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

1. Mr. YASSEEN (Iraq) said that his delegation agreed with the substance of the rule laid down in article 42 but considered that a resolution would be a more suitable way of expressing the idea. In addition, article 41 gave the sending State power to waive immunity from jurisdiction and could be interpreted as providing a perfectly adequate safeguard ensuring that justice would be done. He was convinced that States were responsible entities inspired by considerations of justice. If article 41 was applied in the light of the fundamental principle of good faith, the results sought by article 42 would be ensured. Moreover, from a juridical point of view, if a principle was stated in the form of a legal provision, that provision had to create an obligation, because of the nature of a rule of law *in abstracto*. But article 42 did not create an obligation; it would in fact have been illogical to draft an instrument which provided for immunity from jurisdiction and then include in it an obligation to waive that immunity. The International Law Commission had avoided the illogicality by introducing the proviso concerning the functions of the special mission. It was clear from the Commission's discussion of the text now before the Committee as article 42 that it did not impose an obligation, since the waiver for which it provided was at the sole discretion of the sending State. The Swedish amendment (A/C.6/L.759) brought that out more clearly. Furthermore, the article did not require the sending State to give its reasons for a waiver. Its discretion in the matter was therefore absolute. It was unfortunate that article 42 was worded so as to suggest an obligation, when all it really provided was an option. Since the article did not state an obligation, the idea it contained should not be expressed as a legal provision; moreover, since its purposes were adequately covered by article 41, it was superfluous. However, it was necessary to allay the fears of some delegations that private interests would be insufficiently protected if the article was deleted. That could best be achieved by a recommendation to States to do everything possible to ensure justice. A General Assembly resolution to that effect would suffice. The 1961 Vienna Conference had recognized the difficulty of embodying the idea in a legal provision and had instead adopted a recommendation on the subject in the form of a resolution. He therefore proposed that article 42 should be deleted from the draft Convention; that the Drafting Committee should be instructed to prepare a draft resolution on the subject for consideration and adoption by the General Assembly; that the substance of that draft resolution should be identical with that of article 42; and that its formal parts should be based on those of resolution II adopted by the 1961 United Nations Conference on Diplomatic Intercourse and Immunities.[1]

2. Mr. LIANG (China) said that the practical value of a resolution was open to doubt. Several publications dealing with the 1961 Vienna Conference gave the text of the Vienna Convention on Diplomatic Relations but did not reproduce the associated resolutions. There was also the disputed question of how far General Assembly resolutions had any binding force. He was not certain whether they were on a much higher level than those adopted by international conferences. Also, article 42 was worded in peremptory terms, which might make it difficult to convert it into a resolution couched in the terms of resolution II of the Vienna Conference. Article IV, section 14, and article V, section 20, of the Convention on the Privileges and Immunities of the United Nations showed that an international convention could contain something which was merely an exhortation. On the other hand, although that treatment might be considered appropriate for the relatively new field of the privileges and immunities of international organizations, it was not necessarily suitable for the time-honoured usages of diplomatic practice. That raised the question of codification in preference to the progressive development of international law. It was from the juridical point of view, rather than on account of its language, that article 42 was out of place in the draft Convention, because it was more *de lege ferenda* than *lex lata*, and *de lege ferenda* with respect only to the practice of certain States and the views of particular jurists. That contention was supported by an analysis of State practice as a whole, by the opinions expressed in the International Law Commission, and by the fact that the Vienna Conference had only adopted a resolution on the subject. The question was well summed up on pages 272 to 274 of the work on diplomatic privileges and immunities by C. E. Wilson, published as recently as 1967.[2] His delegation would not object to the proposal to convert article 42 into

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

2 Clifton E. Wilson, *Diplomatic Privileges and Immunities* (Tucson, Arizona, The University of Arizona Press, 1967).

a resolution, an idea which would probably command wide support in the Committee.

3. Mr. VANDERPUYE (Ghana) said his delegation considered that article 42 should be divided into two sections, each calling for different treatment. The first, consisting of the words up to and including "the functions of the special mission", was adequately covered by the provision in article 41, paragraph 1, and could therefore be deleted. The remainder of the article should be retained, in order to provide a safeguard for any civil claims not falling under the exceptions enumerated in article 31, paragraph 2. That would ensure that justice was done in all cases, but it would not prejudice the efficient functioning of the special mission. As to whether the matter should be dealt with by resolution rather than in the draft Convention itself, he thought the Committee should pay close attention to the progressive development of international law. Although the matter might not have been suitable for inclusion in a convention adopted in 1961, the time had come to give it the status of real law.

4. Mr. BARTOS (Expert Consultant) explained that article 42 had its origin in an amendment to the Vienna Convention on Diplomatic Relations proposed by the representative of the Netherlands at the United Nations Conference on Diplomatic Intercourse and Immunities. In formulating the amendment, the Netherlands representative had had in mind the difficulties arising as a result of traffic accidents and the consequent liability of insurance companies. A number of other delegations had opposed the inclusion of the amendment in the Convention, but in a spirit of compromise had agreed to its adoption in the form of a resolution which, although not legally binding, would none the less exercise a certain moral influence. The debate on the proposed amendment at the 27 and 28th meetings was reflected in volume I of the *Official Records* of the Conference.[3]

5. The International Law Commission had restricted the obligation to waive immunity to cases involving civil claims and had imposed the condition that waiver of immunity should not impede the performance of the functions of the special mission, in order to avoid situations where, for instance, an obligation to waive immunity might result in the revelation of State secrets in court, thus undermining the authority and prestige of the mission. He recalled that the International Covenants on Human Rights[4] contained no provision for direct sanctions. Therefore, the Commission had decided to include in the draft articles an express provision which would safeguard the human rights of nationals of the receiving State against violations in respect of civil claims.

6. Mr. ROMPANI (Uruguay) endorsed the entire text of the draft article in the form in which it was submitted; it had been subjected to careful study by the International Law Commission, and the Committee should exercise great caution in amending it. That text undoubtedly had shortcomings. While it distinguished between the different branches of law by referring specifically to civil claims, it might be difficult to provide a precise definition of such claims. In addition, it was perhaps more customary to speak of an equitable settlement than of "just settlement" as referred to in article 42, but neither justice nor equity was an easy concept to define, and the meaning of the former, in particular, was apt to be extremely flexible in common usage.

7. Like the representative of Iraq, he felt that the substance of article 42 flowed directly from article 41, and he would have no objection to the deletion of article 42 if he could be certain that article 41 would be interpreted in the way the Iraqi representative had interpreted it. However, he shared the view of the Ghanaian representative that article 42 might not be entirely superfluous. The fact that an article might not lay down any specific obligation was not in itself an argument for the deletion of that article. In fact, the same could be said of most rules of law. The penal codes of most countries did not proclaim any obligation not to kill, but merely established penalties for killing. In any case, under article 42, States were obliged to use their best endeavours to bring about a just settlement of the claims when immunity was not waived. Stressing that laws should be framed in terms of the minimum which could ethically be demanded, he reiterated his support of the article, which should be retained, if only for the reasons advanced by the representative of Italy (1132nd meeting). While the Swedish amendment might improve the text of the article, he preferred to leave it as it stood and would not support any other amendment.

8. Mr. NJENGA (Kenya) said that his delegation generally favoured adherence to the original text of the draft articles, since it was very carefully drafted and established a fair balance among the interests of all States. That was true of article 42, the provisions of which were, moreover, fully in accordance with both the functional and the representative theories regarding immunity. The functional criterion was explicitly fulfilled by the inclusion of the phrase "when this can be done without impeding the performance of the functions of the special mission". Since the application of the article was restricted to cases involving civil claims, the representative capacity of the person in question could not be affected.

9. It would hardly be proper to reject the article merely because its equivalent did not appear in the Convention of 1961; after all, the work of the International Law Commission encompassed not only the codification, but also the progressive development of international law. He pointed out that, in the application of the 1961 Convention, his country had continually encountered problems in connexion with the settlement of civil claims, and noted that the performance of the functions of a special mission could be impeded by refusal to waive immunity. In the view of his delegation, the provisions of article 42 merely gave effect to the obligation to respect the laws and regulations of the receiving State laid down in article 48.

10. For those reasons, his delegation could not accept the proposal of Trinidad and Tobago (A/C.6/L.763) that the article be deleted. However, he considered that the Swedish amendment would improve the text by making it clear that the sovereignty of the sending State must not be infringed. The Swedish proposal had been opposed on the grounds that it would create only an imperfect obligation on the

3 United Nations publication, Sales No.: 62.X.2.

4 See General Assembly resolution 2200 A (XXI), annex.

part of the sending State, but in defence of the amendment he recalled that even the obligation to accept jurisdiction once immunity had been waived, under article 41, paragraph 4, was imperfect in that a separate waiver was necessary before the judgement could be executed. It was a fact of life in international relations that States had no choice but to rely upon one another's good faith; no international obligation could be "perfect" unless compliance was exacted by force.

11. Mr. SHAW (Australia) noted that no objection had been raised to the substance of the article under discussion; indeed, the principle contained in article 42 was a generally accepted principle of justice and equity. Moreover, the International Law Commission had seen fit to include the article. Only members of the Commission who opposed the retention of article 42 had spoken in the Sixth Committee; it should be remembered, however, that the majority of the members of the Commission had supported the provision concerned.

12. The question should be approached pragmatically and not from the theoretical, jurisprudential viewpoint. The question was whether the article would serve a useful purpose. It was true that States could not be treated like children; but the men who conducted the affairs of State needed to be reminded of their duty, even if they could not be compelled to perform it. Article 42 would serve as a salutary reminder to States which might not be sure what the concept of good faith required of them and show them how to act in accordance with that concept. The Australian delegation therefore believed that the article would be useful.

13. Admittedly, the idea could be expressed in a resolution of the General Assembly. As had been pointed out, however, resolutions were often overlooked and were not always readily available. The Convention should therefore proclaim the discretionary power of the sending State to waive immunity and explain how to exercise the power. It was not necessary for a provision to constitute a command or impose an obligation in order to have the force of law. In any case, article 42 did contain an obligation, even if the obligation was dependent upon a condition whose existence was left to the discretion of the sending State. Once that State had decided that the immunity could be waived without impeding the performance of the functions of the special mission, it was under an obligation to waive the immunity. Municipal law often contained provisions of a similar nature, in which the exercise of an optional or obligatory power was made dependent upon the existence of certain conditions and an obligation could not be enforced.

14. His delegation favoured the retention of article 42 in the text of the Convention.

15. Mr. NALL (Israel) said that the importance of article 42, which attempted to strike a balance between the principle of sovereignty and humanitarian principles, could be seen from the International Law Commission's commentary. The article was based on the same consideration as had been recalled in the preamble of resolution II of the United Nations Conference on Diplomatic Intercourse and Immunities, namely that the purpose of immunities was not to benefit individuals but to ensure the efficient performance of the functions of missions and that there was concern that claims of diplomatic immunity might deprive persons in the receiving State of remedies to which they were entitled by law. In the International Law Commission, the inclusion of an article on the settlement of civil claims had been proposed by the Drafting Committee following a proposal made by Mr. Jiménez de Aréchaga.[5] The article had been adopted by 12 votes to none, with 4 abstentions.[6]

16. His delegation would vote for the retention of the article, which it considered to be of paramount importance. Article 42 was in keeping with the general tenor of the draft Convention. It would promote friendly relations among States and the progressive development of international law and ensure that humanitarian considerations were taken into account.

17. Mr. CASTRÉN (Finland) thought that the article, which had been adopted by a large majority in the International Law Commission and imposed two important obligations on the sending State, should be kept in the text of the Convention. It was true that the sending State itself had to decide whether or not immunity could be waived and, if it could not be waived, what should be done to bring about a just settlement of claims. However, it had to act in good faith. The obligation was therefore quite a strong one.

18. Article 42 complemented and did not contradict article 41. No objection had been raised to the latter article, although its first paragraph was actually even weaker than article 42. Similarly, in article 34 of the draft articles on representatives of States to international organizations (see A/7610 and Corr.1, chapter II), the International Law Commission had adopted provisions which were substantially the same as those of the article under discussion.

19. Mr. GARCIA ORTIZ (Ecuador) thought that articles 41 and 42 were binding to the same degree. Both described a duty but left its exercise to the discretion of the sending State. The comments made by the representative of Iraq were correct from the strictly academic viewpoint. In practice, however, considerable difficulties arose when civil claims could not be brought or settled because the members of a special mission enjoyed immunity from jurisdiction. From the viewpoint of the receiving State, article 42 was necessary, even if it was not a peremptory rule of law. The first part of the article was simply an explanation of the circumstances in which the sending State could waive immunity. The second part merely expressed a hope that the sending State would in good faith seek a just settlement of claims; in both municipal and international law, it was customary to express hopes, which might possibly turn into realities.

The meeting rose at 1 p.m.

5 See *Yearbook of the International Law Commission, 1967*, vol. I (United Nations publication, Sales No.: E.68.V.1), 918th meeting, para. 10.

6 *Ibid.*, 936th meeting.