Document:-
A/CN.4/SR.712

Summary record of the 712th meeting

Topic:
<multiple topics>

Extract from the Yearbook of the International Law Commission:-
1963, vol. I

79. As to the scope of the study, in principle it ought to cover all official intercourse between States that took place outside the framework of normal permanent diplomatic or consular missions and of international organizations. Consideration should be given first to political, technical and administrative special missions, which varied widely in character and were growing in number. Purely ceremonial missions could be relegated to second place.

80. The Commission should maintain its decision to assimilate itinerant envoys to special missions.

81. From the remarks of the Secretary to the Commission at the 565th meeting,[7] he inferred that the decision to exclude from the study questions concerning the privileges and immunities of delegates to congresses and conferences had been limited to meetings coming within the scope of conventions on privileges and immunities or host agreements. There were still a number of conferences that did not fall within that classification, and as Sir Humphrey Waldock had pointed out, it was important to distinguish between conferences that were convened by an international organization and those that were not, because immunity from judicial process in many countries derived from municipal law and would rest on a different international basis in the two cases. However, the question was not of great urgency and could be left aside until further progress had been made on other matters.

82. He agreed with Mr. Tunkin that it was essential to avoid going into great detail. The articles should be drafted as tersely as possible and be few in number. The draft could take other forms than those mentioned in paragraph 51 of the Secretariat's working paper, and all of them should be explored, bearing in mind the need for flexibility imposed by the nature of the subject itself.

83. Enough preparatory work had already been done with the report by Mr. Sandström, the Special Rapporteur for *ad hoc* diplomacy (A/CN.4/129), the Chairman's memorandum (A/CN.4/L.88), the secretariat working paper and the discussions in the Commission and the Sixth Committee. The discussions in the Sixth Committee and at the Vienna Conference on Diplomatic Intercourse and Immunities clearly showed that the Commission was expected to follow its usual procedure of appointing a special rapporteur to prepare draft articles with a commentary, which would be given two readings, the second taking place after the comments of governments had been received. He was therefore in favour of adopting that course and thought that the special rapporteur should be asked to submit the draft articles and commentary in time for the sixteenth session. It could be decided later when they would be discussed; in that connexion he had found Sir Humphrey Waldock's suggestion particularly interesting.

The meeting rose at 6 p.m.

[7] *Yearbook of the International Law Commission, 1960*, Vol. I (United Nations publication: Sales No.: 60.V.1, Vol. 1), p. 259, para. 13.

712th MEETING

Tuesday, 2 July 1963, at 10 a.m.

Chairman: Mr. Eduardo JIMÉNEZ de ARÉCHAGA

Special Missions (A/CN.4/155)

[Item 5 of the agenda] (*continued*)

1. The CHAIRMAN invited the Commission to continue consideration of item 5 of the agenda: special missions.

2. Mr. BRIGGS said that the secretariat working paper (A/CN.4/155) had been useful in focusing the Commission's attention on the decision it was called upon to take. But except for paragraphs 5 and 6, it made little reference to state practice and consisted largely of an account of the opinions of writers. It was therefore desirable that the Commission should appoint a rapporteur at the present session to make a thorough study of state practice in the matter and a more profound juridical analysis of the problem of special missions.

3. With regard to Mr. Tunkin's suggestion that the Commission should give instructions to the Special Rapporteur, he thought that such instructions should be of a general character.

4. As to the scope of the subject, he supported the view expressed by the Commission in its report on its tenth session, that the study of *ad hoc* diplomacy should cover itinerant envoys, diplomatic conferences and special missions,[1] a view that had later been qualified by the decision not to deal with the privileges and immunities of delegates to congresses and conferences. He thought that the limitation should be confined to the question of privileges and immunities. The general question of delegates to international conferences might well come within the scope of the subject of *ad hoc* diplomacy; on that point, he would like to hear the views of Mr. El-Erian, the Special Rapporteur for relations between States and inter-governmental organizations.

5. If the topic of special missions overlapped with other topics, the special rapporteurs concerned should co-operate. In the case of state responsibility, the Commission had already decided that the special rapporteur should co-ordinate his work with that of the special rapporteurs for succession of States and the law of treaties.

6. With regard to the form of the draft — a question dealt with in paragraph 51 of the secretariat working paper — it would be premature to try to decide at that stage whether it should take the form of an additional protocol to the 1961 Vienna Convention on Diplomatic Relations or of a separate convention. The Commission should await the findings of the special rapporteur on special missions.

7. The Commission should certainly appoint a special rapporteur at its present session.

[1] *Yearbook of the International Law Commission, 1958*, Vol. II (United Nations publication, Sales No.: 58.V.1, Vol. II), p. 89, para. 51.

8. Mr. YASSEEN said that when the Commission had resumed its study of special missions at its twelfth session in 1960, it had not followed its customary practice of submitting texts to governments for approval; it had finished its work hastily so as to be able to place a draft before the conference due to meet at Vienna the following year. The Sixth Committee of the General Assembly had adopted the same attitude. When the draft had been put before the Vienna Conference it had been decided that there was not enough time to study it. In fact, it might be thought that the Conference had been unwilling to accept the draft as the starting point for work that might lead to the adoption of a general convention. In the sub-committee appointed to consider the draft, it had been said that it did not cover all the aspects of the question; for although it contained one or two articles particularly concerned with special missions, for the rest it merely stated which of the rules on diplomatic missions in general applied to special missions and which did not.

9. The Commission might run into serious difficulties if it adopted the same method again. If it decided to deal with the question of special missions, it should do so separately. It should not, of course, overlook the results of the Vienna Conference; but neither should it be misled by the apparent resemblance between ordinary diplomatic missions and special missions, for in fact they were very different: for example, in the manner of their beginning and ending, and in the status of their members. Nevertheless, the rules which the Commission and the international community had established concerning permanent diplomacy should be taken advantage of. That was a difficult task, for which the Commission should follow its usual method and first appoint a special rapporteur.

10. The decision taken in 1960 not to distinguish between itinerant envoys and special missions should not be changed; an itinerant envoy was a person who performed successive special missions.

11. The rules to be drafted by the Commission should, he thought, be in the form of a separate convention. But it was too early to settle that question at present, and the Commission should leave some latitude to the future special rapporteur, who would be in a better position to give an opinion on it after he had made a thorough study of the subject.

12. Mr. LACHS said that special missions offered an interesting example of the historical development of diplomacy. They had provided the oldest form of diplomatic contact, one of the earliest examples in his own country's history being the special mission sent by the King of Poland to Queen Elizabeth I of England. Special missions had then given way to permanent missions, but they had now reappeared as an important additional instrument of diplomacy. It was therefore appropriate that the Commission should embark on a study of the subject, with a view to defining in proper legal form the status of the numerous travelling missions which dealt with so many problems in international relations.

13. In its study of the subject, the Commission would be greatly assisted by the secretariat working paper and by the admirable exposition given by Mr. Bartoš at the opening of the discussion (previous meeting, paras. 53-58).

14. The experience of the Commission had shown the inadequacy of the general approach which consisted in applying, *mutatis mutandis*, the rules applicable to ordinary diplomatic relations. What was needed was an instrument containing all the essential provisions concerning the status of special missions; that was where the Vienna Convention on Diplomatic Relations could help. As had been rightly pointed out, however, it would be advisable not to go into too much detail, but to confine the study to the essential elements.

15. The scope of the subject should be restricted to special missions proper and should not include international conferences, whatever their nature or form. The topic of international conferences could be dealt with separately at a later stage by the appointment of a special rapporteur; for although it involved many problems connected with diplomatic privileges and immunities, by reason of its specific character, it also went beyond that subject.

16. It would be better not to prejudge the question of form. He himself would prefer an annex to the Vienna Convention, if only for the practical reason that all the provisions concerning diplomacy could then be embodied in a single volume. At a later stage, the instrument on international conferences could join the other two.

17. The Commission should appoint a special rapporteur and request him to submit a draft at the next session. There had been some discussion at the previous meeting on the urgency of the matter, but there were many reasons why a draft on special missions should be prepared without delay. One was that it would become part and parcel of the law of diplomatic relations which, without an instrument on special missions, would remain deficient. Another was that the other important topics on the agenda would engage the Commission's attention for a considerable time and it was in the interest of the continuity of its work to offer the results at regular intervals. It should be possible for the Commission to approve the draft at its next session.

18. At the close of the present discussion the essential points should be summarized in the form of an enumeration and approved by the Commission as a guide to the special rapporteur. The instructions to be given to the special rapporteur should be in general terms, but as precise as possible, and he should be requested to submit his report in time for the next session.

19. Mr. TSURUOKA said that, like Mr. Lachs, he supported the idea put forward by Mr. Tunkin; he hoped that the Commission would draft a convention which would be as simple and concise as possible. When he had been a government official, he had had occasion to observe that special missions were very frequently employed and generally raised no serious practical problems. Everything connected with their despatch, their reception and the privileges and immunities of

their members was usually regulated, sensibly and courteously, by the application of the *mutatis mutandis* formula.

20. Admittedly, it would be useful, and was even necessary, for the Commission to clear up specific points; but it should propose only very flexible rules, for practice showed that what was possible and usual in one country was not necessarily so in another; besides, a subject that was developing quickly should not be too narrowly circumscribed.

21. Mr. VERDROSS commended the Secretariat for having produced a working paper that would facilitate the task of the special rapporteur, and paid a tribute to Mr. Bartoš for his masterly exposition of the problem. He would not repeat what had been said by Mr. Tunkin, Mr. Yasseen and Mr. Lachs, but he thought the Commission should not unduly restrict the special rapporteur's freedom.

22. Mr. LIANG said that the working paper submitted by the Secretariat had been prepared for purposes of easy reference; it dealt mainly with the work of the International Law Commission and recorded the decisions taken by the Commission on the subject of special missions.

23.He now wished to add a few comments of his own regarding the scope of the subject. At the twelfth session, he had supported Mr. Jiménez de Aréchaga's proposals that the Commission's work on *ad hoc* diplomacy should be confined to special missions.[2] The view he had then expressed had been fully justified by subsequent discussions in the Commission as well as by the present discussion.

24. Paragraphs 48 and 49 of the secretariat working paper referred to the question of diplomatic conferences convened, not by international organizations, but by the governments of individual States. He was still convinced that the question of delegates to congresses and conferences, even those not convened by international organizations, lay outside the topic of special missions.

25. It was interesting to note that, when the topic had first been considered by the Commission, it had been called " *ad hoc* diplomacy "; but that term being rather vague, the Commission had acted wisely in subsequently limiting the topic to special missions, which would include itinerant envoys, since such envoys were charged with special missions.

26. The question of delegates to conferences convened by international organizations formed part of the subject of relations between States and intergovernmental organizations, for which Mr. El-Erian was Special Rapporteur; it would be advisable also to exclude from the subject of special missions the question of delegates to international conferences convened by individual States.

27. The history of the discussions in the United Nations on the subject of special missions showed that it was not to be treated as an appendix to the subject of permanent missions; it had developed into an independent, though closely allied subject.

28. Mr. Lachs had given some interesting particulars of the part which special missions had played in diplomacy and perhaps it would not be inappropriate to allude to the well-known diplomatic episodes connected with Lord Macartney's mission to China in the early nineteenth century, which had constituted an important step in the establishment of normal diplomatic relations between East and West.

29. It was noteworthy that special missions, after lapsing into secondary importance following the development of permanent missions, had now once more come to the fore. They were varied in character and not confined to diplomatic relations. It was not uncommon for a State to send a special envoy to smooth out certain matters which could not be adjusted by the permanent mission, or to negotiate on certain questions. Again, a special mission was occasionally sent to negotiate or conclude a specific treaty or convention. Those were further arguments for not approaching the subject of special missions as merely ancillary or subsidiary to that of permanent missions. Special missions often performed tasks which, because of their specialized personnel, they were better equipped to undertake than permanent diplomatic missions. The Commission had therefore been wise to initiate a more thorough study of special missions as such.

30. Like Mr. Tunkin, he had the impression that the Vienna Conference of 1961 had not criticized the work of the International Law Commission; it had simply realized that the subject of special missions deserved independent study and that it was not enough to associate it with diplomatic relations by means of the *mutatis mutandis* formula. The Conference, and subsequently the General Assembly, had expressed a desire for a full-length, detailed set of articles on the subject.

31. With regard to the material necessary for a more thorough study, he had noted Mr. Briggs' remark that the secretariat working paper gave only a summary of the teachings of publicists in the sense of Article 38, paragraph 1.d, of the Statute of the International Court of Justice. That was largely true, but it was a feature of the subject that there was a dearth of material on state practice. The discussion on the *rebus sic stantibus* clause had shown that there was practically nothing but doctrine on that subject; indeed, the only occasion on which it had been brought before the Permanent Court of International Justice had been that of the Chinese claim for the revision of a treaty with Belgium, but the *rebus sic stantibus* doctrine had not been put to the test because the case itself had not been decided by the Court. The lack of material on state practice was due to the fortunate circumstance that there had been very few disputes between States on the subject of special missions.

32. State practice could be deduced, however, not only from contentious cases, but also from the manner in which States organized special missions. For its work on diplomatic relations, the Commission had had before it the study of the Laws and Regulations regarding

[2] *Yearbook of the International Law Commission, 1960*, Vol. I (United Nations publication, Sales No.: 60.V.1, Vol. I), p. 259.

Diplomatic and Consular Privileges and Immunities prepared by the Secretariat.[3] A study of the relevant provisions of municipal law would provide useful material for the study of special missions, just as it had done for permanent missions. It was pointed out in a footnote to paragraph 5 of the secretariat working paper that " the States of Latin America form the majority of States making express provision for the sending of special missions." A footnote to paragraph 4 of the same document contained a quotation from Hackworth's *Digest of International Law*, which had been prepared for the purpose of presenting the evidence of state practice.

33. Since it was undoubtedly true that, for the time being, there was insufficient material on state practice in the matter of special missions, it might be appropriate to send a circular to governments asking them for material on the subject. A number of governments had already included material on special missions in their replies to a questionnaire on the subject of diplomatic and consular relations, but it might still be possible to elicit additional information.

34. Reference had been made to the connexion between the topic of special missions and the Vienna Convention on Diplomatic Relations. That Convention would undoubtedly constitute an important source of material, but total assimilation would certainly not be possible. During the Commission's discussions on *ad hoc* diplomacy in 1960, Mr. Jiménez de Aréchaga had stated that, in his opinion, all the articles of the 1958 draft were applicable to special missions,[4] except that the provisions of article 3 (Functions of a diplomatic mission) applied only within the scope of the specific tasks assigned to such mission.[5] Special missions differed from permanent missions not only in character, but also in duration. Those differences justified separate treatment of the topic of special missions.

35. One important question regarding the privileges and immunities of special missions had not been previously covered: the question whether special missions which were not of a diplomatic character should be assimilated to diplomatic missions and given diplomatic privileges. That question would require a great deal of discussion of principle, but an examination of it would be extremely useful in present-day conditions. Special missions were no longer confined to diplomatic relations, but extended to cultural, economic and financial relations.

36. Mr. TUNKIN said that the main purpose of the discussion was to decide what instructions should be given to the future special rapporteur. Those instructions should give, first, an indication of the scope of the topic. In his view, it should cover special missions proper, but exclude international conferences. That did not, of course, mean that the special rapporteur would not be at liberty to submit proposals that had some bearing on certain types of conference. For the time being, however, the topic should be confined to special missions properly so called.

37. With regard to the approach, the Special Rapporteur could draw on the Vienna Convention on Diplomatic Relations, but should bear in mind that special missions were a separate institution, and should be kept separate from permanent missions. His study would show how much the two subjects had in common, especially in the matter of privileges and immunities. In 1960, at the Commission's twelfth session, he (Mr. Tunkin) had been opposed to the general approach suggested, namely, that all the provisions of the 1958 draft on diplomatic relations should be regarded as applicable to special missions *mutatis mutandis*; he had urged that the Commission should examine the 1958 draft, article by article, in order to determine the extent to which each article was applicable to special missions. Unfortunately, however, the Commission had not had time to undertake such a thorough study of the problem.

38. As to the form to be adopted, it was clear that the draft would have to take the form of a set of articles which could refer, wherever appropriate, to the Vienna Convention on Diplomatic Relations.

39. A special rapporteur for the topic of special missions should be appointed immediately. The Commission was fortunate in having a member who was highly qualified for the task and who would be giving a set of lectures at the Academy of International Law at The Hague on that very subject.

40. With regard to the place of special missions in the Commission's programme of work, although in addition to the law of treaties, the Commission had under consideration the two important topics of state responsibility and succession of States, to which priority had been given by General Assembly resolutions 1686 (XVI) and 1765 (XVII), it had been decided at the previous session that a number of more limited topics should be taken up at the same time.[6] When appointing a special rapporteur, therefore, the Commission should bear in mind that work on special missions could be done concurrently with work on the major topics he had mentioned.

41. Mr. AGO thought that the question of special missions was precisely the kind of limited, fairly well-defined topic the Commission could usefully study in the intervals between its work on much broader subjects. The Secretariat had prepared a very good working paper which plainly showed that the topic should be examined independently and restricted to special missions proper. It should not be associated with the subject of conferences and congresses convened by States, which was more bound up with that of conferences and congresses convened by international organizations. If, as a result of his work, the special rapporteur found that that delimitation was unsuitable, he could always inform the Commission so that it could rectify its error.

42. All members seemed to agree on the method, which would be to draft a small set of articles, some of which

[3] United Nations, *Legislative Series*, Vol. VII (United Nations publication, Sales No.: 58.V.3).

[4] *Yearbook of the International Law Commission, 1960*, Vol. I (United Nations publication, Sales No.: 60.V.1, Vol. I), p. 258.

[5] *Ibid.*, p. 270.

[6] *Official Records of the General Assembly, Seventeenth Session, Supplement No. 9*, p. 33, para. 60.

might perhaps depart from the rules laid down by the Vienna Conference, whereas others would follow those rules. But, like Mr. Verdross, he hoped that the Commission would allow its special rapporteur ample latitude.

43. Mr. GROS agreed with Mr. Ago and Mr. Tunkin that the importance of the subject should not be exaggerated. Other members, on the contrary, appeared to think that the scope of the study should be widened; for example, some wished to include negotiators specially appointed to discuss certain technical questions. In his view, when a government strengthened an embassy by sending experts for some particular negotiation, it was not really sending a special mission; it was still the ambassador who directed the negotiation, even if his name did not appear on the list of negotiators. Thus many of the missions which some would describe as special missions were really subject to well established general rules.

44. It had also been said that many special missions had tasks which were not diplomatic. But the meaning of the expression " diplomatic missions ", especially since the adoption of the 1961 Vienna Convention, was very broad. Even the discussion of technical matters involved relations between States; similarly, when negotiations were conducted to settle an incident, an effort was being made to improve relations between States. In both cases the negotiations were of a diplomatic character.

45. If he had understood Mr. Ago and Mr. Tunkin correctly, they saw no reason why the Commission should not take the 1961 Vienna Convention as a basis for its work, even if it had to adapt some of the rules to the case of special missions; he shared that view.

46. He also agreed with Mr. Tunkin that it would be better to leave aside the question of delegates to international conferences and that the best form for the Commission's proposals would be a draft protocol to supplement the 1961 Convention. But he thought that the Commission should leave the special rapporteur a good deal of latitude in drafting his report.

47. The work previously done by Mr. Sandström as the Commission's Special Rapporteur should not be underestimated; it provided an excellent starting point, and it was arguable that if the Vienna Conference had had more time, it could have reached a conclusion on the basis of Mr. Sandström's report (A/CN.4/129). Sir Gerald Fitzmaurice had also been right in suggesting that the provisions of the 1958 draft should apply to special missions *mutatis mutandis*.[7]

48. The rules to be drawn up concerning special missions could be considered at the next session on the basis of the report to be submitted to the Commission by the special rapporteur it would appoint.

49. Mr. CADIEUX endorsed the view that international conferences should be excluded from the terms of reference of the special rapporteur for special missions, but pointed out that the Commission had already instructed the Special Rapporteur for relations between States and international organizations to consider certain kinds of conference.

50. In choosing its special rapporteurs the Commission should, of course, bear in mind the special qualifications of its members, but he hoped that in future it would also try to establish a sound geographical balance and an equitable distribution between the various legal systems they represented.

51. Sir Humphrey WALDOCK said that although he broadly agreed with Mr. Tunkin on the need to confine the study to special missions proper, it would not be wise to take a hasty decision to exclude international conferences entirely. He readily agreed that major international conferences should be excluded, but it was becoming increasingly common for a special mission to be entrusted with the discussion of an agreement on what he would call a plurilateral rather than a multilateral basis. Special missions of economic experts were sent to discuss questions of common policy and common interest for the purpose of drawing up a treaty or other form of agreement, and today that was not always done on a bilateral basis: it frequently involved a group of countries. Thus, while he would not object to the emphasis being placed on special missions proper, he would resist any exaggerated tendency to exclude all material that might be considered to relate to international conferences in the widest sense.

52. Mr. EL-ERIAN said that several speakers had referred to the possible relationship between the subject of special missions and the subject of relations between States and intergovernmental organizations, for which he was the Special Rapporteur. Mr. Briggs had asked whether, in his reports on relations between States and intergovernmental organizations, he proposed to deal with the general question of delegates to international conferences, and had drawn attention to the distinction between the special question of the privileges and immunities of delegates to conferences and the general question of the organization and procedure of conferences.

53. Paragraphs 111 and 112 of his first report (A/CN.4/161) were devoted to an analysis of the work of the League of Nations Committee of Experts for the Progressive Codification of International Law on the procedure of international conferences. He had also examined, in paragraphs 118 and 119, the preparatory work on the " method of work and procedure " of the first United Nations Conference on the Law of the Sea, undertaken by the United Nations Secretariat with the advice and assistance of a group of experts. The rules of procedure that had been drawn up had provided an excellent basis for the proceedings of the two Geneva Conferences on the Law of the Sea, the 1961 Vienna Conference on Diplomatic Intercourse and Immunities and the 1963 Vienna Conference on Consular Relations.

54. In his conclusion, in paragraph 178, he had given a broad outline of the subject, dividing it into three " self-contained and closely related groups of ques-

[7] *Yearbook of the International Law Commission, 1960*, Vol. I (United Nations publication, Sales No.: 60.V.1, Vol. I), p. 259, para. 16.

tions ", the second of which comprised privileges and immunities of international organizations, related questions of the institution of legation with respect to international organizations, and diplomatic conferences.

55. A distinction could be made between conferences convened by international organizations and conferences convened by individual States; it was also possible to separate the special question of the privileges and immunities of delegates from the general question of the organization and procedure of international conferences.

56. There was bound to be a certain amount of overlapping between the topic of special missions and other topics, but any decision taken by the Commission at that stage could only be tentative. The Special Rapporteur should be given discretion to study the topic and submit his conclusions to the Commission.

57. Like other members of the Commission, he looked forward to the valuable contribution which Mr. Bartoš could make to the study of special missions.

58. Mr. de LUNA said he agreed with the views expressed by Mr. Bartoš, the Secretary and Mr. Tunkin. The topic should be confined to special missions in the strict sense of the term; for it was true that the problems relating to the appointment and powers of delegates to international conferences were linked with all the other problems raised by conferences.

59. He endorsed Mr. Gros' comment concerning experts temporarily attached to an embassy for a particular negotiation. So long as relations between States were involved, such negotiators were responsible to the Ministry for Foreign Affairs alone and worked under the authority of the Ambassador.

60. Mr. LIANG, Secretary to the Commission, said he had been struck by Sir Humphrey Waldock's remarks; there was perhaps an undue tendency to think in terms of large conferences.

61. He was not altogether in agreement with some speakers regarding the position of special missions in relation to ambassadors. Sometimes a special mission was placed under the general control of the head of the permanent mission, but it was not at all uncommon for a special mission to be headed by another person when it dealt with matters which were not subject to the authority of the permanent diplomatic representatives. It was within his own experience as a member of the Chinese mission to the 1944 Conference at Dumbarton Oaks, which had prepared the draft treaty that had led to the United Nations Charter, that the Chinese Government had made a point of naming as head of its delegation an international lawyer of repute, rather than the head of its permanent mission to the United States.

62. The CHAIRMAN, speaking as a member of the Commission, said that he was in favour of a special rapporteur being appointed to study the question of special missions. The working paper prepared by the Secretariat was certainly extremely useful, but it was not altogether correct in paragraph 17, where it described the position he had taken on the question how far the 1958 draft on diplomatic intercourse and immunities could be made applicable to special missions. He had not proposed that the same rules should be made applicable in a literal sense, but had favoured the formula proposed by Sir Gerald Fitzmaurice, whereby the provisions of the 1958 draft would be applied *mutatis mutandis* because there was no time at that stage for a detailed study of the subject.

63. In the memorandum he had submitted at the twelfth session he had criticized Mr. Sandström [8] for implying in his report that special missions were exempt from the application of certain fundamental rules governing diplomatic intercourse, such as the need for the *agrément* of the receiving State. He had therefore been particularly interested by the view put forward by Mr. Bartoš at the previous meeting, that in fact special notice had to be given by the sending State of its intention to send a special mission to the receiving State.

64. The special rapporteur would have to go deeply into the whole subject and might find some of the conclusions reached at the twelfth session unacceptable. One of the reasons why the Commission had been unable to do full justice to the subject on that occasion had been that the discussions had taken place at the same time as the meetings of the Drafting Committee, so that five members had been unable to take part.

65. Speaking as Chairman, he said there was general agreement that arrangements for the study of the topic should be begun immediately by appointing a special rapporteur, who should be asked to submit draft articles, few in number, drawing where appropriate on the provisions of the Vienna Convention on Diplomatic Relations. The Commission evidently did not wish to decide at the present stage whether those articles should take the form of a protocol to the Vienna Convention, a set of rules for inclusion in a separate convention or some other possible alternative; on that point the special rapporteur should submit a recommendation. The draft articles should be formulated in a terse and concrete manner, without going into too much detail; in other words, they should be suitable for a convention rather than a code on the subject. There was also general agreement to reaffirm the 1960 decision that itinerant envoys should not be dealt with separately.

66. Most members also considered that, as decided in 1960, the question of the privileges and immunities of delegations to conferences convened by States should not be included within the scope of the draft.

67. Perhaps the question of the time when the report was to be submitted could be decided when the officers of the Commission, in consultation with its special rapporteurs, made their recommendations concerning the agenda for the fifteenth session.

68. He invited the Commission to confirm the appointment as Special Rapporteur of Mr. Bartoš, who was clearly the Commission's choice.

Mr. Bartoš was appointed Special Rapporteur on special missions by acclamation.

[8] *Yearbook of the International Law Commission, 1960*, Vol. II (United Nations publication, Sales No.: 60.V.1, Vol. II), p. 116, para. 7.

69. Mr. BARTOŠ, after thanking the Commission for the confidence it had shown in him, said that in his view the scope of the subject should be restricted as much as possible. For lack of time, the Commission had been unable to decide between the two alternatives submitted by Mr. Sandström in his draft,[9] and it might be well to go further into the subject.

70. First, with regard to the relationship between the draft articles on special missions and the 1961 Vienna Convention, the provisions of the Convention would serve as a basis for the work and should be followed as closely as possible, subject to allowance for the difference in nature between special missions and permanent missions. Depending on whether that difference was more or less pronounced, the draft might take the form either of a separate convention or of a protocol to the Vienna Convention. But it would be premature to draw conclusions on that point at present, for it could only be settled by the results of the proposed study.

71. A distinction should be drawn between *ad hoc* diplomacy and permanent diplomacy, so that it would be necessary to define the relationship between special missions and permanent missions. That point was not dealt with in the Vienna Convention, which related solely to diplomatic relations conducted through permanent missions.

72. Special missions should not be confused with permanent specialized missions, which were not only accredited to specialized agencies and regional organizations, but were also used in bilateral relations; for example, the United States missions responsible for implementing the Marshall Plan.

73. It would therefore be necessary to derive from the practice the rules applicable to special missions proper, whatever their size, and to follow the principles laid down by the Commission in 1960. The summary given by the Chairman would be very useful with regard to the directives to be followed.

74. Mr. de LUNA explained that he had not meant to say that all special missions were always under the authority of embassies, but that that was very often the case.

Question of extended participation in general multilateral treaties concluded under the auspices of the League of Nations (General Assembly resolution 1766 (XVII)) (A/CN.4/154, A/CN.4/159 and Add.1, A/CN.4/162)

[Item 2 of the agenda]

75. The CHAIRMAN invited the Commission to consider item 2 of the agenda and drew attention to the note by the Secretariat (A/CN.4/159).

76. Sir Humphrey WALDOCK, Special Rapporteur on the Law of Treaties, introducing his report on the question of extended participation in general multilateral treaties concluded under the auspices of the League of Nations (A/CN.4/162), said that he had concentrated his attention on the twenty-six treaties which had come into force. He had found that five of them had been deliberately closed to additional States and that the remaining twenty-one all contained clauses, framed in virtually identical terms, extending participation to any State not represented at the negotiating conference to which a copy of the treaty might be communicated by the Council of the League of Nations.

77. A rather similar situation had been encountered in connexion with the transfer of certain functions, notably those of depositary, from the League of Nations to the United Nations. Provisions concerning the functions of a depositary were comparable to participation clauses; both belonged to the final clauses which, as distinct from other provisions in a treaty, acquired a certain legal force before the treaty itself actually entered into force.

78. One possible method of extending participation to additional States was by means of a protocol of amendment. That method had been adopted in seven instances, but it could give rise to certain difficulties. One difficulty was that of establishing which States were actually parties if, during the intervening period, a succession of States had taken place; another was that protocols only came into force *inter se*, and if the number of ratifications was limited, the new participants would only enter into treaty relations with those parties to the original treaty which had subscribed to the protocol.

79. He had not been altogether clear about what was expected of the Commission by the General Assembly and had presumed that it should put forward certain considerations rather than attempt to reach a final conclusion. The simple solution he had outlined in his report was therefore suggested somewhat tentatively, but perhaps it would show that the constitutional difficulties discussed in the Sixth Committee were not as great as had been expected. What he envisaged was the General Assembly directing the Secretary-General to send copies of any treaties concluded under the auspices of the League of Nations to any Member of the United Nations, or any other State agreed upon by the designated organ. That organ might be the General Assembly or the Economic and Social Council, which had been given such functions under a number of treaties concluded within the United Nations. It would be necessary to call upon all Member States to use their good offices to secure the assent of non-member States to that procedure.

80. The alternative would be to consider some method of revision of existing treaties — which entailed its own difficulties — or a special form of resolution of the kind submitted by Australia, Ghana and Israel in the Sixth Committee (A/CN.4/162, para. 11).

81. He presumed that the Commission would have to devote a section of its report to the General Assembly to the question, so that it would have to decide whether to put forward the kind of solution he had in mind.

82. Mr. TABIBI congratulated the Special Rapporteur on his extremely valuable report and thanked the Secretariat for the useful summary it had prepared of the relevant discussion in the Sixth Committee. During that discussion he had opposed reference of the matter to

[9] *Ibid.* pp. 112-115.

the Commission because it already had a heavy agenda and because he was anxious that the position it would finally take on state succession should not be prejudiced by a discussion on extended participation in treaties. As a body of jurists the Commission could hardly do otherwise than uphold the principle of the universality of treaties, and it had already indicated, in article 9 of Part I of its draft on the law of treaties,[10] how they could be opened to the participation of additional States.

83. There could be no doubt that the law at present was that no treaty could be open to the participation of additional States except by express provision in the treaty itself or by the consent of the parties, and that new States had no automatic right of succession to rights and obligations under treaties concluded before they had acquired independence.

84. Perhaps the Commission should state in its report that it was in favour of solving the problem either by the depositary ascertaining the views of the parties, or by a resolution of the General Assembly concerning participation, which would call upon non-member States to give their assent to the accession of new States to existing treaties. It seemed that the method of an amending protocol had definite drawbacks and was not appropriate in all cases. Any other method would probably give rise to serious political difficulties.

85. Mr. BARTOŠ said he favoured a solution that would enable all States to accede to the treaties concluded under the auspices of the League of Nations, since they were treaties of general interest which created universal rules of international law.

86. The difficulties arose from the notion — mistaken, in his opinion — that all treaties, even treaties of general interest, were instruments *inter alios acta* to which third States could not accede unless provision was made for such accession in the treaty itself, or unless the States parties to the treaty consented. It was a matter in which the United Nations was in duty bound to act.

87. The resolutions and protocols concerning the transfer of the functions of the League of Nations to the United Nations set out certain rules of which the Special Rapporteur had made an admirable digest, but, with few exceptions, the power thus vested in the United Nations had not been exercised. Under General Assembly resolution 24 (I) it was possible to determine which organ of the United Nations was competent to assume the functions formerly exercised by organs of the League of Nations. Almost all States would be able to accede to a treaty concluded under the League's auspices, not merely those which had participated in drawing it up, but also those to which a copy of the treaty was communicated. Member States had agreed that the League of Nations Council should be empowered to communicate the texts of treaties to States for purposes of accession. In his opinion, that right of communication had not lapsed with the dissolution of the League of Nations Council; it was for the General Assembly of the United Nations to appoint an organ to take over that function, and the Sixth Committee could propose, for each individual treaty, a resolution to communicate the text to States with an invitation to accede. If progress was to be made in developing international law, accession must not be confined to treaties which, for some States at least, created general rules of international law.

88. There were several possible solutions. The simplest and most suitable was that proposed by the Special Rapporteur — namely, the adoption of a resolution inviting States to accede to a treaty.

89. Some conventions might perhaps require revision. In such cases, the procedure should be that already adopted for the groups of conventions on opium and dangerous drugs and on the suppression of the white slave traffic — namely, a protocol to be signed by all States. As that was an important question under the terms of the United Nations Charter, a two-thirds majority of the Members of the United Nations should be required for adoption of the resolution approving the protocol, though the protocol itself need not be signed by that majority. A better solution might perhaps be to adopt a resolution, and reserve recourse to a protocol for cases in which a treaty needed to be brought up to date. A third possible solution would be for the General Assembly to declare itself, by a resolution, competent to assume the functions of the League of Nations Council.

90. Under article 13 of the Charter, the General Assembly was enjoined to encourage the progressive development of international law and its codification. The Security Council was a special organ which did not correspond to the League of Nations Council in all respects, and which did not enjoy general competence in matters of international law. Some writers took the view that the Economic and Social Council could be asked to bring some of the conventions in question up to date, since many of them dealt with matters within its competence.

91. The Commission should present the General Assembly with an opinion definite enough to indicate means of enabling a larger number of States to accede in one way or another to the treaties concluded under League of Nations auspices without impairing the rights of the parties to those treaties. From a purely legal point of view they were not closed treaties, and suitable means should be sought to ensure that they served the purpose for which they had been concluded, namely, to establish rules of international law. If the treaties were capable of being applied by other States, the Commission, with its enlarged membership, should devise ways and means enabling those other States to accede to them. For how could the States which did not apply the treaties be reproached for breaches of general international law if they were refused accession to the treaties?

92. On that point he was, he thought, in agreement with the Special Rapporteur, and the solution he was

[10] *Official Records of the General Assembly, Seventeenth Session, Supplement No. 9*, p. 11.

proposing was not based on the rule *de lege ferenda* which the Commission had included in article 9 of Part I of its draft on the law of treaties, concerning the two-thirds majority prescribed for broadening state participation. It was based both on the general spirit of the Charter and on the need to develop international law. One of the purposes of the United Nations was international co-operation. The treaties they were discussing were to some extent the means of achieving that purpose, and it would be in keeping with the spirit of the Charter to seek extended participation in them by States.

93. Mr. LACHS asked whether all the multilateral agreements listed in the working paper prepared by the Secretariat for the Sixth Committee (A/CN.4/L.498) were still formally in force, or whether some had been amended, superseded or covered by subsequent agreements.

94. Sir Humphrey WALDOCK, Special Rapporteur, said that in his opinion the Commission was not called upon to review the multilateral treaties concluded under the auspices of the League of Nations in order to establish those in which the participation of additional States might usefully be considered. Some would probably be found to be outmoded, but the Commission's task was surely limited to the technical aspects of the problem.

95. Mr. LIANG, Secretary to the Commission, in reply to Mr. Lachs, said that treaties concluded under the auspices of the League of Nations which, owing to the disappearance of organs of the League, could no longer be applied, had been excluded from the list in the Secretariat's working paper.

96. As far as the others treaties were concerned, since he had started acting as depositary, the Secretary-General had in some cases received no instrument and in others only denunciations. Some of the aggrements might have tacitly fallen into desuetude while others had been superseded by new treaty relations between the parties. Three of the conventions listed, namely, the Commission regarding the Measurement of Vessels Employed in Inland Navigation, the Agreement between Customs Authorities in order to Facilitate the Procedure in the Case of Undischarged or Lost Triptychs, and the Agreement Concerning the Preparation of a Transit Card for Emigrants, were regional in character and specifically designed to deal with European conditions, so it was doubtful whether they need be opened to the participation of new States in other parts of the world.

97. Sir Humphrey WALDOCK, Special Rapporteur, pointed out that some regional treaties had been originally intended to be closed and contained no clause opening them to the participation of States outside the region.

The meeting rose at 1 p.m.

713th MEETING

Wednesday, 3 July 1963, at 10 a.m.

Chairman: Mr. Eduardo JIMÉNEZ de ARÉCHAGA

Question of extended participation in general multilateral treaties concluded under the auspices of the League of Nations (General Assembly resolution 1766 (XVII)) (A/CN.4/154, A/CN.4/159 and Add.1, A/CN.4/162)

[Item 2 of the agenda] (*continued*)

1. The CHAIRMAN invited the Commission to continue consideration of item 2 of the agenda.

2. Mr. PAL said he fully subscribed to the contents of the report (A/CN.4/162) by the Special Rapporteur on the law of treaties and to the way in which he had approached the question. The functions conferred on the Council of the League of Nations by the parties under the participation clauses in the twenty-one open treaties under consideration were not analogous to the functions of a depositary. Under section C of General Assembly resolution 24 (I), the General Assembly was itself to examine or would submit to the appropriate organ of the United Nations, " any request from the parties that the United Nations should assume the exercise of functions or powers entrusted to the League of Nations by treaties, international conventions, agreements and other instruments having a political character." He wondered, therefore, whether the Commission would have to examine the twenty-one treaties in order to establish which of them would fall within the scope of that decision by the General Assembly.

3. In his opinion, article 9, paragraph 1 (*b*), in Part I of the draft on the law of treaties adopted at the previous session [1] stated the existing law on the subject. If that were so, it would seem that the United Nations could assume the functions previously discharged by the Council of the League under the participation clauses. The Commission must therefore give serious consideration to the solution suggested by the Special Rapporteur in paragraph 32 of his report. With some modifications that report would presumably form the basis of the section of the Commission's own report to be devoted to the matter.

4. Mr. YASSEEN said that during the discussion of the Commission's report in the Sixth Committee, speaking as the representative of Iraq, he had expressed doubts concerning the advisability of referring the question back to the Commission. He had expressed the view that, if the object was to find a formula consistent with the progressive development of international law, it would be better to wait for the Commission to complete its draft convention on the law of treaties.

5. The question of opening a closed treaty had been touched on in the Commission's 1962 draft. However,

[1] *Official Records of the General Assembly, Seventeenth Session, Supplement No. 9*, p. 11.