

United Nations
GENERAL
ASSEMBLY

TWENTY-THIRD SESSION

Official Records



SIXTH COMMITTEE, 1069th
MEETING

Tuesday, 12 November 1968,
at 3.40 p.m.

NEW YORK

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Agenda item 85:

Draft Convention on Special Missions
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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.707/Rev.1, A/C.6/L.709,
A/C.6/L.729)

Article 29 (Personal inviolability) and article 31
(Immunity from jurisdiction)

1. Mr. DADZIE (Ghana) said that he did not wish his comments at the 1068th meeting to be construed as a reflection on the Expert Consultant, whom he and his delegation held in high regard, both for his erudition and for his personal qualities. He had merely wished to ensure that the Committee did not overtax the Expert Consultant's generosity by requesting too many explanations. He trusted that the representative of Ecuador had not misunderstood his comments.

2. Mr. ALCIVAR (Ecuador) assured the representative of Ghana that his words had not been misunderstood.

3. The CHAIRMAN invited the French representative to introduce his delegation's amendments to article 29 (A/C.6/L.707/Rev.1) and article 31 (A/C.6/L.709).

4. Mr. DELEAU (France) said that the French delegation considered that, in determining the privileges and immunities, particularly the personal ones, to be granted to special missions, account should be taken of the functional needs of the missions and of the need to balance the interests of the sending and receiving States. Only for imperative and exceptional reasons would a State agree to waive almost completely its jurisdiction over persons on its territory or to grant them total inviolability and complete immunity from arrest and detention. If it did so, it might impair the interests of its own nationals and seriously jeopardize public order. There would also have to be imperative reasons to justify enjoyment of such privileges. The fact of being in the service of a foreign State did not in itself confer upon persons on the territory of a State the right to ignore or infringe the laws of the latter with impunity. It seemed, therefore, both

exorbitant and anachronistic unduly to extend personal privileges and immunities which had not been fixed by international law.

5. The International Law Commission proposed that the rules adopted for embassies should be applied to special missions. The French delegation wished again to emphasize that the rules which had been adopted for embassies because of the general and essentially political nature of their functions and their permanent presence in the territory of the receiving State, could not, particularly where personal immunities were concerned, automatically be transferred to members of special missions, whose tasks were specific and for the most part non-political and whose members would, because of the temporary nature of their functions, have less occasion than embassy staffs to come into contact with the legal authorities of the receiving State. It was for those reasons that the French delegation had submitted its amendment to article 31 (A/C.6/L.709). It would be noted that the provisions proposed differed from those adopted for consuls in the 1963 Convention on Consular Relations; that Convention established two exceptions to immunity from civil jurisdiction, whereas the French amendment did not. On the other hand, the French delegation saw no justification for extending immunity from jurisdiction to acts performed otherwise than in exercise of the functions of the persons concerned. He hoped his explanations concerning article 31 would enable members to understand the exact scope of his delegation's amendment to article 29 (A/C.6/L.707/Rev.1).

6. His delegation accepted unreservedly the idea in the Commission's text of article 29 that the receiving State should treat the representatives of the sending State in special missions with due respect and take all appropriate steps to prevent any attack on their persons, freedom or dignity. But it did not feel that it was either possible or justifiable to grant total inviolability and complete immunity from arrest and detention. Since it considered that immunity from jurisdiction should be limited, particularly in criminal matters, to acts performed in the exercise of official functions, the French delegation might have sought to place the same limitation on personal inviolability. That was, indeed, what the Commission had done—and rightly so—in the case of permanent residents and nationals of the receiving State. It had considered, however, that a more liberal approach would better protect the interests and needs of the special mission and had therefore provided in paragraphs 2 and 3 of its amendment that the representatives of the sending State in the special mission and the mission's diplomatic staff should be liable to arrest and preventive detention only in cases involving a crime or serious offence and following a ruling

by the competent judicial authority, and liable to imprisonment or any other form of restriction of their personal freedom only in pursuance of a definitive judicial ruling. Originally, the French delegation had provided (A/C.6/L.707) that the representatives of the sending State in the special mission and the mission's diplomatic staff could be arrested or placed in preventive detention in the case of crime or flagrante delicto, whatever the degree of seriousness. In an effort at conciliation, however, and in order to take account of the comments of certain delegations, that part of the amendment had been dropped.

7. His delegation wished to emphasize that, wherever possible, it made every endeavour to meet the wishes of delegations which took a more liberal view of privileges and immunities, provided naturally that it considered them reasonable and acceptable. The text of the revised French amendment (A/C.6/L.707/Rev.1) was analogous to that of article 40 and paragraphs 1 and 2 of article 41 of the 1963 Vienna Convention on Consular Relations. The Committee should note, however, that the French delegation's text referred to "crime or serious offence", not "serious crime" as did the 1963 Convention. The notion of "serious crime" did not exist in French law and the use of those words was liable to give rise to difficulties of application. From the French point of view, the words "crime or serious offence" covered every infraction punishable, under the French code, by deprivation of liberty for more than five years.

8. Under article 29 as modified by the French amendment, the persons concerned would be granted very wide privileges: they could not, for instance, be imprisoned in pursuance of a ruling unless the ruling was definitive; they could not be imprisoned in pursuance of an administrative ruling; and they could not, where such measures existed, be subjected to bodily constraint except by virtue of a definitive judicial ruling.

9. Mr. BONNEFOY (Chile), introducing his delegation's amendment to article 31 (A/C.6/L.729), said that paragraph 2 of the International Law Commission's text granted almost complete immunity from the civil and administrative jurisdiction of the receiving State. Cases requiring application of the exceptions provided for in sub-paragraphs (a) to (d) could occur fairly frequently with permanent missions but would be rare in the case of special missions, whose members were only temporarily in the receiving State and unlikely to be involved in the situations envisaged in the sub-paragraphs. Considering, therefore, that the exceptions in sub-paragraphs (a) to (d) would not be applicable in practice to special missions, the Chilean delegation had proposed for paragraph 2 wording more general and flexible than that of the Commission and omitting the exceptions provided for in that text. The Chilean amendment covered all four hypotheses listed in sub-paragraphs (a) to (d) of the Commission's text and also provided for other purely private acts not catered for by the Commission. It was in order to prevent the possibility of a person being afforded civil immunity for an act committed in certain circumstances and denied that immunity for the same act committed in different circumstances that the Chilean delegation had proposed a more flexible wording for paragraph 2.

10. In its amendment to paragraph 4, his delegation had taken account of the fact that the limits of functional immunity should be the same as those for immunity from civil and administrative jurisdiction. It did, however, place one restriction on that principle by stating that a measure of execution, when allowable, could in no case infringe the inviolability of the persons of the representatives of the sending State in the special mission or their accommodation. That amendment did tend to restrict the scope of the Commission's text but was not as restrictive as the amendment proposed by the French delegation (A/C.6/L.709).

11. He suggested that the Expert Consultant be requested to express his personal opinion on the questions raised in article 31.

12. Mr. BARTOS (Expert Consultant) said that the question whether the privileges and immunities accorded to special missions had a basis in law or were accorded merely as a matter of courtesy had been raised as far back as the Vienna Conference of 1926 on special missions and the Sixth International Conference of American States, held at Havana in 1928. The question had not arisen at the United Nations Conference on Diplomatic Intercourse and Immunities in 1961, because by then it had come to be recognized that States were under an obligation to accord privileges and immunities to special missions and their members. The 1926 Vienna Conference had decided that special missions had to be granted privileges and immunities in order to enable them to discharge, in complete freedom, their duties and functions in accordance with agreements reached between the sending and receiving States.

13. In its list, which was not exhaustive, of the various categories of special mission,^{1/} the International Law Commission had included the following groups: special missions with purely political powers, including those appointed to conclude peace treaties; special missions of a military character, including those appointed to conclude military agreements; special missions to settle frontier disputes, trace and maintain demarcation lines and signpost frontiers; special missions to perform police duties in frontier zones or carry out operations agreed upon in ad hoc treaties; special missions to deal with transport questions; special missions to deal with technical matters; special missions to deal with questions relating to economics, trade, finance, currency and customs régimes; special missions to deal with veterinary and phytopathological matters; special missions on health services; special missions to deal with humanitarian questions; special missions to enrol a labour force and lay down conditions for immigrants.

14. That list was far from complete, but it showed how difficult it was to conclude that even special missions of a technical character were devoid of representative character. The Commission had discussed the possibility of recognizing that some special missions were of a purely technical nature, which would mean giving less consideration to their relationship to a sovereign State. Some members

^{1/} See *Yearbook of the International Law Commission*, 1964, vol. II (United Nations publication, Sales No.: 65. V. 2), document A/CN.4/166, para.86.

had thought the Commission should look to both the functional theory and the representative theory, and even those members who had favoured the functional theory had recalled that representative character was always connected with function.^{2/} In the end, the Commission had decided that special missions should always maintain their link with the representative theory and that in certain cases States might indicate by bilateral agreement that the functional rule predominated. Accordingly, the rule laid down in article 29 should be maintained, and States should be given the opportunity under article 50 to reduce the privileges and immunities granted by article 29 where necessary. Between Belgium and Luxembourg, for example, there was no need for agents in daily contact to enjoy special guarantees.

15. The main point, however, which the Commission had considered decisive, was that the representatives of the sending State in the special mission and the members of its diplomatic staff should enjoy full independence in their persons, without interference by the receiving State, and it had accordingly drafted article 31 on immunity from jurisdiction. There had been many cases in diplomatic history where the presence of a person in a foreign State had been used as a basis for charging him with a criminal offence or securing a judgement against him, and therefore international law did not permit a receiving State to pass judgement on agents representing a sovereign State and having a representative function in the receiving State.

16. There was some question as to what was meant by the words "a ruling by the competent judicial authority" in the French amendment to article 29 (A/C.6/L.707/Rev.1). The legislation of countries was not identical, and it had been the general opinion in the Commission that it would be very dangerous to permit the territorial State to pass judgement on the freedom and personal status of representatives of other countries. Moreover, if personal inviolability was to be limited where a crime or serious offence was involved, the competent judicial authority would first have to decide whether the actions of the member of the special mission should be characterized as a crime. Whether the safeguards given to the defence were on a level recognized as satisfactory by the world was a separate question. The Commission had decided that the members of the special mission must enjoy personal freedom, and that jurisdictional immunity was essential to the enjoyment of personal inviolability, and vice versa.

17. The Commission had first taken as a guide the Convention on the Privileges and Immunities of the United Nations, which recognized that privileges and immunities were accorded to the representatives of Members, not for the personal benefit of the individuals themselves, but in the interests of the United Nations. But what authority was to decide whether a privilege or immunity was used for the benefit of the sending State? For the territorial State to decide that question would be a negation

of the privileges and immunities granted to representatives. Those who had drafted that Convention had therefore imposed on Member States the duty to waive the immunity of its representative in any case where it could be waived without prejudice to the purpose for which the immunity was accorded. However, the question whether or not the interests of a State were involved in a waiver of immunity was more political than legal, and the problem of how that question could be decided in respect of members of special missions had been discussed at length by the Commission. After four years of hesitation it had decided to submit the text now before the Committee.

18. He personally had at first favoured the functional theory, but he had had difficulty in finding a criterion for determining when the function of a special mission ended and what fell within the notion of function. In the Vienna Convention on Consular Relations, the certification of consular documents had been taken as the criterion, but there could be conflicts of laws, and conflicts of definition, in respect of such documents.

19. Personal inviolability and jurisdictional immunity were serious and difficult questions. The Commission had discussed them a number of times, and had considered all the observations of Governments on each point.

20. Mr. KESTLER FARNES (Guatemala) recalled that his delegation's statement on part II of the draft Convention (1059th meeting), had made it clear that the basic principles underlying the International Law Commission's text should be respected, that the privileges and immunities of special missions should be determined in accordance with their functions and tasks, and that special missions should be considered diplomatic missions and their representative character recognized. While understanding the argument that privileges and immunities of special missions should be restricted because not all special missions had the same character, his delegation considered it dangerous to legislate on the basis of exceptions. The more general the rules, the easier they were to apply. The Commission's draft very properly left the door open in article 50 for Governments to agree on a special position for particular special missions according to their nature.

21. His delegation considered the Commission's wording of article 29 the most acceptable. It treated the personal inviolability of the members of the special mission in a comprehensive and simple manner. The broad statement that they should not be liable to any form of arrest or detention was the most appropriate, because it was to be assumed that relations between States would be governed by good faith. If a member of the special mission was involved in a criminal offence, the prestige of the sending State would be affected, and it might be assumed that the person committing the offence would be duly prosecuted by the sending State. Confidence in the good faith of the sending State was of fundamental importance.

22. His delegation could not support the French amendment to article 29 (A/C.6/L.707/Rev.1), because

^{2/} See Yearbook of the International Law Commission, 1965, vol. II (United Nations publication, Sales No.: 66. V. 2) document A/CN.4/179, para. 82-90.

its paragraphs 2 and 3 contained substantial restrictions on the principles stated in the Commission's text. Paragraph 2 permitted the arrest or preventive detention of members of the special mission in cases involving a crime or serious offence, following a ruling by a competent judicial authority. There was no guarantee, however, that the ruling of the judicial authority would be impartial, and the arrest or preventive detention might prevent the person concerned from performing his official functions. Paragraph 3 contained similar restrictions on the principle of personal inviolability. In his delegation's view, the important point was that the members of the special mission should be fully guaranteed their freedom to perform their functions.

23. The Commission's text of article 30 seemed to be acceptable. It dealt with two important points—the inviolability of the private accommodation of members of the special mission, and the inviolability of their papers, correspondence and property. The inviolability of private accommodation was necessary precisely because the members of the special mission might keep papers and correspondence there. Because of the transitory nature of special missions, their members often did not follow the strict schedule of permanent diplomatic missions, and worked after office hours in their private quarters. As the Commission's draft thus contained two important guarantees for the performance of the functions of the special mission, his delegation could not support the French amendment to delete the article (A/C.6/L.708). It had no objection in principle to the Swedish amendment to the same article (A/C.6/L.725), but it suggested that the last sentence of the amendment should be revised to bring it into line with the text of article 25 approved by the Committee.

24. In its text of article 31, the Commission had wisely included immunity from criminal, civil and administrative jurisdiction. All the members of the Committee knew how difficult it was in judicial practice to draw the line between criminal, civil and administrative matters. The Commission had also been quite right in setting out the exceptions in paragraph 2. The actions excepted were those which in the legislation of those countries were generally referred to the competence of the territorial State. The members of the special mission should enjoy full immunity from the civil and administrative jurisdiction of the receiving State as to all other actions. In the Latin American legal systems, personal actions were governed by the *lex domicilii* and it was assumed that the domicile of a member of a diplomatic mission was his last domicile in the sending State and that he was therefore liable to action in that State. His delegation therefore could not support the amendments of France (A/C.6/L.709) or Chile (A/C.6/L.729) to article 31. The French amendment restricted immunity to acts performed in the exercise of the functions of the member of the mission and within the limits of his powers. In practice, however, it was extremely difficult to distinguish between acts performed in the exercise of official functions and those not so performed. Diplomats were diplomats twenty-four hours a day. His delegation found the last sentence of the Chilean amendment to paragraph 4 very sound, but otherwise

the amendment was too restrictive, and his delegation preferred the broad and simple guarantee of the Commission's text.

25. Mrs. KELLY DE GUIBOURG (Argentina) said that, as she had stated at an earlier stage in the debate, her delegation believed that the criterion for the granting of privileges and immunities to members of special missions, apart from those which arose naturally from the representative nature of the mission, should be the principle of functionality. The Chilean amendment to article 31 (A/C.6/L.729) struck a balance between the International Law Commission's text and the French amendment thereto (A/C.6/L.709), and the arguments in its favour had been clearly and expertly explained by the Chilean representative. Her delegation would support the Commission's text of article 29, because it was most important to maintain the principle of the personal inviolability of the representatives of the sending State in the special mission and the members of its diplomatic staff and to ensure them absolute immunity from penal jurisdiction.

26. Mr. MOLINA LANDAETA (Venezuela) said that the Expert Consultant's explanation of the philosophy underlying articles 29 to 31 had confirmed his delegation's views on those articles. Those views were based on principles which were fundamental to the draft articles as a whole. His delegation had accepted the International Law Commission's decision to base its draft, as far as possible, on the general pattern of the Vienna Convention on Diplomatic Relations, with certain safeguards required by the particular nature of special missions,^{3/} and it approved the Commission's concept of a representative type of special mission to which the draft articles in general would apply.

27. The right of such special missions to the protection of their members and property arose directly from their nature and the status of their members. Venezuela took a generous attitude towards the question of the privileges and immunities to be accorded to special missions and attached special importance to the question whenever it sent or received such missions. Its approach was a simple one: it tried to prevent any dangerous restriction of the privileges and immunities of special missions.

28. The right to personal inviolability dealt with in article 29 was a sacred principle. Unless that principle was maintained, the Convention would be meaningless. As stated in paragraph (2) of the commentary on the article, personal inviolability should, by its very nature, be deemed to be indivisible. His delegation had serious reservations concerning paragraphs 2 and 3 of the French amendment to article 29 (A/C.6/L.707/Rev.1), which were based on the provisions of article 41 of the Vienna Convention on Consular Relations and were much more restrictive in scope than the Commission's text. His delegation could not support a text which would place State representatives and the diplomatic staff of special missions on the consular level.

^{3/} See Official Records of the General Assembly, Twenty-second Session, Supplement No. 9, chapter II, para.16.

29. Article 30 stated the important principle of the inviolability of the private accommodation of the representatives of the sending State in the special mission and of the members of its diplomatic staff. His delegation fully supported the view expressed in paragraph (3) of the Commission's commentary on that article that the principle of inviolability applied regardless of the nature of such accommodation. However, the Commission's comment would not be included in the final text of the Convention, and, since the private accommodation was to enjoy the same inviolability and protection as the premises of the special mission, the terms "private accommodation" and "premises" should be clearly defined. His delegation could not support the French amendment to delete article 30 (A/C.6/L.708), because the article was a substantial part of the draft Convention. Nor could his delegation support the Swedish amendment to that article (A/C.6/L.725), because it would unduly weaken the text.

30. His delegation believed that the principles stated in articles 29 to 31 were in the same category and of equal importance. His delegation supported the Commission's text of article 31 and, on the basis of good faith and Venezuelan practice, endorsed the Commission's decision to model the article closely on the corresponding provisions of the Vienna Convention on Diplomatic Relations.

31. The French amendment to article 31 (A/C.6/L.709) would considerably reduce the scope of the Commission's text by limiting immunity from criminal jurisdiction. While appreciating the French representative's arguments in favour of that amendment, which was based on his country's legislation, he could not support it because it would place State representatives in the special mission and the members of its diplomatic staff on the same level as the technical staff. The Chilean amendment to the same article (A/C.6/L.729) would also place State representatives and diplomatic staff on the same footing as technical staff, although not in respect of criminal jurisdiction. The Chilean amendment was based on the necessity for drawing a clear distinction between activities of the members of a special mission in the exercise of their functions and activities of a private nature, and on Chilean legislation and experience of international relations. Although his delegation could not support the Chilean approach, it would not oppose the amendment but would abstain in the vote on it.

32. Mr. QUERALTO (Uruguay) said that his delegation supported the underlying philosophy of the International Law Commission's text. It shared the views expressed on articles 29 to 31 by the Expert Consultant and the Venezuelan representative and felt that the amendments to those articles would undermine the principles embodied in the Commission's text, since all the rights and privileges set forth in those articles were accorded not for personal reasons but in order to enable special missions to carry out their functions. For the reasons stated by the Venezuelan representative, his delegation would vote

against the French amendments to the articles in question (A/C.6/L.707/Rev.1, A/C.6/L.708, A/C.6/L.709) and would abstain in the vote on the Chilean amendment to article 31 (A/C.6/L.729).

33. Mr. ROBERTSON (Canada) said that, in regard to articles 29 and 31, his delegation's sympathies were divided between the approach of the French delegation reflected in its respective amendments (A/C.6/L.707/Rev.1, A/C.6/L.709) and the approach adopted by the International Law Commission. Canada did not support the view that the system of privileges and immunities applied to special missions should be exactly the same as that established for permanent diplomatic missions by the Vienna Convention on Diplomatic Relations. However, with regard to article 29, it agreed with the Commission's view concerning the need for personal inviolability for the representatives of the sending State in the special mission and the members of its diplomatic staff, and it could therefore not support the French amendment to article 29. If State representatives and diplomatic staff could be arrested in cases involving a crime or serious offence and following a ruling by the competent judicial authority, the question would arise, as the Expert Consultant had pointed out, what constituted a "crime or serious offence" within the meaning of paragraph 2 of the amendment and what authority was competent to make such a ruling; and such a provision might lend itself to abuse.

34. While his delegation agreed with the concept of immunity from arrest and detention, as provided in the Commission's text of article 29, it did not agree that the representatives of the sending State in a special mission and the members of its diplomatic staff should in all cases also be immune from the jurisdiction of the receiving State. His delegation believed that such immunity from jurisdiction, whether criminal or civil, should apply only in respect of acts performed in the exercise of their official functions. For example, if a member of the special mission while in Canada committed a serious crime such as would, in Canadian law, constitute manslaughter or rape, the Canadian Government would be prepared to agree that such a person might be immune from arrest or detention but not that he should also be immune from Canadian jurisdiction as such. In that respect, his delegation disagreed with the Expert Consultant's view that personal inviolability and immunity from jurisdiction were so closely linked that the one could not be provided without the other. Consequently, his delegation would support the French amendment to article 31 (A/C.6/L.709) and would not support the somewhat less restrictive Chilean amendment to that article (A/C.6/L.729) unless the French amendment was rejected.

35. Mr. PERSSON (Sweden) said that his delegation's amendment to article 30 (A/C.6/L.725) had been submitted before the exact text of article 25 had been decided upon. He now withdrew that amendment, since article 25 as approved rendered it superfluous.

The meeting rose at 5.50 p.m.

