



CONTENTS

	Page
Agenda item 87: Draft Convention on Special Missions (<i>continued</i>)	171

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 42 (*Settlement of civil claims*) (*continued*)
(A/C.6/L.759, A/C.6/L.763, A/C.6/L.764 and Add.1 and 2)**

1. Mr. BADEN-SEMPER (Trinidad and Tobago), introducing the amendment contained in documents A/C.6/L.764 and Add.1 and 2, said that the delegations of Bolivia and Tunisia had joined Brazil, India, Iraq and Trinidad and Tobago in co-sponsoring the amendment. In view of the new proposal, his delegation would withdraw its previous amendment to article 42 (A/C.6/L.763).

2. The draft resolution recommended to the General Assembly in the six-Power amendment was framed in the same terms as resolution II of the United Nations Conference on Diplomatic Intercourse and Immunities,¹ with the omission of a reference to the preamble of the Convention adopted by that Conference. In his view, the simplicity of the draft would serve to enhance its impact.

3. The sponsors had decided to replace the phrase "when this can be done" in the operative paragraph by the phrase "when it can do this", in order to bring the English text into line with the French and Spanish versions. In addition, it might be desirable to replace the word "*reclamaciones*" in the operative paragraph in the Spanish text by the word "*acciones*", which appeared in the text of article 42. It might also be advisable to find a suitable substitute for the word "*recursos*" in the Spanish version of the last preambular paragraph, since that word had a rather restricted legal meaning. Certain drafting changes applying only to the French version appeared in document A/C.6/L.764/Corr.1.

4. He recalled that his delegation had explained (1134th meeting) why, in its view, article 42 should be replaced by a resolution of the General Assembly.

5. Mr. DELEAU (France) said that his delegation was in favour of retaining article 42 in the form in which it had

been submitted by the International Law Commission. It neatly left a choice to the discretion of the sending State, as was normal, and it was sufficiently flexible to allow scope for a friendly settlement of any problems which might arise.

6. Mr. ROSENSTOCK (United States of America) said that, in examining article 42, his delegation could find nothing which was legally odd or defective. Even though the sending State was allowed some discretion in regard to its application, the article imposed a clear legal obligation. There was no doubt that such discretion could be subjected to abuse, but that did not deprive the obligation of its legal content. He pointed out that there was no lack of legal precedents for such a provision. Indeed, similar formulas appeared in the Convention on the Privileges and Immunities of the United Nations and the Convention on the Privileges and Immunities of the Specialized Agencies. A resolution replacing the substance of article 42 would not only be considerably weaker in force, but would also be much less generally available. The draft resolution contained in the six-Power amendment under consideration was in fact less complete than resolution II of the Vienna Conference, in that it omitted any reference to the preamble. Therefore, his delegation considered it unacceptable in its own right, and all the more so since its adoption would lead to the deletion of article 42. His delegation saw no validity in the technical objections which had been raised against the article and would vote for its retention.

7. Mr. OGUNDERE (Nigeria) said that, while article 42 might be viewed as a sort of escape clause, his delegation had no fundamental objection to its inclusion in the draft Convention. Its provisions would be equally beneficial to all States, since it was merely a legal statement of the desirability of good faith on the part of the sending State. The reasons for its inclusion in the draft articles were quite clear. On the other hand, it could hardly be said that the deletion of the article would do any great harm to the objectives of the draft Convention. His delegation would be equally satisfied with the retention of article 42 or with its replacement by a General Assembly resolution.

8. Mr. USTOR (Hungary) said that his delegation endorsed the draft articles submitted by the International Law Commission in general and supported the objectives of article 42 in particular. The article was based on two fundamental considerations: first, the duty of States to co-operate in ensuring the proper functioning of special missions, which was also the basis of articles 22, 23 and 48, and second, the fact "that the purpose of such privileges and immunities is not to benefit individuals but to ensure the efficient performance of the functions of special missions as representing States", in the words of the draft preamble (A/6709/Rev.1 and Corr.1, p. 24). Those princi-

¹ See *United Nations Conference on Diplomatic Intercourse and Immunities, Official Records*, vol. II (United Nations publication, Sales No.: 62.X.1), p. 90.

ples were clearly expressed in the Convention on the Privileges and Immunities of the United Nations.

9. While article 42 contained no provisions specifically prohibiting abuses, it was clear that the sending State must consider waiving immunity in cases involving civil claims and must use its best endeavours to bring about a just settlement when it did not do so. If the article were adopted, it would take on legal force, and a sending State could then be taken to task for failing to fulfil its obligation under the article. Thus some doubts might arise regarding whether the sending State alone was competent to determine when immunity should be waived. In that connexion, he noted that the obligations to waive immunity imposed under the Convention on Privileges and Immunities of the United Nations and the headquarters agreements between France and UNESCO² and between Italy and FAO³ were even more stringent and were not restricted to cases involving civil claims.

10. If the Committee was of the opinion that such a provision should have the force of law, it should vote to retain article 42 as it stood. However, if it felt that the text should have only moral force, a draft resolution should be adopted for consideration by the General Assembly. In that connexion, he recalled that the representative who had introduced resolution II at the Vienna Conference had stated that the resolution did not have the "mandatory character of an article of the Convention, but it created a moral obligation".⁴

11. The protection of human rights had been suggested as a reason for including article 42 in the draft Convention, but since the article was confined to civil claims and therefore concerned only pecuniary interests, it could not be said to safeguard human rights in general. A waiver of diplomatic immunity could involve higher interests, for instance in the case of exemption from the obligation to give evidence, where more serious issues might be at stake. Although the sending State could be said to have a moral obligation to protect higher interests, the draft Convention contained no explicit provision to safeguard them. It seemed inappropriate to spell out in an article the moral obligation to protect purely material interests.

12. From the point of view of the progressive development of international law, the right of diplomats to immunity from civil jurisdiction had been questioned as early as the beginning of the twentieth century, when decisions on the subject had been handed down by the Italian courts. Since the principle of circumscribing such immunity was not new, to base an article of the draft Convention on it could not be held out as much proof of progressive development.

13. As far as the possibility of abuse was concerned, he disagreed with the view that cases of abuse had increased

and that it was therefore necessary to have article 42 in the draft Convention. Abuses of immunity had occurred in the past and had been exceptions to the general rule that diplomats could be relied on to behave correctly. That rule still held good. On balance, therefore, his delegation preferred that the article should be replaced by the proposed draft resolution, subject to careful consideration of the latter by the Drafting Committee.

14. Mr. PERSSON (Sweden) announced that his delegation had decided to withdraw its amendment (A/C.6/L.759). Many delegations had supported the International Law Commission's text, although clearly aware of the discrepancy between the words "this can be done" in the English version and the phrase "*il peut le faire*" in the French version. His delegation had discovered that the text in question had originated in French, which removed some of its concern, since the Drafting Committee would no doubt bring the English version into line. Also, several delegations had expressed the view that the discretion provided for in article 42 rested solely with the sending State. Sweden was therefore confident that the defect its amendment had sought to remedy could be eliminated by the Drafting Committee. His delegation would vote for the retention of article 42. If the Committee decided in favour of the draft resolution, Sweden would have no concern about the question raised in its former amendment to the article because the representative of Trinidad and Tobago had covered the point by his oral modification of the draft resolution.

15. Mr. SAHOVIĆ (Yugoslavia) said that the question of special missions and civil claims had to be regulated. The International Law Commission had stressed the importance of that by including article 42 in the draft Convention. But civil claims were less of a problem in the case of special missions than in that of permanent missions. In deciding whether to have an article or a resolution on the subject, it also had to be remembered that in effect article 42 was a recommendation. His delegation agreed that a principle gained strength by being expressed as a rule of law, but it did not regard the principle embodied in article 42 in that light, since not all the elements of a rule of law were present. Yugoslavia therefore favoured replacing article 42 by a resolution and would vote in favour of the text before the Committee. If that was not approved, it would abstain from voting on the Commission's text.

16. Mr. PINTO (Ceylon) said that his delegation fully supported the principle embodied in article 42 and thought that sending States should undertake the obligation for which it provided. It found no difficulty with the idea of formulating a text which imposed an obligation on a State contingent on the exercise of discretion by that State in a certain manner. The International Law Commission had taken a progressive step in basing article 42 on resolution II of the United Nations Conference on Diplomatic Intercourse and Immunities, but the persuasive arguments advanced in support of the draft resolution before the Committee had convinced his delegation that it might be premature to codify the Vienna resolution in article 42. If the codification did not command the support of the great majority of States, the law-making process might be harmed rather than promoted. On balance, therefore, his delegation had decided to support the proposal for a draft resolution.

² United Nations, *Treaty Series*, vol. 357 (1960). No. 5103.

³ See United Nations, *Legislative Series, Legislative Texts and Treaty Provisions concerning the legal status, privileges and immunities of international organizations*, vol. II (United Nations publication, Sales No.: 61.V.3), No. 17, p. 187.

⁴ See United Nations Conference on Diplomatic Intercourse and Immunities, *Official Records*, vol. I (United Nations publication, Sales No.: 61.X.2), Twelfth plenary meeting, para. 39.

If that proposal was rejected, Ceylon would review its position with regard to the Commission's text.

17. Mr. ARBELAEZ (Colombia) said that article 42 was the result of the development of international law and represented the codification of a rule of established practice. His delegation therefore found it acceptable. However, the proposal for a draft resolution showed that it might be too early to make an obligation out of the principle expressed in the International Law Commission's text. In that case, it would be a question of continuing to rely on good faith backed up by the force of a General Assembly resolution.

18. If the Committee approved the draft resolution, the Drafting Committee should consider the insertion in the Spanish version of the words "*acciones y/o*" after the word "*utilizar*" in the third preambular paragraph and the replacement in the operative paragraph of the word "*reclamaciones*" by the word "*acciones*".

19. Mr. NJENGA (Kenya), supported by Mr. CHAILA (Zambia) and Mr. VANDERPUYE (Ghana), moved that a separate vote be taken on the opening paragraph of amendment A/C.6/L.764 and Add.1 and 2. Following the withdrawal of the original amendment of Trinidad and Tobago (A/C.6/L.763), two separate questions were now dealt with in one amendment, and it seemed preferable to decide separately on the question of replacing article 42 by a resolution of the General Assembly and on the question of the actual text of that resolution.

20. Mr. CHAMMAS (Lebanon) agreed with the representative of Kenya. Before deciding whether or not to replace article 42 by a resolution of the General Assembly, the Committee should first decide whether or not it wished to delete article 42. In order to regularize the situation, he wished to resubmit on his own behalf the original amendment of Trinidad and Tobago (A/C.6/L.763).

21. Mr. YASSEEN (Iraq) could not agree that the Lebanese oral amendment would regularize the situation. The idea of the deletion of article 42 was already implicit in the proposal for its replacement by a draft resolution in amendment A/C.6/L.764 and Add.1 and 2. There seemed to be general agreement in the Committee that the question of the settlement of civil claims should be covered either by an article in the draft Convention or by a resolution of the General Assembly. There was a considerable difference between the conditional deletion of article 42 as proposed in amendment A/C.6/L.764 and Add.1 and 2 and its unqualified deletion, as now proposed by the representative of Lebanon. Moreover, the Lebanese oral amendment was unnecessary, since the deletion of article 42 would take place automatically if amendment A/C.6/L.764 and Add.1 and 2 was adopted.

22. Nor could he support the Kenyan motion for a separate vote on the opening paragraph of amendment A/C.6/L.764 and Add.1 and 2, because the opening paragraph might then be adopted and the rest of the text rejected, and the sponsors of the amendment intended that the proposed deletion of article 42 should be conditional upon its replacement by a separate draft resolution for adoption by the General Assembly. The two parts of the

amendment were too closely interrelated to be dealt with separately.

23. Mr. USTOR (Hungary) endorsed the view that the Lebanese oral amendment was unnecessary.

24. Mr. ENGO (Cameroon) said he would oppose the Kenyan motion, for the reasons explained by the Iraqi representative.

25. After a short procedural discussion, the CHAIRMAN invited the Committee to vote on the Kenyan motion that a separate vote should be taken on the opening paragraph of amendment A/C.6/L.764 and Add.1 and 2.

The Kenyan motion was rejected by 44 votes to 30, with 14 abstentions.

26. Mr. ROBERTSON (Canada) said that his delegation had abstained in the vote on the Kenyan motion, because the two parts of amendment A/C.6/L.764 and Add.1 and 2 were closely interrelated and approval of the one without the other would have led to serious procedural difficulties. His delegation had not voted against the Kenyan motion, because it felt that it would be desirable for the Committee to be able to express itself clearly in a separate vote on the question whether or not article 42 should be retained. However, since the Kenyan motion would not, in his delegation's opinion, have adequately achieved that purpose, it had been unable to vote in favour of it.

27. After a further short procedural discussion, Mr. CHAMMAS (Lebanon) withdrew his oral amendment for the deletion of article 42.

28. Mr. ROSENSTOCK (United States of America) said that his delegation agreed with the Canadian view that it would be desirable to take a separate decision concerning the deletion of article 42. He regretted the withdrawal of the Lebanese oral amendment, since delegations had voted on the Kenyan motion on the understanding, the Chairman having expressly so stated, that the Lebanese amendment would then be put to the vote. Accordingly, he now wished to resubmit that amendment on behalf of his own delegation, for the sole purpose of ensuring the opportunity of a vote on the substance of article 42.

29. Mr. USTOR (Hungary) said he regretted the reintroduction of the Lebanese oral amendment. There seemed to be general agreement in the Committee that provision should be made for the settlement of civil claims along the lines of the International Law Commission's text of article 42. The divergence of views centred on the question of the form in which those provisions should be stated. Since the majority of delegations were anxious that the substance of article 42 should be retained in one form or another, it seemed likely that the text that was put to the vote first would have the greater chance of acceptance. It would perhaps have simplified the situation if the Committee had taken a formal decision whether the Commission's text of article 42 or amendment A/C.6/L.764 and Add.1 and 2 should be put to the vote first. Since the Lebanese oral amendment had been reintroduced, his delegation moved that priority should be given to amendment A/C.6/L.764 and Add.1 and 2 in the order of voting.

30. Mr. OGUNDERE (Nigeria) moved that the meeting be adjourned so that delegations could endeavour to settle the question of procedure through private consultations.

The Nigerian motion was adopted by 62 votes to 7, with 18 abstentions.

The meeting rose at 1.15 p.m.