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CONTENTS

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 40 (Nationals of the receiving State and persons permanently resident in the receiving State) (A/C.6/L.702, A/C.6/L.715, A/C.6/L.762)

1. Mr. ALLOTT (United Kingdom), introducing his delegation's amendment to article 40 (A/C.6/L.702), said that the amendment was in two parts: the first part, which related to the English text only, would replace the words "that State" in paragraph 1 by the words "the receiving State"; the second part, calling for the insertion in that same paragraph of the word "only" before the words "immunity from the jurisdiction" and the deletion of the word "only" after the word "inviolability", was intended to bring the wording of that paragraph into line with that of article 38, paragraph 1, of the Vienna Convention on Diplomatic Relations. He observed, in that connexion, that in both the Vienna Convention and the International Law Commission's draft articles there were discrepancies between the versions in the different languages. The Committee could perhaps request the Drafting Committee to rectify them.

2. Mr. DELEAU (France) introduced his delegation's amendment to article 40 (A/C.6/L.715), which would replace the words "shall enjoy immunity from jurisdiction and inviolability only" by the words "shall only enjoy immunity from jurisdiction and inviolability". In the French version, the paragraph reproduced the wording of article 38, paragraph 1, of the Vienna Convention on Diplomatic Relations. However, the text was ambiguous with regard to the extent of the privileges and immunities to be enjoyed by members of special missions who were nationals of the receiving State or were permanently resident in that State. Since the documents of the 1961 Conference and the English text of the Convention on Diplomatic Relations made it abundantly clear that the only privileges which they could enjoy were immunity from jurisdiction and inviolability, both restricted to official acts performed in the exercise of their functions, it would be better to amend the wording of article 40, paragraph 1, as proposed by his delegation. Since it was only a question of drafting, perhaps it could be dealt with by the Drafting Committee.

3. The CHAIRMAN suggested that the United Kingdom and French amendments should be referred to the Drafting Committee.

It was so decided.

4. Mr. CANDIOTI (Argentina) said that he questioned the advisability of adopting article 40 of the International Law Commission's draft articles in its existing form, since its provisions seemed unduly restrictive. It should be remembered that, under article 8 as approved by the Committee at the twenty-third session, the receiving State could, without giving reasons, decline to accept any person as a member of a special mission. Moreover, article 10, paragraph 2, provided that nationals of the receiving State could not be appointed to a special mission except with the consent of that State, which could be withdrawn at any time. Lastly, the Committee at its 1128th meeting had adopted article 1, sub-paragraph *(a)*, under which the consent of the receiving State was required for the very existence of the special mission.

5. In those circumstances, if the receiving State agreed that certain of its nationals or persons having their permanent residence in its territory could be employed in the special mission of the sending State, it seemed only fair and reasonable that those persons should enjoy the inviolability and immunity which they needed to enable them to perform their functions with the requisite independence. According to that draft article, however, they would enjoy inviolability and immunity from jurisdiction only in respect of official acts performed by them, unless the receiving State accorded them other privileges and immunities entirely at its own discretion. Although the International Law Commission considered, as stated in its commentary on article 40, that in principle personal inviolability should be indivisible, it had reproduced in that article the wording of article 38 of the Vienna Convention on Diplomatic Relations, except that the words "private servants" had been replaced by the words "private staff". His delegation considered that members of a special mission who were nationals of the receiving State or were permanently resident in that State should enjoy the same guarantees as other members of the special mission, unless the sending State and the receiving State agreed in particular cases to restrict those guarantees because of special circumstances, in conformity with the provisions of article 50 *(c)*.

6. States might, it was true, have good reasons for not according privileges and immunities to their nationals in their own territory, and that was why articles 8 and 10

rightly left them full freedom to refuse to consent to such persons being appointed to a special mission of a foreign State. However, if the receiving State agreed to permit its nationals to represent another State in its own territory, it should grant them the facilities necessary for the normal exercise of their functions. The privileges and immunities recognized by contemporary diplomatic law were granted not in consideration of the private status of the persons enjoying them–nationality or residence, for example–but in furtherance of the functions they performed as officials of another sovereign State.

7. That would apply *a fortiori* to a case in which the sending State decided to designate as a member of a special mission a person who, while not being a national of the receiving State, was permanently resident in its territory. The restriction imposed by article 40 was still more unjustified in such a case and could be prejudicial in particular to the interests of new and developing States which occasionally had to ask one of their nationals living in the receiving State to represent them in a special mission.

8. To restrict inviolability to acts performed in an official capacity, as provided in article 40, could have very serious consequences in practice. If the receiving State could arrest a member of a special mission for an offence alleged to have been committed while the mission was in existence but not in a strictly official capacity, that could have the effect not only of completely paralysing that representative's activities in the special mission but also of making it possible for the receiving State to seize mission documents and correspondence which he might have on his person.

9. The word "official" in paragraph 1 was also highly ambiguous. If official acts meant all acts performed by the member of the mission in the exercise of his functions, the word was superfluous. If, on the other hand, it was desired to make a distinction between "official" and "private" acts performed by the person concerned in the exercise of his functions, that distinction would presumably be very difficult to apply in practice. If, as the draft article provided, it was left to the authorities of the receiving State to make the distinction, there was great danger of abuse and the members of the special mission would as a result be deprived of any effective guarantee. As the International Law Commission had stated, personal inviolability was indivisible.

10. With regard to article 40, paragraph 2, even if it could be agreed that the privileges and immunities of the service personnel and private staff of the mission who were nationals of the receiving State were dependent on the goodwill of the latter, the same system could not be accepted with regard to other members of the special mission, namely, the administrative and technical personnel, who might in practice perform important functions. That would apply, for example, to a person in charge of filing or cipher officers, who were often in possession of secrets and documents of the sending States and should enjoy adequate protection.

11. For all those reasons, his delegation had submitted an amendment (A/C.6/L.762) which, if adopted, would ensure that members of the special mission who were nationals of the receiving State or were permanently resident in that State enjoyed the minimum guarantees necessary for the normal exercise of their functions; it called for the insertion of the words "administrative and technical" after the word "diplomatic" in paragraph 1 and the deletion of the word "official" from the same paragraph.

12. Mr. OGUNDERE (Nigeria) endorsed the two parts of the United Kingdom amendment and the French amendment. He thought it wise to refer them to the Drafting Committee, but, since Nigeria was not a member of that Committee, he would like to have a clearer idea whether the article was intended to restrict the right to enjoy immunity or the extent of privileges and immunities. It seemed to him that in the English text the word "only" referred to official acts and that consequently the point to bring out was that members of special missions who were nationals of or permanently resident in the receiving State did not enjoy immunity from jurisdiction and inviolability except in respect of official acts performed in the exercise of their functions.

13. He was prepared to support the Argentine amendment, since he believed that administrative and technical staff, who did the bulk of the work, should enjoy the immunities in question.

14. Mr. ROBERTSON (Canada) believed that the Argentine amendment raised a problem involving the practice of States. He would be unable to support the amendment, because it went beyond the limits of official functions and would establish privileges and immunities broader than those generally granted by Canada.

15. Mr. BONNEFOY (Chile) said that, in his view, the Argentine amendment was of paramount importance to small countries with very few qualified people capable of working in special missions. He would therefore support the amendment, for he believed that administrative and technical staff, who had access to very important official documents, should enjoy the same protection as diplomatic staff.

16. Mr. MARTINEZ CARO (Spain) fully supported both parts of the Argentine amendment. The first was a functional amendment whose effect was to strengthen the independence of the special mission. The second was equally justified, since all acts performed by members of the special mission in the exercise of their functions were official acts.

17. Mr. VALLARTA (Mexico) also supported the Argentine amendment. In his view, administrative and technical staff should enjoy privileges and immunities in the conditions specified in article 40, paragraph 1. He also favoured deleting the word "official".

18. Mr. ARBELAEZ (Colombia) said that he found no difficulty in supporting the Argentine amendment. It protected the interests of small countries and developing countries which sometimes had to use the services of nationals of a third State permanently resident in the receiving State, if they were particularly well qualified. Moreover, the word "official" might be misleading and should be deleted.

19. Mr. GARCIA ORTIZ (Ecuador) favoured both parts of the Argentine amendment and would support it because, in his view, administrative and technical staff needed the same legal protection as diplomatic staff and should therefore enjoy privileges and immunities. He would like to know the Spanish representative's opinion regarding the position of the word *"sólo"* in the Spanish text of article 40, paragraph 1.

20. Mr. DELEAU (France) expressed regret at having to disagree with the preceding speakers. In his view, article 40, as drafted by the International Law Commission and subject to the change proposed in the French amendment, reflected the true state of affairs. Article 40, paragraph 2 made allowance for the needs of the special mission with regard to its administrative and technical staff.

21. His delegation would vote against the Argentine amendment, which implied an unacceptable and unjustified encroachment on the principle of the equality of citizens, and, if that amendment were adopted, it would be obliged to vote against article 40.

22. Mr. CAPOTORTI (Italy) agreed with the statement of the French representative. The granting of privileges and immunities to members of special missions who were nationals of or permanently resident in the receiving State was an exceptional favour, as it was. The suggestion now under discussion had been considered during the drafting of the Vienna Convention on Diplomatic Relations, and the International Law Commission had, nevertheless, made its article 40 identical, except for the necessary changes in wording, with article 38 of that Convention. Moreover, he opposed deleting the word "official", which appeared in article 38 of the Vienna Convention. He would therefore vote against the Argentine amendment.

23. Mr. SANTISO GALVEZ (Guatemala) said that he would vote for the Argentine amendment not only from motives of regional solidarity but also because of its merits. He favoured the first part of the amendment for the reasons already indicated by other delegations. With regard to the second part, he asked the Expert Consultant to inform him whether the International Law Commission had felt that the word "official" was not absolutely essential or that there were some acts performed in the exercise of staff members' functions which might not be official.

24. Mr. BARTOS (Expert Consultant) said that the International Law Commission had considered the question whether members of the administrative and technical staff of special missions should be accorded the same privileges and immunities as members of the diplomatic staff. The question was not easy to answer, particularly since some so-called minor staff members, such as chancellery staff members, who did not have diplomatic status, were sometimes entrusted with more important functions than some members of the diplomatic staff. The Commission had finally decided to accept the solution adopted in the case of the Vienna Convention on Diplomatic Relations. Thus, although the proposal contained in the first part of the Argentine amendment had been among the solutions considered by the International Law Commission, the fact remained that it ran counter to the Commission's final decision.

25. With regard to the second part of the amendment, he explained that the International Law Commission had sought to protect the interests of the receiving State. If only acts performed in the exercise of functions were considered, the concept would be difficult to define precisely. The Commission had feared that deleting the adjective "official" would give the members of special missions too much latitude; that fear was even more justified in the case of persons who were nationals of or permanently resident in the receiving State, that is to say persons who were under the jurisdiction of that State. In that case too, the Commission had retained the solution adopted in the case of the Vienna Convention on Diplomatic Relations.

26. Mr. SOLHEIM (Norway) recalled that at Vienna in 1961 the question of the extent of the privileges and immunities to be accorded to the administrative and technical staff of permanent diplomatic missions had, in view of its importance, been discussed at some length. He saw no justification for increasing the number of persons entitled to enjoy the privileges and immunities provided for in the draft Convention by placing the administrative and technical staff of special missions on the same footing as the diplomatic staff. Moreover, the problem had already been thoroughly studied by the International Law Commission. The Committee was dealing with a work of codification and should therefore proceed with great care, for in the matter of special missions international practice provided little guidance; his delegation therefore opposed the first part of the Argentine amendment. It would also vote against the second part of the amendment, for if the word "official" was deleted it would be questionable whether the persons concerned should be granted the exceptional privileges provided for in article 40.

27. Mr. GASTLI (Tunisia) said he thought that the United Kingdom and French amendments would help to improve the wording of article 40. With regard to the Argentine amendment, he recalled that at Vienna his country had found it difficult to support the provisions of the Convention which granted privileges and immunities to members of the administrative and technical staff of permanent diplomatic missions who were nationals of or permanently resident in the accrediting State; the first part of the Argentine amendment now went even further than the provisions of the Vienna Convention in that respect. Since Tunisia had always considered it impossible, under its existing legislation, to grant privileges and immunities to Tunisian nationals in Tunisian territory, it could not support that part of the Argentine amendment. He wished to add that, if the Argentine proposal was adopted, article 40 would be contrary to the basic law of Tunisia, so that it would be difficult for the Tunisian Parliament to accept it. As for the second part of the Argentine amendment, his delegation attached very great importance to the retention of the word "official", since, if it was deleted, one might wonder just what acts were being referred to in article 40. His delegation would therefore vote against both parts of the Argentine amendment.

28. Mr. ROMPANI (Uruguay) said that he supported the first part of the Argentine amendment, although he would have preferred the term "specialized staff" to the term "administrative and technical staff", which was, on the

whole, very difficult to define. On the other hand, he was not in favour of the second part of the amendment, since his delegation preferred to see the word "official" retained.

29. Mr. VANDERPUYE (Ghana) said that the first of the drafting amendments proposed by the United Kingdom delegation was acceptable to him; however, he felt, for the same reasons as the Nigerian representative, that the second was not justified.

30. His delegation was not in favour of the Argentine amendment, since the persons referred to in article 40 were either nationals of or permanently resident in the receiving State and any privileges and immunities granted to them would be to the detriment of the rest of the community; the persons in question should not be granted more privileges and immunities than were required for the exercise of their official functions.

31. He wished to state in conclusion that he favoured the text of article 40 prepared by the International Law Commission.

32. Mr. ALLOTT (United Kingdom) said that the Argentine amendment raised serious questions of principle. He recalled that it was only after much hesitation that his delegation had finally accepted the fundamental idea on which the International Law Commission's draft was based, namely that special missions should be granted the same privileges and immunities as those granted to permanent diplomatic missions by the Vienna Convention. The Argentine amendment would grant members of the administrative and technical staff of special missions who were nationals of or permanently resident in the receiving State more extensive privileges and immunities than those granted by the Vienna Convention in the case of permanent diplomatic missions, although there was no reason for doing so and one could even argue that it should be the other way round. For his part, he considered the Argentine amendment absolutely unacceptable and wished to stress that, if it was adopted, his country would have the greatest difficulty in accepting the Convention as a whole. In view of the seriousness of the problem, his delegation proposed that the vote on article 40 should be postponed until the next meeting and urged other delegations to study carefully the implications of the Argentine amendment.

33. Mr. SILVEIRA (Venezuela) said that he favoured the text of article 40 prepared by the International Law Commission. The Argentine amendment was contrary to a fundamental principle of the Venezuelan Constitution, i.e. that of equality before the law, which would be violated if the receiving State was obliged to grant privileges and immunities to members of special missions who were nationals of that State.

34. Miss DAHLERUP (Denmark) observed that, in drafting the Vienna Convention, the International Law Commission had had a large body of customary law to guide it, while in the case of its draft articles on special missions it had performed more of a legislative function; it was therefore advisable to proceed very cautiously with the draft articles. Her delegation considered it impossible to accept a provision which would violate the principle of equality before the law, to which it attached great importance. She would therefore vote against the Argentine amendment.

35. Mr. OGUNDERE (Nigeria) said that he drew two conclusions from the explanations provided by the Expert Consultant: first, that it was not impossible to conceive of according to members of the administrative and technical staff of a special mission who were nationals of or permanently resident in the receiving State immunity from jurisdiction and inviolability in respect of official acts performed in the exercise of their functions, and, secondly, that the International Law Commission, in seeking to draw a balance between the interests of the receiving State and those of the sending State, had, in its text, weighted the balance in favour of the receiving State. That being the case, his delegation, in a spirit of compromise and in response to the appeal made by the United Kingdom delegation, urged all delegations to support the text of article 40 prepared by the International Law Commission.

36. The CHAIRMAN suggested that the vote on article 40 should be postponed until the next meeting, as proposed by the United Kingdom delegation.

It was so decided.

Article 41 (Waiver of immunity)

37. The CHAIRMAN, noting that no amendments had been proposed to the article, said that, in the absence of any objection he would take it that the Committee approved the text of article 41 prepared by the International Law Commission.

Article 41 was approved and referred to the Drafting Committee.

Article 42 (Settlement of civil claims) (A/C.6/L.759, A/C.6/L.763)

38. The CHAIRMAN noted that the Committee had before it two amendments to article 42, one submitted by Sweden (A/C.6/L.759) and the other by Trinidad and Tobago (A/C.6/L.763).

39. Mr. PERSSON (Sweden) observed that article 42 imposed on the sending State an obligation to waive the immunity of members of its special mission in respect of civil claims when that could be done without impeding the performance of the functions of the mission. The interpretation of the latter part of that provision lent itself to some ambiguity. Article 42 of the present draft was based on paragraph 5 of the former article 27, which had since become article 41. When the International Law Commission redrafted article 42, it limited it to civil claims but did not change its view that it was the right of the sending State to decide if, and when, the immunity should be waived. His delegation shared the views of those who had stated during the discussion of the paragraph in the International Law Commission that the idea embodied in it was a reasonable one; it was for the sending State alone to decide whether the immunity of its representatives could be withdrawn without detriment to the purpose for which it had been granted. That was at any rate the conclusion the Swedish delegation had drawn from the preparatory work. The

Swedish amendment (A/C.6/L.759) was based on the principle of good faith and did not alter the moral obligation which the article imposed on the sending State, but his delegation felt that if the words "when this can be done" were replaced by the words "in any case where, in the opinion of the sending State," the actual substance of the article, namely the special nature of the obligation that it imposed, would become clearer.

40. Mr. BADEN-SEMPER (Trinidad and Tobago) said that perusal of the work that had led up to the adoption of article 42 showed that there had not been adequate discussion of the article, considering the importance of the question with which it dealt. He shared the view of the Swedish representative that neither the preparatory work nor the discussions in the International Law Commission gave a clear enough indication of the scope of the article or of the reasons for its inclusion in the draft Convention. There had been no previous attempt to give a provision of that kind the status of a rule of positive law. He considered that, if article 42 was retained, the draft Convention would contain a contradiction by granting, on the one hand, an immunity which the sending State had a discretionary power to waive, and on the other hand prescribing that the sending State was under a duty to waive the immunity. There were also difficulties inherent in attempting to deal with the question of the waiver of immunities with respect to civil claims (article 42) in a radically different manner from the question of the waiver of immunities with respect to criminal and administrative jurisdiction (article 41). Finally, viewed against the provisions of article 32 of the Vienna Convention on Diplomatic Relations, the provisions of article 42 of the draft Convention on Special Missions might have the result of placing very senior representatives on a special mission in a position inferior to that of junior officers in a permanent diplomatic mission who were assisting the special mission.

41. Even if it were conceded that article 42 did not seriously affect the draft Convention, inasmuch as it provided grounds upon which the immunity need not be waived, there was still the question of whether the burden of proof in establishing grounds for refusal to waive immunities was affected. While the adoption of the Swedish amendment would help to alleviate that difficulty, it might on the other hand only exacerbate the basic inconsistency between article 41 and article 42 of the draft Convention.

42. Since article 42 was not a normative provision, his delegation felt that, at least in its present form, it should not be included in the draft Convention, and had accordingly submitted its formal proposal to that effect (A/C.6/L.763).

43. Mr. BARTOS (Expert Consultant) said that article 42 was based on the principle laid down in resolution II, which had been adopted on 14 April 1961 by the United Nations Conference on Diplomatic Intercourse and Immunities.[1] He agreed that the rule stated in the resolution was not ideal, since it imposed on the sending State an obligation that was qualified by two recommendations whose application was left to the discretion of the sending State. The Committee should therefore decide whether article 42 was to be retained in the draft Convention or annexed to it in the form of a resolution.

44. The intent of article 42 was surely praiseworthy, since, in the interests of any persons having claims against members of the diplomatic staff of special missions, the article imposed on the sending State the obligation to waive the immunity enjoyed by such staff when that would not impede the performance of the functions of the mission. In that regard, too, the wording of article 42 was clearly less than perfect, for it did not truly reflect the spirit in which it had been drafted. Moreover, the concept of a just settlement remained vague, in that the procedures for reaching such a settlement were not specified in the article.

45. He felt that, in view of the imperfect wording of article 42, the Committee should perhaps recognize that, despite its laudable intentions, the International Law Commission had not been able to work out a satisfactory legal formulation and should instruct the Drafting Committee to eliminate the article as a legal rule but to include it in the draft Convention either as a recommendation or as a resolution. He would like to know the views of delegations in that regard.

46. Mr. MOSCARDO DE SOUZA (Brazil) said that he supported the Trinidad and Tobago delegation's proposal to delete article 42, as well as Mr. Bartos' suggestion that its provisions should be embodied in a recommendation annexed to the draft Convention.

47. Mr. CAPOTORTI (Italy) said that immunity from civil jurisdiction was sometimes justified, but not when the performance of the functions of the person enjoying such immunity would not be impeded by the action brought against him. Article 42 represented an effort to take account of the interests of civil claimants by lessening the sometimes excessive rigidity of the principle of immunity from jurisdiction. It seemed particularly reasonable to make exceptions to that principle in the case of special missions, since, because of their temporary nature, they were less likely than permanent missions to become involved in a lawsuit and the performance of their functions was therefore less likely to be impeded. Article 42 laid down two obligations: first, the obligation to waive immunity from jurisdiction when the sending State could do so without causing the performance of the functions of the special mission to be impeded, and, secondly, the obligation, if the case arose, to seek a just settlement of the claim. His delegation felt that those two rules were complementary and, furthermore, that the discretionary power which they conferred on the sending State was not incompatible with the normative nature of a convention. The Committee could, of course, decide to make article 42 a mere recommendation, but it should be noted, in that connexion, that unless a formal proposal was made along the lines of the Expert Consultant's suggestion, the Committee would have to choose between retaining and completely eliminating the article. His delegation would prefer to see article 42 retained in its present form rather than altered in the manner proposed by the Swedish amendment, which, in its view, placed even greater emphasis on the discretionary power of the sending State than did the International Law

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

Commission's text. It would therefore vote in favour of retaining article 42 and against the Swedish amendment.

48. Mr. REIS (United States of America) said that he was in favour of retaining article 42 in its present form, for the reasons just indicated by the Italian representative. The fact that the obligation imposed on the sending State was contingent on whether or not the performance of the functions of the mission would be impeded was entirely reasonable and brought the article into harmony with the notion that the functions of the mission were of primary concern, a concept fundamental to the draft Convention as a whole. The discretionary power conferred on the sending State in that connexion did not mean that no legal rule existed. Furthermore, the secondary obligation requiring the sending State to "use its best endeavours to bring about a just settlement of the claims" was based on the principle of good faith, and introduced an element of flexibility and realism which, in the view of his delegation, would be useful in practice.

49. Being aware of the difficulties that the conduct of members of a special mission could create for the citizens of a receiving State, he did not consider it superfluous to remind States of their possible duties as sending States and it was therefore not desirable to delete article 42. The considerations that had prompted the drafting of the article reflected changes in international relations, and it was difficult to see why the Vienna Convention on Diplomatic Relations of 1961 should be taken as a model in the present case. He reserved his delegation's right to speak on the question again.

The meeting rose at 6 p.m.