

Document:-
A/CN.4/SR.922

Summary record of the 922nd meeting

Topic:
Special missions

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

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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. Bartoš, 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. BARTOŠ, 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,

which referred to persons "who are nationals of or permanently resident in" the receiving State, and article 14 on the nationality of the head and the members of the special mission and of members of its staff, which referred only to nationality, without any mention of permanent residents.

11. That anomaly reflected an inconsistency between articles 8 and 38 of the 1961 Vienna Convention on Diplomatic Relations, on which articles 14 and 36 of the draft on special missions were based. The explanation of that inconsistency was that the reference to permanent residents, which was not to be found in the International Law Commission's draft articles on permanent diplomatic missions, had been introduced by the 1961 Vienna Conference, which had, however, omitted to bring the text of article 8 into line with that of article 38.

12. It was significant that the decision to insert in both paragraphs of article 38 of the 1961 Vienna Convention the words "or permanent resident(s)" after the word "national(s)" had been taken in the Committee of the Whole of the 1961 Vienna Conference by the not very convincing majority of 27 votes to 8, with 32 abstentions.¹ The model of the 1961 Convention was, therefore, not very persuasive. Moreover, he saw no reason why the limitation in respect of permanent residents should be introduced in connexion with special missions, where so much was left to the agreement of the States concerned. But if the Commission preferred to equate permanent residents in the receiving State with nationals of that State in article 36, then the text of article 14 should be reconsidered, since the two articles involved the same basic principle.

13. Mr. BARTOŠ, Special Rapporteur, pointed out that at the 12th plenary meeting of the Vienna Conference, article 38 had been adopted by more than two-thirds of the votes.

14. Mr. TAMMES said that the vote he had mentioned related specifically to the introduction of a reference to permanent residents. Of course, as was usual at international conferences, the 1961 Vienna Conference had adopted the article as a whole by a large majority, but that vote did not relate specifically to the question of equating residents with nationals.

15. The comments of Governments favouring the deletion of article 36 were a reflection of the Commission's own views as expressed in paragraph (4) of its commentary to article 36:

"The Commission stresses that, in its view, it is better that this question should be settled by mutual agreements rather than that general international rules should be laid down on the subject".²

16. Mr. CASTAÑEDA said that while he was in favour of retaining article 36, at the same time he had some doubt about the soundness of the rule it expressed. Even if the Vienna Conference had finally admitted that nationals of

the receiving State could be diplomatic agents, that situation was not a desirable one, and all the less so in the case of a special mission. To take as an example the case of a special mission composed of businessmen who were nationals of the receiving State; they would enjoy immunity for acts performed in the exercise of the functions of the special mission, but where was the line to be drawn between their official acts and the acts performed in their own private interest? And what was one to say about their privileged position in relation to other businessmen of the receiving State? Might it not be advisable, in that case, to refuse functional immunity? Admittedly a derogation from the rule could be made by mutual agreement.

17. Mr. NAGENDRA SINGH said that he was inclined to agree with Mr. Tammes that there was some inconsistency between articles 14 and 36. Either the reference to permanent residents should be dropped from article 36, or it should be introduced into article 14.

18. Mr. BARTOŠ, Special Rapporteur, said that the sending State was not prohibited from designating permanent residents of the receiving State as members of a special mission; the point was that they would enjoy only functional immunity.

19. As the Australian and New Zealand Governments had observed at the time, it sometimes happened that merchants or businessmen who were established in the territory of the receiving State but were nationals of the sending State took unfair advantage of their position in order to serve their own private interests; in that case, the receiving State should be able to refuse them privileges and immunities. That view had also been upheld by a large number of African and Asian countries.

20. The question raised by Mr. Castañeda of how to draw the line between acts attaching to the function and acts performed in a private capacity was a difficult one. The answer depended on the interpretation placed on article 42, on professional activity. Latin American practice was for businessmen who were members of a special mission to take advantage of their stay in the territory of the receiving State to deal with private matters. United Kingdom practice was for the sending State first to delegate a kind of semi-official mission of businessmen to study market possibilities. That advance mission was followed by the official mission to conclude a trade agreement. There was always a certain interval between the cessation of the functions of the unofficial mission and the sending of the official mission.

21. Mr. Tammes had rightly pointed out that the draft submitted by the Commission at Vienna had not contained any provision concerning persons permanently residing in the receiving State. The addition had been made at Vienna on the suggestion of Commonwealth and African countries. The Scandinavian and Benelux countries had not opposed that provision, although in their opinion there was a danger that it might limit the possibilities of international relations. The Commission had therefore to decide whether to maintain that clause from the Vienna Convention on Diplomatic Relations.

22. Mr. KEARNEY said he supported the retention of article 36 as it stood.

¹ United Nations Conference on Diplomatic Intercourse and Immunities, *Official Records*, vol. II, p. 66, para. 191(5).

² *Yearbook of the International Law Commission, 1965*, vol. II, p. 188.

23. He was opposed to any change in article 14 which would cut down unnecessarily the sending State's freedom of choice. There was no strong feeling against the use for a special mission of persons permanently resident in the receiving State and any attempt to restrict such use would give rise to many problems.

24. From the practical point of view, the text of article 36 reflected the desire of States not to increase the scope of privileges and immunities. Those considerations applied with considerable force in the case of a person who resided permanently in the receiving State and was regarded by the inhabitants of that State as one of them; the extension of privileges to such a person sometimes gave rise to feelings of resentment.

25. Mr. JIMÉNEZ de ARÉCHAGA said he also supported article 36 as it stood. The text reflected the distinction adopted at the 1961 Vienna Conference between three categories of persons: first, the diplomatic personnel who enjoyed full immunity; secondly, persons who enjoyed the more limited immunity "in respect of acts performed in the course of their duties", to use the expression appearing in article 33 and taken from article 37 (3) of the Vienna Convention on Diplomatic Relations; and, thirdly, the nationals of and permanent residents in the receiving State who enjoyed the even more limited immunity "in respect of official acts performed in the exercise of their functions", as stated in article 36, paragraph 1, and in the corresponding provision of the 1961 Vienna Convention, on which that paragraph was based.

26. In 1957, the Commission itself had deliberately introduced into the text on diplomatic intercourse and immunities the word "official" before "acts", precisely in order to confine the immunity and the inviolability strictly to the indispensable minimum necessary to enable the member of the staff of the mission concerned "to perform his duties satisfactorily", as indicated in paragraph (2) of the commentary to what had then been article 30 on diplomatic agents who were nationals of the receiving State.³

27. He therefore urged the Commission to adopt article 36 in the form in which it had been submitted.

28. Mr. USHAKOV said that articles 14 and 36 contemplated an exceptional situation to which in principle everyone, including the members of the Commission, objected. The question was in fact one that should be settled at the conference: it was for plenipotentiaries to say whether their governments were for or against the rejection of that principle.

29. Mr. Tammes had rightly said that articles 14 and 36 should be brought into line. Would it not be possible to provide in article 14 that the consent of the receiving State was also required for the appointment of persons permanently resident in that State? The problem would then be simplified. If the Commission did not accept that view, he would naturally not object to the retention of article 14 as at present worded.

30. The situation to which Mr. Castañeda had referred actually occurred very seldom. Special missions were

generally composed of government officials of the sending State and diplomats, who were not concerned with private business. There was of course no harm in providing for that somewhat exceptional situation, but in his view the article should be retained as at present worded.

31. Mr. REUTER said that he favoured the retention of articles 14 and 36 which, like the whole draft, represented a compromise between the interests of the sending and receiving States. Article 36 was complementary to article 14, in the sense that article 14 gave the receiving State the legal right to object to the appointment of certain members of the special mission, and article 36 gave the receiving State an assurance that, if it refrained from making use of that right, it would not pay too high a price for doing so.

32. Mr. YASSEEN said that in his view article 36 was acceptable as it stood. It was natural that a national of the receiving State should be given functional immunity and articles 14 and 36 supplemented each other very neatly. There was no need to mention persons permanently resident in the receiving State in article 14 because, if they were nationals of the sending State, incompatibility would arise between their legal position as nationals and their legal position as permanent residents.

33. The best course would be for the receiving State, at the time when it was notified of the arrival of a special mission and of its membership, to refuse if necessary to agree to the appointment of one or more persons covered by those provisions.

34. Mr. CASTRÉN said that he could accept article 36, which he too regarded as a compromise. Nevertheless, as the Special Rapporteur had suggested, the Drafting Committee might reword certain passages in the commentary which were open to misinterpretation.

35. Mr. RAMANGASOAVINA said that he also was in favour of retaining article 36 as at present worded. It usefully supplemented article 14, in which the Commission laid down the principle that, essentially, special missions were composed of nationals of the sending State. But there might be exceptions; for instance, some of the members of the special mission might be nationals of the receiving State or nationals of a third State, permanently resident in the receiving State. Article 36 was useful because it gave the receiving State the right not to grant the same privileges and immunities to such persons as it did to the other members of special missions.

36. With regard to the question raised by the Belgian Government of the placing of the word "que" in the French text of the last phrase in paragraph 1, his view was that both phrases were equally acceptable.

37. Mr. EUSTATHIADES said that he found both article 14 and article 36 satisfactory. The difficulty to which Mr. Castañeda had referred would certainly arise in practice and would be solved on a functional basis; but it was impossible to go into such details in the draft.

38. The slight difference between articles 14 and 36 was deliberate and well advised. Article 14 provided that the sending State could not appoint a national of the receiving State to a special mission except with the consent of that State. During the discussion on article 14 at the 907th

³ *Yearbook of the International Law Commission, 1957*, vol. II, pp. 141 and 142.

meeting, some members of the Commission, including Mr. Castrén and himself, had expressed the view that paragraph 3 of that article was rather too strict. It would be a mistake to go still further, and especially to raise the question of consent again in connexion with article 36. Some States—and he was not referring only to newly-independent States—might find it essential to appoint persons residing in the receiving State as members of a special mission.

39. Mr. CASTAÑEDA, referring to Mr. Ushakov's remarks, said that special missions with a mixed membership were in fact quite common, at any rate in certain countries, such as those importing capital and manufactured goods. For instance, a Belgian special mission on economic co-operation which had visited Mexico had been headed by the Prince of Liège and its members had included two Belgian Ministers and several Belgian civil servants as well as about fifteen private bankers. His Government had had every reason to be satisfied with the membership of that mission. The sending State might equally well include in its special mission persons who were nationals of, or resident in, the receiving State and carried on professional activities there, as for example businessmen or bankers. In that case, acts performed by those persons in their official capacity on behalf of the special mission would be almost indistinguishable from acts performed by them in their private capacity on behalf of their firms. The consequence of article 36 would be that such persons would enjoy immunity from civil jurisdiction in respect of acts performed by them as bankers or businessmen in their country of residence, a situation which would be inequitable so far as the other bankers or businessmen in that country were concerned. It was true that the receiving State could object to such persons being members of the special mission, but why should it not be given the opportunity of accepting them on condition that it did not have to grant them immunity? It was hardly possible for the Commission to refuse to contemplate such an eventuality.

40. The CHAIRMAN, speaking as a member of the Commission, said that some problems of application would be bound to arise for many articles. As far as article 36 was concerned, however, it should be possible to interpret the words "official acts performed in the exercise of their functions" without undue difficulty as covering only those acts which were performed on behalf of the special mission.

41. He himself agreed with Mr. Jiménez de Aréchaga and other speakers that articles 14 and 36 should be retained as they stood. They dealt with quite different aspects of the question and there was no reason why the Commission should adopt the same solution for the problem of permanent residents in both articles.

42. Mr. USTOR said that he was in general agreement with article 36. The point raised by Mr. Castañeda could be met by amending the opening words of paragraph 1 which now read: "Except in so far as additional privileges and immunities may be recognized by special agreement...". That proviso covered only the case in which additional privileges might be granted; it could be amended so as to cover also the possibility of more

restricted privileges being agreed upon by the States concerned in a special agreement.

43. Mr. BARTOŠ, Special Rapporteur, said that it would be comparatively easy to bring articles 14 and 36 into line with each other by including in article 14, paragraph 3, an additional stipulation that the receiving State could also reserve the right to refuse persons of whatever nationality who were permanently resident in the receiving State. He would submit a draft in that sense to the Drafting Committee, although personally he did not consider such a provision necessary, for it was always open to the receiving State to declare such persons *non grata* or unacceptable; in that case the person or persons concerned would not have to leave its territory but would have to cease performing any functions in the special mission.

44. The situation to which Mr. Castañeda had referred did occur in practice. But some countries regarded it as inadmissible and it was impossible to conceive of it occurring in the case of special missions from the socialist countries; in the case of the capitalist countries, some accepted it and others merely tolerated it.

45. The proviso at the beginning of paragraph 1 made the rule very flexible. What was guaranteed was immunity from jurisdiction and inviolability in respect of official acts performed by members of the mission in the exercise of their functions. It was, of course, hard to distinguish between those acts and other acts. That question had not yet been settled even in municipal law, and in international law the dividing line was even less clearly established.

46. Most members of the Commission were in favour of the existing wording of the article. The proposed rule was useful from the psychological point of view, because the granting of privileges and immunities to persons possessing the nationality of the State visited, or permanently resident there, was a matter which was viewed by many people with misgivings. On the other hand, it might be useful for some countries to be able to appoint such persons as members of special missions. Although he had no objection to an attempt being made to find a more satisfactory wording, he would advise the Commission to maintain the rule, which had been adopted by a more than two-thirds majority at the Vienna Conference.

47. He would amend the commentary so as to make it clear that nothing in the text of the article ran directly counter to the views expressed by the Belgian, Swedish and Netherlands Governments in their comments.

48. He proposed that article 36 be referred to the Drafting Committee.

49. Mr. EUSTATHIADES said that it was his understanding that the Special Rapporteur had agreed to refer in paragraph 3 of article 14 to persons permanently resident in the receiving State. In his view, that would be going too far. Since the purpose of special missions was to encourage closer international relations, it was inconceivable that the consent of the receiving State should be required before the sending State could appoint as members of a special mission persons who were permanently resident in the receiving State.

50. The CHAIRMAN pointed out that the Commission, in its discussion on article 14 at the 907th meeting, had not

expressed any view that could serve as a basis for changing that article. The question which had now been raised with regard to article 14 should be discussed when the Commission came to consider the text of that article again.

51. As far as article 36 was concerned, there was a large majority in favour of retaining it as it stood. There arose only questions of drafting, which could be dealt with by the Drafting Committee, such as the placing of the word “*que*” in the French version of the article. Personally, although he found the drafting of the article unsatisfactory, he would be reluctant to depart from the language used in the 1961 Vienna Convention simply on grounds of elegance of language.

52. He had always found it somewhat strange that the last sentence of paragraph 2, like the corresponding provisions of the 1961 Vienna Convention, should apply only to members of the staff of the mission and to the private staff. The requirement that “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” should surely apply also to the more important persons mentioned in paragraph 1, whenever the receiving State might be called upon to exercise jurisdiction over them.

53. He suggested that article 36 be referred to the Drafting Committee for consideration in the light of the discussion.

*It was so agreed.*⁴

ARTICLE 43 (Right to leave the territory of the receiving State) [46]

54. *Article 43* [46]
Right to leave the territory of the receiving State

The receiving State must, even in case of armed conflict, grant facilities in order to enable persons enjoying privileges and immunities, other than nationals of the receiving State, and members of the families of such persons irrespective of their nationality, to leave at the earliest possible moment. It must, in particular, in case of need, place at their disposal the necessary means of transport for themselves and their property.

55. The CHAIRMAN invited the Commission to consider article 43, the Special Rapporteur’s proposals for which were contained in paragraph 8 of the section dealing with that article in his fourth report (A/CN.4/194/Add. 2).

56. Mr. BARTOŠ, Special Rapporteur, said that the article corresponded to article 44 of the Vienna Convention on Diplomatic Relations.

57. Two proposals had been made by the Government of Israel. The first referred to the terminology used and would be considered by the Drafting Committee.

58. The second proposal was that the archives of the special mission should be mentioned as well as its property. He had no objection to that proposal but he considered that the question of the archives was adequately dealt with in article 44 of the draft.

59. Mr. REUTER said that, although he supported the Special Rapporteur’s conclusions, he wished to point out that the second proposal by Israel referred rather to draft article 44, which did not seem to provide for situations where the special mission ceased to function and the sending State and the receiving State had no diplomatic or consular relations with each other.

60. The expression “their property”, in draft article 43, was rather surprising, but he did not propose to object if the Commission did not succeed in finding a more satisfactory expression.

61. Mr. BARTOŠ, Special Rapporteur, said that, at its 912th meeting, the Commission had considered the possibility of incorporating an additional provision in article 44 to the effect that, if the special mission ceased to function in circumstances where there were no diplomatic or consular relations between the two States, it should be possible for the sending State to remove its archives.

62. Mr. EUSTATHIADES said that, even though that question was dealt with in article 44, there was no objection to mentioning the archives in article 43, as the Israel Government requested, since article 43 dealt with a quite exceptional situation.

63. Mr. KEARNEY asked whether the phrase “persons enjoying privileges and immunities” was meant to include permanent residents in the receiving State, who were accorded a certain degree of immunity, so as to ensure that they could leave the territory of that State.

64. Mr. BARTOŠ, Special Rapporteur, said that the idea at the Vienna Conference had been that all nationals of the sending State would be able to leave the country in the circumstances described, even if they were permanently resident there. That was a general rule of international law which applied to the exceptional situation contemplated in the article before the Commission. There had been much discussion at the Vienna Conference about another question, namely, whether, in the case of armed conflict, wives or children who were nationals of the receiving State were permitted to follow their husbands or fathers.⁵ The question had been settled on the basis that the unity of the family should be maintained. The same situation might arise in the case of special missions, and he would therefore advise the Commission to maintain the expression used in the Vienna Convention.

65. The CHAIRMAN suggested that article 43 be referred to the Drafting Committee, which would need to take account of the suggestions by the Government of Israel and to consider the relation of that article with article 44.

*It was so agreed.*⁶

⁵ United Nations Conference on Diplomatic Intercourse and Immunities, *Official Records*, vol. I, Summary Records of the Committee of the Whole, 36th meeting, paras. 72-74, and 37th meeting, paras. 1-7.

⁶ For resumption of discussion, see 934th meeting, paras. 64-73.

⁴ For resumption of discussion, see 934th meeting, paras. 40-48.

ARTICLE 37 (Duration of privileges and immunities) [44, paras. 1 and 2]

66. *Article 37* [44, paras. 1 and 2]
Duration of privileges and immunities

1. Every person entitled to privileges and immunities shall enjoy them from the moment he enters the territory of the receiving State for the purpose of performing his functions in a special mission, or, if already in its territory, from the moment when his appointment is notified to the competent organ of that State.

2. When the functions of a person enjoying privileges and immunities have come to an end, such privileges and immunities shall normally cease at the moment when he leaves the country, or on expiry of a reasonable period in which to do so, but shall subsist until that time, even in the case of armed conflict. However, with respect to acts performed by such a person in the exercise of his functions as a member of the special mission, immunity shall continue to subsist.

67. The CHAIRMAN invited the Commission to consider article 37, 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.194/Add.2) and in his additional comments in part two of document A/CN.4/194/Add.4.

68. Mr. BARTOŠ, Special Rapporteur, said that the article reproduced *mutatis mutandis* paragraphs 1 and 2 of article 39 of the Vienna Convention on Diplomatic Relations.

69. The Belgian Government had proposed that the word "organ" be replaced by the word "authority". He did not agree, for an organ was not necessarily an authority. One solution might be to use the expression adopted by the Drafting Committee in the case of another article, namely "the Ministry of Foreign Affairs or other organ".

70. The Chilean Government found the expression "on expiry of a reasonable period" too vague and proposed that it be made more precise by adding the words "granted by the receiving State". He accepted that suggestion.

71. Mr. YASSEEN said that he too considered the Chilean Government's proposal acceptable. As for the Belgian Government's proposal to replace the word "organ" by the word "authority", it would be best to say simply "from the moment when his appointment is notified to that State".

72. Subject to those comments, he could accept article 37.

73. Mr. USTOR said that article 37 was acceptable but its meaning should be made clearer; a departure from the wording of the Vienna Convention on Diplomatic Relations was both necessary and justified. As it stood, the text failed to cover the position of members of the family of the head and members of the special mission and of its diplomatic staff who enjoyed privileges and immunities.

74. Mr. AGO said he wondered what had prompted the Commission to take the decision to split up article 39 of the Vienna Convention into two parts. Was the death of a member of a special mission more important than the death of a member of a permanent diplomatic mission, that it should be dealt with in a separate article? Unless

there was good reason for that decision, it would be better to amalgamate articles 37 and 38 and consequently to delete the title "Case of death".

75. Mr. BARTOŠ, Special Rapporteur, said it was true that there was a gap in the Vienna Convention, in that it did not mention members of the family. He therefore proposed to add a third paragraph to article 37 to state that the privileges and immunities granted to members of the family had the same duration as the privileges and immunities of the persons they accompanied.

76. Replying to Mr. Ago, he agreed that it would be more logical to insert paragraph 3 of article 39 of the Vienna Convention, which also dealt with the duration of privileges and immunities, in article 37 rather than in article 38. On the other hand, article 39, paragraph 4, of the Vienna Convention had no direct connexion with article 37.

77. He proposed that article 37 be referred to the Drafting Committee; in addition to its present two paragraphs, it would include a third paragraph dealing with members of the family and a fourth consisting of paragraph 1 of article 38.

78. Mr. EUSTATHIADES said that he could accept Mr. Yasseen's proposal to drop the words "the competent organ" and to say simply "from the moment when his appointment is notified to that State". He would also suggest that paragraph 3 of article 38 be included in article 29, on exemption from dues and taxes.

79. The CHAIRMAN suggested that article 37 be referred to the Drafting Committee without the Commission taking any final decision on its substance.

*It was so agreed.*⁷

ARTICLE 38 (Case of death) [44, para. 3, and 45]

80. *Article 38* [44, para. 3, and 45]
Case of death

1. In the event of the death of the head or of a member of the special mission or of a member of its staff, the members of his family shall continue to enjoy the privileges and immunities to which they are entitled until the expiry of a reasonable period in which to leave the country.

2. In the event of the death of the head or of a member of the special mission or of a member of its staff, or of a member of their families, if those persons are not nationals of or permanently resident in the receiving State, the receiving State shall facilitate the collection and permit the withdrawal of the movable property of the deceased, with the exception of any property acquired in the country the export of which was prohibited at the time of his death.

3. Estate, succession and inheritance duties shall not be levied on movable property the presence of which in the receiving State was due solely to the presence there of the deceased as the head or member of the special mission or member of its staff, or as a member of their families.

81. The CHAIRMAN invited the Commission to consider article 38, the Special Rapporteur's proposals for which were contained in paragraph 6 of the section dealing with that article in his fourth report (A/CN.4/194/Add.2).

⁷ For resumption of discussion, see 934th meeting, paras. 49 and 50.

82. Mr. BARTOŠ, Special Rapporteur, said that the article was based on article 39, paragraphs 3 and 4, of the Vienna Convention, As had been suggested, paragraph 1 of article 38 would be moved to article 37 and paragraph 3 to article 29.

83. If the Commission decided that article 38 was to consist solely of paragraph 2, the title of the article would have to be altered. Alternatively, it could be left to the Drafting Committee to decide in which article that paragraph should be placed.

84. Mr. AGO said that although he acknowledged that the paragraph did not deal with the question of the duration of privileges and immunities, he was in some doubt whether there was really any point in breaking up the text of the Vienna Convention because of a title which ultimately would not appear in the convention proper. What had to be established was the principle that when a person ceased for one reason or another to be a member of a special mission, any laws which might, for instance, prohibit the removal of his property from the receiving State did not apply. He himself thought that it would be preferable to include the provisions of article 39 of the Vienna Convention in a single article.

85. The CHAIRMAN observed that article 38 raised problems primarily of drafting and arrangement. Generally speaking, the substance of the article seemed to be acceptable. He suggested that it be referred to the Drafting Committee.

*It was so agreed.*⁸

The meeting rose at 1.5 p.m.

⁸ For resumption of discussion, see 934th meeting, paras. 51-63.

923rd MEETING

Friday, 16 June 1967, at 10.5 a.m.

Chairman: Sir Humphrey WALDOCK

Present: Mr. Ago, Mr. Bartoš, Mr. Castañeda, Mr. Castrén, Mr. Eustathiades, 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)

(continued)

[Item 1 of the agenda]

ARTICLE 17 *quater* (Status of the Head of State) [21]

1. *Article 17 quater* [21]
Status of the Head of State

The Head of State who leads a special mission of the sending State enjoys in the receiving State all the facilities, privileges and immunities which are accorded, under the rules of international

law and international custom, to a Head of State on an official visit to the receiving State.

All persons forming part of a special mission which is led by a Head of State and the members of his suite shall enjoy all the facilities, privileges and immunities which are enjoyed in the receiving State by the diplomatic staff of permanent diplomatic missions accredited to that State and all the facilities, privileges and immunities which may be necessary for the performance of the tasks incumbent on the members of special missions.

2. The CHAIRMAN invited the Commission to consider the Special Rapporteur's proposal for a new article 17 *quater* (A/CN.4/194/Add.2) and drew attention to his additional comments thereon in the supplements to his fourth report (A/CN.4/194/Add. 4 and Add. 5).

3. Mr. BARTOŠ, Special Rapporteur, said the first question for the Commission's consideration was whether it was desirable to lay down special rules for so-called high-level special missions. He had outlined the history of the problem and of the work which had been done on it in his report (A/CN.4/194, paragraphs 246-250).

4. With regard to article 17 *quater* of the draft, he wished to draw the Commission's attention to paragraphs 1, 2 and 3 of the commentary (A/CN.4/194/Add. 2).

5. There was a difference of opinion as to whether it was possible to speak of high-level special missions when the mission was headed by a high-ranking personage who was not the Head of the State, such as a Prime Minister, Minister for Foreign Affairs, Cabinet Minister, and so on. The United States proposal (A/CN.4/193) which had served as a basis for discussion during the debate at the 897th meeting on the definition of special missions had provided that a special mission headed by a minister or high-ranking official should be received in the receiving State by a minister or official of the same rank. The Commission ought to base itself on that proposal if it decided to adopt special rules on so-called high-level special missions.

6. Actually, the important thing was the mission itself and not the head of the mission. If the Commission adopted the notion of high-level special missions, where, in the hierarchy of high-ranking persons, would be the dividing line between the ordinary special mission and the high-level special mission? Would it adopt some other criterion for that distinction? What would be its attitude towards members of Parliament? It was the Head of State and his executive that were considered, generally speaking, as representing the State abroad.

7. He had no personal preference and he hoped that the Commission would adopt whatever point of view was most commonly recognized among States.

8. Mr. JIMÉNEZ de ARÉCHAGA said that it would be impossible to establish a distinction between political and non-political missions or a hierarchy of importance between them. Nor should the Commission attempt to codify rules governing the legal position of a Head of State or a Foreign Minister visiting another country, as they raised problems outside general diplomatic law. The subject was a separate one and must be dealt with as a whole.

9. However, it should be possible to formulate an objective criterion for defining high-level special missions and