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Summary record of the 424th meeting

Topic:
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SECTION I. DIPLOMATIC INTERCOURSE IN GENERAL

ARTICLE 1

The text of article 1 was adopted.

COMMENTARY ON ARTICLE 1

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

It was so agreed.

ARTICLE 2

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

The meeting rose at 1.10 p.m.

424th MEETING

Monday, 24 June 1957 at 3 p.m.

Chairman: Mr. Jaroslav ZOUREK.

Consideration of the Commission's draft report covering the work of its ninth session**(A/CN.4/L.70 and Add.1 to 3) (continued)****CHAPTER II: DIPLOMATIC INTERCOURSE AND IMMUNITIES (A/CN.4/L.70/Add.1) (continued)****II. DRAFT ARTICLES CONCERNING DIPLOMATIC INTERCOURSE AND IMMUNITIES (continued)****SECTION I. DIPLOMATIC INTERCOURSE IN GENERAL (continued)****ARTICLE 2 (continued)**

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

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

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

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

COMMENTARY ON ARTICLE 2

3. Referring to the commentary on article 2, Mr. BARTOS agreed that the Commission could not give an exhaustive list of the functions of a diplomatic mission, but thought it might have been more relevant to state and that there had been a tendency in the Commission to indicate the limits of such functions. He had, however, no specific amendment to suggest.

4. Mr. GARCÍA AMADOR thought it would be desirable to have a somewhat fuller commentary on an article which was at the very basis of the whole draft.

5. Mr. SPIROPOULOS said that while, in general, he agreed with Mr. García Amador, if the Commission decided to expand the commentary, it was a little difficult to see where it would stop. In his view, the Commission need not spend much time discussing the commentary on any of the articles, since the draft was not final. The commentary on article 2 might be retained in its present form, and the Special Rapporteur requested to prepare a somewhat fuller text for consideration at the next session.

6. Sir Gerald FITZMAURICE, Rapporteur of the Commission, suggested that, without bringing in theoretical considerations, the Commission could very simply expand the commentary at its current session, possibly along the following lines:

“Without attempting to be exhaustive, this article is believed to reproduce the actual practice of States as it has existed for a very long time.”

7. The CHAIRMAN suggested that the Special Rapporteur be requested to prepare a text along those lines, for consideration later at the current session.

It was so agreed.

ARTICLE 3

The text of article 3 was adopted unanimously.

ARTICLE 4

The text of article 4 was adopted unanimously.

ARTICLE 5

8. Mr. EL-ERIAN and Mr. BARTOS both said they were opposed to article 5 for the reasons they had given earlier. (386th meeting, paras. 60 and 61; 403rd meeting, paras. 56 to 62).

The text of article 5 was adopted.

ARTICLE 6

9. Mr. SANDSTRÖM, Special Rapporteur, suggested that the French title of the article be brought into line with the English, which reflected the scope of the article more correctly.

It was so agreed.

10. Replying to points raised by Mr. MATINE-DAFTARY and Mr. SCALLE, Mr. SANDSTRÖM, Special Rapporteur, said that the words “or not acceptable” in paragraph 1 seemed necessary since the article referred to all members of the mission staff, and it seemed inappropriate to use the term “*persona non grata*” in connexion with administrative and service staff. The final phrase of the paragraph, “or his connexion with the mission shall be terminated”, also seemed necessary in order to cover the case of nationals of the receiving State. If the Commission thought it desirable,

suitable additions could perhaps be made which would make the purpose of the two phrases clear.

11. Sir Gerald FITZMAURICE thought that such a course would be undesirable, in the one case because it was difficult to decide in a uniform manner the categories of staff for which the term “*persona non grata*” was inappropriate and, in the other, because a national of the sending State, particularly if he was not one of the diplomatic staff proper, would not necessarily be recalled, but might prefer to remain in the receiving State provided he was allowed to do so.

12. Mr. TUNKIN agreed with Sir Gerald Fitzmaurice, and felt that all that was necessary was to alter the words “his connexion with the mission shall be terminated”, which did not clearly reflect the idea that the person concerned should no longer be a member of the mission staff.

13. Mr. AMADO suggested that the last phrase of paragraph 1 might be amended to read “or his functions shall be terminated” in accordance with the wording used in paragraph 2.

14. Mr. YOKOTA pointed out that, in view of what Sir Gerald Fitzmaurice had said, the word “mostly” should be inserted after the word “refer” in the last sentence of paragraph 6 of the commentary on articles 3 to 7.

15. Mr. BARTOS said that the drafting difficulty was only a foretaste of the substantive difficulties that would result from the Commission’s decision to treat non-diplomatic staff on the same footing as diplomatic staff. He only mentioned the point because it was not too late to reverse that decision.

16. In the absence of further comments, the CHAIRMAN suggested that the Special Rapporteur be asked to submit a redraft of paragraph 1 of article 6 in the light of the discussion.

It was so agreed.

17. Turning to paragraph 2, Mr. BARTOS pointed out that, although reference was made to the sending State’s “obligations under paragraph 1”, that paragraph did not explicitly impose any obligations.

18. Faris Bey EL-KHOURI said that, when the receiving State declared a member of a mission *persona non grata*, all it could do, should the sending State fail to recall or dismiss him, was to withdraw recognition of him as a member of the mission.

19. Mr. PAL, Chairman of the Drafting Committee, in reply to Mr. Bartos’s remarks, said that by “recalled” was clearly meant “recalled by the sending State” and by “his connexion with the mission shall be terminated” was clearly meant “terminated by the sending State”. By the words “may declare the functions of the person concerned to have been terminated”, the Drafting Committee had meant exactly the same as Faris Bey El-Khoury.

20. Mr. SPIROPOULOS said that he appreciated the force of Mr. Bartos’s remarks. It might be preferable to say in paragraph 1: “In such a case the sending State shall be under an obligation to recall this person or to terminate his connexion with the mission”.

21. He also agreed with Faris Bey El-Khoury that paragraph 2 was not exactly in accordance with existing practice. Only the sending State could declare the func-

tions of the person concerned to have been terminated. All the receiving State could do was to withdraw his privileges and immunities.

22. The CHAIRMAN thought that the Commission had in effect agreed that, in the case in point, the receiving State could declare the functions terminated.

23. Sir Gerald FITZMAURICE agreed that it was not only a question of withdrawing privileges and immunities. He had no doubt at all that a diplomatic agent's functions in the receiving State ceased once he was declared *persona non grata*.

24. Mr. LIANG, Secretary to the Commission, said that Sir Gerald Fitzmaurice was no doubt perfectly correct as far as the head of the mission was concerned; but if, for example, a third secretary was declared *persona non grata* but not recalled, he would continue to carry out his normal duties until the day of his departure, and it might seem somewhat grandiloquent to say with regard to such a person that the receiving State could "declare his functions to have been terminated".

25. Mr. TUNKIN said he could not see the force of the Secretary's objection. In the case cited, if the person concerned was declared *persona non grata* but not recalled within a reasonable time, the receiving State could then declare that it no longer recognized him as third secretary. That not only entailed the withdrawal of privileges and immunities, but went somewhat further.

26. Mr. LIANG, Secretary to the Commission, said that he was in complete agreement with the principle in the way that Mr. Tunkin had formulated it, but that that did not quite correspond to the way in which it was formulated in the text.

27. Mr. SANDSTRÖM, Special Rapporteur, suggested that he submit a redraft of paragraph 2 also in the light of the discussion.

It was so agreed.

ARTICLE 7

28. Mr. BARTOS wondered whether the receiving State could really "effect a limitation" of the size of the mission. Would it not be more accurate to say that it could refuse to accept more than a certain number?

29. Mr. AGO suggested that the relevant words in paragraph 1 be amended to read: "the receiving State may refuse to accept a size exceeding what is reasonable and customary."

30. Mr. SPIROPOULOS supported Mr. Ago's suggestion.

31. He also wondered whether the introductory proviso could not be omitted, since it was obvious that a specific agreement prevailed over the general rule laid down in the article.

32. The CHAIRMAN recalled that the idea of inserting the introductory proviso had been to stress that the two States should first seek agreement on the size of the mission.

Mr. Ago's suggestion was adopted.

33. The CHAIRMAN suggested that, in the French text of paragraph 2, the words "*personnes telles que les*" should be deleted, since the practice referred to applied not to persons such as military, naval and air attachés, but to military, naval and air attachés only.

The suggestion was adopted.

The text of article 7 was adopted as amended.

COMMENTARY ON ARTICLES 3 TO 7

34. Turning to the commentary on articles 3 to 7, Mr. SANDSTRÖM, Special Rapporteur, said that since his interpretation of the word "staff" had been slightly different from the Drafting Committee's, it would be necessary to make certain changes in the draft text of his commentary. Thus paragraph 1 should be amended to read:

"Articles 3, 4, 5, 6 and 7 deal with the appointment of the persons who compose the mission, a matter which is obviously the responsibility of the sending State, and with the influence which the receiving State can exercise in this respect."

35. Mr. GARCÍA AMADOR felt it was desirable to use some other word than "influence" which might convey a wrong impression.

36. Mr. TUNKIN suggested that the words "the influence which the receiving State can exercise" be replaced by "the receiving State's rights".

37. Mr. KHOMAN felt that the word "rights" could not appropriately be used of all the steps which the receiving State could take by virtue of articles 3, 4, 5, 6 and 7. It might be better to find some neutral term and say, for example, "the role which the receiving State can play in order to safeguard its rights and interests".

38. Mr. SANDSTRÖM, Special Rapporteur, said that, while he could see no valid objection to Mr. Tunkin's suggestion, if the word "rights" were felt to be inappropriate the word "prerogatives" might be used. Alternatively the paragraph could be deleted altogether.

39. Mr. GARCÍA AMADOR thought the most appropriate wording might be: "the relations between the receiving State and the sending State."

40. Mr. TUNKIN said he would be perfectly willing to accept Mr. García Amador's suggestion.

41. Mr. AGO felt the best course would be to delete the paragraph altogether, since it added nothing to what was said in paragraph 3. If it was felt desirable to have an introductory paragraph to that section of the commentary, paragraph 3 should precede and be merged with paragraph 1.

42. Mr. EL-ERIAN agreed that the two paragraphs could be merged in one.

Mr. PAL, First Vice-Chairman, took the Chair.

43. After further discussion, the Chairman proposed that paragraphs 1 and 3 be redrafted in the light of the discussion.

It was so decided.

Paragraph 2 was adopted.

44. Mr. TUNKIN, referring to the third sentence of paragraph 4, suggested that the idea it contained was self-evident and not particularly well expressed. He urged the deletion of the sentence.

It was so agreed.

Paragraph 4, as amended, was adopted with one minor drafting change.

45. Mr. TUNKIN proposed to delete all except the first phrase of the first sentence in paragraph 5, and to merge it with the second sentence.

It was so decided.

Paragraph 5, as amended, was adopted.

Paragraph 6 was adopted with one minor drafting change.

46. Mr. SANDSTRÖM, Special Rapporteur, proposed the deletion of the words "other than its head" from paragraph 7.

It was so decided.

Paragraph 7, as amended, was adopted.

Paragraph 8 was adopted.

47. Mr. FRANÇOIS proposed the insertion of a paragraph at that point to indicate that the Commission had also considered the question of the appointment of persons of dual nationality.

It was so decided.

48. Mr. SANDSTRÖM, Special Rapporteur, made the following suggestions: firstly, to merge paragraphs 9 and 10; secondly, to replace the words "the first of these exceptions" in the second sentence of paragraph 9 by the words "the first paragraph"; thirdly, to delete the first sentence of paragraph 10; and fourthly, to amend the second sentence of paragraph 10 to read "Paragraph 2 of article 7 gives the receiving State the right to refuse . . ."

These suggestions were adopted.

49. Mr. TUNKIN suggested substituting the word "limitations" for "exceptions" in the first sentence of paragraph 9, and deleting the last sentence of paragraph 9 on the ground that, if article 36 were adopted, any dispute in connexion with the convention might be referred to the International Court of Justice and not merely disputes in connexion with article 7.

It was so agreed.

50. Mr. LIANG, Secretary to the Commission, suggested replacing the words "to reduce" in the third sentence of paragraph 10 by the words "to limit the size of".

It was so agreed.

Paragraphs 9 and 10, as amended, were adopted.

ARTICLE 8

51. The CHAIRMAN pointed out that article 8 was a new article drafted by the Special Rapporteur at the Commission's request (393rd meeting, para. 13).

52. Replying to Mr. KHOMAN, he said that the article would be submitted to Governments as it stood, i.e. with both variants.

The text of article 8 was unanimously adopted.

53. Mr. BARTOS pointed out that it was not strictly correct to say that the head of the mission could take up his functions after he had presented his credentials to the ministry of foreign affairs. Cases often arose where the receiving State was unable to accept the credentials in the form in which they were submitted, since that might entail either recognition of a claim implicit in the

titles of the head of the sending State or recognition of a newly-established State. It would be better to say that the head of the mission could take up his functions "when the copy of his credentials submitted to the ministry of foreign affairs had been accepted."

54. Mr. SANDSTRÖM, Special Rapporteur, suggested that Mr. Bartos's point was covered by the words in the commentary, "which . . . must be the time when his status is established".

55. Mr. TUNKIN observed that, although cases of the kind mentioned by Mr. Bartos were by no means infrequent, it would be difficult to find a neat formula to meet his point. The idea of acceptance was, he thought, implied in the words "presented a copy of his credentials".

56. The CHAIRMAN pointed out that the text of the article had already been approved.

Commentary on article 8.

57. Mr. LIANG, Secretary to the Commission, thought that the reference in the English text to municipal law was somewhat obscure and served little purpose.

58. The CHAIRMAN proposed the deletion of the words "as in municipal law governing the power of attorney".

It was so decided.

59. Mr. FRANÇOIS suggested that the word "formality" was inappropriate and that it would be better to end the sentence with the words "to await the presentation of the letters of credence to the Head of State".

It was so agreed.

The commentary, as amended, was adopted.

ARTICLE 9

60. The CHAIRMAN pointed out that article 9 was also a new article, drafted by the Special Rapporteur at the Commission's request (392nd meeting, para. 84).

The text of article 9 was unanimously adopted.

COMMENTARY ON ARTICLE 9

The commentary was adopted.

ARTICLE 10

61. Mr. BARTOS reaffirmed his opposition to the principle of dividing heads of mission accredited to Heads of State into two classes.

62. Mr. YOKOTA, referring to sub-paragraph (b), said that he saw no reason for the words "envoys, ministers and other persons". A so-called envoy extraordinary and a minister plenipotentiary were one and the same person, and there were no "other persons" accredited as diplomatic agents to Heads of State.

63. Mr. TUNKIN pointed out that the text reflected the practice of States. In some States the second class of heads of mission were described as "envoys" and in others as "ministers".

64. Mr. SANDSTRÖM, Special Rapporteur, said that the term "other persons" was intended to cover ministers resident.

65. The CHAIRMAN pointed out that the text was based on that of the Regulation concerning the relative

ranks of diplomatic agents adopted by the Congress of Vienna, which the Commission had agreed to follow.

The text of article 10 was adopted.

ARTICLES 11 AND 12

The text of articles 11 and 12 was adopted.

ARTICLE 13

66. The CHAIRMAN stated that the French text of the article would be brought into line with the wording of the corresponding provision in the Regulation of the Congress of Vienna.

The text of article 13 was adopted.

COMMENTARY ON ARTICLES 10 TO 13

67. The CHAIRMAN said that it was proposed to redraft the beginning of paragraph 1 of the commentary as follows:

"Articles 10, 12 and 13 are intended to incorporate in the draft, with slight modifications, the provisions of the Vienna Regulation concerning the rank of diplomats, and article 11 provides . . ."

The proposal was adopted.

Paragraph 1, as amended, was adopted.

The meeting rose at 6.5 p.m.

425th MEETING

Tuesday, 25 June 1957, at 9.30 a.m.

Chairman: Mr. Jaroslav ZOUREK.

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

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

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

II. DRAFT ARTICLES CONCERNING DIPLOMATIC INTERCOURSE AND IMMUNITIES (continued)

SECTION I. DIPLOMATIC INTERCOURSE IN GENERAL (continued)

COMMENTARY ON ARTICLES 10 TO 13 (continued)

1. Mr. HSU proposed the deletion from paragraph 2 of the words "such a reform being justified by the principle of equality between States".

2. The use of the word "reform" gave the impression that the distinction in rank between the two classes of envoy had actually reflected a difference in standing between States. That was not the case, and any assumption that the distinction implied inequality of standing was merely an abuse. As a result of frequent criticism in recent years of such an assumption, the fact had been generally recognized that no inequality between States was implied. The existence of two different classes was of advantage to States and need not be subjected to further disparagement, since it enabled them to economize on missions to States with which their relations were not important enough to justify an exchange of ambassadors.

3. Mr. SANDSTRÖM, Special Rapporteur, said that, though he could not fully agree with Mr. Hsu, he would have no objection to deleting the clause.

4. Mr. BARTOS was not in favour of deleting the clause. He regarded equality of rank among envoys as symbolic of equality among States.

It was agreed to delete the final clause of paragraph 2.

Paragraph 2, as amended, was adopted.

5. Mr. LIANG, Secretary to the Commission, pointed out that paragraph 3 would need to be amended accordingly. He suggested substituting the words "for the abolition of any difference in title" for the words "for a reform designed to abolish at least any difference in rank".

6. Mr. SANDSTRÖM, Special Rapporteur, suggested using the word "change" instead of the word "reform" and deleting the words "at least".

It was so agreed.

Paragraph 3, as amended, was adopted.

7. Mr. HSU observed that the Commission's decision with regard to paragraphs 2 and 3 raised the question whether paragraph 4 need be retained. The reference to "the problem" at the end of the paragraph was open to the same objection as the previous reference to "reform". In his opinion, no problem existed.

8. Mr. SANDSTRÖM, Special Rapporteur, was in favour of retaining the paragraph.

9. Sir Gerald FITZMAURICE, Rapporteur of the Commission, said that he failed to see why Mr. Hsu should be so concerned. However, to accommodate him, he proposed that only the first part of paragraph 4, as far as the words "Vienna Regulation", be retained and added to the end of the previous paragraph.

10. Mr. FRANÇOIS, while acknowledging that Mr. Hsu's remarks were partly justified, was in favour of retaining the paragraph. The existing state of affairs was undoubtedly unsatisfactory, and the only way of improving it was to raise all envoys accredited to Heads of States to the rank of ambassador.

11. Mr. HSU pointed out that the existing tendency to give heads of mission the title of ambassador might be reversed, once it was realized that difference in rank implied no difference in the standing of States. He could accept the Rapporteur's suggestion.

12. The CHAIRMAN put to the vote the Rapporteur's proposal that the remainder of the paragraph, after the words "Vienna Regulation", be deleted.

The proposal was rejected by 9 votes to 3, with 6 abstentions.

13. Mr. MATINE-DAFTARY urged that reference be made at an appropriate point in the commentary to the fact that there had been some difference of opinion in the Commission regarding the advisability of retaining the classification established by the Regulation adopted by the Congress of Vienna. Although the spirit in which that Regulation had been established no longer prevailed, and the representatives of all States were nominally equal, some States were in favour of retaining the two classes in order to be able to appoint ambassadors only to those States with which they had very close relations.

14. Mr. SPIROPOULOS pointed out that Mr. Matine-Daftary's views would emerge clearly from the summary record of the discussion.