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Summary record of the 403rd meeting

Topic:
Diplomatic intercourse and immunities

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should undoubtedly be inserted in the amendment—he should enjoy no immunity, but be treated on precisely the same footing as other persons who practised the same profession or engaged in the same commercial activities. The case could not really be assimilated to that of divorce. The dignity itself of a diplomatic agent required that he should not engage in activities outside his official duties.

76. Mr. AMADO thought that Mr. Verdross's amendment did not go far enough; he preferred the fuller statement in article 24, paragraph 2, of the Harvard draft. The clause should either not be included, or be worded as precisely as possible to specify all members of the diplomatic agent's family who might engage in affairs which had nothing to do with the exercise of the agent's official duties.

77. Mr. SANDSTRÖM, Special Rapporteur, agreed by and large with Mr. François. To engage in a professional activity outside his official duties would impair the dignity not merely of the diplomatic agent himself but of the whole mission. If anything at all were to be included, therefore, he would prefer a clause on the lines of the relevant article in the Harvard draft, but he regarded the whole idea of a diplomatic agent engaging in any professional activity outside his official duties as repugnant.

78. Mr. VERDROSS accepted Mr. Amado's suggestion. The text of the Harvard draft was certainly preferable to that of the Institute of International Law; he had followed the latter only because it was briefer. The Drafting Committee would probably wish to make a separate paragraph if the longer Harvard draft text was adopted.

79. Mr. BARTOS preferred Mr. Verdross's version to the texts of either the Harvard draft or the Institute of International Law, since it was more consonant with the general feelings of Governments.

80. Mr. EL-ERIAN said he was prepared to accept Mr. Verdross's wording or any similar formulation.

81. He proposed that the Commission vote immediately that it agreed, in principle, to insert a clause to the effect that a diplomatic agent, or member of his family, should not be immune from civil jurisdiction if he engaged in a professional or commercial activity outside his official duties. The actual drafting could be left to the Drafting Committee.

The principle thus expressed was adopted by 16 votes to none with 4 abstentions, and the text was referred to the Drafting Committee.

The meeting rose at 1 p.m.

403rd MEETING

Thursday, 23 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. The CHAIRMAN, after recalling that at the previous meeting a final decision on sub-paragraph (*b*) of paragraph 1 had been deferred in order to give members further time for reflection, put the sub-paragraph to the vote.

Sub-paragraph (b) of paragraph 1 was adopted by 10 votes to 1, with 3 abstentions.

2. Sir Gerald FITZMAURICE said that he had voted against the provision because it put the matter in a form in which it would probably never arise. With some redrafting, however, the sub-paragraph could be made pertinent. He suggested wording it as follows:

> "The mere fact that a person interested in an estate is a diplomatic agent shall not prevent or impede litigation."

3. Mr. BARTOS said he had abstained from the vote, but supported Sir Gerald Fitzmaurice's proposal.

4. Faris Bey EL-KHOURI said that he had abstained because he considered that diplomatic agents should be immune from criminal jurisdiction only. It was in the interest neither of the receiving State nor of the diplomatic agent for him to be immune from civil jurisdiction

5. Mr. SPIROPOULOS said that he had voted for the principle, but agreed with Sir Gerald Fitzmaurice on the desirability of redrafting the text.

6. The CHAIRMAN said the text had been adopted subject to redrafting.

7. Inviting the Commission to consider paragraph 2, the Chairman drew attention to the following redraft submitted by Mr. Verdross:

> "A diplomatic agent who is a national of the receiving State shall enjoy the privilege of immunity only in respect of acts performed in the exercise of his diplomatic functions."

8. Mr. SANDSTRÖM, Special Rapporteur, observed that the number of amendments submitted to the paragraph bore testimony to the variety of opinions held on the advisability of according immunity from jurisdiction to diplomatic agents who were nationals of the receiving State. His own view was that, once the receiving State consented to the appointment of one of its own nationals as a member of a foreign mission, it must accord him a certain immunity from jurisdiction in order to preserve the dignity of his functions and of the mission. The amendment submitted by Mr. Verdross represented the absolute minimum that could be accorded to such diplomatic agents by way of immunity. He himself would prefer full immunity from criminal jurisdiction.

9. Mr. EL-ERIAN proposed that paragraph 2 become paragraph 4 and be worded as follows:

> "A diplomatic agent who is a national of the receiving State shall not enjoy any immunities from the jurisdiction of the receiving State except those specifically granted to him by the receiving State."

10. Since the Commission, by a majority vote, had adopted the principle that the sending State could appoint a national of the receiving State to its mission with the consent of the latter State, it was necessary to decide what status such diplomatic agents should enjoy. In the rare cases in which such persons had been appointed, there had been some controversy as to their position.

11. Indeed, the law of some countries, as pointed out in the comment on article 8 of the Harvard Law School

draft,[1] provided that the benefits of diplomatic privileges and immunities should not extend to nationals of the receiving State who were members of foreign missions. In other cases, it had been ruled that such diplomatic agents enjoyed immunity only if the receiving State had accepted them without any reservation, as in the judgement of 24 February 1890 in *Macartney v. Garbutt* in the Queen's Bench Division.[2] It followed that the same consent was required for the granting of privileges and immunities as for the appointment of a national of the receiving State as a foreign diplomatic agent.

12. Some might argue that the provision that consent must be obtained to his appointment was sufficient in itself, since the receiving State could always refuse consent if it objected to the conditions attached to it. He thought it inadvisable, however, to present the receiving State with so categorical an alternative, and oblige it to refuse consent to an appointment to which it might not otherwise object, simply because it did not wish to accord full immunity to the person appointed. He was sure that any attempt to represent such a condition as a rule of international law would be opposed by many States, particularly those which had experienced the abuses of the capitulations system.

13. To accord immunity from criminal jurisdiction to such a diplomatic agent would place him in a unique position. Ordinary diplomatic agents, though immune from criminal jurisdiction in the receiving State, were nonetheless subject to the jurisdiction of the sending State. But a diplomatic agent who was a national of the receiving State, and enjoyed immunity therein, could commit murder with impunity, since he would not be subject to the criminal jurisdiction of the sending State either.

14. The Egyptian Penal Code contained a provision, common to most penal codes, that it applied only to crimes committed on Egyptian territory (article 1), except crimes against the security of the State or the stability of the national currency (article 2). But if the national of another State were appointed a member of the Egyptian Embassy in that State and enjoyed immunity from criminal jurisdiction, he could not be tried, either in that State or in Egypt, for any crime he might commit in that State which did not fall within the two categories of crimes covered by article 2 of the Egyptian Penal Code.

15. In view of the legal objections to the principle and to the difficulties it would occasion in practice, he considered it essential for such diplomatic agents to enjoy only those immunities specifically granted them by the receiving State.

16. Mr. FRANÇOIS said that, in substance, his amendment came to much the same as Mr. El-Erian's. He proposed that paragraph 2 be deleted, and that the position of the diplomatic agents in question, with respect both to immunities and exemption from taxation, customs duties and inspection, be dealt with in a new paragraph 3 of article 24 to read as follows:

> "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."

17. For the same reasons as Mr. El-Erian, he was unable to accept the Special Rapporteur's text. The argument that a receiving State which consented to the appointment of one of its nationals to a foreign mission was bound to recognize his extraterritoriality did not hold water. The opposite was true, namely, that in seeking the consent of the receiving State, the sending State automatically renounced all right to immunity for the diplomatic agent concerned.

18. Many countries, including his own, were firmly opposed to according privileges and immunities to their nationals appointed to foreign missions. And it was precisely immunity from criminal jurisdiction that they found least acceptable. The possibility of the agent's committing a criminal offence was not, after all, remote. He could easily be guilty of criminal negligence in a traffic accident, for instance.

19. He found Mr. Verdross's amendment (para. 7 above) equally unacceptable. The phrase "acts performed in the exercise of his diplomatic functions" was so broadly worded that it would, for example, preclude action being taken against a diplomatic agent who was guilty of criminal negligence when taking a communication from his mission to the ministry of foreign affairs by car.

20. The receiving State could, if it wished, grant full immunity to a national appointed with its consent to a foreign mission, but it must be free not to grant any at all.

21. Mr. VERDROSS agreed with the Special Rapporteur that, when a receiving State consented to the appointment of one of its nationals to a foreign mission, it was bound to accord him a certain minimum of rights. Such a view was in harmony with the principles adopted by the Commission in the earlier articles of the draft. He agreed, too, with Mr. El-Erian and Mr. François, that it was impossible for all the acts of such diplomatic agents to be immune from criminal jurisdiction. The acts covered by his amendment, however, were not acts for which the diplomatic agent could himself be held responsible; they were the acts of the sending State, and hence not subject to the jurisdiction of the receiving State. He considered that diplomatic agents of the type in question should enjoy immunity from both criminal and civil jurisdiction in respect of acts performed in the exercise of their diplomatic functions.

22. Mr. TUNKIN agreed with Mr. El-Erian and Mr. François that the granting of immunities to diplomatic agents who were nationals of the receiving State should be as much dependent on the consent of the receiving State as their actual appointment. The practice of appointing nationals of receiving States to such functions was, in most cases, a vestige of the colonial system, and was generally found only in countries which had not yet succeeded in shaking off all trace of their colonial past, so that frequently the consent of the receiving State was only given under pressure. The formula proposed by Mr. El-Erian and Mr. François, therefore, had the advantage of giving the receiving State a second chance of asserting its sovereign rights.

23. He could not agree with Mr. Verdross's view that the receiving State was bound in such cases to accord a certain minimum of rights. It was possible to reverse the argument and claim that any sending State wishing to appoint a national of the receiving State must bear the consequences.

[1] Harvard Law School, *Research in International Law, I. Diplomatic Privileges and Immunities* (Cambridge, Mass., 1932), p. 70.

[2] *Law Reports*, 24 Q.B.D. 368.

24. He would favour merging the proposals of Mr. François and Mr. El-Erian in the following text, which should preferably appear in article 24:

> "Members of the staff of the mission who are nationals of the receiving State, together with their wives, children and private staff, shall not enjoy any immunities from the jurisdiction of the receiving State except those specifically granted to them by the receiving State."

25. Mr. PAL, referring to Mr. Verdross's amendment, said that he did not see how any criminal liablity could arise if the acts were to be those performed strictly in the exercise of diplomatic functions. Of course such criminal liability would be possible if the acts contemplated were made comprehensive enough to embrace all acts done in the course of the exercise of diplomatic functions.

26. He supported Mr. François's proposal, though not for the reasons advanced by Mr. Tunkin. Without forgetting that, till recently, imperialism and colonialism had prostituted certain sections of the dominated people to their own purposes, he would not agree that the practice of appointing nationals of the receiving State as diplomatic agents was a vestige of that system. The practice in question had indeed been rare, and, even in those rare instances, it had been resorted to, not in the interests of the receiving State, but in the interests and at the instance of the sending State. If he supported Mr. François's proposal, it was because he felt that it was proper that a State, even while agreeing to such utilization of its nationals by a foreign State for the time-being friendly, should not be rendered helpless in the eventuality of such citizens turning disloyal to their own State, especially when the international world was reverberating with talk of fifth-column activities. Nationals of the receiving State appointed as members of a foreign mission might act, for example, as fifth columnists, and in such cases justice would certainly not be done to the receiving State if these (its own citizens) were not subject to its jurisdiction. In order to close the door to such possibilities, he was rather in favour of deleting the paragraph altogether, as was at first proposed by Mr. François (para. 16 above). In that case, a sending State, wishing to appoint a national of the receiving State, would think twice before doing so.

27. Mr. YOKOTA said that, on purely theoretical grounds, Mr. Verdross's amendment was quite correct. He did not think however that the principle could be said to be an established rule of international law. Article 15 of the 1929 resolution of the Institute of International Law,[3] for example, stated that agents belonging by their nationality to the country to whose Government they were accredited enjoyed no immunity from jurisdiction. It was by no means a matter of course under international law that such agents enjoyed immunity from criminal jurisdiction, and it was even more uncertain that they enjoyed immunity from civil jurisdiction. On the other hand, many authors claimed that if the receiving State consented to such an appointment, it must grant full diplomatic privileges.

28. In view of the uncertainty and the absence of any established rule, he must support the amendments of Mr. El-Erian and Mr. François, but he preferred the amendment of the latter because it was more adequate for the effective exercise of the diplomatic functions.

[3] Harvard Law School, *op. cit.*, p. 187.

29. Mr. SANDSTRÖM, Special Rapporteur, observed that the words "acts performed in the exercise of his diplomatic functions" in the English text of Mr. Verdross's amendment were somewhat broader in meaning than the words *"des actes de sa fonction diplomatique"*. Diplomatic agents must naturally enjoy immunity in respect of such acts.

30. Paragraph 2 of article 20 should not be considered in isolation, but in relation to provisions in other articles. The provision in article 4, that the appointment of such diplomatic agents was subject to the consent of the receiving State, gave the latter the means of restricting the privileges and immunities granted him. Article 21, on the waiving of immunity, was also relevant, since the sending State would presumably be more ready to waive immunity in the case of a national of the receiving State.

31. As a matter of fact, there was really no great harm in accepting the principle favoured by Mr. François and Mr. El-Erian.

32. Mr. SPIROPOULOS said that the argument that the receiving State, having once consented to the appointment of one of its nationals as a member of a foreign mission, must accord him a certain minimum of privileges, had a great deal in its favour. The receiving State clearly had no right to prosecute such a diplomatic agent for any public acts he performed. Perhaps the substitution of the term "public acts" in Mr. Verdross's amendment might render it less broad in scope. It would certainly exclude the type of case mentioned by Mr. François. That was a matter of drafting, however, and he was not for the moment prepared to take up a final position with regard to the amendment.

33. The receiving State, apart from the certain minimum which Mr. Verdross considered it bound to accord, could, of course, grant fuller immunity if it wished. The system would not work very well in practice, however. States, when submitting the list of the prospective members of their mission, did not normally state their nationality. Greece had, in fact, once accepted a person with a Turkish name in the list of members of the Turkish mission, without realizing that he also possessed Greek nationality. Furthermore, to his knowledge, no State, when accepting members of missions, specified the categories of immunity granted to each individual.

34. Mr. GARCIA AMADOR said that all three amendments before the Commission had a sound foundation, and it might be possible to strike a balance between them. Adoption of Mr. El-Erian's and Mr. François's amendments would have undesirable and serious consequences, however, for they left the question of immunities, which lay at the very basis of the exercise of the diplomatic function, entirely in the hands of the receiving State. He doubted whether it was possible for a diplomatic agent to fulfil his functions without enjoying at least a certain minimum of immunity. Had he no privileges, he would suffer a sort of *capitis diminutio* and, although performing the same functions as the other members of the diplomatic corps, would cut a rather sorry figure among them.

35. Accordingly, though recognizing that Mr. Verdross's amendment would need redrafting, he was in favour of including a provision on those lines. It was possible, however, to combine the apparently conflicting principles formulated by Mr. El-Erian and Mr. François, on the one hand, and Mr. Verdross, on the other.

The Commission might say that, when a receiving State consented to the appointment of one of its nationals as a member of a foreign diplomatic mission, it was entitled to specify what privileges and immunities he was to enjoy, without prejudice to the minimum of immunity that he must enjoy in order to exercise his functions.

36. Sir Gerald FITZMAURICE wondered whether the whole question had not been presented in a false light, as if the appointment of a national of the receiving State to a foreign diplomatic mission were something imposed by the sending State. The question of such appointments never arose, of course, in colonial territories proper, since they did not enjoy the right of legation, active or passive. It arose solely in recently emancipated countries, and then it was never a question of a national of those countries being appointed to the mission of the former colonial Power. On the contrary, it was the recently emancipated States which, in view of the relatively undeveloped state of their diplomatic services, found it convenient to appoint nationals of the countries to which their missions were accredited. He could recall no case in which the United Kingdom had appointed a non-British representative, but he knew of several cases where countries, whose diplomatic services were not fully organized, had appointed a British subject to represent them in the United Kingdom. The situation was, therefore, the exact opposite of that described by Mr. Tunkin. The sending State was not obliged to appoint a national of the receiving State but, if it did and the appointment was accepted, it was in the interest of the sending State for its representative to enjoy as broad a range of immunities as possible. Thus, the practice of appointing nationals of receiving States to foreign missions, in so far as it served any useful purpose, was in the interest of the less-developed States and not of the former colonial Powers.

37. There were two possible theories with regard to the question. One could say that the receiving State was in no way bound to accept the appointment of one of its nationals to a foreign mission, and that, if it did, it could attach conditions to his appointment. Mr. El-Erian had put forward some very strong arguments in favour of that theory, in particular, the fact that countries prepared to accept one of their own nationals as a member of a foreign mission might refuse altogether if they were not free to regulate the scope of his immunity. The alternative theory was that the receiving State might refuse, but that if it consented, it must accord the customary immunities. Despite the strong practical considerations in favour of the first theory, he felt that the second was technically correct.

38. Referring to Mr. François's amendment, he wondered how its author reconciled it with the principle of *ne impediatur legatio* to which he had shown such attachment at the previous meeting (402nd meeting, para. 73). If subjection to the jurisdiction of the receiving State would prevent the proper performance of the diplomatic function in the one case, why would it not in the other?

39. He agreed with Mr. Verdross, Mr. Spiropoulos and Mr. García Amador that a receiving State, consenting to the appointment of one of its nationals to a foreign mission, must grant him the minimum of immunity essential for the fulfilment of the functions which it had agreed to his performing. If it did not, it would be taking away with the left hand what it had given with the right. He accordingly supported Mr. Verdross's amendment, subject to drafting changes.

40. Mr. MATINE-DAFTARY said that his attitude towards the question under discussion was dominated by memories of the bitter injustice suffered by Iran during the century prior to the abolition of the capitulations system in 1928. All the peoples of the Orient, he was sure, would reject the idea that a receiving State must accord immunity to one of its nationals appointed to a foreign mission. The practice of appointing nationals of the receiving State was a bad one, in any case, and a mere *pis-aller*. If a sending State wished its diplomats to enjoy full privileges, it should appoint its own nationals.

41. Mr. Matine-Daftary therefore supported the amendments proposed by Mr. El-Erian and Mr. François, which would help to discourage the practice.

42. Mr. PADILLA NERVO said that it was always open to a State to refuse to accept one of its own nationals as the diplomatic agent of a foreign State; even if it did accept him, it was not bound to do so unconditionally. In order to avoid controversy, however, it was essential that the receiving State which wished to place conditions on its acceptance should indicate them at the time, in order that the sending State might decide whether it could agree to the conditions, or whether they were such as to interfere with the effective performance of the diplomatic function.

43. Mr. Padilla Nervo therefore proposed that Mr. François's text (para. 16 above) for article 24, paragraph 3, be amended so as to make it clear that the persons in question would enjoy privileges and immunities only to the extent determined by the receiving State at the time it agreed to their serving as diplomatic agents of the sending State.

44. A similar amendment could be made to the text proposed by Mr. El-Erian (para. 9 above). Amended in that way, either text would really be more satisfactory than Mr. Verdross's (para. 7 above) from the point of view of the sending as well as of the receiving State, since the position would be perfectly clear in advance, and if the sending State did not like it, it could make other arrangements. On the other hand, if Mr. Verdross's amendment were adopted, there might very well be disagreement as to what acts were "performed in the exercise of" diplomatic functions.

45. Mr. KHOMAN felt that, though it had given rise to controversy, the question was of very little importance in practice, since nowadays there were very few cases where a national of the receiving State was appointed head of a foreign diplomatic mission. Even when he was, there did not appear to be the slightest ground for disquiet on the part of the receiving State, in whom the sending State was indeed displaying a notable degree of confidence by appointing one of its nationals to so important and delicate a post in preference to one of its own.

46. There were doubtless good logical reasons why the person in question should not enjoy any diplomatic privileges or immunities. It was noteworthy, however, that the Convention on the Privileges and Immunities of the United Nations[4] made no distinction between the privileges and immunities enjoyed by officials who were nationals of the State in which they worked and those who were not, save only in respect of taxation. Although the two cases were not, of course, entirely comparable, that was but one illustration of the current tendency towards

[4] United Nations, *Treaty Series*, Vol. I, 1946-1947, p. 15.

granting all diplomatic agents, whether nationals of the receiving State or not, such diplomatic privileges and immunities as were essential for the performance of their diplomatic functions.

47. He was therefore inclined to favour Mr. Verdross's proposal, though he agreed that the Drafting Committee should try to make it less open to differing interpretations. He did not object in principle to Mr. El-Erian's proposal or Mr. François's, subject to their being amended in the way proposed by Mr. Padilla Nervo; but, if either of them was adopted, the great majority of States, who at present had no laws or regulations governing the status of any of their nationals who were appointed diplomatic agents of another State, would be obliged to enact such laws and regulations, and he was not sure that they would be at all keen to do so.

48. Mr. AMADO remarked that it was strange that, in a Commission which was supposedly engaged on a task of codification, there had been very little said about how many cases were involved and what the existing practice was with regard to them. As far as he knew, very few cases were involved, and he agreed with Mr. Matine-Daftary that, from the point of view of international law, the situation they gave rise to was highly abnormal.

49. He would therefore be in favour of deleting the paragraph altogether, but if the Commission felt its substance should be retained, he could accept either Mr. Verdross's approach, subject to the text being made clearer, or that of Mr. François or Mr. El-Erian, subject to the amendment proposed by Mr. Padilla Nervo (para. 43 above).

50. Mr. HSU said it was true that many States, including his own, had bitter memories of the way in which the system of extra-territoriality or of the capitulations had worked, but agreed with Sir Gerald Fitzmaurice that they were quite irrelevant to the point at issue. No question of colonialism or imperialism was involved. In Imperial days, the Chinese Government also had been in the habit of appointing the nationals of certain receiving States as its diplomatic agents, and he stressed that that had been done on its own initiative, not at the suggestion of the receiving States. It was, of course, true that such cases were becoming increasingly rare, but that was no reason why the Commission should ignore them altogether.

51. In his view, a solution to the present difficulty could be found by combining Mr. Verdross's proposal with Mr. El-Erian's. The Commission should state that, as a general rule, a diplomatic agent who was a national of the receiving State should enjoy immunity in respect of acts performed in the exercise of his diplomatic function, provided, however, that the receiving State could stipulate otherwise at the time it agreed to his serving as a diplomatic agent of the sending State.

52. Mr. VERDROSS pointed out that, if the principle were accepted that a diplomatic agent who was a national of the receiving State enjoyed no immunity, the authorities of the receiving State would, in the event of their detaining him, be able to produce in court any diplomatic papers he was carrying at the time; those papers might well relate to public acts of the sending State, which would thus be made subject to the jurisdiction of the receiving State, and that was clearly quite unacceptable.

53. Although the Austro-Hungarian authorities had apparently had no difficulty in such circumstances in distinguishing between acts that were performed in the exercise of the diplomatic function and those that were not, he was prepared to accept any wording which safeguarded immunity for public acts, but left it to the discretion of the receiving State whether, and to what extent, to grant immunity for private acts.

54. Mr. EDMONDS felt that one fundamental question was involved, namely, the conduct of the business of government. Under common law at least, the doctrine of sovereign immunity still extended, by and large, to the agent of the State as well as to the State itself. A State which sent a diplomatic mission to a foreign country was, in his view, merely carrying on the function of government in another place. In the United States of America, a United States national who was, quite exceptionally, appointed to a foreign diplomatic mission, in whatever capacity, enjoyed full immunity from criminal and civil jurisdiction, except perhaps in respect of debts incurred prior to the appointment.

55. Provided the receiving State's right to object to the appointment was recognized—as it was in the Commission's draft—he could see no danger in the text prepared by the Special Rapporteur. He had, however, no objection to Mr. Verdross's amendment or, subject to the addition proposed by Mr. Padilla Nervo, those of Mr. François and Mr. El-Erian.

56. Mr. BARTOS said that, at the Chairman's request, he had refrained from putting in a dissenting opinion regarding article 4 at the time that article had been adopted, but he was doing so now, since his objections applied also to the paragraph under discussion.

57. During the discussion of article 4, most members of the Commission had agreed that it was nowadays an exception for diplomatic agents to be chosen from among the nationals of the receiving State, whose consent was in any case necessary before they could be appointed. In his view, that exception, which was really more in the nature of a historical survival, should be dealt with in the same way as the Commission had decided to deal with other exceptional cases; in other words, it should simply be referred to in the commentary. The fact that the consent of the receiving State was required could not be regarded as implying approval of a practice which was contrary to the general principles of international law and out of line with current practice; it was simply an attempt to guard against some of the abuses to which the practice could give rise.

58. National sovereignty was exercised through diplomatic channels by individuals who bore the character of representatives of the nation and were selected from among its nationals. It was contrary to the modern view of public international law and comparative constitutional law for anyone to enjoy a special position in his own country by virtue of representing another country. A person in that position was no longer responsible for what he did in his own country. Working on its territory, but for and on behalf of another country, he was exonerated in advance for any disloyalty to his own country; and disloyal he was bound to be if he was to discharge his responsibilities to the sending State conscientiously. However, cordial the relations between the two States might be, their interests necessarily diverged. Yet, as a citizen, it was surely his duty to defend the interests of his own country, not those of the country whose service he had entered.

59. Moreover, the modern State exercised authority through the elected or appointed representatives of its

people. It was nowadays an almost universal rule that public office in any country was reserved solely for its nationals. It was tactless, to say the least, for the sending State to ask a national of the receiving State to act as its diplomatic agent, since that meant his renouncing the greater part of his civic rights and placing himself in the position of an alien, albeit a favoured one. For favoured he must be, since otherwise he could not perform his functions properly.

60. The examples that had been cited by Mr. Ago during the discussion on article 4, such as the Holy See, the Order of Malta and the Republic of San Marino (387th meeting, para. 14), were quite exceptional cases which did not really affect the rules of international law. Those rules were based on the idea of friendly relations between peoples, and on the duty of foreign diplomats to hold aloof from the domestic affairs of the country to which they were accredited, a duty which was incompatible with the civic duties of someone who was a national of the country.

61. Such was the position in theory, and it was amply confirmed in practice. In 1925, the person who had been appointed Albanian Minister in Belgrade had happened to have Yugoslav as well as Albanian nationality; so, before taking up his appointment, he had been obliged to renounce his Yugoslav nationality. The same was true of one of the present Ambassadors in Belgrade, who had also happened to acquire Yugoslav nationality in childhood.

62. There had also been cases of United States diplomatic agents in Belgrade who had originally come from Yugoslavia and possessed dual nationality at the time of their appointment; by virtue of a special reciprocal agreement between the United States and Yugoslavia, they had not been obliged to renounce Yugoslav nationality, but their United States nationality had been regarded as dominant, provided they did not settle in the country. He understood that in that agreement, when referring to "diplomatic agents", the term meant not only the heads of missions, but all the diplomatic personnel, properly speaking (in other words, excluding only administrative and technical staff and servants), for the question arose just as much for them as for ambassadors, seeing that any of them might at any time be called on to perform the duties of a *chargé d'affaires ad interim*.

63. Mr. YOKOTA felt that solid arguments could be advanced in favour both of Mr. Verdross's approach and of that preferred by Mr. François and Mr. El-Erian. He suggested that a solution could be found by combining the two approaches, retaining the text proposed by Mr. Verdross as a statement of the general rule, and adding to it some such words as "provided however that the receiving State may limit the privileges and immunities which he shall enjoy, at the time it agrees to his serving as a diplomatic agent of the sending State".

64. Mr. FRANÇOIS said the only reason why he had opposed Mr. Verdross's amendment was that he feared it might lead to abuse. He could accept it, provided the text was made more precise, for example, by the insertion of the word "legitimate" before "exercise", or provided its scope was explained in the commentary. It could, of course, be coupled with his own amendment or Mr. El-Erian's.

65. While he had no objection to Mr. Padilla-Nervo's addition (para. 43 above) to his own amendment, he doubted whether it was of any importance in practice. If an ambassador who was a national of the receiving State behaved in such a way that the receiving State wished to restrict his privileges and immunities, it would ask for him to be replaced, and would doubtless ensure that his successor, if also one of its own nationals, did not enjoy the same freedom of action.

66. Mr. EL-ERIAN agreed with Mr. Tunkin that the provision under consideration should be taken out of article 20 and placed where it would apply to the whole of sub-section B of section II.

67. No provision at all would have been necessary if the Commission had not insisted, in article 4, on recognizing an exceedingly rare and obsolescent practice. Mr. García Amador had said that, since the practice did exist, even though it was exceedingly rare, it should not be left to municipal law to regulate. There were, however, a great many questions which were left to municipal law to regulate; to take only one example, the immunities enjoyed by past Heads of States. Reference had also been made to the Convention on the Privileges and Immunities of the United Nations; but, in his view, it was not possible to assimilate the class of international civil servants, which was growing yearly in numbers and importance, to the negligible and steadily decreasing number of diplomatic agents who were nationals of the receiving State.

68. Since the Commission had, however, referred to the practice in article 4, some provision of the kind now under consideration was necessary. With regard to Mr. Amado's remarks, he had already sought to show that current practice, in the few cases where the receiving State agreed that one of its nationals should serve as a diplomatic agent of the sending State, was that the receiving State stipulated that the person in question should enjoy only certain specified privileges and immunities. Mr. Verdross's amendment would make that impossible, and he could not therefore accept it, at any rate in its present form.

69. His own amendment was in accordance with current practice, but, in order to simplify the discussion, he withdrew it in favour of Mr. François's, which should, however, be amended in the manner proposed by Mr. Padilla Nervo, so as to remove any uncertainty.

70. Mr. SPIROPOULOS thought that Mr. Verdross's text only applied to cases where there was no agreement between the sending and receiving States. The two States could naturally agree that the person in question should enjoy wider immunity, narrower immunity or no immunity at all; it was, after all, an accepted principle that *lex specialis* should prevail. To make the matter clear, however, the following words should perhaps be added at the beginning of Mr. Verdross's amendment:

> "Except where otherwise agreed between the sending and the receiving States,"

71. The CHAIRMAN declared the discussion of paragraph 2 of article 20 closed, and suggested that the Special Rapporteur submit a revised text for consideration at the next meeting.

72. The question where the provision should be placed was more than a matter of drafting, but could be decided later.

The Chairman's suggestion was adopted.

The meeting rose at 1.5 p.m.