Summary record of the 921st meeting

Topic:
Special missions

Extract from the Yearbook of the International Law Commission:
1967, vol. I
Mr. Ushakov. He was also prepared to include in article 36 the clause concerning nationals of the receiving State and persons permanently resident in that State.

73. The CHAIRMAN suggested that the Drafting Committee be asked to consider the question of a separate provision on liability for motor car accidents in connexion with article 26.

It was so agreed.7

74. Mr. USTOR suggested that the Drafting Committee might also consider the possibility of eliminating articles 32 to 35 and incorporating their substance in the preceding articles so as not to have two separate sets of articles on the members of the mission and of its diplomatic staff, on the one hand, and the members of the administrative, technical and service staff on the other. The draft would then follow the Vienna Convention system less closely, but would be easier to consult and to understand.

75. Mr. BARTOŠ, Special Rapporteur, said that the participants in the Vienna Conference had not been completely satisfied with the wording of article 37 of the Convention on Diplomatic Relations. It might therefore be better to devote a special article to each category of staff.

76. The CHAIRMAN, speaking as a member of the Commission, said that he doubted whether it was necessary to drop the reference to nationals of, or permanent residents in, the receiving State, for such a deletion would be a departure from the Vienna Convention on Diplomatic Relations and might be confusing.

77. Speaking as Chairman, he suggested that article 32 be referred to the Drafting Committee, together with the problem of liability for road traffic accidents.

It was so agreed.8

Membership of the Drafting Committee

78. The CHAIRMAN said that he had received a letter from Mr. Albónico stating that, for reasons beyond his control and very much to his regret, he had had to go back to Chile and would not be returning before the end of the session. That left the Drafting Committee without a Spanish-speaking member and he suggested that Mr. Jiménez de Aréchaga be asked to replace Mr. Albónico.

79. Mr. JIMÉNEZ de ARÉCHAGA said he was willing to serve on the Drafting Committee.

80. Mr. AGO said he regretted the forced departure of Mr. Albónico and noted with concern that, despite the enlargement of the Commission’s membership, the number of members participating in the work of the session had not increased. He asked the Chairman to appeal to all members to do their utmost to attend the Commission’s meetings during the last few weeks of the session, for if there were any more absences, the question of voting might raise serious problems.

The meeting rose at 1 p.m.
suggested by the Belgian Government concerning the exemption from social security legislation of members of service staff who were not nationals of the receiving State or permanently resident in that State.

7. Mr. REUTER said that he agreed with the Special Rapporteur’s conclusions. He wished however to ask him whether, from the terminological point of view, the expressions “ressortissants de l’État de réception” and “qui ont la nationalité de l’État de réception”, used in the heading and in the text of article 36 of the draft, were equivalent.

8. Mr. BARTOŠ, Special Rapporteur, said that the word “ressortissants” had been wrongly used in the French text of the Vienna Conventions. In French jurisprudence, the word “ressortissants” had a much broader meaning than the term “nationaux”. The inhabitants of French possessions who did not possess French nationality had been considered “ressortissants” of the French State. Later on, the notion had been applied to members of the French Foreign Legion, and, in time of war, to any person serving in the French armed forces. He did not know the exact reason why the Vienna Conventions used the term “ressortissants”, but he himself preferred the word “nationaux”. Constitutional law drew a distinction between active and passive subjects and the same distinction was made in Slavic and German terminology.

9. Mr. YASSEEN said that he approved the article as a whole. The immunity provided for that category of staff of the special mission could not be restricted any further. The article was, in fact, a strict application of the functional theory.

10. He shared the Special Rapporteur’s view regarding the Belgian Government’s suggestion. The question raised by Mr. Reuter, although essentially terminological, touched on an important subject. The legal systems which had granted persons a status different from that of nationals were on the decline, and it was inadvisable that article 33 should, by using the word “ressortissants”, give further currency to a notion which was becoming obsolete. The expression which should be used was “qui n’ont pas la nationalité de l’État de réception”.

11. Mr. CASTRÉN said that what the Commission was now discussing was not a question of substance; questions of form should be referred to the Drafting Committee. Although he personally felt that the word “ressortissants” ought to be avoided, he considered it better to keep the present wording of the article, since it reproduced the terms used by the two Vienna Conventions.

12. Mr. JIMÉNEZ de ARÉCHAGA said that the Belgian Government’s proposal to delete the reference to the nationality or permanent residence of members of the service staff was acceptable, because the point was covered in article 36, paragraph 2.

13. The Belgian Government’s second amendment (A/CN.4/188) should not be accepted because it would create doubts about the position of locally-recruited temporary staff who were not nationals of or permanently resident in the receiving State.

14. The Netherlands Government’s proposal (A/CN.4/193) could create practical difficulties because there might be some uncertainty as to whether accidents caused, for example, by a lorry or a bicycle would be excluded.

15. Mr. NAGENDRA SINGH said that both the amendments proposed by the Belgian Government should be referred to the Drafting Committee, since no issue of substance was involved.

16. Mr. EUSTATHIADES, referring to the Netherlands Government’s comments, said he wished to advert to a question which had been discussed at the previous meeting. He understood that traffic accidents were to be the subject of a separate provision, which the Commission would consider later in connexion with article 26. He would like to know, however, whether a person attached to the domestic staff of a member of a special mission enjoyed immunity from civil jurisdiction if he was responsible for an automobile accident. Did such a person belong to the “service staff” within the meaning of article 33?

17. Mr. BARTOŠ, Special Rapporteur, said that under a classification frequently used in international law and international practice, chauffeurs were considered as members of the “service staff”; it was in connexion with that category of staff that the problem of traffic accidents mainly arose. That was probably the reason why the Netherlands Government had made its comment. If the Commission accepted the suggestion which Mr. Reuter had made at the previous meeting,1 that immunity from civil jurisdiction in general should be abolished for acts involving third-party liability for motor accidents, the problem would be more or less solved. The question then arose whether a similar limitation should be placed on functional immunity, a solution which had not in fact been accepted at the Vienna Conference. In his opinion, a cook driving a car to the market on an errand for a member of the special mission was not covered by functional immunity, in contradistinction to the official chauffeur who, when driving a member of the mission, was acting in the course of his duties. He preferred to keep to the formula adopted by the Vienna Convention on Diplomatic Relations.

18. With regard to the term “ressortissants”, certain countries, like France, maintained the fiction or institution of privileged foreigners, while other countries, like the United States, had the institution of protected persons. It was incorrect to say, however, that persons who enjoyed the right of asylum were “ressortissants” of the country of asylum. That was a point on which the Drafting Committee should reflect, for what it all came to, as Mr. Reuter had said, was a question of terminology.

19. Mr. USHAKOV said that, in his opinion, chauffeurs were not members of the service staff, either within the meaning of article 1(g) of the Vienna Convention on Diplomatic Relations or within the meaning of article 0(1) of the draft.

20. Mr. BARTOŠ, Special Rapporteur, said that in his own country a chauffeur was considered a skilled worker.

1 Para. 69.
21. The CHAIRMAN said that the problem raised by the use of the word "ressortissant" was one that affected the French text, although its meaning might also have a bearing on the interpretation of the English text. Any change of terminology would mean a departure from the text of the Vienna Convention on Diplomatic Relations.

22. Mr. YASSEEN said that as he understood the matter, the term "ressortissant" in French terminology had a different connotation from that of the term "national". The Commission would perhaps decide to support Mr. Castren's view and adopt the terminology of the two Vienna Conventions, but it should be remembered that since 1961 forty States had gained their independence and that consequently the word "ressortissant", which had perhaps been justified at the time, was no longer acceptable.

23. Mr. BARTOS, Special Rapporteur, said he had the impression that in the United Kingdom, a distinction was made between "citizens" and "subjects" and it seemed to him that it was approximately the same difference as the one between "nationaux" and "ressortissants".

24. The CHAIRMAN said that in the English text of the Vienna Convention on Diplomatic Relations the word "national" had been used, and perhaps in United Kingdom practice it was interpreted in a fairly wide sense.

25. Mr. USTOR said that the interpretation of the word "ressortissants" had been discussed at length in the League of Nations in connexion with the application of the Treaty of Versailles and the Treaty of Trianon. One view was that it more or less meant nationals, and another that it meant the population living in a certain country and not only the nationals of the country.

26. The CHAIRMAN said he thought that the expression "permanently resident" would be sufficient in the present context.

27. Mr. BARTOS, Special Rapporteur, said that the question of the distinction between "nationaux" and "ressortissants" did not arise in the case of the English or Spanish texts and he accordingly proposed that the word "nationaux" be adopted for the French text. After all, the expression "ressortissants" belonged to the old French terminology, which went back to the Treaty of Vienna.

28. The CHAIRMAN suggested that article 33 be referred to the Drafting Committee.

It was so agreed.²

² For resumption of discussion, see 934th meeting, paras. 28-30.

PRIVATE STAFF

ARTICLE 34 (Private staff) [38]

29. Article 34 [38]

Private staff

Private staff of the head and members of the special mission and of members of its staff who are authorized by the receiving State to accompany them in the territory of the receiving State shall, if they are not nationals of or permanently resident in the receiving State, be exempt from dues and taxes on the emoluments they receive by reason of their employment. In all other respects, they may enjoy privileges and immunities only to the extent admitted by the receiving State. However, the receiving State must exercise its jurisdiction over those persons in such a manner as not to interfere unduly with the performance of the functions of the special mission.

30. The CHAIRMAN invited the Commission to consider article 34, the Special Rapporteur's proposals for which were contained in paragraph 9 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.

31. Mr. BARTOS, Special Rapporteur, said that the article corresponded to paragraph 4 of article 37 of the Vienna Convention on Diplomatic Relations and followed it very closely. The expression "private servants" used in that Convention had, however, been replaced by the expression "private staff", as in the Vienna Convention on Consular Relations. There were two reasons for that change in the terminology: first, the word "servant" was reminiscent of a social order that was now a thing of the past, and secondly, the persons to whom the article referred might be private tutors or nurses, who were certainly not servants.

32. The article also contained the words "who are authorized by the receiving State to accompany them in the territory of the receiving State", which did not appear in the corresponding provision of the Vienna Convention on Diplomatic Relations.

33. Apart from those two changes, the article laid down precisely the same rules as the corresponding provision of the Vienna Convention. The persons concerned were entitled to exemption from dues and taxes only on the emoluments they received by reason of their employment. In other respects, their status was left to the discretion of the receiving State, as was made clear in the last two sentences of the article.

34. The exception made in the case of persons who were nationals of or permanently resident in the receiving State gave rise to the same problem as in article 33. The Commission should note in that connexion that some States, especially the Arab States, preferred the idea of "habitual residence" to that of "permanent residence". Tunisia had observed that some aliens habitually resident in North African countries made a kind of profession of offering their services to special missions from various States, thereby creating potentially awkward situations. Generally speaking, it was the Commonwealth countries which regarded permanent domicile as an established legal institution.

35. He had already dealt with the comment by the Netherlands Government, which considered that the expression "private servants" should be reintroduced.
36. The Greek Government wished to restrict the privileges and immunities of the persons referred to in the article. But the privileges for which the article provided represented the minimum. He (Mr. Bartos) had always considered, and still considered, that such persons should be granted "minor" immunity from criminal jurisdiction, because they were indispensable to the functioning of the special mission. But the Commission had not taken that view and no Government had advocated it; consequently, he would not raise it again.

37. The only point on which he desired to have the Commission's opinion was the United Kingdom Government's suggestion that exemption from taxation on emoluments should not extend beyond six months.

38. The CHAIRMAN said he did not consider that the United Kingdom proposal justified an alteration in the text, because it dealt with a very special point which had little significance in the case of special missions as they were usually of short duration.

39. Mr. YASSEEN said that he too saw no reason to alter the wording of the article as a result of the United Kingdom Government's comment. Most special missions were of short duration and the article moreover contained a provision which made the presence of such persons dependent on the agreement of the receiving State, which could thus make its acceptance of them subject to certain conditions if it wished.

40. Mr. AGO said that he agreed with Mr. Yasseen. The Commission should not make any changes in the terminology used in the article. In particular, it would be better not to drop the expression "permanently resident in" which had been preferred to any other by the Vienna Conference on Diplomatic Intercourse and Immunities. It must be remembered, too, that if a receiving State had any objection to the presence of some other person, it always had the right not to accept him.

41. The CHAIRMAN suggested that article 34 be referred to the Drafting Committee.

_It was so agreed._

**ARTICLE 35 (Members of the family) [39]**

**Article 35**

*Members of the family*

1. The members of the families of the head and members of the special mission and of its diplomatic staff who are authorized by the receiving State to accompany them shall, if they are not nationals of the receiving State, enjoy the privileges and immunities specified in articles 24 to 31.

2. Members of the families of the administrative and technical staff of the special mission who are authorized by the receiving State to accompany them shall, if they are not nationals of or permanently resident in the receiving State, enjoy the privileges and immunities specified in article 32.

43. The CHAIRMAN invited the Commission to consider article 35, the Special Rapporteur's proposals for which were contained in paragraph 16 of the section dealing with that article in his fourth report (A/CN.4/194/Add.2) and in his additional comments in the supplements to that report (A/CN.4/194/Add.4 and Add.5).

44. Mr. BARTOS, Special Rapporteur, said that article 35 corresponded to paragraph 1 of article 37 of the Vienna Convention on Diplomatic Relations, but contained certain new provisions deemed necessary in the case of special missions. For instance, the phrase "who are authorized by the receiving State to accompany them" had been added, although he was not very satisfied with that wording. Admittedly, there were cases where the receiving State, either for political reasons or for reasons of expediency—for example, when the special mission was moving to frontier areas—did not authorize members of the special mission to take members of their families with them. But express permission was not invariably required and he would therefore prefer the wording "if the receiving State does not object".

45. The other noteworthy difference from the Vienna Convention was the addition of a paragraph 2, which concerned members of the families of the administrative and technical Staff and touched on a question which had not been dealt with in article 32.

46. With regard to paragraph 1, in which there was a reference to articles 24-31, the Belgian Government found it hard to see how a member of the family could enjoy tax exemption on "income attaching to functions with the special mission", for which provision was made in article 29. There were occasions, however, where a member of a special mission was entitled to an addition to his salary if he was accompanied by a member of his family; in that case, the reference to article 29 was justified. It was a minor point, which could be settled by the Drafting Committee.

47. The Drafting Committee would have to examine paragraph 2 carefully in order to eliminate as far as possible the misunderstandings which appeared to have provoked the comments by the United Kingdom and Austrian Governments.

48. In addition to repeating the comment on road accidents which it had made on previous articles, the Netherlands Government proposed that the words "in so far as these privileges and immunities are granted to them by the receiving State" be added to paragraph 1 and that paragraph 2 be amended accordingly.

49. The United States Government doubted whether the proposed rule was necessary, while the Greek Government wished to restrict the privileges and immunities for which the article provided.

50. Thus, the substance of article 35 had been seriously criticized, especially in the comments by the United States and Netherlands Governments.

51. Mr. TAMMES said that the text of article 35 was not clear. If the phrase "the members of the families of the head and members of the special mission and of its diplomatic staff who are authorized by the receiving State to accompany them" meant that those persons always required the authorization of the receiving State,

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8 For resumption of discussion, see 934th meeting, paras. 31 and 32.
then a rule to that effect would have to be inserted at the beginning of the draft among the articles dealing with consent and notification. Personally he did not think that such an interpretation was possible, given the fact that travel between many countries was free and members of families could travel in their own right without any need for an authorization: the question of restricted areas was of course a separate one. That being so, he presumed that the phrase must mean that only authorized members of families could enjoy the privileges and immunities specified in articles 24 to 31, the matter being left to the discretion of the receiving State. Thus article 35 did not amount to much and the reference to authorization should either be deleted and the privileges and immunities extended to all members of families, or a more elastic formula of the kind incorporated in article 34 should be adopted.

52. Mr. AGO said that article 35 dealt with the privileges and immunities accorded to members of the family and it was obvious that, in order to enjoy those privileges and immunities, the members of the family had first to have been admitted into the receiving State. Was there really any need for the Commission to decide the awkward question whether the receiving State had to give official permission for members of a special mission to be accompanied by members of their families or whether such permission could be assumed? To avoid creating unnecessary difficulties, he would suggest that the passage should merely refer to "the members of the families".

53. Mr. NAGENDRA SINGH said that he entirely agreed with the Belgian Government’s comment regarding tax exemption for members of the family. Those persons would not normally stay long enough in the receiving State for their incomes to be taxable; however, if circumstances arose in which they earned income that was taxable in the receiving State, there was no justification whatsoever, under the functional principle, for granting them exemption.

54. As he had mentioned during the discussion on articles 31 and 32, the provisions of those articles granted members of the administrative and technical staff of a special mission greater privileges than those enjoyed by the corresponding staff of permanent missions. As far as members of the families of such staff were concerned, paragraph 2 of article 35 gave them greater privileges than those extended to persons of the same category by the 1961 Vienna Convention. Article 37, paragraph 2, of that Convention gave members of the family the benefit of the privileges and immunities specified in articles 29 to 35. With regard to the privileges specified in article 36 of the 1961 Convention, those persons only enjoyed the benefit of paragraph 1 "in respect of articles imported at the time of first installation".

55. Since article 32 of the draft extended to the administrative and technical staff of the special mission the benefit of the "privileges and immunities specified in articles 24 to 31", and article 31 did not limit customs exemption to articles imported at the time of first installation, the result was to give them, and consequently members of their families by virtue of paragraph 2 of article 35, greater privileges than those granted to the same categories of persons in the case of permanent missions by the 1961 Vienna Convention.

56. Special missions were temporary by nature, so did not require any customs exemption; if any such exemption were to be granted, it should be limited to articles imported on first installation.

57. He supported the proposal for the deletion of the words "who are authorized by the receiving State to accompany them".

58. Mr. JIMÉNEZ de ARÉCHAGA said he also approved the deletion of those words. In 1965, the Special Rapporteur had proposed an article 31, entitled "Status of family members", which dealt at length in paragraphs 1, 2 and 3 with the question of the entry of members of the families of the head and members of the staff of the special mission. The discussion on that article had shown little support in the Commission for the idea of a special authorization regarding the entry of members of the family into the receiving State. As a result, paragraphs 1, 2 and 3 had been dropped from the article. However, in the shortened text introduced at the 819th meeting as article 34, entitled "Members of the family", the words "who are authorized by the receiving State to accompany them" appeared in paragraph 1.

59. Those words, which were a survival from the earlier text, should be deleted. The idea which they were intended to convey could be covered in one of the general articles of the draft, such as article 3 or article 4.

60. He agreed with the Special Rapporteur’s recommendation (A/CN.4/194/Add.2) that the Netherlands Government's proposal concerning paragraph 1 should not be adopted. He did not agree, however, with the Special Rapporteur's favourable view of the suggestion by that same Government that the members of the family should not enjoy immunity in respect of damage resulting from road accidents.

61. That suggestion was inadequate in two respects. First, it dealt with only one type of civil claim and ignored such claims as those arising from divorce and maintenance litigation. Secondly, it was too drastic in that it would rule out all immunity from jurisdiction.

62. He was in favour of keeping to the principle adopted at the 1961 Vienna Conference, which was based on immunity combined with the possibility of waiver. At the 918th meeting he had put forward a proposal based on the system embodied in sections 14 and 20 of the Convention on the Privileges and Immunities of the United Nations. Under that system, the receiving State would have not only a right but a duty to waive the immunity where, in its opinion, that immunity would impede the course of justice and could be waived without prejudice to the purpose for which the immunity had been granted.

6 Ibid., 819th meeting, para. 93.
7 Paras. 10 and 43.
It was essential to adhere to that system, which had been strongly upheld by the first Secretary-General of the United Nations in the first test case relating to the application of section 20 of the Convention. That case related to a violation of the speed limit by the Secretary-General's official chauffeur when driving him to an urgent meeting of the Security Council; the New York Court of Appeal had upheld the immunity in that case.

Mr. USHAKOV said that he approved the proposal to include in article 35 the words “who are authorized by the receiving State to accompany them” or some other expression conveying the same idea. The Vienna Conference had not succeeded in defining the expression “members of the family” because ideas on the subject varied from one country to another. In the case of a permanent mission, it was possible to decide by means of an exchange of notes with the authorities of the receiving State what persons were authorized to accompany members of the mission as members of their families; but in the case of special missions, which were nearly always temporary, those concerned did not have sufficient time to settle the matter. Article 35 should therefore be very clear on that point.

Paragraph 2 of the article was not very happily worded. Instead of using the expression “the privileges and immunities specified in article 32” and thus referring the reader to “the privileges and immunities specified in articles 24 to 31”, it would be better to say in so many words “the privileges and immunities specified for the administrative and technical staff”.

Mr. EUSTATHIADES said that his views on article 35, paragraph 2, were the same as Mr. Ushakov’s. As it stood, the paragraph might imply that the electrician’s daughter, for example, would enjoy quite unnecessary privileges and immunities, and that impression would only be dispelled if the reader referred to articles 24 to 31. It would therefore be better to state that the only privileges and immunities in question were those granted to the administrative and technical staff. With regard to the words “who are authorized by the receiving State to accompany them”, he would point out that authorization did not depend on the grant of immunities. If those words were retained, it would be necessary to make clear what was meant by the word “authorized”. Another solution would be to accept Mr. Ago’s proposal and to say simply “the members of the families”.

The suggestion by the Netherlands Government that the words “in so far as these privileges and immunities are granted to them by the receiving State” should be added at the end of paragraph 1 seemed worth adopting. To give privileges and immunities to all members of the families of the administrative and technical staff was stretching courtesy too far.

He would, of course, accept the solutions to which he had just referred, but it would in fact be preferable not to mention members of the families of the administrative and technical staff.

Mr. CASTRÉN said that he had already expressed the view that the provision that members of the staff of a special mission could not be accompanied by their families unless authorized to do so by the receiving State was too strict. He was grateful to the Special Rapporteur for his conciliatory attitude in proposing that the wording be changed so as to state that authorization by the receiving State was not necessary but that that State could object to members of the special mission being accompanied by members of their families. He accepted that proposal.

Mr. BARTOS, Special Rapporteur, said that he had not been responsible for the proposal that privileges and immunities should be granted to members of the administrative and technical staff; it had been the Commission itself which had decided to follow the Vienna Convention. Mr. Eustathides seemed to think that the words which the Netherlands Government proposed to add to paragraph 1 would restrict the privileges and immunities accorded to members of the families of the administrative and technical staff: but paragraph 1 did not refer to the administrative and technical staff. Personally he could not accept the Netherlands Government’s proposal, but he must leave it to the Commission to settle the question of principle.

He could accept Mr. Ushakov’s suggestion that the words “the privileges and immunities specified for the administrative and technical staff” be added at the end of paragraph 2.

Replying to Mr. Nagendra Singh, he pointed out that where installation in general was concerned, no provision was made in the draft for any privilege in connexion with articles imported on first installation, even in the case of the diplomatic staff.

He proposed to delete the words “who are authorized by the receiving State to accompany them” and to include in the article a sentence to the effect that the receiving State could restrict the number of members of families accompanying members of the mission.

The question of defining “members of the family” had been deliberately left aside. The Vienna Conference had not succeeded in finding a definition acceptable to all countries.

Mr. NAGENDRA SINGH said that he had not proposed that members of the family should be given customs exemption on articles imported on first installation. He had objected to members of the family of the administrative and technical staff of the special mission being given privileges more extensive than those specified for the same category of persons by the 1961 Vienna Convention in the case of permanent missions.

The combined effect of the various articles on special missions would be to give the administrative and technical staff of special missions and the members of their families privileges in excess of those granted by article 37, paragraph 2, of the 1961 Vienna Convention; that was the reason for the objections by the United Kingdom and Austrian Governments. The position should be remedied by deleting paragraph 2 of article 35 and amending article 32 by substituting for the words “the privileges and immunities specified in articles 24 to 31”, the words “the privileges and immunities specified in articles 24 to 30”.

Mr. CASTRÉN said that he had already expressed the view that the provision that members of the staff of a special mission could not be accompanied by their families unless authorized to do so by the receiving State was too strict. He was grateful to the Special Rapporteur for his conciliatory attitude in proposing that the wording be changed so as to state that authorization by the receiving State was not necessary but that that State could object to members of the special mission being accompanied by members of their families. He accepted that proposal.

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The combined effect of the various articles on special missions would be to give the administrative and technical staff of special missions and the members of their families privileges in excess of those granted by article 37, paragraph 2, of the 1961 Vienna Convention; that was the reason for the objections by the United Kingdom and Austrian Governments. The position should be remedied by deleting paragraph 2 of article 35 and amending article 32 by substituting for the words “the privileges and immunities specified in articles 24 to 31”, the words “the privileges and immunities specified in articles 24 to 30”.

Mr. CASTRÉN said that he had already expressed the view that the provision that members of the staff of a special mission could not be accompanied by their families unless authorized to do so by the receiving State was too strict. He was grateful to the Special Rapporteur for his conciliatory attitude in proposing that the wording be changed so as to state that authorization by the receiving State was not necessary but that that State could object to members of the special mission being accompanied by members of their families. He accepted that proposal.
77. The CHAIRMAN said that the point made by Mr. Nagendra Singh was one of substance, but it arose out of a question of drafting.

78. The discussion had shown that the Commission as a whole did not support the retention of the words “who are authorized by the receiving State to accompany them”. The Drafting Committee would consider the suggestion by Mr. Jiménez de Aréchaga to cover that point in one of the early articles of the draft, and the suggestion by the Special Rapporteur to insert a passage which would allow the receiving State to make the entry of members of the family conditional, or to place limitations upon it.

79. He suggested that article 35 be referred to the Drafting Committee for consideration in the light of the discussion.

   It was so agreed.9

   The meeting rose at 1.5 p.m.

9 For resumption of discussion, see 934th meeting, paras. 33-39.

922nd MEETING

Thursday, 15 June 1967, at 10.5 a.m.

Chairman: Sir Humphrey WALDOCK

Present: Mr. Ago, Mr. Bartos, Mr. Castañeda, Mr. Castrén, Mr. Eustathiades, 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 36 (Nationals of the receiving State and persons permanently resident in the territory of the receiving State) [40].

1. Article 36 [40]

   Nationals of the receiving State and persons permanently resident in the territory of the receiving State

1. Except in so far as additional privileges and immunities may be recognized by special agreement or by decision of the receiving State, the head and members of the special mission and the members of its diplomatic staff who are nationals of or permanently resident in that State shall enjoy only immunity from jurisdiction, and inviolability, in respect of official acts performed in the exercise of their functions.

2. Other members of the staff of the special mission and private staff who are nationals of or permanently resident in the receiving State shall enjoy privileges and immunities only to the extent admitted by the receiving State. However, the receiving State must exercise its jurisdiction over those persons in such a manner as not to interfere unduly with the performance of the functions of the special mission.

2. The CHAIRMAN invited the Commission to consider article 36, 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. BARTOS, Special Rapporteur, said that the rules in article 36 had been the subject of much debate at the two Vienna Conferences. Discussion had turned on the question of the nationality of members of the mission, who, in principle, should be nationals of the sending State and, more particularly, on the question of members of the mission permanently resident in the receiving State, a category which had been regarded with some suspicion. In the case of nationals of the receiving State, the latter had the right to refuse to allow them to join the special mission. In the case of persons permanently resident in the receiving State, the problem was more difficult, for many countries were bound by conventions which guaranteed freedom of establishment for aliens. Of course, the receiving State could always resort to the expedient of declaring such persons non grata, but that was a fairly serious decision. In any case, even if the Commission adopted the Vienna wording, more than one point would still have to be clarified.

4. He had no objection to the comment by the Belgian Government, which was of a drafting nature.

5. The Swedish Government’s request that the commentary to the article should be revised would be taken into consideration.

6. He fully approved the United Kingdom Government’s observation that the clause relating to nationals of, and permanent residents in, the receiving State should appear only once, namely in article 36.

7. With regard to the comments of the Netherlands Government, which asked for the deletion of the article, he recalled that that Government had taken the same position at the two Vienna Conferences, but that an overwhelming majority of States had been in favour of placing some limitation on access to diplomatic and consular posts.

8. The Commission should therefore decide whether it was necessary to maintain the limitation principle and, if so, to what extent. For the time being, that limitation was guaranteed, first, by the rule under which such members of the special mission enjoyed only functional immunity and, secondly, by the provision which required the receiving State to exercise its jurisdiction over those persons in such a manner as not to interfere unduly with the performance of the functions of the special mission. That provision was more a recommendation or “psychological rule” than a rule of actual law.

9. He was in favour of retaining article 36, subject to certain drafting changes.

10. Mr. TAMMES said that he saw no compelling reason for the inconsistency between the provisions of article 36,