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Summary record of the 400th meeting

Topic:
Diplomatic intercourse and immunities

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400th MEETING

Friday, 17 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 16 *(continued)*

1. The CHAIRMAN, inviting the Commission to continue consideration of article 16, paragraph 3 (398th meeting, para. 27 and 399th meeting, para. 79), suggested that, in the light of the discussion, the first sentence be amended as follows: "The diplomatic courier shall be protected by the receiving State."

2. Mr. MATINE-DAFTARY, referring to the question of captains of aircraft carrying diplomatic mail, said that, unless they were provided with a diplomatic passport, they were in exactly the same position as ordinary postmen.

3. Mr. TUNKIN said that the "diplomatic courier" was a well-known concept which was best left alone. The entrusting of diplomatic mail to pilots was not a general practice, and the problems to which it gave rise should be left to the States concerned to settle. States might raise objections to the inclusion of a special provision on the subject in the draft, and it would be better simply to refer to the problem in the commentary.

4. Mr. BARTOS remarked that pilots carrying diplomatic mail could be divided into three categories. The first was the ordinary commercial airline pilot, carrying diplomatic mail merely as part of the aircraft's pay-load, and naturally not entitled to any diplomatic privileges. The second was the commercial airline pilot who was also accredited as diplomatic courier. Cases of the kind were quite common. In his opinion, such pilots enjoyed the privilege of inviolability until they handed over their diplomatic mail to a representative of the mission, a formality generally carried out at the airport itself. There was, however, a third, quite new category, of flying couriers operating planes allocated to embassies for the sole purpose of carrying diplomatic mail. The United States Embassy in Belgrade had had two such planes for the last two years. Since the innovation had not been introduced by agreement with the Yugoslav Government, the latter had protested. On further consideration, however, it had agreed that the practice was in accordance with international law. States were entitled to use any means of communication in their relations with their missions, and all civil planes had the right to fly over countries signatories to the conventions of the International Civil Aviation Organization (ICAO). The practice was not confined to Yugoslavia or to United States embassies.

5. Mr. FRANÇOIS observed that the privilege of inviolability was enjoyed by diplomatic couriers only as long as they were carrying the diplomatic bag.

6. Mr. TUNKIN thought it would be inadvisable to limit the inviolability of diplomatic couriers strictly to the periods during which they were carrying diplomatic bags. Diplomatic couriers usually moved from capital to capital, spending a short time in each, and it would only create confusion if they were inviolable for part of the time and not for the rest.

7. He did not think it necessary to include in the article any reference to air pilots carrying diplomatic bags. It would be sufficient to use the term "diplomatic courier" in the article, and to specify in the commentary that to claim inviolability diplomatic couriers must carry a diplomatic passport or *laissez-passer*.

8. Mr. VERDROSS thought that, if the same person combined the functions of pilot and diplomatic courier, he was entitled to protection. If he was merely a pilot and not an accredited courier, he was not entitled to protection.

9. Mr. SANDSTRÖM, Special Rapporteur, suggested that, in the case of commercial airline pilots who were also accredited couriers, the second function was a secondary one.

10. Mr. SPIROPOULOS said that the right of States to use aeroplanes for communication with their embassies was an established right regulated by the ICAO conventions. When the pilot of an aeroplane was at the same time a diplomatic courier, the aeroplane could be regarded merely as his means of travel. No one contemplated special provisions for diplomatic couriers who travelled by car.

11. Mr. AMADO said that if the sending State chose a means of communication such as the aeroplane, which prevented the receiving State according the diplomatic courier proper protection, the sending State must bear the consequences.

12. Mr. BARTOS pointed out that the use of aircraft pilots as couriers raised an important legal problem. Under the ICAO conventions, aircraft pilots were liable to arrest on personal grounds, for instance if they were not properly qualified, or on grounds involving third party liability. Pilots accredited as diplomatic couriers, though still subject to the law, would have to be immune from arrest on such grounds.

13. Mr. SPIROPOULOS agreed with that view.

14. Mr. SANDSTRÖM, Special Rapporteur, said he appreciated that the third type of pilot mentioned by Mr. Bartos should enjoy inviolability. In the case of commercial airline pilots, however, the position was different.

15. The CHAIRMAN observed that the majority of the Commission appeared to be agreed that, where commercial airline pilots were involved, it was the diplomatic pouch only that enjoyed immunity and not the pilot.

16. He put to the vote the following text, which combined the Special Rapporteur's article (398th meeting, para. 27) and the amendment proposed by Mr. Tunkin (399th meeting, para. 79):

> "The diplomatic courier shall be protected by the receiving State. He shall enjoy personal inviolability and shall not be liable to arrest or detention of an administrative or judicial nature."

The text was adopted by 19 votes to none, with 1 abstention.

17. The CHAIRMAN invited the Commission to consider paragraph 4 of article 16 (398th meeting, para. 27).

18. He suggested that the question whether the paragraph be included in article 16, or in an article dealing with the obligations of third States in general (article 19), be referred to the Drafting Committee.

It was so agreed.

19. The CHAIRMAN suggested replacing the words "dispatches and messengers" by the words "diplomatic couriers" in order to avoid misunderstanding.

20. Mr. YOKOTA, referring to the words "accord the same protection", pointed out that by its last decision the Commission had recognized that diplomatic couriers enjoyed personal inviolability in the receiving State. Third States could not however be expected to accord them the same privileges. He, therefore, suggested amending the paragraph to read as follows:

"The diplomatic courier shall have the right of innocent passage through third States."

21. Mr. EL-ERIAN doubted the advisability of introducing the concept of "innocent passage". To the best of his knowledge, the term was used only with reference to the passage of ships through the territorial sea of other States, and the Commission would undoubtedly recall the difficulty it had had in defining its implications when preparing its draft of the law of the sea. A further objection to Mr. Yokota's amendment was that it imposed on third States the obligation to admit diplomatic couriers in transit. If third States were willing to admit diplomatic couriers, they were, of course, bound to protect them. But there was no rule of law which said that they must admit them.

22. Mr. SANDSTRÖM, Special Rapporteur, said that it would be possible to say that third States "shall be bound to accord free passage and protection".

23. Mr. GARCIA AMADOR supported Mr. El-Erian and the Special Rapporteur's suggestion. Except on the term "innocent passage", he agreed with Mr. Yokota's views.

24. Mr. AMADO considered that the right of free passage was included in the concept of "protection".

25. Mr. TUNKIN said that it would be inadvisable to accept Mr. Yokota's text, since it applied only to the so-called "innocent passage" of the diplomatic courier but did not protect him from measures of constraint on the part of the local authorities. The inviolability of the diplomatic courier arose out of the fact that he was carrying a diplomatic bag. If third States admitted diplomatic couriers they must respect their inviolability, which was so closely connected with the inviolability of the diplomatic bag.

26. The addition suggested by the Special Rapporteur was not necessary, and introduced a new obligation on third States, i.e., that they must admit diplomatic couriers. Since the Commission had already recognized the right of receiving States to refuse to accept members appointed to missions accredited to them, it was hardly logical to adopt a principle that third States must admit any diplomatic courier who wished to cross their frontier.

27. Mr. AGO asked that the Drafting Committee be requested to specify that Powers occupying the territory of third States were under the same obligations with respect to diplomatic couriers as the third States themselves.

It was so agreed.

28. The CHAIRMAN put to the vote the following text for paragraph 4:

"Third States shall be bound to accord the same protection to diplomatic couriers in transit."

The text was adopted by 16 votes to none with 4 abstentions.

29. Mr. EL-ERIAN said that, although he had voted for the paragraph, he wished to dissociate himself entirely from the interpretation that the provision involved an obligation on third States to admit diplomatic couriers. In the current state of international law no such obligation existed.

30. Mr. KHOMAN suggested modifying the text to bring it into line with that of article 19, which said "the third State shall accord".

31. The CHAIRMAN said that Mr. Khoman's observation would be taken into account by the Drafting Committee.

32. Faris Bey EL-KHOURI said that he had abstained from voting because he objected to the use of the word "protection", which seemed to imply that third States must have diplomatic couriers escorted throughout their territories. The provision should merely convey the idea that diplomatic couriers must not be interfered with by third States.

33. Mr. SANDSTRÖM, Special Rapporteur, pointed out that the previous paragraph of article 16 made clear what was meant by protection.

QUESTION OF INCLUDING AN ADDITIONAL ARTICLE (ARTICLE 16 (*a*))

34. The CHAIRMAN invited the Commission to consider the following additional article, which Sir Gerald Fitzmaurice proposed should be inserted in the draft after article 16:

"The receiving State shall permit and facilitate full freedom of movement and circulation in its territory to all members of the mission in the exercise of their functions, including the provision of any necessary special facilities for the ownership, driving and use of motor vehicles, whether self- or chauffeur-driven."

35. Sir Gerald FITZMAURICE said that, thirty years ago, a provision such as that which he was proposing would not have been necessary. It had always been traditional and regarded as axiomatic that members of diplomatic missions enjoyed full freedom of movement on the territory of the receiving State, subject to a few minor exceptions in the case of fortified zones to which entrance was prohibited on strategic grounds. The right involved was of great importance. Unless members of missions were able to move about the country freely, they could not keep their Governments accurately informed of local conditions, and lack of accurate information, it need hardly be said, was prejudicial to good relations between States.

36. In recent years, some countries had placed drastic restrictions on freedom of movement. He did not wish to mention any specific instances. Cases had, however, occurred where members of missions had been confined to an area within a radius of 15 or 20 kilometres of the capital of the country to which they were accredited. In addition, they had been shadowed wherever they went, had been obliged to obtain a special permit for any jour-

ney they wished to make, and had been escorted on such journeys, albeit at a discreet distance, by members of the police. Every kind of material obstacle had been put in the way of their driving motor cars with the object of forcing them to employ chauffeurs. The tests for driving licences, in particular, had been made so severe that even the most skilled racing driver would have failed to pass them.

37. Normally, the statement in paragraph 1 of article 16 that "The receiving State shall accord all necessary facilities for the performance of the work of the mission" (398th meeting, para. 27) would have been quite sufficient, but the practices he had described made a more specific provision advisable. Though he did not really see why members of missions should not have freedom of movement as private persons too, in order to make the amendment more acceptable he had limited its scope by the qualification "in the exercise of their functions".

38. Mr. TUNKIN pointed out that the task of the Commission was to codify existing rules and practices. The rule enunciated by Sir Gerald Fitzmaurice in his amendment did not, however, exist in practice. Each Government established regulations respecting the movement of members of diplomatic missions on its territory in the light of the prevailing situation, and specifically took into consideration reasons of security. Many, if not all, States had such regulations.

39. As far as the general principle of freedom of movement was concerned, nobody would object to it. On the other hand, all members of the Commission would agree that its task was to produce a text capable of adoption and application by States and not one that would simply be put on the shelf. That being so, the Commission should not confine itself to establishing sound principles in the abstract, but must take into account the facts of the existing situation.

40. Since the question had been raised—and he regretted that it ever had been raised—he would explain why, for instance, the Soviet Union had applied restrictions on the movement of members of missions, closing certain parts of the country and requiring special permits for certain journeys. It had never wanted those restrictions, but had been unable to act otherwise in face of the existing international situation, characterized by the race of armaments initiated by certain States, which had set up close to the borders of the Soviet Union military bases equipped with atom bombs, atomic weapons, and so on. Any State in like circumstances would have been bound to consider such a situation as a threat to the security of the country and its people, and to take appropriate measures to safeguard that security. Though he could not speak on behalf of the Government of the Soviet Union, as a private citizen of that country he did not think that its Government could have acted in any other way.

41. He must, therefore, oppose Sir Gerald Fitzmaurice's amendment as not corresponding to the existing rules of international law, and infringing upon the rights of States to take the necessary measures on their own territories to safeguard their security, measures which in no way prejudiced the security or rights of other States.

42. Mr. SANDSTRÖM, Special Rapporteur, fully agreed with the principle enunciated by Sir Gerald Fitzmaurice. If he had included no provision on the point, it was because he realized that the rule could not be enunciated without some qualification, since every State had the right to prohibit entry to certain areas of its territory. Once such exceptions were allowed, however, the door was open to practices such as Sir Gerald Fitzmaurice had described. Little would, therefore, have been gained by including an article enunciating a rule of principle only. In formulating the first sentence of article 16, paragraph 1, he had had in mind primarily the principle of freedom of movement.

43. Mr. SPIROPOULOS thought that Sir Gerald Fitzmaurice's amendment might have been discussed in connexion with article 17. Since the general principle was accepted even by the speaker opposing the amendment as a whole, while all were agreed that some qualification was necessary, he proposed the insertion of the words "in so far as compatible with public security", after the words "in its territory".

44. Mr. YOKOTA said that Sir Gerald Fitzmaurice's amendment, that members of missions must enjoy freedom of movement in so far as necessary for the performance of their functions, was entirely acceptable in principle. The Commission had already agreed, in connexion with the first paragraph of article 16, that the receiving State must accord all necessary facilities. According to General Assembly resolution 685(VII), the task of the Commission was to codify existing principles and rules and recognized practice. The restriction of members of diplomatic missions to a narrow radius from the capital of the receiving State was a comparative innovation, and though it had become the practice in recent years in certain countries, he very much doubted whether it could be regarded as a "recognized practice" within the meaning of the resolution.

45. Mr. AGO observed that all members of the Commission appeared to be agreed in recognizing the principle enunciated by Sir Gerald Fitzmaurice as constituting an essential factor in ensuring the proper functioning of diplomatic missions abroad. It therefore seemed desirable to include such a statement of principle. He agreed with the qualification proposed by Mr. Spiropoulos, recognizing the right of the receiving State to close certain areas. Such a practice, however, ought to be the exception and not the rule. To declare, for instance, 80 per cent of a country closed to members of foreign missions would be to violate the principle of freedom of movement itself.

46. Mr. AMADO suggested inserting the qualification "outside areas prohibited for security reasons" after the words "in its territory", in Sir Gerald Fitzmaurice's amendment.

47. Mr. KHOMAN remarked that the principle of freedom of movement appeared to be accepted by all members of the Commission, as part of the diplomatic privileges which should be accorded to missions. Sir Gerald Fitzmaurice's amendment was in complete accord with the principles pervading the whole draft. In most, if not all, countries, however, some restrictions were placed on freedom of movement in areas which were also closed to the general civil population as well. The whole question lay in the extent of the areas thus closed. The closing of vast areas was contrary to the general principle.

48. Mr. Spiropoulos and Mr. Amado had suggested including qualifying clauses based on the criterion of the security of the State. However, the Commission, when dealing with the inviolability of the premises of mis-

sions (article 12), had refused to qualify that principle on the grounds of the security of the State. To be consistent, therefore, it could not reject that qualification on one occasion and adopt it on another. To affirm the principle would not mean that States would not be able to take security measures. In a public emergency or in time of war, it would be permissible for them to close certain areas to the members of missions without drastically curtailing their freedom of movement.

49. Mr. TUNKIN said it was essential to draw a line between matters coming under international law and matters for domestic jurisdiction. Most members had already expressed the view that diplomatic agents, while enjoying certain privileges and immunities, were not thereby placed above the local law, and, in the case in point, members of missions could not enjoy freedom of movement regardless of the laws and regulations of the receiving State. Mr. Yokota argued that the restrictions on the movement of members of missions as applied in the Soviet Union was not a recognized practice. It had, however, no need to be recognized. Every State was free to take such measures, and many States did that.

50. Referring to Mr. Khoman's observations, he said that he was still of the opinion that the Commission must take account of existing facts as well as of principles, which were never absolute.

51. Sir Gerald FITZMAURICE said he quite appreciated that in many countries there were prohibited zones, for example, adjoining their frontiers; they were the exception, however, and over by far the greater part of the country foreign diplomats were free to come and go as they chose. But in the cases he had in mind—they were not confined to only one country—the exception had become the rule: the greater part of the country, including even areas in the vicinity of the capital, was closed to foreign diplomats, who were thus prevented from obtaining the intimate knowledge of the country and its inhabitants that their duties required.

52. It was to some extent true that the Commission must preserve the distinction between international and municipal law. All international law, however, was in the nature of a restriction of national sovereignty; and a State which recognized the value of diplomatic intercourse, to the extent of allowing a foreign State to maintain a diplomatic mission in its territory, could not consistently lay down a rule which, for example, made it well-nigh impossible for members of the mission to use motor cars.

53. He did not insist on his proposal as it stood, and would accept any of the suggestions put forward by Mr. Ago, Mr. Amado, or Mr. Spiropoulos. However, if the last-named's suggestion were adopted it should be stated in the commentary that prohibited areas were to be the exception rather than the rule.

54. Mr. SPIROPOULOS drew Mr. Khoman's attention to the fact that the present case was quite different from the one he had referred to. In article 12 the Commission had refused to make provision for exceptional cases of an emergency nature; but it was a normal, recognized practice for Governments to designate prohibited areas.

55. Mr. YOKOTA said that, though it might be true as a general principle that the receiving State had the right to regulate the movement of foreigners throughout its territory, he was by no means sure that that was true where members of diplomatic missions were concerned. If, as he believed to be the case, they had always enjoyed free movement—outside certain prohibited areas—he did not think the receiving State could suddenly enact a law depriving them of their rights in that respect.

56. The question of expropriation provided an analogy. As a general principle, every State had the right to enact legislation enabling it to expropriate foreign property, subject to payment of compensation; but the Commission had recognized that it had no such right in the case of the premises of foreign missions, where the existing practice was that agreement must first be reached between the sending and receiving State.

57. Mr. EL-ERIAN said that, in his view, it was necessary to arrive at a form of words that would reconcile two principles—which he was glad to note almost all members of the Commission had expressly recognized—that of freedom of movement for the purpose of exercising the diplomatic function, and that of the receiving State's right to protect its own security by designating prohibited zones. That could easily be done by incorporating Mr. Spiropoulos's amendment (para. 43 above) in the text proposed by Sir Gerald Fitzmaurice (para. 34 above), though the words "and the laws of the receiving State" might be inserted after "public security", so as to cover cases where foreigners were banned from certain areas for religious reasons.

58. He also suggested that the Drafting Committee might consider deleting the words "and circulation" and referring simply to "freedom of movement", as in article 13, paragraph 1, of the Universal Declaration of Human Rights.[1]

59. Mr. KHOMAN recalled that many members of the Commission had previously criticized the term "security of the State" on the grounds that it could be used to cover almost anything. If reference was to be made to the laws of the receiving State, as Mr. El-Erian suggested, it was perhaps unnecessary to retain the term "security"; it would be sufficient, in order to conform to decisions taken previously by the Commission, to state in the commentary that the laws which the Commission had in mind included those designed to protect the security of the State against armed attack.

60. The CHAIRMAN recalled that Sir Gerald Fitzmaurice had already expressed his willingness to accept Mr. Spiropoulos's amendment, subject to an explanatory note in the commentary.

61. He suggested that the Special Rapporteur be requested to submit a revised text for consideration at an early meeting. In his view, the text might well be combined with the sentence reading: "The receiving State shall accord all necessary facilities for the performance of the work of the mission", which most members had agreed (398th meeting) should be removed from article 16.

The Chairman's suggestion was adopted.

GENERAL DEBATE ON THE FINAL FORM OF THE DRAFT

62. The CHAIRMAN felt that, before passing on to sub-section B of section II of the draft (articles 17 to 26), it would be desirable to consider further a point already raised by Mr. Spiropoulos, namely, what form

[1] *Official Records of the General Assembly, Third Session, Part I, Resolutions*, p. 74.

the draft should finally take: that of a convention, of a model code, or of what he had termed a "simple restatement".

63. A decision on that point would inevitably affect the method of work and the terms of many of the articles, particularly those of sub-section B of section II. Thus, for example, the contents of article 23, on customs immunities, must necessarily differ according to whether the Commission decided merely to formulate the existing law in a code, or whether it wished to prepare a draft convention. In the latter case, it might go beyond the international law in force by proposing to codify a practice which had not yet become law, but which was general enough to warrant the reasonable expectation that the texts proposed by the Commission would be accepted by Governments.

64. Speaking as a member of the Commission, Mr. Zourek said that, in his view, it was only by means of a convention that the Commission could bring about a uniformity of practice, thereby removing the causes of friction between States, which was its goal.

65. Mr. SANDSTRÖM, Special Rapporteur, said that he had worked on the assumption that his draft would form the basis for a draft convention, not only for the reason given by Mr. Zourek, but also because there was already a fair measure of agreement in that particular field of international law.

66. Mr. EL-ERIAN and Mr. SCELLE agreed that the Commission should aim at a draft convention, and that it was more realistic for it to do so for diplomatic intercourse and immunities than for any other subject on its programme.

67. Sir Gerald FITZMAURICE, while he quite agreed that the draft being discussed stood as good a chance of developing into a convention as any the Commission was likely to submit, doubted whether a draft convention was the most desirable form. It was most improbable either that the General Assembly would simply approve a draft convention in the form in which it was submitted by the Commission and open it for signature, or that it would convene a special conference to consider it, as it had done in the case of the draft articles on the law of the sea. It would be much more likely to examine it itself, with far less time for careful study of it than the Commission had been able to afford; and in those circumstances, any changes it made might not be for the better. Moreover, even after the General Assembly had approved the convention and opened it for signature, there was no knowing how many States would ratify it; and difficulties would inevitably arise between those who did and those who did not. There was also the problem of reservations. He was not, therefore, sure that a convention would necessarily be of more value than a model code, which the General Assembly could simply take note of, possibly with some expression of approval.

68. It might be wise to defer any final decision in the matter till the next session of the Commission. If the comments of Governments on the draft indicated that the great majority of them would be prepared to accede to a convention along those lines, he agreed that they should be given an opportunity of doing so; if not, the situation would require further consideration.

69. Mr. LIANG (Secretary to the Commission) recalled that there had been a similar discussion at the eighth session of the Commission in connexion with Sir Gerald Fitzmaurice's report on the law of treaties.[2] Sir Gerald Fitzmaurice, as Special Rapporteur, had then argued that the draft articles contained in his report could not form the basis of a draft convention unless they were radically altered; and the Commission had accordingly agreed that in that field it would not aim at a draft convention. Had it decided otherwise, it would have been necessary for the Special Rapporteur to begin his work all over again.

70. In the present case, however, he agreed with Sir Gerald Fitzmaurice that there was no urgency about taking a final decision, although the articles would undoubtedly have to be reconsidered if they were to be presented in the form of a code, in the sense in which Sir Gerald Fitzmaurice had used that term.

71. Mr. AGO said that he agreed with Sir Gerald Fitzmaurice and the Secretary that the Commission should not take any final decision in the matter until its next session.

72. Mr. TUNKIN felt the Commission should at least take a provisional decision at its current session so that, in submitting its draft to Governments, it could indicate what form, in its view, the final document should take; that was, after all, an important matter. It was also of some importance to the Commission to know just what it was aiming at.

73. In his view, it should, wherever possible, aim at a draft convention, and there was reason to believe that in the present instance the great majority of States would be willing to accede to a convention. If their comments indicated otherwise, the Commission could always reconsider the matter at its next session.

74. Mr. SPIROPOULOS said that, since the Special Rapporteur had drafted his articles with a draft convention in mind, and since more than half of them had already been considered on that understanding, the Commission had in fact no choice but to continue as it had begun. It could not change horses in mid-stream.

75. After further discussion, the CHAIRMAN suggested that the Commission proceed on the understanding that its draft was to form the basis of a draft convention, subject to reconsideration of the matter at the next session, if necessary.

It was so agreed.

SECTION II, SUB-SECTION B

76. The CHAIRMAN recalled Mr. Bartos's suggestion (394th meeting, paras. 27 and 28) that, before taking up sub-section B of Section II of the draft (articles 17 to 26) the Commission should discuss the question of the categories of persons which should enjoy diplomatic privileges and immunities.

77. Mr. BARTOS pointed out that the Commission had so far distinguished only between heads of missions and other members of missions. There were, however, many other categories that could be distinguished. In the first place, there were the technical collaborators of heads of missions (special attachés), who were usually treated as a category apart. Secondly, there were the administrative personnel, who might or might not be recruited locally, and who in some countries enjoyed diplomatic privileges and immunities only so far as their official

[2] *Yearbook of the International Law Commission, 1956,* Vol. I, 368th to 370th meetings.

duties were concerned, while in other countries they enjoyed full diplomatic privileges and immunities. Thirdly, there were servants, who could also be recruited locally, or brought from the sending State. Fourthly, there were wives and families; in that connexion, some countries distinguished between married and unmarried daughters. Fifthly, other close relatives were also granted certain privileges and immunities, as a matter of courtesy in some countries, such as France, and as a matter of right in others, such as the United States of America. Finally, there were various minor special categories, such as personal chaplains to ambassadors.

78. If the Commission accepted the old theory of extra-territoriality, or even if it accepted the modern theory of "representative character", it followed that all those categories should enjoy full diplomatic privileges and immunities. On the other hand, if it accepted the "demands of the office" theory, the situation was obviously different.

The meeting rose at 1.5 p.m.

401st MEETING

Tuesday, 21 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 17

1. Mr. SANDSTRÖM, Special Rapporteur, introduced article 17 of his draft (A/CN.4/91) and said he proposed to omit the phrase "shall accord him all necessary facilities for the exercise of his functions" which had been transferred to article 16, paragraph 1.

2. He had been in two minds as to whether to include a provision that diplomatic agents should not be subpect to any constraint, arrest, extradition or expulsion, on the lines of article 7 of the resolution adopted by the Institute of International Law in 1929,[1] but had decided not to do so, because he considered that such acts were covered by article 20 on immunity from jurisdiction. He was willing to include such a provision if the Commission so desired.

3. Mr. VERDROSS observed that the previous articles dealt with "heads of missions". To make it clear that sub-section B of section II dealt with diplomatic agents in general, he thought it might be better to use the plural throughout.

4. Mr. SPIROPOULOS drew attention to article 24, which stated that the privileges and immunities set forth in articles 12 to 20 applied equally to the staff of the mission. He therefore proposed that the Commission refer for the moment to "heads of missions" in article 17 and subsequent articles, and leave the final drafting to the Drafting Committee. Another possible alternative was to amend article 24.

5. Mr. AGO said that, if article 17 and those immediately following it were made to refer to heads of missions only, it would be necessary to refer to other diplomatic agents later on.

6. He proposed that the first sentence in paragraph 1 should be redrafted to read: "The person of the diplomatic agent is inviolable", a wording more in line with that of previous articles.

7. Mr. SANDSTRÖM, Special Rapporteur, accepted Mr. Ago's proposal.

8. In reply to Mr. Spiropoulos, he said that he had chosen the term "diplomatic agent" because of its more general sense.

9. Mr. PADILLA NERVO suggested including an article similar to article 2 of the 1929 resolution of the Institute of International Law, showing what categories were entitled to the various immunities.

10. Mr. SANDSTRÖM, Special Rapporteur, pointed out that article 24 performed the same function in a different way.

11. Mr. LIANG, Secretary to the Commission, observed that the whole of sub-section B consisted of provisions covering all diplomatic members of missions. If the term "heads of missions" were substituted for "diplomatic agent" in the group of articles, it would be necessary to have a similar group of articles referring to subordinate members of missions, and that would be a rather clumsy arrangement. The idea of making the articles apply to heads of missions and then pointing out in article 24, paragraph 1, that they applied to the staff of the missions as well, was not a particularly happy one either. It implied too sharp a distinction between the head of the mission and the rest of his diplomatic staff. He wondered whether the whole subsection could not be preceded by some general provision indicating what categories of diplomatic staff were entitled to the various privileges and immunities.

12. Mr. TUNKIN thought that whatever term was adopted would only be provisional. He noted that the terms "members of a diplomatic mission" and "members of the diplomatic staff" were used in the draft articles already prepared by the Drafting Committee.

13. After further discussion, Mr. SPIROPOULOS withdrew his proposal.

14. Mr. AMADO said he would have preferred the wording "all necessary steps" to "all reasonable steps", which was rather subjective.

15. The CHAIRMAN, speaking as a member of the Commission, doubted the wisdom of stating that diplomatic agents were never subject to expulsion. There had been cases, admittedly very rare, where receiving States had been obliged to order a diplomatic agent to leave the country after the sending State had refused to recall him.

16. Mr. AMADO remarked that the text presumably referred to a formal measure of expulsion, as practised in the case of criminals and undesirables.

17. Mr. MATINE-DAFTARY considered the statement that the person of a diplomatic agent was inviolable to be quite sufficient. Elaboration merely detracted from its force.

18. The CHAIRMAN put to the vote the following amended text for paragraph 1, subject to drafting changes:

[1] Harvard Law School, *Research in International Law, I. Diplomatic Privileges and Immunities* (Cambridge, Mass., 1932), pp. 186 and 187.