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Summary record of the 923rd meeting

Topic:
Special missions

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

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

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

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

*It was so agreed.*⁸

The meeting rose at 1.5 p.m.

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

923rd MEETING

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

Chairman: Sir Humphrey WALDOCK

Present: Mr. Ago, Mr. Bartoš, Mr. Castañeda, Mr. Castrén, Mr. Eustathiades, Mr. Jiménez de Aréchaga, Mr. Kearney, Mr. Nagendra Singh, Mr. Ramangasoavina, Mr. Reuter, Mr. Tammes, Mr. Tsuruoka, Mr. Ushakov, Mr. Ustor, Mr. Yasseen.

Special Missions

(A/CN.4/193 and Addenda; A/CN.4/194 and Addenda)

(continued)

[Item 1 of the agenda]

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

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

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

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

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

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

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

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

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

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

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

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

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

to arrive at an acceptable solution that took account of all the views expressed in the discussion. That was particularly important when so many members of the Commission were absent. A provision adopted by a close majority and without the support of the Governments which had taken the trouble to submit comments was doomed to failure.

10. He thought that agreement would be possible on a text that might be inserted between articles 23 and 24 and which would read:

"The members of the diplomatic staff of a special mission headed by a Head of State, Head of Government or a Minister of State shall enjoy the privileges and immunities established in articles 29 to 32 and 36 of the Vienna Convention on Diplomatic Relations. These same articles shall also apply to the head and members of the diplomatic staff of a special mission when the sending and the receiving States so agree before the departure of the mission."

A provision on those lines would furnish an objective criterion for defining a high-level mission.

11. Under articles 24, 25, 26, 27 and 31, other special missions would be given reduced privileges and immunities in accordance with their functional requirements.

12. Mr. RAMANGASOAVINA said that, although the distinction made in article 17 *ter* between the categories of special missions seemed to him injudicious, it seemed entirely natural, on the other hand, that special missions led by a Head of State should be given special protection and surrounded with a certain solemnity. In that case it was the representational theory which prevailed.

13. In the case of special missions headed by a Minister for Foreign Affairs or some other high-ranking personage who was not a Head of State, rather special treatment might be provided for, though there was no need to go so far as to draft separate articles concerning them. The solution proposed by Mr. Jiménez de Aréchaga might be adopted and the provisions laid down in the Vienna Convention on Diplomatic Relations applied to such missions.

14. In principle, he was opposed to dividing special missions into different categories based on their level or on their technical character. Article 40 *bis*, on non-discrimination, provided in paragraph 2(c) that States could agree among themselves to reduce reciprocally the extent of the facilities, privileges and immunities for particular categories of missions. A few amendments should be made to that provision in order to regulate the question of special treatment without having to draft a new article.

15. Mr. YASSEEN said that, in drawing up the draft convention, the Commission had realized that it had to lay down a kind of general law for special missions or, in other words, the necessary minimum rules for the performance of their tasks. States could agree mutually on additional privileges and immunities in order to take account of the exceptional nature or particular level of a given special mission, but the Commission's draft should represent a general formula which would be applicable to ordinary cases. It was very difficult to draw up a list of the necessary qualifications and titles to justify granting a

more generous status to a special mission headed by a high-ranking personage who was not the Head of State. Normally, States entered into negotiations concerning the sending of a high-level special mission and determined the status which it should be given.

16. The draft was based on the idea that different special missions did not receive different treatment, but it provided for an exception in the case of special missions led by the Head of State, whose status was established by rules of international law. Article 17 *quater* could therefore be kept, since it was not a rule in itself but rather a reference to the rules of international law.

17. Mr. USHAKOV said that in principle he shared the view expressed by Mr. Yasseen. If, however, the Commission adopted a special article on special missions led by a Head of State, Prime Minister or Minister for Foreign Affairs, certain provisions of the draft would become inapplicable. Thus, in the draft provisions concerning so-called high-level special missions annexed to his second report¹ the Special Rapporteur had laid down a number of rules concerning special missions headed by a Minister for Foreign Affairs, which replaced certain articles of the draft.

18. In his opinion, the Commission should decide either to deal with only minimum standards in its draft—and ignore the question under consideration—or to draft a few articles to govern the case of high-level special missions.

19. Mr. NAGENDRA SINGH said that the realities of life must be taken into account in any process of codification; there was no overlooking the fact that special missions were sometimes led by Heads of State and Heads of Governments, and the draft articles should therefore include some provision on that subject. A distinction should be made, however, between special missions led by Heads of State and Heads of Government and those led by ministers, of varying rank, or officials. He did not share the view of Mr. Jiménez de Aréchaga, who had put Heads of State on the same level as ministers. The Special Rapporteur had made a commendable effort to frame an article concerning Heads of State, but the drafting might need touching up and it would probably have to be expanded.

20. The best solution would be to provide for minimum standards and to leave it to the States concerned to reach agreement about any special privileges and immunities to be accorded.

21. Mr. AGO said that it was important not to confuse two different things: the status of the special mission as a whole, and the status of the persons who formed part of it. The status of the special mission might vary, depending on whether it was a more or less high level mission, but he was not sure that it was necessary to make that distinction. Was the mere fact that a special mission was led by a Head of State, a Prime Minister or a Minister for Foreign Affairs sufficient reason why the whole mission should be given different treatment and, more particularly, why the

¹ *Yearbook of the International Law Commission, 1965*, vol. II, p. 144, sub-paragraphs (b), (d), (f), and (g) of rule 4.

other members of the mission should automatically be entitled to the full privileges and immunities provided for in the Vienna Convention on Diplomatic Relations? The Commission would do better to confine itself to defining the personal situation of the Head of State, the Prime Minister, the Minister for Foreign Affairs or other personages of the same rank when one of them formed part of a special mission.

22. In connexion with another article of the draft,² the Commission had already envisaged the case where a special mission included members of the diplomatic staff of the permanent mission of the sending State in the receiving State; it had thought that in that case such persons retained their status as members of the permanent mission, which was governed by the Vienna Convention on Diplomatic Relations. By analogy inasmuch as general international law furnished certain rules concerning the status of a Head of State, a Prime Minister or a Minister for Foreign Affairs on an official visit to a foreign State, the Commission could lay down a rule specifying that when one of those persons or a person of similar rank formed part of a special mission, his situation was governed not by the articles of the draft, but by the rules of general international law. There was no need to do anything more.

23. Mr. REUTER said that the point under discussion was connected with the subject of article "X" (A/CN.4/194/Add. 2), on the legal status of the provisions, and raised a question which came up in connexion with almost all the articles: what purpose did the Commission have in mind in preparing its draft? He personally thought that the convention which was being drafted was intended primarily to facilitate the task of governments by proposing a ready-made solution which in the majority of cases would relieve them of the necessity of laying down detailed conditions. Above all else, therefore, it was necessary to produce something which would be convenient to use. The proposed model should be a single text or include only a very small number of variants. Since the Commission had already worked out a system of general law, it could limit itself to reminding States that they could agree on different special systems which might be either broader or stricter than the general system.

24. Certain members of the Commission, it seemed, would prefer the system defined in the draft to be a minimum system, the least which States could offer in any given case. If the Commission adopted that approach, the system should be fixed at a rather low level and be based more on the Convention on Consular Relations.

25. If the Commission thought it necessary to state special rules concerning high-level special missions, he agreed with Mr. Yasseen, and for the same reasons, that it would be better to consider only the case of the special mission on the highest level, the special mission led by a Head of State. In that case, the draft would gain by being slightly more explicit: since the Commission would refer to the rules of general international law, it would take the opportunity to specify what those rules were. But it was no doubt already too late to undertake a work of that kind.

26. He hoped that the draft would define a general system and a system for special missions at the Head of State level. For the rest, States would be completely free to define the system which they wished to apply, by referring either to the Vienna Convention on Diplomatic Relations or to the rules concerning special missions at the level of Heads of State, and they would also not be prevented from applying a stricter system, if they preferred, than the general system defined in the draft.

27. Mr. BARTOŠ, Special Rapporteur, said he agreed that it was extremely difficult to delimit so-called high-level special missions, seeing that the hierarchy of functions varied considerably from one country to another. For reasons of convenience, the rules of procedure of the Security Council provided that a Head of State, a Head of Government or a Minister of Foreign Affairs did not have to produce credentials, since those persons were presumed to represent their State.

28. It would not be very difficult to lay down rules of international law which would be applicable in the case of an official visit by a Head of State, for those rules were to some extent fixed; but, even so, the way in which a Head of State was treated in a foreign country generally depended in practice on an agreement between the two States, and in particular on the protocol of the receiving State.

29. In general, the suite of a Head of State enjoyed full privileges and immunities, but in that case, too, a question of definition arose: what persons or category of persons could lawfully claim to form part of his suite?

30. He could accept Mr. Yasseen's proposal that only the first sentence in article 17 *quater* should be kept. That sentence had a fairly precise meaning because of the reference to an "official visit", which was different from a State visit or a private visit. He was convinced that in most cases everything would be settled by an agreement between the States concerned.

31. He was not opposed to the solution proposed by Mr. Jiménez de Aréchaga as far as its substance was concerned. As a general rule, however, he was against inserting a reference to an existing convention in a draft convention. After all, it was possible that States which had not ratified the Vienna Convention might ratify the new convention on special missions, and in that case the duties of those States would be ill-defined.

32. The Commission was technically well equipped to take a valid decision and he therefore urged it to say whether it wished to abide by its previous decision not to draft any separate provisions concerning so-called high-level special missions.³ If it reversed that decision, he would submit a draft.

33. Mr. TSURUOKA said that the Commission would be wise to abide by its previous decision, especially after the explanations given by the Special Rapporteur.

34. In that case, the Commission could decide to keep only the first sentence in article 17 *quater*, as suggested by Mr. Yasseen and supported by the Special Rapporteur.

² Article 3.

³ See *Yearbook of the International Law Commission, 1966*, vol. II, document A/6309/Rev. 1, Part II, para. 69.

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

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

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

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

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

The meeting rose at 11.35 a.m.

⁴ *Ibid.*, following paragraph 38.

924th MEETING

Monday, 19 June 1967, at 11.40 a.m.

Chairman: Sir Humphrey WALDOCK

Present: Mr. Ago, Mr. Bartoš, Mr. Castañeda, Mr. Castrén, Mr. Eustathiades, Mr. Jiménez de Aréchaga, Mr. Kearney, Mr. Nagendra Singh, Mr. Ramangasoavina, Mr. Reuter, Mr. Tammes, Mr. Ushakov, Mr. Ustor, Mr. Yasseen.

Special Missions

(A/CN.4/193 and Addenda; A/CN.4/194 and Addenda;
A/CN.4/L.121)

(continued)

[Item 1 of the agenda]

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

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

¹ See 923rd meeting, para. 1.

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

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

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

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

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

² Para. 10.

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