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Summary record of the 458th meeting

Topic:
Diplomatic intercourse and immunities

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458th MEETING

Friday, 6 June 1958, at 9.45 a.m.

Chairman: Mr. Radhabinod PAL.

Diplomatic intercourse and immunities (A/3623, A/CN.4/114 and Add.1-6, A/CN.4/116 and Add.1-2, A/CN.4/L.72, A/CN.4/L.75) (continued)

[Agenda item 3]

DRAFT ARTICLES ON DIPLOMATIC INTERCOURSE AND IMMUNITIES (A/3623, PARA. 16; A/CN.4/116/ADD.1-2) (continued)

ARTICLE 21 (continued)

Paragraph 4 (continued)

1. Sir Gerald FITZMAURICE said the Special Rapporteur's proposed paragraph concerning diplomatic couriers (A/CN.4/116/Add.1) was open to a number of objections. While the first sentence was acceptable in principle, he wondered whether it was necessary to mention the courier's passport, as distinct from a document testifying to the status of the courier. In some countries, only couriers who were permanent members of the courier service were given courier's passports. Frequently, however, diplomatic bags were carried by other members of the foreign service, for example by diplomats proceeding to their posts or returning home on leave. It was customary to issue to such persons a document attesting that on that particular journey they were carrying an official bag. A similar document might sometimes be given to the captain of an aircraft when he acted as courier.

2. He was not sure whether the second sentence of the proposed new paragraph represented any improvement on the 1957 draft (A/3623). In the first place, it did not say that the diplomatic courier should be protected by the receiving State, a provision to which no Government had objected. Secondly, the phrase "during his journey" in the new text might be interpreted to mean that the courier should not enjoy personal inviolability and immunity from arrest or detention in the intervals between his journeys. Such intervals might be short or long, according to the remoteness of the post to which the courier was sent; but, unless he went on leave during the interval, his inviolability and immunity should not be interrupted. It would probably be a simple drafting matter to substitute some such phrase as "in transit" or "while carrying out his functions". He would have preferred the 1957 draft, which covered the situation adequately, but would be prepared to accept the Special Rapporteur's new text if the drafting changes to which he had referred were made.

3. Mr. SANDSTRÖM, Special Rapporteur, referring to Sir Gerald Fitzmaurice's first criticism, said the idea of protection was implicit in the expression "personal inviolability". The word "journey" meant both the outward and the return journey, and also the interval

between them. The text could certainly be redrafted in satisfactory form by the Drafting Committee.

4. Mr. YOKOTA said that while he was not opposed to the inclusion of a definition of "diplomatic courier" in the draft, he thought the text proposed by the Special Rapporteur might be improved.

5. Some confusion was created by the last sentence of paragraph 4 of the commentary on article 21 of the 1957 text, for that sentence implied that when the captain of a commercial aircraft was entrusted with a diplomatic bag he was to be regarded as a diplomatic courier, provided that he was furnished with a document testifying to his status as such. Whereas, however, a diplomatic courier was a person travelling for the purpose of transmitting a diplomatic bag, the captain of a commercial aircraft belonging to a regular airline and engaged in ordinary service could hardly be said to be travelling for the purpose of delivering a diplomatic bag and hence could not be regarded as a diplomatic courier. While the bag itself was entitled to protection, the captain of an aircraft or a member of its crew hardly needed any special privilege of inviolability. The status of diplomatic courier should therefore be reserved for persons travelling for the purpose of transmitting a diplomatic bag.

6. Accordingly, he thought the Special Rapporteur's proposed definition should be amended to state that a diplomatic courier was a person who was travelling for the purpose of transmitting a diplomatic bag. The word "exclusively" should be deleted from the second sentence of the Special Rapporteur's proposed new paragraph because it would exclude persons who were travelling for some other purpose at the same time.

7. Mr. TUNKIN said he also would prefer the 1957 text, possibly with some small drafting changes. The Special Rapporteur's proposed new text raised a number of difficulties. Sir Gerald Fitzmaurice had already drawn attention to the excessively restrictive interpretation which might be placed upon the words "during his journey".

8. He would not object to the addition, in the 1957 text, of a phrase stipulating that the diplomatic courier should be furnished with a document testifying to his status, though not necessarily a courier's passport. The first sentence might perhaps be amended to read: "The diplomatic courier, who should have documents testifying to his status, shall be protected by the receiving State."

9. The extension of the courier's inviolability to the captains of commercial aircraft might cause difficulty. When a State admitted diplomatic couriers, it undertook the obligation to protect them and respect their inviolability, but the situation was different with the captain of a commercial aircraft.

10. The CHAIRMAN observed that the points being discussed had all been thoroughly dealt with at the Commission's preceding session. They were not points which had been overlooked at the time and which had now been raised by Governments.

11. Mr. BARTOS recalled that at its preceding session the Commission had taken no firm decision on the question whether the captains of commercial aircraft carrying diplomatic bags should be accorded the inviolability and immunity of diplomatic couriers. The Commission had decided that the point should be mentioned in the commentary and that no further action should be taken until the reactions of Governments were known. As there seemed to have been no decisive request from Governments that the matter should be brought under regulation, the text should be left as drafted at the previous session.

12. In his opinion, the final decision on the particular point should be taken by the body which would deal with the Commission's draft in the last resort, whether it was a diplomatic conference or the Sixth Committee of the General Assembly.

13. Mr. AMADO said he was not in favour of changing the 1957 text. As the Chairman had pointed out, all the difficulties had been discussed at length at the preceding session. The Commission should not allow itself to be prevented from adopting the most generally acceptable text by an exaggerated desire to achieve perfection.

14. Mr. SANDSTRÖM, Special Rapporteur, said that in view of the arguments in favour of retaining the 1957 draft, he withdrew the new text which he had proposed.

15. The CHAIRMAN put to the vote paragraph 4 of article 21 as drafted at the ninth session.

Paragraph 4 was adopted unanimously.

Paragraph (4) of the commentary

16. Mr. YOKOTA said that the Netherlands and Japanese Governments in their observations had expressed opposition to the grant of inviolability to the captain of a commercial aircraft carrying the diplomatic bag; the Chilean Government, on the other hand, favoured the grant of inviolability, and the Swiss Government, in saying that there should be a special provision confirming the custom of entrusting the diplomatic bag to captains of commercial aircraft, appeared also to favour it.¹ In view of the divergence of opinion among Governments, it seemed to him that the Commission should not draft paragraph (4) of the commentary in such categorical terms as it had done at the ninth session.

17. Mr. ZOUREK said he could not see any difficulty. Undoubtedly the custom existed in many countries of sending the diplomatic bag by air, even without a courier. If the captain of the aircraft had a courier's passport, he should be regarded as a courier; if he did not hold a courier's passport he should be regarded as a mere carrier, without the inviolability which international law recognizes in the person of a diplomatic courier. That had been the substance of the Commission's opinion at the ninth session, and he felt that

the Commission should adhere to it and state it precisely in the commentary.

18. Mr. BARTOS said that the captain of a commercial aircraft, when carrying the diplomatic bag entrusted to him by a Government, was acting as a diplomatic courier; but as captain of the aircraft he was, or could be, held civilly or criminally responsible for actions connected with his navigating of the aircraft. In other words, in the absence of provisions safeguarding his status, there was the danger of a conflict between his responsibilities as a pilot and his status as a courier; he could, for example, be arrested for contravening some regulation, with the bag in his possession. For that reason he felt that inviolability should be granted to the captain of a commercial aircraft for so long as he had the diplomatic bag in his possession.

19. Mr. TUNKIN said that the captain of an aircraft was primarily responsible for the management of his aircraft, and in carrying the diplomatic bag he was fulfilling a subsidiary function. It was sufficient that the diplomatic bag should remain inviolable; there was no need to grant any special privileges to the captain.

20. Sir Gerald FITZMAURICE observed that if the captain carried a courier's passport or other equivalent document he would rank as a courier and have the inviolability of a courier; if he held no such passport or document he would not have that inviolability. Historically, the custom of using couriers had arisen from the greater dangers attending travel in past centuries, when it had been found desirable to send a person to safeguard diplomatic documents in transit. The situation had changed greatly, and if on any particular journey a courier was not employed, there seemed no good reason to grant inviolability to a mere carrier. Indeed, if it were decided to grant inviolability to the captain of an aircraft, there seemed no logical reason why it should not be granted to other drivers of public vehicles carrying the diplomatic bag, such as engine drivers or the captains of ocean liners. If the sending State wished to provide a courier, it could do so: if not, it could by private arrangement draw the captain's attention to the fact that the bag was on board the aircraft, but could hardly expect the captain to be accorded personal inviolability. He was therefore in favour of leaving paragraph (4) of the commentary as drafted at the previous session: it went far enough, if not indeed too far.

21. Mr. PADILLA NERVO considered that to give the captain of an aircraft the status of a diplomatic courier, which was not his principal function, might conflict with the conventions of the International Civil Aviation Organization. If a State wished to send a courier, it was at liberty to do so; if it did not consider a courier necessary, the carrier surely did not qualify for the status of courier. In the circumstances, he thought that the words "who is not provided with such a document" should be deleted from the last sentence of paragraph (4) of the commentary. If it was decided not to delete them, he would be in favour of deleting the whole paragraph.

¹ For the observations of the four Governments see A/CN.4/114 and Add.1.

22. Mr. BARTOS observed that there was no analogy between the carrying of diplomatic mail by normal postal services and the practice of entrusting diplomatic bags to commercial airline pilots. The first was governed by international convention. The diplomatic mail was entrusted to the good faith of the carrying State and, though there were provisions whereby that State could refuse to accept such mail, once it was accepted a formal legal relationship was established between the consigning State and the carrying State, or States. In the second case, the relationship between the consigning State and the captain of the aircraft was a purely personal one, devoid of any conventional safeguard. The practice was, however, steadily growing and most chanceries had a list of airline pilots to whom diplomatic bags of special importance could safely be entrusted.

23. Two embassies in Yugoslavia, those of the United Kingdom and the United States of America, had aircraft specially intended for the carriage of diplomatic mail, though sometimes diplomatic agents and persons on mission were carried on the aircraft as well. The other, more usual, practice was to entrust the diplomatic bag to the captain of an aircraft of the national airline of the country concerned. In such cases, the captain of the aircraft, once he had handed over the diplomatic bag at its destination, reverted to the status of ordinary commercial pilot under the jurisdiction of the local civil authorities.

24. He, too, doubted the advisability of retaining the last sentence in paragraph (4) of the commentary on article 21. It would be better to point out that the commercial airline pilots carrying diplomatic bags had a dual status and that the problems arising out of that duality of status had not yet been resolved either by international law or by international practice. The Commission was faced with something of a dilemma. If it declined to recognize the practice of entrusting diplomatic bags to commercial airline pilots, it would be refusing to recognize an institution which was fast gaining acceptance. If on the other hand, it approved of the practice it would run the risk of neglecting the other consideration that the captain of a commercial aircraft was not exclusively engaged in carrying diplomatic mail.

25. Sir Gerald FITZMAURICE pointed out that the case of special pilot couriers was totally different from that of captains of commercial aircraft to whom diplomatic bags were entrusted. A diplomatic courier who piloted a special plane, even though it might carry private non-paying passengers as well as as much a courier, and as such entitled to diplomatic protection and immunity, as if he chose to take the diplomatic bag by car and took non-paying passengers with him. The courier was duly furnished with the proper papers in both cases, and neither operation was in any manner of speaking a commercial venture.

26. He still failed to see why, when diplomatic bags were entrusted to the captain of a commercial aircraft by private arrangement between him and the sending State, he should be regarded as even temporarily enjoying diplomatic inviolability.

27. Mr. AMADO remarked that it was an undeniable fact that the diplomatic bag conveyed inviolability on the person who was carrying it. Thus, once a captain of a commercial aircraft was entrusted with the diplomatic bag and given the appropriate papers, he became inviolable, though his inviolability ceased as soon as he handed over the bag at its destination.

28. Mr. ZOUREK said that he, too, thought that it would be quite sufficient to delete the words "who is not provided with such a document".

29. The CHAIRMAN put to the vote Mr. Padilla Nervo's proposal to delete the words "who is not provided with such a document" in paragraph (4) of the commentary on article 21.

The proposal was adopted by 10 votes to 2, with 4 abstentions.

30. Sir Gerald FITZMAURICE pointed out that, since the last sentence of paragraph (4) had been framed precisely with the words just deleted in mind, the last part of the sentence would probably have to be redrafted.

31. The CHAIRMAN put to the vote paragraph (4), as amended, of the commentary on article 21, subject to drafting changes.

Paragraph 4, as amended, was adopted by 11 votes to 2, with 4 abstentions.

32. Mr. SANDSTRÖM, Special Rapporteur, drew attention to the comments of the Governments of Belgium, Japan and Argentina on the use of wireless transmitters by diplomatic missions (A/CN.4/116). In response to the proposal of the Argentine Government and bearing in mind the desirability of formulating precise rules in the body of the article and not in the commentary, he had incorporated the last two sentences of paragraph (1) of the commentary as a new paragraph in his revised version of article 21 (A/CN.4/116/Add.1). Since, however, it was clearly the wish of the Commission to avoid amending texts which were in the nature of a compromise reached after thorough discussion at its previous session, he wished now to withdraw the proposal after having drawn attention to the reasons underlying it.

33. Sir Gerald FITZMAURICE said that, in view of the Special Rapporteur's decision, he would merely draw attention to the astonishing diversity of State practice in the matter of the use of wireless transmitters by diplomatic missions. In some countries, it was not allowed at all. The United Kingdom, on the other hand, as stated in its comments (A/CN.4/116), made no objection to the use of wireless apparatus by foreign diplomatic missions for the purpose of communicating with their respective Governments. It would be recalled that at the previous session it had been strongly emphasized that under existing international conventions on telecommunications, diplomatic missions were bound to apply to the receiving State for special permission to operate transmitters. It was, therefore, interesting to note that in the United Kingdom missions were not

required to seek any special permission or even to obtain a licence to operate such installations. He hoped that the United Kingdom's extremely liberal practice in the matter would come to be adopted by other countries.

34. Mr. ALFARO suggested that article 21 was incomplete as it stood. Much diplomatic correspondence was not sent in a diplomatic bag or carried by courier but conducted through the post. He, therefore, considered it essential to enunciate the inviolability of diplomatic correspondence in general, and for that purpose proposed adding to paragraph 2 of the article the words "The official correspondence of the mission is inviolable". The use of the word "official" should dispose of any objection to extending the inviolability to private correspondence directed to the mission. The phrase "official correspondence of the mission" meant correspondence from the mission, that sent to the mission by its chancellery or other authorities of the sending State, and correspondence between the mission and consulates situated in the receiving State.

35. Mr. SANDSTRÖM, Special Rapporteur, said that he had no objection to the proposal, on the understanding that "official correspondence" applied only to mail emanating from the mission.

Mr. Alfaro's proposal was adopted unanimously.

Article 21 as a whole, as amended, was adopted unanimously.

The meeting rose at 11.30 a.m.

459th MEETING

Monday, 9 June 1958, at 3 p.m.

Chairman: Mr. Radhabinod PAL.

Filling of casual vacancy in the Commission (article 11 of the Statute)

[Agenda item 1]

1. The CHAIRMAN announced that at a private meeting held on Friday, 6 June 1958, the Commission had considered the question of filling the casual vacancy which had occurred in consequence of the resignation of Mr. El-Erian; it had been decided that the election to fill the vacancy would be postponed until the Commission's eleventh session.

Diplomatic intercourse and immunities (A/3623, A/CN.4/114 and Add.1-6, A/CN.4/116 and Add.1-2, A/CN.4/L.72, A/CN.4/L.75) (continued)

DRAFT ARTICLES CONCERNING DIPLOMATIC INTERCOURSE AND IMMUNITIES (A/3623, PARA. 16; A/CN.4/116/ADD.1-2) (continued)

ADDITIONAL ARTICLE (ARTICLE 21 A)

2. Mr. SANDSTRÖM, Special Rapporteur, referred to the proposed additional article 21 B (A/CN.4/116/

Add.1), drafted in response to an observation of the Netherlands Government (A/CN.4/114/Add.1). He thought that such an article should appear in subsection B of the draft article (A/3623, para. 16) rather than in subsection A, which dealt only with mission premises and archives.

3. Mr. LIANG, Secretary to the Commission, said that the word "recovered" in the English text should be replaced by "levied".

4. Furthermore, he considered that it would be appropriate to use the term "mission" instead of "sending State"; the former was more generally used throughout the draft articles.

5. Mr. SANDSTRÖM, Special Rapporteur, said he had no objection to the changes suggested.

6. Mr. BARTOS said that a mission was entitled to charge fees in respect of visas, for example, and obviously it would be exempt in the receiving State from taxes on such fees. There seemed to be little reason for inserting a new article covering what was self-evident.

7. Mr. ZOUREK agreed with Mr. Bartos that the article was unnecessary; he had never heard of any case where the receiving State taxed fees charged by a mission in the course of its official duties. He had no objection to the substance of the article, but it seemed to him that a reference in the commentary would suffice.

8. Mr. ALFARO considered that the new article, which dealt with exemptions from taxation, should either precede or follow article 26 which was mainly concerned with taxation. He was in favour of the new article, for the draft should above all be unambiguous, and the article dealt with a matter not covered elsewhere in the draft provisions.

9. Mr. TUNKIN did not object to the article, but doubted whether such a small matter required an article to itself. He agreed with Mr. Zourek that it would be more appropriate to mention it in the commentary.

10. The CHAIRMAN drew Mr. Liang's attention to the fact that article 17 referred to the exemption of the sending State from taxation in respect of mission premises. The term "mission" was not used in the draft articles to designate the beneficiary of exemptions and privileges. He suggested that the terminology of the new article, as also its context, should be left to be settled by the Drafting Committee.

11. The CHAIRMAN put to the vote the proposal that the substance of the Special Rapporteur's proposal should be embodied in an article.

By 8 votes to 6, with 4 abstentions, it was so decided.

12. The CHAIRMAN put to the vote article 21 A as proposed by the Special Rapporteur, subject to drafting changes.

Article 21 A was adopted by 10 votes to none, with 5 abstentions.