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Summary record of the 578th meeting

Topic:
Other topics

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of the Vienna conference and puts it forward in that spirit."

It was so agreed.

CHAPTER IV (*Other decisions of the Commission*)
(A/CN.4/L.92/Add.3)

Section I (*Codification of the principles and rules of international law relating to the right of asylum*)

Section I was adopted.

Section II (*Study of the juridical régime of historic waters, including historic bays*)

Section II was adopted.

Section III (*Planning of future work of the Commission*)

55. Mr. LIANG, Secretary to the Commission, suggested that it should be made clear in the text that the subject of state responsibility would be taken up at the thirteenth session.

It was so agreed.

56. Mr. BARTOŠ asked what would happen if the Vienna conference in 1961 made a recommendation regarding the Commission's future work.

57. The CHAIRMAN replied that section III simply reported the Commission's decision, based on what was known at the present session.

58. Mr. GARCÍA AMADOR observed that a recommendation from the Vienna conference would have to be addressed to the General Assembly. Naturally, the Commission would have to take into account any new instructions by the General Assembly.

Section III was adopted subject to the Secretary's suggestion.

Section IV (*Co-operation with other bodies*)

59. Mr. YOKOTA considered that section IV should report the general approval of Mr. Tunkin's observation (571st meeting, paragraphs 33 and 41) that it was of more importance that the Commission should receive the papers, summary records and other documents of conferences of international organizations interested in the development of international law than that it should send observers to such conferences for a few days.

60. Mr. TUNKIN said that the report should indicate that it was the feeling (*ibid.*, paragraphs 45 and 50), and perhaps even the decision, of the Commission that the Secretariat should arrange for the transmission to members of the documents Mr. Yokota had mentioned.

61. Mr. LIANG, Secretary to the Commission, said that he hesitated to predict the extent of the interchange envisaged. For example, if fifty

members of the Asian-African Legal Consultative Committee should request all the documents of the Commission, a serious problem would arise. Under United Nations rules, fifty sets of the Commission's *Yearbook* could not be distributed free of charge. Some quantitative parity in the exchange would have to be aimed at, and he hoped the Secretariat would be given a certain latitude in the matter.

62. The CHAIRMAN did not think that the Commission had contemplated an exchange of documents. The Secretariat was to request the bodies in question to provide the documents desired by the Commission. If counter-requests for Commission documents were received, they would have to be treated in accordance with United Nations rules.

63. The summary records would show what the Commission had intended. He suggested that a paragraph should be added to section IV, indicating the kind of help the Commission hoped to receive.

It was so agreed.

Section IV, as amended, was adopted.

Section V (*Date and place of the next session*)

Section V was adopted.

Section VI (*Representation at the fifteenth session of the General Assembly*)

Section VI was adopted.

The meeting rose at 1 p.m.

578th MEETING

Thursday, 30 June 1960, at 3.30 p.m.

Chairman: Mr. Luis PADILLA NERVO

Consideration of the Commission's draft report covering the work of its twelfth session (A/CN.4/L.92/Add.2) [continued]

CHAPTER II (*Consular intercourse and immunities*)

1. The CHAIRMAN recalled that there now remained to be considered chapter II (Consular intercourse and immunities) of the draft report (A/CN.4/L.92/Add.2). He invited debate on the commentaries to the articles.

Commentary to article 19 (Appointment of the consular staff)

2. Sir Gerald FITZMAURICE doubted whether paragraph 6 was really necessary, since in the context it might give the inaccurate impression that, although the article purported to give total freedom of choice of the consular staff to

the sending State, that freedom had little reality because the receiving State was at any time able to refuse a visa. Cases of such refusal were extremely unusual and it would be wiser to omit the paragraph altogether.

3. Mr. ŽOUREK, Special Rapporteur, said he had inserted the paragraph not only because it was a statement of fact, but also because an analogous provision was contained in the commentary to the corresponding article of the draft on diplomatic intercourse. If the paragraph were omitted, governments might query the discrepancy between the two commentaries.

4. Sir Gerald FITZMAURICE said he would not insist on his suggestion.

The commentary to article 19 was adopted.

Commentary to article 19 a (Size of staff)

5. Mr. YOKOTA thought that the first two paragraphs might well be omitted, since it was not the Commission's practice to state the circumstances of the adoption of an article in the commentary. Moreover, whereas the Special Rapporteur had given substantive reasons in paragraph 1 for his omission of such an article in his original draft (A/CN.4/L.86), paragraph 2 gave only a formal reason for the Commission's majority decision to include the provision. The reader might receive the impression that the Special Rapporteur had had good reasons for not including the provision, while the Commission had taken its decision without any foundation. Such an impression should not be conveyed in a commentary which purported to be the work of the Commission.

6. Mr. ŽOUREK, Special Rapporteur, said that he would be prepared to amplify paragraph 2, and to include the arguments advanced in support of the article. He believed, however, that the reader should be made aware that there had been a difference of opinion on the inclusion of article 19 a.

7. The CHAIRMAN, speaking as a member of the Commission, thought that it would be difficult and take time to draft a commentary setting out the arguments put forward by members.

8. Mr. PAL observed that it was not the usual practice of the Commission to include arguments for and against an article in the commentary, which should be confined to observations on the article as finally adopted.

9. Mr. TUNKIN could not agree with Mr. Pal that that was the usual practice. Nevertheless, he agreed with Mr. Yokota that there was some imbalance between paragraphs 1 and 2, and proposed that the last sentence of paragraph 1 might be deleted.

10. The CHAIRMAN suggested that Mr. Tunkin's proposal should be followed.

It was so agreed.

11. Mr. LIANG, Secretary to the Commission, observed that the phrase "might also be of

practical use to consulates" in paragraph 2 was inaccurate. It might be better to say "of practical use in respect of consulates".

12. The CHAIRMAN suggested that the exact wording should be left to the Special Rapporteur and the Rapporteur of the Commission.

It was so agreed.

The commentary to article 19 a, as amended, was adopted.

Commentary to article 20 (Persons deemed unacceptable)

13. Mr. ŽOUREK, Special Rapporteur, accepted minor drafting amendments to paragraphs 1, 2 and 6 suggested by Sir Gerald Fitzmaurice, Mr. Matine-Daftary, Mr. Ago and Mr. Scelle.

14. Mr. YOKOTA said that his criticism of paragraphs 1 and 2 of the commentary to article 19 a applied equally to paragraphs 7 and 8 of the commentary to article 20. The motivation of the Special Rapporteur's original text was described at length in paragraph 7, while the arguments submitted by members during the debate were treated much more summarily in paragraph 8. That paragraph should be amplified in order to restore the balance.

15. Mr. ŽOUREK, Special Rapporteur, said he would be prepared to include all the arguments, but observed that the main consideration had been the wish to follow the draft on diplomatic intercourse.

16. Mr. AGO, referring to the second sentence of paragraph 8, said he did not recall any decision by the Commission to draw the attention of governments to that particular point.

17. Mr. ŽOUREK, Special Rapporteur, pointed out that the particular question would be settled much more effectively if government opinions on it were obtained.

18. Mr. AGO said that in the absence of an express decision by the Commission, the procedure of asking governments for their opinions was not acceptable.

19. The CHAIRMAN said that governments would comment on the draft as a whole, and their attention would be drawn to special cases where the Commission had been unable to reach a decision. In any case, the Commission should first decide on the wording of paragraph 7.

20. Sir Gerald FITZMAURICE suggested that the last two sentences of paragraph 7 might be deleted.

It was so agreed.

21. Sir Gerald FITZMAURICE suggested that the last two sentences of paragraph 8 should be omitted and the first sentence altered to read "Since, however, many members of the Com-

mission, relying mainly on article 8 of the draft articles on diplomatic intercourse, objected to the insertion of this condition as going too far in the case of the consular staff, the Special Rapporteur withdrew it."

22. The CHAIRMAN thought that the Special Rapporteur and the Rapporteur of the Commission might be authorized to settle the final text of the commentary in the light of the amendments suggested.

It was so agreed.

The commentary to article 20 was adopted, subject to the amendments mentioned.

Commentary to article 21 (Notification of the arrival of members of the consulate and of the termination of their functions)

23. Mr. ŽOUREK, Special Rapporteur, accepted drafting amendment to paragraphs 1 (a), 3 and 5 proposed by Mr. Edmonds, Mr. Scelle and Mr. Ago.

The commentary to article 21, as amended, was adopted.

Commentary to article 22 (Use of the national flag and of the state coat-of-arms)

24. Sir Gerald FITZMAURICE thought that paragraph 7 should be omitted, since it was practically inconceivable that anyone should regard the display of the coat-of-arms or flag of the sending State as conferring the right of asylum.

25. Mr. ŽOUREK, Special Rapporteur, said that an express provision on the matter appeared in a large number of consular conventions. He would not, however, insist on the inclusion of paragraph 7.

26. He accepted drafting amendments to paragraphs 4 and 8 suggested by Mr. Ago.

27. Mr. LIANG, Secretary to the Commission, said he had some doubts concerning the last sentence of paragraph 8. It was incorrect to say that "this problem", which might be held to mean the relatively secondary question of the use of a coat-of-arms and the national flag of the sending State, would be considered in connexion with the law of treaties. It might be better to say that the general problem of the primacy of international law over municipal law would be considered in that connexion.

28. The CHAIRMAN suggested that the passage in question should be amended in conformity with the Secretary's remarks.

It was so agreed.

The commentary to article 22, as amended, was adopted.

Commentary to article 25 (Inviolability of consular premises)

The commentary to article 25 was adopted.

Commentary to article 26 (Exemption in respect of the consular premises from taxation)

The commentary to article 26 was adopted.

Commentary to article 27 (Inviolability of official correspondence, archives and documents)

The commentary to article 27 was adopted.

Commentary to article 28 (Facilities)

The commentary to article 28 was adopted.

Commentary to article 28 a (Free movement)

29. Mr. YOKOTA said that his earlier criticism of the commentaries on certain other articles also applied to the commentary on article 28 a. The Special Rapporteur had given his reasons for not including the article in his original draft (A/CN.4/L.6), but had not given the arguments that had led the majority of the Commission to include the article. The last sentence of the commentary was particularly inappropriate, since article 28 a had not been adopted provisionally, but on the same footing as all the other articles.

30. Mr. ŽOUREK, Special Rapporteur, pointed out that all the articles adopted by the Commission were provisional and would have to be reviewed in the light of the comments of governments. He did not remember hearing any substantive arguments in favour of the inclusion of the article, but he would be prepared to look through the summary records again and to amplify the commentary accordingly.

31. Mr. YOKOTA agreed with the Special Rapporteur that all the articles were provisional. Nevertheless, he thought it indvidious and misleading to single out article 28 a by specifically describing it as provisional when the other articles were not expressly so described.

32. Mr. AGO, supported by Mr. SCELLE, pointed out that certain members had urged that a consul's movements should not be limited to the consular district (531st meeting, paragraphs 35 and 40), especially in cases where the consul was exercising his function of protecting the nationals of the sending State. Restriction of the movement to the consular district would tend to hamper the consul in the exercise of his functions.

33. Mr. ŽOUREK, Special Rapporteur, observed that the arguments referred to by Mr. Ago had been put forward after it had been agreed to include the article in the draft. The commentary was concerned with the prior question whether such an article should be included at all in the draft. He had not included such a provision in his original draft because he had found no analogous provision in any of the bilateral conventions that he had studied. Nevertheless, he would be prepared to amplify the second part of the commentary.

34. Mr. YOKOTA suggested that the last part of the third sentence of the commentary should be omitted, so as not to leave the erroneous impression that article 28 *a* was the only clause that had been adopted provisionally.

It was so agreed.

The commentary to article 28 a, as amended, was adopted.

Commentary to article 29 (Freedom of communication)

The commentary to article 29 was adopted.

Commentary to article 30 (Communication with the authorities of the receiving State)

35. Mr. AGO proposed two amendments. Firstly, in paragraph 4 of the commentary, third sentence, the comma and all the words after "the Ministry of Foreign Affairs of the receiving State" should be deleted and replaced by "in the particular case where the sending State has no diplomatic mission in the receiving State". Secondly, in paragraph 6, the last sentence, which referred to article 59 in its original form, should be deleted. The Commission had not adopted article 59 in that form but had decided to submit alternative texts to governments.

36. Sir Gerald FITZMAURICE pointed out that all the consular conventions cited in paragraph 6 constituted examples of conventions which did not allow consuls to address the central authorities direct. There were some conventions which permitted consuls to have access to the central authorities and he proposed that one or two examples of such conventions should also be mentioned.

37. Mr. ŽOUREK, Special Rapporteur, accepted the amendments proposed by Mr. Ago and Sir Gerald Fitzmaurice.

With those amendments, the commentary to article 30 was adopted.

Commentary to article 30 a (Communication with nationals of the sending State)

38. Mr. YOKOTA proposed the deletion of the second sentence of paragraph 6 of the commentary. If the authorities of the receiving State refused to allow the consul to visit a prisoner, a mere statement of reasons could not be deemed sufficient to make that refusal consistent with the freedom of communication. Unless the reasons given were valid reasons under the applicable laws and regulations, the refusal would in fact frustrate the freedom in question. He therefore urged the deletion of the sentence in question, which did not contain any safeguard against abuse.

39. Sir Gerald FITZMAURICE supported Mr. Yokota's proposal and suggested that paragraph 7, and the passages in paragraph 5 concerning

persons held *incomunicado*, could also be omitted. As they stood, paragraphs 5, 6 and 7 placed undue emphasis on that form of detention, thus throwing the whole commentary out of balance.

40. Mr. EDMONDS, supporting Mr. Yokota's proposal, said that the second sentence of paragraph 6, and some other passages of the commentary to article 30 *a*, were in direct contradiction with the actual provisions of that article. He recalled that the discussion in the Commission on the article had largely centred on the question of the time when the consul would be allowed to visit his national: if he could not do so until the trial was about to begin, the real purpose of article 30 *a* — which was to enable him to make arrangements for his national's defence — would be completely nullified.

41. Mr. AGO also supported Mr. Yokota's proposal and proposed the deletion, in paragraph 5 of the commentary, of the fifth and sixth sentences (passage commencing with the words: "Under the laws of some countries . . ." and ending with the words: ". . . the person is held *incomunicado*.").

42. Mr. TUNKIN said that the second sentence of paragraph 6 was perhaps unduly vague; he therefore favoured its deletion, but suggested that the first sentence should also be deleted, since it merely repeated one of the provisions of article 30 *a*.

43. As to paragraph 7, he said its text reflected accurately the understanding on which the Commission had approved article 30 *a*.

44. Mr. BARTOŠ said that it was essential to amend the wording of the commentary so that it would reflect not only the views of the Special Rapporteur and of a minority of the members, but also that of the majority, who had supported the provisions of article 30 *a*. The commentary, as it stood, placed too much emphasis on the State's interests and all too little on human rights, which had been foremost in the minds of the majority of the members, who wished to safeguard the right of the consul to communicate with his national before the trial in order to arrange for his defence.

45. Sir Gerald FITZMAURICE said that if Mr. Yokota's and Mr. Ago's amendments were accepted, he would be prepared to agree to the retention of paragraph 7 as it stood.

46. Mr. TUNKIN said that the criticism voiced by Mr. Bartoš was unfounded. The Special Rapporteur had merely taken into account in the commentary those cases in which it was impossible, in the interests of the investigation of a case, to allow the consul to see the arrested person.

47. Mr. ŽOUREK, Special Rapporteur, accepted Mr. Ago's proposal for the deletion of the fifth and sixth sentences of paragraph 5.

48. He could not, however, accept Mr. Yokota's

amendment to delete the second sentence of paragraph 6. That sentence merely stated an obvious fact.

Mr. Ago's amendment to paragraph 5 was adopted unanimously.

Mr. Yokota's amendment to paragraph 6 was adopted by 10 votes to 2, with 6 abstentions.

49. Mr. MATINE-DAFTARY said that he could not accept the first sentence of paragraph 6 without the second. He therefore proposed the deletion of that first sentence.

The proposal was rejected by 9 votes to 3, with 1 abstention.

50. Mr. EDMONDS proposed the deletion of paragraph 7.

51. Sir Gerald FITZMAURICE said that he would vote against that proposal because, after the deletion of the fifth and sixth sentences of paragraph 5 and the second sentence of paragraph 6, he could accept paragraph 7 as it stood.

52. Mr. ŽOUREK, Special Rapporteur, said that he would vote against the proposal because he had accepted Mr. Ago's amendment to paragraph 5 only on the understanding that paragraph 7 would be retained as it stood.

Mr. Edmonds' proposal was rejected by 8 votes to 3, with 3 abstentions.

The commentary to article 31 a, as amended, was adopted.

Commentary to article 31 (Levying of consular fees and charges and exemption of such fees and charges from taxes and dues)

The commentary to article 31 was adopted.

Commentary to article 32 (Special protection and respect due to consuls)

The commentary to article 32 was adopted.

The meeting rose at 6 p.m.

579th MEETING

Friday, 1 July 1960, at 9 a.m.

Chairman: Mr. Luis PADILLA NERVO

Consideration of the Commission's draft report covering the work of its twelfth session (A/CN.4/L.90 and Add.1, A/CN.4/L.92/Add.1, 2 and 3) [concluded]

CHAPTER II (*Consular intercourse and immunities*)
(concluded)

1. The CHAIRMAN invited the Commission to continue its consideration of the commentary on the draft articles concerning consular intercourse and immunities (A/CN.4/L.92/Add.2).

Commentary to article 33 (Personal inviolability)

2. Mr. MATINE-DAFTARY noted that the commentary did not mention his dissenting opinion (539th meeting, paragraph 6, and 540th meeting, paragraphs 40 to 45).

3. Mr. ŽOUREK, Special Rapporteur, did not consider it possible to state the view of a single member of the Commission in the commentary. However, if Mr. Matine-Daftary so wished, his dissent could be recorded in a footnote.

4. Mr. MATINE-DAFTARY pointed out that he had not been alone in opposing the anomalous system put forward in article 33 which appeared to confer on consuls immunity from prosecution for offences punishable by a sentence of a specified number of years. He could have agreed that consular officials should not be liable to arrest or detention pending trial except in the event of criminal proceedings. He regretted that his constructive proposal had been disregarded.

5. Mr. ŽOUREK, Special Rapporteur, said he would be prepared to insert a sentence in the commentary to the effect that some members had held that consuls should not be eligible for immunity from imprisonment in cases where imprisonment was ordered by a judicial decision.

6. The CHAIRMAN, observing that in the past the Commission had even omitted to mention in its commentary a minority view held by several members, suggested that Mr. Matine-Daftary's objection might be recorded in a footnote.

It was so agreed.

7. Mr. TUNKIN asked whether the statement made in the last sentence of paragraph 12 was accurate. He had assumed that the exceptions to the benefit of article 33 related to gainful private activity carried on in the receiving State only.

8. Mr. ŽOUREK, Special Rapporteur, said that if a consul carried on a gainful private activity in any country there was a *prima facie* presumption against his eligibility for the privileges specified in article 33. Admittedly, if the activity was carried on in the sending State or in a third State, there was less reason for withholding the privileges in the receiving State. In his opinion, the Commission should reach a decision on the point.

9. The CHAIRMAN observed that the Commission had not discussed the point, and if the last sentence in paragraph 12 was accepted as it stood, article 33, paragraph 1, which seemed to refer only to gainful private activity in the receiving State, would have to be reconsidered.

10. Mr. ŽOUREK, Special Rapporteur, said he would agree to the deletion of the last sentence in paragraph 12 and hoped that the point would be considered at the next session.

It was agreed that the sentence in question would be omitted.