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Summary record of the 474th meeting

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474th MEETING

Monday, 30 June 1958, at 4.20 p.m.

Chairman: Mr. Radhabinod PAL.

Consideration of the Commission's draft report covering the work of its tenth session (A/CN.4/L.78 and Add.1-4) (continued)

CHAPTER III: DIPLOMATIC INTERCOURSE AND IMMUNITIES (A/CN.4/L.78/ADD.2)

I. INTRODUCTION

1. Mr. SANDSTRÖM, Special Rapporteur, observed that the introduction to chapter III of the report made no reference either to *ad hoc* diplomacy or to diplomatic relations between States and international organizations or to the related question of the privileges and immunities of the organizations themselves. He had been asked to prepare a report on *ad hoc* diplomacy but, as he had stated earlier in the session, he had not had time to do so.

2. Mr. ZOUREK recalled that at its ninth session the Commission had decided not to deal with the question of the privileges and immunities of international organizations, and he was therefore of the opinion that there was no need to make a further reference to the subject in the report on the tenth session.

3. Mr. SANDSTRÖM, Special Rapporteur, agreed with Mr. Zourek, but thought that the subject of *ad hoc* diplomacy should be mentioned. He asked whether the Commission still desired him to prepare a report on that subject.

4. The CHAIRMAN asked the Commission whether it wished to renew its request to the Special Rapporteur to prepare a report on the subject of *ad hoc* diplomacy.

The Commission decided by 11 votes to none, with 1 abstention, to renew its request to the Special Rapporteur.

5. Sir Gerald FITZMAURICE observed that the Commission would not be able to take up the subject of *ad hoc* diplomacy at its next session and that the report to be prepared by the Special Rapporteur could not be considered by the Commission before the twelfth session.

6. Mr. YOKOTA suggested that the report on the current session might refer to the subjects mentioned by the Special Rapporteur (*ad hoc* diplomacy and relations of international organizations with States and *inter se*) by reproducing the text of paragraphs 13 and 14 of the Commission's report covering the work of its ninth session (A/3623).

7. Sir Gerald FITZMAURICE, Rapporteur of the Commission, supported the suggestion.

8. The CHAIRMAN suggested that the report should

also indicate what action had been taken on the subjects at the current session.

The suggestions were agreed to.

There were no further observations on the introduction to chapter III.

II. TEXT OF THE DRAFT

ARTICLE 1

9. Sir Gerald FITZMAURICE, Rapporteur, said there had been some discussion in the Drafting Committee concerning the appropriateness of the word "authorized" in article 1 (a). The head of a mission was charged by the sending State with a duty, rather than authorized to act. Consequently, if the Committee had had more time, he felt sure that it would have decided to redraft the sub-paragraph to read:

"(a) The 'head of the mission' is the person charged by the sending State with the duty of acting in that capacity."

He suggested that the definition should be so redrafted.

The drafting change suggested by the Rapporteur was adopted.

10. Mr. BARTOS proposed that the words "or a *chargé d'affaires ad interim* while acting in that capacity" should be added to the definition of "head of the mission" in sub-paragraph (a). Without that addition, there would be no provision in the draft to enable a *chargé d'affaires ad interim* to act as head of a mission and a Ministry for Foreign Affairs might claim, for example, that it was not acting in a discriminatory way if it failed to invite *chargés d'affaires ad interim* to attend meetings of heads of missions.

11. Mr. SANDSTRÖM, Special Rapporteur, said he doubted whether the expression "head of mission" was used in the draft in a sense which would include *chargés d'affaires ad interim*. In that connexion, he referred particularly to article 13. Article 16, too, he thought, made it clear that the category of heads of mission included only persons who had been accredited as such.

12. Sir Gerald FITZMAURICE, Rapporteur, thought that article 13 clearly showed that the term "head of mission" did not include *chargés d'affaires ad interim*.

13. Mr. MATINE-DAFTARY pointed out that the *agrément* of the receiving State was not needed even for permanent *chargés d'affaires*.

14. Mr. BARTOS suggested that article 13 might be amended so as to include *chargés d'affaires ad interim* in the category of heads of mission.

15. Sir Gerald FITZMAURICE, Rapporteur, observed that besides article 13 there were a number of articles in the draft in which the expression "head of mission" was used in contexts which would exclude *chargés d'affaires ad interim*.

16. Mr. SANDSTRÖM, Special Rapporteur, pointed out that the definitions in article 1 were "for the purpose of the present draft articles" only, and that consequently the possibility of more comprehensive definitions was not excluded.

17. Mr. ALFARO agreed with Mr. Bartos that it was a defect of article 1 (a) that it did not include *chargés d'affaires* acting as heads of mission *ad interim*. It would be much simpler and more logical to say: "The 'head of the mission' is the person competent to represent the sending State."

18. Mr. LIANG, Secretary to the Commission, thought Mr. Alfaro's suggestion should be considered by the Commission. As it stood, article 1 (a) was not a definition at all.

19. The CHAIRMAN suggested that the Commission should vote on the text of article 1 as presented in the draft report, on the understanding that it might subsequently be amended in the light of the Commission's consideration of the rest of the draft.

On that understanding, article 1 was adopted by 12 votes to none, with 1 abstention.

ARTICLE 2

Article 2 was adopted unanimously.

COMMENTARY ON ARTICLE 2

20. Sir Gerald FITZMAURICE, Rapporteur, suggested that, in paragraph (1), it might be going too far to say that any State Member of the United Nations would be acting contrary to the spirit of the United Nations Charter if, in the absence of exceptional and temporary reasons (e.g., non-recognition), it refused to establish diplomatic relations at another State's request. In the first place, non-recognition often took place for reasons that could not be described as exceptional and temporary, whether those reasons were justified or not; and, in the second place, to describe refusal to establish diplomatic relations at another State's request as contrary to the spirit of the United Nations Charter was hardly consistent with the text of the article, which stated that the establishment of diplomatic relations took place by mutual consent.

21. He therefore suggested that the middle part of the paragraph be deleted. The text would then read:

"(1) There is frequent reference in doctrine to a 'right of legation' said to be enjoyed by every sovereign State. The interdependence of nations and the importance of developing friendly relations between them, which is one of the purposes of the United Nations, necessitate the establishment of diplomatic relations between them. However, this right cannot be exercised without agreement between the parties. The Commission did not consider that it should mention the right of legation in the text of the draft."

22. Mr. SANDSTRÖM, Special Rapporteur, agreed to the suggested redraft.

Paragraph (1) of the commentary, as amended by the Rapporteur, was adopted by 10 votes to none, with 2 abstentions.

Paragraphs (2), (3) and (4) were adopted unanimously.

ARTICLE 3

Article 3 was adopted unanimously.

COMMENTARY ON ARTICLE 3

23. Sir Gerald FITZMAURICE, Rapporteur, expressed doubt concerning the first sentence in paragraph (4) of the commentary. It was generally beyond the power of a diplomatic mission to prevent an infringement of treaties and of rules of international law. On the other hand, it might have to make representations in order to protect the interests of the sending State when neither a treaty nor a rule of international law had been infringed. He suggested that the first sentence, which was already covered by paragraph (3), should be omitted and that the words "The functions mentioned in sub-paragraph (b)" should replace the words "This activity" at the beginning of the second sentence.

24. With regard to paragraph (5), he suggested that the phrase "Obtaining information" should be replaced by a brief reference to article 3, sub-paragraph (d).

25. In paragraph (7), the expression "commercial representation" might be interpreted as covering commercial attachés, to which the paragraph clearly did not apply. He suggested that the expression should be replaced by "trade missions".

26. Mr. TUNKIN said that he had no objection to the change suggested by the Rapporteur in paragraph (4), though he could not entirely agree with the latter's arguments.

27. In paragraph (8), he suggested that the words "the receiving State is often willing that they should" should be replaced by the words "it is the usual practice for them to", which would be more in keeping with the existing situation.

28. Mr. SANDSTRÖM, Special Rapporteur, accepted the Rapporteur's suggestions with regard to paragraphs (4) and (7). At the beginning of paragraph (5) the words "Obtaining information covers" could be replaced by the phrase "The activities mentioned under paragraph (d) cover". As for paragraph (8), though he had no objection to Mr. Tunkin's suggestion, he thought that the whole paragraph could be deleted and the matter dealt with under article 39.

29. The CHAIRMAN put to the vote the commentary on article 3, together with the four above-mentioned amendments.

The commentary, as amended, was adopted by 11 votes to none, with 1 abstention.

ARTICLES 4 AND 5

Articles 4 and 5 were adopted unanimously.

ARTICLE 6

30. Mr. SCELLE objected on stylistic grounds to the words "*nomme à son choix*" in the French text of article 6.

31. Mr. SANDSTRÖM, Special Rapporteur, said that the words "may appoint" alone would not be enough to bring out the contrast between the procedure in the case of subordinate staff of the mission and that in the case of heads of mission, dealt with in article 4.

Article 6 was adopted by 13 votes to none, with 1 abstention.

ARTICLE 7

Article 7 was adopted by 12 votes to 1.

ARTICLE 8

Article 8 was adopted by 13 votes to none, with 1 abstention.

COMMENTARY ON ARTICLES 4 TO 8

32. Mr. LIANG, Secretary to the Commission, referring to paragraph (1) of the commentary, suggested that the passage concerning the concordance of the texts in the various languages was unnecessary.

33. With special reference to paragraph (2), he said that the commentary introduced some subsidiary rules which might make it difficult to ascertain the precise content of the articles themselves. The last sentence in the paragraph was an example. The Commission had been at some pains to draw a clear distinction between the position with regard to the appointment of subordinate staff and that with regard to the appointment of the head of the mission. The last sentence appeared, however, to apply to both. As far as heads of mission were concerned, it seemed to be an understatement; and as far as subordinate staff was concerned, it appeared to be somewhat in contradiction with article 6. He suggested deleting either the last sentence or the entire paragraph.

34. Sir Gerald FITZMAURICE, Rapporteur, said that article 5 was new. He proposed therefore that paragraph (1) of the commentary should read: "Article 5 is new, but the text of articles 4, 6, 7 and 8 as adopted..." The second sentence could well be omitted.

35. Mr. SANDSTRÖM, Special Rapporteur, agreed to both changes.

Paragraph (1) of the commentary, as amended, was adopted unanimously.

36. Sir Gerald FITZMAURICE, Rapporteur, said that paragraph (2) was very similar to paragraph (1) of the 1957 commentary (A/3623, para. 16, commentary on articles 3 to 6) and the last sentence of the paragraph was the same. But that sentence was undoubtedly not very clear, and he agreed that it might well be deleted. There was no reason, however, for deleting the rest of

the paragraph, which stated as a general principle that both the sending and the receiving State should be satisfied as to the persons composing the mission.

37. Mr. SANDSTRÖM, Special Rapporteur, accepted the suggestion that the last sentence of paragraph (2) be deleted. The rest of the paragraph was a statement of the existing position, and deserved to be retained; but, instead of the passage "the several categories listed in article 1 (Definitions)", he would prefer an enumeration of the categories, as in paragraph (1) of the corresponding 1957 commentary. The second sentence of paragraph (2) would therefore read:

"The mission comprises a head, and assistants subordinate to him, who are normally divided into several categories: diplomatic staff, who are engaged in diplomatic activities proper; administrative and technical staff, and service staff."

38. Mr. TUNKIN objected to the inclusion of the word "proper", which had been omitted from article 1.

39. Mr. SANDSTRÖM, Special Rapporteur, agreed to the deletion of the word.

Paragraph (2) of the commentary, as amended, was adopted unanimously.

40. Mr. YOKOTA said that as the last sentence of paragraph (2) had been deleted, paragraph (3) would be unintelligible without some explanation of the kind of procedure that was envisaged.

41. Sir Gerald FITZMAURICE, Rapporteur, said that the main objection to the last sentence of paragraph (2) was that it was by no means clear what it referred to. Its deletion made no difference to the intelligibility of paragraph (3).

42. Mr. SANDSTRÖM, Special Rapporteur, suggested that it would clarify the first sentence of paragraph (3) and satisfy Mr. Yokota's objection if at the beginning the words: "To achieve this result", were added.

The suggestion was agreed to.

Paragraph (3) of the commentary, as amended, was adopted unanimously.

43. Sir Gerald FITZMAURICE, Rapporteur, proposed that, for the sake of clarity, in the first sentence of paragraph (4) the words "that is to say, their names are not submitted in advance" should be added after "the sending State".

44. Mr. LIANG, Secretary to the Commission, suggested that the English text read "in principle" instead of "as a rule".

45. Mr. SANDSTRÖM, Special Rapporteur, accepted those two amendments.

Paragraph (4) of the commentary, as amended, was adopted unanimously.

46. Mr. ALFARO pointed out that the reference in paragraph (4) to "*persona non grata*" appeared to cover all members of the mission, whereas paragraph (5) limited the term *persona non grata* to diplomatic staff

only. The same wider use of the term occurred in article 8, paragraph 1. He felt that the inconsistencies should be eliminated.

47. Mr. TUNKIN said that article 8, paragraph 1, was perfectly clear. In any case, even if the term "not acceptable" were used in the case of the diplomatic staff or "*persona non grata*" in the case of the other staff, the effect would be the same.

48. The CHAIRMAN pointed out that the apparent inconsistency noted by Mr. Alfaro was in fact explained in the commentary.

49. Mr. ZOUREK proposed that the word "usually" be inserted before the word "employed" at the end of the second sentence of paragraph (5).

50. Mr. SANDSTRÖM, Special Rapporteur, accepted that amendment. It brought the text into closer conformity with existing practice.

Paragraph (5) of the commentary, as amended, was adopted by 14 votes to none, with 1 abstention.

The meeting rose at 6.5 p.m.

475th MEETING

Tuesday, 1 July 1958, at 9.45 a.m.

Chairman: Mr. Radhabinod PAL.

Consideration of the Commission's draft report covering the work of its tenth session (A/CN.4/L.78 and Add.1-4) (continued)

CHAPTER III: DIPLOMATIC INTERCOURSE AND IMMUNITIES (A/CN.4/L.78/Add.2) (continued)

II. TEXT OF THE DRAFT (continued)

COMMENTARY ON ARTICLES 4 TO 8 (continued)

Paragraph (6) of the commentary on articles 4 to 8 was adopted.

1. Mr. ZOUREK suggested that the opening words of the French text of paragraph (7) should be revised to read: "*La suite normale de ce qu'une personne a été déclarée persona non grata après qu'elle est entrée en fonction . . .*"

2. Mr. SANDSTRÖM, Special Rapporteur, agreed to the suggested amendment.

3. Mr. YOKOTA said that the last sentence of paragraph (7) seemed somewhat peremptory and made no provision for the continuance of diplomatic privileges and immunities during the interim period between the date of the declaration referred to in the preceding sentence and the date of the departure of the person declared *persona non grata*. He therefore suggested that the phrase "subject to article 37" (the article corresponding to article 31 of the 1957 text (A/3623,

para. 16)) should be inserted in the sentence so as to avoid giving the impression that diplomatic privileges and immunities would cease immediately on the date of the declaration.

4. Mr. SANDSTRÖM, Special Rapporteur, said that the declaration mentioned in the penultimate sentence of paragraph (7) should take effect immediately.

5. Mr. TUNKIN said that the terms of the declaration would be decisive; it might provide for the continuance of privileges and immunities for a specified period additional to the "reasonable time" within which the sending State was to recall the diplomatic agent concerned or declare his functions terminated. He suggested that the last sentence of paragraph (7) might be deleted if the words "and that the person concerned no longer enjoys diplomatic privileges and immunities" were added at the end of the preceding sentence.

6. Mr. ZOUREK suggested that the possibility of the continuance of diplomatic privileges and immunities for a certain time after the date of the declaration might be provided for if the words "or will be terminated on a specified date" were added after the words "are terminated" in the penultimate sentence.

7. Sir Gerald FITZMAURICE, Rapporteur of the Commission, recognized the force of Mr. Yokota's objection to the last sentence of paragraph (7).

8. Mr. MATINE-DAFTARY also criticized the last sentence of paragraph (7). The declaration referred to in the penultimate sentence should provide for a specified period at the end of which diplomatic privileges and immunities would be discontinued. The person concerned would then become subject to the laws of the receiving State concerning aliens. He could either remain in the country on the same footing as other aliens, or, if the receiving State found his presence objectionable, he could be expelled; but it was wrong to emphasize the possibility of expulsion as did the last sentence of paragraph (7) as drafted.

9. Faris Bey EL-KHOURI observed that the phrase "and may even be expelled" was not necessary, since upon losing his diplomatic privileges and immunities the person concerned would be subject to the municipal law of the receiving State. The phrase should therefore be deleted.

10. The CHAIRMAN pointed out that a reasonable time for the recall of the person concerned or the termination of his functions was provided for in the second sentence of paragraph (7). Only after that reasonable time had expired would the declaration referred to in the third sentence be made.

11. Mr. SANDSTRÖM, Special Rapporteur, observed that the Commission might either adopt Mr. Yokota's suggestion or delete the last sentence, since it was not strictly necessary.

12. Mr. AGO observed that if a diplomatic agent should cease abruptly to enjoy privileges and immunities he would be liable not merely to expulsion but even