

United Nations Conference on Diplomatic Intercourse and Immunities

Vienna, Austria
2 March - 14 April 1961

Document:-
A/CONF.20/C.1/SR.4

4th meeting of the Committee of the Whole

Extract from Volume I of the *Official Records of the United Nations Conference on Diplomatic Intercourse and Immunities (Summary records of the plenary meetings and of the meetings of the Committee of the Whole)*

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)

Article 10 (Size of staff)

1. The CHAIRMAN invited the Committee to continue its debate on articles 6 to 10 of the International Law Commission's draft (A/CONF.20/4) and on the amendments proposed to those articles (A/CONF.20/C.1/L.1, L.2, L.3, L.4, L.9, L.48).

2. Mr. BOUZIRI (Tunisia) said that his delegation, though it recognized the practice, and even the necessity, of appointing military, naval or air attachés, was not anxious to have the principle of their appointment or exchange enunciated as clearly as it was in article 6. The Commission had clearly been aware of the difficulty, since its draft provided that the receiving State might require the names of attachés to be submitted beforehand for approval. His delegation would not submit a formal amendment, but would prefer the last sentence of article 6 to be re-drafted to oblige the sending State to ask for approval of its appointments, rather than to permit the receiving State to require names to be submitted.

3. The amendment to article 6 submitted by France (L.1) might cause some difficulty, since it provided that entry on the diplomatic list should constitute recognition of diplomatic rank by the receiving State, and if the entry were delayed for any reason, the member would not be recognized as a diplomat.

4. His delegation could not support article 7. There, too, the Commission had apparently been aware of the difficulty, since the draft provided that the express consent of the receiving State was required before its nationals could be appointed members of the diplomatic staff of a foreign mission. The amendment submitted by France (L.2), which would give the receiving State the same right with regard to nationals of a third State, was desirable. Although in some cases such appointments might be useful, the receiving State should have the right to refuse them. His delegation would prefer article 7 to be deleted, but would agree that a receiving State might accept nationals of a third State if it so desired.

5. The amendment proposed by France to article 8 (L.3) added nothing to the existing text, which was satisfactory.

6. In article 10, paragraph 1, his delegation would prefer the words "what is reasonable and normal" to be deleted, since their interpretation would give rise to endless controversy.

7. Mr. de ERICE y O'SHEA (Spain) said that article 6 should distinguish between diplomatic staff, who were appointed by the sending State, and subordinate staff, who in many cases were freely appointed by the head of the mission. The second sentence should not refer specifically to military, naval or air attachés, since such a reference would omit certain other (e.g., scientific) attachés to whom the provision should apply. His delegation would propose an amendment empowering the receiving State to require prior submission of the names of attachés in general (L.46).

8. He agreed that the question of the appointment of nationals of the receiving State, covered by article 7, was no longer of practical importance. By the law of

Spain and of some other countries, a national who without his government's leave entered the service of a foreign country as a diplomat lost his nationality. His delegation supported the French amendment (L.2) covering the case — also very rare — of the appointment of a national of a third State.

9. Article 8, paragraph 1, should not apply to all members of the staff of the mission. For a member of diplomatic staff a formal declaration of *persona non grata* was appropriate; if the person concerned belonged to the administrative and technical staff, or to the service staff, or was a private servant, the receiving State should be entitled at any time to request the head of the mission to dismiss him and send him out of the country. The Spanish delegation would introduce an amendment to that effect (L.78).

10. In article 10, paragraph 1, the expression "reasonable and normal" was much too vague. His delegation would introduce an amendment permitting the receiving State, in the absence of specific agreement on the size of the mission, to refuse to accept a size at variance with the circumstances and conditions in the receiving State and the sending State (L.80). The reference to "the needs of the particular mission" should be dropped, because that question concerned the sending State only.

11. Although Spain did not favour the principle of reciprocity in diplomatic intercourse, its delegation would put forward an amended text for article 10, paragraph 2, which would permit the receiving State either to refuse to accept officials of a particular category altogether, or to accept them only subject to reciprocity (L.80).

12. Mr. BARNES (Liberia) said that his delegation was in principle opposed to the appointment of a national of the receiving State as a member of the diplomatic staff of a foreign country. It was the duty of a diplomatic officer to foster the understanding of his country and his people among the people of the receiving State and so to promote friendly relations between the two countries. Clearly, that duty could not be performed satisfactorily by a national of the receiving State. However, in view of the large number of the newly independent States, it would be undesirable to prevent altogether an arrangement which would enable a new State to overcome its initial financial and other difficulties. His delegation would therefore accept article 7 if suitably amended to mark the exceptional character of the appointment of a national of the receiving State.

13. Mr. DIARRA (Mali), speaking on a point of order, said that his government regretted the absence from the Conference of the representatives of the only lawful government of the Congo (Leopoldville), that headed by Mr. Gizenga.

14. Referring to article 7, he said his delegation was opposed in principle to the appointment of a national of the receiving State, which would run counter to the whole spirit of the draft. Certain newly independent African States needed, however, to call upon the services of persons who were nationals of a receiving State in order to solve the problems connected with the establishment and initial organization of their diplomatic missions.

15. Mr. KRISNA RAO (India) said that the existing practice whereby persons appointed under article 7 did not enjoy fiscal privileges in respect of their imports or private acts was recognized in customary international law, and clearly referred to in article 15 of the Cambridge draft of the Institute of International Law. In any case, the receiving State, in consenting to the employment of its nationals by a foreign State, could specify in advance the conditions governing such employment. That proposition was supported by recognized publicists, and sanctioned by precedent in Germany, France and the United Kingdom. A further reason why remuneration for such employment should be subject to income tax was that any attempt at exemption would be strongly resisted by governments and parliaments as infringing the principle of the equality of all citizens before the law. The point was indirectly covered in article 37, which provided only for immunity in respect of acts performed in the course of duty, but he had thought it useful to clarify his delegation's interpretation of the relevant articles.
16. With regard to article 8, paragraph 1, his delegation would propose an amendment inserting after the words "the head of the mission" the words "appointed in accordance with article 4" (L. 64). A State which had not objected to the appointment of a person as head of mission might subsequently find reasons for declaring him *persona non grata*.
17. Mr. de SOUZA LEO (Brazil) said that his government felt considerable doubt whether article 10, paragraph 1, on the size of staff, should be retained. The best course might be to delete it and place paragraph 2, suitably re-worded, in article 6.
18. Mr. RIPHAGEN (Netherlands) said that articles 4 and 8 enabled the receiving State to object to the appointment or to the continued presence of any member of a foreign diplomatic mission. Article 7 made its consent necessary for the appointment of one of its nationals as a member of the diplomatic staff of a foreign mission. Clearly, such an appointment could not be precluded if the receiving State had no objection. To delete article 7 altogether would imply that the sending State was free to appoint nationals of the receiving State as members of the diplomatic staff.
19. His delegation had no objection in principle to the French amendment to article 7 (L.2), but did not feel that the receiving State should be entitled to forbid the appointment of a person who had the nationality both of the sending State and of a third State; he suggested that after the words "nationals of a third State" words to the following effect should be added: "who do not possess the nationality of the sending State".
20. Mr. NGO-DINH-LUYEN (Viet-Nam) agreed with the Netherlands representative that article 7 should be retained. The receiving State and the sending State could not be prevented from agreeing on the appointment of a national of the receiving State. His delegation supported the French amendment regarding nationals of a third State; it might save embarrassment in cases where relations of the receiving State with the third State were strained, and without the amendment the receiving State would have to declare the appointed persons unacceptable.
21. With regard to article 10, he announced that his delegation would submit an amendment (L.88).
22. Mr. PONCE MIRANDA (Ecuador) thought the French amendment to article 6 (L.1) deserved consideration. To provide that entry on the diplomatic list constituted recognition of diplomatic rank by the receiving State would offer a simple means of indicating that a person was not acceptable.
23. Article 7 should prohibit absolutely the appointment of a national of the receiving State or of a third State to the diplomatic staff of a mission. Ecuadorian law forbade the grant of diplomatic status to nationals as representatives of a foreign Power. To give them diplomatic privileges in their own country would violate the democratic principle of equality before the law. Such appointments could be admitted only exceptionally.
24. Mr. KIRCHSCHLAEGER (Austria) said that his delegation could accept the articles as drafted, but thought some of the proposed amendments desirable. It would give them careful consideration and support them unless they changed the draft in principle.
25. Mr. DASKALOV (Bulgaria) said that his delegation could not support article 7. It was illogical to grant diplomatic privileges to nationals of the receiving State; the practice was rare and appeared to be dying out. The Secretariat might be asked to supply information on existing cases. The provision might be abused, as had happened in the past, to influence the domestic affairs of newly independent States. Moreover, a national of a receiving State might have a conflict of loyalty to his fatherland and to the sending country, and should not be placed in such a situation.
26. Article 7 was closely linked with article 37. The diplomatic privileges of a national who had become an agent of another government raised a delicate question. One view was that he should be granted all diplomatic privileges, another that he should receive only those which the receiving State saw fit to grant. Neither course was satisfactory, and whichever was adopted by the Conference would always give rise to difficulties and friction. The only solution was to delete article 7.
27. Mr. MECHECHA HAILE (Ethiopia) said that his delegation had decided after careful consideration to support articles 6 and 7 as they stood. It would not support the French amendment to article 7 since, although the appointment of a national of the receiving State seemed undesirable, a State which wished to appoint a national of a third State as its representative should be able to do so.
28. It supported the amendments proposed by France to articles 8 and 10 (L.3 and L.4).
29. Mr. HO-EUL WHANG (Republic of Korea) said that his delegation could not support article 7 as it stood. Under his country's Foreign Service Act, a Korean national could not be appointed to the staff of a foreign diplomatic mission. Since, however, it did not wish to

exclude the possibility completely so far as other countries were concerned, his delegation would support the amendment proposed by Indonesia (L.66), which followed article 7 of the draft convention adopted by the Asian-African Legal Consultative Committee (A/CONF.20/6).

30. Mr. VALLAT (United Kingdom) supported article 7 in principle. To be able to appoint nationals of the receiving State to the diplomatic staff of a mission was important, particularly to new and smaller countries, which might not be able to find other qualified persons. The interests of the receiving State were amply protected, since the article clearly stated that its nationals could be appointed only with its express consent. There seemed no reason, therefore, why any State should object to the inclusion of article 7. Immunities should be considered under article 37.

31. Mr. JEZEK (Czechoslovakia) said that the appointment of nationals of the receiving State was very rare and an obsolescent practice. The retention of article 7 might damage the whole concept of the convention as a modern code. Citizens of Czechoslovakia could not be appointed to the diplomatic staff of foreign missions. If, however, article 7 was not deleted altogether, it might be amended to make the receiving State's express consent necessary before one of its nationals could be appointed to any category of the staff of a foreign mission. In many countries the administrative and technical staff of a diplomatic mission, who fulfilled important functions, included nationals of the receiving State, and their appointment must be subject to its knowledge and consent.

32. Mr. WESTRUP (Sweden) fully supported the views of the Netherlands representative on article 7. The Conference should depart from the Commission's text only if absolutely necessary. Cases to which article 7 applied might still occur, and the Conference should take a long-term view.

33. Mr. TAWO MBU (Nigeria) also strongly favoured the retention of article 7. In the first attempt to codify the international law on diplomatic practice, a serious gap would be left if it were deleted. Although the appointment of nationals of the receiving State to the diplomatic staff of a mission might not be a desirable practice, it was expedient and economically wise for young States to do so when they felt confidence in the receiving State in regard to international relations. His delegation did not share the fears of some speakers. The provision should be available to States which wished to take advantage of it.

34. Mr. KRISHNA RAO (India) explained that his reference to article 37 did not imply opposition to article 7, which he fully supported.

35. Replying to the representatives of Yugoslavia and Tunisia, Mr. de VAUCELLES (France) said that his delegation, in proposing its amendment to article 6, wished to stress that while the sending State was free to appoint the members of the staff of the mission, the receiving State still retained a "droit de regard" which in practice took the form of entering the names of the

members of the mission on the diplomatic list and issuing special identity cards to them. Several speakers had rightly remarked that not all States had a diplomatic list, which in any case was published only at fairly long intervals. His delegation therefore held that it was by issuing a special identity card to a person that the receiving State gave outward expression to the act of placing his name on the list and, in effect, recognized him as enjoying diplomatic status. The interval between the arrival of a member of a mission and the moment when he received his card might admittedly raise delicate problems, but the French delegation did not see how that could be remedied.

36. He fully supported the provisions of article 7, which should be retained. Monaco, for example, had long been represented in Paris by a French citizen and it would be regrettable if the Conference took any discriminatory action.

37. Mr. BOUZIRI (Tunisia) said that the explanations of the representative of France confirmed his earlier doubts. The French delegation's amendment to article 6 was not a satisfactory answer to the problem of the interim period, which should be solved in precise and explicit terms.

38. Mr. BARTOŠ (Yugoslavia) was also dissatisfied with the proposed amendment to article 6. What, for instance, would be the position of a member of a mission who was refused a diplomatic card after, say, three months in the country to which he had been assigned?

39. With regard to article 7, he said he was aware of the case of Monaco referred to by the representative of France, and could give other examples, such as Liechtenstein and San Marino. That, however, was an entirely different case from that for which article 7 was designed to provide.

40. Mr. USTOR (Hungary) considered that the appointment of members of a diplomatic mission from among nationals of a receiving State was contrary to the very nature of diplomacy. The task of the Conference was to codify rules of international law on diplomatic relations, on the basis of existing law and practice. In his opinion the case covered by article 7 was a rare exception and therefore not appropriate for codification. Nor did it conform with the interests of the new States, which were eager to maintain their national independence and free themselves from foreign influence. It was to be hoped that they would be able to staff their diplomatic missions with their own nationals.

41. Mr. MARESCA (Italy) said that the principle underlying articles 6, 7 and 10 was the consent of the receiving State and that principle should be brought out clearly in all three articles.

42. Monsignor CASAROLI (Holy See) agreed with the representative of Hungary that the case provided for in article 7 was becoming rarer, and that it was desirable for States to be represented by their own nationals. Nevertheless, some States still found it necessary, and would continue to do so, to employ nationals of other countries; he therefore considered that the article should

be retained as a safeguard. It might perhaps be amended to indicate that the Conference thought the practice was rare and not to be recommended.

43. Mr. TAKAHASHI (Japan) said that, while the comments and the amendments seemed to him valid, he felt that it would be unwise to depart too far from the draft prepared with such care by the International Law Commission.

44. Mr. HORAN (Ireland) supported the amendment to article 6 proposed by France. With regard to article 8, paragraph 2, he agreed with the representative of Israel that it would be wise to define "a reasonable period". His delegation had not yet made up its mind concerning article 7.

45. Mr. do NASCIMENTO e SILVA (Brazil) proposed an amendment to article 7, which he thought might reconcile the views expressed during debate. The article should lay down the basic principle that the staff of diplomatic missions should be appointed from the nationals of the sending States; in exceptional cases, and only with the express consent of the receiving State, the staff could include nationals of the receiving State or of a third State (see L.77).

46. Mr. SUCHARITAKUL (Thailand) announced that he was submitting an amendment to article 9 deleting the words "of the staff" (L.51). The reason was that the words "members of the staff of the mission" excluded the head of the mission; but "members of the mission", as defined in article 1 (b), included him.

47. Mr. KRISHNA RAO (India) pointed out that article 9 did not indicate when notice should be given of the arrival and departure of members of a mission.

48. Mr. CARMONA (Venezuela) considered article 9 useful but had doubts regarding its second sentence, which seemed to give locally engaged members of the mission the same status as diplomats.

49. Mr. OJEDA (Mexico) supported article 9 as it stood. It was essential that the arrival and departure of all members of a mission should be notified.

The meeting rose at 5.55 p.m.

FIFTH MEETING

Wednesday, 8 March 1961, at 10.55 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 1 (Definitions)

Article 2 (Establishment of diplomatic relations and missions)

Article 3 (Functions of a diplomatic mission)

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

Article 5 (Appointment to more than one State) (resumed from the second meeting)

1. The CHAIRMAN invited the Committee to resume its debate on articles 1 to 5 of the International Law Commission's draft (A/CONF.20/4). He drew attention to a number of amendments submitted to those articles.¹ He referred to his earlier suggestion (first meeting, para. 8) concerning the procedure for dealing with article 1 (Definitions). The terminological amendments proposed by the Swiss delegation (L.24) would, with that delegation's agreement, be referred to the Drafting Committee.

2. Mr. PUPLAMPU (Ghana) said that, as it could not accept the definition of the head of the mission in article 1, sub-paragraph (a), his delegation would submit an amendment (L.89). The amendment proposed jointly by Colombia and Spain (L.5) did not satisfy his delegation. He supported the Irish delegation's amendment to sub-paragraph (d) (L.16) and recalled the practice followed by various countries in drawing up the diplomatic list. The amendment to sub-paragraph (e) proposed by the Guatemalan delegation (L.8) failed to take account of established custom and was too restrictive. In his opinion, the definition of "diplomatic agent" proposed by the International Law Commission should stand. He supported the United States amendment to article 1, sub-paragraph (h) (L.17) and also that delegation's proposal for the addition of a sub-paragraph (i) defining "members of the family".

3. Mr. TUNKIN (Union of Soviet Socialist Republics) expressed his country's great interest in the development of diplomatic relations. A codification in the form of a multilateral convention would enable diplomats to perform their duties more efficiently and would help to strengthen international co-operation and establish friendly relations among nations.

4. He believed that the International Law Commission's draft took good account of generally accepted rules and constituted an excellent working basis.

5. Article 1 was exclusively terminological, and he regretted the tendency of some delegations to stray from its subject matter.

¹ The following amendments had been submitted by the date of the meeting:

To article 1: A/CONF.20/C.1/L.5, L.8, L.16, L.17, L.23, L.24, L.25, L.35, L.73 (and Corr.1), L.81, L.89, L.90, L.91.

To article 2: A/CONF.20/C.1/L.6, L.15.

To article 3: A/CONF.20/C.1/L.13, L.14, L.26, L.27, L.30, L.31, L.33, L.82.

To article 4: A/CONF.20/C.1/L.18, L.28, L.37, L.42, L.43.

To article 5: A/CONF.20/C.1/L.19, L.22, L.36, L.40, L.41, L.44 (and Corr.1), L.71, L.75, L.83.

In addition, a new article had been proposed (A/CONF.20/C.1/L.7).