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**Chairman:** Mr. Gonzalo ALCÍVAR (Ecuador).

AGENDA ITEM 87

**Draft Convention on Special Missions (*continued*) (A/6709/  
Rev.1 and Corr.1, A/7375; A/C.6/L.745, A/C.6/L.747)**

*Article 43 (Transit through the territory of a third State)  
(continued) (A/C.6/L.703)*

1. Mr. ROBERTSON (Canada) said that, as far as the substance was concerned, his delegation would have no difficulty in supporting the International Law Commission's text of article 43. However, the second part of the United Kingdom amendment (A/C.6/L.703) would add clarity, and he would support that part of the amendment if it was maintained. He tended to agree with the reservations expressed at the 1134th meeting by the Expert Consultant and the other speakers, in particular the Observer for Switzerland, in regard to the insertion of the word "directly" in paragraph 1.

2. He asked the Expert Consultant whether the Commission, when drafting article 43, had considered the possibility or necessity of providing the transit State with any means of recourse against a special mission which abused the privileges and immunities afforded to it, such as the remedies provided in article 12, paragraph 1, and article 20, paragraph 1 (*e*). Article 43 stated that the transit State should grant inviolability and such other immunities as might be required to ensure transit or return; he would like to know how broadly that phrase should be interpreted, for example, whether the transit State would be meeting its obligations if it prevented a member of a special mission from leaving the transit lounge of its airport.

3. Mr. BARTOS (Expert Consultant) replied that the first question had been considered by the International Law Commission, which had felt that good faith on the part of the sending State and the members of the special mission was a prerequisite for the application of article 43, paragraph 1. The duty imposed on the transit State would not cover cases where a member of a special mission abused the privileges and immunities accorded it.

4. With regard to article 12, paragraph 1, he believed that the transit State had the same right as the receiving State to

declare a member of a special mission *persona non grata*. However, there was a considerable difference between the position of a receiving State and that of a State of transit with regard to the application of article 12, paragraph 1. For example, where there was conflict between the transit State and the sending State, the principles of courtesy and caution should be borne in mind. Careful and strict precautions could be taken to give the members of the special mission a safe-conduct through the State of transit if such passage was essential for the performance of its task. Such precautions had been taken, for example, in the case of the Turkish delegation to the London conference convened to conclude a peace treaty during the Balkan Wars. On that occasion, the Turkish delegation had travelled through Bulgaria and part of the present territory of Yugoslavia by train, but it had been stipulated that the delegation should not leave the carriages it occupied until the train reached the Austro-Hungarian frontier.

5. On the other hand, the Commission had not even considered the question whether or not the transit State could refuse to recognize the existence of the special mission under article 20, paragraph 1 (*e*). That was a prerogative of the receiving State only. The transit State might request that the special mission change its route to another State, or it might restrict the privileges and immunities accorded to it, but the existence or non-existence of the special mission rested upon consent between the sending and the receiving State.

6. Under article 18, a third State acting as host to special missions from two or more States was to assume the rights and obligations of a receiving State only to the extent that it indicated in giving its consent, and it had the right to lay down conditions to be observed by the sending States. The same rule applied in the case of a transit State, which might restrict or extend privileges and immunities as it saw fit. A transit State duly notified and raising no objection under article 43, paragraph 4, committed itself only to allowing the special mission transit through its territory.

7. If, owing to exceptional circumstances, it was found necessary to restrict the freedom of movement of the members of the special mission in the territory of the transit State, that question might perhaps be resolved through the consular and diplomatic representatives of the States concerned. It had been the view of the Commission that the chief criterion in the granting of privileges and immunities by the transit State should be a functional one. The transit State had, however, the obligation to do nothing which might impede the special mission in the performance of its task. Again, international courtesy, which depended on the degree of amicability in relations between the States concerned, would be a primary factor in determining the latitude accorded by the transit State.

8. Mr. CAPOTORTI (Italy) said that in considering article 43 it was essential to bear in mind the basic difference between the obligations of the receiving State and those of the transit State in the matter of privileges and immunities. The obligations of the receiving State were based not only on its acceptance of the special mission, without which the special mission could not come into existence, but also on the interest of that State in ensuring the efficient performance of the special mission's task. The interests of the transit State were not involved, and the basis for its extension of privileges and immunities to the special mission was the principle of international solidarity and compliance with the provisions of the draft Convention. The limitations placed on State sovereignty by the draft Convention were more serious in the case of the obligations it imposed on the transit State. The case of special missions was very different from that of permanent diplomatic missions, where such limitations were based on reciprocity.

9. Article 43 as at present worded gave a transit State the choice between two extremes. Refusal of transit under paragraph 4 would hardly help to promote friendly relations among States. On the other hand, he interpreted the present text of the article as meaning that if a State did not refuse the special mission transit through its territory it was obliged to grant its members privileges and immunities under paragraph 1. It would therefore be advisable to adopt the second part of the United Kingdom amendment, which would make acceptance of the special mission dependent upon the express consent of the transit State. The amendment would clarify the meaning of the article, and in view of the swiftness of modern communications its requirements would not entail undue delay.

10. Adoption of the United Kingdom amendment would mean that, instead of refusing the special mission access to its territory, the transit State could merely limit the privileges and immunities accorded to it. Moreover, when expressing its consent the transit State could stipulate clearly the conditions on which transit was granted. For the transit State to declare a member of a special mission *persona non grata* under article 12, paragraph 1, would be a somewhat radical step. However, if the idea of express consent was accepted, the transit State could stipulate, when giving that consent, that if any abuse occurred, it would withdraw the privileges and immunities granted, duly notifying the sending State of such action.

11. The United Kingdom amendment would also bring article 43 more into line with article 18, paragraph 3 of which stipulated that the third State would assume rights and obligations to the extent that it indicated in giving its consent.

12. Adoption of the second part of the United Kingdom amendment would render the first part superfluous, because if the transit State could stipulate expressly the extent of the privileges and immunities to be granted, there would no longer be any risk that a special mission might make a detour and abuse privileges and immunities granted by a transit State. Moreover, he shared the concern expressed by other delegations concerning the inadvisability of unduly restricting the choice of route of special missions.

13. It would be wise to make it quite clear that the right of objection applied also in the case of transit of members

of the administrative and technical or service staff of the special mission or members of their family. That had undoubtedly been the Commission's intention when drafting the article, and he therefore suggested that the Drafting Committee be requested to consider inserting in paragraph 2 a reservation to the effect that its application would be without prejudice to the provisions of paragraph 4.

14. Mr. NJENGA (Kenya) thanked the French delegation for withdrawing its amendment. His delegation considered the text of article 43 acceptable as it stood, particularly in view of the clarification furnished by the Expert Consultant. With the exception of paragraph 4, the article was based on article 40 of the Vienna Convention on Diplomatic Relations; in the view of his delegation, the provisions of paragraph 4 adequately met the point which had led the United Kingdom delegation to submit its amendment. The insertion of the word "directly" would leave the article open to different interpretations and would unnecessarily complicate its application. His delegation failed to see any strong reason for insisting on a direct route. Some representatives had contended that the article might oblige third States to grant excessive privileges to members of special missions, but in his opinion the granting of "inviolability and such other immunities as may be required to ensure his transit or return", in the terms of paragraph 1, would leave little room for abuse.

15. The question of transit could not be separated from that of immunities. A member of a special mission who had been granted a transit visa but to whom immunities had not been accorded might, during transit through a third State, be subjected to treatment which was not in accordance with his status as a government representative. Moreover, in such a situation, there was nothing to prevent a third State from seizing official communications carried by diplomatic couriers, provided nothing was done to interfere with the transit of the couriers themselves. He considered it essential to eliminate any possibility of such violations of standard diplomatic practice. He therefore appealed to the United Kingdom representative to withdraw his amendment, and stressed that the provisions of paragraph 4 allowed the third State ample discretion.

16. Mr. KLEPATSKY (Byelorussian Soviet Socialist Republic) said that in the opinion of his delegation it was logical and necessary that special missions should be granted the same privileges and immunities in respect of transit through a third State as were accorded them by the receiving State, including those extended to administrative and technical staff and to the families of members and staff. That view was fully consistent with the principles underlying the draft articles. The privileges and immunities envisaged in article 43 were quite reasonable, especially in view of the similarities between special missions and permanent missions.

17. The United Kingdom amendment would have the effect of restricting the transit of special missions and their staff through third States and would give those States complete freedom to determine the manner in which the provisions of the article should be applied. The amendment to paragraph 4 was superfluous, since tacit consent was already required under the provisions of that paragraph. As

for the amendment to paragraph 1, only the sending State was competent to decide which route was most appropriate. His delegation fully agreed with the explanation provided by the Expert Consultant and would be unable to accept the United Kingdom amendment. It would vote for article 43 as drafted by the International Law Commission.

18. Mr. POLLARD (Guyana) said that his delegation supported the first part of the United Kingdom amendment in principle, but felt that the words "proceeding" and "returning" required some qualification; he hoped that the Drafting Committee could find a formula which would establish a criterion of reasonableness in the choice of route. His delegation would be unable to support the second part of the United Kingdom amendment, which it considered unduly restrictive.

19. Mr. SANTISO GALVEZ (Guatemala) noted that under article 40 of the Vienna Convention, diplomatic agents enjoyed privileges and immunities when in transit through the territory of a third State without prior consent by that State. Paragraph 4 of the article under consideration, on the other hand, required notification in advance. But although the article was thus somewhat restrictive, his delegation found it acceptable.

20. His delegation felt that the first part of the United Kingdom amendment would further complicate rather than simplify the application of the article. Hence it could not support that part of the amendment. It considered the second part equally unacceptable, since the restrictions imposed in the International Law Commission's draft were sufficient and adequately catered for the interests of all States. The amendment would make the text excessively restrictive. The interests of the third State might be involved under certain conditions; it was not unusual, for example, for special missions in Central America to hold consultations with Governments of third States while in transit. He therefore supported the original text of the article.

21. Mr. UOMOTO (Japan) pointed out that under the article as drafted, the interests of the third State would be subordinate to those of the sending and receiving States, in that it would be obliged to accept a mission even where it did not recognize its status as a special mission. In addition, the third State was placed in an awkward position when it had to choose between granting privileges and immunities to a special mission, on the one hand, and completely denying it the right of entry, on the other. A provision which prevented a State from granting the right of transit without according immunities was hardly in the interests of friendly relations between States. The first part of the United Kingdom amendment would permit increased flexibility in such a case.

22. He pointed out that applications for visas were submitted to consular officials, and that such applications did not constitute notification through the diplomatic channel. Article 2 required express consent on the part of the receiving State, and he saw no reason why the same provision should not apply to a third State, as proposed in the second part of the United Kingdom amendment.

23. His delegation considered that privileges and immunities should be accorded to the members and staff of

special missions in transit through third countries only to the extent required by functional necessity, and never for purposes of tourism or recreation. The insertion of the word "directly" in the first part of the United Kingdom amendment would eliminate any uncertainty with respect to the application of article 43 to extreme cases, and he would therefore support that part of the amendment as well. In his delegation's view, considerations of functional necessity, rather than of time or distance, should be applied in determining what constituted a "direct route".

24. Mr. BREWER (Liberia) could not support the first part of the United Kingdom amendment, since it was difficult to determine what constituted a direct route, and it was nowhere made clear who was to decide. In regard to the second part of the amendment, he considered it inappropriate to place an obligation on a State without its consent in a case where it did not stand to benefit by the acceptance of such an obligation. The principle of sovereignty required that a third State should be obliged to grant privileges and immunities only when it had expressly consented to do so. He would therefore support the second part of the United Kingdom amendment. However, he would have liked to see a statement in the text to the effect that, while States had the right to refuse transit, such refusal should not be used in order to impede the functioning of a special mission, especially in cases where the third State was a party to the Convention.

25. Mr. JAHODA (Czechoslovakia) said that the obligation on the part of third States to recognize the status of a special mission had been incorporated in article 43 to ensure the normal development of mutual relations between States. That principle had been fully recognized in article 40 of the Vienna Convention. The additional conditions in paragraph 4 of the article under consideration were reasonable, and he assumed that transit would be denied only under exceptional circumstances.

26. The first part of the United Kingdom amendment introduced a subjective criterion into the text of the article, and raised considerable problems. The amendment was somewhat superfluous in any case, since the transit visas granted by most States were subject to a time-limit. The second part of the amendment would give third States the right to subject a special mission to conditions different from those imposed by the sending and receiving States, and not necessarily compatible with the status of the special mission. Such a provision was unnecessary, since under paragraph 4 the third State already had the right to deny transit to the special mission. He believed that the United Kingdom amendment would result in unnecessary legal complications, and he would therefore support the text of article 43 as drafted by the International Law Commission.

27. Mr. MIRAS (Turkey) said that article 43, as it stood, would place considerable obligations on a third State without giving it the same guarantees as the receiving State. The situation was further complicated by the fact that special missions were likely to have more members and staff than the diplomatic missions envisaged in article 40 of the Vienna Convention. A visa application was not equivalent to notification, since such an application would generally not indicate the reason for the journey. If visa applications

were to be accepted in lieu of notification, it might involve much additional work for the third State. Members of a special mission might actually stay longer in a third State than in the receiving State, while the third State would derive no corresponding benefit. On the whole, article 43 subordinated the interests of the third State to those of the receiving State. Moreover, under the provisions of the article, the only way in which a third State could express its reluctance to granting privileges and immunities to the members of the special mission would be through outright denial of the right of transit.

28. His delegation therefore supported the amendment submitted by the United Kingdom delegation, since it would make the provisions of the article more flexible by enabling the third State to permit the passage of the special mission without granting privileges and immunities and thus avoid many practical difficulties.

29. Mr. ALLOTT (United Kingdom) said that his delegation would withdraw its two amendments to paragraph 1, since it seemed generally agreed that the good faith and reasonableness of States would be sufficient to ensure a satisfactory interpretation.

30. In the interests of simplification, the United Kingdom had decided to modify its amendment to paragraph 4 by substituting the words "and has consented to it" for the phrase proposed. The modified amendment would bring article 43 into line with article 2 and would balance the draft Convention by emphasizing that both the sending and the transit of special missions were consensual.

31. Mr. POTOLOT (Central African Republic) said that by leaving it to the transit State to consent or object to the passage of a special mission, article 43 simply reflected State practice. His delegation sympathized with the United Kingdom amendment in its new form but thought that its effect could be to hamper rather than facilitate the application of the future Convention. Courtesy and flexibility should continue to be the rule in international relations.

32. Mr. GABOU (Congo (Brazzaville)) said that the reliance of States on the institution of special missions not only made article 43, and particularly paragraph 4 thereof, a crucial feature of the draft Convention, but it also raised the question of nationalistic conceptions of the right of special missions to passage. At first sight, his delegation had welcomed the International Law Commission's text of the article, but closer scrutiny had persuaded it that paragraph 4 could nullify the benefits provided by the other paragraphs of the article. Whereas paragraphs 1, 2, 3 and 5 recognized the need for the right of passage and thus for granting the necessary privileges and immunities, paragraph 4 left the question of passage, and so the enjoyment of those privileges and immunities, to the sole discretion of the transit State. The principle underlying such a formulation seemed inconsistent with the spirit of the draft Convention as a whole. To take the case of a State whose territory was completely encircled by that of another State, paragraph 4 could, in certain political circumstances, have the effect of preventing the former State from dispatching a special mission. He cited other examples of the political discrimination which could flow from paragraph 4. Even

when political considerations did not arise, the need to dispatch a special mission might be too urgent to allow the sending State to take the steps stipulated in paragraph 4.

33. Because of such difficulties, both the Commission's text and the amended text proposed by the United Kingdom were unacceptable. His delegation was seeking a more satisfactory solution to the problem of the right of the special mission to transit, one which would reconcile the divergent trends that had emerged in the discussion. It therefore proposed that article 43 should be amended to include a new paragraph to the following effect:

"The third State shall be bound, in consideration of the desire of the international community to establish and strengthen good and friendly relations between States, to comply with the obligations with respect to the persons mentioned in the foregoing three paragraphs even where it has not been informed in advance, by visa application or by notification, of the transit of those persons as members of the special mission. The third State shall nevertheless be permitted to prohibit the use of the national territory, except in respect of airport transit areas and the fastest possible means of road, rail or sea communication with the place of performance of the tasks of the special mission."

Finally, good faith and international courtesy provided adequate safeguards against abuses of the benefits conferred by article 43.

34. The CHAIRMAN pointed out that since the time-limit for the submission of amendments to article 43 had expired, the proposal made by the representative of Congo (Brazzaville) could not be entertained.

35. Mr. CASTREN (Finland) welcomed the withdrawal of the first part of the United Kingdom amendment. The danger of a formulation which could have been used as a pretext for an excessively rigid interpretation had thus been avoided. His delegation favoured the remainder of the United Kingdom proposal, as modified. The situation would be clearer if express consent was stipulated. The drawbacks of such a course had been exaggerated.

36. Mr. KOSTOV (Bulgaria) said that special missions in transit should be inviolable and should have the privileges and immunities necessary for their journeys. Their functioning might be impeded if that was not the case. The only difference between the obligations of the transit State and those of the receiving State was one of degree. Paragraph 4 of the International Law Commission's text took account of the temporary nature of special missions. His delegation interpreted the requirement of advance information as meaning information given sufficiently in advance of the crossing of the frontier by the special mission to enable the transit State to discharge its obligations or raise an objection, as the case might be. Transit States had a sovereign right to object to the passage of a special mission; that was a perfectly normal state of affairs, although refusals were unlikely to be frequent. The new wording of the United Kingdom amendment could be interpreted as implying the requirement of express agreement. His delegation would therefore oppose it, since Bulgaria held that tacit agreement should be sufficient to secure the operation

of article 43. It would therefore vote in favour of the article as it stood.

37. Mr. SHAW (Australia) said that the Committee had already considered the basis of article 43—the creation of privileges and immunities—in relation to the receiving State. It had been said that the provisions of the draft Convention in that respect represented a proper balance between the interests of the sending and receiving States. His delegation considered that a like balance should prevail with regard to the relationship of the sending and transit States, and it would have expected the same words to be used in article 43 as were used in connexion with the receiving State. Paragraph (2) of the International Law Commission's commentary on the article showed that some sort of consent was required in the case of the transit State. The situation had changed since the drafting of article 43; article 1, sub-paragraph (a), and article 2 had been worded so as to give prominence to the notion of consent. If the United Kingdom amendment, as modified, was adopted, not only would the balance he had mentioned between the interests of the sending and transit States be ensured, but the text of the entire draft Convention would become more consistent. His delegation would therefore support that amendment.

38. Mr. GARCIA ORTIZ (Ecuador) said that the provisions of paragraphs 1, 2 and 3 did not create obligations for the transit State, because it could escape the operation of those paragraphs by raising an objection. They therefore represented no more than rules of courtesy which the transit State could apply if it wished. The only real obligation was in paragraph 5, and that was based on humanitarian considerations; an aircraft carrying a special mission might make a forced landing, for example. Paragraph 4 showed that in essence the bulk of the article was a recommendation. That being so, his delegation would vote in favour of the text as it stood. It would oppose the United Kingdom amendment, because the requirement of express consent was unnecessary; the possibility of objection was sufficient for the purpose of the article.

39. Mr. DADZIE (Ghana) said that the question of consent was implied from the circumstances of article 43, since no one could go to another country without the latter's consent. His delegation welcomed the United Kingdom amendment in its revised form; it represented a more active formulation of the principle of consent than the International Law Commission's wording, under which the onus had been on the transit State to object. The fact that the United Kingdom did not insist on express consent was wise, since officials occasionally omitted, by oversight, to transmit communications in which consent was given. The United Kingdom wording suggested that consent could be both express and implied. Ghana welcomed the flexibility of the new formulation and would vote in favour of the Commission's text as amended by the United Kingdom proposal.

40. The CHAIRMAN invited the Committee to vote on the United Kingdom amendment to paragraph 4, as orally modified.

*The United Kingdom amendment to paragraph 4, as proposed in document A/C.6/L.703 and orally modified, was rejected by 34 votes to 30, with 20 abstentions.*

41. The CHAIRMAN called on the Committee to vote on the International Law Commission's text of article 43.

*Article 43, as drafted by the International Law Commission, was approved by 73 votes to 1, with 10 abstentions.*

42. Mr. GABOU (Congo (Brazzaville)), explaining his delegation's vote, said that it had opposed the International Law Commission's text because it did not embody the ideas conveyed by the wording he had read out earlier in the meeting.

*The meeting rose at 1.10 p.m.*