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11th meeting of the Committee of the Whole

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ELEVENTH MEETING

Monday, 13 March 1961, at 10.30 a.m.

Chairman: Mr. LALL (India)

Consideration of the draft articles on diplomatic intercourse and immunities adopted by the International Law Commission at its tenth session (A/CONF.20/4) (*continued*)

Article 5 (Appointment to more than one State) (*continued*)

1. The CHAIRMAN said that some delegations wished to explain their voting at the tenth meeting.

2. Mr. BARTOŠ (Yugoslavia) explained that at the tenth meeting his delegation had voted against reference to the Drafting Committee of several amendments because it believed that they related to substance.

3. Mr. WICK KOUN (Cambodia) said that his delegation had abstained in two votes on amendments to article 5, since it had hoped the Committee would be able to vote on the original text, which it supported, and not only on the amendments.

Article 6 (Appointment of the staff of the mission)

4. The CHAIRMAN invited debate on article 6 of the International Law Commission's draft (A/CONF.20/4) and drew attention to the amendments submitted.[1]

5. Mr. CAMERON (United States of America), introducing his delegation's amendment (L.20), said that its object was to state explicitly what was already implicit in the article as drafted by the Commission. Inasmuch as the new paragraph 2 proposed by Mexico (L.32 and Rev.1) would achieve the same purpose, and in order to facilitate debate, his delegation would, however, withdraw its amendment and instead support the Mexican proposal.

6. Mr. SUFFIAN (Federation of Malaya) said that the amendment submitted by his delegation (L.45) was purely a drafting amendment. In giving the receiving State the right to require the names of attachés " to be submitted beforehand, for its approval ", article 6 implied that the receiving State was the superior authority, whereas in reality, diplomatic relations were based on equality between States. The object of the amendment was to remove that implication. His delegation would be content if the amendment was referred to the Drafting Committee without a vote.

7. Mr. BARUNI (Libya) said that his delegation would not press for a vote on its amendment (L.47) if his government's right to refuse to accept any military, naval or air attaché was assured.

8. Mr. de VAUCELLES (France) said that his delegation would agree that its amendment (L.1) should be referred to the Drafting Committee, together with the amendment proposed by Italy (L.48 and Rev.1), and the sub-amendment to the French amendment which had been submitted by Spain and Tunisia (L.92). In spite of variations of detail, the Drafting Committee could base a satisfactory text on those amendments and that proposed by Chile and Ecuador (L.104).

9. He pointed out, however, that the second of his delegation's amendments extended the provision to specialized technical advisers and attachés. The Drafting Committee should not lose sight of the point, which was not mentioned in any of the amendments submitted by other delegations.

10. The CHAIRMAN appreciated the French delegation's endeavour to save time, but pointed out that the amendments proposed by France, Italy, the Congo (Leopoldville) and Chile and Ecuador went into details of the procedure and machinery for the recognition of diplomatic rank and provileges. The draft as it stood mentioned no such details but merely sought to establish principles. The Committee would therefore have to decide whether it wished provisions on machinery and procedure to be introduced into the draft.

11. On the other hand, the sub-amendment to the French amendment proposed by Spain and Tunisia raised a question of principle rather than procedure, in that it sought to determine the status of the diplomat pending the receiving State's decision on his formal recognition. The Committee might consider adopting a provision to the effect that, pending that decision, the new member of the diplomatic staff should enjoy privileges and immunities provisionally. It might, however, be unnecessary to add any such provision in article 6, since article 18, paragraph 1, seemed to cover the point fully.

12. Mr. EL-ERIAN (United Arab Republic) suggested that the point should be discussed in connexion with article 38 on privileges and immunities, and that article 6 should deal only with the appointment of the staff of the mission.

13. Mr. GASIOROWSKI (Poland) supported the Chairman's view that, in so far as the amendment of France and the related amendments, which his delegation opposed, touched on an extremely important principle, they should not be referred to the Drafting Committee without a decision by the Committee of the Whole.

14. Mr. BOUZIRI (Tunisia) said that the point mentioned by the Chairman was covered only incidentally by article 38, which referred to " every person entitled to diplomatic privileges and immunities ". The persons so entitled were not defined in article 38, and the two questions were distinct.

15. The original text of article 6 was simple and flexible and to some extent reflected current practice. It did not, however, cover certain difficulties and details. The sub-amendment presented by his delegation jointly with Spain dealt with procedure, but with procedure very closely linked to principle. Article 6 stressed the freedom

[1] The following amendments had been submitted: France, A/CONF.20/C.1/L.1; United States of America, A/CONF.20/C.1/L.20; Mexico, A/CONF.20/C.1/L.32 and Rev.1; Argentina, A/CONF.20/C.1/L.38; Fed. of Malaya, A/CONF.20/C.1/L.45; Spain, A/CONF.20/C.1/L.46; Libya, A/CONF.20/C.1/L.47; Italy, A/CONF.20/C.1/L.48 and Rev.1; Congo (Leop.), A/CONF.20/C.1/L.74; Spain and Tunisia, A/CONF.20/C.1/L.92; Chile and Ecuador, A/CONF.20/C.1/L.104.

of the sending State to appoint the members of its mission, making no distinction between diplomatic staff and administrative and technical staff. The same confusion arose in the draft in regard to the granting of immunities, and there, too, a distinction should be made. The freedom of the sending State to appoint all the members of its mission was limited only by articles 8 and 10. Accordingly, his delegation could not support the draft article as it stood. A total freedom of appointment might embarrass the receiving State. Although under article 8 the receiving State could declare any member of the staff persona non grata, it would be better to include a preventive measure rather than a remedial measure that might be difficult to apply in practice. The provision in article 6 that the receiving State might require the names of military, naval or air attachés to be submitted beforehand " for its approval " was based on the prior assumption that such appointments were normal. His delegation did not accept that assumption. The special character of such appointments should be stressed and they should require the decision, rather than the approval, of the receiving State. The amendment proposed by Italy, although not entirely satisfactory, was an improvement on the existing text, and his delegation supported the principle embodied in it and in the amendment submitted by Libya.

16. The amendment proposed by France, supplemented by that by Chile and Ecuador, limited the freedom of appointment and provided safeguards for the receiving State. There was no provision in either amendment, however, for a time limit within which entry on the diplomatic list must be made. There should be some guarantee that the period before entry was not long or indefinite. The sub-amendment proposed by Spain and Tunisia therefore provided that a decision concerning entry should be taken " as soon as possible ", and that in the interim the diplomatic agent should be able to perform his functions and enjoy security and the respect due to him as the representative of his country, at least provisionally. The receiving State should accept the good faith of the sending State and presume in favour of the diplomatic agent. His delegation could not support any amendment which did not correspond to those views.

17. Mr. KAHAMBA (Congo: Léopoldville), introducing his delegation's amendment, said that its purpose was to specify the essential requirements: notification of the appointment to the receiving State, and that State's consent, albeit tacit, to the appointment. The general diplomatic usage was that the notification was effected by a note verbale, and the absence of the reply from the receiving State was deemed to constitute acceptance. But the request for a diplomatic visa, and the granting of the visa, would also constitute notification and acceptance.

18. Diplomatic status could not be made to depend on the entry of the diplomatic agent's name on the diplomatic list, which was merely a list of names drawn up mainly for the benefit of the authorities. The entry of a name on that list did not itself confer diplomatic status, nor did the omission of a name *per se* deprive the person concerned of that status.

19. He could not accept the idea expressed in the joint sub-amendment by Spain and Tunisia of diplomatic privileges being granted " by courtesy ". Such privileges were conceded as of right.

20. Mr. MELO LECAROS (Chile) withdrew the joint amendment of his delegation and Ecuador, on the understanding that the reference in it to the diplomatic register rather than the diplomatic list would be referred to the Drafting Committee. The diplomatic register, unlike the diplomatic list, would always be up to date.

21. He could accept the sub-amendment proposed by Spain and Tunisia, in particular its concluding sentence.

22. He drew attention to the passage in the Argentine amendment which provided that the receiving State was not obliged to state reasons for its refusal of a military, naval or air attaché.

23. Mr. YASSEEN (Iraq) said that the articles should be confined to the statement of general principles of diplomatic law and should not deal with the details of the application of those principles. In particular he opposed any reference to the diplomatic list, which would give it undue importance. The establishment of the diplomatic list was purely an administrative measure intended to facilitate the identification of diplomatic agents. The entry of a name on the list did not raise an absolute presumption that the person enjoyed diplomatic status, which was derived from international law, not from entry on the diplomatic list.

24. Mr. REGALA (Philippines) said that it was difficult to distinguish between questions of substance and those of procedure. For example, many authorities regarded entry on the diplomatic register as a matter of procedure, but others regarded it as an essential prerequisite to the enjoyment of diplomatic privileges. Conflicting rulings had also been given on that point by national courts.

25. The Committee should therefore decide as a matter of substance whether it regarded notification and acceptance, or entry on the diplomatic register, as the prerequisite for the enjoyment of diplomatic immunities.

26. Mr. de VAUCELLES (France) said that his delegation was prepared to agree that the question of the provisional status of a diplomatic agent pending recognition should be discussed in connexion with article 38. The French amendment to article 6, however, dealt with other points as well and filled a number of gaps in the article.

27. It was necessary to refer expressly in article 6 to the receiving State's droit de regard. He agreed with the Chilean representative that the receiving State's recognition of the status of a diplomatic agent was effected by entry on the diplomatic register, not the actual publication of the diplomatic list. In all countries where he had served as a diplomat, he had been issued with a card bearing a number, a fact which clearly showed that a register of foreign diplomatic officers existed in all those countries. However, marginal cases arose, which led in practice to negotiation between a head of mission and the receiving State. If it were desired to maintain the maximum privileges deemed essential to diplomatic

agents, it was necessary to do everything possible to limit numbers.

28. For those reasons his delegation would not accept any text which did not contain the idea of an agreement between the sending State and the receiving State, expressed by the entry in the diplomatic register and the issue of a special card.

29. Mr. JEZEK (Czechoslovakia) said that his delegation could accept the Argentine amendment, but considered that the other amendments would not improve article 6 and would only complicate the existing practice.

30. In particular he could not accept the idea, expressed in the sub-amendment proposed by Spain and Tunisia, that diplomatic privileges were enjoyed merely by courtesy pending registration. A considerable time might elapse between a diplomatic agent's arrival and his registration in the receiving State, and it was extremely undesirable, both for the receiving State and for the diplomatic agent, that his status should be uncertain during that period. The provisions of that sub-amendment, and of the French amendment, conflicted with the provisions of article 38, paragraph 1. They were also at variance with the recognized practice, which was that a diplomatic agent enjoyed diplomatic privileges from the moment he crossed the frontier.

31. He opposed the Italian amendment, which would introduce an added complication in requiring the receiving State's written acknowledgement of the communication of the appointment.

32. For those reasons his delegation urged that article 6 should be adopted as drafted by the Commission, subject only to consideration of the Argentine amendment.

33. Mr. MAMELI (Italy), introducing his delegation's amendment, said that it set forth the rule that the consent of the receiving State was essential to the existence of diplomatic status. Several speakers had referred to the right of the receiving State to declare a diplomatic officer persona non grata. That right existed at all times, but its exercise was an extremely delicate matter. It would be unwise to create conditions under which such unpleasant incidents might be multiplied unnecessarily.

34. As for the form in which the receiving State's consent should be given, his delegation still thought that the best form was that State's acknowledgment of the notice of appointment. Whereas the appointment of the head of the mission was subject to the agrément of the receiving State, appointment of the members of the mission's staff was not; and some provision had to be made to safeguard the receiving State's right of decision.

35. With regard to military, naval or air attachés, the Italian amendment strengthened article 6 by providing that " the sending State shall request beforehand this approval ".

36. Mr. VALLAT (United Kingdom) said that the purpose of the articles was to codify existing principles and rules of general application, subject only to those exceptions which were essential to deal with particular cases.

37. Article 6, as drafted by the International Law Commission, provided an excellent example of that method. The first sentence stated the general principle: the sending State had right freely to appoint the members of the staff of the mission. The second sentence set forth an exception for military, naval and air attachés. He did not believe that the Conference should attempt to deal with details of procedure. In particular, it was not advisable to refer to the internal procedure of the establishment of the diplomatic list. The exact purpose of the diplomatic list varied from one State to another, and the Conference could not iron out the differences. Moreover, procedure was dealt with in other articles of the draft, such as article 12 on the commencement of the functions of the head of the mission, article 15 on precedence, and article 38 on the duration of privileges and immunities.

38. For those reasons his delegation urged the rejection of all amendments to article 6.

39. Mr. KRISHNA RAO (India) said that the records of the discussion in the Commission showed that it had not attached to the diplomatic list the same importance as did some of the amendments before the Committee.

40. It had emerged from those discussions that no formal act such as agrément was necessary in the case of diplomatic agents other than the head of mission, but that some means should be provided whereby the receiving State could be advised of their presence in its territory.

41. English courts had held more than once that the entry of a name on the diplomatic list was not an essential prerequisite to the enjoyment of diplomatic privileges.

42. In any event, whatever form was recognized for the acceptance by the receiving State, that State was bound to observe the privileges and immunities of the diplomatic agent from the moment he entered its territory.

43. The Italian amendment and the Mexican amendment seemed to cover the question of consent by the receiving State, and the Indian delegation found them acceptable.

44. Mr. TUNKIN (Union of Soviet Socialist Republics) supported the Commission's draft of article 6, which reflected the existing practice. First, it stated the right of the sending State freely to appoint its diplomatic agents. Secondly, it emphasized the distinction between the head of the mission, for whose appointment the prior agrément of the receiving State was necessary, and the members of the mission, who could be appointed without any prior request for consent. Since article 8 clearly gave the receiving State the right at all times to declare any diplomatic agent persona non grata, no useful purpose would be served by any addition to article 6.

45. If the receiving State refused to grant a diplomatic card or to include a name on the diplomatic register, as suggested in some of the amendments, it would in fact be applying article 8.

46. The attempt made in some of the amendments to regulate points of detail would only lead to complication in the appointment of diplomatic agents. Some, moreover, related to matters dealt with in articles other than article 6. For example, the question of the notification

of appointments, mentioned in the Spanish delegation's amendment, was relevant to article 9. Similarly, the Mexican delegation's proposal for a paragraph 2 related to the subject-matter of article 8.

47. The second sentence of article 6 also stated an accepted practice. Some, but not all, States required the names of military, naval and air attachés to be submitted beforehand for approval, and the purpose of the provision was to enable them to continue to do so.

48. The French proposal that the same treatment should be extended to specialized technical advisers and attachés went far beyond the existing practice. It would empower the receiving State to enquire into the division of work inside the diplomatic mission.

49. Mr. MATINE-DAFTARY (Iran) said that it was a fundamental principle of a debate on amendments that the Chairman had full discretion to decide whether amendments were relevant or not. If the Conference's rules of procedure did not contain that principle, he suggested that a new rule should be added.

50. The French amendment was not relevant to article 6. It introduced the procedure of agrément in relation to all the members of the mission, and the procedure for which it provided was slow and complicated. It would make recognition of any member of a mission depend upon his entry on the diplomatic list. That would delay indefinitely his assumption of diplomatic privileges and immunities, for it was well known that in practice very few States could keep their diplomatic lists constantly up to date. It would therefore be more appropriate to discuss the amendment in connexion with article 38.

51. Mr. GLASER (Romania) said that the French proposal would completely reverse existing practice as reflected in article 6. It could also lead to the extraordinary situation that a diplomat travelling to a new post would enjoy diplomatic privileges and immunities in all the countries of transit, because his status was written on his passport, but not in his country of assignment, because he did not appear on the diplomatic list. States would be unwilling to send diplomats abroad unless they were certain to enjoy diplomatic privileges and immunities. It was true that the sub-amendment of Spain and Tunisia provided a courtesy safeguard; but that was not a proper substitute for protection under international law. The situation for which the French amendment was intended to provide would hardly ever arise, and he could not see that so rare a case justified a radical change in the existing law.

52. Of the other amendments, he would support that submitted by Argentina.

53. Mr. de ERICE y O'SHEA (Spain) said that the two main points stressed in the amendments to article 6 were freedom of appointment for the sending State, and acceptance by the receiving State. He was willing to withdraw his delegation's amendment in favour of the Mexican amendment if the representative of Mexico would accept the following minor amendments: deletion of the reference to military, naval and air attachés in the second sentence of paragraph 1, and the addition to paragraph 2 of words to the effect that a State was not obliged to give reasons for refusing the approval of a member of a mission. He hoped his offer might facilitate withdrawal of the amendments submitted by Chile and Ecuador, Argentina, and possibly those submitted by Libya and the Congo (Leopoldville).

54. Mr. OJEDA (Mexico) accepted the sub-amendments proposed by the Spanish representative. In reply to comments on the Mexican amendment, he said that a State's right to refuse a member of the mission's staff was not the same as its right to declare a member persona non grata (article 8). His delegation's amendment was relevant to article 6, for in both a distinction was made between general and military personnel.

55. Mr. BARTOŠ (Yugoslavia) said that both practically and theoretically the best amendment, and the closest to past and current practice, was that submitted by Italy. It postulated an understanding between the States concerned. The Italian delegation, he was sure, wished to spare a diplomat the unpleasant experience of being sent out by his country wiht a diplomatic visa and later being declared persona non grata by the receiving country; indeed, he saw no reason why anyone should be put in such a position. He would vote for the Italian amendment.

56. Mr. DELFINO (Argentina) said he would withdraw his delegation's amendment on condition that the provision finally adopted provided that a State was not obliged to give reasons for declaring a member of a mission persona non grata. It was an exceedingly important principle, and its omission could cause difficulties between States.

57. Mr. TUNKIN (Union of Soviet Socialist Republics) admitted that the representative of Mexico was right in insisting that the second part of his amendment was not fully covered by article 8. Nevertheless, he still found the amendment difficult to accept, for it appeared wrongly to place sending and receiving States on an equal footing. Adequate safeguards were provided by articles 8 and 10, and he therefore considered that article 6 should not be amended.

The meeting rose at 1.10 p.m.

TWELFTH MEETING

Monday, 13 March 1961, at 3.15 p.m.

Chairman: Mr. LALL (India)

Consideration of the draft articles on diplomatic intercourse and immunities adopted by the International Law Commission at its tenth session (A/CONF.20/4) (*continued*)

Article 6 (Appointment of the staff of the mission) (*continued*)

1. The CHAIRMAN invited the Committee to continue its debate on article 6 of the International Law Com-