

Document:-  
**A/CN.4/SR.881**

**Summary record of the 881st meeting**

Topic:  
**Special missions**

Extract from the Yearbook of the International Law Commission:-  
**1966, vol. I(2)**

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International rules on the conflict of laws were regarded as rules of private international law. Many such rules were formulated in treaties themselves, but that ideal was not always attained. If the proposal related only to that aspect of the matter, namely, harmonization of the commercial law of different countries by means of rules on conflict, he thought the Commission was competent to deal with it.

63. If the problem was approached from that particular standpoint, he could not quite agree with Mr. Ago. In his opinion, the Commission's work on the subject would not duplicate that of The Hague Conference on Private International Law, which, although it had become a permanent institution, retained a rather special character, because it consisted of the European States and only three or four countries outside Europe.

64. A clear idea of the question could only be formed by studying its other aspects, which were of course the commercial aspect and that relating to the peaceful coexistence of different political and social systems. That was why, for practical reasons, he thought the Commission could not undertake to study the question as a whole, since it could deal with it only from the standpoint of private international law.

65. He would not express any opinion on the suggestion made by the Secretariat in paragraph 6 of its note, as he thought it was for the United Nations to decide whether it was desirable and feasible to establish a new commission to deal with the matter.

66. Mr. STAVROPOULOS (Legal Counsel) noted that there was clearly a consensus of opinion in the Commission that it should not undertake responsibility for studying the topic in question.<sup>3</sup>

The meeting rose at 1.5 p.m.

<sup>3</sup> See document A/6396.

## 881st MEETING

*Thursday, 30 June 1966, at 11.15 a.m.*

*Chairman:* Mr. Mustafa Kamil YASSEEN

*Present:* Mr. Ago, Mr. Amado, Mr. Bartoš, Mr. Briggs, Mr. Castrén, Mr. El-Erian, Mr. Jiménez de Aréchaga, Mr. Paredes, Mr. Pessou, Mr. Reuter, Mr. Rosenne, Mr. Ruda, Mr. Tsuruoka, Mr. Tunkin, Mr. Verdross, Sir Humphrey Waldock.

## Special Missions

(A/CN.4/188 and Add.1 and 2, A/CN.4/189 and Add.1 and 2)

*(resumed from the 878th meeting)*

[Item 2 of the agenda]

1. The CHAIRMAN invited the Commission to continue consideration of the second general question raised by the Special Rapporteur concerning the draft

articles on special missions, namely, the distinction between the different kinds of special mission (A/CN.4/189, chapter II).

2. Mr. BARTOŠ, Special Rapporteur, said that many States had not expressed an opinion on that question, but he did not infer from that that they were in agreement with the Commission. He found it very difficult to accept the Czechoslovak Government's suggestion that a distinction should be made between political missions and technical or administrative missions (A/CN.4/188). It was hard to see on what basis such a distinction could be made; for instance, were special missions entrusted with the delimitation of frontiers or the conclusion of commercial treaties or financial agreements to be regarded as political missions?

3. The Austrian Government thought that a distinction should be made between diplomats and non-diplomats serving on the same special mission (A/CN.4/188/Add.2). He was rather in favour of such a distinction, but it would be hard to maintain that a member of a special mission who was a first secretary of embassy was a diplomat, whereas the chancellor of a university, an eminent scientist or a politician leading, or serving on, a special mission was not.

4. He would therefore prefer to leave it to States to decide how far they would follow the rules to be proposed by the Commission.

5. Mr. TSURUOKA said he agreed that it was difficult to draw a very clear distinction between special missions described as "diplomatic" or "political" and other special missions. The matter was one that could be left to the judgement of the parties concerned without endangering the development of international relations.

6. He would like to know whether the Special Rapporteur wished the Commission, at that stage, to go into the extent of the specific privileges and immunities to be accorded to special missions in the draft articles.

7. Mr. BARTOŠ, Special Rapporteur, said he had not wished to make a list of privileges and immunities. He had first thought that they should be granted within the limits of functional necessity; but the Commission had rejected that idea, and after reflection he thought it had been right. It would be better to state what the privileges and immunities were, using the Convention on Diplomatic Relations as a guide.

8. The Commission had a choice of two alternatives. It could follow the system it had established and specify privileges and immunities, subject to certain limitations where subordinate staff were concerned, leaving States free to derogate from the relevant provisions by a mutual agreement to restrict the enjoyment of privileges and immunities; or it could produce a theoretical solution, within the limits set by functional necessity, leaving it to States to decide what was required to enable a special mission to function.

9. He preferred the first alternative and thought it advisable to specify the limitations. For example, where freedom of movement was concerned, it was necessary to specify that what was meant was a special mission's freedom to enter the country concerned, to travel in it for the purpose of performing its functions and to go

to the nearest embassy or consulate without restriction. It would be better to adopt that solution than merely to refer to functional necessity which, even where travel was concerned, could be interpreted in very different ways. Mr. Ago had adopted a rather liberal approach when he urged that the Commission should provide for special missions to have complete freedom of movement except in restricted zones. If the Commission wished to grant that privilege to special missions, he would not object, especially as the present tendency was to grant all tourists the right to travel freely, except in zones to which entry was prohibited by the authorities.

10. Mr. TSURUOKA said that, where privileges and immunities granted to the members of special missions were concerned, it would be advisable for the draft articles to lay down certain rules common to all kinds of special missions, based on the functional theory. The parties would be free to derogate from those provisions by increasing or decreasing the privileges or immunities granted, but the provisions would apply in the absence of other written or oral agreements.

11. The effect should not be underestimated; if the future convention contained provisions of that kind, the parties concerned would be inclined to comply with them and would be encouraged to conclude agreements on the subject. The advantage of such provisions was that they would not bind the parties too strictly, but would guide them in the interests of the development of international relations; since the rules would be based on the functional theory, they would make it easier for the special mission to perform its task.

12. The Commission need not go into details at that stage; it would be in a better position to discuss the need for those various provisions when the Special Rapporteur submitted the articles.

13. Mr. JIMÉNEZ de ARÉCHAGA suggested that when the Special Rapporteur submitted the articles on privileges and immunities, he should do so in the form proposed by Mr. Tsuruoka; in other words, he should distinguish between the privileges and immunities which he considered indispensable for all special missions and those which might be useful for a special mission at a higher level.

14. Mr. BARTOŠ, Special Rapporteur, said that in his view all the privileges and immunities provided for in the draft articles were useful and even necessary for all special missions, but they could be restricted in some cases. It could be laid down that all special missions were entitled to import personal effects and articles for the official use of the mission free of duty, irrespective of the rank of the head of the special mission or of the task it was to perform. Obviously, the articles in question would differ according to the mission's task.

15. As to archives, he could not conceive that States would maintain that technical special missions did not need a guarantee of inviolability of their archives. There were always official secrets, and national interests had to be safeguarded.

16. With regard to immunity from jurisdiction, he had made a distinction between acts which were immune from jurisdiction and acts which were not. He had

proposed that acts performed in the exercise of the mission's functions be immune from criminal jurisdiction, which was essential to enable it to perform its task. Wars had often been caused by what the sending State had regarded as the arbitrary arrest of members of a special mission.

17. It must also be borne in mind that special missions were sent not only to countries which maintained more or less cordial relations with the sending State, but also to countries with which that State had no relations. It could hardly be contemplated that in the latter case special missions would enjoy no safeguards and would be deprived of certain immunities.

18. In short, he thought the Commission could not go into detail; it could either take the Convention on Diplomatic Relations as a model, leaving it open to States to agree among themselves not to grant particular privileges and immunities to certain special missions, or state that privileges and immunities were restricted in accordance with the functional theory.

19. The CHAIRMAN suggested that the Commission should ask the Special Rapporteur to bear in mind the statements made during the discussion and draw the necessary conclusions from them.

*It was so decided.*

20. The CHAIRMAN invited the Commission to consider the third general question raised by the Special Rapporteur, namely, the question of introducing into the draft articles a provision prohibiting discrimination.

21. Mr. BARTOŠ, Special Rapporteur, reminded the Commission that he had proposed including a provision on non-discrimination corresponding to article 47 of the Convention on Diplomatic Relations and to article 72 of the Convention on Consular Relations, but that proposal had been rejected.<sup>1</sup> After summarizing the comments made by the Yugoslav, Belgian, Swedish and United Kingdom Governments (A/CN.4/188 and Add.1), he noted that, apart from the Yugoslav Government, all of them had been against the inclusion of a provision prohibiting discrimination. In the circumstances the Commission need only maintain its decision.

22. Mr. CASTRÉN supported the Special Rapporteur's suggestion that the Commission should abide by its previous decision. The reasons why the Commission had decided that it would be unwise to include a provision prohibiting discrimination were explained in its report and the only government which had taken the opposite view had given no reasons.

23. Mr. RUDA said that the Commission had made the right decision at the previous session; there was no reason to include an article corresponding to article 47 of the Vienna Convention on Diplomatic Relations. The position of permanent missions was quite different from that of special missions, which were often covered by a special agreement between the sending and the receiving State.

24. Mr. EL-ERIAN said that in fact the majority of special missions were not covered by special agreements. He agreed that, in view of the diversity of such

<sup>1</sup> *Yearbook of the International Law Commission, 1965, vol. I, p. 241, paras. 67 et seq.*

missions, it would be difficult to include a provision on non-discrimination similar to those in the Conventions on Diplomatic Relations and Consular Relations. Nevertheless, it was important not to encourage discrimination with respect to legal status and immunity between special missions of identical character, although discrimination might exist with respect to facilities and privileges. It must be remembered that Heads of State, for instance, had a special legal status in international law. The problem might be dealt with in the commentary.

25. Mr. BRIGGS said he agreed that there was no need to include an article on non-discrimination, for the reasons given by the Commission in paragraph 49 of its 1965 report,<sup>2</sup> namely, that the nature and tasks of special missions were so diverse that in practice such missions had inevitably to be differentiated *inter se*.

26. In an article he had written some years previously for the *American Journal of International Law*,<sup>3</sup> he had questioned the need for article 47 of the Vienna Convention on Diplomatic Relations.<sup>4</sup> He had always regarded paragraph 1 of that article as entirely unnecessary because, when States became parties to a treaty, it was understood that there should be no discrimination as between parties. In essence, paragraph 2(a) of the article merely provided that discrimination should not be regarded as discrimination in the case of a restrictive interpretation of the treaty permitted by the terms of the treaty, and paragraph 2(b) that discrimination should not be regarded as taking place where the treaty was inapplicable, since clearly the Convention did not apply in a situation where "... States extend to each other more favourable treatment than is required by the provisions of the present convention".

27. So far as the point raised by Mr. El-Erian was concerned, he considered that some discrimination would be inevitable in the application of the articles on special missions, since it would be impossible for States to treat all special missions on a basis of parity. The draft could be applied without unfair discrimination by adapting the articles to the situation of each particular special mission.

28. The CHAIRMAN, speaking as a member of the Commission, said that it would be difficult to tolerate discriminatory treatment of several special missions which had arrived simultaneously in the same capital to settle a particular question at joint meetings. The inclusion of a provision prohibiting discrimination in such a case might be justified.

29. Mr. EL-ERIAN said that article 47 of the Vienna Convention on Diplomatic Relations was based on the idea that there were fairly widely established rules of customary international law relating to permanent diplomatic missions, which laid down a certain standard of treatment; while that standard represented a minimum, States were free to accord more favourable treatment. But there were no established rules of customary international law relating to special missions, and their

functions and status, unlike those of permanent diplomatic missions, were not uniform. On the other hand, it was surely inconceivable that there should be discrimination in such a case as that just mentioned by the Chairman or that the Commission should do anything to encourage such an idea.

30. Mr. BARTOŠ, Special Rapporteur, explained that one of the reasons why he had first proposed including a rule prohibiting discrimination was that on several occasions States had complained that their special missions were being treated with less consideration than those of other States which had come to the same town for the same negotiations. But the Commission had taken the view that it was difficult to lay down such a rule for special missions, and that a certain minimum standard of courtesy in their treatment was all that was needed.

31. Of the governments which had commented on the point, only the Yugoslav Government had expressed itself in favour of his original idea. The Government of Upper Volta, however, had suggested that the draft should include, not a general rule prohibiting discrimination, but a provision to the effect that there should be no discrimination with regard to the formal reception of special missions from different States. That suggestion echoed a provision in article 13 of the Vienna Convention on Diplomatic Relations to the effect that the practice prevailing in the receiving State for the presentation of credentials "shall be applied in a uniform manner". The Government of Upper Volta had not put forward any arguments in support of its suggestion, but it seemed to him to be justified, for some special missions had been kept waiting for several weeks before being officially received, whereas others were received immediately. He also thought that a rule on non-discrimination was necessary in the special case to which the Chairman had drawn attention.

32. He was still convinced, however, that the draft articles should contain a general provision on non-discrimination. If the Commission did not share that view, it would have to reiterate in its report the reasons why it considered that such a provision should not be included; otherwise, if the draft were submitted to a diplomatic conference, proposals on the subject would certainly be submitted for political, if not for legal reasons. Some governments had pressed most vigorously for the inclusion of a rule prohibiting discrimination in both the Vienna Conventions and he was therefore rather surprised that so few had expressed themselves in favour of including such a provision in the draft articles on special missions. In view of that attitude on the part of governments, he would not urge that the rule be reintroduced.

33. Mr. PESSOU said that some degree of discrimination in the reception and treatment of special missions was only human and was difficult to prevent. A mission from a friendly country was inevitably given favoured treatment. Moreover, previous personal relationships were bound to play a part; for instance, if at some future date, it were to fall to him in the exercise of official duties to welcome a special mission led by one of the present members of the Commission, he would obviously be inclined to receive it with special honours. As

<sup>2</sup> *Official Records of the General Assembly, Twentieth Session, Supplement No. 9*, p. 38.

<sup>3</sup> Vol. 56 (1962), p. 475.

<sup>4</sup> United Nations Conference on Diplomatic Intercourse and Immunities, *Official Records*, vol. II, p. 87.

Mr. El-Erian had already pointed out, States could not be prevented from sometimes going beyond the minimum standard.

34. Such human behaviour did, however, lead to some inequality and injustice, so it should not be encouraged. He therefore hoped that the Special Rapporteur would find a formula, either on the lines of the Vienna Convention on Diplomatic Relations or more appropriate to the case in point, to limit discriminatory practices in regard to special missions.

35. Mr. TUNKIN said that in 1965 the Commission had not accepted the Special Rapporteur's suggestion on the ground that the nature and tasks of special missions were so diverse that in practice such missions had inevitably to be differentiated *inter se*. In view of that diversity, it was clearly not possible to lay down a rule that all special missions should be placed on the same level even in respect of privileges and immunities.

36. The problem had another aspect, however, which was connected with the principle of sovereign equality of States. It was because of that fundamental principle of international law that provisions on non-discrimination had been included in the 1961 and 1963 Vienna Conventions. Thus the draft articles could well include a provision requiring non-discrimination as between States, rather than as between special missions. In view of the principle of sovereign equality of States, special missions on the same level belonging to different States should not receive different treatment. He was not, of course, referring to differences in the cordiality of the reception, which would correspond to the degree of friendship between the countries concerned. Such differences, which reflected political considerations, were not prohibited by international law.

37. For those reasons, he suggested that the Special Rapporteur should prepare a provisional draft article on non-discrimination between States in respect of the privileges and immunities of special missions. That non-discrimination had no bearing on other problems relating to special missions. When the Commission had the Special Rapporteur's text before it, it could take a final decision on whether or not such a provision should be included in the draft.

38. Mr. TSURUOKA said that his view was very similar to Mr. Tunkin's. The privileges and immunities granted to special missions might differ according to the nature of the mission but not, for missions of the same kind, according to the sending or receiving State. Nevertheless, although he had no objection to that aspect of the matter being examined by the Commission, he did not think it would be of much use to include an article on non-discrimination in the draft, even if it were confined to privileges and immunities. In particular, it was hard to see how such an article could be applied in practice and how a State which, in the opinion of other States, had infringed the rule could be called to account. After all, there were always differences between the tasks of special missions; even in the special case to which the Chairman had referred, namely, that of delegations attending the same meeting to discuss a particular matter, their tasks might differ in a way which justified differences in privileges and immunities. Besides

certain advantages, such an article would therefore have disadvantages. It might perhaps be better to rely on custom and courtesy to ensure observance of the principle of equality and non-discrimination between States.

39. Mr. VERDROSS said he had supported the Special Rapporteur's proposal at the first reading and he entirely agreed with Mr. Tunkin's remarks.

40. Mr. AGO said he also supported Mr. Tunkin's suggestion. The Commission could not take a final decision until it had seen a text, considered its implications and determined whether it could appropriately be included in the draft, for the position of special missions was very different from that of permanent diplomatic missions.

41. Mr. BARTOŠ, Special Rapporteur, said he was glad to see that the Commission was reverting to his original idea. He was prepared to draft an article based on the corresponding articles of the two Vienna Conventions, but taking into account the fundamental difference between permanent missions and special missions. Permanent missions should enjoy absolute equality because their tasks were identical, but the same was not true of special missions, and the Commission should be careful not to assimilate unlike things. At that stage, it would only be taking a provisional decision; the final decision would be taken when it came to discuss the draft article by article and had a text before it.

42. Mr. BRIGGS said that Mr. Tunkin had drawn a valid distinction between non-discrimination as between States and non-discrimination as between special missions. In the application of any treaty, however, non-discrimination as between the parties was taken for granted and did not require to be specified. For that reason, he would abstain on the question put to the Commission.

43. Mr. AMADO said he fully agreed with Mr. Briggs. It must not be suggested even indirectly that some discrimination between States was permissible. As to special missions, it was obvious that even if equal treatment was accorded to them it might vary in cordiality.

44. The CHAIRMAN said that if there were no objection he would assume that the Commission agreed to adopt Mr. Tunkin's suggestion.

*It was so decided.*

45. The CHAIRMAN invited the Special Rapporteur to introduce his fourth general question: reciprocity in the application of the draft.

46. Mr. BARTOŠ, Special Rapporteur, drew attention to paragraphs 14 and 15 of chapter II of his report (A/CN.4/189). In his view, reciprocity was a condition for the application of any treaty text of that kind and an express provision on the subject was therefore unnecessary. He had raised the question only because of the comment by the Belgian Government.

47. Mr. ROSENNE said he fully agreed with the Special Rapporteur. At most, consideration might be given to mentioning the matter in the commentary.

48. Mr. TUNKIN said he also agreed with the Special Rapporteur. It was implicit in any convention that the reciprocity rule could be applied by the States parties.

In fact, reciprocity was relevant to all rules of international law. If a State committed a breach of a rule of international law, the State injured by that breach could retaliate in kind. The rule of reciprocity thus had the effect of a sanction.

49. The CHAIRMAN said that if there were no objection he would assume that the Commission agreed to adopt the Special Rapporteur's proposal.

*It was so decided.*

50. The CHAIRMAN invited the Special Rapporteur to introduce his fifth general question: the relationship of the draft on special missions with other international agreements.

51. Mr. BARTOŠ, Special Rapporteur, drew attention to paragraphs 16 to 20 of chapter II of his report. In a comment received after he had written the report (A/CN.4/188/Add.1), the United Kingdom Government had stated that there would be advantage in adding to the draft articles a provision dealing with their relationship to other international agreements. Thus four governments in all had advocated the inclusion of a provision of that kind and no contrary view had been expressed either in the Sixth Committee of the General Assembly or in the written comments. The Commission might therefore include in the draft an article similar to article 73 of the Vienna Convention on Consular Relations.

52. Mr. TUNKIN said it would be difficult at that stage to take a decision on the relationship between the draft articles and international agreements in force. He therefore proposed that the decision be postponed until the Commission had adopted all the draft articles on special missions.

53. He did not believe it would be advisable to include a provision on the lines of article 73 of the Vienna Convention on Consular Relations; that article was unsatisfactory and he was convinced that it would remain a dead letter.

54. Mr. BRIGGS agreed that article 73 of the 1963 Vienna Convention was unsatisfactory.

55. He believed that the Commission could adopt the various draft articles on special missions without taking any decision at that stage on the desirability of including an article on their relationship with existing international agreements.

56. Mr. ROSENNE said he agreed with Mr. Tunkin and Mr. Briggs.

57. Mr. TSURUOKA said it seemed to him that the point had already been settled in the draft articles on the law of treaties,<sup>5</sup> which laid down rules concerning the relationship between different treaties, including *inter se* agreements. In settling the Special Rapporteur's question, the Commission should accordingly be guided by what it had already done in its work on the law of treaties.

58. Mr. BARTOŠ, Special Rapporteur, suggested that he should draft a trial article on the relationship with other international agreements; the Commission should come to a decision when that text was before it.

<sup>5</sup> *Official Records of the General Assembly, Twenty-first Session, Supplement No. 9, pp. 10 et seq.*

59. Mr. CASTRÉN supported the Special Rapporteur's proposal. Like several other speakers, he thought it would be better not to take article 73 of the Vienna Convention on Consular Relations as a model, as that article had been much criticized since its adoption.

60. The CHAIRMAN said that, if there were no objection, he would assume that the Commission agreed to adopt the Special Rapporteur's proposal.

*It was so decided.*

61. The CHAIRMAN announced that he had received a letter from Mr. Elias expressing regret that his official duties prevented him from attending the session. He requested the Secretariat to write to Mr. Elias on behalf of the Commission to thank him for his letter.

The meeting rose at 1 p.m.

## 882nd MEETING

*Friday, 1 July 1966, at 11 a.m.*

*Chairman:* Mr. Mustafa Kamil YASSEEN

*Later:* Mr. Herbert W. BRIGGS.

*Present:* Mr. Ago, Mr. Amado, Mr. Bartoš, Mr. Castrén, Mr. Jiménez de Aréchaga, Mr. Paredes, Mr. Rosenne, Mr. Ruda, Mr. Tsuruoka, Mr. Tunkin, Mr. Verdross, Sir Humphrey Waldo.

## Special Missions

(A/CN.4/188 and Add.1 and 2, A/CN.4/189 and Add.1 and 2)

*(continued)*

[Item 2 of the agenda]

1. The CHAIRMAN invited the Commission to consider the next of the preliminary questions raised by the Special Rapporteur in his third report, namely, the form of the instrument relating to special missions (A/CN.4/189, chapter II, section 6).

2. Mr. BARTOŠ, Special Rapporteur, said that of the governments which had expressed their views on the subject, either in the Sixth Committee of the General Assembly or in written comments, only the Netherlands Government had advocated a code,<sup>1</sup> just as it had done in the case of the draft on the law of treaties.

3. In comments received recently (A/CN.4/188/Add.1 and 2), the United Kingdom and Austrian Governments appeared to favour a convention, though they had omitted to specify whether it should be a separate instrument or be attached to an existing convention.

4. He interpreted the reservation made by the Government of Israel (A/CN.4/188) as relating rather to the procedure or machinery for adopting the instrument than to the form it should take.

<sup>1</sup> *Official Records of the General Assembly, Twentieth Session, Sixth Committee, 847th meeting, para. 7.*