Document:-
A/CN.4/SR.406

Summary record of the 406th meeting

Topic:
Diplomatic intercourse and immunities

Extract from the Yearbook of the International Law Commission:-
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56. The CHAIRMAN observed that, since the Commission appeared to be unanimous in regarding the waiving of immunity as an act of State, he would put the first sentence of paragraph 1 to the vote, subject to redrafting by the Drafting Committee.

The first sentence was adopted by 17 votes to none with 1 abstention.

57. Mr. AGO pointed out that he had voted for the proposal on the understanding that it would be redrafted in a positive sense, as proposed by Mr. Amado, and that the words "the Government of" would be omitted.

58. Mr. PAL said that he had abstained, because he doubted the validity of the principle implied in the text voted upon. He would have preferred a wording on the lines of article 19 of the Havana Convention. The sanction of the sending State was certainly needed, but the question was whether that was enough; he had grave doubts whether the sending State alone could waive immunity. Further, the rights of waiver before and after an incident were on different footings.

59. Faris Bey EL-KHOURI said that he had voted for the proposal, only on the understanding that waiver of immunity applied only to specific legal proceedings. Nothing in the article indicated any limitation on the scope or duration of a waiver of immunity.

60. The CHAIRMAN put to the vote Mr. Tunkin's proposal to delete the second sentence of paragraph 1 (para. 36 above).

The proposal was adopted by 8 votes to none with 8 abstentions.

61. Mr. AMADO said that he had voted for the deletion of the sentence because it enunciated something which was self-evident.

62. Mr. BARTOS explained that he had been obliged to abstain because mere deletion of the second sentence did not make it clear that a declaration of waiver of immunity need not necessarily be made by the head of the mission. Had Mr. Tunkin proposed replacing the sentence by a provision stating that a formal declaration from the sending State was necessary, but without specifying through whom it was to be made, he would have voted for the proposal.

63. Mr. KHOMAN said that he had abstained because he considered a formal declaration to be necessary as evidence that immunity had been waived. He noted that many jurists were of that opinion, including Sir Cecil Hurst, who stated that "there must be some act to which the courts can look as embodying the consent of the sovereign of the country which the diplomatist represents".[4]

The meeting rose at 6.10 p.m.

406th MEETING

Tuesday, 28 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]

[4] *International Law—The Collected Papers of Sir Cecil Hurst* (London, Stevens and Sons Ltd., 1950), p. 249.

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 consider paragraph 2 of article 21 and drew attention to the following alternative text submitted by Mr. François:

> "The instigation of legal proceedings by a diplomatic agent shall preclude him from invoking immunity of jurisdiction in respect both of counter-claims directly connected with the principal claim and of appeals lodged against the decision rendered."

2. Mr. BARTOS said that, although the immunity of diplomatic agents from criminal jurisdiction was absolute, case law pointed to the almost general conclusion that diplomatic agents could waive their immunity from civil jurisdiction in various ways. In the United Kingdom, the United States of America and France, for instance, case law was unanimous in the view that acceptance by diplomatic agents of the jurisdiction clause in leases and hire contracts implied that they thereby automatically waived their immunity from civil jurisdiction. He was, therefore, opposed to the paragraph in question, because, in many cases, it was not the instigation of legal proceedings that precluded the diplomatic agent from invoking immunity but the prior act of entering into a contract.

3. Mr. MATINE-DAFTARY, recalling his previous statement (405th meeting, paras. 50 and 51), said that if, as he himself considered, immunity from jurisdiction belonged to the sending State, no distinction could be drawn in that regard between civil and criminal jurisdiction, and a diplomatic agent could waive immunity only with the consent of his Government. There was, however, no indication in the paragraph whether the instigation of legal proceedings could be undertaken only with the consent of the sending State. On a point of drafting, he saw no occasion for the inclusion in the Special Rapporteur's text of the words "germane to the principal claim". Any receivable counter-claim must be germane to the principal claim.

4. Mr. SPIROPOULOS wondered whether the Commission was on the right course. Having adopted in paragraph 1 the principle that a waiver of immunity must ultimately come from the sending State, it must be careful not to adopt any provision which appeared to contradict that principle. Paragraph 2 gave the impression that whenever a diplomatic agent appeared as plaintiff in a court in the receiving State, the judge must conclude that he had waived his immunity from civil jurisdiction. Paragraph 2 could, however, be reconciled with paragraph 1 if it was understood that a diplomatic agent must obtain his Government's consent before entering into litigation in the State to which he was accredited.

5. Mr. Bartos, by raising the matter of contracts, had introduced a further complication—the idea of the waiving of immunity in advance. There again the question arose whether the consent of the sending State was necessary before the agent could accept the jurisdiction clause, and whether the fact of its consent should be mentioned in the clause.

6. Mr. PAL said that the Commission must examine how far paragraph 2 was consistent with the principle adopted in paragraph 1. According to paragraph 1, it was for the sending State to waive immunity. If that

implied that the right of immunity rested with the State only, then it was difficult to see how the instigation of proceedings by a diplomatic agent could amount to a waiver of that immunity. Of course it was possible to read paragraph 1 as simply laying down who could exercise the right of waiver, irrespective of the question where the right of immunity rested. Similarly, paragraph 2 might be read as only enacting the consequences of submission to jurisdiction in the specified manner, irrespective of the logical consequences of considering where the right to immunity lay.

7. The Commission should clarify those matters in its comments on paragraph 1, and it would be better to specify in its comments on paragraph 2 that the right which belonged to the State was exercised by the diplomatic agent. Then, when he instigated proceedings, it was to be presumed that what he did was with the consent of the sending State, and hence with the consequence laid down in the paragraph.

8. There were two ways of submitting to jurisdiction; by initiating proceedings or by entering an appearance in answer to a suit and failing to invoke immunity. In the latter instance, as case law showed, it was possible to invoke immunity even at a later stage. It would be desirable not to pass over that part of the question in silence.

9. He was, however, not satisfied with the form in which paragraph 1 had been adopted, and he experienced the same misgivings with regard to paragraph 2.

10. Mr. VERDROSS said that Mr. Tunkin's description of the nature of diplomatic immunity (405th meeting, para. 32 et seq.) was quite correct. It was a right belonging to the State, the diplomatic agent being merely the person in whose favour the right was exercised. On the other hand, it was a regular practice for diplomatic agents to enter into contracts involving submission to civil jurisdiction. Case law was rich in examples of counter-claims against diplomatic agents, and of cases where costs had been awarded against them. In his opinion, the only way to avoid the apparent conflict between the principle and case law was to regard the State as the rightful owner (*ayant-droit*) of the right to immunity, who could give the holder (*titulaire*) the power to dispose of that right.

11. Mr. AGO remarked that the Commission should not be overawed by the principle that diplomatic immunity was a right belonging to the State of the diplomatic agent. While it was true that only a State had the right to call upon another State to respect the immunity of its diplomatic agents, it was also true that the immunity enjoyed was not an immunity concerning the State, but an immunity concerning the diplomatic agent himself, especially where acts committed by him as a private person were concerned.

12. In that respect, too, one should not forget the true meaning of immunity from jurisdiction. The fact that a diplomatic agent enjoyed that immunity did not mean that the jurisdiction of the receiving State would never be able to operate with respect to that agent, even when he himself had recourse to that jurisdiction. Enjoying immunity from jurisdiction meant simply enjoying the right not to be the object of judicial proceedings, in other words not being bound to appear as defendant in the courts in consequence of proceedings instituted against him. The immunity in question had never meant the inability to appear as plaintiff before the same courts. Nor did the immunity mean that the courts were never competent to deal with cases in which a diplomatic agent was implicated.

13. Moreover, it was not only established practice that a diplomatic agent who appeared as plaintiff could not plead immunity if he was later the object of counter-claims; it was a perfectly logical deduction, not at all in contradiction with the principle.

14. Sir Gerald FITZMAURICE agreed with Mr. Ago that there was no contradiction between principle and practice. He also shared his doubts as to whether the Commission was on the right tack, at least as far as civil actions were concerned. Criminal proceedings were quite another matter. Never being instigated by individuals, they constituted, in a sense, an act of State, and the immunity of the diplomatic agent might therefore be regarded as appertaining to his State and not to him. In civil proceedings, however, the immunity of the diplomatic agent was, at least in part, of a personal character, though there might be a prior arrangement between him and his sending State regarding the waiver of it.

15. Most of the difficulties sprang from the fact that the Commission had not completed its task in connexion with paragraph 1. That paragraph could not be interpreted as meaning that only the State could invoke or waive immunity. It merely said that immunity could not be invoked if the sending State had waived it.

16. He thought that a new paragraph should be inserted after paragraph 1, specifying when immunity could be waived. Paragraph 2 would then fall into place as an example of how immunity was waived when a diplomatic agent instituted proceedings himself.

17. Mr. AMADO reaffirmed his conviction that the diplomatic agent was enveloped in absolute inviolability. If he waived his immunity, it could only be because his sending State had already agreed to do so. He could not agree with the arguments of Mr. Ago and Sir Gerald Fitzmaurice. He drew attention in that connexion to the statement in the Secretariat memorandum that authors were practically unanimous in considering that even when a waiver was made in due form, a subsequent court order against the diplomat could not be enforced by execution levied on his property or by constraint of his person (A/CN.4/98, para. 290).

18. Mr. YOKOTA, after recalling the Commission's decision on paragraph 1, said that waiver of immunity could be explicit or tacit. Paragraph 2 would be easier to follow if the Commission inserted a new paragraph listing the cases in which immunity could be presumed to have been tacitly waived.

19. He proposed the following text for that purpose:

"Immunity from jurisdiction is presumed to be waived in the following cases:

(*a*) When a diplomatic agent enters an appearance to an action against himself and allows the action to proceed without pleading his immunity;

(*b*) When he himself brings an action under the jurisdiction of the receiving State."

20. Mr. LIANG, Secretary to the Commission, also felt that there was no contradiction between paragraphs 1 and 2, but for different reasons. To use a somewhat old-fashioned terminology, the State could be regarded as the subject of the right of immunity and the diplomatic agent as its object. It was a recognized practice in inter-

national law for the State to authorize its diplomatic agent to initiate legal proceedings and bear the consequences. It was, however, the duty of the head of mission in such cases to warn his Government in advance, and to desist from taking action if so instructed. The apparent contradiction between the two paragraphs was perhaps merely a matter of wording.

21. Mr. MATINE-DAFTARY agreed with Mr. Amado regarding the inviolability of the diplomatic agent. For a diplomat to be free to divest himself of his immunity in civil matters would be to bring him down to the level of the business-man. On the other hand, it was illogical to say that, because of his immunity, a diplomatic agent could not be cited as defendant, but could be a plaintiff.

22. Mr. HSU agreed that there was no contradiction between the two paragraphs. While considering the immunity of a diplomatic agent to be a right belonging to the State, he appreciated that case law supported the view that in certain cases the diplomatic agent might waive his immunity.

23. In paragraph 2 it must be assumed that whenever the diplomatic agent waived his immunity explicitly or tacitly, he did so with the consent of his Government.

24. Mr. TUNKIN recalled his previous statement regarding the basis of diplomatic immunity (405th meeting, para. 32 et seq.). The diplomatic agent enjoyed his immunity as a public official and not as a private person, even though his immunity covered his acts as a private person. That being so, he could not dispose of his right of immunity at his own discretion.

25. It might, however, be possible to find a legal construction of paragraph 2 which would prevent its conflicting with paragraph 1. The remarks of Mr. Verdross and Mr. Yokota deserved careful consideration in that connexion. Perhaps the first part of the paragraph could be amended to read:

> "The instigation of legal proceedings in civil courts by a diplomatic agent shall be considered as waiving his immunity and shall preclude . . ."

26. Mr. PAL considered that the right of immunity was shared by the diplomatic agent and did not belong solely to the State. Consequently, he failed to see how the State could unilaterally waive its agent's immunity. It would be more in accordance with the basic principle to state that the Government waived immunity with the concurrence of the diplomatic agent.

27. He agreed, however, that in strict logic there was no contradiction between paragraph 2 and the unqualified principle in paragraph 1, which had been adopted by the majority of the Commission and which gave the diplomatic agent no personal right of immunity at all.

28. Mr. AGO explained that he had not intended to imply that a diplomatic agent had the right to waive his immunity on his own authority. The waiver was always on the authority of the State, as it was an international right of the State which was being waived. However, nothing was more natural than for the waiver to be made, on behalf of the State, by an agency of the State, namely, the diplomatic agent and, especially, the head of a mission.

29. Regarding counter-claims in particular, he would like to point out that certain difficulties probably arose from the fact that paragraph 2 was not in its proper content. It really belonged to the exceptions to immunity from jurisdiction, cited in article 20, paragraph 1. He drew attention in that connexion to article 12 of the 1929 resolution of the Institute of International Law[1], where counter-claims were listed with real actions as matters in respect of which immunity could not be invoked.

30. Mr. Ago suggested inserting the Special Rapporteur's text on that point, appropriately redrafted, as subparagraph (*c*) of article 20, paragraph 1.

31. Mr. EL-ERIAN submitted that immunity belonged neither to the sending State nor to the diplomatic agent but to the diplomatic function. Practice during the last decade supported that view. Examples were furnished by the Convention on the Privileges and Immunities of the United Nations—in section 14, dealing with the privileges and immunities of representatives of Members,[2] and in section 20, dealing with those of officials.[3] Almost identical provisions were to be found in sections 16 and 22 of the Convention on the Privileges and Immunities of the Specialized Agencies[4] and in articles 14 and 23 of the Convention on Privileges and Immunities of the League of Arab States, adopted in 1953 by the Council of the Arab League.

32. The conventions in question also shed light on the practice with regard to the authority empowered to waive immunity. According to the Convention on the Privileges and Immunities of the United Nations, the immunity of representatives of Members could be waived only by States themselves, that of the Secretary-General by the Security Council alone, and that of officials by the Secretary-General. The provision thus ran parallel to the principle that the sending State alone could waive the immunity of the head of the mission, but that the head of a mission acted in the case of subordinate members of the mission.

33. He urged the Commission to adopt a provision on the same lines in order to bring article 21 into line with the existing practice of States.

34. The CHAIRMAN, speaking as a member of the Commission, pointed out that although, under the Charter of the United Nations, the judges of the International Court of Justice enjoyed diplomatic privileges and immunities, officials of the United Nations did not. The latter merely enjoyed those "necessary for the independent exercise of their functions in connection with the Organization". Those were not, therefore, diplomatic immunities. For that reason it would be wrong for the Commission to base its work of codification on the relevant provisions of the conventions quoted by Mr. El-Erian.

35. Mr. SPIROPOULOS fully agreed with the Chairman. He was somewhat surprised to see that the debate had centred on the question of the basis of diplomatic immunity, a subject on which there was a vast amount of literature and which he thought was largely cut and dried. Immunity was granted in order to ensure that a diplomatic agent should not be prevented from discharging his functions. In the case of criminal jurisdiction, the diplomatic agent could not waive his immunity himself, because the right did not belong to him personally,

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

[2] United Nations, *Treaty Series*, Vol. I, 1946-1947, p. 22.

[3] *Ibid.*, p. 26.

[4] United Nations, *Treaty Series*, Vol. 33, 1949, pp. 272 and 276.

but to the State he represented. In the case of civil jurisdiction, the practice was less uniform.

36. Mr. Spiropoulos suggested the inclusion in article 21 of a provision to the effect that, in civil proceedings, immunity could be presumed to have been waived when a diplomatic agent appeared as a defendant, or when a counter-claim was lodged against him. A waiver of immunity from criminal jurisdiction could never be presumed.

37. The only other question to be decided was whether an explicit or tacit waiver of immunity from civil jurisdiction was to be regarded as final, as Sir Gerald Fitzmaurice appeared to think, or whether the sending State could intervene and say that its diplomatic agent had been ill-advised.

38. Mr. KHOMAN suggested that, apart from the exceptions cited in article 20 where immunity from civil jurisdiction could not be invoked, when a diplomatic agent tacitly or explicitly waived immunity in a civil action it was because the condition that immunity was necessary for the discharge of his functions did not apply in that instance. Immunity from civil jurisdiction could be waived by a diplomatic agent, and the State could allow its agent to go to court. But the diplomatic agent was always accountable to his Government, and if the outcome of the action was such as to render him unable properly to discharge his functions in the receiving State, he could be recalled.

39. He agreed with Mr. Yokota and Sir Gerald Fitzmaurice that there was a link missing between paragraph 1 and paragraph 2. Perhaps Mr. Spiropoulos's proposal to include a provision stating when a waiver of immunity could and could not be presumed, would supply it.

40. Sir Gerald FITZMAURICE said he was in complete agreement with Mr. Spiropoulos. The Secretary had doubtless had much the same considerations in mind when he had distinguished between an express waiver and an implied waiver.

41. The present confusion was, he thought, due in part to the Commission's failure to differentiate between a diplomatic agent's position vis-à-vis his Government and his position *vis-à-vis* the receiving State's courts. As a service matter, it was probably true that a diplomatic agent could never waive his immunity without his Government's consent. That did not mean, however, at any rate as far as civil cases were concerned, that the receiving State's court was under an obligation to ascertain whether a diplomatic agent had obtained his Government's consent before submitting to the receiving State's jurisdiction. He agreed that in criminal cases the position was somewhat different.

42. With those considerations in mind, he proposed the following new paragraph for insertion after the abridged version of paragraph 1 which had been adopted in principle at the previous meeting:

> "2. In criminal proceedings, waiver must be effected expressly by the Government of the sending State through the appropriate channels. In civil proceedings, waiver may be express or implied. An implied waiver is presumed to have occurred if the member of the mission submits voluntarily to the jurisdiction of the Court, either by himself initiating the proceedings, or by appearing in them as defendant without making any objection to the jurisdiction of the Court."

43. Mr. SCELLE said he marvelled at the hesitation which most members of the Commission had displayed in a field that was admittedly full of difficulties but which was assuredly not new, and regarding which he would have expected to find a general measure of agreement.

44. Although he could accept the addition proposed by Sir Gerald Fitzmaurice, he could not agree that the Special Rapporteur's draft was defective. On the contrary, even if the wording could be improved, its general approach was very logical and in accordance not only with the necessities of diplomatic life but with the oldest rules of international law.

45. There was no dispute about the principle laid down in paragraph 1: it was universally agreed that immunity from jurisdiction belonged to the sending State, and not to its diplomatic agent. It was also universally agreed, and indeed obvious, that the scope of jurisdictional immunity differed, depending on whether the proceedings were civil or criminal.

46. The difficulty appeared to relate rather to paragraph 2, but in his view that paragraph was a necessary and logical counterpart to paragraph 1. Indeed he saw no objection to deleting the last five words, "germane to the principal claim", since it was of the very essence of a counter-claim that it was germane to the principal claim, and it seemed clear that no-one could waive immunity for the purpose of making a claim, and at the same time invoke immunity in respect of what was no more than a legitimate defence to it.

47. He could not altogether agree with those who argued that, even though a diplomatic agent had accepted the jurisdiction of the local courts in a civil case, the sending State remained free to over-rule him. In his view, the waiver of immunity was an irrevocable act. Cases where a diplomatic agent blundered in waiving immunity from jurisdiction were no different, as regards the relation of cause to effect, from cases where he blundered with regard to other, possibly weightier, matters; in neither case could the annoyance or embarrassment caused to his Government have the effect of expunging his blunder. To allow it to do so would be contrary to the principle of equality of States. The head of a diplomatic mission was, after all, the embodiment of the sending State, and had a heavy responsibility to bear; if he made too many blunders, he would be recalled, but it would be too easy if his acts remained without effect simply because they were based on an error of judgment, or a wrong appraisal of the situation.

48. Mr. EL-ERIAN said that he felt obliged to clarify his position, in view of the observations of the Chairman and Mr. Spiropoulos. He entirely agreed with the Chairman that the Commission should not draw analogies from the situation of international organization as regards immunities in cases where such analogies were inappropriate. There was, of course, a difference between diplomatic immunities and the immunities of international organizations, but when he had quoted the relevant provisions of the conventions governing the privileges and immunities of the international organizations, he had done so as evidence of the current practice of States. In the, admittedly exceptional, cases where there was a resemblance between the rules governing the immunities of international organizations and the rules governing diplomatic immunities, it was surely neither wrong nor unprecedented to draw an analogy from one to the other. In its Advisory Opinion of 11 April 1949 on the question of reparations for injuries suffered in the serv-

ice of the United Nations, the International Court of Justice, for example, had already drawn a similar analogy, arguing that international organizations to some extent enjoyed an international personality, for the purpose of carrying out the tasks assigned to them.[5]

49. He agreed with Mr. Spiropoulos that the Commission's primary task was the codification and progressive development of international law, and that in carrying out that task it was not bound by the text of any convention; but, in its work of codification, it was surely obliged to pay some heed to conventions as reflecting a not unimportant part of the current practice of States. Mr. Spiropoulos himself often quoted, for example, the Havana Convention, the Harvard Law School draft and the 1929 resolution of the Institute of International Law, in support of his arguments.

50. The question at issue was not an academic one. It was a question of principle, underlying many separate provisions in the Commission's draft. If the Commission had been working in the dim and distant past, it would have been quite natural for it to devote most of its efforts to establishing diplomatic privileges and immunities on a firm basis; but diplomatic privileges and immunities had been established and universally recognized for many long years, and, if the Commission was to make any contribution to the subject, it could only do so, in his view, by adopting a new point of departure, one which was consistent with present-day theory and practice in other fields. It was for that reason that he had been so much concerned that the Commission should lend the weight of its authority to the modern, functional or "demands of the office" theory of the basis of diplomatic immunities.

51. Mr. El-Erian did not, however, insist on his proposal. It was perhaps unnecessary to formulate the underlying principle, provided a satisfactory solution was found for the problems that arose in practice. His only doubt regarding Sir Gerald's proposal was whether an implied waiver should be presumed to have occurred if a diplomatic agent, who was appearing as a defendant in a civil case, made no objection to the jurisdiction of the court. In his view there was, in the present instance, only one recognized exception to the principle that a right could not be abandoned unless an explicit statement was made to that effect, and that was the other case referred to by Sir Gerald Fitzmaurice, namely, where a diplomatic agent himself initiated the proceedings.

52. Faris Bey EL-KHOURI felt that the whole question was now very clear. In order to help the Commission decide the only issue of principle on which it appeared to be divided, he would point out that the immunities enjoyed by a Member of Parliament could not be waived by the Member himself but only explicitly by Parliament as a whole, since it was in Parliament as a whole, rather than in its individual Members, that immunity was vested. Since the analogy between parliamentary and diplomatic immunities was perfectly valid, he concluded that a diplomatic agent's jurisdictional immunity could only be waived by the sending State, and then only explicitly, never tacitly.

53. Mr. AGO felt that the Commission was nearing the stage where it could refer the article to the Drafting Committee. His only objection to the text proposed by Sir Gerald Fitzmaurice (para. 42 above), the third sentence of which was identical in substance with Mr. Yokota's amendment (para. 19 above), was that immunity from civil jurisdiction had always been understood to mean only that the person concerned could not be sued by a third party, never that he could not himself initiate proceedings before the court. The question of an implied waiver of immunity did not therefore arise when the diplomatic agent himself initiated proceedings by making himself a plaintiff before a court of the receiving State. There could be no question of waiving immunity where it had never existed.

54. For the reason that he had already given, paragraph 2 of the Special Rapporteur's text could be deleted in the context of article 21. Counter-claims should be referred to under article 20, paragraph 1, as another case with regard to which diplomatic agents did not enjoy jurisdictional immunity.

55. Mr. BARTOS said that, although in principle he had no objection to the text proposed by Mr. Yokota, he noted that, like the Special Rapporteur's text, it failed to distinguish between civil and criminal proceedings; but he assumed that Mr. Yokota had only civil proceedings in mind. Moreover, Mr. Yokota's text—as, for that matter, Sir Gerald's, which in general he preferred—did not make clear when immunity should be waived or invoked. In his own view, it was essential that the matter should be finally settled before the proceedings began; if immunity had been waived by the diplomatic agent himself, it could not subsequently be invoked by his Government once proceedings had begun. On the other hand, a waiver could take a specific form, relating to particular proceedings, or a general form, as when it took place in advance, before any question of proceedings arose.

56. There was one other matter which was not referred to in either text, but which was of considerable importance in practice, namely, the question whether the court could presume that the head or member of a mission who waived immunity had been authorized to do so by his Government or by the head of his mission respectively, or whether the court was bound to make enquiries before proceeding with the case. If the Commission was not in agreement on that question, it could only pass over it in silence, though that would be regrettable, in view of the disagreement and confusion on the point.

57. The CHAIRMAN, speaking as a member of the Commission, said that, in his view, the sending State must be able to nullify a waiver of immunity by one of its diplomatic agents, not only because that was current practice but also because it was in accordance with the fundamental principle that immunity was conferred in the interest of the State and not in the interest of the diplomatic agent himself, and because there was always the possibility that the diplomatic agent might waive immunity in a case which really bore not only on his private acts but on the official acts of the sending State.

58. With regard to paragraph 2 of the Special Rapporteur's text, Mr. Zourek preferred the amended version proposed by Mr. François. He agreed with Mr. Ago, however, that the question of counter-claims should be referred to in the article on immunity from jurisdiction (article 20), as in the resolution adopted in 1929 by the Institute of International Law.[6] In his view, it was essential to retain the words "germane to the principal claim", since in some countries counter-claims could relate to entirely separate matters.

[5] *I.C.J. Reports 1949*, p. 174.

[6] Harvard Law School, *op. cit.*, pp. 186 and 187.

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