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Summary record of the 423rd meeting

Topic:
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procedure. It must accordingly leave out many things on the assumption that they were already known. The whole of article 1 could, in fact, be dispensed with, some of the ideas it contained being merely mentioned in a preamble and the ideas in paragraphs 1 and 2 being worked into the text of article 2. That was a question, however, which could be discussed in a drafting committee at the next session.

38. Mr. AMADO agreed with the Secretary. Mr. Verdross's amendment introduced a completely foreign element into the Special Rapporteur's perfectly coherent, but to him unacceptable, structure.

39. The CHAIRMAN, speaking as a member of the Commission, agreed with Sir Gerald Fitzmaurice. Arbitration agreements in which the details of the execution of the undertaking to arbitrate were not specified were extremely common.

40. Faris Bey EL-KHOURI agreed that Mr. Verdross's amendment contained elements calculated to undermine the whole system of the draft, since it gave either party the possibility of frustrating the intent of the original undertaking to arbitrate by simply not agreeing on the constitution of the tribunal.

41. He would nevertheless support the amendment, since he believed in preserving the freedom of choice of parties to a dispute.

42. Mr. SCELLE, Special Rapporteur, pointed out that, if the clause he had proposed were not inserted in Mr. Verdross's amendment, the provisions of article 4 regarding the appointment of arbitrators by the International Court of Justice would no longer be applicable should the parties fail to agree on a *compromis*.

43. He could accept the amendment, however, if it were clear that it did not override the rest of the provisions of the draft; the additional clause he had proposed would provide such a safeguard.

The meeting rose at 11.25 a.m.

423rd MEETING

Friday, 21 June 1957, at 10.30 a.m.

Chairman: Mr. Jaroslav ZOUREK.

Planning of future work of the Commission

[Agenda item 7]

1. The CHAIRMAN said there could be little doubt that at its next session the Commission must give priority to the questions of arbitral procedure and diplomatic intercourse and immunities.

2. He invited comments on the order in which the remaining three topics on its current programme should be listed on the next session's agenda.

3. Mr. AGO felt it was most desirable that the Commission should take a binding decision at its current session on the topics that would be discussed at the next session in order that members might know what topics specially to prepare. It would take the Commission a large part of the next session to complete its work on arbitral procedure and diplomatic intercourse and immunities, and that should be taken into consideration when deciding the other topics to be taken up.

4. Regarding diplomatic intercourse and immunities, he wondered whether the Secretariat could prepare an

analysis of the law and practice of the different States. Such an analysis would have been very valuable to the Commission in its discussions at the current session. Fortunately, however, the Commission had been engaged only on a preliminary reading, so the lack of such analysis had, perhaps, been a less serious matter than it would have been had the Commission been preparing its final draft. It would be desirable to have an analysis of that kind whenever the Commission took up a new topic.

5. Mr. LIANG, Secretary to the Commission, said that the Secretariat was preparing a collection of laws and regulations in the field of diplomatic intercourse and immunities, which would be published before the Commission met for its tenth session next year. It was unfortunately impracticable to supply advance copies to all members of the Commission, since the material was exceedingly voluminous, but it had been made available to Mr. Sandström, Special Rapporteur on the topic of diplomatic intercourse and immunities, and also to Mr. Zourek, Special Rapporteur on the topic of consular intercourse and immunities.

6. Mr. Ago had also mentioned the desirability of compiling materials relating to the practice of States as distinct from their laws. He recalled in that connexion that at its first session the Commission had considered ways of making the evidence of customary international law more readily available,¹ and had eventually submitted certain proposals to the General Assembly regarding the possibility of compiling documentation on the practice of States concerning various branches of international law; no further action, however, had been taken on them. He was afraid that for the next session the Secretariat's resources would not permit it to undertake a work of such large size. He would however study the matter.

7. Sir Gerald FITZMAURICE said that, although in principle he agreed with Mr. Ago, in practice it seemed desirable for the Commission to be prepared to discuss the other three topics on its current programme, at least for a few meetings each. For one thing the Special Rapporteurs would find it useful to have the Commission's preliminary comments on certain key points in their reports; as Special Rapporteur on the question of the law of treaties, he, for example, was very eager to hear the Commission's views on the doctrine of *rebus sic stantibus*. Moreover, it always happened that, after the Commission had finished substantive discussion of the main topics on its agenda, there had necessarily to be a pause while the Drafting Committee completed its work, while the Special Rapporteur revised his commentary, and while the final report was processed. In his view, therefore, the Commission should at least place State responsibility, the law of treaties and consular intercourse and immunities on its agenda for the next session, in addition to the two topics mentioned by the Chairman.

8. Mr. SPIROPOULOS thought that after arbitral procedure and diplomatic intercourse and immunities, the Commission should, next year, give priority to the law of treaties which had been on its programme since 1949. It had always been the Commission's practice to include all topics on its current programme in the agenda for the next session. In addition to the reasons for doing so which Sir Gerald Fitzmaurice had men-

¹ Official Records of the General Assembly, Fourth Session, Supplement No. 10, chap. V.

tioned, there was always the possibility that one or other of the Special Rapporteurs might be unable to attend part of the session.

9. Mr. SANDSTRÖM felt there was some conflict between the Special Rapporteurs' interest in hearing the Commission's views on their reports and the other members' interest in not having to prepare more topics than would be discussed. On balance he inclined to the view expressed by Mr. Ago.

10. Mr. TUNKIN said that in general he agreed with Mr. Sandström and Mr. Ago. It was clearly unrealistic to hope that the Commission could discuss all the topics on its current programme at its next session. In order to avoid causing inconvenience to its members, it must at least take a firm decision now regarding the order in which the various topics would be taken up. He agreed that the law of treaties should be taken up after arbitral procedure and diplomatic intercourse and immunities, since he personally doubted whether the present approach to that topic was likely to lead to any practical results. In his view, it was essential to have a week or ten days in which to discuss the topic and give the Special Rapporteur the specific guidance which neither he nor his predecessors had ever had.

11. Mr. YOKOTA felt that, in addition to arbitral procedure and diplomatic intercourse and immunities, the Commission should allow at least one week each for discussion of the law of treaties and State responsibility, for the reasons indicated by Sir Gerald Fitzmaurice. The question of consular intercourse and immunities should be postponed until the 1959 session.

12. Mr. GARCÍA AMADOR thought that experience at the current session showed that it was impossible to fix a rigid timetable even at the beginning of the session, let alone a year in advance, since there was always the possibility of circumstances arising which necessitated some sudden change.

13. Mr. PAL said that at any rate it seemed clear that the Commission must begin with arbitral procedure and diplomatic intercourse and immunities. However, he wondered whether, in discussing the latter topic, it intended to give priority to consideration of the comments of Governments on its current draft or to the additional report for which the Special Rapporteur had been asked on certain related topics such as the right of asylum.

14. He agreed that the third topic on the agenda should be the law of treaties, and he saw no possibility of the Commission taking up any further topics since the law of treaties alone would, in his view, occupy three sessions.

15. Mr. SANDSTRÖM, Special Rapporteur, pointed out that his instructions to prepare an additional report related not to the right of asylum, but only to *ad hoc* diplomacy. He agreed, however, with Mr. Pal that the third topic on the agenda for the next session should be the law of treaties, and that the Commission should not attempt to deal with any other topics.

16. Sir Gerald FITZMAURICE agreed with Mr. García Amador that, whatever decision the Commission took now, everything would depend in practice on what progress was made with arbitral procedure and diplomatic intercourse and immunities. The Commission might hope to dispose of those two topics in five or six

weeks, and for that reason alone it would be desirable that the other three topics should remain on the agenda.

17. Regarding the point raised by Mr. Pal, he felt that the discussion of diplomatic intercourse and immunities should be confined almost entirely to the comments of Governments on the current draft. Consideration of the Special Rapporteur's additional report should be postponed to another year, in fairness to the other topics on the programme.

18. Mr. SCALLE shared the view that, once the Commission had disposed of arbitral procedure and diplomatic intercourse and immunities, it should take up the law of treaties, which had been on its programme for so long and which was perhaps more amenable to judicial treatment than a topic that raised as many delicate and controversial issues as State responsibility.

19. Mr. TUNKIN thought that no immediate answer could be given to Mr. Pal's question. The Special Rapporteur, and later on the Commission itself, might find that the question of *ad hoc* diplomacy could be dealt with by inserting two or three additional articles in the current draft, in which case there was no reason why the Commission should not consider it in 1958. If, on the other hand, he found that it had to be dealt with separately, it would have to be left for later consideration.

20. Mr. SPIROPOULOS, supported by Sir Gerald FITZMAURICE, expressed the hope that, if the Special Rapporteur found it possible to adopt the former course, the Commission would not feel under an obligation to submit the articles in question to Governments for comment, since that would mean delaying submission of the whole draft to the General Assembly for a further year.

21. The CHAIRMAN suggested, in the light of the discussion, that the Commission decide to place the following items on its agenda for the next session, it being understood that they would be taken up in that order:

1. Arbitral procedure.
2. Diplomatic intercourse and immunities: consideration of the comments of Governments on the draft prepared at the ninth session, and of the possibility of inserting in it provisions relating to *ad hoc* diplomacy.
3. Law of treaties.
4. State responsibility.
5. Consular intercourse and immunities.

It was so agreed.

Date and place of the tenth session

[Agenda item 6]

22. The CHAIRMAN announced that the Commission, at a private meeting, had decided to hold its tenth session at Geneva for a period of ten weeks beginning on 28 April 1958.

Consideration of the Commission's draft report covering the work of its ninth session (A/CN.4/L.70 and Add.1)

23. The CHAIRMAN invited the Commission to consider, paragraph by paragraph, the draft report covering the work of its ninth session.

CHAPTER I: ORGANIZATION OF THE
SESSION (A/CN.4/L.70)

No observations.

CHAPTER II: DIPLOMATIC INTERCOURSE
AND IMMUNITIES (A/CN.4/L.70/ADD.1)

I. INTRODUCTION

Paragraphs 1 to 3

No observations.

Paragraph 4

24. Sir Gerald FITZMAURICE, Rapporteur of the Commission, proposed that after the last sentence of the paragraph an explanation should be added that the Commission's decision was due to its work on the draft on the law of the sea.

It was so decided.

Paragraph 5

No observations.

Paragraph 6

25. Mr. GARCÍA AMADOR said that it should be made clear in the paragraph that the question to be studied was that of *ad hoc* missions to Governments. In article 2 of Havana Convention² the term "extraordinary" was used in a different sense and applied to diplomatic officers accredited to international conferences and bodies. He therefore suggested the deletion of the words "extraordinary or" from the second sentence.

It was so agreed.

26. Mr. SANDSTRÖM, Special Rapporteur, proposed transferring to paragraph 6 the first sentence of the Introduction to the draft articles concerning diplomatic intercourse and immunities in order to clarify the meaning of the term "*ad hoc* missions".

It was so agreed.

27. Mr. GARCÍA AMADOR, referring to the same sentence, said that he was under the impression that the question referred to the Special Rapporteur for study did not include diplomatic conferences.

28. Mr. SANDSTRÖM, Special Rapporteur, replied that missions to international organizations had been excluded but not diplomatic conferences.

29. The CHAIRMAN pointed out that any negotiations between more than two States might be regarded as a diplomatic conference. It was therefore essential to include that category.

30. Mr. SCALLE observed that in French the term *ad hoc* was open to a variety of interpretations and so was one to be avoided.

31. Mr. AMADO wondered whether it was necessary to refer to *ad hoc* diplomacy at all, since the term was defined in the rest of the sentence under discussion.

32. In the last part of the sentence it was not clear whether the reference was to "diplomatic conferences" as such or to "special missions to diplomatic conferences".

33. Sir Gerald FITZMAURICE, Rapporteur, said he would like to retain the term "*ad hoc* missions" in the English text as a useful means of denoting a variety of special and temporary missions.

34. In connexion with Mr. Amado's second point, he proposed recasting the last part of the sentence as follows: "which covers roving envoys, diplomatic conferences and special missions sent to a State for limited purposes".

35. Mr. KHOMAN remarked that the terms "roving envoys" and "special missions" really referred to the same thing.

36. Mr. SANDSTRÖM, Special Rapporteur, said he could not agree. A roving envoy might go to a whole series of States in turn.

37. He agreed to the Rapporteur's proposed recast of the last part of the sentence.

38. The CHAIRMAN proposed that paragraph 6 should be redrafted in the light of the decisions taken and the comments made.

It was so agreed.

Paragraph 7 and introductory sentence of paragraph 8

No observations.

II. DRAFT ARTICLES CONCERNING DIPLOMATIC INTERCOURSE AND IMMUNITIES

39. The CHAIRMAN said that the first paragraph should be redrafted in the light of the decision taken with regard to paragraph 6 of the Introduction.

It was so decided.

40. The CHAIRMAN proposed that the word "diplomatic" should be deleted from the phrase "diplomatic relations between States and the international organizations" in the second paragraph.

It was so decided.

41. Mr. LIANG (Secretary to the Commission), referring to the second paragraph, suggested that the last sentence be drafted differently. The question of the privileges and immunities of international organizations, though it had to do with the question of relations between States and those organizations, was a subject in itself and not merely "linked" with the latter. He suggested stating: "There is also the question of privileges and immunities . . .".

42. Referring to the third paragraph, he pointed out that the conventions on the privileges and immunities of the United Nations and of the specialized agencies were fundamental instruments and not merely *ad hoc* conventions. The term "special conventions" would be acceptable.

43. Sir Gerald FITZMAURICE, Rapporteur, agreed with the Secretary's suggestion and proposed that the first sentence of the second paragraph be deleted accordingly.

44. Mr. YOKOTA proposed that the two paragraphs be merged.

It was agreed to redraft the two paragraphs in the light of the discussion.

² Convention regarding Diplomatic Officers, signed at Havana on 20 February 1928. See League of Nations, *Treaty Series*, Vol. CLV, 1934-1935, No. 3581, p. 365.

SECTION I. DIPLOMATIC INTERCOURSE IN GENERAL

ARTICLE 1

The text of article 1 was adopted.

COMMENTARY ON ARTICLE 1

45. Mr. AMADO, referring to the commentary on the article, proposed limiting it to the statement: "The Commission here confirms the general practice of States".

It was so agreed.

ARTICLE 2

46. Mr. SANDSTRÖM, Special Rapporteur, pointed out that the article was a new one which had been drafted pursuant to a decision of the Commission (411th meeting, page 64) and then referred direct to the Drafting Committee.

47. Mr. PAL, Chairman of the Drafting Committee, pointed out that the Commission had accepted the principle of the article and had merely entrusted the drafting to the Drafting Committee.

48. Mr. AMADO, referring to sub-paragraph 3 of the article, suggested that the words "subject to authorization by the Government of the sending State" with reference to the conclusion of agreements, were unnecessary.

49. Mr. YOKOTA proposed that sub-paragraphs 2 and 3 be transposed, since the role of negotiation dealt with in sub-paragraph 3 was closely connected with the role of representation dealt with in sub-paragraph 1. Moreover it was a more important function than the protection of the interests of a sending State and its nationals.

50. Mr. PAL, Chairman of the Drafting Committee, saw no need to change the sequence of the sub-paragraphs. The order in which they came was no indication of their importance.

51. Sir Gerald FITZMAURICE, Rapporteur, thought that the order proposed by Mr. Yokota was more logical, though there was something to be said for the existing sequence.

52. Mr. KHOMAN agreed with Mr. Amado. It went without saying that envoys must have the authorization of their Governments before concluding agreements, but that was also true of the agents of the receiving State.

53. He suggested inserting the words "with a view to concluding agreements" after the word "negotiating" in sub-paragraph 3.

54. Mr. SPIROPOULOS said that while he was not really convinced of the need for such an article at all, he would not oppose it. He agreed with Mr. Amado. The idea enunciated in the last part of sub-paragraph 3 really belonged to the law of treaties; it was out of place in the context and might even prove misleading.

55. Mr. SANDSTRÖM, Special Rapporteur, said that the clause to which Mr. Amado objected had been included because such authorization was in fact necessary, even though often given in advance. He had also had in mind the special case of the signature by the diplomatic mission of agreements negotiated by other agents of the sending State.

56. Mr. TUNKIN agreed that the last part of sub-paragraph 3 dealt with a question that came under the

law of treaties. He proposed ending the sub-paragraph with the words "between the two States".

57. Mr. MATINE-DAFTARY, referring to sub-paragraph 4, proposed substituting the word "activities" for the not very satisfactory term "development".

58. Mr. PADILLA NERVO, referring to sub-paragraph 3, pointed out that the words "or its agents" were superfluous, since the only way of negotiating with a Government was through its agents. It would also be better to delete the phrase "with regard to any questions which may arise in the relations between the two States", since it might rule out the possibility of negotiating on situations in third States, or on the general international situation, both possibly of great interest to the two States concerned.

59. Referring to sub-paragraph 4, he proposed substituting the words "developments in" for "development of".

60. Mr. SPIROPOULOS agreed with Mr. Yokota's proposal to rearrange the sub-paragraphs, and agreed with Mr. Padilla Nervo on both points he had raised in connexion with sub-paragraph 3.

61. He saw no need to include sub-paragraph 4, since, quite apart from the fact that it was a common practice to obtain information by other than lawful means, it merely dealt with an obligation of diplomatic agents towards their own Government and had no direct bearing on relations between the sending and the receiving State.

The meeting rose at 1.10 p.m.

424th MEETING

Monday, 24 June 1957 at 3 p.m.

Chairman: Mr. Jaroslav ZOUREK.

Consideration of the Commission's draft report covering the work of its ninth session

(A/CN.4/L.70 and Add.1 to 3) (continued)

CHAPTER II: DIPLOMATIC INTERCOURSE AND IMMUNITIES (A/CN.4/L.70/Add.1) (continued)**II. DRAFT ARTICLES CONCERNING DIPLOMATIC INTERCOURSE AND IMMUNITIES (continued)****SECTION I. DIPLOMATIC INTERCOURSE IN GENERAL (continued)****ARTICLE 2 (continued)**

1. Mr. SANDSTRÖM, Special Rapporteur, referring to the suggestions made at the previous meeting, said that he saw no objection to deleting the whole of sub-paragraph 3 after the words "of the receiving State". On the other hand, it seemed desirable to retain sub-paragraph 4, since it supplied a logical basis for article 19, relating to facilities and free movement.

2. Mr. BARTOS said that he was opposed to the deletion of the second part of sub-paragraph 3, since he thought it made for clarity. He would not, however, press his opposition to a vote.

It was agreed to delete the second part of sub-paragraph 3, following the words "of the receiving State".

The text of article 2, as amended, was adopted unanimously.