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CONTENTS

Chairman: Mr. K. Krishna RAO (India).

AGENDA ITEM 85

Draft Convention on Special Missions (continued) (A/6709/Rev.1 and Corr.1, A/7156 and Add.1 and 2; A/C.6/L.646, A/C.6/L.654 and Add.1, A/C.6/L.664)

Article 6 (Sending of special missions by two or more States in order to deal with a question of common interest) (continued)

1. The CHAIRMAN recalled the Committee's decision at its 1044th meeting to vote on the United States proposal that article 6 be deleted.

2. Mr. FRANCIS (Jamaica) said that before the vote he would welcome an explanation by the Expert Consultant of the considerations which had prompted the International Law Commission to include article 6 in the draft.

3. Mr. YASSEEN (Iraq) supported that suggestion. While the institution of special missions was essentially an instrument of bilateral diplomacy, article 6 reflected the trend towards its development as an instrument of multilateral diplomacy.

4. Mr. BARTOS (Expert Consultant) said that the text of articles 5 and 6 had not been included in the draft articles as originally submitted to the International Law Commission at its nineteenth session. Article 6 was one of the three articles which had been submitted to the Commission during that session by the acting Chairman of the Commission's Drafting Committee, Mr. Ago. It was designed to cover cases of ad hoc diplomacy on subjects of common interest to a limited number of States, which could not be subsumed under the heading of collective diplomacy. The topics dealt with in such cases were not wide enough for consideration by international conferences and were often subjects of local interest only, such as the use of rivers or ports. The Commission had agreed with Mr. Ago's explanation that such cases should be regarded as relating more closely to the subject of special missions than to that of international conferences. The Commission had felt that the codification of the rules pertaining to such cases under the heading of special missions would be useful because it would provide for the settlement of questions of common interest to a limited number of States without the cumbersome arrangements normally required for an international conference. He himself, in his capacity as Special Rapporteur on the topic, had not drafted article 6, but that article had been endorsed by the Commission, which had felt that it was of practical value.

5. Mr. REIS (United States of America) said that in his delegation's view the Special Rapporteur had been quite correct not to include any such provision in his draft. Article 6 had no legal content and was purely descriptive; it was impossible to foresee what the consequences of its inclusion might be. It might, as the representative of Iraq had suggested, reflect the "multilateralization" of diplomacy, but it was out of place in the present context.

6. Mr. VALLARTA (Mexico) said that, after hearing the explanation of the Expert Consultant, his delegation was convinced of the usefulness of article 6. He was concerned lest the result of lengthy work in the International Law Commission might be annulled by a decision taken in the Committee. Article 6 should be studied very carefully and, if the Committee agreed, should be submitted to the Drafting Committee, which could perhaps devise a generally acceptable wording.

7. Mr. VEROSTA (Austria) said it was now clear that article 6 provided for cases where a number of States decided to hold meetings and sent delegations, rather than special missions, to those meetings. Such activities really came under the general heading of conferences rather than of special missions, and his delegation would support the proposal to delete article 6.

8. Mr. SPERDUTI (Italy) said that, although his delegation had previously supported the deletion of article 6, it now felt that there might be grounds for its retention. A distinction should be drawn between meetings where two or more States met in the territory of one of them to discuss a question of common interest and meetings on the level of international conferences for such purposes as the drafting of multilateral treaties. Otherwise, article 6 might lead to confusion. However, if it was clearly understood that article 6 was intended to apply only to the type of negotiations referred to by the Expert Consultant, it might usefully be retained. He would appreciate further clarification on that point from the Expert Consultant.

Mr. Gobbi (Argentina), Vice-Chairman, took the Chair.

9. Mr. BARTOS (Expert Consultant) said that the Commission had approved the inclusion of article 6 on the basis of certain specific cases. For example,

questions relating to the frontiers between Austria, Yugoslavia and Italy, and in particular to rail traffic to Trieste, were dealt with in accordance with the rules laid down in agreements annexed to the Treaty of Peace with Italy,[1] and any changes in those rules were matters which affected the common interests of all three countries but were too limited in scope to be dealt with by a regular international conference. Article 6 provided specifically for such cases. Articles 4, 5 and 6 all dealt with cases of multilateral co-operation which tended towards the bilateral. As Special Rapporteur, he had considered that such cases were a special instance of multilateral diplomacy rather than of bilateral diplomacy proper.

10. Mr. AMADO (Brazil) said that in drafting a convention on special missions, the International Law Commission had been engaged in the development, rather than the mere codification, of international law. As in the case of the law of the sea, firm rules had not yet been established by international practice, but the topic was of such lively interest to States that the Commission had undertaken to draft a legal instrument to cover it. While the deletion of article 6 would not prevent States from dealing with questions of limited interest through special missions, the Commission had included the article in order to make provision for such cases. However, since its inclusion might lead to confusion, it might perhaps be preferable to delete it.

11. Mr. DADZIE (Ghana) said that each sending State could negotiate independently with the receiving State. The fact that a receiving State received more than one special mission on a single issue was incidental. The sending States could always arrange to meet concerning the question of common interest they wished to discuss with the receiving State. If, however, article 6 were included in the convention, the sending States would be obliged to meet before sending their special missions to the receiving State. The Ghanaian delegation therefore favoured the deletion of article 6.

12. Mr. SONAVANE (India) agreed that from a legal point of view the only relationship to be considered for the purposes of the Convention, with respect to the situation contemplated by article 6, was that between each of the sending States and the receiving State. As that relationship was provided for by article 2, article 6 seemed superfluous. Moreover, the words "to deal, with the agreement of all of them, with a question of common interest" might lead to difficulties in international relations. It could happen, for instance, that sending States A and B decided to send special missions to receiving State C to deal with a question of common interest and that sending State A subsequently lost interest in the matter and decided not to participate in the talks. Would State B's special mission be unable to engage in talks with State C, on C's territory, without the consent of State A? Logic, and the purpose of the proposed Convention would suggest that there was no reason why sending State B and receiving State C should not, in such circumstances, deal with each other through State B's special mission. Hence, although it understood the reasons which had prompted the Commission to include article 6 in the draft convention, the Indian delegation felt that there was no need for it in law and that it should be deleted, or the wording should be improved.

13. Mr. REIS (United States of America) said that the examples cited in the Commission in support of its inclusion of article 6 were insufficient. If, on a question of common interest to them all, Italy and Yugoslavia decided to send special missions to Austria, the provisions of the article would not help or hinder the conduct of the business or affect Austria's sovereign prerogative to accept or refuse the special missions.

14. Mr. MULIMBA (Zambia) thought that a formula should be devised which would legalize the possibility of two or three States dealing, through special missions, with questions of limited, rather than universal, interest. He could therefore not agree that article 6 should be deleted. He proposed, however, that further discussion on the matter, and the vote on the proposal of the United States delegation, be deferred until the Committee came to discuss article 18. The latter article could possibly be expanded to include the provisions of article 6.

Mr. Rao (India) resumed the Chair.

15. Mr. KESTLER FARNÉS (Guatemala) thought that the retention of article 6 would serve some purpose. The arguments in favour of its deletion were based on purely legal grounds. The Convention should not, however, be merely restrictive in nature; rather, it should be an instrument for co-operation between States. In any case, article 6 was linked with other articles in the Convention, particularly article 18, and its deletion would change the philosophy underlying the Convention as a whole. Furthermore, the difference between international conferences and special missions as provided for in article 6 derived from the nature of the subject matter dealt with rather than with the number of States involved. Under article 6, the receiving State was not merely a State but one whose specific and limited interests were to be discussed.

16. Mr. RATTANSEY (United Republic of Tanzania) drew attention to the importance of the words "common interest". Provision should be made in the Convention to enable two or more States with a common interest simultaneously to send special missions to a third State which shared that interest. The idea governing article 6 should therefore be retained, but might possibly be included in article 18. In the latter event, the receiving State's right, under article 18, to withdraw its agreement should be retained.

17. Mr. OWADA (Japan) supported the proposal for the deletion of article 6. The simultaneous sending of special missions by two or more States to another State should not be confused with an international conference. Provision was made in article 2 for the series of bilateral negotiations required in the former. In the latter, there was no reason why even conferences with a restricted number of participants should not be regarded as international in character. His delegation welcomed the intention expressed by the United Kingdom delegation, at the 1044th meeting, to propose a new provision to cover that point.

[1] United Nations, Treaty Series, vol. 49 (1950), No. 747.

18. Mr. SVANE (Denmark) said that nothing new would be gained by the insertion of article 6. The progressive development of international law could take place on the basis of article 2.

19. Mr. OMBERE (Kenya) said that article 6 should be retained. The Committee was merely expressing in writing what already occurred in general practice. Haste in law-making was unwise. If the Committee could not agree on a formula, the matter should be referred to the Drafting Committee. The suggestion that the question be dealt with under article 18 was not wholly satisfactory; the two articles dealt with different situations.

20. The CHAIRMAN said that the only proposal before the Committee was for the deletion of article 6. It seemed that little purpose would be served by referring the matter to the Drafting Committee.

21. Mr. MYSLIL (Czechoslovakia) said that under the terms of article 6 there was no legal relationship between the sending States; the only legal relationship was that between each sending State and the receiving State and provision for that relationship was made in article 2. The only phrases which might indicate some legal element were "with the agreement of all of them" and "a question of common interest".

22. With regard to the former, whether the agreement referred to in the first phrase was that of the sending States only or that of the sending States and the receiving State, the wording of article 6 weakened the idea that sending States had to obtain the consent of the receiving State before sending special missions, and the inclusion of the article in the Convention could serve as a pretext for foreign intervention.

23. As to the phrase "a question of common interest", was there any reason why one of the sending States should not discuss with the receiving State a matter which concerned them only, not the other sending States? The article did, of course, relate to international practice. It should be remembered, however, that the Committee's purpose was to draft legal articles, not articles on international practice. It was because the article was devoid of legal content that so many delegations favoured its deletion.

24. Mr. KIBRET (Ethiopia) asked if the deletion of the article would leave a gap in the law on special missions. Under the provisions of article 2, a receiving State could consent to receive special missions from one or more sending States. Once in the receiving State, such missions could decide, with the agreement of all them, to deal with a question of common interest. In such a case, all the sending States need not have known, when making their original requests for permission to send a special mission, that a matter of common interest would be discussed. Presumably, however, the receiving State would inform the sending States of the fact at the time it gave its consent to receive the special missions. Article 6 did not provide that the sending States and the receiving State could discuss, at the same time, a matter of common interest; what it provided was that special missions could be sent at the same time. The relations between the sending States and the receiving States had been described as bilateral. It did not appear, however, that article 6 was intended to cover that type of relationship. As a question of common interest was to be discussed, the sending States could establish relationships inter se, in which case the provisions of article 18 would apply. The situation to which article 6 related therefore called for the application of articles 6 and 18. Was there a difference between such a situation and an ordinary diplomatic conference in the territory of a receiving State? On the other hand, did special missions have a collective right to make joint representations to a receiving State? No answers to those questions were provided in article 6. His delegation therefore favoured deletion of the article.

25. Mr. MULIMBA (Zambia) formally moved that the vote on article 6 should be deferred until the Committee took up article 18. In the meantime the Drafting Committee, together with the Czechoslovak delegation, might consider what would be the best wording to cover a practice accepted as sound by a large number of delegations.

26. The CHAIRMAN said he would have to put the United States proposal for the deletion of article 6 to the vote, since the Committee had so decided at the 1044th meeting and no objection had been raised at that time.

27. Mr. RATTANSEY (United Republic of Tanzania) said that under rule 120 of the rules of procedure of the General Assembly, the Zambian motion to adjourn the debate on article 6 should have precedence over other proposals before the Committee.

28. Mr. SINCLAIR (United Kingdom), noting that the Committee at the 1044th meeting had adopted a decision to vote on article 6, pointed out that, under rule 124 of the rules of procedure, when a proposal had been adopted, it might not be reconsidered unless the Committee, by a two-thirds majority of the members present and voting, so decided.

29. Mr. BANDIO (Central African Republic) said that if the Committee did not dispose of article 6 at the present time, it would have to consider two articles when it took up article 18. The Committee should take a decision on article 6 now.

30. Mr. OSTROVSKY (Union of Soviet Socialist Republics) said that although the Committee at its 1044th meeting had taken a decision to put article 6 to the vote at the present meeting, the decision had not been a formal one. Since a number of delegations were not convinced that article 6 should be deleted, the Committee should not act hastily but should defer consideration of article 6 until article 18 was taken up in order to give those delegations more time to weigh the matter. The Committee was master of its own procedure.

31. Mr. WARNER (United States of America) said that his delegation did not wish to press for a vote on the article without regard to the views of other delegations. Its amendment had been proposed with a view to expediting the Committee's work. He suggested that article 6 might be put to the vote at the present meeting and that those delegations concerned about article 6 might submit their ideas when article 18 was discussed.

32. Mr. RATTANSEY (United Republic of Tanzania) did not think that suggestion would meet the situation. If the vote on article 6 was postponed until the Committee took up article 18, those delegations concerned with article 6 would have an opportunity to submit a provision incorporating both articles. As the discussion on article 6 had been reopened at the present meeting, rule 124 of the rules of procedure was not applicable.

33. The CHAIRMAN said that no rule of procedure was clearly applicable to the present situation. In his personal capacity, he suggested, since the question of combining articles 6 and 18 had been raised in the discussion, that article 6 should be considered when article 18 was taken up.

34. Mr. SINCLAIR (United Kingdom) agreed that no rule of procedure seemed wholly adequate to the situation. He understood the concern felt by some delegations regarding the consequences of a vote to delete article 6, and in the circumstances his delegation would be content to have the decision on article 6 deferred until article 18 was taken up.

35. Mr. WARNER (United States of America) said that his delegation was happy to concur with the Chairman's suggestion.

36. The CHAIRMAN noted that there was general agreement that article 6 should be taken up when the Committee discussed article 18.

37. Mr. DADZIE (Ghana) urged delegations wishing to have a particular article considered at the same time as other articles to raise the issue at the beginning of the discussion on the article in question.

Article 7 (Non-existence of diplomatic or consular relations and non-recognition)

38. Mrs. d'HAUSSY (France), introducing her delegation's amendment (A/C.6/L.664), said that article 7, paragraph 2, prepared by the Commission was in harmony with the practice of States, which were required by the necessity of international relations to enter into contact with the authorities of States they did not recognize. Some Governments, however, had objections to paragraph 2, and her delegation had submitted its amendment because it felt that the force would be taken out of those objections if the article included an express statement that the sending of a special mission to a State which was not recognized or the reception of a special mission from a State which was not recognized did not imply recognition. It was preferable that the question should not remain open.

39. Mr. SINCLAIR (United Kingdom), explaining why his delegation and the Nigerian delegation proposed in their amendment (A/C.6/L.654 and Add.1) the deletion of paragraph 2, said that in the first place—and he wished to make it crystal clear for the record—his delegation recognized and accepted that in practice most forms of dealings might take place between a State and an entity which it did not recognize as a State. Such dealings might include the sending of missions of the type defined in the draft Convention as special missions. In other words, his delegation found no difficulty with the concept that non-recognition was not a bar to the sending of a mission by an unrecognized entity or authority to deal with a State on specific questions or to perform a specific task in relation to that State. It questioned very much, however, whether it was desirable or appropriate to deal with that question in the Convention on Special Missions. He reminded the Committee that paragraph 2 had been inserted at a very late stage of the Commission's work, as could be seen from paragraphs 21 to 82 of the summary record of the Commission's 899th meeting,[2] where it appeared that the members of the Commission themselves had been divided as to whether the matter should be dealt with by a specific reference to recognition by a safeguard clause, or simply by a statement in the commentary.

40. On a more substantive point, by using the term "special mission" in paragraph 2, the Commission was in effect giving convention treatment to negotiating missions from unrecognized entities. His delegation was not sure what that would mean in practice. Article 19, for example, gave a special mission the right to use the flag and emblem of the sending State in the territory of the receiving State. His delegation wondered whether it would be appropriate for an ad hoc mission sent by an unrecognized entity to raise a flag and emblem in the territory of the receiving State. His delegation believed that the treatment to be accorded to a mission from an unrecognized entity should be a matter for ad hoc arrangement between the receiving State and the entity concerned. In that connexion he drew attention to the Austrian Government's comment pointing out the contradiction between the terms of article 7 and the definition in article 1 (a) (see A/7156).

41. He did not want to provoke a discussion on the controversial issue of recognition as a legal concept in international law. However, the use of the phrase "a State which it does not recognize" was, as his Government had pointed out in its written comments (ibid.), inapt, at any rate for countries such as his own which believed that there were certain legal rules governing recognition. If it was accepted that there was a legal duty to accord recognition as a State if certain objective conditions for such recognition were fulfilled, then that phrase was meaningless, for it implied that even if the objective conditions for the according of recognition were met, recognition might still be refused.

42. In his delegation's view, the adoption of the proposed amendment would not in any sense imply that non-recognition was a bar to the sending or reception of special missions.

43. Mr. PINTO (Ceylon) said that his delegation had suggested the previous year that it might be desirable, assuming that paragraph 2 was to be retained, to add another paragraph designed to make it clear that the mere sending and receiving of a special mission could not be regarded as an act of recognition as between the States concerned. To that extent its position had been very close to that reflected in the French amendment (A/C.6/L.664), with which it had much sympathy. On further reflection, however, its misgivings had grown stronger. Paragraph 2 presented serious difficulties, including problems of terminology. His dele-

2/ See Yearbook of the International Law Commission, 1967, vol. I.

gation doubted, for example, that the text should refer to a "State" which the sender did not recognize; there might be hesitation in using the term in that context. His delegation now felt that, instead of burdening the text of article 2 with disclaimers or reservations to redress any imbalance created by article 7, paragraph 2, it might be preferable to delete the paragraph altogether, as proposed in the United Kingdom and Nigerian amendment (A/C.6/L.654 and Add.1).

44. His delegation would not wish its position to be interpreted as implying any opposition to the basic idea of paragraph 2, which it considered sound. Nevertheless, in view of the fact that the paragraph concerned an area in which there was even less experience than there was in the general field of special missions and since its inclusion, even with appropriate safeguards, might raise more problems than it would solve, his delegation would prefer to have the paragraph deleted.

45. In any case, there could be no objection to a State's agreeing with an entity which it did not recognize that the provisions of the Convention would be applied to special missions sent or received between them. The only effect of the deletion of paragraph 2 would be that special missions to or from unrecognized countries would not automatically be subject to the provisions of the Convention.

46. Mr. OGUNDERE (Nigeria) said that his delegation considered that the purity of the legal norms embodied in the draft Convention on Special Missions should be preserved, and that incursions into other branches of international law, particularly the much disputed area of State responsibility, were unfortunate. The present trend in international law was to identify and isolate areas of conflict, and to draw recognizable and definitive boundaries between the various branches of the law. Thus the Commission, in its study of the law of treaties, had separated the succession of States and Governments in respect of treaties from the main body of treaty laws. That most desirable tendency also explained why the law of international relations had been divided into three branches, namely diplomatic relations, consular relations, and special missions.

47. When the Commission presented its draft articles on State responsibility and those on the recognition of States and Governments, the content of paragraph 2 would be adequately covered. The Commission itself had sounded a note of warning in paragraph (2) of its commentary on article 7 when it said that it had not decided the question whether the sending or reception of a special mission prejudged the solution of the problem of recognition, as that problem lay outside the scope of the topic of special missions. The fact that the members of the Commission had been divided on paragraph 2 suggested that the paragraph should be given very careful scrutiny.

48. Paragraph 2 was an escape clause for the neo-colonialist Powers which, under the umbrella it provided, would boldly send assistance, mercenaries, arms and ammunition to, and extend and foster trade and currency links with, rebellious groups in developing countries, particularly in Africa, in order to promote outmoded and immoral imperialist and neo-colonialist interests.

49. Special missions were mainly concerned with promoting trade, monetary, technological and cultural co-operation among States. In the law of State responsibility, the exchange by a State of special missions of that kind with an entity not recognized by it was concrete evidence of implied recognition. The French amendment (A/C.6/L.664) sought unsuccessfully to cure that difficulty. His delegation could not support that amendment, which went much further into the domain of State responsibility than the text prepared by the Commission.

50. Paragraph 2 was also out of harmony with other provisions of the draft, such as articles 1 (a) and 19. His delegation therefore urged its deletion.

The meeting rose at 1.10 p.m.

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77601—May 1969—2,150