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Summary record of the 805th meeting

Topic:
Special missions

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101. Mr. TUNKIN said that the question of inviolability had been discussed at length during the preparation of the Commission's draft on diplomatic relations, and the Commission had rightly concluded, as far as the premises of a diplomatic mission were concerned, that the agents of a receiving State could not enter without the special permission of the head of mission in each case and that the receiving State had a duty to protect the premises from entry by private persons.

102. The question of prior notice raised by Mr. Reuter had also been discussed, but the suggestion that inviolability should be contingent upon prior notice had been rejected because such a rule would unduly complicate matters. It was self-evident that the receiving State could not be regarded as under an obligation to protect the premises of a special mission if its authorities were unaware of the whereabouts of the premises, but it would be unwise to insert a provision on the matter lest the alleged absence of notice be used as a pretext by States for not taking the requisite protective action.

103. He doubted whether Mr. Rosenne was right in thinking that the draft should be closely modelled on the Vienna Convention on Consular Relations, because it was arguable that the analogies between special and diplomatic missions were closer. He was firmly against Mr. Rosenne's proposal for the insertion of a provision corresponding to that in the last sentence of article 31, paragraph 2, of the Convention on Consular Relations. That provision had in fact been inserted by the Vienna Conference and not by the Commission, which had agreed that, in the interests of friendly co-operation between States, any possibility of intrusion into consular or diplomatic premises should be ruled out.

104. He supported Mr. Verdross's proposal that the content of paragraph 3 should form the second sentence of paragraph 1 since the provision as so amended would then state the fundamental rule on inviolability.

105. Mr. VERDROSS said that Mr. Briggs and Mr. Tunkin had referred to the two meanings of the term "inviolability". First, it had a negative meaning—that of prohibition of entry. Secondly, it had a positive meaning—that of the obligation to protect. The first meaning could be covered in paragraph 1 and the second in paragraph 2 of the article; paragraph 3 could then be deleted.

The meeting rose at 1 p.m.

805th MEETING

Thursday, 17 June 1965, at 3.15 p.m.

Chairman: Mr. Milan BARTOŠ

Present: Mr. Ago, Mr. Briggs, Mr. Castrén, Mr. Elias, Mr. Jiménez de Aréchaga, Mr. Pessou, Mr. Reuter, Mr. Rosenne, Mr. Ruda, Mr. Tsuruoka, Mr. Tunkin, Mr. Verdross, Sir Humphrey Waldock, Mr. Yasseen.

Special Missions

(A/CN.4/179)

(continued)

[Item 3 of the agenda]

ARTICLE 19 (Inviolability of the premises of the special mission) [19] (continued)¹

1. The CHAIRMAN invited the Commission to continue its consideration of article 19.

2. Mr. ROSENNE referred to his suggestion, made at the 804th meeting, that the scope of article 19 should be extended by including a provision based on the last sentence of article 31, paragraph 2, of the Vienna Convention on Consular Relations.² Mr. Tunkin had opposed the suggestion on the grounds that the provision in question had been inserted in the Vienna Convention by the United Nations Conference on Consular Relations and not by the Commission itself, which had agreed that in the interests of friendly co-operation between States any possibility of intrusion into premises, whether consular or diplomatic, should be excluded.³

3. The fact that the States represented at the Conference had found it necessary to introduce the provision in article 31 of the Convention spoke for itself. In the case of special missions, which rarely occupied buildings of their own but were usually accommodated in buildings used for other purposes as well, it was as essential as in the case of consular missions that the consent of the head of the mission to entry into the premises could be assumed in case of fire or other disaster requiring prompt protective action.

4. Mr. BRIGGS agreed with Mr. Rosenne.

5. The CHAIRMAN, speaking as Special Rapporteur, said that his difficulties in drafting article 19 could best be understood in the light of the difference between the articles on which it was based: article 22 of the Vienna Convention on Diplomatic Relations and article 31 of the Vienna Convention on Consular Relations, which were not constructed along the same lines. The former said that "the premises of the mission shall be inviolable", whereas the second said that "consular premises shall be inviolable to the extent provided in this article".

6. So far as substance was concerned, the Vienna Convention on Diplomatic Relations laid down the absolute inviolability of the mission's premises, and hence the duty of agents of the receiving State to refrain from entering them. The Vienna Convention on Consular Relations on the other hand (in particular article 41) empowered the authorities of the receiving State to take certain action against consular officers.

7. With regard to the active protection due to special missions, he had followed the provisions of the two Vienna Conventions, which were largely parallel. In addition, he had drawn conclusions from events that had occurred in recent years, which had led to intrusions into premises in connexion with popular movements

¹ See 804th meeting, following para. 76.

² *Ibid.*, para. 96.

³ *Ibid.*, para. 103.

or demonstrations on a smaller scale. On several occasions the question had arisen whether the receiving State was obliged to accord protection and not to accept the theory that such events constituted a case of *force majeure*. The Government of Yugoslavia had ordered the police to lie down on the ground outside the Belgian Embassy when certain events had occurred in the Congo. Crowds might be tempted to attack by the fact that the police did not do their duty.

8. In his opinion, each of the three paragraphs of article 19 had a distinct purpose; one stated the principle of inviolability, another described what the authorities had to do to prevent certain actions, and the third was concerned with active protection. The question was how far the two Vienna Conventions should be followed, and which one should be taken as a model.

9. In reply to Mr. Rosenne's question concerning presumed consent, he said he had not wished to introduce the presumption into the article without an express decision by the Commission, which had twice ruled against it. At the Vienna Conference on Diplomatic Intercourse and Immunities, 1961, the amendment containing such a formula⁴ had been opposed by a small majority, but the formula had been accepted at the Vienna Conference on Consular Relations, 1963,⁵ although at variance with the draft prepared by the International Law Commission. He thought that a question of principle was involved: now that the rule had become a part of positive international law, against the wishes of the Commission, should the Commission follow its own precedents or should it overrule them?

10. With regard to the question who could authorize the agents of the receiving State to enter the premises, he said that under the Vienna Convention on Diplomatic Relations the person competent to give the consent was the head of the diplomatic mission, and under the Vienna Convention on Consular Relations the two organs competent to give the consent were the head of the consular post and the head of the permanent regular diplomatic mission accredited to the country in which the consular post was situated. In the case of special missions, he had thought it better to mention both possibilities, for in practice the heads of special missions were often inexperienced and might refuse to listen to the arguments used to justify entry. Accordingly, he had proposed an alternative though not cumulative combination of the rules set forth in the two Vienna Conventions.

11. He thought that, apart from the question raised by Mr. Rosenne, the differences in the views concerning article 19 related to drafting rather than to substance. Mr. Reuter had asked whether a State had a duty to know its obligations with regard to the object to be protected: he (the speaker) thought that the point should not give rise to controversy so far as the actual rules were concerned, and that it would be enough to improve the text and to draft it in more precise language.

⁴ Amendment submitted by Ireland and Japan; see *United Nations Conference on Diplomatic Intercourse and Immunities, Official Records*, Vol. II, doc. A/CONF.20/C.1/L.163.

⁵ See *United Nations Conference on Consular Relations, Official Records*, Vol. I, fourteenth plenary meeting, especially paras. 46 *et seq.*

12. In reply to Mr. Elias's question whether the article should say that the premises of a special mission "are inviolable" or "shall be inviolable"—in other words whether the provision should be drafted as a general statement or as a rule of law—he thought that the mandatory formula "shall be" should be retained.

13. Mr. PESSOU suggested that the opening passage of paragraph 3 should be amended to read: "Except in cases of *force majeure* or imminent danger (fire or threats), agents of the receiving State may not enter the said premises without the consent of the head of the special mission . . ."

14. The CHAIRMAN, speaking as Special Rapporteur, said that he was not sure that the Commission should accept the idea of *force majeure* as justifying entry, an idea which it had twice rejected in the past and which, as diplomatic history showed, lent itself to abuse.

15. Mr. PESSOU said that there had been several unfortunate cases where the authorities of a country had been unable to prevent a political demonstration against the embassy of a foreign country. At the least, therefore, the article should provide that, except in case of threats or danger, permission for agents of the receiving State to enter the premises was always given by the head of the special mission.

16. The CHAIRMAN, speaking as Special Rapporteur, said that two different cases were involved: Mr. Pessou, who had been right in submitting his proposal, was thinking of the case where the territorial State should prevent a violation of the premises, whereas he (the speaker) was thinking of the case of fire or other disaster.

17. Mr. ROSENNE said he could not accept the contention that the Commission was bound by decisions which it had taken at earlier sessions when, in a different composition, it had been examining a different topic from that now under discussion, any more than the International Court was formally bound by any decision which it had made in a previous case. There should, of course, be some element of continuity and development in the Commission's thinking, but that consideration did not prevent it from departing altogether from an earlier decision if it thought fit, even if it had reached that earlier decision on two previous occasions. It was impossible to overlook the fact that, on the issue he had raised, the Vienna Conference on Consular Relations had not followed the same conclusion as the Commission.

18. However, to avoid prolonging the discussion, he would have no objection if the point which he had raised were referred to the Drafting Committee.

19. Mr. TUNKIN thought that Mr. Rosenne's reference to the decision taken by the Conference on Consular Relations was unconvincing. Many members of the Commission considered that the Commission's draft articles on consular relations⁶ had been spoilt, rather than improved, by that Conference; and the inclusion of the last sentence of article 31, paragraph 2, in the Convention of 1963 was one example of the way in which the sense of the Commission's draft articles had been impaired.

⁶ *Yearbook of the International Law Commission, 1961, Vol. II, pp. 93 et seq.*

20. The point raised by Mr. Rosenne was, of course, a very important one and deserved careful consideration by the Commission. But members should not allow their opinion to be swayed by the single fact that the Conference on Consular Relations had reached a conclusion different from their own. They should rather examine the whole history of the problem, and particularly various arguments and facts by which the Commission had been guided in producing the relevant provision in its own draft on consular relations.⁷

21. The CHAIRMAN asked if the Commission wished to refer article 19, together with Mr. Rosenne's proposal, to the Drafting Committee forthwith, or if it wished first to take a decision on Mr. Rosenne's proposal.

22. Mr. YASSEEN said that so important a matter, which involved a whole series of problems, should not be referred to the Drafting Committee. Although the local authorities should, of course, be permitted to help in putting out a fire, it was also conceivable that the fire might have been set by those same authorities in order that they should be able to enter the premises in question.

23. Mr. TUNKIN, supported by Mr. CASTRÉN; thought that the matter should be referred to the Drafting Committee, since the attendance at the Commission's current meeting was far from complete.

24. Mr. YASSEEN again objected to the idea that so important a matter should be referred to the Drafting Committee.

25. Mr. REUTER said that he shared Mr. Yasseen's view. He had noted on several occasions that, when the members of the Commission were not in agreement on a provision, they referred the controversial text to the Drafting Committee, where the real work, which should be done in the plenary Commission, was not done. He thought that the Commission should not discuss such a delicate matter when only half of its members were present; in his opinion, consideration of the matter should be postponed.

26. Mr. JIMÉNEZ de ARÉCHAGA, supported by Mr. BRIGGS, suggested that article 19 be referred to the Drafting Committee and that a decision on Mr. Rosenne's proposal should be postponed until the Drafting Committee had reported back to the Commission with its recommendations concerning the article.

27. Mr. REUTER said that the Drafting Committee had a heavy work-load and should not be asked to settle questions which should be settled by the Commission itself, since those were questions of substance which the Drafting Committee was not authorized to discuss.

28. The CHAIRMAN suggested that the Commission should refer article 19 to the Drafting Committee and that, when it received the Committee's text, it should consider whether it was desirable to add the sentence taken from article 31 of the Vienna Convention on Consular Relations.

*It was so agreed.*⁸

⁷ *Ibid.*, p. 109, article 30.

⁸ For resumption of discussion, see 817th meeting, paras. 7-10.

ARTICLE 20 (Inviolability of archives and documents)
[20]

Article 20

[20]

Inviolability of archives and documents

The archives and documents of a special mission shall be inviolable at any time and wherever they may be. Documents in the possession of the head or members of the special mission or of members of its staff or in the room occupied by them shall likewise be deemed to be documents of the special mission.

29. The CHAIRMAN, speaking as Special Rapporteur, said that article 20 took account of article 24 of the Vienna Convention on Diplomatic Relations and of article 33 of the Vienna Convention on Consular Relations. However, his draft article 20 made no reference to furnishings or other property such as means of transport, which were dealt with in article 24 of his draft.

30. Mr. BRIGGS said he could accept the first sentence of article 20, but thought that the second sentence was redundant. Documents in the possession of the head or members of the special missions which related specifically to the work of the special mission were covered by the words "documents of a special mission" in the first sentence, whereas other documents in the possession of the head or members of a special mission might not relate to the special mission's work at all and were irrelevant to the subject under discussion.

31. The word "inviolable" in the first sentence of article 20, as in article 19, seemed to be ambiguous; he assumed that it meant both that the archives and documents of a special mission should not be seized by the authorities of the receiving State, and that the authorities of that State had a duty to prevent the theft of a special mission's archives and documents. There was another problem, too, which had been evaded both by the Conference on Diplomatic Intercourse and Immunities and by the Conference on Consular Relations. Neither of the Vienna Conventions contained any specific provision relating to the issue which had arisen in the courts of Canada and the United Kingdom—and probably in other countries as well—concerning documents stolen from the archives of a particular diplomatic mission and used as evidence in a court to obtain a conviction. He had in mind particularly the case of *Rex v. A.B. (Kent)*⁹ in which an employee of the United States Embassy in London had stolen certain documents, and the only way in which it had been possible to secure his conviction had been to introduce the stolen documents as evidence in court; and the case of *Rose v. The King*¹⁰ in which a member of the Canadian Parliament had been charged with certain offences and documents stolen from a Soviet mission had been produced in court to obtain his conviction. In both of the cases cited the courts had held that the defendant could not plead the privileged character of the documents when the States from whose diplomatic archives they had been stolen had not done so. Did the provision in article 20 that the archives and documents of the special mission would be inviolable at any time

⁹ [1941] 1 K.B.454.

¹⁰ [1947] 3 D.L.R.618.

and wherever they might be mean that the documents could not be produced in court if they came into the hands of the receiving State after being stolen ?

32. The CHAIRMAN, speaking as Special Rapporteur, said that in the United States, between 1947 and 1949, government agents had seized documents in order to determine whether they really belonged to the special mission. In his opinion, the second sentence was even more necessary than the first where special missions were concerned, for they were very often mobile and had no building in which to keep their documents.

33. Mr. RUDA agreed with Mr. Briggs that the second sentence of article 20 was redundant, since its sense was already covered by the words "and wherever they may be" in the first sentence.

34. Mr. VERDROSS, replying to Mr. Briggs, said that the sentence "the archives . . . shall be inviolable", which was taken from the two Vienna Conventions, meant that the authorities of the receiving State could not touch the archives and documents. It had a negative meaning in that it described what the authorities in question could not do.

35. He proposed that the article should be simplified by incorporating in the first sentence the idea contained in the second, so that it would then read :

"The archives and documents of a special mission, even if in the possession of the head of the special mission, are inviolable".

36. Mr. PESSOU said he understood Mr. Briggs's misgivings, which, fortunately, had been allayed by Mr. Verdross. It would be a mistake to read something into the text that was not there.

37. He considered that the article should be amended to read :

"The archives and documents of a special mission and, in general, all documents belonging to or in the possession of the special mission are inviolable, wherever they may be and whoever may be in possession of them".

That wording was based on a passage in a study by Mr. Torres of the Vienna Convention on Consular Relations.¹¹

38. Mr. JIMÉNEZ de ARÉCHAGA said that article 20 provided an excellent example of the extent to which the Commission should specify in detail the privileges of special missions.

39. At the previous meeting Mr. Reuter had urged that the Commission should consider every possible aspect of the activities of special missions, and should adopt a text covering those activities in the greatest possible detail.¹² That was a sound general policy in other cases, but it might be wiser not to apply it in the particular case of the codification of the rules concerning special missions, because the Commission might be affecting the efficacy of the more important general Conventions of Vienna. The Special Rapporteur had considered

very carefully the question of the inviolability of archives and documents, and had decided to insert an additional sentence which did not appear in the corresponding articles of the Vienna Convention on Diplomatic Relations or of the Vienna Convention on Consular Relations. But, if the Commission were to adopt an excessively precise and detailed text regarding the inviolability of the archives and documents of special missions, that text might indirectly affect the interpretation of the existing law relating to ordinary diplomatic and consular missions. For instance, the inclusion of the proposed second sentence of article 29 in a convention on special missions, and the absence of any corresponding provision in the two Vienna Conventions might give rise to the interpretation that the two existing Conventions did not provide protection for the documents of diplomatic and consular missions to the same extent as that proposed for the documents of special missions in the second sentence of article 20.

40. The CHAIRMAN, speaking as Special Rapporteur, said that the Vienna Convention on Diplomatic Relations provided for the inviolability of the residence of the head of the mission, whereas the position was different in the case of the residence of the head of the special mission.

41. Mr. YASSEEN pointed out that, according to the proposed text, the archives and documents should be inviolable "wherever they may be", the essential condition being that they had to be documents of the special mission. The best solution would be to state who would determine what documents were mission documents. For his part, he saw no reason why it should not be the head of the mission who would have the final say in the matter. In any case, the second sentence of the article was not really essential, since it was only a particular application of the first sentence.

42. The CHAIRMAN, speaking as Special Rapporteur, considered that in practice the second sentence was more useful than the first.

43. Mr. TUNKIN said that in principle he agreed with the wording of the second sentence of article 20. Like Mr. Jiménez de Aréchaga, however, he was seriously concerned about the difference between the wording of article 20, as proposed by the Special Rapporteur, and the wording of the corresponding articles in the Vienna Conventions. The two Conventions — and particularly the Vienna Convention on Diplomatic Relations in its article 30 — provided for the inviolability of documents of members of missions in their private residences, and article 26 of the draft under discussion likewise asserted the inviolability of the residence of members of special missions.

44. He doubted whether it would be wise to retain the second sentence of article 20, but only because its retention might give rise to some misinterpretation of other articles in the present draft or indeed in existing Conventions.

45. Mr. CASTRÉN also considered that the second sentence was unnecessary, as the first was very categorical.

46. Mr. REUTER said that the question of principle to be settled was whether the Commission really had to

¹¹ Santiago Torres Bernardez in *Annuaire français de droit international* (IX), 1963, pp. 78 to 118.

¹² See 804th meeting, para. 91.

follow the Vienna Conventions mechanically. If so, a convention on special missions could be reduced to a protocol of two or three articles. However, the formulae adopted in 1961 and 1963 did not solve all the problems.

47. He cited a hypothetical case in which there could be double inviolability: certain archives were violated by a State to the prejudice of another State. For example, one embassy stole documents from another, whereupon the stolen papers became documents of the first-mentioned embassy and were therefore covered by two conflicting immunities.

48. In another hypothetical case, the members of a special mission mislaid a briefcase containing papers, which had to be opened for the purpose of determining what it contained: who was competent to identify the contents as that mission's archives or documents?

49. He did not object to leaving those problems unsolved if it was intended that the Vienna Conventions should be sacrosanct and if the law was not to advance further now that they had been signed. Personally, he favoured the reasonable compromise solution chosen by the Special Rapporteur in his second sentence, which disposed of some of the difficulties.

50. Mr. ROSENNE noted that in the first sentence of article 20 the Special Rapporteur had adopted the phrase "at any time" which appeared in article 24 of the Vienna Convention on Diplomatic Relations. He personally preferred the phrase "at all times", which appeared in the Vienna Convention on Consular Relations (article 33), and thought that the substitution of that phrase for the words "at any time" might resolve some of the difficulties which had arisen in regard to the second sentence of article 20.

51. There was, moreover, a distinct difference between the English and French texts of the second sentence. The general consensus seemed to be in favour of deleting the second sentence; but he thought that the matter should be given some further consideration, particularly if an English wording could be found which reflected more faithfully the sense of the original French text.

52. Sir Humphrey WALDOCK wished to associate himself with the views expressed by Mr. Jiménez de Aréchaga and Mr. Tunkin. Any provision relating to the inviolability of archives and documents would undoubtedly cover matters which might give rise to innumerable problems in practice; and, although there might be certain advantages in trying to solve some of those problems in advance, it was surely wiser to be guided by the corresponding provisions of the Vienna Conventions, which were based on a full knowledge of the problems that had arisen in international practice. If the Commission began to embroider on the Vienna Conventions on points which were not specifically related to special missions alone, it would be going beyond its instructions. There might indeed be a strong case for a supplementary protocol to the Vienna Conventions; but such a protocol would have to be suggested by States. What the Commission had been instructed to do was to review the provisions of the Vienna Conventions, and to decide which of them should be

extended and which restricted in the case of special missions. It had no mandate to deal with subjects not specifically connected with special missions. It had a limited function to perform and should observe the limitations imposed on it.

53. Mr. ELIAS said he did not think that the disagreement which existed over article 20 could be settled merely by drafting changes to incorporate the sense of the second sentence in the first sentence. The issue was rather one of principle — did the Commission wish to extend the protection to be granted to documents in the possession of the head or members of the special mission even to itinerant members of the mission, as the Special Rapporteur stated in paragraph (4) of his commentary? In his (the speaker's) view, protection of that kind should be extended to documents in the possession of the head of the mission, but he doubted whether the same inviolability should be provided for documents in the possession of members of the special mission or of members of its staff. The Special Rapporteur had stated that his proposal was based on the provisions of article 33 of the Vienna Convention on Consular Relations; but the idea of extending protection to documents in the possession of members of a mission or members of its staff did not appear in that article.

54. Secondly, at the previous meeting he had suggested that draft article 24 (Inviolability of the property of the special mission) should be included in article 19, as a new paragraph.¹³ In summing up the discussion on article 19, the Special Rapporteur had not specifically replied to that suggestion, but it appeared that part of the answer, at least, was contained in the last sentence of paragraph (5) of the commentary on article 20. In order not to prolong the discussion, he would reserve his position until the Commission came to consider draft article 24.

55. The CHAIRMAN, speaking as Special Rapporteur, wondered where the Commission's duty lay: its function could not be merely to repeat what had been accepted at Vienna, since under its terms of reference the Commission was to carry out a thorough analysis of the case of special missions. In the course of his research he had found more than thirty cases where documents seized at the residence of the head of a special mission had not been deemed to be documents belonging to the special mission. Frontier officials frequently wished to search diplomats or agents whose names did not appear in the lists of diplomatic couriers. Foreign Ministries received complaints about such incidents daily.

56. It was therefore necessary to adopt a provision raising the presumption that documents found at the residence of the head of the special mission belonged to the mission, in the light of the difference between regular missions and special missions.

57. He suggested that the article should be referred to the Drafting Committee together with the arguments advanced during the discussion.

*It was so agreed.*¹⁴

¹³ See 804th meeting, para. 86.

¹⁴ For resumption of discussion, see 817th meeting, paras. 11 and 12.

ARTICLE 21 (Freedom of movement) [21]

Article 21 [21]
Freedom of movement

1. The head and members of a special mission and the members of its staff shall have the right to freedom of movement in the receiving State for the purpose of proceeding to the place where the special mission performs its task, returning thence to their own country, and travelling in the area where the special mission exercises its functions.

2. If the special mission performs its task elsewhere than at the place where the permanent diplomatic mission of the sending State has its seat, the head and members of the special mission and the members of its staff shall have the right to movement in the territory of the receiving State for the purpose of proceeding to the seat of the permanent diplomatic mission or consulate of the sending State and returning to the place where the special mission performs its task.

3. If the special mission performs its task by means of teams or at stations situated at different places, the head and members of the special mission and the members of its staff shall have the right to unhindered movement between the seat of the special mission and such stations or the seats of such teams.

4. When travelling in zones which are prohibited or specially regulated for reasons of national security, the head and members of the special mission and the members of its staff shall have the right to freedom of movement, if the special mission is to perform its task in precisely those zones. In such a case, the head and members of the special mission and the members of its staff shall be deemed to have been granted the right to freedom of movement in such zones, but they shall be required to comply with the special rules applicable to movement in such zones, unless this question has been settled otherwise either by mutual agreement between the States concerned or else by reason of the very nature of the special mission's task.

58. The CHAIRMAN, speaking as Special Rapporteur, said that although the text of the draft article was based on the ideas contained in article 26 of the Vienna Convention on Diplomatic Relations and in article 34 of the Vienna Convention on Consular Relations, the notions underlying the draft article were different. General freedom of movement was granted to permanent diplomatic missions because, as had been explained at Vienna, diplomats were authorized to observe events in the country. On the other hand, freedom of movement was granted to special missions in practice only to the extent necessary for the performance of their tasks. In the United States, for example, the freedom of movement of special missions was, as in many other countries, subject to certain restrictions. Movement in certain areas was subject to special permission which, so far as he knew, had never been refused by the authorities. In fact, freedom of movement was restricted to a greater or lesser extent according to the country concerned. The Commission should make a choice between the two notions.

59. If the special mission comprised several teams operating in different parts of the receiving State's territory, the special mission had to be able to keep in touch with them at all times. With regard to movement in so-called "prohibited" zones, or zones which were

specially regulated, there were in practice differences between the rules applied to special missions and those provided by the Vienna Conventions. But it might happen that a special mission had to perform a task in a prohibited zone. In that case, it was considered that the agreement relating to the special mission implied the right to freedom of movement in that zone.

60. In brief, the head and members of the special mission should be able to proceed freely to the place where they would perform their task, to proceed freely to the seat of the permanent diplomatic mission or the consulate of the sending State, to move freely between the seat of the special mission and the seats of the different teams of which it was composed, to return freely to their own country and even to enter prohibited zones without hindrance. It might accordingly be said that special missions had the right to freedom of movement in the places where their tasks were to be performed.

61. Mr. CASTRÉN said that paragraph 1 was the most important clause in the article, for it supplemented the provisions laid down in the Vienna Conventions. He did not clearly see the distinction between paragraphs 2 and 3. He thought that paragraph 4 might be omitted and a simplified version of that paragraph added to paragraph 1 in the following terms:

"If the special mission performs its task in zones which are prohibited or specially regulated for reasons of national security, the head and members of the special mission and the members of its staff shall be required to comply with the special rules applicable to movement in such zones, unless this question has been settled otherwise either by mutual agreement between the States concerned or else by reason of the very nature of the special mission's task."

62. The CHAIRMAN, speaking as Special Rapporteur, said that Mr. Castrén's text did not take into account the essential rule set forth in paragraph 4 — the right to freedom of movement in zones which were prohibited or specially regulated. It provided only that special missions would have to comply with the regulations in force. A passage might be added in Mr. Castrén's text stating "... have the right to freedom of movement, subject to compliance with ... etc.". More than a drafting question, an essential principle was involved.

63. Mr. CASTRÉN said that his proposal for combining paragraphs 1 and 4 of the text seemed to him to meet the Special Rapporteur's objection.

64. Mr. ELIAS agreed with the thought behind draft article 21, but considered that its four paragraphs could be reduced to two at the most. It did not seem necessary, for example, to provide, as did paragraph 2, for the case where the special mission performed its task elsewhere than at the place where the permanent diplomatic mission of the sending State had its seat; in his opinion, it would be sufficient to guarantee, as in paragraph 1, the special mission's freedom of movement for the purpose of proceeding to the place where it performed its task, subject, of course, to the conditions laid down in paragraph 4. Paragraph 3 could also be dispensed with, as it concerned a mere matter of detail. Lastly, although he had no specific text to propose, he thought

that paragraph 4 should be streamlined and drafted in clearer terms.

65. The CHAIRMAN, speaking as Special Rapporteur, said that if freedom of movement was accepted as a principle, everything contained in paragraph 2 and 3 could be summed up in one sentence. He did not have the impression, however, that States always granted that freedom to special missions.

66. Mr. ROSENNE said that, in condensing article 21, the Commission should not lose sight of the principle stated in paragraph (3) of the Special Rapporteur's commentary. He fully agreed with the Special Rapporteur that special missions should have the right to freedom of movement in the territory of the receiving State only to the extent required to ensure the smooth performance of their tasks.

67. Mr. TSURUOKA supported the idea, expressed by Mr. Rosenne, of a limited freedom of movement. The freedom should be admitted and recognized to the extent considered necessary for the performance of the task of the special mission. That was the criterion which should be observed in drafting paragraph 1. With respect to paragraph 4, he said that the paragraph was based on the assumption that the right to freedom of movement had already been recognized, but in practice that right would remain ineffective in the absence of prior agreement on the subject. The idea of a general guarantee of freedom of movement was in many respects an attractive one, but was it really necessary? It would perhaps be better to leave it to the States concerned to settle that question by mutual agreements. Special missions would not have too great difficulty in performing their task, but the principle stated in paragraph 4 should not be overemphasized.

68. The CHAIRMAN, speaking as Special Rapporteur, said that the right to freedom of movement should remain the cardinal principle, for in a country part of which was under military law, special missions had the right to freedom of movement but they had to obtain permission from the responsible military headquarters in order to enter so-called prohibited zones.

69. Mr. VERDROSS said that if a government authorized a special mission to perform a task in a prohibited zone, it should supply it with the means of free access to that zone. But an express provision to that effect was not needed, for in recognizing a purpose, one recognised also the means necessary for achieving that purpose.

70. Mr. TUNKIN said that he was broadly in agreement with article 21; with respect to paragraph 4, however, he agreed with Mr. Tsuruoka that it was hardly possible to deduce from the general task of the special mission that it would be automatically permitted to enter certain specific zones. Such an inference would be going too far. He hoped that the Drafting Committee would stress the specific arrangement which might be needed in the light of the general functions of the special mission in order to facilitate its work.

71. The CHAIRMAN, speaking as Special Rapporteur, said that he had proceeded from the premise that two interested States concluded an agreement providing

that the special mission should perform its task in certain places situated in prohibited zones. In his opinion, therefore, it was necessary to place even more emphasis on the right to freedom of movement in those zones.

72. Sir Humphrey WALDOCK agreed with Mr. Tunkin and Mr. Tsuruoka that paragraph 4 raised a very delicate question; perhaps that paragraph overemphasized the right of freedom of movement, which was already stated in paragraph 1. He thought it hardly likely that States would accept paragraph 4 as it stood. In order to retain the Special Rapporteur's idea, and at the same time to make the paragraph acceptable to States, he suggested that the reference to the right to freedom of movement in the first sentence of paragraph 4 should be omitted. The sentence might then be revised on the following lines, using some of the wording of article 26 of the Vienna Convention on Diplomatic Relations :

“ When travelling in zones which are prohibited or specially regulated for reasons of national security, the head and members of the special mission and the members of its staff shall be subject to the laws and regulations concerning such zones, except as may be otherwise agreed between the States concerned or indicated by the nature of the special mission's task. ”

73. With respect to the other paragraphs of the article, he thought that the Special Rapporteur had steered a judicious course between the various difficulties involved.

74. The CHAIRMAN, speaking as Special Rapporteur, said that the essential principle to be established was the right of the special mission to enter so-called prohibited zones if such entry was necessary for the performance of its task. The prior agreement concluded between the governments concerned should not be subsequently subject to rules restricting its application.

75. Mr. BRIGGS said that he had assumed that paragraph 4 referred to situations, for example, where international teams were inspecting disarmament sites; those teams would naturally be in prohibited zones because they were authorized to be there. That point, he felt, was adequately covered by the draft suggested by Sir Humphrey Waldock. The first three paragraphs should, as Mr. Elias had suggested, be condensed and simplified.

76. The CHAIRMAN, speaking as Special Rapporteur, said he agreed with Mr. Elias that the reference to contact with consular and diplomatic missions and with the different teams of the special mission should be added to paragraph 1. The controversial question was that concerning paragraph 4, although it was agreed that special missions had to comply with special rules when travelling in prohibited zones. The Drafting Committee would have to draft paragraph 4 with particular care. He suggested that article 21 should be referred to the Drafting Committee.

*It was so agreed.*¹⁵

¹⁵ For resumption of discussion, see 817th meeting, paras. 13 and 14.

ARTICLE 22 (Freedom of communication) [22]

Article 22

[22]

Freedom of communication

1. The receiving State shall permit and protect free communication on the part of the special mission for all official purposes. In communicating with the Government and the other missions and consulates of the sending State, wherever situated, the special mission may employ all appropriate means, including its couriers. However, the special mission may install and use a wireless transmitter only with the consent of the receiving State.

2. The official correspondence of the special mission shall be inviolable. Official correspondence means all correspondence relating to the special mission and its functions.

3. The bag of the special mission shall not be opened or detained.

4. The packages constituting the bag of the special mission must bear visible external marks of their character and may contain only documents or articles intended for the official use of the special mission.

5. The courier of the special mission, who shall be provided with an official document indicating his status and the number of packages constituting the bag, shall be protected by the receiving State in the performance of his functions. He shall enjoy personal inviolability and shall not be liable to any form of arrest or detention.

6. Special missions shall have, first and foremost, the right to permanent contact with the permanent diplomatic mission of their State accredited to the country in which they are performing their task and with the consuls of their own State within whose jurisdictional territory they are exercising their functions.

7. Special missions shall not have the right to send messages in code or cipher unless they have been accorded this right by an international agreement or by an authorization of the receiving State.

8. Only members of the special mission or of its staff may act as couriers of the special mission.

77. The CHAIRMAN, speaking as Special Rapporteur, said that draft article 22 differed slightly from article 35 of the Vienna Convention on Consular Relations and from article 27 of the Vienna Convention on Diplomatic Relations. A technical question was involved. The articles in the Vienna Conventions to which he had referred had established the principle that diplomatic and consular missions had the right to make contact with nationals of their country in the receiving State. Some special missions had sought recognition of the same right for themselves, but in his opinion such a right would exceed their competence. It was true that occasionally educational or ecclesiastical special missions travelled to certain countries to make contact with students or members of particular religious communities; but such contact was not, in normal practice, a task for special missions, and that consideration could therefore be disregarded.

78. Article 22 of his draft was based on article 27 of the Vienna Convention on Diplomatic Relations, subject to certain terminological changes.

79. So far as the use of couriers was concerned he said that, after consulting his country's frontier authorities, he

had thought it advisable not to make provision for the possibility of the special mission's employing couriers *ad hoc* or of its employing as a courier a person who was a national of or resident in the receiving State. Only members of the special mission or of its staff could act as couriers of the special mission. Admittedly, the special mission could route its mail through the sending State's embassy or consulates, but it should be noted that in some cases (e.g. communications between Italy and Yugoslavia) special missions sometimes used captains of ships or of commercial aircraft as couriers *ad hoc*. It might therefore be possible to insert a provision to that effect in article 22.

80. Mr. RUDA said that the basic idea in article 22 was that of freedom of communication between the special mission and the authorities of the sending State; accordingly, he approved of paragraphs 1 to 5, which correctly reflected article 27 of the Vienna Convention on Diplomatic Relations. He was fully in agreement with the principle stated in paragraph 6 that special missions should have the right to permanent contact with the permanent diplomatic mission of their State accredited to the country in which they were performing their task. With respect to paragraph 7, he said that the transmission of messages in code or cipher was a common practice of special missions, and in fact the task of a special mission would often be made more difficult if the practice was prohibited. With regard to paragraph 8, he thought that the use, when considered necessary, of diplomatic couriers who were not members of the special mission should also be permitted.

81. The CHAIRMAN, speaking as Special Rapporteur, said that, in general, special missions were not authorized to send messages in code or cipher. There were provisions in the Convention of the Universal Postal Union on that point.

82. With reference to Mr. Ruda's other remark, concerning the employment of *ad hoc* couriers by special missions, he said that his country's frontier authorities had warned him of the danger of the use of such couriers by special missions. He agreed to the inclusion in paragraph 8 of a reference to the use of the services of members of embassies and consulates and of captains of ships and of commercial aircraft.

83. Mr. AGO said that, since private persons used codes in their communications, it would be wrong to refuse to special missions the right to use codes and ciphers.

84. The CHAIRMAN, speaking as Special Rapporteur, pointed out that private persons could use codes on condition that the code was deposited with and approved by the appropriate authorities.

85. Mr. AGO proposed that the following phrase should be added at the end of the second sentence in paragraph 1: "and code and cipher".

86. He agreed that reference should be made in paragraph 8 to the possibility of using captains of ships and of commercial aircraft as *ad hoc* couriers of the special mission, because in certain circumstances they constituted the most convenient means of communication. He had no criticism to make with regard to the other paragraphs, except paragraph 6, which, in his opinion, should follow paragraph 1, dealing specifically

with freedom of communication. However, the usefulness of paragraph 6 was questionable, for it might give the impression that there were difficulties in the way of communicating freely with the diplomatic and consular authorities of the sending State.

87. The CHAIRMAN, speaking as Special Rapporteur, agreed to delete paragraph 6.

88. Mr. TSURUOKA said that what mattered above all was that the special mission should enjoy the conditions necessary for its success. For that purpose, and in order to avoid misunderstandings, it was desirable to establish effective co-ordination at the seat of the permanent diplomatic mission in the country where the special mission performed its task. In that connexion, he found the Special Rapporteur's idea a good one, but it should be laid down that special missions were permitted to send messages in code or cipher to the embassies or consulates in question. Communications with the Government of the sending State could be routed through its diplomatic or consular agents, though the States concerned would naturally be free to conclude an agreement granting special facilities to special missions.

89. The CHAIRMAN, speaking as Special Rapporteur, said that that argument had often been used by permanent diplomatic missions in order to keep control over special missions. He agreed that it was necessary to facilitate liaison through embassies, but communications of that kind were not always possible, particularly in regions difficult of access, unless it was possible to communicate by wireless transmitter, river or ocean routes or helicopter.

90. Mr. TSURUOKA said that his suggestion had been that the States concerned should be completely free to agree on special measures when communications between the special mission and the permanent diplomatic mission and consuls of the sending State were particularly difficult.

The meeting rose at 5.55 p.m.

806th MEETING

Friday, 18 June 1965, at 10 a.m.

Chairman: Mr. Milan BARTOŠ

Present: Mr. Ago, Mr. Amado, Mr. Bedjaoui, Mr. Briggs, Mr. Castrén, Mr. Elias, Mr. Jiménez de Aréchaga, Mr. Pal, Mr. Pessou, Mr. Reuter, Mr. Rosenne, Mr. Ruda, Mr. Tsuruoka, Mr. Tunkin, Mr. Verdross, Sir Humphrey Waldock, Mr. Yasseen

Special Missions

(A/CN.4/179)

(continued:)

[Item 3 of the agenda]

ARTICLE 22 (Freedom of communication) [22] (continued)¹

1. The CHAIRMAN invited the Commission to continue its consideration of article 22.

2. Mr. YASSEEN said that, although article 22 followed the corresponding article of the Vienna Convention on Diplomatic Relations, it included a number of innovations, which the Commission should examine carefully.

3. Under paragraph 7, for example, special missions did not have the right to send messages in code or cipher unless they had been accorded that right by an international agreement or by an authorization of the receiving State. That provision was not consistent with the requirements of special missions or with the realities of international life. Everyone knew the reasons why permanent missions used codes and ciphers in communicating with the sending State; those reasons were equally valid for special missions and justified a provision granting to such missions the unrestricted right to communicate with the sending State by those means. If that practice was not already established in positive law, it should be recognized in the interest of the progressive development of international law.

4. Paragraph 6 contained another new notion, that of free communication by the special mission with the permanent mission of its State. In his opinion, that freedom of communication should be clearly guaranteed, because the special mission always used the services of the permanent mission as its link with the sending State. Moreover, the reason why some doubted the desirability of authorizing special missions to use codes and ciphers was perhaps that in reality special missions did so in any case through the permanent missions; however, there might be cases which called for a specific rule allowing special missions to communicate direct with the sending State in code or cipher.

5. On the question whether a special mission should in fact have the right to employ the captain of a commercial aircraft or of a ship as a courier, as diplomatic and consular missions were permitted to do by the Vienna Conventions, he had no strong views. There was nothing to be lost by stating that right, which should be governed by all the guarantees provided in the Vienna Conventions; nor would there be any great risk if it were not mentioned at all. The provision stipulating that the courier had to be a member of the special mission or of its staff was perhaps required by the temporary character of special missions.

6. Mr. ROSENNE said that article 22 should be brought more closely into line with the Vienna Conventions. Paragraph 1 should be drafted in more or less the same terms as the first paragraphs of the corresponding articles in those Conventions; in the second

¹ See 805th meeting, following para. 76.