

Document:-
A/CN.4/SR.924

Summary record of the 924th meeting

Topic:
Special missions

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

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35. The Commission, however, could also adopt another method, based on what it had done in its draft articles on the law of treaties.⁴ Article 2, paragraph 1 (a) of that draft indicated that the articles referred primarily to treaties in written form concluded between States, and article 3 safeguarded the legal force of international agreements not in written form or not concluded between States, as well as the application to those agreements of the rules set forth in the articles to which they would be subject independently of those articles.

36. Similarly, with regard to high-level special missions, the Commission could state that special missions led by a Head of State, a Prime Minister, a Minister for Foreign Affairs or persons holding an equivalent rank in the sending State were not "special missions" within the meaning of the articles, but that that in no way prevented the application of the rules of international law to such missions, independently of the articles.

37. The CHAIRMAN said that the Commission would continue its consideration of article 17 *quater* at its next meeting; he noted that five different approaches to the problem had been suggested.

38. The Commission would be sorry to hear that, for unavoidable reasons, Mr. Tsuruoka would be unable to attend the remainder of the session and it would thus lose the benefit of his wisdom and constructive suggestions.

39. Mr. TSURUOKA said he regretted having to leave before the end of the session, but hoped to be able to attend the twentieth session.

The meeting rose at 11.35 a.m.

⁴ *Ibid.*, following paragraph 38.

924th MEETING

Monday, 19 June 1967, at 11.40 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;
A/CN.4/L.121)

(continued)

[Item 1 of the agenda]

ARTICLE 17 *quater* (Status of the Head of State) [21]
(continued)¹

1. The CHAIRMAN invited the Commission to continue its consideration of article 17 *quater*.

¹ See 923rd meeting, para. 1.

2. Mr. BARTOŠ, Special Rapporteur, said that, before continuing, he wished to draw attention to the amendment (A/CN.4/L.121) submitted by Mr. Jiménez de Aréchaga at the previous meeting,² the effect of which would be to upset the entire system which had so far been built up with respect to privileges and immunities. Under the terms of the proposed new article, which would be article 23 *bis*, there would no longer be any separate system for special missions. In the case of high-level special missions and special missions for which States had agreed in advance that those provisions would apply, there would merely be a reference to the articles of the Vienna Convention on Diplomatic Relations. All other special missions would be subject, in the matter of privileges and immunities, to the system which applied to officials of the United Nations.

3. If the Commission decided in favour of Mr. Jiménez de Aréchaga's amendment, they would have to consider the entire second part of the draft all over again.

4. The CHAIRMAN said that he would try to summarize the opinions and suggestions put forward during the discussions.

5. The Special Rapporteur had proposed a system, embodied in his article 17 *quater* and supplemented in his article 17 *ter*, which made provisions for only one special category of special mission, namely a mission led by a Head of State. For other special missions, any special régime would be a matter of agreement between the two States concerned; the agreement would be either an *ad hoc* one relating to a particular special mission, or a general agreement covering a whole series of special missions to be exchanged by the countries concerned.

6. One of the problems which arose in connexion with high-level special missions was that they could be headed by a variety of different dignitaries, such as Ministers of State and members of Parliament. One member of the Commission, Mr. Yasseen, had asked that the category of high-level special missions should be restricted to those led by a Head of State, but Mr. Ushakov had objected that such an approach would create a presumption that, in the absence of a specific agreement between the two States concerned, a special mission headed by the Prime Minister or Foreign Minister of the sending State would be governed by the standard rules on ordinary special missions. Mr. Tsuruoka had therefore proposed that that difficulty should be dealt with by means of a general provision excluding from the operation of the draft articles on special missions those missions which were led by a Head of State or by certain other high dignitaries; the reservation might be on the lines of article 3 of the Commission's draft articles on the law of treaties³ and would specify that the fact that the draft articles did not relate to high-level special missions did not affect the legal status of those missions or the application to them of any of the rules set forth in the draft articles, to which they would be subject independently of those articles.

² Para. 10.

³ *Yearbook of the International Law Commission, 1966*, vol. II, document A/6309/Rev. 1, Part. II, following paragraph 38.

7. Mr. Ramangasoavina had proposed another solution to that problem: the article on high-level special missions should be eliminated, which would limit the draft articles to the standard rules, and all special cases should be dealt with by an agreement between the States concerned.

8. A different approach to the whole question had been suggested by Mr. Ago, who had urged that the Commission should formulate special provisions for the high dignitaries themselves, rather than for the special missions to which they belonged; according to that approach, the other members of a high-level special mission would be governed by the standard rules on ordinary special missions.

9. Lastly, the Commission had before it a proposal by Mr. Jiménez de Aréchaga for the addition of a new article 23 *bis*, combining the Special Rapporteur's ideas with the suggestion made by certain Governments in their comments that high-level special missions should include all special missions headed by an official of not less than Cabinet rank. It should be noted, however, that one of those Governments, that of the United States, thought that the standard articles on special missions should govern only the high-level special missions in question, whereas ordinary special missions would be governed by agreement between the states concerned. In his proposal, Mr. Jiménez de Aréchaga had adopted an opposite approach: the diplomatic staff of high-level special missions would enjoy the diplomatic privileges and immunities specified in certain articles of the 1961 Vienna Convention on Diplomatic Relations, while ordinary special missions would be governed entirely by the draft articles on special missions. At the same time, he had proposed that the same articles of the 1961 Vienna Convention should apply to the head and the diplomatic staff of a special mission, if the sending and receiving States had so agreed before the departure of the mission.

10. Mr. JIMÉNEZ de ARÉCHAGA said that the Chairman had accurately interpreted the scope and intention of his proposal for a new article 23 *bis*.

11. He was not suggesting any radical change in the Commission's approach to the whole topic of special missions, but was merely proposing a means of bridging the differences of opinion which had arisen with regard to the privileges and immunities to be enjoyed by members of special missions. The scope of those privileges and immunities, as far as ordinary special missions were concerned, was still an open question: the Drafting Committee was endeavouring to devise a formula capable of attracting general support in the Commission.

12. The purpose of his proposed article 23 *bis* was to give States the possibility of choosing an alternative formula which could be used in preference to the standard rules for special missions, so as to meet the requirements of high-level special missions.

13. Objection had been raised to the method used in article 23 *bis* of referring back to certain articles of the 1961 Vienna Convention on Diplomatic Relations. That objection could easily be met by replacing the reference in question by the text of the rules set forth in articles 29 to 32 and 36 of that Convention.

14. Article 23 *bis* did not contain any provision concerning the status of the Head of State, which would continue to be governed by existing international law; it referred only to members of the diplomatic staff of a special mission led by a Head of State, a Head of Government or a Minister for Foreign Affairs. It should also be remembered that the provisions of article 23 *bis* did not extend to the administrative and technical staff or the service staff of a high-level special mission.

15. Mr. KEARNEY said that the substance of article 17 *quater* was not vital to the general scheme of the draft articles. It was not essential that the draft should contain special provisions on special missions headed by a Head of State or other important dignitary. The fact of the matter was that, in such cases, detailed preparations were always made beforehand. Also, the position in law was that the courtesies, privileges and immunities extended to the head of such a mission were at least equal to those extended to the head of a permanent diplomatic mission. It did not seem necessary to deal, in connexion with such high dignitaries, with the problem whether they could be declared *non grata* or not; it was hardly conceivable that such a declaration would be made in the case of a visiting Prime Minister or Minister for Foreign Affairs of another country.

16. The text of the first paragraph of article 17 *quater* amply illustrated that point; the provisions of that paragraph merely required States to follow the accepted international practice when receiving a special mission led by a Head of State. A provision of that type was not essential to the draft.

17. A more important problem was that the application of the draft articles on special missions would clearly depend on whether the receiving State was prepared to regard a particular group of visiting foreign officials as a special mission within the meaning of the draft. The text of article 1 as adopted by the Drafting Committee⁴ made it clear that it would be for the receiving State to say whether a group of visiting officials from the sending State qualified as a special mission and were therefore governed by the rules set forth in the draft articles. A system of that kind was perhaps advantageous for the larger and more influential States but might not be convenient for the others. In the circumstances, the proposal put forward by Mr. Jiménez de Aréchaga was attractive because it laid down certain objective requirements and did not leave the determination of what constituted a special mission to the discretion either of the sending State or of the receiving State.

18. That proposal also had the merit of going to the heart of the problem, which was to determine the privileges and immunities to be granted to special missions. It had been pointed out that article 17 *quater* raised two separate questions: first, whether there should be any special rule for high-level missions; secondly, to what persons should privileges and immunities be granted. Personally, he considered that the two problems could be approached as a single question, namely, that of determining whether privileges and immunities under the draft articles should not be limited to persons of high rank.

⁴ See 926th meeting, para. 2.

19. However, the most serious problem was to determine what the Commission meant by a special mission, so as to define the scope of the privileges and immunities to be granted. The concept of a special mission was not a fixed legal concept; there was no definition accepted either by treaty or by State practice. The Commission was therefore not yet clear about the purpose of the draft articles under discussion. He could give the following examples of official visits, in respect of which it would be necessary to determine whether they constituted special missions or not: a visit by a doctor of medicine from the Ministry of Health of one country to his counterpart in another country in order to discuss with him questions of malaria control; a visit by members of the Protocol Department of the Foreign Ministry of one country to their colleagues in the Foreign Ministry of another country for the purpose of making arrangements for the visit of a Minister for Foreign Affairs; a visit by a major-general to attend the testing of a new type of rifle for the purpose of reporting on the possibility of purchasing it from the country which produced it. With the development of international communications, official visits of that kind accounted for the bulk of official movements. The Commission should earnestly consider whether officials engaged in visits of that type really required a broad measure of diplomatic privileges and immunities. For his part, he thought that it would be a mistake to extend to them all the privileges and immunities set forth in the draft articles on special missions.

20. The proposed article 23 *bis* would make it possible to confine the granting of diplomatic privileges and immunities to a limited category of persons, so that other officials could be left outside the scope of the draft articles.

21. The CHAIRMAN said that Mr. Kearney had drawn attention to the problem of the lower range of special missions, whereas the Commission was at present discussing what might be called the upper range of those missions. It was working on the assumption that the standard articles on special missions would apply in the generality of cases and was considering whether special arrangements should be made to deal with high-level missions.

22. Mr. USTOR said that article 17 *quater* covered only the "Head of State". But in certain countries the Executive consisted of a collegiate body whose chairman could not, properly speaking, be considered a Head of State; in fact, under certain constitutional systems, the chairman of the collegiate executive was not the highest dignitary in the country and did not always represent his country at the highest level. It was therefore essential to adopt a more flexible formula which could be applied to all possible constitutional forms.

23. As other speakers had already pointed out, the provisions of article 17 *quater* did not constitute a codification of the subject, since they merely referred to existing international law in the matter. The Commission should therefore accept the offer made by the Special Rapporteur to draft a set of substantive rules on the special position of high dignitaries when those dignitaries led special missions.

24. In order to prove acceptable to governments, the draft articles on special missions should embody an

average or standard set of rules rather than minimum rules. They should therefore reflect the treatment which governments were most likely to concede to special missions and the treatment which they usually expected to see granted to their own special missions. His own view was that a special mission was a mission presented as such by the sending State and accepted as such by the receiving State. Since the draft was to include provisions concerning notification, the receiving State would have all the necessary safeguards; it would be in a position to refuse to regard as a special mission any group of officials who were travelling in the interests of some organ of the sending State but were not acting as representatives of the State as such.

25. Since the draft articles on special missions would relate to the average type of mission, it was necessary to make some provision for special arrangements for high-level missions; whence the need for article 17 *quater*, provided that it stated the substantive rules to be applied to a Head of State or other dignitary heading a special mission. He agreed with Mr. Ago that the other members of a high-level special mission should not be given different treatment from that received by members of ordinary special missions.

26. The proposed article 23 *bis* applied only to special missions headed by a dignitary of at least the rank of Cabinet Minister. That proposal had the defect of downgrading by implication a special mission headed by an ambassador; missions of that kind, however, were often sent to deal with extremely important matters. In State practice, it was the rule rather than the exception that a special mission was headed by an ambassador, who should enjoy the privileges normally granted to diplomatic agents.

27. He was in favour of article 17 *quater*, provided its scope was extended to cover dignitaries other than the Head of State, and provided also that it was drafted so as to state the rules in the matter instead of merely referring to "the rules of international law and international custom".

28. Mr. CASTRÉN said that his view, like Mr. Ago's, was that the status of special missions and that of the high dignitaries who headed them should be dealt with separately. The essential thing was to formulate general rules for special missions which were not governed by a special agreement, without considering, at that stage, all the categories of special missions. The draft took the diversity of special missions into account in several places, in particular in article 40 *bis*, and it should not be forgotten that article 17 *ter* and articles "X" and "Y" still had to be considered.

29. Although there was no necessity to determine in the draft the status of high dignitaries who headed special missions, it was not sufficient merely to mention the matter in the commentary, which would not appear in the final text of the future convention. Two solutions had been suggested: either to insert a reservation concerning such personages and their suites in the preamble of the convention, or to adopt an article which would refer to the rules of international law governing the matter. He himself was in favour of the second solution, which had been proposed by the Special Rapporteur.

30. He would suggest that the second sentence in article 17 *quater* should be deleted and that the first sentence should mention not only the Head of State, but also the Head of Government, the Minister for Foreign Affairs and perhaps also the other members of the Cabinet. States would always be able to provide for special treatment for other high dignitaries by special agreement. Article 17 *quater* would then read:

“A Head of State, Head of Government, Minister for Foreign Affairs or other member of the Cabinet who leads a special mission of the sending State, as well as his suite, shall enjoy in the receiving State all the privileges, immunities and facilities which are accorded them on an official visit to that State, in conformity with the provisions of international law, international custom and special agreements concluded between the sending State and the receiving State”.

31. At first glance, Mr. Jiménez de Aréchaga's amendment seemed hardly acceptable, but he might have occasion to revert to it later.

32. Mr. TAMMES said that he had examined the records of the Commission's previous session and could see no justification for confining the provisions of article 17 *quater* to the Head of State. Nor did the comments by Governments provide any grounds for that limitation.

33. From the practical point of view, it was more important to regulate the position of high officers of State other than the Head of State, since there existed well-established rules of international law on the treatment to be extended to a Head of State but few, if any, on the subject of other high dignitaries such as a Vice-President of a Republic or President of the Senate.

34. The Commission should therefore prepare two articles on high-level missions, the first to deal with the problem of a special mission headed by a Head of State, and the second to cover other high-level missions. It would then be for the future conference of plenipotentiaries to decide whether those two articles should be incorporated in the final instrument on special missions.

35. That approach would go far towards meeting the purposes of Mr. Jiménez de Aréchaga's proposed article 23 *bis* and would have the advantage of being more specific than the method of merely referring to certain articles of the 1961 Vienna Convention. It should be remembered that the draft articles on special missions virtually reproduced, with minor adaptations, the various articles of the 1961 Vienna Convention and made the rules embodied in that Convention applicable to all special missions.

36. It would be helpful if the Secretariat would inform the Commission how many States had so far ratified the 1961 Vienna Convention on Diplomatic Relations or had otherwise declared themselves bound by its provisions.

37. Lastly, he would like to ask Mr. Ustor whether it was always open to a government to state whether or not it wished to consider a particular mission a special mission for the purposes of the application of the draft articles.

38. Mr. USTOR said the answer was in the affirmative. Under the terms of the draft articles, the consent of both

the receiving State and the sending State was necessary. The sending State must express its intention to send a group of officials as a special mission; faced with that request, the receiving State could reply that it was prepared to receive the officials in question but did not wish to regard them as a special mission. Such a situation could arise when, for instance, there was a question whether a particular mission would represent the sending State or only its State Railways.

39. The CHAIRMAN said that the discussion had shown that it was desirable that the Drafting Committee should report to the Commission at an early stage on the question, which had already been referred to it, of the definition of a special mission. The Drafting Committee should also consider what bearing the question of notification would have on that definition.

40. It was clear, however, that the draft on special missions was intended to regulate many of the examples given by Mr. Kearney. The Commission had drafted its rules on special missions in such a way that they applied to the ordinary type of day-to-day mission. Accordingly, it would have to consider the question whether it was advisable to incorporate in the draft special rules on high-level dignitaries for cases when such dignitaries headed a special mission.

41. Mr. USHAKOV said that the discussion had shown the impossibility of defining the notion of “high-level special missions”; it was an expression that could be applied to missions which included not only the Head of State or the Prime Minister but also a great variety of other dignitaries. It was equally impossible to determine the immunities and privileges which should be accorded to the staff of a high-level special mission, for in certain cases all members of the special mission were considered as forming part of the suite of the Head of State, and by virtue of that fact enjoyed diplomatic privileges and immunities, while in other cases, only some of them had that status.

42. It would be better merely to refer to international custom without trying to lay down special rules for high-level special missions and he therefore proposed that article 17 *quater* should be drafted to read:

“A Head of State, Head of Government, ministers or other high dignitaries heading a special mission shall enjoy all the facilities, privileges and immunities accorded to them by special agreement between the States concerned.”

43. Mr. REUTER said that the Commission should give an answer to three fundamental questions. First, how many essential régimes would be provided for by the convention? Secondly, how was the category or categories of missions to which the convention would apply to be defined? Thirdly, what régime would apply to that category or to those categories?

44. Personally, he considered that the convention should provide for a single régime of a general nature. The average category to which it would apply could, as Mr. Ustor had said, be defined in each case by a special decision of the States concerned. If that was not regarded as sufficient, the Drafting Committee would have to try to

establish certain objective criteria which would make it possible to determine, in the absence of a definition by States, whether the convention applied; in that case the criterion was likely to be sought in the general idea of the "representation of the State". So far as the régime which would apply to the average category was concerned, he could not accept Mr. Jiménez de Aréchaga's proposal recommending a régime similar to that for international officials, since it would jeopardize all the work the Commission had already done.

45. Once those three fundamental questions had been answered, the Commission could consider the secondary problems, and the proposals concerning them, but it was important that all the work already done should not be called in question.

46. Mr. AGO said that the discussion seemed to suggest the conclusion that it was inadvisable to introduce the very idea of "high-level special missions" and to place missions on different levels. The Commission might therefore consider that all the articles already examined laid down general rules and insert in the draft convention special clauses relating, not to high-level special missions, but to special missions including high dignitaries or, more precisely, to the situation of those dignitaries when they formed part of a special mission. The general rules could then be stricter, since the high dignitaries would enjoy special treatment. The Commission should therefore consider the question from the point of view of the composition of the special mission rather than attempt to draw a distinction between various categories of special missions, which might create insuperable difficulties.

47. Mr. JIMÉNEZ de ARÉCHAGA said he was very concerned at Mr. Ustor's reply to the question put to him by Mr. Tammes. If an *ad hoc* agreement was necessary in each case in order that a special mission should be governed by the draft articles, then the whole purpose of the draft would be fundamentally changed. It would cease to be a draft convention and would become a mere set of model rules. Moreover, if the application of the draft was to be entirely at the discretion of the receiving State, the door would be left open to undesirable forms of pressure. The Commission must decide whether, for the purposes of defining special missions, it wished to adopt an objective or a subjective criterion.

The meeting rose at 1 p.m.

925th MEETING

Tuesday, 20 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;
A/CN.4/L.121)

(continued)

[Item 1 of the agenda]

ARTICLE 17 *quater* (Status of the Head of State) [21]
(continued)¹

1. The CHAIRMAN invited the Commission to continue its consideration of article 17 *quater*.

2. Mr. CASTAÑEDA said that the Commission, having decided to adopt a special article on high-level special missions, could not confine itself to formulating rules relating to dignitaries heading special missions, but must also try to define the status of the special mission itself, on which the situation of its other members depended.

3. With regard to method, it was not enough merely to refer to the rules of international law and international custom. He agreed with Mr. Ustor and Mr. Reuter that a minimum number of rules must be clearly stated, from which it would of course be open to States to depart, either by unilateral decision or by mutual agreement.

4. As to reference to the provisions of the Vienna Convention on Diplomatic Relations which appeared in Mr. Jiménez de Aréchaga's proposal (A/CN.4/L.121),² it would be better from the point of view of legal drafting to refer instead to the corresponding articles of the draft itself, which had already been adapted to the needs of special missions.

5. Also in view of the proposed new terminology, article 23 *bis* should commence with the words: "The representatives and the members of the diplomatic staff of a special mission...".

6. Lastly, in order to avoid having to revise the whole of part II of the draft, the provisions applicable to other missions could be left in abeyance so that for the present only high-level special missions would be dealt with.

7. Mr. BARTOŠ, Special Rapporteur, said that few members had replied to the two questions he had put to the Commission before it began to consider article 17 *quater*, namely, should special rules be formulated for so-called high-level special missions, and what should be the criterion for distinguishing those missions from other special missions?

8. On the first question, he agreed with Mr. Ago that a distinction should be drawn between the special mission itself and the dignitary who headed it and for whom certain courtesies and honours should be provided, as well as certain special legal rules, particularly with regard to his suite. The Commission should give a clear answer to that question, either affirmative or negative.

9. On the second question, the very notion of high-level special mission was difficult to define with precision, because of the diversity of examples to be found in the different countries. The definition of special mission pro-

¹ See 923rd meeting, para. 1.

² *Ibid.*, para. 10.