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### **The Notion of "Diplomatic Special Mission" in International Law**

Pojęcie „dyplomatyczna misja specjalna” w prawie międzynarodowym

Понятие „дипломатическая специальная миссия” в международном праве

The technological explosion after the Second World War in the field of communication and transportation has altered the world of politics in many aspects and has brought about important changes in the sphere of diplomacy. Statesmen have become more mobile, communication more rapid, the diplomatic apparatus more bureaucratic. These features have changed a great many diplomatic forms. In the new circumstances, the special mission, the oldest institution of the diplomatic law, is flourishing. Used more frequently than ever before, it is still young and of the highest importance.

#### I

The subjects of the international law have, as a rule, a community character. They are abstract entities created by law. For this reason, the State, the most important among such entities, always acts in foreign relations through its organs which have the sole authority to express the will of the State.

Each State has many different organs, but only a few of them have the capacity to act on behalf of the State in its international relations. Their competence depends on the internal legal order of the State concerned as well as on the international law and custom. Official intercourse between States is run by a special class of persons which form the foreign service of every State. Whatever they do constitutes the official

activity of a State. Those officers belong to the civil service of a State and are its organs in the field of its international relations.<sup>1</sup>

Foreign relations of a State may have official or diplomatic character. Official intercourse takes place either directly between Governments or by agencies acting on their behalf. Diplomatic relations are a special kind of official relations in that they are strictly connected with the foreign policy of the State.<sup>2</sup> External diplomatic relations are conducted by diplomatic missions which are specific State organs.

## II

In the international law literature, the notion of the "diplomatic mission" is used in an organic, functional or structural meaning. In the organic sense, a diplomatic mission is an official organ of the sending State acting on the territory of the receiving State with its consent.<sup>3</sup> In the functional denotation, a diplomatic mission is a function, which is exercised by selected persons on behalf of the sending State.<sup>4</sup> In the

<sup>1</sup> Cf: L. Ehrlich: *Prawo narodów*, wyd. III, Kraków 1956, p. 145—146; J. S. Zajaczkowski: *Przywileje dyplomatyczne a funkcjonariusze międzynarodowi*, Warszawa 1934, p. 19; Ph. Cahier: *Le droit diplomatique contemporain*, Genève 1964, p. 333; P. Guggenheim: *Traité de droit international public*, Genève 1953, vol. I, p. 481.

<sup>2</sup> Cf: J. Makowski: *Zerwanie stosunków dyplomatycznych i jego skutki prawne*, „Sprawy Międzynarodowe” [SM] 1959, No. 2, p. 44—45.

<sup>3</sup> „Дипломатический словарь”, Москва 1971, vol. I, p. 478; B. Wiewióra [in:] *Zarys prawa międzynarodowego publicznego*, Warszawa 1956, vol. II, p. 48—49; Cahier: *op. cit.*, p. 55; L. J. Harris: *Diplomatic Privileges and Immunities: A New Regime is Soon to be Adopted by the United States*, „American Journal of International Law” [AJIL] 1968, No. 1, p. 103.

<sup>4</sup> J. Machowski: *Sytuacja personelu administracyjnego organizacji międzynarodowych w świetle prawa i polityki*, SM 1962, No. 8, p. 18; *Dictionnaire diplomatique*, Académie Diplomatique Internationale, Paris, vol. II, p. 129; Some authors stress "diplomatic functions" of a mission: *Draft Convention on Diplomatic Privileges and Immunities, with Comment*, Harvard Law School, AJIL 1932, vol. 26, Supplement, p. 42; C. A. Colliard: *La Convention de Vienne sur les relations diplomatiques*, „Annuaire Français de Droit International” [AFDI] 1961, p. 9; some authors emphasize the „representative character" of a diplomatic mission, see: K. Warszewicki: *De legato et legatione*, wyd. I, Kraków 1595, translation: „O pośle i poselstwach”, Warszawa 1935, p. 132; Wicquefort: *L'ambassadeur et ses fonctions*, La Haye 1681, vol. I, p. 5; F. Słotwiński: *Prawo narodów naturalne połączone z praktyką państw europejskich*, Kraków 1822, p. 121—123; P. Fiore: *Fiore's Draft Code, 1890*, AJIL 1932, Supplement, vol. 26, p. 156; P. Pradier-Fodéré: *Cours de droit diplomatique à l'usage des agents politiques du ministère des affaires étrangères des États européens et américains*, Paris 1899, p. 253; A. B. Сабанин: „Посольское и консульское право”, Москва 1930, p. 76;

structural meaning, a diplomatic mission is a machinery serving the chief of a mission to fulfil the purposes of the mission.<sup>5</sup>

Does the notion of the diplomatic mission include or exclude a temporary mission as well? This seems to be a very controversial problem. Extreme opinions were formulated, among others, by S. Kauffmann<sup>6</sup>, Ph. Cahier and M. Hardy. For example, Ph. Cahier wrote: "[...] a diplomatic mission can be defined as the organ of a subject of international law, permanently accredited to another subject of international law for the purpose of maintaining diplomatic relations with that subject"<sup>7</sup>. In the opinion of M. Hardy, "the term «diplomatic mission» refers to the permanent diplomatic mission sent between one State and another, and not to special mission or those maintained at international organizations"<sup>8</sup>.

The above-mentioned statements are typical of the so-called restrictive trend in modern diplomatic law, but at the same time an overwhelming majority of writers maintain that there are two basic types of diplomatic missions: the permanent and the temporary ones. Some authors differentiate, accordingly, between "*les agents diplomatiques proprement dits*" and "*les agents diplomatiques au sens large*" with the same diplomatic status.<sup>9</sup>

The state of literature on this subject was greatly affected by the Havana Convention on Diplomatic Officers (1928) which states, in Art. 2: "Diplomatic officers are classed as ordinary and extraordinary. Those who permanently represent the Government of one State before that of another are ordinary. Those entrusted with a special mission or those who are accredited to represent the Government in international conferences and congresses or other international bodies are extraordinary"<sup>10</sup>.

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J. R. Wood and J. Serres: *Diplomatic Ceremonial and Protocol. Principles, Procedures and Practices*, New York 1970, p. 9.

<sup>5</sup> There are functional-structural definitions by S. E. Nahlik: *Prolegomena prawa dyplomatycznego*, „Zeszyty Naukowe Uniwersytetu Jagiellońskiego”, CLX, Prace Prawnicze, vol. 31, Kraków 1967, p. 32; A. Maresca: *La missione diplomatica*, Milano 1959, p. 7—8; И. П. Блищенко, В. Н. Дурденевский: „Дипломатическое и консульское право”, Москва 1962, p. 134.

<sup>6</sup> S. Kauffmann: *Die Immunität der Nicht-Diplomaten, ein Beitrag zur Kodifikation des Völkerrechts*, Leipzig 1932, p. 6—56.

<sup>7</sup> Ph. Cahier: *Vienna Convention on Diplomatic Relations*, „International Conciliation” 1968, No. 571, p. 8.

<sup>8</sup> M. Hardy: *Modern Diplomatic Law*, Manchester 1968, p. 13.

<sup>9</sup> Cf: R. Genet: *Traité de diplomatie et le droit diplomatique*, Paris 1931, vol. I, p. 79; Pradier-Fodéré: *op. cit.*, p. 292 and 253. Cf: also Nahlik: *Prolegomena...*, p. 32.

<sup>10</sup> *Convention on Diplomatic Officers Adopted at Havana, February 20, 1928*, AJIL 1932, vol. 26, Supplement, p. 175.

This classification was supported in many private codifications<sup>11</sup> and by a majority of writers<sup>12</sup>. L. Sfez expresses the same point of view, in a different and original way, when he says: "[...] *la rupture des relations diplomatiques n'entraîne nullement la fin des relations diplomatiques entre les deux pays*".<sup>13</sup>

In the judgment of the present writer, permanent or temporary character of a mission is not its substantial characteristic, it is thus not necessary to include it in the definition of a diplomatic mission. The term "diplomatic mission", in the meaning of this paper, will be applied to any foreign organ of the sending State serving in inter-state relations, fulfilling any entrusted functions and always representing official and public interests of the sending State.

<sup>11</sup> *Diplomatic Agents, Project No. 22/1925 of American Institute of International Law*, Art. 2, AJIL 1932, vol. 26, Supplement, p. 168; *Diplomatic Agents, Project No. VII/1927 of the International Commission of American Jurists*, Art. 2, *ibid.*, p. 172; Fiore: *op. cit.*, p. 156, Art. 435; the commentary to Art. 1 (b) in the *Draft Convention on Diplomatic Privileges and Immunities*, Harvard Law School, p. 42; E. Pessôa: *Diplomatic Agents, Pessôa's Draft Code*, 1911, Art. 125—150, AJIL 1932, vol. 26, Supplement, p. 165—168; Lord Phillimore: *Proposed Codification of the Law Regarding the Representation of States*, AJIL 1932, vol. 26, Supplement, p. 178.

<sup>12</sup> Cf. J. Bianco: *Diplomacia ad hoc*, „Revista de Derecho Internacional y Ciencias Diplomáticas” 1964, No. 25—26, p. 27—28; Блищенко, Дурденевский: *op. cit.*, p. 202. R. L. Brown: *The Rise of the Ambassador*, „Contemporary Review” 1967, No. 1215, p. 198; I. Cardinale: *Le Saint-Siège et la diplomatie*, Paris—Tournai—Rome—New York 1962, p. 179; Ehrlich: *op. cit.*, p. 158—160; A. A. Forgac: *New Diplomacy and the United Nations*, New York 1965, p. 17; Guggenheim: *op. cit.*, p. 491; Harris: *op. cit.*, p. 103; G. U. G. Krishna Murthy: *Dynamics of Diplomacy*, Delhi 1968, p. 50; J. V. Louis: *Le procès des diplomates français en Égypte, problèmes juridiques*, AFDI 1963, p. 243—244; J. Makowski: *Przedstawiciele dyplomatyczni*, [in:] *Encyklopedia nauk politycznych*, vol. I, Warszawa 1936, p. 975; Ch. de Martens: *Guide Diplomatique*, Paris 1851, vol. I, p. 52; S. E. Nahlik: *W przededniu kodyfikacji prawa dyplomatycznego*, SM 1958, No. 6, p. 51; L. Oppenheim: *International Law, A Treatise*, ed. by H. Lauterpacht, London—New York—Toronto 1952, p. 694; R. Regala: *Law and Diplomacy in a Changing World*, Manila 1965, p. 162; M. Rostworowski: *Prawo dyplomatyczne*, Kraków 1934, p. 19; Сабанин: *op. cit.*, p. 78; E. Satow: *A Guide to Diplomatic Practice*, London 1917, vol. I, p. 174; J. Secrétan: *Les immunités diplomatiques des représentants des États membres et des agents de la Société des Nations*, Lausanne 1928, p. 8; Słotwiński: *op. cit.*, p. 126; „Дипломатический словарь”, т. II p. 303—304; K. Stefko: *Dyplomatyczne zwolnienie od jurysdykcji cywilnej*, Lwów 1938, p. 120; G. Stuart: *Le droit et la pratique diplomatiques et consulaires*, „Recueil des Cours. Académie de Droit International” [RCADI] 1934, vol. II, p. 517; Warszawicki: *op. cit.*, p. 133; Wiewióra: *op. cit.*, p. 48—49; Wood and Serres: *op. cit.*, p. 25; В. А. Зорин: „Основы дипломатической службы, Москва 1964, p. 90.

<sup>13</sup> L. Sfez: *La rupture des relations diplomatiques*, „Revue Générale de Droit International Public” [RGDIP] 1966, No. 2, p. 404—405.

Diplomatic missions may be of a permanent or of a temporary character. According to different purposes of missions and its status in the international law, it is possible to distinguish the following types of diplomatic missions.<sup>14</sup> The permanent diplomatic mission is either the embassy or legation accredited by one State to another, or the mission of a State to an international organization. The temporary diplomatic mission is either (1) a special mission sent in the bilateral relations between States, or (2) a special mission sent to an international conference or congress, or (3) a mission to a conference being the sessional organ of an international organization, or (4) a mission sent by an international organization either to a State or to another international organization.

The status of any diplomatic missions is regulated by one of the three multinational instruments: (a) the Vienna Convention on Diplomatic Relations (1961) — as regards permanent missions in bilateral relations<sup>15</sup>; (b) the New York Convention on Special Missions (1969) — as to temporary missions in bilateral relations<sup>16</sup>; and (c) the Vienna Convention on the Representation of States in Their Relations with International Organizations of a Universal Character (1975) — as for permanent and temporary missions sent by States to the organs or conferences of international organizations.<sup>17</sup> The status of special missions in multilateral relations (conference missions) has not been as yet expressly regulated.

### III

According to Art. 1 (a) of the Convention on Special Missions (CSM): "A «special mission» is a temporary mission, representing the State, which is sent by one State to another State with the consent of the latter for the purpose of dealing with its specific questions or of performing in relation to it a specific task".

During the first period of discussion in the United Nations International Law Commission (ILC), the terms "ad hoc diplomacy" and „ad hoc mission" were used.<sup>18</sup> According to a proposal by Professor Ago (Italy)

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<sup>14</sup> For other classifications see: Maresca: *op. cit.*, p. 325; Блищенко, Дурденевский: *op. cit.*, p. 54; И. П. Блищенко: „Дипломатическое право", Москва 1972, p. 54; *id.* „Курс международного права", т. IV, Москва 1968, p. 27; „Дипломатический словарь", т. I, p. 479; Зорин: *op. cit.*, p. 208.

<sup>15</sup> "United Nations, Treaty Series", vol. 500, p. 95—126.

<sup>16</sup> "United Nations Document" [UN Doc.] A/7630: "General Assembly Official Records" [ORGA]: Twenty-Fourth Session, Supplement No. 30.

<sup>17</sup> UN Doc. A/Conf. 67/16.

<sup>18</sup> *Report on ad hoc Diplomacy* by A. E. R. Sandström, *Special Rapporteur*,

to replace those terms with the term "special mission" so as to stress the contemporary character of the field of interest of the Convention, the ILC approved of this point of view. The term "special mission" may lead to some confusion, however, as the Convention deals only with the State organs sent abroad in the representative character which means that a "special mission" must be a diplomatic one.

The above-mentioned definition of a special mission has four basic components: (1) a subjective element — a mission is sent by a State to another State; (2) an organic element — a mission is an organ of the sending State, representing its will abroad; (3) a functional element — the task of the mission is precisely defined which does not mean, however, that its scope is strictly limited; (4) a temporary element — a mission has a provisional character, which does not necessarily mean a brief one.

In the international law literature, most authors agree as to the existence of these four elements of the definition<sup>19</sup>, but there are slight differences in its interpretation. J. Nisot<sup>20</sup> and M. Waters have suggested a completely different notion of a special mission excluding the organic element of the definition. According to M. Waters, "special or *ad hoc* agents [...] should be defined as those individuals assigned by a State to temporary missions, whose duties do not have the breadth of scope normally assumed to be a part of the regular diplomats and who may or may not have diplomatic rank".<sup>21</sup> It is necessary to stress that these definitions do not define a "diplomatic special mission".

#### IV

There are two major problems in a commentary of the subjective element of the notion of a special mission, namely, if it is possible to

UN Doc. A/CN.4/129, "Yearbook of the International Law Commission" [YILC] 1960, vol. II, p. 108—115.

<sup>19</sup> Cf: A. Abou-Heif: *Vers un status juridique pour la diplomatie ad hoc*, „Annuario di Diritto Internazionale” 1967—1968, p. 461—462; M. Bartoš: *Le statut des missions spéciales de la diplomatie ad hoc*, RCADI 1963, vol. I, p. 463—465; I. P. Bliszczenko: *Soudobé diplomatické právo a diplomacie ad hoc*, „Časopis pro Mezinárodní Právo” 1964, No. 4, p. 307; M. R. Доннагумма: *La diplomazia ad hoc*, Napoli 1968, p. 1; И. П. Блищенко: „Конвенция о дипломатии ad hoc”, „Советский ежегодник международного права”, [СЕМП] 1966—1967, p. 127; К. С. Сандровский: „Специальные миссии в дипломатической практике Советского государства в первые годы после Октябрьской революции”, „Правоведение” 1967, No. 3, p. 41.

<sup>20</sup> J. Nisot: *Diplomatie ad hoc: les „missions spéciales”*, „Revue Belge de Droit International” 1968, No. 2, p. 416.

<sup>21</sup> M. Waters: *The ad hoc Diplomat, A study of Municipal and International Law*, The Hague 1963, p. 165.

exchange a special mission between a State and a political movement, and if a special mission can be used in multilateral relations.

The possibility of using a special mission in relations between a State and a political movement is strictly connected with a very controversial problem of the subjects of international law. There is no agreement as to the character of subjects in international law of political movements in general. There are exceptions, however, in the cases of anti-colonial activity and of recognized belligerency.

A commentary to Art. 1 in the ILC Draft CSM (1965) includes the following statement: "In the case of insurrection or civil war [...], any such movements which have been recognized as belligerents and have become subjects of international law have the capacity to send and receive special missions".<sup>22</sup> After critical comments by the Swedish Government<sup>23</sup>, the ILC has decided to remove the above-mentioned sentence<sup>24</sup>. The delegations of the Third World strongly criticized this decision.<sup>25</sup>

In the judgment of the present writer a colonial nation has the right to self-determination and its organs are forms of "a State *in statu nascendi*".<sup>26</sup> A foreign representation of that nation may be of a diplomatic character. In the case of a civil war or of a war of secession, the same situation becomes reality after the recognition of the belligerency of insurgents. A contemporary practice of States is to grant to political delegations of such movements the character of diplomatic special missions<sup>27</sup> (for example, in the Evian negotiations).

<sup>22</sup> UN Doc. A/6009, YILC 1965, vol. II, p. 165.

<sup>23</sup> UN Doc. A/6709/Annex I, YILC 1967, vol. II, p. 394. The Swedish Government has formulated a few interesting questions: "[...] supposing that States A and B are both parties to the future instrument on special missions, supposing further that there is an insurrection in State A, that State B recognizes the insurgent as belligerents, and that State A protests against that recognition as an intervention in its internal affairs, supposing finally that State B sends a special mission to the insurgents, would State A be obliged to consider the mission as a special mission under the instrument? If so, is State A to be considered as a third State in relation to the special mission? [...] If the insurgents were defeated and the mission captured by State A on its territory what is the mission's status?"

<sup>24</sup> UN Doc. A/6709, YILC 1967, vol. II, p. 348.

<sup>25</sup> The Ivory Coast Government proposed to include in the Convention scope any missions sent to or received by any *de facto* Government. See: UN Doc. A/7156, ORGA: Twenty-Third Session, vol. II, Annexes, p. 4.

<sup>26</sup> Cf: Z. J. Pietraś: *Wojna narodowowyzwoleńcza a prawo międzynarodowe*, SM 1971, No. 3, p. 83—86; *id.*: *Próba klasyfikacji wojen*, „Studia Nauk Politycznych” 1973, No. 4, p. 93—105; see also L. Antonowicz: *Pojęcie państwa w prawie międzynarodowym*, Warszawa 1974, p. 112—117; Блищенко: „Дипломатическое право...”, p. 115—116; Блищенко, Дурденевский: *op. cit.*, p. 32—33, 42.

<sup>27</sup> See also: A bou - Heif: *op. cit.*, p. 467; Donna rumma: *op. cit.*, p. 14—15; Stefko: *op. cit.*, p. 125—126; Satow: *op. cit.*, p. 177.

However, because of the narrow scope of the notion of a special mission in Art. 1 (a) of the CSM, such delegations would not have the character of special mission *ipso iure*. But it is possible to use the Convention by analogy, especially because the exchange of special missions should be preceded by the consent of both negotiating parties (Art. 2 of the CSM) as regards the legal status of missions. Exchange of special missions is not hindered by non-existence of diplomatic or consular relations (Art. 7 of the CSM), or by non-recognition of organs of the political movement concerned.

A literal interpretation of Art. 1 (a) of the CSM excludes the possibility of using that instrument in multilateral intercourse, because it applies to State to State relations only. There were three trends of a solution of that problem during the ILC discussions: the first was to include conference missions in the CSM<sup>28</sup>; the second was to include this kind of missions in the Convention on the Representation of States in Their Relations with International Organizations of a Universal Character (CRSIO); the third was to regulate the problems of missions to conferences convened by international organizations in the CRSIO and the problems of missions to conferences convened by States in the CSM.<sup>29</sup>

It seems that the final effect of the work of the ILC is a fourth solution: missions to conferences convened by international organizations are included in the CRSIO, while the problems of missions to conferences convened by States are regulated neither in the CSM, nor in the CRSIO. According to Art. 1 § 1 (5) of the CRSIO, "Conference means a conference of States convened by or under auspices of an international organization" and, according to Art. 1 § 1 (9) of the CRSIO, "delegation means [...] the delegation to an organ or the delegation to a conference" in the above-mentioned meaning. Art. 2 § 3 of the CRSIO states that "[...] the present Convention does not apply to other conferences [...]", but there is a possibility of application of these rules in such cases by analogy.

It is necessary to emphasize that the subjective scope of the CSM was

<sup>28</sup> UN Doc. A/CN.4/129, YILC 1960, vol. II, p. 108 and p. 113—114; UN Doc. A/CN.4/194 — *Fourth Report on Special Missions, by Mr. M. Bartoš, Special Rapporteur*, YILC 1967, vol. II, p. 9 and 22—23.

<sup>29</sup> That point of view was the opinion of the majority of the ILC. In the opinion of Mr. Bartoš, a Special Rapporteur of the ILC, the distinction between the two types of delegations is purely formal and the procedure of the ILC "[...] involved a logical as well as a practical error", see: UN Doc A/CN.4/194, YILC 1967, vol. II, p. 22—23. See the same opinion: Доннарумма: *op. cit.*, p. 9—11; *id.*: *La convention sur les missions spéciales* (8 décembre 1969), "Revue Belge de Droit International" [RBDI] 1972, No. 1, p. 39; Блищенко: „Дипломатическое право...", p. 116—117, p. 135; Nisot: *op. cit.*, p. 418; M. Gaşiorowski: *Dyplomaci i konsulowie*, Warszawa 1966, p. 174—175.



determined in an inconsistent way: (a) Art. 6 of the CSM is concerned with the situation of a meeting of a few special missions in order to deal together with a question of common interest to all of them; (b) Art. 18 of the CSM applies to a meeting of a few special missions in order to negotiate with each other, but without the participation of the receiving State; (c) Art. 16 § 1 of the CSM contains rules of precedence in the above-mentioned cases.

The representatives of Governments interpreted this situation in three ways. One group of States stressed the contradiction between Art. 1 (a) of the CSM and Art. 6 and Art. 18 of the CSM.<sup>30</sup> The second group tended expressly to include missions to conferences convened by States in the CSM.<sup>31</sup> The third group wanted to remove Art. 6 and Art. 18 of the CSM as having "no legal content", if its capacity does not mean a conference.<sup>32</sup> A compromise solution was finally adopted and a contradictory interpretation of these rules is possible both in theory and in the practice of States.

In the international law theory, A. Abou-Heif, H. Arbuet Vignali and M. Paszkowski are of the opinion that special missions may only be used in bilateral intercourse<sup>33</sup> while, on the other hand, M. Donnarumma, S. E. Nahlik and J. Nisot agree that the CSM also covers special missions sent to conferences convened by States.<sup>34</sup>

In the opinion of this writer, it is to be regretted that, after so many years of the work of the ILC on codification of the diplomatic law, the legal status of missions to conferences convened by States seems still to be vague. There is only one logical interpretation of this state of affairs, namely that such missions are special missions under the CSM and that, in spite of Art. 1 (a) of the CSM, it is possible to protect them on the basis of Art. 6 or Art. 18 of the CSM in connection with Art. 2 of the CSM.

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<sup>30</sup> The Government of Canada, ORGA 23/VI, SR 1044, p. 3—4; Italy, ORGA 24/VI, SR 1142, p. 198 and Austria, UN Doc. A/7156, p. 2.

<sup>31</sup> Finland, UN Doc. A/6709/Annex I, YILC 1967, vol. II, p. 381; Japan, ORGA 23/VI, SR 1044, p. 3—4; Australia, ORGA 23/VI, SR 1053, p. 5; Great Britain in its amendment, UN Doc. A/C.6/L.704, ORGA 23/VI, Annexes, p. 48.

<sup>32</sup> The United States, Great Britain, France, Denmark, Czechoslovakia, Liberia, India, Ethiopia, Ghana: see: ORGA 23/VI, SR 1044, p. 3—4 and SR 1045, p. 2.

<sup>33</sup> Abou-Heif: *op. cit.*, p. 459; H. Arbuet Vignali: *La Convención sobre las misiones especiales*, „Revista Uruguaya de Derecho Internacional”, vol. I, 1972, p. 187—188 and 198; M. Paszkowski: *Dyplomacja wielostronna na forum organizacji międzynarodowych*, Warszawa 1976, p. 23.

<sup>34</sup> Donnarumma: *La convention...*, p. 39; S. E. Nahlik [in:] *Encyklopedia prawa międzynarodowego i stosunków międzynarodowych*, Warszawa 1976, p. 188—189; Nisot: *op. cit.*, p. 418.

It is not surprising that the CSM was applied for the first time in multilateral intercourse. During the second stage of negotiation at the European Conference on Security and Co-operation in Geneva (1973—1975), the Swiss Government suggested that its participants use the CSM instrument for regulating the status of their delegations. In the form of exchange of notes all participant States accepted that proposition.

## V

The organic element of the notion of the special mission is based on the prerequisite that the mission represents the sending State, i.e. that the mission is an organ of that State representing its will abroad. In the opinion of the ILC this is an essential distinguishing characteristic by which a special mission can be distinguished from other types of temporary missions of a "technical character".

There are nowadays innumerable meetings of experts negotiating on specific problems of international intercourse, not all of them being meetings of diplomatic special missions. After an intense discussion, it was the conclusion of the ILC that any action implying the representation of a sovereign State at the international level in its relations with other subjects of international law comes within the scope of diplomacy in general and, consequently of *ad hoc* diplomacy as well.<sup>35</sup>

During a discussion in the United Nations General Assembly a few States gave important comments on this item.<sup>36</sup> In the view of the Soviet delegation, a special mission must be "empowered by a State to negotiate on its behalf", the representative of France said that it should represent "the State as a whole", while according to the opinion of Spain it must represent "the State as a single entity".

In this connexion, it should be emphasized that the diplomatic special mission must be an organ of the sending State having the legal capacity to express the sovereign will of that State within the limits of its specific task.<sup>37</sup>

A real problem is that the functions of special missions are limited on the basis of an agreement between negotiating States (Art. 3 of the CSM). For this reason, it is possible to send or receive a special mission with diplomatic character which does not represent the State "as a whole",

<sup>35</sup> *Fourth Report on Special Missions, by Mr. M. Bartoš, Special Rapporteur, YILC 1967, vol. II, p. 23.*

<sup>36</sup> ORGA 24/VI, SR 1128, p. 132—134.

<sup>37</sup> Cf: Hardy: *op. cit.*, p. 92; Louis: *op. cit.*, p. 257—528; Nahlik: *Prolegomena...*, p. 29—30.

or even does not express "the sovereign will", but is concerned with purely technical matters. On the other hand, States have the right to make decisions as to the interpretation of its national sovereignty and to the protection of their representations abroad. It seems that the general trend of modern diplomatic intercourse consists in a growing importance of "technical" matters which are dealt with on a political or diplomatic level.

There are a few tests to be taken in account should a dispute arise between the sending and the receiving State as to the diplomatic character of a special mission. In the international law literature most writers deal with the following symptoms of the diplomatic status of persons entrusted with special mission: (a) diplomatic rank and title, (b) diplomatic passport, (c) diplomatic visa, and (d) full powers.

The importance of the first test was stressed by the authors of the Harvard Draft Convention on Diplomatic Privileges and Immunities (1932), where the main criterion of differentiation between diplomatic and non-diplomatic missions was a formal one: the diplomatic rank and title of the head of the mission.<sup>38</sup> This symptom seems too formal to most contemporary writers and it was rejected during the work of the ILC.

It would seem that the bearer of a diplomatic passport of the sending State who obtained a diplomatic visa of the receiving State has the right to international privileges and immunities and that his diplomatic status is unquestionable. However, the reality does not seem to be so simple. Internal law order of States differs deeply in that area and international reactions are not based on any clear customary or comity rule.

In the international law literature it is possible to determine seven main trends in this subject:

(1) The bearer of a diplomatic passport with a diplomatic visa of the receiving State has the diplomatic status.<sup>39</sup>

(2) The bearer of a diplomatic passport has the diplomatic status.<sup>40</sup>

(3) A diplomatic passport with a diplomatic visa constitutes a presumption of the diplomatic status of the bearer.<sup>41</sup>

<sup>38</sup> *Draft Convention on Diplomatic Privileges and Immunities*, Harvard Law School, AJIL 1932, vol. 26, Supplement, p. 43.

<sup>39</sup> Блищенко: „Дипломатическое право...”, p. 119—120; Блищенко [in:] „Časopis pro Mezinárodní Právo”, p. 314; Блищенко [in:] SJMP 1966—1967, p. 127—128; Ch. Morton: *Les privilèges et immunités diplomatiques, Étude théorique suivie d'un bref exposé des usages de la Suisse dans ce domaine*, Lausanne 1927, p. 116—117; Ehrlich: *op. cit.*, p. 187.

<sup>40</sup> Wood and Serres: *op. cit.*, p. 63; Waters: *op. cit.*, p. 80; E. Reale: *Le problème des passeports*, RCADI 1934, vol. IV, p. 93.

<sup>41</sup> V. Outrata: *Několik poznámek k pojmu diplomacie ad hoc a její klasifikaci*, *Diskuse*, „Časopis pro Mezinárodní Právo” 1965, No. 1, p. 65.

(4) A diplomatic passport constitutes a presumption of the diplomatic status of the bearer.<sup>42</sup>

(5) The issue of a diplomatic passport is meant to ensure to the bearer the diplomatic status.<sup>43</sup>

(6) A diplomatic passport serves as a travel document and as the certificate of the official identity of the bearer with the aim "d'obtenir pour sa personne le respect que comportent ses hautes fonctions".<sup>44</sup>

(7) The fact of using a diplomatic passport with a diplomatic visa does not constitute a presumption of the diplomatic status of the bearer.<sup>45</sup>

In the opinion of this writer, the issue of a diplomatic passport by the sending State is an expression of the intention to ensure to the bearer the diplomatic status. When the receiving State agrees to give him a diplomatic visa it means that a strong presumption exists as to the diplomatic status of the bearer. The law concerning the practice of issuing diplomatic passports and visas differ from State to State<sup>46</sup> and the frequent effect of this situation is that an officer in the sending State may have the right to a diplomatic passport, while an officer of the equivalent rank in the receiving State may not have it, or vice versa. In the case of a special mission, this would create serious problems.

For example, in the Polish People's Republic about fifty types of persons have the right to a diplomatic passport, e.g. (a) members of the central decision-making bodies of the three political parties and of the Central Council of Trade Unions, as well as secretaries of the Polish United Workers Party in voivodeships, (b) members of the Government,

<sup>42</sup> Cahier: *Le droit...*, p. 114—115; Блищенко, Дурденевский: *op. cit.*, p. 212; Gašiorowski: *op. cit.*, p. 176.

<sup>43</sup> Зорин: *op. cit.*, 203; a note of the Secretary of State of the USA of July 25, 1918, see: Waters: *op. cit.*, p. 79.

<sup>44</sup> F. Borella: *Le passeport*, RGDIP 1960, No. 2, p. 304; see also: B. Filipowicz: *Ogólne zasady protokołu dyplomatycznego z uwzględnieniem form towarzyskich*, Warszawa 1967, p. 85—87; about *laissez-passer* used in this situation see: K. Bertoni: *Praktyka dyplomatyczna i konsularna*, Kraków 1947, vol. I, p. 35; Зорин: *op. cit.*, p. 204.

<sup>45</sup> Bartoś: *op. cit.*, p. 488; Guggenheim: *op. cit.*, p. 499; J. D. Becker: *The State Department White List and Diplomatic Immunity*, AJIL 1953, No. 4, p. 705—706; the same opinion was expressed by the Court in the USA in the "Gubitchev Case" (1949) — see: Waters: *op. cit.*, p. 78; D. R. Deener: *Some Problems of the Law of Diplomatic Immunity*, AJIL 1956, No. 1, p. 116—117.

<sup>46</sup> There was an attempt to unify the practice of the States at the Paris Conference on Passports (1920), but the only effect was a general resolution. See: Reale: *op. cit.*, p. 132; K. Szwarzenberg-Czerny: *Immunitety dyplomatyczne i konsularne, Zbiór norm prawnych z zakresu prawa międzynarodowego obowiązujących na obszarze Polski i Wolnego Miasta Gdańska*, Warszawa 1935, p. 192.

(c) other high officials in the central civil and military administration, (d) chief officers of the local (voivodeship) administration.<sup>47</sup>

On the other hand, there seems to be a clear international trend to abolish the practice of issuing diplomatic visas on the basis of reciprocity.<sup>48</sup> These new developments, rather obviously, complicate the whole problem.

It is a common opinion of most writers that the character of the full powers of a special mission determines the functional scope of its activity thus constituting the best basis for granting diplomatic privileges and immunities both to the members of the mission and to the special mission itself.<sup>49</sup>

A common practice of the past was to present the full powers of a special mission during its first official contact with the receiving State.<sup>50</sup> Nowadays the scope, place and time of the negotiation as well as the composition of a special mission are agreed before each negotiation, usually by an exchange of notes between the sending and the receiving State. According to the ILC, "The ceremonial reception of a special mission and the ceremony of presenting its full powers are no longer considered obligatory in practice".<sup>51</sup> The practice of presenting the full powers exists even now in cases of the signature of a treaty, and in the activity of a special mission in multilateral relations.

In a case when full powers were not presented and the prior agreement concerning a special mission was rather vague, the diplomatic status of a special mission and of its members may become vague too. The lack of any prior agreement may be a decisive one, like in the "Dr. J. D. Teja Case" (1971), when the bearer of a diplomatic passport, having full powers in which he was referred to as "an economic adviser of the Costa Rica Government in the special mission", was arrested in Great Britain and extradited according to India's claim.<sup>52</sup>

<sup>47</sup> *Uchwała Rady Ministrów PRL nr 240/71 z 11 listopada 1971 r. w sprawie paszportów urzędowych; Wykaz osób uprawnionych do otrzymywania paszportów dyplomatycznych na podstawie § 2 pkt 2 uchwały nr 240 Rady Ministrów PRL z 11 listopada 1971 r. w sprawie paszportów urzędowych, wydany 14 stycznia 1972 r. oraz uzupełniony dnia 4 lutego 1972 r.*

<sup>48</sup> See: J. Makowski: *Prawo dyplomatyczne i organizacja służby zagranicznej*, Warszawa 1952, vol. III, p. 105—106; Szwarценберг-Черны: *op. cit.*, p. 157—189.

<sup>49</sup> Bartoš: *op. cit.*, p. 488; Блищенко: „Дипломатическое право...”, p. 119; Satow: *op. cit.*, p. 105, vol. I.

<sup>50</sup> Cf: Pessôa: *op. cit.*, p. 165; Stuart: *op. cit.*, p. 506; Bertoni: *op. cit.*, p. 36; J. Serres: *Manuel pratique de protocole*, Vitry 1965, p. 279—280.

<sup>51</sup> UN Doc. A/6709, YILC 1967, vol. II, p. 354.

<sup>52</sup> Cf: Ch. Rousseau: *Grande-Bretagne, Limites d'application de l'immunité des agents diplomatiques en transit*, RGDIP 1972, No. 1, p. 209; I. Brownlie:

## VI

The functional element of the notion of a special mission is determined by the aim of the mission. According to Art. 1 (a) of the CSM, the purpose of a special mission is to deal with the receiving State on specific questions, or to perform in relation to it a specific task. According to Art. 3 of the CSM "The functions of a special mission shall be determined by the mutual consent of the sending and the receiving State". The same idea of indefiniteness of functions was implied in Art. 44 of the CRSIO concerning delegations to organs of international organizations and to conferences convened by such organizations.

Other conventions include an exemplification of the functions of a mission: as regards a permanent diplomatic mission in Art. 3 of the Vienna Convention of Diplomatic Relations; as to a permanent mission to an international organization in Art. 6 of the CRSIO; as for a permanent observer mission to an international organization in Art. 7 of the CRSIO; as regards a consular post in Art. 5 of the Vienna Convention of Consular Relations (1963).

In the view of the ILC it was impossible to enumerate the functions of special missions because of their great diversity.<sup>53</sup> The field of activity of a special mission is tantamount to the scope of modern international relations. A special mission may negotiate on the general state of affairs in bilateral intercourse, or try to establish diplomatic relations, or sign a trade treaty, or serve as an instrument in military co-operation, or act in the field of atomic energy, or discuss forms of technological aid, or negotiate on prices of raw materials, and so forth.

The normal task of a special mission is one which would ordinarily be performed by a permanent diplomatic mission of the sending State, if such mission existed in the receiving State, or if it had not been decided on that particular occasion that a special mission was required.<sup>54</sup>

The difference between the functions of a permanent diplomatic mission and those of a special mission is based on the scope of responsibility. A permanent diplomatic mission is responsible for maintaining general diplomatic relations while a special mission is responsible for the performance of its specifically defined task within the scope of general diplomatic relations.<sup>55</sup> The fact that a task of a special mission is specifically

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*Decisions of British Courts during 1970—1971 involving Questions of Public or Private International Law*, "British Yearbook of International Law" 1971, p. 398—399.

<sup>53</sup> UN Doc. A/6709, YILC, vol. II, p. 349.

<sup>54</sup> See a comment of the Great Britain Government, ORGA 24/VI, SR 1128, p. 134.

<sup>55</sup> Cf. F. P. Speedwell: *Funkcjonowanie misji specjalnych*, SM 1970, No. 3,

defined does not mean, however, that its scope of activity must be strictly limited in each case. Sometimes, a specific task may even include a general review of relation between the States concerned, had the States concerned agreed that this should be the "specified task" in this particular case.<sup>56</sup>

The important characteristic of a special mission is that its functions must be determined in each case, in exceptional situations by a prior treaty, but more frequently by an informal *ad hoc* agreement.

## VII

The temporary element of the notion of a special mission comprises the prerequisite of the provisional character of that mission. It is chiefly thus that it becomes possible to distinguish between a special mission and a permanent diplomatic mission.<sup>57</sup>

The ILC was unanimous in regarding a special mission as temporary in character, and the representatives of States were of the same opinion during the codification process.

The temporary nature of a special mission may manifest itself either by the time fixed for its duration, or by the time fixed for the completion of its task.<sup>58</sup> According to Art. 20 § 1 of the CSM, the functions of a special mission come to an end upon the expiry of the duration assigned for the special mission, unless it is expressly extended, or upon the completion of the task of the special mission.

The provisional character of a special mission does not mean that the duration of that mission is always brief, because the task of the mission may be of a complicated nature and its completion may take a comparatively long time. The temporary nature of a special mission means that the intention of the States concerned is that the existence of the special mission should not be permanent. Consequently, a permanent specialized mission which may exist side by side with a permanent diplomatic mis-

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p. 117; „Дипломатический словарь”, т. III, p. 416; Hardy: *op. cit.*, p. 92; Wood and Serres: *op. cit.*, p. 163.

<sup>56</sup> See opinion of the Polish member of the ILC, Prof. M. Lachs — YILC 1964, vol. I, SR 758, p. 227—228; see also UN Doc. A/6709, YILC 1967, vol. II, p. 348.

<sup>57</sup> According to M. Donnarumma, a temporary character of a special mission is a main criterion of differentiation of that kind of mission, *La diplomazia "ad hoc"*, p. 7—8.

<sup>58</sup> Cf: UN Doc. A/6709, YILC 1967, vol. II, p. 348; Speedwell: *op. cit.*, p. 117; „Дипломатический словарь”, т. III, p. 416; Блищенко: „Дипломатическое право...”, p. 135.

sion is not a special mission, because it is not possessed of a temporary character.<sup>59</sup>

### STRESZCZENIE

W artykule przedstawiono ewolucję form współczesnej dyplomacji, ukształtowaną pod wpływem rozwoju techniki, łączności i komunikacji. Pojęcie „misja dyplomatyczna” używane jest obecnie w znaczeniu organicznym, funkcjonalnym oraz strukturalnym i obejmuje dwa podstawowe typy: misje stałe oraz misje czasowe. Do pierwszej grupy należą ambasady i poselstwa oraz misje państw do organizacji międzynarodowych. Do drugiej: a) misje specjalne w stosunkach dwustronnych, b) misje specjalne na obrady międzynarodowych konferencji i kongresów, c) misje na konferencje międzynarodowe, które są sesyjnymi organami organizacji międzynarodowych oraz d) misje wysyłane przez organizacje międzynarodowe do państw lub do innych organizacji międzynarodowych.

Dyplomatyczna misja specjalna to misja czasowa, wykorzystywana bądź w stosunkach bilateralnych, bądź w stosunkach multilateralnych. Pojęcie „dyplomatyczna misja specjalna” zawiera cztery podstawowe elementy: podmiotowy, organiczny, funkcjonalny oraz czasowy. Zgodnie z podmiotowym elementem definicji misja specjalna może zostać wysłana przez jedno państwo do innego państwa, ale może też zostać wykorzystana przez ruch polityczny w czasie wojny domowej, narodowo-wyzwoleńczej lub secesyjnej i wreszcie może stać się instrumentem dyplomacji multilateralnej podczas konferencji międzynarodowej. Zgodnie z organicznym elementem definicji misja specjalna jest organem państwa wysyłającego, reprezentującym jego suwerenną wolę na zewnątrz. O statusie dyplomatycznym misji specjalnej świadczą: a) rangi i tytuły członków misji, b) fakt posiadania paszportów dyplomatycznych, c) uzyskanie wiz dyplomatycznych oraz d) charakter pełnomocnictw, przy czym zgodnie ze współczesną praktyką państw żaden z tych elementów nie rozstrzyga problemu w sposób jednoznaczny. Element funkcjonalny definicji jest zdeterminowany przez cele działania misji specjalnej, które są ustalane przez zainteresowane państwa. Cele misji nie mają charakteru ogólnej reprezentacji państwa wysyłającego. Element czasowy definicji zwraca uwagę na tymczasowość lub prowizoryczność stosunków dyplomatycznych utrzymywanych przez misje specjalne.

### РЕЗЮМЕ

Статья посвящена рассмотрению влияния техники и коммуникации на эволюцию форм современной дипломатии. В настоящее время понятие „дипломатическая миссия” употребляется в органическом, функциональном и структуральном значениях и охватывает два основных типа миссии: миссии постоянные и временные. К первой группе относятся посольства, представительства и миссии государств в международных организациях. Ко второй группе принадлежат: а) специальные миссии в двусторонних отношениях; б) специальные

<sup>59</sup> *Fourth Report on Special Missions, by Mr. M. Bartoš, Special Rapporteur, UN Doc. A/CN.4/194, YILC 1967, vol. II, p. 40.*



миссии на международных конференциях и конгрессах; с) миссии на международных конференциях, являющиеся временными органами международных организации, d) миссии, направляемые международными организациями в государства и наоборот.

Дипломатическая специальная миссия — это временная миссия, используемая как в билатеральных, так и в мультилатеральных отношениях. Понятие „дипломатическая специальная миссия“ содержит четыре основных элемента: субъективный, органический, функциональный и временный. Согласно субъективному элементу дефиниции, специальная миссия может высылаться одним государством в другое, может также использоваться каким-либо политическим движением во время гражданской войны и, наконец, может стать инструментом мультилатеральной дипломатии во время международной конференции. Согласно органическому элементу дефиниции, специальная миссия является органом направляющего государства, выражающим его суверенную волю. О дипломатическом статусе специальной миссии свидетельствуют: а) ранги и титулы членов миссии, б) факт обладания дипломатическими паспортами, с) получение дипломатических виз, d) характер полномочий, причем согласно современной практике государств, ни одно из этих элементов не решает проблемы однозначно. Функциональный элемент дефиниции детерминируется целями специальной миссии, которые устанавливаются заинтересованными государствами. Цели миссии не носят характера общего представительства вышлагающего их государства. Временный элемент дефиниции обращает внимание на временность или провизоричность дипломатических отношений установленных специальными миссиями.

