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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.682, A/C.6/L.692, A/C.6/
L.697)

Article 21 (*Status of the Head of State and persons of high rank*)

1. Mr. DARWIN (United Kingdom) referred, in connexion with the United Kingdom proposals for part II of the draft Convention, to the new articles which his delegation proposed for insertion therein (A/C.6/L.698 and Corr.1).

2. Article 21 was a turning-point in the Sixth Committee's examination of the proposed Convention, for it was in part II that the real substance of the Convention was to be found. His delegation's aim was to create a clear and comprehensive legal régime for special missions, which had hitherto been in an unclear position, and to provide fully for their needs as well as for the interests of both sending and receiving States.

3. All delegations apparently considered that privileges and immunities must be accorded with great care and only to the extent necessary for the privileged persons concerned. There were several aspects to that. First, privileges and immunities constituted an exception to the principle of equality before the law and a derogation from the scope of the normal legislative powers of the receiving State concerned. Secondly, it was necessary to strike a proper balance between the interests of the sending and receiving States. Thirdly, a scheme should be made which would be capable, as far as possible, of automatic application in as many cases as possible. Fourthly, the Convention should have the broadest possible acceptance.

4. The institution of special missions was not so clearly defined or well known as that of diplomatic and consular agents, and the variety of special missions now sent from one State to another to transact business was extremely wide. In other fields where privileges and immunities were granted, codifying instruments had not been afraid to draw distinctions such as those between career and honorary consuls

and between senior and other officers of organizations. It seemed hardly reasonable to treat all special missions alike.

5. The scale of privileges and immunities proposed by the International Law Commission did not seem entirely appropriate where the function of missions was more technical or more limited than that of a ministerial special mission. The choice was either to reduce the entire scale of privileges and immunities to a level appropriate to all special missions without exception, or to draw distinctions among special missions. The Commission's articles should be applied to "ministerial" special missions, while an alternative régime could be applied to other, "standard", special missions. An important question was what scale should be selected for "standard" special missions, i.e. those not led by the highest officers of the State. The scale given to Member States by the Convention on the Privileges and Immunities of the Specialized Agencies seemed appropriate to such missions. It was well known in practice and incorporated in the legislation of almost every country in the world, and it would not require detailed drafting or negotiation.

6. If a special scale were given for "standard" special missions, the United Kingdom delegation would be able to accept, virtually without change, articles 22 to 47 as proposed by the Commission. Furthermore, the Sixth Committee would not become bogged down in fundamental arguments about each element in the scale proposed by the Commission, as would happen if an attempt were made to re-negotiate all the articles with a view to making them acceptable to all members of the Committee in respect of all special missions. To support that point, his delegation had submitted, in documents A/C.6/L.699-L.703, all the other amendments it wished to propose to articles 22 to 47. The line between "ministerial" and "standard" special missions was an important matter, and his delegation would be interested to hear the views of other delegations on the line it had tentatively proposed in its amendment to article 21 (A/C.6/L.697).

7. Referring to that amendment, he said that the second sentence of the new paragraph proposed therein provided for any case where it was agreed between the sending and receiving States that the person concerned, though not technically a Minister, ought properly to be accorded the privileges and immunities received by a Minister and special missions led by a Minister. The effect of the amendment was to provide that part II of the draft articles (Facilities, privileges and immunities) would apply to a limited group of special missions.

8. Commenting on the new articles proposed (A/C.6/L.698 and Corr.1), he said that the text of article 47 quater was drawn substantially from sections 13 and 15 of the Convention on the Privileges and Immunities of the Specialized Agencies, but it did not provide expressly for the use of codes and bag facilities; since article 28, listed in article 47 ter, so provided.

9. It was important that the Sixth Committee's codification work on the basis of articles prepared by the Commission should succeed, since such a draft must find support in the world community.

10. Mr. DELEAU (France), introducing his delegation's amendment to article 21 (A/C.6/L.692), said it was clear from the International Law Commission's commentary that before the Second World War there had been no fixed doctrine on the question whether the privileges and immunities of special missions were granted out of courtesy or were based on law. It was now admitted that special missions were entitled to certain privileges and immunities; though their extent had not yet been established.

11. The Commission had based its study generally on the Vienna Convention on Diplomatic Relations. The French delegation approved of the idea of examining how far rules already established in international law for permanent diplomatic missions might or might not be applied to special missions. In an area where international law was still very uncertain, it was useful for States to be able to refer, in the absence of special agreements, to a general norm applicable to all special missions. But his delegation drew attention to the difficulties States might encounter in applying a convention which granted the members of special missions nearly all the privileges and immunities granted to members of permanent diplomatic missions. It should be remembered that, as international relations were currently developing, all States received very many special missions. The Convention the Committee was preparing would oblige all States which ratified it to grant privileges and immunities to a considerable number of persons who might be located anywhere in their territories and for whom the head of the permanent diplomatic mission accredited to the Head of the receiving State would assume no responsibility. A considerable burden might thus be placed on the public administrative, legal, fiscal and customs services of the receiving State.

12. Even more than in the case of diplomatic missions, the privileges and immunities granted to a special mission should be justified by its needs. That meant that, in order not to impose too heavy a burden on the receiving State, and thus make the Convention difficult to apply in practice, unnecessary privileges should not be granted. On the other hand, if the interests of the sending State were to be safeguarded, special missions should enjoy all the privileges and immunities essential to the successful fulfilment of their tasks.

13. The French delegation had therefore attempted to define a statute for members of special missions which would take account of the functional needs and the temporary nature of such missions. Its proposals would ensure the delicate but fundamentally necessary balance between the interests of the sending State and

those of the receiving State. In part I of the draft Convention, the Committee's main concern had been to respect the sovereignty of the sending State. It would be natural in part II, dealing with the mission after it had been established, to impose on the receiving State only such obligations as were really necessary. In that spirit his delegation proposed in paragraph 3 of its amendment to article 21 (A/C.6/L.692) that articles 22 to 27 should be applicable to all special missions without distinction.

14. His delegation thought that in some respects the privileges and immunities to be given to members of special missions should be less extensive than those envisaged by the Commission, and would therefore propose amendments to some of the articles in part II. Its amendment to article 40 would simply correct a drafting error. Other amendments would clarify the Commission's text where clarification would make the task of national administrations easier or would give more consideration to the temporary character of special missions and the distinctive nature of their task. Thus, his delegation would like to have it clearly indicated in article 27 that freedom of movement should be subject to the exigencies of national security. It thought that article 44 should limit more clearly the duration of privileges and immunities, particularly those of permanent residents of the receiving State. If a resident was entitled to privileges and immunities from the date when his appointment was notified, there might be a long period of time during which such a person enjoyed privileges without doing anything to justify them. It also seemed necessary, if the State of transit was to ensure the immunities provided for in article 43, that it should be informed of the passage of the mission and give its express consent.

15. Moreover, in view of the temporary character of special missions, some of the provisions of the Commission's draft accorded benefits which were surely not indispensable in the circumstances and might, if stated as a general rule, be open to abuse. One example was the tax exemptions envisaged in articles 24 and 33. It did not seem absolutely necessary that a special mission should be exempted (article 24) from transfer taxes on the purchase of premises which it would perhaps occupy for only a few weeks, or that its members should enjoy the tax privileges accorded in article 33 for a stay which by definition was limited. The same considerations had led his delegation to suggest minor changes in article 35 concerning customs facilities and in article 39 concerning members of the family, who in fact would accompany the members of the mission only in rather exceptional cases.

16. Aside from those adjustments, his delegation would propose solutions having a different effect than the Commission's text in six articles only. With reference to article 28, his delegation thought that special missions should as a general rule use the bags of the sending State's diplomatic or consular posts. If the special mission had a bag of its own, the rules relating to the consular bag, rather than those relating to the diplomatic bag, should apply.

17. Regarding the personal inviolability of representatives and diplomatic staff (article 29), his delegation would suggest that such persons might have their freedom restricted on the order of the judicial

authorities in the case of an offence which was sufficiently grave, pursuant to a judicial decision of final effect, and possibly also when they were apprehended in the commission of a crime or offence. His delegation would therefore propose wording for article 29 rather similar to the text of article 41 of the Vienna Convention on Consular Relations.

18. His delegation also considered that in article 31 immunity from jurisdiction should be limited to acts performed in the exercise of official functions. Lastly, his delegation saw no justification for granting immunity from the jurisdiction of the receiving State to service staff in article 37, or inviolability to administrative and technical staff in article 36, and did not consider it possible to ensure the inviolability of the private accommodation of members of the special mission, as required in article 30, since that accommodation might be merely a hotel room.

19. The status his delegation would give to special missions was quite liberal, although less so than that envisaged by the Commission. In any case, it represented an advance in relation to the present situation, and would permit special missions to accomplish their task in favourable conditions and at the same time enable receiving States to accept the Convention and apply it without difficulty to many special missions likely to be sent to their territory.

20. While the same rules could be laid down for all special missions, certain persons should, by reason of their rank, be accorded a special personal status, "*intuitu personae*", independently of that accorded to other members of the special mission. In paragraph 1 of its amendment to article 21 (A/C.6/L.692), his delegation had tried to indicate that the status of a Head of State, when he led a special mission, should be governed, not by the provisions of the Convention, but by the international law applicable to Heads of State on an official visit, since international custom on that subject was well developed and his delegation saw no need to attempt to codify the customary rules within the too rigid confines of the Convention.

21. Regarding the Head of the Government and the Minister for Foreign Affairs, the rules of international law were already fairly clear, but the customary rules were not so well established. The status of Ministers was disputed. His delegation had therefore thought that it would be useful and reasonable to provide that such persons of high rank enjoyed the status of diplomatic agents, since they too travelled more and more often. The reference, in paragraph 2 of his delegation's amendment, to Ministers "of comparable rank" to the Minister for Foreign Affairs had been included in view of the constitutional organization of some states where there were several categories of Ministers having different rank. His delegation would accept any suggestion for wording which would express that idea. His delegation had put the reference to the Vienna Convention on Diplomatic Relations in square brackets, not because it had any objection to mentioning that Convention expressly, but because States which were not parties to the Convention might object to such a reference. In that event, the words "accorded to diplomatic agents" would suffice, since the law applicable to diplomatic agents was well established in international custom. The second sentence of para-

graph 2 of the amendment was intended to cover persons; such as the presidents of national legislatures, who did not necessarily have the rank of Minister but whose functions in their State were so important as to justify according them diplomatic status when they took part in a special mission. The national importance of the task entrusted to an eminent person as part of a special mission might also in some cases justify that status.

22. With regard to paragraph 3 of the amendment, the articles in question, as amended by his delegation on the basis of experience and administrative practice, would provide privileges and immunities which met the needs of special missions and assured them the necessary conditions for their proper functioning, but did not impose excessive obligations on the receiving State, having due regard to the large number of such missions.

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

23. Mr. HAMBYE (Belgium), commenting on his delegation's amendment (A/C.6/L.682), which would delete article 21, thought it was inappropriate to start part II of the draft Convention with a provision dealing with the privileges and immunities of persons whose participation in the special mission was fortuitous. Article 21 was also redundant, because the draft Convention did not, expressly or implicitly, eliminate international law or the customary rules of law which it codified. Whatever happened to the draft Convention, the usages and customs at present governing the treatment of persons of high rank would continue in effect and would be applied, and there was therefore no point in stating them in the Convention. The question was one covered by uncoded international law, usage and custom. Moreover, the text drafted by the International Law Commission was woolly and open to different interpretations (e.g., the expression "other persons of high rank") and it would in practice give rise to difficulties.

24. Mr. NAINA MARIKAR (Ceylon) expressed concern about too close an assimilation of special missions to permanent diplomatic missions, particularly if it involved an undue extension of privileges and immunities—which already occurred only too often—to groups of persons whose number, status and function could not be foreseen. His delegation favoured a stricter application of the principle underlying article 22, under which the receiving State would be obliged to accord only such facilities as were required for the performance of the special mission's functions, having regard to the mission's nature and task.

25. In his country, any exception to the deep-rooted tradition of equality before the law could be made only after the most careful study of the need for it, and it must above all be justifiable by the Government before public opinion as not constituting favouritism towards a privileged and perhaps conspicuous group. The most obvious example of such an exception was the diplomatic corps, to which his Government extended all such privileges and immunities as were in accordance with international law. Recently, foreign government bodies, the United Nations and other international organizations and their personnel had been accorded

certain privileges and immunities, partly either through special legislation or through administrative decision in line with current international practice, but always after full study of the political, administrative and fiscal implications.

26. In his delegation's view, article 22, expanded to refer not only to facilities but also to privileges and immunities, might well be placed at the beginning of part II of the draft Convention as a concise statement of the functional principle which should be the basis for all the provisions of the Convention. Viewed in the light of the functional approach foreshadowed in article 22, subsequent articles seemed to confer privileges and immunities in excess of what was required, having regard to the nature and the task of special missions, and indeed virtually indistinguishable from those accorded to permanent diplomatic missions, whose traditions and functional demands were in many respects quite different. The provisions of the draft seemed appropriate to missions led by high-ranking government officials, who might not only discharge high representative functions but also combine those functions with a role at the working level during a special mission, so that the functional approach required that that category of special mission should receive the best treatment the law could offer, as did also the necessity to safeguard friendly relations between States and to protect the dignity, personnel and property of high-ranking special missions and ensure that no legal or administrative rule impaired their efficiency.

27. In the case of special missions not of a high-level kind, however, the functional approach would seem not to require the virtually complete protection afforded to missions led by high officials. The exemptions to which such missions would be entitled had more the character of sovereign immunity than of diplomatic privileges and immunities. There was no better summary of such exemptions than the Convention on the Privileges and Immunities of the United Nations and the Convention on the Privileges and Immunities of the Specialized Agencies. Not only were the principles in those Conventions well-balanced and based on a functional approach which had become

part of State practice, but they also had the merit of having been accepted by a large number of States. The Agreement between Austria and the International Atomic Energy Agency^{1/} offered another example of the wide endorsement of the level of exemptions which States regarded as reasonable in respect of essentially working-level special missions.

28. The International Law Commission's draft went too far in not distinguishing between levels of special missions and giving them all privileges and immunities comparable to those of permanent diplomatic missions. The distinction to be made was a corollary of the functional approach, which had been endorsed by all States as the only rational basis for the extension of privileges and immunities to others besides accredited diplomats.

29. The United Kingdom amendments (A/C.6/L.697 and A/C.6/L.698 and Corr.1) went far towards redressing the balance, without doing violence to the basic structure of the draft Convention, and gave expression to the functional approach more effectively than did the articles prepared by the Commission in their present form. Accordingly, his delegation supported those amendments, but suggested that article 22, expanded to refer not only to facilities but also to privileges and immunities, should form paragraph 1 of an article 20 *bis*, the paragraph proposed by the United Kingdom delegation in amendment A/C.6/L.697 forming paragraph 2 of that article. Article 20 *bis* would then contain a clear statement of the basic principles to be elaborated in the subsequent provisions of part II of the draft Convention.

30. Mr. ALCÍVAR (Ecuador) requested that the Expert Consultant explain the International Law Commission's conception of part II of the draft Convention. He would like to know, in particular, what special privileges and immunities were accorded under international law to Heads of State, Ministers, and in general to missions of high rank.

The meeting rose at 12.25 p.m.

^{1/} United Nations, *Treaty Series*, vol. 339 (1959), No. 4849.