was quite different in a situation where, for instance, a territorial State asserted after a motor car accident that it was never one of the functions of a special mission to cause traffic accidents and arrested the person responsible. As far as personal inviolability properly so called was concerned—as distinct from court proceedings—it seemed to him inadmissible that the receiving State should have the right unilaterally to deprive the person charged of his liberty. It was permissible to contend that the receiving State should be given the sovereign right to decide unilaterally whether an act formed part of the functions of the mission; that was an attitude that it was possible to take. But the Commission had to choose: either the receiving State had the right to take a unilateral decision or it did not. The Commission could only say yes or no; there was no possibility of compromise.

54. Mr. BARTOŠ, Special Rapporteur, said that he too considered it necessary to establish a very clear distinction between the question of personal inviolability and the question of immunity from jurisdiction in certain special cases.

55. He attached importance to the principle of personal inviolability and to the duty of the receiving State or the State of transit to respect it.

56. With regard to the question of immunity, he would refer members of the Commission to articles 17 bis and ter, consideration of which had been postponed.² Under article 17 bis, States were at liberty to waive certain privileges, facilities and immunities by mutual agreement. It was naturally easier to grant a derogation if the States concerned trusted each other. The principle of immunity from jurisdiction would then be respected, unless the sending State had waived it by agreement; such a waiver could be made either before or after the offence had been committed.

57. Under several frontier conventions, frontier officials such as sanitary inspectors, veterinary surgeons, parasitologists, post office and railway officials and so forth were granted functional immunity but not immunity from jurisdiction. Legal annals showed that cases where such officials had been arrested in the absence of a waiver of immu-

² For discussion of these articles, see 925th meeting, paras. 31-53.

nity from jurisdiction had sometimes led to the closing of frontiers and to a serious crisis in the relations between the frontier States.

58. In short, personal inviolability was a standard rule which had been included in the Vienna Conventions. In his view, article 24 could be retained as it stood and sent to the Drafting Committee. Later, when the Commission came to consider article 26, it could decide whether the provisions on immunity from jurisdiction should be revised with a view to making them more flexible or to altering some of the details of their application.

59. The CHAIRMAN said he noted that there was a clear majority in the Commission in favour of adopting the system taken from article 29 of the 1961 Vienna Convention on Diplomatic Relations.

60. If there were no objection, he would consider that the Commission agreed to refer article 24 to the Drafting Committee for consideration in the light of the discussion, as proposed by the Special Rapporteur.

It was so agreed.³

ARTICLE 25 (Inviolability of the private accommodation) [30]

61. Article 25 [30] *Inviolability of the private accommodation*

1. The private accommodation of the head and members of the special mission and of the members of its diplomatic staff shall enjoy the same inviolability and protection as the premises of the special mission.
2. The papers, correspondence and property of the persons referred to in paragraph 1 shall likewise enjoy inviolability.

62. The CHAIRMAN invited the Commission to consider article 25, the Special Rapporteur's proposals for which were contained in paragraph 11 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.

63. Mr. BARTOŠ, Special Rapporteur, said that article 25 reproduced *mutatis mutandis* article 30 of the Vienna Convention on Diplomatic Relations. He recommended that the Commission adopt the same formula as in the introductory article and replace the expression "of the head and members of the special mission" by the expression "of the members of the special mission".

64. Article 25 had been the subject of comments by Governments and the Belgian Government had proposed the addition at the beginning of paragraph 2 of the words, "Except as provided in article 26, paragraph 4...", since it considered that the members of a special mission ought not to enjoy a more extensive inviolability than that granted to diplomatic agents by the 1961 Vienna Convention.

65. The United Kingdom Government, in its comments on articles 24, 25 and 26, had expressed the view that the scope of the inviolability provided for by those articles was excessive and that in article 25 it should only apply to official documents and official acts. He did not share that

view and did not think that that proposal should be adopted.

66. The Netherlands Government had proposed the deletion of article 25, but he considered that the Commission should not abolish a guarantee as important as inviolability of the private accommodation, papers and correspondence of members of the special mission, for that inviolability was necessary for the performance of the special mission's task.

67. According to the Canadian Government the scope of article 25 was "somewhat excessive"; the provisions of article 24 seemed to it to be sufficient so far as inviolability was concerned. If article 25 was to be retained, a reservation should be added to it similar to one contained in article 31, paragraph 2, of the Vienna Convention on Consular Relations, which had been referred to by the Canadian Government in connexion with article 19; in the Canadian Government's opinion, it did not seem possible to require the receiving State to guarantee any special protection of private accommodation which, in the case of special missions, would "usually be in hotel rooms; generally, the receiving State had no other duty than to take "reasonable precautions".

68. The Greek Government had asked that restrictions be placed on the inviolability provided for in article 25 in the case of technical or short-term missions, even if they were responsible for negotiating and signing a treaty.

69. He considered that the Commission should retain article 25, subject to any derogations which the sending State and the receiving State might decide upon by mutual agreement.

70. Mr. REUTER pointed out that, in paragraph 11 of his comments (A/CN.4/194/Add.2), the Special Rapporteur had concluded that the article should not be amended, whereas in paragraph 5 he had recommended that the Commission should adopt the amendment proposed by the Belgian Government (A/CN.4/108). In his (Mr. Reuter's) opinion, that was an interesting proposal and the Drafting Committee might perhaps find it necessary to provide for a derogation from the principle of inviolability where a final judgement had been given by a court of law.

71. Mr. BARTOŠ, Special Rapporteur, said that the Belgian Government's proposal was "to introduce, as in article 30 of the Vienna Convention on Diplomatic Relations, a proviso regarding measures of execution on property..." In his opinion, the Commission ought not to mention property in article 25, paragraph 2; it could be the subject of a separate article, as in the Vienna Convention on Diplomatic Relations.

72. Mr. KEARNEY said he supported the Special Rapporteur's suggestion concerning property.

73. That left to be decided the question whether papers and correspondence included private papers, particularly those that would fall within the exceptions set forth in article 26. In his opinion, if a member of a special mission should be subpoenaed and required to produce documents in a civil case, he would have to comply with such orders.

³ For resumption of discussion, see 931st meeting, paras. 56-58.

74. Mr. JIMÉNEZ de ARÉCHAGA said that article 24 granted extensive immunities, including immunities from criminal jurisdiction, similar to those accorded under the two Vienna Conventions. The Commission should be cautious with respect to articles 24 to 26 and lay down a moderate rule, for otherwise the draft articles might not be acceptable to States.

75. Given the special character of special missions, there was no real need for article 25, particularly for paragraph 2. The immunities of important special missions could be covered in a general article providing that the provisions of the Vienna Convention on Diplomatic Relations applied to them.

76. Mr. YASSEEN said that he could agree to the deletion of the words "and property" in paragraph 2, but he did not think that the Commission should permit the slightest exception to the rule of the inviolability of the papers and correspondence of members of the special mission and its diplomatic staff. After all, in order to determine whether the papers and correspondence were of an official or a private nature, the agent of the receiving State would have to examine them, and that itself would be an infringement of the principle of inviolability.

77. Mr. NAGENDRA SINGH said he wished to propose as a compromise solution that special missions should be divided into two categories, political and non-political, with the former receiving immunities of the kind accorded to permanent missions and the latter lesser immunities such as those accorded under the Convention on Consular Relations. That course should satisfy governments like the United Kingdom and Netherlands Governments, which were anxious to lay stress on the functional aspect of special missions.

78. There seemed to be no need for the word "private" to qualify the word "accommodation" in paragraph 1, since the accommodation was that of the special mission itself.

79. Mr. AGO said that he shared Mr. Yasseen's view; if the inviolability of papers and correspondence was not guaranteed, the special mission could not perform its task. If there were diplomatic relations between the sending State and the receiving State, the special mission and its members could, if necessary, avoid trouble by entrusting their correspondence to the permanent diplomatic mission but if there were none, the fact that the receiving State was permitted to examine the papers and correspondence itself to decide whether they were official or private could give rise to serious difficulties.

80. With regard to property, the problem was less important in the case of a special mission than in that of a permanent diplomatic mission, but for movable property, such as means of transport, it might be necessary to provide certain safeguards.

81. Mr. ALBÓNICO said that during the discussion on articles 24 and 25, there had been some confusion between the concept of inviolability and that of immunity from jurisdiction. The personal inviolability of a diplomatic agent or of a member of a special mission consisted in the absolute prohibition to touch his person or attack his

freedom and dignity. Any restraint on personal freedom under the rule of law could only be the consequence of a warrant for arrest following legal proceedings or, in exceptional cases, where there had been a flagrant offence. There could be no doubt that the head and members of the special mission enjoyed the most complete personal inviolability and accordingly there was no need to draw any distinction between official and non-official acts.

82. The problem of immunity from jurisdiction and arrest, search or seizure of documents should be dealt with in article 26 and not in article 25.

83. Mr. JIMÉNEZ de ARÉCHAGA said that the point raised by Mr. Yasseen was already covered by article 20 and article 22, paragraph 2. It would be going too far to grant immunity from jurisdiction for personal papers.

84. Mr. CASTRÉN said that he could not approve the deletion of paragraph 2, which in no way duplicated the provisions of articles 20 and 22. Article 20 provided for the inviolability of the archives and documents of the special mission and article 22 for that of its official correspondence, whereas article 25, paragraph 2, referred to the inviolability of the papers and correspondence of members of the special mission and its diplomatic staff.

85. The Commission should retain article 25, with the amendments recommended by the Special Rapporteur.

86. Mr. USHAKOV said that he too was in favour of keeping article 25, and in particular paragraph 2, for the reasons stated by Mr. Castrén.

87. Mr. REUTER said that under French law, public documents were not allowed to fall into the hands of private persons but became the property of the National Archives. As Mr. Yasseen had said, the difficulty was to determine whether a document was official or private, which presupposed that it would have to be examined and that meant, in the case of special missions, that the inviolability of the documents and correspondence of members of that mission would necessarily be infringed.

88. In the last analysis, the problem was a jurisdictional one and the Commission seemed to be divided into two camps, one preferring the jurisdiction of the sending State and the other that of the receiving State. Perhaps, in a final article, the Commission could include a provision to the effect that the sending State could waive inviolability. It would be dangerous, however, to admit exceptions to the principle of inviolability since exceptions would render the concept nugatory.

89. Mr. BARTOŠ, Special Rapporteur, said that in international law the concept of extra-territoriality had been replaced by the concept of inviolability, which was to be found in the Vienna Conventions of 1961 and 1963.

90. Article 24 of the Convention on Diplomatic Relations provided for the inviolability of the archives and documents of the mission, whereas article 30 provided for the inviolability of the diplomatic agent's papers and correspondence. That distinction was particularly important in the case of special missions, whose members did not enjoy the guarantees conferred by permanent residence

and frequently had to carry their papers and correspondence themselves. He could illustrate that point from his own experience. On his way to the International Court of Justice at The Hague and carrying important documents, he had been ordered by a frontier official to provide those documents for inspection and only by a determined resistance and his invocation of the agreement between the Netherlands Government and the International Court of Justice had he succeeded in avoiding inspection. That example proved that the inviolability of the papers and correspondence of members of special missions must be absolute if the mission was to be able to perform its task.

91. As several members had observed, it was extremely difficult to determine whether correspondence was official or private; letters addressed to members of the special mission or received by them often concerned both their personal activities and their functions as members of the mission.

92. With regard to the property of members of the special mission, the Commission could either delete the reference to it in paragraph 2, or insert at the beginning of the paragraph the proviso suggested by the Belgian Government, or even make it the subject of a new article. He preferred not to make any recommendation.

93. Mr. JIMÉNEZ de ARÉCHAGA said that the incident described by the Special Rapporteur confirmed the view propounded by himself and other members of the Commission, that special missions in general should be accorded the privileges and immunities necessary for the exercise of their functions. The protection which the Special Rapporteur had obtained for the official papers he was carrying derived from Article 42, paragraph 3, of the Statute of the International Court of Justice, which was based on the functional theory and referred to "the privileges and immunities necessary to the independent exercise of their duties" enjoyed by "agents, counsel and advocates of parties before the Court".

94. It was clear from the Commission's comments on its drafts concerning diplomatic and consular relations that inviolability and immunity were two different things. In the system established by the Vienna Conventions, inviolability was the wider concept and included immunity.

95. The CHAIRMAN, speaking as a member of the Commission, said that he had no difficulty in accepting article 25, since, if it were amended to conform to the Vienna Convention on Consular Relations, it should be adequate. He agreed with Mr. Yasseen that it was impossible to distinguish between private and official correspondence without running counter to the principle of inviolability.

96. In his opinion, article 24 went too far and ought to have been modelled on the corresponding article in the Vienna Convention on Consular Relations. The exception to immunity from jurisdiction provided for in that Convention in respect of crimes should be applied to special missions. A member who had committed a crime would in any event cease to be useful to the mission.

97. He suggested that article 25 be referred to the Drafting Committee which should consider whether or not

the question of inviolability of property should be dealt with in a separate article.

It was so agreed⁴

The meeting rose at 12.55 p.m.

⁴ For resumption of discussion, see 931st meeting, paras. 59-63.

917th MEETING

Thursday, 8 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. 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 26 (Immunity from jurisdiction) [31]

1. *Article 26* [31]
Immunity from jurisdiction

1. The head and members of the special mission and the members of its diplomatic staff shall enjoy immunity from the criminal jurisdiction of the receiving State.

2. Unless otherwise agreed, they shall also enjoy immunity from the civil and administrative jurisdiction of the receiving State, except in the case of:

(a) A real action relating to private immovable property situated in the territory of the receiving State, unless the head or member of the special mission or the member of its diplomatic staff holds it on behalf of the sending State for the purposes of the mission;

(b) An action relating to succession in which the person referred to in sub-paragraph (a) is involved as executor, administrator, heir or legatee as a private person and not on behalf of the sending State;

(c) An action relating to any professional or commercial activity exercised by the person referred to in sub-paragraph (a) in the receiving State outside his official functions.

3. The head and members of the special mission and the members of its diplomatic staff are not obliged to give evidence as witnesses.

4. No measures of execution may be taken in respect of the head or of a member of the special mission or of a member of its diplomatic staff except in the cases coming under sub-paragraphs (a), (b) and (c) of paragraph 2 of this article, and provided that the measures concerned can be taken without infringing the inviolability of his person or of his residence.

5. The immunity of the head and members of the special mission and of the members of its diplomatic staff from the jurisdiction of the receiving State does not exempt them from the jurisdiction of the sending State.