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CONTENTS

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

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

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) (continued)

1. Mr. BARTOS (Expert Consultant) said that he would try to explain, as he had been asked to do at the 1055th meeting, the thinking behind the International Law Commission's draft of part II of the articles, indicating how it had seen the main problems to be solved.

2. The Commission had first had to take a decision on what level of protection it would take as a basis for the privileges and immunities to be granted to special missions. Legal theory gave little indication of any way in which a scale could be established indicating how far it was possible to go in granting privileges and immunities to certain special missions and certain members of missions. Some works on ad hoc diplomacy proposed the holding of diplomatic titles, but that criterion had immediately been opposed, since the most important missions were often entrusted to persons who did not have such titles and could not be given them. Practice showed that different countries did not follow the same system. One country might treat the governor of its national bank as equivalent to a Minister Plenipotentiary, but another might not go so far. In some countries, a chief of staff sent on a special mission was given the rank of ambassador, but not in others. In the absence of explicit treaties concerning such missions or of an agreement concerning reciprocity of courtesy measures between the States concerned, it would be difficult to know what immunities should be granted to such persons. In addition, the granting of immunities made it necessary to take into consideration the nature of the functions of the members of special missions. Some special missions, for example, might include one or two members of diplomatic rank who only had secondary functions, while the important functions were entrusted to members who did not hold such rank. It was necessary, of course, to determine the position of the latter and the question had come up several times in the Commission. There had been discussion of, inter alia, the possibility of basing the granting of privileges and immunities on the holding of diplomatic titles, and then within the framework thus established, on the functions of the members of special missions. He, for his part, had proposed taking functional privileges and immunities as a basis, so that members of special missions and missions as such would be given privileges and immunities in accordance with the requirements of the work to be done.

3. In point of fact, situations encountered in practice seemed to indicate the way towards a solution. Following the Big Three meetings which had taken place during the Second World War, there had been discussions on the treatment given to the three missions. The difficulty had been that President Roosevelt had been Head of State, whereas the other two had only been Heads of Government. His party would therefore normally have received superior treatment to Churchill's and Stalin's if it had not been decided to treat all three delegations alike. The commentators were agreed that what had been done on that occasion was first to make equality of treatment the rule and then to recognize the status of the mission with the highest rank, i.e., that of the President of the United States. In that case, the problem had of course been resolved before the meeting, in order to avoid any political complications. That example showed the need to bear the substantive issues in mind when taking major decisions and the privileges and immunities had in that case been of a functional nature. The Commission had concluded that in order to allow greater freedom in such cases, the facilities and privileges should be extensive in scope.

4. In order to determine what distinctions should be made, if necessary, between different special missions for the purposes of granting privileges and immunities, the Commission had envisaged the possibility of making a complete inventory of all types of special missions. It had counted forty-two, but the categories had still to be defined. The procedures found to be followed in practice, however, had made that task very difficult. For special military missions, most States requested absolute immunities, whatever their task. It could very well occur that in addition to a military hydrological mission, there was a civilian mission with indentical functions, for which one might question whether equal treatment was justified. In other cases, two States might indicate whether they attached primary or secondary im-

portance to the function of their special missions by the higher or lower rank of the persons they appointed to them. Thus, a mission whose task was to regulate the sugar market might consist of civil servants with diplomatic rank, whereas another mission with the same task might include administrators or economists. No member of the Commission had been able to propose an objective criterion by which it could be determined whether it was the calling of the persons or the function to be discharged that counted. In any case, the Commission had noted that if the calling of the persons was to be an indicator of the importance of the mission, that might create problems in the case of several missions having the same purpose. Several States, for example, might send missions at the same time to bring home the bodies of war dead. The fact that some were composed of military officers and others of civil servants or ecclesiastics could not be taken as a criterion indicating the nature of the missions. The Commission had given thought to such considerations and most of its members had considered that all special missions were of a representative nature and that consequently they could all be entitled to privileges and immunities equivalent to those granted to diplomatic missions, on the understanding, however, that States could, by agreement, deprive special missions of those privileges and immunities which they did not need.

5. There had been some qualifications, however, with regard to the principle accepted by the Commission. The Austrian member of the Commission had considered that it would be better not to give too much, because States might be wary of granting diplomatic privileges too generally and that in that connexion States came before persons. The United Kingdom member had said that he had to allow for the fact that in his country public opinion was not very favourable towards a too liberal policy in such matters. He had declared himself in favour of a system of granting immunities to the extent that they seemed acceptable. He had also argued that if the immunities given were too great, some parliaments might refuse to ratify the Convention. Other members, on the other hand, had been convinced that the general application of the system of diplomatic privileges and immunities was the best guarantee that special missions would be able to discharge their functions properly.

6. Studies of specific cases showed that a State was less demanding with regard to the privileges and immunities to be granted its special mission when its relations with the receiving State were friendly. Greater demands were made, on the other hand, between States which did not know each other well. That situation involved a double risk, because if they demanded the widest possible guarantees for their own special missions, their respective parliaments were likely to be unwilling to grant them to the special mission of the other party. Observing that a single country could simultaneously apply two systems, he cited the case of Belgium, whose mission to Luxembourg had only limited privileges, whereas for those it sent to African countries it requested the full range of diplomatic immunities, on the basis, admittedly, of the treatment sought from those countries by other States. Something similar to the most-favoured-nation clause seemed to be involved. Those differences had been taken into consideration in the solution adopted by the Commission. At the general international level the broadest immunities were requested, but within a more limited context, States had the option of establishing a less extensive system, the system of functional immunities. The two levels corresponded, to a certain extent, to the relation between diplomatic immunities and consular immunities and he noted in that connexion that an expression such as "minor immunities" was often used in the case of consular status.

7. The fact that some States were opposed to the granting of full immunities while others were prepared to agree to it had, in conjunction with the above-mentioned distinction between major and minor immunities, prompted the Commission to consider the question of the technical or political character of special missions. It had been noted that special missions which were supposedly technical in nature could suddenly acquire a political character. That was the case, for example, when a mission whose task was to investigate a frontier incident, i.e., to determine certain facts, found itself obliged to take part in discussions of a political nature. The question of what criterion should be applied in determining the point at which a mission became political in nature had not been settled. It was an important question, for when a previously technical mission became political in nature it might be decided to apply new arrangements under which guarantees appropriate to the members of political missions were accorded. The members of the Commission had not wished to take a position now with regard to that distinction, and the majority of them had agreed that it was possible to make a broad assumption that all special missions, without exception, could be political in nature. The Commission had taken that fact into account in deciding to adopt a general rule calling for the application of diplomatic privileges and immunities and leaving States free to introduce restrictions as they proceeded from general to particular cases and, in particular, to reduce diplomatic immunities to a régime equivalent to that of consular immunities.

8. The extent to which States trusted one another was naturally a factor in the question of recognizing the jurisdiction of national criminal courts. The question had arisen whether members of special missions could in some cases be removed from that jurisdiction. The Commission had felt that the question was a political rather than a legal one and that States should decide for themselves whether or not to renounce their right to exercise jurisdiction over their agents. That view had derived from the general principle that the members of special missions should be granted the widest possible privileges and immunities, except as otherwise agreed in specific cases.

9. The broad assumption formulated by the Commission had been given approval after all differing opinions had been heard. He himself was inclined to favour the granting of consular privileges and immunities, accompanied, in the case of political and military missions, by a more favourable régime which took account of the identity of the persons in charge of

the missions. The final vote had been unanimous, however, and there had been no indication of any dissenting view in the Commission.

10. In conclusion, he noted that the Commission had adopted a single, absolute criterion and had refused to impose limitations on privileges and immunities and to make them subject to certain rules in accordance with the nature of the special missions concerned.

Mr. Krishna Rao (India) took the Chair.

11. Mr. NALL (Israel) said that the Sixth Committee had embarked upon the consideration of the articles that had formed the core of the future Convention on Special Missions, namely, those concerned with facilities, privileges and immunities to be accorded to special missions. The question that one paused to ask was: what was the raison d'être of the provisions in question? Was the aim to create a privileged class of persons enjoying a particular status, to give recognition to the important responsibilities entrusted to certain members of special missions, or to establish certain standards? The answer, of course, was that the International Law Commission had sought to create conditions which would enable persons appointed for that purpose to discharge certain tasks of a representative although temporary character, and it should be borne in mind that the other purposes of the proposed rules must remain subordinate to that paramount objective of helping special missions to perform their functions in the most favourable atmosphere possible.

12. Virtually all the states represented in the Sixth Committee had already taken part in detailed discussions of the question of privileges and immunities at the Vienna Conferences of 1961[1] and 1963.[2] Those Conferences had adopted two Conventions dealing respectively with diplomatic and consular relations, the first being essentially a codifying instrument, while the second established universally applicable rules based on international customary law and on existing bilateral and regional agreements. The draft articles on special missions were based on the provisions of those two Conventions. The criticism directed against that approach by certain States reflected apprehension that special missions would be accorded advantages which were too extensive; in other words, the States in question felt that only Heads of State and Ministers should enjoy such privileges and not the other members of special missions. His delegation shared that apprehension and therefore favoured the approach reflected in the United Kingdom amendment (A/C.6/L.697). It also felt that the second part of the draft could be reduced to two or three articles incorporating the principles underlying the United Kingdom amendment; it would then be sufficient to mention the privileges and immunities conferred by the Vienna Conventions and to indicate those which were to be accorded to the various groups of persons of which special missions were made up.

13. In conclusion, he wished to state once again that special missions must be accorded the privileges and immunities necessary for the discharge of their tasks. In normal practice, the privileges and immunities in question were virtually indistinguishable from those accorded to diplomatic missions, consular posts and diplomatic and consular agents respectively.

14. Mr. BINDSCHEDLER (Observer for Switzerland) said that he found article 21 of the International Law Commission's draft generally acceptable. Paragraph 1 dealt with the status of a Head of State who was leading a special mission, and the Commission had been quite right in the present instance in referring to general international law, which had long ago determined the status of that category of persons. Paragraph 2, on the other hand, called for two comments.

15. First of all, he was uncertain as to the precise meaning of the words "other persons of high rank". Since that was too vague a concept, it might be advisable to replace the words in question by the expression "other members of the Government" or, better still, by the formula "Ministers of comparable rank" contained in the French amendment (A/C.6/L.692), which should eliminate any ambiguity.

16. Secondly, he wondered whether the reference to international law was relevant. It was difficult to make the assertion that international law accorded special privileges and immunities to the category of persons dealt with in paragraph 2; certain privileges and immunities were granted to Ministers for Foreign Affairs and perhaps, in some measure, to Heads of Government, but that was not true in the case of other Ministers. He wondered what rules were being referred to in paragraph 2; the Commission itself was uncertain in that regard, as was apparent from the last sentence of paragraph (3) of its commentary on article 21. It must therefore be concluded that in paragraph 2 of article 21 the Commission had not done any codifying, since, not finding a clear-cut rule, it had merely made a reference to general international law, the rules of which were not precise.

17. The French amendment would grant Heads of Government, Ministers for Foreign Affairs and Ministers of comparable rank the treatment accorded to diplomatic agents by the Vienna Convention on Diplomatic Relations. That approach, which achieved the Commission's aim of granting a privileged status to the category of persons in question, was completely satisfactory. He observed in that connexion that there could be no objection to referring to the Vienna Convention—which, it should be noted, was wholly devoted to the codification of international law and contained very few innovations—for it was most unlikely that any State that had not ratified the Vienna Convention would ratify the future Convention on Special Missions.

18. He regarded the United Kingdom amendment (A/C.6/L.697) as ill-advised, since it would have the effect of creating two categories of special missions and thus overturning the whole system which had been set up by the Commission. That would be acceptable if there was sufficient justification for taking such a step, but there was not; neither existing international law nor the practice of States

[1] United Nations Conference on Diplomatic Intercourse and Immunities, held from 2 March to 14 April 1961.

[2] United Nations Conference on Consular Relations, held from 4 March to 22 April 1963.

drew a distinction between two categories of special missions. If some system of classification was really needed, moreover, a much larger number of categories should be created. In any event, it was not desirable to make the proposed distinction, for the purpose of the Convention was merely to establish a set of broad, simple rules, without going into detail. The draft articles prepared by the Commission had the requisite qualities of simplicity and clarity and, in addition, the advantage of flexibility, since States were permitted to agree among themselves on departures from the proposed régime. It should also be pointed out that article 21 accorded a privileged status to certain members of special missions, which was quite proper, and not to certain special missions as such.

19. Any attempt to distinguish between the different categories of special missions involved the choice of the criteria upon which the classification should be based, in the light of the diversity of such missions. The criterion adopted by the United Kingdom in its amendment was the personality at the head of the mission; that was a purely formal and rather arbitrary criterion which did not take into account the importance of the mission's task, though that should be the determining factor. The adoption of that amendment could have completely unacceptable consequences: for instance, there were special missions of the highest political importance which were not led either by Heads of State, or by Ministers. Although it was reasonable to grant that type of person a privileged status, the status of all special missions could not be made dependent on that of the head of the mission. In view of the shortcomings of the United Kingdom amendment, it would be preferable to keep to the Commission's text and merely try to improve it. The French amendment, however, without changing the substance of the draft, added certain useful provisions which would facilitate its application by States.

20. With regard to the Belgian amendment (A/C.6/L.682), which recommended the deletion of article 21, paragraph 1 of that article might certainly be considered superfluous, since it merely referred to general international law, as did the final paragraph of the draft preamble. The article should, however, be maintained, because its second paragraph referred to a question which had not been settled or which might at least lead to controversy and which should be resolved in the manner suggested in the French amendment. The deletion of article 21 could also be interpreted as being prompted by a desire to put an end to the special status enjoyed by Heads of State, which was clearly not the intention of the Belgian delegation.

21. The Commission had been right to base its draft articles on the facilities, privileges and immunities of special missions on the two Vienna Conventions. For practical reasons, it would be preferable not to increase the number of rules of international law nor to introduce too many new rules. Moreover, special missions were often of equal importance to, if not of greater importance than, permanent diplomatic missions. The Commission's draft could no doubt be improved in its details. For example, some of the privileges and immunities accorded to special missions were perhaps excessive: article 28 should stipulate that special missions must use the installations of the permanent diplomatic missions; similarly, the rules laid down regarding the fiscal status of special missions were unnecessary, since in practice there had never been a case in which a receiving State had subjected a special mission to its taxation laws and it was extremely improbable that such a case would arise in the future.

22. Mr. ROBERTSON (Canada) considered that the question of the privileges and immunities to be accorded to members of special missions in part II of the draft was significant and should therefore be dealt with more broadly than the preceding articles. That was particularly necessary in view of the scope of the French and United Kingdom amendments, which, in fact, dealt with all the articles from 21 to 46. A decision in principle regarding the scheme to be adopted should also be made at the outset, in order to avoid agreeing on a partial solution which would prove unacceptable.

23. The views of the Canadian Government concerning the question of the privileges and immunities of special missions had been consistent. In its comments[3/] on the 1965 draft articles, it had said that it would be preferable not to go too far in assimilating the status of special missions to that of permanent missions and that it was opposed to any excessive extension of privileges and immunities. Its view then and now was that the granting of such privileges and immunities should be closely related to considerations of functional necessity and should be limited to the degree required to ensure the efficient discharge of the duties entrusted to special missions. Its comments on the current draft articles (see A/7156/Add.1) had made the point that Canada continued to be of the opinion that certain of the articles were too liberal and went too far in assimilating the status of special missions to that of permanent missions. In that connexion, the Canadian representative on the Sixth Committee had stressed at the twenty-second session (962nd meeting) that the immunities granted to permanent missions under the 1961 Vienna Convention should not ipso facto be granted to special missions.

24. The Canadian delegation was in favour of the idea underlying the draft articles and believed that if it was possible to reach agreement on such a draft, it would be a real contribution to the codification and progressive development of international law. It very much wished to be able to become a party to whatever text was eventually agreed upon and to see it gain wide acceptance. It was therefore concerned lest certain key articles on privileges and immunities should finally appear so rigid or so liberal that it became impossible for some States, such as Canada, to become parties to the Convention, which would be most regrettable.

25. The French amendment (A/C.6/L.692) went a long way towards meeting the Canadian objections to article 21 of the International Law Commission's draft, to which the French proposals would constitute

3/ See Official Records of the General Assembly, Twenty-second Session, Supplement No. 9, annex I, p. 33.

the best alternative. The Canadian delegation therefore supported that amendment, while realizing that it unfortunately did not meet with the approval of some of the other delegations. There was clearly a division within the Committee between those who supported a conservative approach to the granting of privileges and immunities to special missions and those who supported a broader approach. It was to be hoped that a middle road could be found, so as to ensure the adoption of a text sufficiently flexible to provide clearly defined privileges and immunities for special missions but at the same time meeting the objections of those who did not wish those privileges and immunities to be as wide in scope as those laid down in the draft articles.

26. All seemed to agree that there were at least two types of special missions: high-level missions led by Heads of State or Government Ministers, and lower-level missions. Some considered that there was a third class—high-level missions led neither by a Head of State nor by a Minister. The Canadian delegation did not consider it practicable to draft a single set of rules applicable to all those diverse situations. The United Kingdom amendment (A/C.6/L.697) recognized that difficulty and met it by laying down a two-tiered set of privileges and immunities, thus catering both for those who favoured a restrictive approach and for those who favoured a more liberal solution. It also provided a further element of flexibility by recognizing the right of States to apply high-level privileges to low-level missions.

27. It would be useful to make clear in the proposed Convention the right of States to extend or restrict the privileges and immunities through bilateral or multilateral agreements. In that way, States willing to go beyond the minimum norms required by the Convention could freely do so, while those preferring a more restrictive régime could agree to be bound by the Convention, which would still grant adequate privileges and immunities to ensure the efficient discharge of the duties entrusted to special missions.

28. His delegation thought that the United Kingdom amendment to article 21 (A/C.6/L.697), and the articles 47 bis to 47 series which the United Kingdom proposed should be inserted in the Convention (A/C.6/L.698 and Corr.1), provided a suitable compromise. An objection raised against the United Kingdom proposals was that, under the terms of those proposals, most sending States would endeavour to obtain the widest privileges for all their missions. That was not necessarily true, and even if it were, States could still exercise their sovereign powers and decide on the extent of the privileges and immunities to be accorded. Even if such a trend were to develop, it would be preferable for the States concerned to settle the question bilaterally, within the framework of the Convention, rather than to find themselves unable to accept the Convention and perhaps obliged to negotiate outside its framework. His delegation would therefore urge the members of the Committee to give the most careful consideration to the United Kingdom proposals, which constituted a most useful compromise between the French text and that of the International Law Commission.

29. In conclusion, he pointed out that the final position of the Canadian delegation with regard to the Convention would inevitably be influenced more by the outcome of the discussions on part II of the Convention than by the decisions reached on other less fundamental provisions of the text.

30. Mr. DUPLESSY (Haiti) feared that the draft articles of the International Law Commission might be changed to such an extent that they would lose much of the generous spirit that had prevailed when they were drawn up. The adoption of certain criteria would in fact only make it more difficult to attain the Committee's goal, which was the progressive development of international law, in other words the setting up of legal machinery to bring States closer together and promote international understanding. All attempts to introduce narrow concepts were bound to set back the development of public international law. Closer relations between States, which were essential to the future of the international community, could be achieved only if the ideas adopted were imbued with some spirit of generosity, and it should be noted in that respect that special missions had played a greater part in history in promoting such closer ties than had the work of the Commission.

31. Article 22 was therefore most important, since it provided that the receiving State should accord to the special mission the facilities required for the performance of its functions, having regard to the nature and task of the special mission. Thus the special mission was considered as a whole, and if the receiving State were to grant privileges, immunities and facilities only to some of its members and not to others who were likewise representatives of the sending State, the mission might find itself hampered to some extent in the performance of its functions.

32. It would seem, however, that the distinction made by the Commission in article 21 was fully justified. It was necessary to stress the fact that the Head of the sending State, when leading a special mission, should enjoy the facilities, privileges and immunities accorded by international law to Heads of State on an official visit. It should also be specified that the Head of the Government, the Minister for Foreign Affairs and other persons of high rank, when taking part in a special mission of the sending State, should not be granted the same treatment, in so far as privileges and immunities were concerned, as that accorded to other representatives of the sending State who were members of the special mission. For that reason, the Haitian delegation would not support the Belgian amendment (A/C.6/L.682), which would delete article 21 on the ground that it merely reproduced the corresponding provisions of the Vienna Convention.

33. The United Kingdom amendment (A/C.6/L.697) would accord privileges and immunities as a right only to special missions led by the Head of State, Head of Government, the Foreign Minister or any other Ministers of the Government and would require an agreement between the sending and receiving States for any special mission which did not include such persons. Such a requirement would to some extent invalidate the long preparatory work done by

the International Law Commission and hamper international exchanges which played such a useful part in bringing States closer together. Some States might be inclined not to send a special mission when faced with the difficulties which the conclusion of a preliminary agreement on the status of the members of the mission would probably occasion. In his delegation's opinion, the United Kingdom amendment failed to take into account article 22, which provided for the granting of the facilities required for the performance of the special mission's functions. If distinctions had to be made, they should be based not on the nature of the persons composing the special mission, but on the aims it wanted to achieve, with due regard to its nature and its task. For those reasons his delegation would not vote for the United Kingdom amendment.

34. The French amendment (A/C.6/L.692) likewise tended to restrict the facilities to be accorded to special missions by favouring a preliminary agreement between the sending State and the receiving State on the granting of diplomatic privileges and immunities to persons of high rank other than the Head of State, the Head of the Government, the Minister for Foreign Affairs and Ministers of comparable rank. It gave rise to the same objections as in the case of the United Kingdom amendment, and his delegation would therefore not vote for it.

35. He would vote for article 21 as drafted by the Commission, since that text was generous in concept and would promote international harmony.

The meeting rose at 5.25 p.m.

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