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Summary record of the 475th meeting

Topic:
Other topics

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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

to arrest and trial—which seemed to him a hardly tolerable situation.

13. Mr. ZOUREK could not accept the view that the diplomatic privileges and immunities of a diplomatic agent declared *persona non grata* should subsist even if he refused to leave the country.

14. The CHAIRMAN said there seemed to be a general feeling that the last sentence should be deleted. He therefore put paragraph (7) to the vote with the last sentence deleted and the penultimate sentence amended in the manner suggested by Mr. Tunkin (para. 5 above).

Paragraph (7) of the commentary, as so amended, and with the drafting change to the French text suggested by Mr. Zourek, was adopted by 12 votes to none, with 1 abstention.

Paragraph (8) of the commentary was adopted.

15. Mr. AGO noted that paragraph (9) of the commentary, in discussing the appointment of nationals of the receiving State as diplomatic agents of other States, distinguished between two categories of such nationals. The first consisted of persons who were nationals of the receiving State alone, and the second of persons who were nationals of both the sending and the receiving States. He thought there were more persons in the second category than in the first, and consequently he found the third sentence of the paragraph unnecessary and undesirable. He suggested that it should be deleted.

16. Mr. YOKOTA said he found the sentence to which Mr. Ago had referred somewhat difficult to understand, since even if the receiving State gave its consent it would still be deprived of its jurisdiction so far as concerned the official acts performed by those of its nationals who were employed as diplomatic agents of other States. The point to be stressed was that it should not be so deprived of jurisdiction without consenting thereto, and he therefore suggested that the words “without its consent” should be inserted after the words “one of its nationals”. Better still, the whole sentence might be deleted.

17. Sir Gerald FITZMAURICE, Rapporteur, wondered whether Mr. Yokota’s interpretation was correct. The whole purpose of the sentence was to explain why the receiving State’s consent was required. If it was not required, a person might secure employment with a foreign diplomatic mission for the sole purpose of claiming immunity from jurisdiction in his own country. He therefore thought the sentence should be retained.

18. Mr. AGO observed that the immunity from jurisdiction, so far as nationals of the receiving State were concerned, was accorded in respect only of official acts performed in the course of their duties as diplomatic agents attached to foreign missions. Though he did not dispute the accuracy of the idea on which the third sentence was based, he considered that the wording was unacceptable.

19. The CHAIRMAN suggested that it might not be necessary to give the reason why the consent of the receiving State should be required.

20. Mr. AGO said that the real reason for requesting the consent of the receiving State had nothing to do with the fact that that State would be deprived of its jurisdiction over a national but arose from the fact that that State would be faced with one of its nationals acting as the representative of a foreign State. The question of privileges and immunities was purely incidental.

21. Mr. BARTOS opposed Mr. Ago’s suggestion that the third sentence of paragraph (9) should be deleted. The employment of nationals of the receiving State as diplomatic agents of foreign missions might lead to a conflict of obligations, and that was why privileges and immunities had to be granted. In his opinion the authors of the commentary had well expressed the intention which lay behind the provisions of the draft.

22. Mr. TUNKIN suggested that the words “for the appointment as a diplomatic agent of a national of a third State”, in the fourth sentence of paragraph (9), should be deleted, since the problem had not been discussed by the Commission and such cases were comparatively infrequent.

23. Sir Gerald FITZMAURICE, Rapporteur, said he did not agree that cases of that kind were infrequent. In fact, they were quite common, especially, for example, in Italy, the Vatican City and the countries of the British Commonwealth. The reference in the commentary was, he thought, useful and should be retained.

24. He drew attention to two small drafting changes which should be made in paragraph (9). In the antepenultimate sentence, the word “however” should be inserted after “provision”; and in the last sentence the word “entirely” should be inserted after the word “opposed”.

25. The CHAIRMAN put to the vote paragraph (9) as amended by the deletion of the third sentence.

Paragraph (9) of the commentary, as so amended, was adopted by 7 votes to 4, with 2 abstentions.

Paragraph (10) of the commentary was adopted.

26. Mr. TUNKIN suggested the deletion of the second sentence of paragraph (11) of the commentary because he did not think it was any longer the general practice that the prior consent of the receiving State was required in the case of multiple accreditation.

27. Sir Gerald FITZMAURICE, Rapporteur, suggested that it might be enough to delete the words “According to practice”.

28. Mr. TUNKIN and Mr. SANDSTRÖM, Special Rapporteur, accepted the suggestion.

Paragraph (11) of the commentary, as so amended, was adopted unanimously.

ARTICLE 9

Article 9 was adopted unanimously.

COMMENTARY ON ARTICLE 9

29. Sir Gerald FITZMAURICE, Rapporteur, said that it was not clear from the last sentence of the commentary that the persons there referred to as leaving their posts were leaving them finally. He suggested that the words "who leave their posts" be replaced by the words "who are finally leaving their posts".

30. Mr. SANDSTRÖM, Special Rapporteur, had no objection to the amendment.

The commentary on article 9, as amended, was adopted unanimously.

ARTICLE 10

31. Mr. TUNKIN said that the last sentence of paragraph 2 of article 10 was not concerned with the size of the staff. He suggested therefore that a more appropriate context would be article 6, which, like that sentence, dealt with the appointment of the staff.

32. In reply to Mr. BARTOS, he admitted that article 6 was a general rule, whereas the last sentence of article 10, paragraph 2, was a special rule. Both, however, dealt with the appointment of the staff, and should therefore be together.

33. Mr. SANDSTRÖM, Special Rapporteur, had no objection to the transfer of the last sentence to article 6. But for the fact that article 4 dealt with *agrément* in the case of the head of the mission only, the sentence might well be added to that article.

Mr. Tunkin's suggestion was agreed to.

Article 10, as amended, was adopted by 10 votes to none, with 2 abstentions.

COMMENTARY ON ARTICLE 10

34. Mr. TUNKIN thought that the sentence in paragraph (3) of the commentary beginning with the words "Failing such agreement" should be drafted in language analogous to that used in article 10 itself: a right to limit the size of the staff was not the same as a refusal to accept a size exceeding what was reasonable and normal.

35. He added that the passage in paragraph (5) of the commentary beginning with the words "Only the States concerned" and ending with the words "to have recourse" appeared to be unrelated to the subject of the article and contained statements of doubtful validity. He proposed that the passage in question be omitted.

36. Mr. SANDSTRÖM, Special Rapporteur, said that if the passage in question were deleted the argument would not suffer; nevertheless, he considered that it was a useful explanatory comment and hence should stand.

37. Mr. YOKOTA said that many Governments followed the criteria laid down. The provisions of article 10

were very broad, and it was essential that States should understand the reasons why they had been drafted in that way. For that reason he thought that the passage under discussion should be retained.

38. He proposed that the word "vague" in the antepenultimate sentence of paragraph (5) should be replaced by the word "general".

39. Mr. MATINE-DAFTARY thought that paragraph (5) of the commentary complicated, rather than explained, the sense of article 10. In the circumstances it might be better to delete the entire paragraph.

40. Mr. AGO pointed out that the last sentence of paragraph (4) should be omitted, as it had just been decided that the last sentence of article 10, paragraph 2, would be transferred to article 6.

41. In paragraph (3) he disliked the term "absolute right". It had a specialized meaning in French, which was unsuitable in the context. In the same paragraph the last sentence was also extremely ambiguous.

42. Sir Gerald FITZMAURICE, Rapporteur, in reply to Mr. Ago, said that the right was not absolute, but qualified, as it was limited by the provisions of the article. He could see no possible objection to the term, at least in English.

43. Mr. SANDSTRÖM, Special Rapporteur, agreed that there was no objection to the term "absolute right".

44. The last sentence of paragraph (3) of the commentary followed the language used in the commentary on article 7 of the 1957 text.

45. Mr. YOKOTA said that the last word of paragraph (3) should be "normal", to accord with the terminology used in the article.

46. Mr. LIANG, Secretary to the Commission, pointed out that the act of limiting the staff would be carried out by the sending State, but the request for limitation would be made by the receiving State. Consequently, the last sentence of paragraph (3) required some clarification.

47. After some discussion, Mr. SANDSTRÖM, Special Rapporteur, agreed to substitute for the words "the right, but not an absolute right, to limit the size of the staff" in paragraph (3) the words "the right within certain limits to refuse to accept an increase in the size of the staff". He also agreed to the insertion of the words "claim for" between "Any" and "limitation", and to the substitution of the word "normal" for the word "customary" in the last sentence of paragraph (3).

The commentary on article 10, as amended, was adopted by 11 votes to none, with 4 abstentions.

ARTICLE 11

48. Mr. SCELLE criticized the word "bureaux", in the French text of article 11, on the ground that it meant essentially a room or a piece of furniture. He preferred *annexes* or *dépendances*, which would bring

out the relationship between the offices and the mission headquarters.

Article 11 was adopted by 14 votes to none, with 1 abstention, on the understanding that the Secretariat would endeavour to find a more suitable French term corresponding to the English word "offices".

COMMENTARY ON ARTICLE 11

49. Mr. YOKOTA thought it undesirable and unnecessary to begin the commentary with the words "In consequence of an observation made by one Government". He suggested that they be omitted.

50. Mr. SANDSTRÖM, Special Rapporteur, agreed to the suggestion.

The commentary on article 11, as amended, was adopted unanimously.

ARTICLE 12

Article 12 was adopted by 10 votes to none, with 1 abstention.

COMMENTARY ON ARTICLE 12

51. Mr. SANDSTRÖM, Special Rapporteur, said that as the Commission had decided to delete the introductory words of the commentary to article 11, it should also omit the words "to adopt one Government's suggestion and" in paragraph (2) of the commentary on article 12.

It was so agreed.

The commentary on article 12, as amended, was adopted by 10 votes to none, with 1 abstention.

ARTICLE 13

52. Mr. TUNKIN observed that the draft in article 13 dealt with the *chargé d'affaires ad interim* before it dealt with the head of the mission. It would be preferable to put article 13 after article 17.

53. Mr. SANDSTRÖM, Special Rapporteur, agreed to the rearranged order.

Article 13 was adopted unanimously.

COMMENTARY ON ARTICLE 13

54. Sir Gerald FITZMAURICE, Rapporteur, said that in paragraph (2) of the commentary the emphasis was wrongly placed in the statement that the head of the mission in some countries was not replaced when he was in the country. The question was not that of replacement by the sending State, but whether the receiving State regarded him as able or as unable to perform his functions so long as he was in that country. The situation would be made clearer if the words "in some the head of the mission is not replaced when he is in the country" were replaced by the words "in some the head of the mission is not regarded as requiring to be replaced as long as he is in the country".

55. Mr. SANDSTRÖM, Special Rapporteur, accepted the amendment.

The commentary on article 13, as amended, was adopted unanimously.

ARTICLES 14 AND 15

Articles 14 and 15 were adopted unanimously.

ARTICLE 16

Article 16 was adopted unanimously.

ARTICLE 17

Article 17 was adopted unanimously.

56. Mr. BARTOS said that he had voted for articles 16 and 17 subject to a reservation concerning religious authorities and their representatives.

COMMENTARY ON ARTICLES 14 TO 17

57. Mr. TUNKIN suggested that paragraph (3) of the commentary on articles 14 to 17 might well be omitted, since it gave no particulars of the nature of the observations of Governments on the point.

58. Sir Gerald FITZMAURICE, Rapporteur, considered paragraph (5) unnecessarily elaborate. Since the date according to which heads of mission took precedence was entirely dependent on article 16, paragraph 1, the paragraph could be confined to a statement of that fact.

59. Mr. SANDSTRÖM, Special Rapporteur, said that he had included paragraph (3) merely in order to point out that the question had been reconsidered. He accepted both suggestions.

60. He drew attention to the following addition to the commentary:

"(8) The Commission did not feel called upon to deal in the draft with the rank of the members of the mission's diplomatic staff. This staff comprises, apart from specialized officials such as military, naval, air, commercial or other attachés, the following classes:

- Minister-Counsellors
- Counsellors
- First Secretaries
- Second Secretaries
- Third Secretaries
- Attachés

Their rank is established on the same principles as the rank of heads of mission."

61. Mr. TUNKIN suggested the deletion of the last sentence in the additional paragraph, which had not been accepted by the Drafting Committee.

62. Mr. LIANG, Secretary to the Commission, suggested that the first item in the list should read "Ministers or Minister-Counsellors". "Minister" was a title given in some embassies to a diplomatic agent of a rank intermediate between that of the ambassador and that of the minister-counsellor.

63. After further discussion, Mr. SANDSTRÖM, Special Rapporteur, accepted both Mr. Tunkin's and the Secretary's suggestions.

64. Mr. ALFARO suggested that cultural attachés should be mentioned as well, since they were acquiring increasing importance.

65. Mr. BARTOS pointed out that it was quite a common practice for civil attachés to be given a rank in the diplomatic hierarchy and, for example, to be entitled first secretary for commercial affairs. To make their position *vis-à-vis* their purely diplomatic colleagues clear, he suggested adding a phrase such as "excepting, in the case of civil attachés, those to whom a diplomatic rank has been assigned".

66. Mr. ZOUREK said that Mr. Bartos' addition could be made but seemed hardly necessary, since it was clear that the phrase in the second sentence in the paragraph referred only to specialized attachés who had no diplomatic rank.

67. Mr. TUNKIN was in favour of adopting the paragraph as it stood. The Drafting Committee had discussed the position of attachés and had decided to set them apart, partly in view of the complicating factor of the different ranking of service attachés in the army, navy or air force.

68. Sir Gerald FITZMAURICE, Rapporteur, suggested that the reference to specialized officials in the second sentence in the paragraph should be omitted and a new paragraph added on the following lines:

"There are also specialized officials such as military, naval, air, commercial, cultural or other attachés, who may be placed in one of the above-mentioned classes."

69. Mr. SANDSTRÖM, Special Rapporteur, accepted the suggestions of Mr. Alfaro and Sir Gerald Fitzmaurice.

Paragraph (8), as amended, was adopted unanimously.

The commentary on articles 14 to 17 as a whole, as amended, was adopted unanimously.

ARTICLE 18

Article 18 was adopted unanimously.

COMMENTARY ON ARTICLE 18

70. Sir Gerald FITZMAURICE, Rapporteur, suggested and Mr. SANDSTRÖM, Special Rapporteur, agreed that the words "This article" at the beginning of the commentary should be amended to read "The rule laid down in this article".

The commentary on article 18, as amended, was adopted unanimously.

ARTICLE 19

Article 19 was adopted unanimously.

COMMENTARY ON ARTICLE 19

71. Mr. TUNKIN observed that paragraph (3) of the commentary was both unclear and unnecessary. He suggested its deletion.

72. Mr. YOKOTA suggested that the words "the mission's staff" in paragraph (2) should be amended to read "the members of the staff of the mission" to bring the text into line with the wording of article 1.

73. Mr. SANDSTRÖM, Special Rapporteur, accepted both suggestions.

The commentary on article 19, as amended, was adopted by 13 votes to none, with 1 abstention.

ARTICLE 20

Article 20 was adopted unanimously.

COMMENTARY ON ARTICLE 20

74. Sir Gerald FITZMAURICE, Rapporteur, pointed out that the references to the observations of Governments in paragraph (6) and (7) of the commentary might have to be omitted in the light of the Commission's decision concerning similar references in commentaries to preceding articles.

On that understanding, the commentary on article 20 was adopted unanimously.

ARTICLE 21

Article 21 was adopted unanimously.

COMMENTARY ON ARTICLE 21

75. Mr. LIANG, Secretary to the Commission, suggested that the word "intention" in the first sentence of paragraph (1) of the commentary should be replaced by the word "substance".

76. Sir Gerald FITZMAURICE, Rapporteur, suggested that the second sentence in paragraph (1) of the commentary should be deleted, since the article itself referred to the sending State and to the head of the mission, and not to the mission. He also suggested that the last sentence in the same paragraph should be revised to read: "The Commission thought that a reference to specific services rendered was preferable to the phrase 'for services actually rendered'."

77. Mr. AGO, recalling the previous discussion on the subject, suggested that the phrase "which is a more comprehensive description" in the third sentence of paragraph (1) of the commentary should read "which in the Commission's interpretation covers all dues or taxes levied by any local authority".

78. Mr. SANDSTRÖM, Special Rapporteur, accepted all four suggestions.

The commentary on article 21, as amended, was adopted unanimously.

ARTICLE 22

Article 22 was adopted unanimously.

COMMENTARY ON ARTICLE 22

79. Mr. GARCÍA AMADOR observed that the opening words of the second sentence in paragraph (1) of the commentary might convey the impression that the 1957 commentary had been drafted independently of the Commission. He suggested that the words should be amended to read: "As the Commission pointed out at its ninth session".

80. Mr. LIANG, Secretary to the Commission, said that the words "One Government points out" at the beginning of paragraph (2) would leave the reader guessing what Government was meant. If reference to the particular observation was necessary, he would suggest either that the Government should be specified or that a reference to the document containing its observations should be inserted.

81. Mr. YOKOTA observed that the first two sentences of paragraph (2) might well be omitted.

82. Mr. SANDSTRÖM, Special Rapporteur, agreed that the first two sentences of paragraph (2) might be deleted. Paragraph (1) might also be deleted.

83. Mr. ZOUREK supported Mr. García Amador's suggestion as being preferable to the deletion of paragraph (1). Paragraph (2) could begin with the words "It was suggested that".

84. Mr. SANDSTRÖM, Special Rapporteur, accepted the suggestions of Mr. García Amador and Mr. Zourek.

The commentary on article 22, as amended, was adopted unanimously.

ARTICLE 23 AND COMMENTARY

Article 23 and commentary were adopted unanimously.

ARTICLE 24

Article 24 was adopted by 14 votes to none, with 1 abstention.

COMMENTARY ON ARTICLE 24

The commentary on article 24 was adopted unanimously.

The meeting rose at 1 p.m.

476th MEETING

Wednesday, 2 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)

ARTICLE 25

1. Sir Gerald FITZMAURICE, Rapporteur of the Commission, suggested that the words "liable to arrest or detention, whether administrative or judicial" in paragraph 5 of the article should be replaced by "liable to any form of arrest or detention", a form of words agreed upon by the Drafting Committee in connexion with article 27.

2. Mr. SANDSTRÖM, Special Rapporteur, accepted the amendment.

Article 25, as amended, was adopted unanimously.

COMMENTARY ON ARTICLE 25

3. Mr. SANDSTRÖM, Special Rapporteur, said that he wished to amend paragraph (3) of the commentary in certain respects. The words "One Government pointed out that" at the beginning of the first sentence should be replaced by the word "Formerly"; the words "this represents the practice obtaining in earlier times" at the beginning of the second sentence should be deleted, and the two sentences should be merged.

4. Mr. TUNKIN thought that the first statement in the third sentence of paragraph (3) was too categorical; the practice there described was not invariable.

5. Referring to the fourth sentence in paragraph (4), he pointed out that not all the incoming correspondence of the mission was "official"; only that emanating from official government organs could be so described.

6. Sir Gerald FITZMAURICE, Rapporteur, agreed with Mr. Tunkin on his first point and suggested that the word "always" be inserted between the words "no longer" and "pass" in the third sentence of paragraph (3).

7. With reference to Mr. Tunkin's second point he said that, even if the fourth sentence of paragraph (4) was redrafted, the difficulty of deciding what was official correspondence would still remain; and as the sentence now stood, incoming correspondence must be official, to. He would not, however, object to the deletion of the sentence.

8. Mr. YOKOTA said that, in keeping with the Commission's decision not to refer to observations of