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Summary record of the 407th meeting

Topic:
Diplomatic intercourse and immunities

Extract from the Yearbook of the International Law Commission:-
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59. Mr. EDMONDS was of the opinion that the Commission had strayed somewhat from the basic principle. Almost all members agreed that the basis of diplomatic immunities was the necessity for the mission to carry on the diplomatic business of the sending State. He understood that the Commission had adopted paragraph 1 on the understanding that it would be cast in a positive rather than a negative form, so as to state that immunity from jurisdiction could only be waived with the consent of the sending State. That being so, the only question the Commission had still to deal with was the manner in which such consent on the part of the sending State was to be established to the satisfaction of the court of the receiving State.

60. Mr. AMADO said that a State, or a diplomatic agent as the emanation and embodiment of a State, had never previously been regarded as forfeiting immunity merely as a result of instigating legal proceedings. And indeed, if a State wished to defend its interests in the courts of another State, there was no reason why it should forfeit its immunity. The Commission should bear in mind the fact that adoption of Sir Gerald Fitzmaurice's text would entail an innovation in international law.

61. Sir Gerald FITZMAURICE said that he agreed that, strictly speaking, when a State or a diplomatic mission instigated legal proceedings, no question of a waiver of immunity was involved. He was prepared to modify his text accordingly.

62. Mr. SPIROPOULOS said that, in his view, the present wording of Sir Gerald Fitzmaurice's proposal was more correct. A diplomatic agent who initiated civil proceedings made himself *ipso facto* subject to the jurisdiction of the receiving State, but his own State might have serious objections to his doing so. It alone could waive his immunity, and a waiver of immunity was definitely implied.

63. The CHAIRMAN suggested that the Commission vote on the additional paragraph proposed by Sir Gerald Fitzmaurice (para. 42 above), leaving it to the Drafting Committee to modify the text as necessary.

64. It was perhaps unnecessary to vote on Mr. Yokota's amendment (para. 19 above), the substance of which, as had already been pointed out, was identical with that of the third sentence in Sir Gerald's text.

65. Mr. YOKOTA indicated his assent.

66. Faris Bey EL-KHOURI requested a separate vote on the second and third sentences of Sir Gerald Fitzmaurice's text.

The first sentence of the text submitted by Sir Gerald Fitzmaurice was adopted by 18 votes to none with 1 abstention.

67. Mr. BARTOS, explaining his vote in favour of the text, said that he had no objection to the first sentence but only to the remainder.

The second and third sentences were adopted by 17 votes to none with 2 abstentions.

68. Mr. MATINE-DAFTARY, referring to paragraph 2 of the Special Rapporteur's text and Mr. François's amendment to it (para. 1 above), said there was no justification for mentioning only one of the many procedural incidents that might arise during hearing of the case—counter-claims, and only one of the other tribunals it might be referred to before being finally settled—the Court of Appeal.

69. Mr. BARTOS thought that Mr. Matine-Daftary's remarks served to show that it would be prudent to pass over all such questions as that of counter-claims, which in any case had no bearing on the question of waivers, as Mr. Ago had already demonstrated.

70. Mr. AGO said that, in his view, either the text proposed by the Special Rapporteur, or that of article 12, paragraph 2, of the 1929 resolution of the Institute of International Law, was preferable to the text proposed by Mr. François, which brought two different matters under a single head.

71. The CHAIRMAN proposed that the Commission decide in principle to include a provision relating to counter-claims, it being understood that the Drafting Committee would consider where to place such a provision, and what other matters, if any, should be included in it.

The Chairman's proposal was adopted unanimously.

The meeting rose at 1.10 p.m.

407th MEETING

Wednesday, 29 May 1957, at 9.30 a.m.

Chairman: Mr. Jaroslav ZOUREK.

Diplomatic intercourse and immunities (A/CN.4/91, A/CN.4/98) *(continued)*

[Agenda item 3]

CONSIDERATION OF THE DRAFT FOR THE CODIFICATION OF THE LAW RELATING TO DIPLOMATIC INTERCOURSE AND IMMUNITIES (A/CN.4/91) *(continued)*

ARTICLE 21 *(continued)*

1. The CHAIRMAN invited the Commission to continue the consideration of article 21, relating to the waiving of immunity. The only paragraph that had not yet been considered was paragraph 3, which laid down a principle that was, he thought, universally recognised.

Paragraph 3 was adopted in principle, subject to consideration by the Drafting Committee.

ARTICLE 22

2. The CHAIRMAN suggested that, even if all the members of the Commission could not entirely agree with what the Special Rapporteur had said in his commentary regarding the basis of exemption from taxation, namely, that it was an immunity accorded by courtesy, they might be able to agree that paragraph 1 constituted a reasonable minimum of exemption. It was, of course, to be understood that exemption was always granted subject to reciprocity.

3. In his view, the purpose of the draft was of particular importance in connexion with articles 22 and 23, since, if it was drawing up a convention, the Commission naturally enjoyed greater freedom of action than if it was merely stating the existing law.

4. Mr. François, who unfortunately was still indisposed, had submitted a proposal to the effect that the words "of foreign nationality" be deleted from paragraph 1 and that paragraph 2 be deleted altogether.

5. Mr. TUNKIN recalled that, in connexion with article 20, paragraph 2, the Commission had envisaged at its 403rd meeting the possibility of devoting a separate article to the whole question of the privileges and

immunities enjoyed by diplomatic agents who were nationals of the receiving State. If that were done, paragraph 2 of article 22, and the words in paragraph 1 whose deletion Mr. François proposed, were clearly unnecessary. He thought therefore that Mr. François's proposal could be referred to the Drafting Committee.

6. The CHAIRMAN and Mr. AGO expressed agreement with Mr. Tunkin's view.

7. Sir Gerald FITZMAURICE pointed out, however, that in paragraph 2 the emphasis was on the emoluments which the diplomatic agent received by reason of his office, in other words, on the salary he received from the sending State. Depending on the use which the receiving State made of the discretionary power that the majority of the Commission apparently desired to vest in it under the proposed article relating to diplomatic agents who were its nationals, the effect of the deletion of paragraph 2 of article 22, might be to infringe the principle that no Government could tax another Government's funds; it was probably in order to safeguard that principle that the Special Rapporteur had inserted the paragraph. In Sir Gerald's view, the paragraph should be retained, whatever the decision on the current provision in paragraph 2 of article 20.

8. Mr. EL-ERIAN said that, in his view, diplomatic agents who were nationals of the receiving State should not enjoy exemption from taxation on their salaries. Such exemption could not be regarded as one of the minimum immunities which certain members of the Commission had urged that all diplomatic agents must enjoy, irrespective of their nationality, in order to be able to perform their diplomatic functions. Moreover, if their salaries were not taxed, nationals of the receiving State who were working for a foreign diplomatic mission would be in a rather privileged position compared with their compatriots working, for example, in their own Foreign Office. For those overriding reasons, he felt that the case under discussion should be regarded as an exception to the principle referred to by Sir Gerald Fitzmaurice: that seemed perfectly reasonable, seeing that it was the exception for diplomatic agents to be nationals of the receiving State.

9. He was therefore in favour of deleting paragraph 2, or at any rate deferring further consideration of it until the Commission had decided the general question of principle regarding the immunities to be enjoyed by diplomatic agents who were nationals of the receiving State.

10. Mr. AGO said that he would have no objection to deleting paragraph 2 and the words "of foreign nationality" from paragraph 1, on the clear understanding that that did not imply that the Commission was opposed to the rule laid down in paragraph 2; the substance of that rule could, if the Commission so decided, be reintroduced elsewhere, in connexion with the provision which the Special Rapporteur had proposed in place of the current paragraph 2 of article 20 (405th meeting, para. 16).

On that understanding Mr. François's proposal (para. 4 above) was adopted.

11. The CHAIRMAN invited comments on the four exceptions to the general principle of exemption from taxation listed in sub-paragraphs (*a*) to (*d*) of paragraph 1.

12. Refering to sub-paragraph (*a*), Mr. BARTOS pointed out that in many countries customs duties were regarded as indirect taxes. He suggested, therefore, that in order to avoid what would, for such countries, appear to be an obvious inconsistency in the text, the words "other than the customs duties referred to in article 23" be inserted after the words "indirect taxes".

13. Mr. KHOMAN pointed out that there were certain other indirect taxes from which diplomatic agents were commonly exempted. In the United States of America, for example, they were exempt from the government tax on petrol.

14. Mr. TUNKIN recalled that, after considering his proposal for insertion of the words "and representing a source of income" after the words "receiving State" in paragraph 1(*a*) of article 20 (402nd meeting, para. 4), the Commission had adopted an alternative amendment suggested by Sir Gerald Fitzmaurice (*Ibid.*, para. 25). A similar amendment should be made in sub-paragraph (*b*) of paragraph 1 of article 22.

15. With reference to sub-paragraphs (*b*) and (*c*), Mr. AGO pointed out that diplomatic agents were commonly subject to inheritance taxes in countries where such taxes were levied. Those taxes were not taxes on income, and applied to movable as well as immovable property. Some addition might, therefore, have to be made to sub-paragraphs (*b*) and (*c*) in order to cover them.

16. He also wondered whether there were, in fact, any cases of "dues" being levied on immovable property.

17. The CHAIRMAN thought that stamp duty was normally regarded as a "due", at least in Central European countries.

18. Mr. AGO said that in certain countries stamp duty was regarded as a tax.

19. The CHAIRMAN suggested that that point could be considered by the Drafting Committee.

20. With regard to sub-paragraph (*d*), Mr. AGO expressed the view that the wording employed could be dangerous. According to certain theories, any tax or due could be said to represent, either directly or indirectly, remuneration for services actually rendered. If the Commision could not find a more restrictive wording, it should at least explain clearly in the commentary what it meant.

21. The CHAIRMAN recalled that the Commission had decided to delete the words "of foreign nationality" in paragraph 1, and the whole of paragraph 2 of the text submitted by the Special Rapporteur for article 22.

22. He put to the vote the text as thus amended, on the understanding that the Drafting Committee would consider the various points raised.

The text was adopted by 15 votes to none, with 3 abstentions.

23. The CHAIRMAN announced that Mr. François had also proposed the addition of the following two paragraphs to article 22.

"3. A diplomatic agent shall not be subject, in respect either of himself or of his staff, to the legal provisions governing social insurance.

4. A diplomatic agent shall not be exempt from succession duties levied by the receiving State on inheritances in its territory."

24. With regard to the first additional paragraph proposed by Mr. François, Mr. AMADO said he agreed in principle, as far as nationals of the sending State were concerned, but that the question of diplomatic agents who were nationals of the receiving State again arose in that connexion. Diplomatic members of the Brazilian Embassy in London, for example, paid the National Health Insurance contributions for all United Kingdom nationals whom it employed, since otherwise they might not be eligible for the benefits.

25. The CHAIRMAN agreed that the proposed provision could not apply to nationals of the receiving State.

26. Mr. BARTOS said that practice was threefold. In the first place, social insurance contributions were not paid at all, but that was highly undesirable, for the reason mentioned by Mr. Amado. Secondly, the sending State formally assumed responsibility for the contributions, but even in such cases there were difficulties—the main one being immunity from execution—and the receiving State often paid after all. Finally, the British system, which had also been adopted by the Yugoslav Government as the only one that worked satisfactorily, made the payment of contributions the personal responsibility of all locally-recruited embassy staff members who, as nationals of the territorial State, were directly responsible for their social insurance—the diplomatic mission or the sending State not assuming any legal obligations concerning social insurance. However, difficulties arose with that system also. Some States considered that their locally-recruited personnel enjoyed immunity from payment of contributions, such contributions being duties on income. Mr. Bartos was of the opinion that that contention had no legal basis. The receiving State undertook the responsibility and the expenses arising from effective payments by all its nationals, including the expenses for those of its nationals temporarily engaged in the service of foreign missions. Such a State ordered its nationals to pay social insurance contributions, and entered into a direct legal relationship with them. Foreign missions were not asked to do anything, and therefore they did not have the right to interfere with the implementation of the social insurance system, because such interference would represent not only a violation of the principle of non-intervention in the internal affairs of other States, but also an obstacle to the carrying out of a humanitarian activity.

27. Mr. AGO proposed that no provision be inserted along the lines of the first additional paragraph proposed by Mr. François, inasmuch as the matter was not really one of immunities. It was the duty of the head of a mission, to see that proper provisions to meet old age, sickness or disability were made for his staff, and particularly his junior staff. Mr. François's text might be taken to suggest that that was not his concern.

28. Mr. TUNKIN felt that Mr. Amado had raised a perfectly valid point. According to the laws of the Soviet Union, social insurance was compulsory, but the entire contribution was paid by the employer. When a foreign diplomatic mission engaged a Soviet national, therefore, a special provision was inserted in his employment contract that the mission undertook to pay his social insurance contribution.

29. Mr. Tunkin accordingly agreed that, if the Commission wished to insert a provision of the kind proposed by Mr. François, it should make clear that it applied only to foreign nationals. Like Mr. Ago, however, he would prefer that the provision should be omitted altogether.

30. Mr. SPIROPOULOS said he shared the views expressed by Mr. Tunkin.

31. The CHAIRMAN put to the vote Mr. Ago's proposal not to include any provision along the lines of the first additional paragraph proposed by Mr. François.

The proposal was adopted by 13 votes to 2 with 3 abstentions.

32. With regard to the second additional paragraph proposed by Mr. François (para. 23 above), Mr. MATINE-DAFTARY said that, in Iran, an inheritance was regarded as income, and so would be covered by paragraph 1(*c*). If that was not so in other countries, however, he agreed that the proposed addition was necessary.

33. Mr. VERDROSS said that the second additional paragraph prepared by Mr. François undoubtedly filled a gap.

34. Mr. AMADO agreed, but suggested that, in the French text at least, the wording could be made clearer.

35. Sir Gerald FITZMAURICE suggested that the provision could very well be made an additional subparagraph of paragraph 1, since in most countries succession duties were regarded as a form of tax.

36. The CHAIRMAN suggested that the Commission decide in principle to insert a provision to the same effect as the second additional paragraph proposed by Mr. François, it being left to the Drafting Committee to prepare a suitable text.

It was so agreed.

ARTICLE 23

37. The CHAIRMAN pointed out, that, in the opinion of the Special Rapporteur—as stated in the commentary to the draft—national legislations differed greatly on the question of exemption from customs duties and inspection, but the rule which he proposed constituted a reasonable minimum.

38. Mr. AMADO observed that paragraph 1 left the position undefined with regard to a great many articles, such as wines, spirits and tobacco. He agreed, however, that exemption in respect of such articles could only be a matter of international courtesy.

39. Mr. BARTOS agreed that the Commission could certainly go no further than the Special Rapporteur had proposed. With regard to the articles mentioned by Mr. Amado, for example, some countries imposed no restriction, others allowed a duty-free monthly quota, others made the head of the mission sign a statement that the articles were intended for personal consumption only. Even as regards personal effects, some countries distinguished between what the diplomatic agent brought in when he arrived and what he had sent to him afterwards. In the interests of the progressive development of international law, however, he thought the Commission could take the modest step forward proposed by the Special Rapporteur.

40. Mr. EDMONDS wondered what distinction there was between articles for the use of the mission and effects intended for the diplomatic agent's establishment. In its broadest sense, the mission's function might

well include "the establishment" or the home of the diplomatic agent. He also pointed out, with regard to paragraph 2, that a distinction was often made between accompanied and unaccompanied baggage; the Commission should therefore specify, either in the article itself or in the commentary, whether pargaraph 2 referred to accompanied and unaccompanied baggage, or to unaccompanied baggage only.

41. Mr. VERDROSS said that, although the whole question of exemption from customs duties and inspection had long been settled by courtesy, there had for some time been a tendency in that field to transform practices established as a matter of courtesy into rules of international law. The Commission must take that tendency into account, and he was therefore in favour of the Special Rapporteur's text.

42. Mr. SPIROPOULOS agreed, as far as paragraph 1 was concerned, although he shared Mr. Edmonds' view that sub-paragraph (*d*) largely duplicated sub-paragraph (*a*). On the other hand, the question of exemption from inspection was still dealt with as a matter of courtesy. If, however, that question was going to be regulated in the Commission's draft, he did not think any distinction should be made between accompanied and unaccompanied baggage.

43. The CHAIRMAN thought that by "effects intended for his establishment" were meant the furniture and fittings intended for the diplomatic agent's private residence.

44. Mr. TUNKIN said that the whole subject was regulated partly by international law and partly by international courtesy. He agreed with Mr. Verdross, however, that even for those exemptions which were still regarded as a matter of international courtesy, there was nowadays a tendency towards formulating rules of law. He was in favour of the Commission's taking a further step in that direction, as proposed by the Special Rapporteur.

45. Sir Gerald FITZMAURICE thought that, except as regards sub-paragraph (*a*), paragraph 1 of the text proposed by the Special Rapporteur went beyond existing international law, though the exemptions it listed were all generally granted in practice.

46. In an article printed in the *British Year Book of International Law*, the author, after referring to the wide divergence between the laws of the various States with regard to exemption of diplomatic agents from customs duties and inspection, continued:

> "Despite the variations mentioned, however, and although the exemptions are by no means essential for the successful functioning of a mission, the practice of granting them is now so widespread and so firmly established that one might be tempted to ask whether the custom of granting concessions has not hardened into a rule of law. On the other hand, it is difficult to see how it can justly be asserted that liability to pay customs dues is a hindrance to a diplomatic representative and, that being the case, the exemptions must be regarded as being still what they originally were—concessions based on international comity or courtesy."[1]

47. In his view, that conclusion was borne out by all that had been written on the subject. As he had already indicated, the only exception was as regards articles for the use of the mission (sub-paragraph (*a*) of paragraph 1), where exemption was essential to the proper functioning of the mission.

48. For those reasons, Sir Gerald was somewhat reluctant to agree to paragraph 1 as it stood, but if the majority of the members of the Commission were in favour of retaining it, it should at least be made clear in the commentary that the Commission was deliberately proposing an innovation on the ground that the practice was very widely observed.

49. Mr. KHOMAN said that, in general, he agreed with Sir Gerald Fitzmaurice. The difficulty in which the Commission found itself was, he thought, due to its trying to include a list of exemptions rather than a general formula similar to that in article 18, paragraph 3, of the Havana Convention.[2]

50. Moreover, the text proposed by the Special Rapporteur appeared to overlook the fact that exemption was almost always granted subject to reciprocity and to the proviso that articles and effects admitted duty free should not be sold, at any rate within a specified period of time.

51. Finally, the text of paragraph 2 appeared to run counter to paragraph 1, in which many of the articles referred to were indeed "goods liable to import duty".

52. Mr. YOKOTA said that, though he agreed that certain of the exemptions from customs duties and inspection could nowadays be regarded as rules of international law, in many respects current practice was still based on international courtesy. The Commission should therefore be chary about extending the scope of the article unduly.

53. In particular, he was extremely doubtful whether it could be regarded as a rule of international law that the personal effects of the servants of diplomatic agents should be exempt from customs duties. He therefore proposed the deletion of the words "and servants" in paragraph 1 (*c*).

54. The CHAIRMAN, speaking as a member of the Commission, said that, although the practice of exempting from customs duties the articles and effects referred to in paragraph 1 could not yet be said to constitute a rule of international law, it was so wide-spread that if the Commission was preparing a convention, there was no reason why it should not propose that the practice be made a rule of international law, provided the commentary made clear that it was an innovation which was proposed.

55. He also agreed with Mr. Khoman that it should be clearly indicated in the commentary that the exemptions were granted subject to reciprocity.

56. Mr. SPIROPOULOS agreed that the Commission was at liberty either to leave the question to be dealt with largely as a matter of international courtesy, as in the past, or to formulate rules of international law with regard to it.

57. There could, he thought, be no doubt that it was already a rule of international law that articles for the use of the mission should be exempt from customs

[1] A. B. Lyons, "Personal Immunities of Diplomatic Agents", *The British Year Book of International Law, 1954* (London, Oxford University Press, 1956), p. 326.

[2] Convention regarding Diplomatic Officers, signed at Havana on 20 February 1928. See League of Nations, *Treaty Series*, Vol. CLV, 1934-1935, No. 3581, p. 269.

duties. Even if it was not a rule, it was at least universal practice that the diplomatic agent's personal effects should also be exempt. And if the Commission was going to adopt the text which the Special Rapporteur proposed for article 24, paragraph 3, it could not logically refuse exemption for the personal effects of the diplomatic agent's family and such private servants as he brought with him from the sending country; that, too, would accord with current international practice. The position as regards locally recruited servants was, as Mr. Yokota had said, somewhat different. Finally, as regards the furniture and fittings intended for the diplomatic agent's personal residence, it could be reasonably argued that he could not exercise his diplomatic functions without them, and that he could not afford to pay duty on them, as he might be required to do, in all the countries to which he might be sent in the course of his career; the exemption could therefore be regarded as necessary for the exercise of the diplomatic function. In all those respects, therefore, current practice could validly be made the basis of international rules of law.

58. The position was quite different with regard to wines and spirits, tobacco, and, for example, private motor cars—though in that respect, too, a case could perhaps be made out on the ground that the motor car was as necessary to the diplomatic agent as many articles of his furniture—and the matter should be left to international courtesy, as in the past.

59. Mr. LIANG, Secretary to the Commission, suggested that bilateral treaties often contained very detailed provisions regarding the baggage and effects of diplomatic agents. In particular, a very sensible distinction was drawn between what was brought with the mission or member of mission on arrival, and what was brought in later. As far as effects intended for the establishment of a diplomatic agent were concerned, there was not much doubt that they were normally imported free of duty. Indeed, the officials of the United Nations and specialized agencies enjoyed such facilities on first installation. In practice, however, many other articles were admitted duty-free, provided the mission certified that they were for the agent's personal use only.

60. Mr. AGO agreed with Mr. Spiropoulos and the Secretary. The provisions relating to diplomatic agents were perhaps rather too limited in scope, and he would like to see the category "articles for his personal use" added to the two other categories "personal effects" and "effects intended for his establishment".

61. Referring to Mr. Yokota's proposal to delete the words "and servants", he suggested that the question be left in abeyance until the Commission had settled the question of entitlement to privileges and immunities dealt with in article 24.

62. Mr. PADILLA NERVO expressed a preference for a general formula on the lines of article 20 of the Harvard draft,[3] or of article 18, paragraph 3, of the Havana Convention,[4] instead of the list given by the Special Rapporteur. Such a general formula would provide better coverage for existing practice.

63. Moreover, in view of the quite wide-spread abuse of exemption from customs duty, he proposed that the Commission specify in the commentary on the article that, once the mission or member of the mission was installed, the receiving State might require the amount of articles brought in for personal use to be kept within reasonable limits.

64. Mr. SPIROPOULOS proposed that the Commission adopt both of Mr. Padilla Nervo's proposals together with that of Sir Gerald Fitzmaurice (para. 48 above).

65. Mr. TUNKIN agreed with Mr. Yokota on the desirability of deleting the words "and servants". In practice, personal servants were often granted certain privileges, but merely as a matter of courtesy. The Commission should not therefore treat the exemption of servants from customs duties as if it were an established rule, but leave it to *comitas gentium.*

66. In connexion with Mr. Padilla Nervo's proposal to adopt a general formula—which he thought might with advantage be referred to the Drafting Committee—he pointed out that article 20 of the Harvard draft referred to articles for the "official" use of a mission. It might be advisable to include that term in the Commission's text. He also noted that sub-paragraph (*d*), "effects intended for his establishment", of the Special Rapporteur's text was not covered in either of the other texts referred to by Mr. Padilla Nervo.

67. The CHAIRMAN proposed that the entitlement of servants to exemption be dealt with in conjunction with article 24, as suggested by Mr. Ago.

It was so agreed.

68. He also proposed that Mr. Padilla Nervo's proposals be referred to the Drafting Committee, and that a text be included in the commentary explaining the scope and the basis of exemption from customs duty and drawing attention to the existence of more liberal provisions in some bilateral treaties. Attention could also be drawn in the commentary to the fact that there was a case for placing both a time-limit on the import of effects for the diplomatic agent's establishment and quantitative restrictions on the consumer goods he imported, once duly installed.

Paragraph 1 was unanimously adopted on that understanding.

69. The CHAIRMAN invited the Commission to turn to paragraph 2. He remarked that the wording of the paragraph might be improved.

70. Mr. PADILLA NERVO thought it illogical to refer to goods "liable to import duty", since practically all the articles and effects mentioned in the first paragraph were liable to duty. Some provision on the lines of article 21 of the Harvard draft,[5] regarding articles whose importation, or exportation, was prohibited, should be included in the draft.

71. Faris Bey EL-KHOURI also commented on the absence of any reference to articles whose import was prohibited; in his own country, for instance, the import of certain alcoholic liquors was prohibited.

72. The CHAIRMAN thought that some reference should also be made, somewhere in the draft, to the obligation of the diplomatic agent to respect the laws of the receiving State on the prohibition of the export of certain articles, particularly works of art regarded as part of the national patrimony.

[3] Harvard Law School, *Research in International Law, I. Diplomatic Privileges and Immunities* (Cambridge, Mass., 1932), p. 23.

[4] League of Nations, *op. cit.*

[5] Harvard Law School, *op. cit.*

73. Mr. BARTOS agreed that the wording of the paragraph required clarification. He, too, was in favour of an explicit mention of the prohibition of the export of works of art regarded as part of the national cultural patrimony and of articles of archaeological interest. Diplomatic agents frequently infringed national laws in that respect.

74. The CHAIRMAN, speaking as a member of the Commission, wondered whether it was necessary to refer in the draft to exemption from inspection. The other drafts did not mention it.

75. Mr. AGO argued that it was both logical and necessary to refer to exemption from inspection after having dealt with exemption from customs duty. He agreed with Mr. Padilla Nervo, however, that the words "liable to import duty" should be modified, as they seemed to contradict the principle of exemption from customs duty. The question of the prohibition of the export of objects of artistic value or archaeological interest was a very important one, but, being quite a different matter, should be dealt wtih separately, as it was in the Harvard draft. The provision should, in particular, draw attention to the obligation on diplomatic agents to respect the laws and regulations prohibiting the export of such objects.

76. Mr. AMADO remarked that, although not opposed to a reference to the question in the draft, he wondered whether it was not already adequately covered in municipal law.

77. Sir Gerald FITZMAURICE pointed out that, apart from the question of the export of works of art, there was also the question of the prohibition of the import of such articles as dangerous drugs, gold, firearms and plants (the latter in order to prevent the spread of plant diseases). He had been struck by the absence of any provision on the subject in the Special Rapporteur's draft, especially as the Harvard draft dealt with the question. It might convey the wrong impression if the Commission's draft referred to the possibility of inspection solely on the ground that the baggage might contain goods liable to duty.

78. Mr. SPIROPOULOS agreed that a provision dealing with the prohibition of certain imports and exports was absolutely essential.

79. Mr. VERDROSS, referring to Mr. Ago's proposal (para. 75 above), pointed out that the duty of diplomatic agents to comply with the laws and regulations of the receiving State was enunciated in article 27.

80. Mr. AGO conceded Mr. Verdross's point, and accordingly proposed the substitution of the words "goods not covered by the exemptions mentioned in paragraph 1 above or articles the import or export of which is prohibited by the law of the receiving State" for the words "goods liable to import duty".

81. Mr. SPIROPOULOS pointed out that a provision on such lines was hardly covered by the French title of the article, *"Exemption douanière"*.

82. The CHAIRMAN put paragraph 2, as amended by Mr. Ago, to the vote, on the understanding that the question of its exact position in the draft be left to the Drafting Committee.

Paragraph 2, as thus amended, was unanimously adopted.

83. After some discussion, the Chairman put paragraph 3 to the vote, on the understanding that it would be merged with paragraph 2.

Paragraph 3 was unanimously adopted.

ARTICLE 24

84. The CHAIRMAN invited the Commission to consider article 24 paragraph by paragraph.

85. He said that the question of the type of privileges and immunities to which the various elements composing the staff of a mission were entitled was a complicated one. He thought, nevertheless, that the Commission might rapidly reach agreement if it first defined the various categories clearly. A distinction should be made between the official staff—comprising the diplomatic staff, the administrative and service staff and auxiliary staff—and the non-official staff. In the case of the first category of the official staff, comprising the head of the mission as well as subordinate diplomatic agents and attachés (military, trade and press attachés, etc.), the Chairman thought the members of the Commission would be unanimous in considering it entitled to full privileges and immunities. With regard to the other categories (administrative and service staff and also auxiliary staff), which embraced secretaries, stenographers, archivists, mission chauffeurs, etc., practice varied considerably from country to country, as it did in the case of non-official staff (private secretaries, servants, etc.). Some States granted liberal privileges and immunities to administrative and auxiliary staff, others only certain rights. Others again granted privileges and immunities on a reciprocal basis, while a fourth group of States granted none at all.

86. The Chairman drew attention to Mr. François's proposal to substitute the following text for the Special Rapporteur's draft article:

"1. The members of the staff of the mission, including administrative and service staff, shall, if they are not nationals of the receiving State, enjoy the diplomatic privileges and immunities set forth in the preceding articles.

"2. The privileges and immunities of persons entitled in their own right shall also apply to:

"(*a*) Their wives;

"(*b*) Their children under 18 years of age; and

"(*c*) Their private servants who are not nationals of the receiving State and live under the same roof.

"3. Members of the staff of the mission who are nationals of the receiving State, together with their wives, children and private staff, shall enjoy privileges and immunities only to the extent admitted by the receiving State."

87. Mr. VERDROSS remarked that, with regard to administrative staff, practice was far from uniform. A number of countries, including his own, accorded privileges and immunities to administrative staff, and he was in favour of that custom. It was often most difficult to draw a clear-cut distinction between the diplomatic and non-diplomatic staff of missions. The missions of the smaller countries, particularly those accredited to other small countries, were often staffed merely by a head of mission and some administrative personnel, which often performed functions of a diplomatic nature.

88. Mr. BARTOS observed that, in the matter of entitlement to diplomatic privileges and immunities, a number of countries, among them Yugoslavia, adopted the French system, which drew a distinction between those

members of the staff of missions who were entered on the diplomatic list and those who were not. Persons on the list, i.e., heads of missions, subordinate diplomatic agents and specialist attachés, enjoyed the customary diplomatic privileges and immunities, with certain slight variations according to rank. Those not on the list, classed as *"employés d'ambassade"*, enjoyed immunity *de facto*, but *de jure* were entitled only to functional immunity, i.e. immunity in respect of official acts. In the case law of several countries, including Yugoslavia, "official acts" had been interpreted as covering only acts performed on the premises of the mission or when accompanying diplomatic mail. Functional immunity was enjoyed by the administrative and technical staff of missions and those members of the auxiliary services not recruited on the spot.

89. He considered such functional immunity to be quite adequate for the staff concerned. Administrative, technical and auxiliary staff was far easier to replace than the diplomatic agents proper, who were often in charge of specialized sections. Thus the principle of *ne impediatur legatio*, which was the basis of immunity, hardly applied in the case of non-diplomatic staff. Furthermore, experience showed that certain offences, which diplomats, possibly owing to their better education, stricter discipline and greater *esprit de corps*, rarely committed, were quite common amongst the subordinate staff.

90. The staffs of diplomatic missions had grown to such an extent that it had become necessary to subject some of their members to the national jurisdiction. Whereas in the past the diplomatic corps in an average capital had numbered only 200, there might now be 4,000 on the diplomatic list and four or five times as many subordinate mission staff. In view of that expansion, there was a tendency for some States to limit both the total size of missions and the number on the diplomatic list. Even countries accustomed to accord full privileges and immunities to all those on the diplomatic list were changing their attitude in face of the trend. The United States of America had recently addressed a circular letter to all States practising such restrictions, and the United Kingdom had begun to apply the principle of reciprocity. Thus, there was no uniform practice in the matter, and the Commission, if it wished to codify the question, could not ignore the new trend which existed side by side with the older established custom.

91. Mr. MATINE-DAFTARY said he was concerned at the abuses of privileges and immunities committed by the administrative and service staffs of missions, and hence doubted the advisability of extending full immunity to them. He thought it best to leave it to the head of the mission to decide, in the light of the needs of the mission, which members of his staff should be accorded immunity. He would submit an amendment on those lines.

The meeting rose at 1.5 p.m.

408th MEETING

Friday, 31 May 1957, at 9.30 a.m.

Chairman: Mr. Jaroslav ZOUREK.

Diplomatic intercourse and immunities (A/CN.4/91, A/CN.4/98) *(continued)*

[Agenda item 3]

CONSIDERATION OF THE DRAFT FOR THE CODIFICATION OF THE LAW RELATING TO DIPLOMATIC INTERCOURSE AND IMMUNITIES (A/CN.4/91) *(continued)*

ARTICLE 20 *(continued)*[1]

1. The CHAIRMAN invited the Commission to resume consideration of the Special Rapporteur's redraft of paragraph 2, relating to the position of diplomatic agents who were nationals of the receiving State. (405th meeting, para. 16). The proposed text read as follows:

> "A diplomatic agent who is a national of the receiving State shall enjoy immunity from jurisdiction in respect of official acts legitimately performed in the exercise of his functions. He shall moreover enjoy the privileges and immunities granted to him by the receiving State."

2. He recalled that Mr. Tunkin had proposed (405th meeting, para. 17) that the following words be added to the first sentence of that text: "unless otherwise determined by the receiving State at the time it agrees to his serving as a diplomatic agent of the sending State".

3. Mr. PAL said, with regard to Mr. Tunkin's amendment, that, according to the wording adopted by the Drafting Committee for article 4, the express agreement of the receiving State was now required only for such of its nationals as were appointed as diplomatic staff, and not for those appointed as administrative and service staff.

4. Mr. TUNKIN pointed out that if the Commission decided, in connexion with article 24, that the privileges and immunities referred to in the draft should be limited to diplomatic staff, there would be no inconsistency between his amendment and the text adopted by the Drafting Committee for article 4. If it decided that the privileges and immunities should be enjoyed by all members of the mission, including administrative and service staff, he agreed that there would be an inconsistency, but it was, he thought, one which could be left to the Drafting Committee to remove.

5. Mr. YOKOTA said that he had no objection to Mr. Tunkin's amendment, except that it left the entire responsibility for the decision in the hands of the receiving State. He personally would prefer the amendment which Mr. Spiropoulos had suggested at the time the Commission had first considered article 20, paragraph 2, namely, the insertion of the words "except where otherwise agreed between the sending and the receiving States" (403rd meeting, para. 70).

6. Sir Gerald FITZMAURICE said he could not agree to Mr. Tunkin's amendment, since he considered that a State which accepted one of its own nationals as another State's diplomatic agent must at least accord him immunity from jurisdiction in respect of official acts performed in the exercise of his functions.

7. He wondered whether the word "legitimately" in the redraft proposed by the Special Rapporteur did not rather beg the question, since it was precisely in respect of official acts performed in the exercise of the diplomatic function, but the legitimacy of which was disputed, that immunity was required. He suggested that the word "legitimately" be deleted, and that the Drafting Committee consider instead inserting the word "normal" before "exercise".

8. Mr. AGO agreed that the word "legitimately" should be deleted.

9. With regard to the amendment proposed by Mr. Tunkin, he pointed out that the official acts performed by a diplomatic agent in the exercise of his functions

[1] Resumed from 405th meeting.