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3rd meeting of the Committee of the Whole

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Article 4 (Appointment of the head of the mission: agrément)

42. Mr. REGALA (Philippines) suggested that article 4 should be amended to provide that the receiving State had to decide within a reasonable time whether to give its agrément.

43. Mr. BOLLINI SHAW (Argentina) said that his delegation would submit an amendment providing that the receiving State should not be obliged to give its reasons for refusing to grant the agrément, a matter entirely within its own competence.

44. Mr. de ERICE y O'SHEA (Spain) fully supported that view. He suggested, however, that since the agrément was not usually required for chargés d'affaires ad interim who might act as heads of mission, the word " permanent " should be inserted before " head of the mission ".

45. Mr. CAMERON (United States of America) announced that his delegation would submit an amendment to cover the case in which a chargé d'affaires ad interim had been directed to fill the post until the arrival of the permanent head of the mission. The term " agrément " was not technically correct in that case, and it was proposed that the words " or other sign of approval " should be added in the first line, before the words " of the receiving State ".

Article 5 (Appointment to more than one State)

46. Mr. ZABIGAILO (Ukrainian Soviet Socialist Republic) said that his delegation would submit an amendment to article 5. Although it accepted the principle that a receiving State had the right to withhold its agrément, the regulation of that principle by international law might complicate the procedure of presenting credentials.

47. Mr. CAMERON (United States of America) said that his delegation was submitting an amendment to article 5, requiring that the receiving State should first be notified of the intention of the sending State to accredit the head of mission to a third State, so that it might object if it so desired; the proposed amendment also extended the article to cover diplomatic staff accredited to the third State.

48. Mr. de ERICE y O'SHEA (Spain) had no objection to article 5 or to the amendment proposed by the representative of the United States, which would clarify it. He suggested, however, that the article should be amended to provide for the case in which several States agreed to accredit a single head of mission to one or more States.

49. Mr. BOLLINI SHAW (Argentina) observed that that point was covered by the Havana Convention of 1928, article 5 of which provided that " Several States may entrust their representation before another to a single diplomatic officer."

The meeting rose at 5.20 p.m.

THIRD MEETING

Tuesday, 7 March 1961, at 10.45 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 6 (Appointment of the staff of the mission)

Article 7 (Appointment of nationals of the receiving State)

Article 8 (Persons declared *persona non grata*)

Article 9 (Notification of arrival and departure)

Article 10 (Size of staff)

1. The CHAIRMAN invited the Committee to consider articles 6 to 10, which were interdependent, together. He drew attention to the amendments submitted by the delegation of France to articles 6, 7, 8 and 9 (A/CONF. 20/C.1/L.1, L.2, L.3, L.4), by the delegation of the United Kingdom to article 9 (A/CONF.20/C.1/L.9) and by the delegation of Italy to article 6 (A/CONF.20/ C.1/L.48).[1]

2. Mr. PHILOPOULOS (Greece) observed that article 8, which dealt with the recall of a member of the mission, should not be mentioned in article 6, which dealt with the appointment of the staff of the mission. Furthermore, the phrase " subject to the provisions of article 7 " should be inserted at the beginning of article 10, paragraph 1.

3. Mr. de VAUCELLES (France) said that the object of his delegation's amendment ot article 6 (L.1) was to make it clear that, while the appointment of a member of the staff of a diplomatic mission should not be subject to the agrément of the receiving State, that State remained free to discuss the question of his entry on the diplomatic list. It was, of course, the sending State which conferred diplomatic status on its nationals, but that status had to be recognized by the receiving State, and it was, precisely, entry on the list which constituted such recognition. The point was very important, for it established a distinction between the diplomatic staff proper and the administrative and technical staff of the mission, who, in the opinion of the French delegation, should not enjoy such extensive privileges and immunities as diplomats. The purpose of the second part of the amendment was to extend to specialized technical advisers and attachés the generally recognized right of the receiving State to refuse its agrément to military attachés. The procedure would apply only to the head of the specialized technical services, since it had gradually become the custom — recognized in fact by all States — for him to act as the representative of his particular ministerial department,

[1] All references in this and subsequent records of the Committee of the whole to " L " documents are references to documents in the series A/CONF.20/C.1/L. . . .

and to have direct access to the corresponding departments of the receiving State.

4. The French delegation was also submitting an amendment to article 7 (L.2), for it considered — contrary to the views expressed by the International Law Commission in paragraph 9 of its commentary on article 7 (A/3859) — that the provision applicable to the nationals of the receiving State should be extended to cover nationals of a third State. In such cases, however, the formula would be less strict, and would leave it to the receiving State to decide whether or not to exercise its right.

5. The object of the amendment to article 8 (L.3) was merely to restore a provision which had appeared in article 3 of the draft submitted to the International Law Commission by Mr. Sandström (A/C.N.4/91), but which the Commission had not adopted. The receiving State might often consider it preferable not to give any official reason for requesting the recall of a member of a diplomatic mission, in order not to embitter its relations with the sending State. In most cases, moreover, the person whose recall was requested was well aware of the reasons, even if he was unwilling or unable to admit the fact publicly. In cases where the person concerned was not the head of the mission, the head was generally warned of the action it was proposed to take, so that the person concerned could leave even before the request was made.

6. Mr. BOLLINI SHAW (Argentina) shared the views of the French representative, particularly the amendment concerning the receiving State's right not to explain its decision on the acceptability or its request for the recall of members of the staff of the mission. The Argentine delegation had submitted a like amendment to article 4 (L.37) and would also submit amendments to the same effect to articles 6 and 8 (L.38 and L.39). With regard to article 10, it would prefer the words " what is reasonable and normal," in paragraph 1, to be replaced by the words " what it considers reasonable and normal " (L.119). Lastly, he asked for an explanation of the meaning to be attached to the words " officials of a particular category " in paragraph 2 of the same article.

7. Mr. MATINE-DAFTARY (Iran), referring to article 7, said that, as he had pointed out during the debate in the International Law Commission, the practice of choosing members of the diplomatic staff from among the nationals of the receiving State was unusual and obsolete. The receiving State could not grant to its own nationals all the privileges and immunities usually enjoyed by the members of a diplomatic mission, and such a situation was bound to be embarrassing for them. His delegation would prefer article 7 to be deleted entirely.

8. Mr. SUBARDJO (Indonesia) explained that his country had never allowed its nationals to become members of diplomatic missions sent to Indonesia by other States. Burma and the United Arab Republic had expressed much the same view in the debate of the Asian-African Legal Consultative Committee on the functions, privileges and immunities of diplomatic envoys or agents. The Indonesian delegation would submit a formal amendment to article 7 (L.66).

9. Mr. CHAVEZ (El Salvador) considered that article 6 should mention attachés specializing in atomic matters.

10. Mr. MAMELI (Italy), agreeing with the French representative's remarks concerning article 6, referred to the Italian delegation's amendment to that article (L.48).

11. His delegation considered article 7 very important and did not wish to amend it in any way. With regard to article 8, it considered that the receiving State was not under an obligation to explain its decision and that the sending State was bound to recall a member of the staff who had been declared persona non grata. In article 10, the concept of " what is reasonable and normal " should be dropped.

12. Mr. OJEDA (Mexico) considered that, in so far as article 6 laid down the rule that the sending State might " freely " appoint the members of the staff of the mission, it did not correspond to the facts. The receiving State could take various measures which drastically limited the sending State's freedom of choice. For example, it could withhold its agrément, refuse an entry visa, or declare a particular member of the staff of the mission persona non grata even before he arrived in the country. Since the exceptions to the rule were very numerous, it would be better to state in article 6 that the receiving State could refuse admittance to a member of the mission staff appointed by the sending State. Article 8 of the Havana Convention (A/CONF.20/7) contained a similar provision.

13. Mr. CARMONA (Venezuela) supported the views of the representatives of Argentina, France, Italy and Mexico to a great extent. Article 6 was not fully satisfactory, and he considered that the first sentence was dangerous. It gave the sending State complete freedom to grant diplomatic status. It should be specified what persons were covered by the expression " staff of the mission ", and, as the French representative had said, diplomatic staff proper should be distinguishable from administrative and technical staff of the mission. The French delegation's amendment requiring an agreement with the receiving State was a clearer and more precise formula, though more stringent than Venezuela wished in that it specifically provided for the entry of diplomatic officials on the diplomatic list. Less categorical language, such as the provision taken from the Havana Convention, as suggested by the Mexican delegation, might be better. In any event, however, article 6 could not stand as drafted, for the principle it stated was subject to too many exceptions. It was difficult to determine whether the refusal of the agrément should be notified before or after the appointment. The custom was that the receiving State made its views known before the appointment, and traditional protocol had forms of refusal which were not too offensive.

14. The question of military, naval or air attachés had provoked long and controversial discussions. Venezuela considered that the receiving State should have the right to require the names of the staff of the mission to be communicated beforehand. Moreover, that rule should apply not only to military attachés, but also to technical

attachés and counsellors who, by virtue of their functions, maintained direct relations with the authorities of the receiving State. Preferably, the Convention should not lay down separate rules for military attachés.

15. On article 7, Indonesia and Iran had expressed very definite views. Venezuela did not allow its nationals to represent foreign countries diplomatically, for if they did they would enjoy privileges contrary to the democratic principle of the equality of citizens laid down in the constitution. If other countries saw fit to act differently, it was not for Venezuela to object; but he would prefer article 7 to be an exception, not a principle.

16. Turning to article 8, he said that if the receiving State did not give reasons for declaring a diplomat persona non grata, that was because it was not required to do so; the sending State was free to ask for the reasons, but it then ran the risk of creating new difficulties. Article 8 contained, in the second sentence of paragraph 1 and in paragraph 2, an element which did not fit the facts. In order to avoid friction, a receiving State enjoying good relations with the sending State would try to be courteous in declaring a member of the staff of the mission persona non grata. Often, however, a government would act more brusquely, and the draft article did not seem to allow for such a situation. He would not propose an amendment, but thought it would be wise to bear those possibilities in mind and draft a clearer text.

17. The Venezuelan delegation had instructions to vote in favour of article 10, but fully appreciated the Argentine amendment (L.119).

18. Mr. MELO LECAROS (Chile), referring to article 7, supported the French amendment (L.2). The principle should be stated that a diplomatic agent must be a national of the sending State; otherwise, the concept of a " mercenary " diplomacy resulted. He saw little force in the International Law Commission's argument against that principle (paragraph 9 of commentary) — namely, that the position of the technical and administrative staff not of diplomatic rank would cause difficulties. He agreed with the Venezuelan delegation that it was unnecessary for a receiving State to explain why it declared a member of the staff of a mission persona non grata.

19. Mr. SUCHARITAKUL (Thailand) said, with reference to article 7, that the nationality laws of the receiving State might differ from those of the sending State. In that case, the nationality of the person concerned should be determined according to the laws of the receiving State. He submitted an amendment to that effect (L.50).

20. Mr. EL-ERIAN (United Arab Republic) was opposed to article 7. The appointment of nationals of the receiving State to a foreign diplomatic mission was contrary to the whole idea of diplomatic relations that the agent should represent his own government. Such a practice reversed the normal situation and there was no need for it. The International Law Commission had itself recognized that fact at its tenth session, when it had explained in its commentaries on articles 4, 5, 6, 7 and 8 that the custom was rare and there were grounds for believing that it would disappear.

21. He considered that a diplomatic mission should recruit technical staff, such as interpreters, draftsmen and typists locally, but they were not of diplomatic rank. Diplomacy had a representative character, which — again according to the International Law Commission — was borne out only if a person represented his own government. Thus it was not desirable to sanction an obsolete custom in an article. However, he would support the Indonesian amendment (L.66) if the majority considered that provision should be made for the situation contemplated in article 7.

22. U SOE TIN (Burma) said that his government was, in principle, opposed to the appointment of its nationals as members of the diplomatic staff of foreign governments. However, in view of the safeguards requiring the express consent of the receiving State and also of the provisions of article 8, his government would take a liberal view of the inclusion of article 7, and would also support the French amendment (L.2). Articles 8 and 9 seemed acceptable, but in article 10, paragraph 1, he would prefer the words " it considers reasonable " to be substituted for the words " is reasonable ".

23. Mr. LINTON (Israel) said that his delegation agreed with the idea underlying the French amendment to article 6 (L.1) that recognition or acceptance by the receiving State of foreign diplomatic agents was necessary. However, the way in which the acceptance was granted was a matter for the receiving State and its domestic law. The proposed amendment was liable to confer international status on the diplomatic list, which was a creation of, and was governed by, domestic law. In his country, as in some others, registration on the diplomatic list was in itself of no particular legal value, and acceptance of a foreign diplomatic agent could be granted in other ways. While the receiving State should be allowed to refuse acceptance of a particular diplomatic agent, that need not necessarily have a bearing on the domestic question of registration on the diplomatic list.

24. He hoped that the right to declare a person persona non grata would be used with the greatest restraint. A diplomat normally exercising the functions enumerated in article 3 should not be declared persona non grata. Such a declaration should be made only in most serious cases, otherwise the receiving State could commit an " abus de droit ". For humanitarian reasons, a diplomat declared persona non grata should be given reasonable time in which to leave the receiving country. Referring to the words " within a reasonable period " in article 8, paragraph 2, he suggested that as persons were sometimes requested to leave the receiving country within an extremely short time, it would be preferable to avoid hardship, particularly for those with children, by providing that in no case should a person declared persona non grata be required to leave in less than some specified period, say seven days.

25. Mr. BARTOŠ (Yugoslavia), referring to the amendment to article 6 proposed by France (L.1), said that the practice, current in many countries, of establishing a diplomatic list was commendable. However, it had the disadvantage that the legal status of a member of the diplomatic staff was undetermined between the time

of his arrival in the receiving State and the time when that State recognized his entry on the list as valid. That gap had often given rise to disputes. The amendment to article 6 proposed by Italy (L.48) might determine the Yugoslav attitude to the French amendment.

26. The Yugoslav delegation considered that the principle stated in article 7 was meaningless in the modern world and raised a point of conscience. However, if a majority of the Committee was in favour of retaining that article, the Yugoslav delegation would support Indonesia's amendment and the French amendment.

27. The Yugoslav delegation was in sympathy with the French amendment to article 8 (L.3) but did not consider it necessary. There was, in fact, nothing in article 8 that obliged the receiving State to give reasons for its decision, and consequently the amendment was superfluous. On the other hand, the receiving State was not prohibited from explaining its decision if it saw fit to do so.

28. The first of the United Kingdom amendments to article 9 (L.9) was justified, and the second undoubtedly clarified the text; on the other hand, the Yugoslav delegation could not accept the third amendment. It was also frankly opposed to the amendment submitted by France (L.4) to article 9. The intervention of administrative authorities in the issue of withdrawal of residence permits and cards would only complicate the process and delay completion of the necessary formalities. Hence, the Yugoslav delegation could not vote in favour of that amendment.

29. Mr. BARUNI (Libya) considered that the provisions of article 7 might prove very embarrassing to the receiving State, as had been rightly pointed out by the representatives of Iran, Indonesia and the United Arab Republic. The receiving State would, for instance, be in a difficult position if immunity from jurisdiction was claimed for one of its nationals who was on the staff of a foreign mission. Although the rule laid down in article 7 conflicted with the Libyan Constitution, his delegation would be able to accept that article, if it were suitably amended.

30. Mr. RUEGGER (Switzerland) said he could support the French proposal that the non-diplomatic staff of missions should not be eligible for the benefit of diplomatic privileges and immunities. The Swiss delegation might submit amendments to articles 6, 7, 8 and 10, but would endeavour to depart as little as possible from the excellent draft prepared by the International Law Commission. It approved the principle stated in article 7, which the Commission had adopted by a majority after long discussion. It understood the doubts to which that article had given rise, but considered that the sovereign right of States was safeguarded by the discretion given to the State of residence to give or refuse its consent. The Swiss delegation hoped that it would be clearly stated, however, either in the convention itself or in the report of the Committee of the Whole, that the consent of the receiving State was not required in the case of non-diplomatic staff.

31. With regard to article 8, he referred to the Federal Government's comment (A/4164) that it should be expressly provided that the receiving State was not obliged to give reasons for its decision not to accept a diplomatic agent. In addition, it should be laid down that the sending State should refrain from sending a diplomatic agent to the receiving State if the latter made it known that he would not be acceptable.

32. The Swiss delegation was in favour of article 10 as drafted by the International Law Commission, but thought it should be specified what was considered to be a reasonable and normal size. As a general rule, the size of the staff of a mission should be in keeping with the mission's volume of work.

33. Mr. AMLIE (Norway) agreed with the representatives of Iran and the United Arab Republic that the convention should not contain a provision which indirectly endorsed the practice of recruiting diplomatic staff from among the nationals of the receiving State. Such a practice was abnormal and liable to embarrass both the sending and the receiving State. However, it was not a question of great importance, and if the majority of the Committee was in favour of the text of article 7, the Norwegian delegation would not vote against it. His delegation would be favourable to a provision along the lines of the amendment proposed by France (L.2).

34. He had the impression that various delegations were going to submit amendments to articles 4, 5, 6, 7 and 8, introducing in each of those articles a provision which explicitly stated that there was no obligation on the part of the receiving State to explain the reasons for a negative decision concerning the acceptance of personnel, etc. In his opinion, the inclusion of such a provision in the text was superfluous. If such an express statement was desired, however, it should not be repeated in each article, but should be made once in a separate article referring to the articles concerned.

35. With regard to the other articles under consideration, his delegation would be prepared to vote for them as they stood.

The meeting rose at 12.50 p.m.

FOURTH MEETING

Tuesday, 7 March 1961, at 3 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)

Article 7 (Appointment of nationals of the receiving State)

Article 8 (Persons declared persona non grata)

Article 9 (Notification of arrival and departure)