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Summary record of the 408th meeting

Topic:
Diplomatic intercourse and immunities

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

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

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

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

The meeting rose at 1.5 p.m.

408th MEETING

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

Chairman: Mr. Jaroslav ZOUREK.

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

[Agenda item 3]

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

ARTICLE 20 (continued)¹

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

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

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

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

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

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

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

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

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

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

¹ Resumed from 405th meeting.

were acts of the State, and that was the case regardless of the agent's nationality. Therefore, if the receiving State agreed to one of its nationals serving as a diplomatic agent of the sending State, but at the same time declined to recognize his immunity from jurisdiction in respect of the official acts performed in the exercise of his functions, the effect was as though it had withheld its consent and had not permitted the exercise of those same functions, for it was inconceivable that the receiving State should subject to its own jurisdiction the sovereign acts of the sending State.

10. Mr. SPIROPOULOS felt that the Commission was over-rating the importance of the question, since the determining factor, in practice, would be the degree of goodwill shown by the two States concerned. It was, as had already been pointed out, extremely rare for the head of a mission to be a national of the receiving State. In practice, the problem arose almost exclusively in connexion with clerks, messengers, and so on, the nature of whose duties was hardly likely to involve them in acts in respect of which they required immunity from the jurisdiction of the receiving State. Although he preferred his own amendment, which seemed more elegant from the legal point of view, he saw no objection to Mr. Tunkin's, under which the sending State, if it did not agree to one of its mission staff being made subject to the jurisdiction of the receiving State, could always appoint someone else.

11. Mr. TUNKIN said he was prepared to withdraw his own amendment in favour of that suggested by Mr. Spiropoulos.

12. Mr. VERDROSS supported the redraft of paragraph 2 proposed by the Special Rapporteur, since in his view it was essential that all diplomatic agents should enjoy a certain minimum of immunities, for the reasons given by Mr. Ago. Otherwise, a diplomatic agent who was a national of the receiving State might be arrested while he had in his possession confidential diplomatic papers belonging to the sending State, and such papers might be made the basis of legal proceedings, which was clearly quite inadmissible.

13. Mr. SPIROPOULOS felt that the point referred to by Mr. Verdross was of no practical importance, since diplomatic agents did not normally walk about the streets with secret documents in their possession, and, as he had already observed, the vast majority of persons affected would in any case have very limited access to secret documents.

14. Although he too could have accepted the redraft proposed by the Special Rapporteur, it was sometimes necessary to seek a compromise solution such as he himself had suggested. Mr. Tunkin had accepted that suggestion, and he hoped that members of the Commission whose views on the matter were opposed to Mr. Tunkin's would show a like spirit of compromise. He would, of course, have no objection if the Drafting Committee wished to add the words "at the time it agrees to his serving as a diplomatic agent of the sending State" in the text proposed by the Special Rapporteur and amended by him.

15. Mr. EL-ERIAN regretted that he could not agree to the redraft proposed by the Special Rapporteur, since it did not take into account all the points of view expressed during the discussion at the 403rd meeting, but only one, namely, that the diplomatic agent must in all cases enjoy certain minimum immunities. In particular,

the redraft entirely failed to reflect the view expressed by himself and Mr. François, namely, that the principle that a State enjoyed jurisdiction over its nationals must be respected.

16. Nor could he agree to the amendment proposed by Mr. Spiropoulos, under which a diplomatic agent who was a national of the receiving State would enjoy immunity from jurisdiction in respect of official acts, unless the sending State agreed that he should not enjoy such immunity. On the other hand, Mr. Tunkin's amendment correctly made the immunities enjoyed by such a person a matter for the receiving State to decide; if the sending State felt that the conditions imposed by the receiving State were unacceptable, it could always appoint someone else.

17. If Mr. Tunkin's amendment were withdrawn, Mr. El-Erian would be obliged to maintain his own original amendment (403rd meeting, para. 9), although, in the light of the discussions that had taken place since he had first presented it, in particular the general agreement that there should be a separate article regulating the whole question of the immunities and privileges enjoyed by diplomatic agents who were nationals of the receiving State, he would amend it to read as follows:

"A diplomatic agent who is a national of the receiving State shall not enjoy any diplomatic immunities or privileges in the territory of the receiving State except those specifically granted to him by the receiving State at the time of its consent to his appointment."

18. Mr. AGO pointed out that the only type of immunity with regard to which the question of official acts could arise was immunity from jurisdiction; all other types of immunity related to the diplomatic agent's personal acts. He agreed with Mr. Spiropoulos that very few cases would arise in which it would be necessary for a member of a diplomatic mission who was a national of the receiving State to invoke immunity from jurisdiction in respect of official acts. The Commission, however, was laying down principles, and it was a highly dangerous and quite unacceptable principle to say that acts which were undoubtedly acts of the sending State could be subject to the jurisdiction of the receiving State. He could not, therefore, accept Mr. Spiropoulos's amendment, which expressly envisaged the possibility that immunity from jurisdiction might not be enjoyed in respect of official acts performed on behalf of the sending State.

19. While unable to support Mr. El-Erian's amendment either, he thought that, in practice, the amendment, though more extreme, might actually be less dangerous, for on a reasonable construction it could only be interpreted as having the effect of excluding the official acts of diplomatic agents.

20. Faris Bey EL-KHOURI felt that the Commission must be under no misapprehension as to the numbers involved. Even if each mission recruited only one or two clerks, drivers, interpreters or messengers locally, hundreds would be involved in each receiving State. If the receiving State were left entirely free to accord to each of them whatever immunities it wished, anarchy, discrimination and wide-spread confusion and friction would result; the same would happen if each case were left to the receiving State to settle in agreement with the sending State. He could not, therefore, vote for the redraft of paragraph 2 submitted by the Special Rapporteur. The Commission should, in his view endeavour to reach agreement upon a rule which could be applied uniformly

in every case; if it was unable to do so, it might be obliged to leave the matter to the discretion of the receiving State, but then it should at least ensure that each receiving State granted the same privileges and immunities to all its nationals who were employed by foreign diplomatic missions.

21. Mr. PAL felt that, in substance, there was no difference between Mr. Spiropoulos's proposal and Mr. Tunkin's, since the decision rested ultimately with the receiving State, whose consent was required before any one of its nationals could be appointed as a foreign diplomatic agent. On consideration, however, he preferred the redraft submitted by the Special Rapporteur, with the amendments proposed by Sir Gerald Fitzmaurice.

22. Mr. SANDSTRÖM, Special Rapporteur, said the main purpose of his redraft was to recognize a certain minimum of immunity which all diplomatic agents must enjoy, regardless of whether they were nationals of the receiving State or not. The amendments suggested by Mr. Tunkin and Mr. Spiropoulos and the text proposed by Mr. El-Erian would all deny that minimum. He accordingly still preferred the text which he himself had proposed. By "legitimately" he had had in mind that there were certain activities such as espionage which could not be regarded as private acts, but in respect of which immunity from jurisdiction could hardly be claimed.

23. Mr. TUNKIN felt it made little difference in practice what text the Commission adopted. If the redraft proposed by the Special Rapporteur were adopted, however, the receiving State would be obliged to take into account the automatic consequences of its agreeing to one of its own nationals being appointed a foreign diplomatic agent; it would then probably refuse to give its agreement in a considerable number of cases where it might well have given it, subject to certain conditions which would have been equally acceptable to the sending State.

24. He could not agree with Mr. El-Erian that there was any danger in Mr. Spiropoulos's amendment. If it were adopted, and if the sending State insisted that a national of the receiving State whom it wished to appoint to its diplomatic mission should enjoy immunity from jurisdiction in respect of official acts, but the receiving State was unwilling to grant such immunity, the receiving State would be at liberty to refuse to agree to the appointment at all. However, the text proposed by Mr. El-Erian was undoubtedly clearer and recognized the receiving State's special interest in the matter.

25. Faris Bey El-Khoury's point might be met to some extent by omitting the words "at the time of its consent to his appointment" from the text proposed by Mr. El-Erian, since that would make it possible for States to enact laws which regulated in a uniform manner the immunities and privileges that should be enjoyed by such of their nationals as were employed by foreign diplomatic missions. Many States already had such laws, at least as far as servants were concerned.

26. Mr. EL-ERIAN said, with regard to Faris Bey El-Khoury's remarks, that by "diplomatic agent" he meant only the head of the mission or a diplomatic official proper. In his view, servants should be excluded from all privileges and immunities by virtue of article 24.

27. The CHAIRMAN said that he would first put to the vote Mr. El-Erian's amendment (para. 17 above) as being the furthest removed from the original.

The amendment was rejected by 8 votes to 5, with 8 abstentions.

28. Mr. BARTOS, explaining his vote, emphasized that he was, in principle, against the accreditation of a national in his country by foreign States, but, as the Commission held the opposite view and took into consideration that possibility, in his opinion such a diplomat must be given those privileges and immunities which were necessary for the unhindered carrying out of his functions. Further, there were countries which had subsequently claimed foreign diplomats as their nationals on the basis of so-called historical reasons. The nationality laws of certain countries, such as Turkey, Hungary and Bulgaria, for instance, would have given rise to serious anomalies if the text proposed by Mr. El-Erian had been adopted, because such countries considered as their nationals persons of dual nationality who were born, or whose parents had been born, on territory formerly under their rule. Mr. Bartos had, therefore, been obliged to vote against Mr. El-Erian's text.

29. The CHAIRMAN then put to the vote the amendment proposed by Mr. Spiropoulos, namely, the addition of the words "except where otherwise agreed between the sending and the receiving States". Those words would be added at the beginning of the redraft proposed by the Special Rapporteur.

The amendment was not adopted, 7 votes being cast in favour, with 7 against and 7 abstentions.

30. Replying to a question by the Chairman, Sir Gerald FITZMAURICE said he was quite willing that his amendment (para. 7 above) to the redraft proposed by the Special Rapporteur should be considered further by the Drafting Committee in the light of the Special Rapporteur's explanation.

31. Mr. MATINE-DAFTARY said that, before the Chairman put to the vote the redraft proposed by the Special Rapporteur, he wished to know whether it was intended that it should form the separate article that some members of the Commission had envisaged to cover the whole question of the immunities and privileges accorded to locally-recruited mission staff.

32. The CHAIRMAN said that that was not its purpose. The text was intended to deal solely with the question of the immunity from jurisdiction enjoyed by the head of a mission or a diplomatic official who was at the same time a national of the receiving State.

33. On that understanding, he put to the vote the redraft proposed by the Special Rapporteur for paragraph 2 of article 20 (para. 1 above).

The text was adopted by 12 votes to 2 with 7 abstentions, subject to further consideration by the Drafting Committee of the amendment suggested by Sir Gerald Fitzmaurice.

34. Mr. SPIROPOULOS, explaining his vote in favour of the text that had been adopted, said that it would make no difference in practice that his amendment had been rejected. That amendment had been designed only as a compromise. He himself preferred the text as it stood.

35. Mr. EL-ERIAN said he had voted against the text that had just been adopted for the reasons that he had already made clear in his previous statements on the subject (403rd meeting, paras. 9-15, and paras. 15-17 and 26 above).

36. Mr. BARTOS said that he had voted in favour of the text despite the fact that it was undesirable, in his view, that diplomatic agents should ever be chosen from among the nationals of the receiving State. If they were, however, and if the receiving State accepted them, he agreed that they should enjoy immunity from jurisdiction in respect of official acts.

37. The CHAIRMAN then invited the Commission to resume consideration of the additional paragraph for article 20, proposed by Mr. François (404th meeting, para. 29).

38. He recalled that Mr. François had accepted Mr. Tunkin's suggestion that the words "in accordance with the laws of that State" be added at the end of the first sentence (*ibid.*, para. 59).

39. Mr. GARCIA AMADOR asked whether the words "shall be justiciable" implied an obligation on the part of the sending State to bring its diplomatic agents before the proper courts if occasion arose.

40. The CHAIRMAN replied that, in his understanding, Mr. François's text merely expressed the universally recognized principle that a diplomatic agent remained subject to the jurisdiction of the sending State, and hence could be the object of proceedings instituted in the courts of that State, provided of course that under the laws of that State a court was specified that had jurisdiction. Moreover, the text tended to vest jurisdiction in the courts of the sending State, if the legislation of the latter failed to specify a court.

41. Mr. SPIROPOULOS felt that the insertion of Mr. Tunkin's amendment robbed the first sentence of Mr. François's text of all practical significance. The only point in Mr. François's text now lay in the second sentence, but the relation between it and the first sentence was obscure, to say the least.

42. Mr. FRANÇOIS agreed that the essence of his proposal lay in the second sentence. The first, however, still had some importance, since a State might take the view that, whatever a diplomatic agent did in the receiving State, he could not be brought before its courts; it was that attitude which it was essential to combat.

43. Mr. SPIROPOULOS pointed out that, if the laws of the sending State did not already provide that a diplomatic agent could be brought before its courts, adoption of Mr. François's text with the amendment proposed by Mr. Tunkin would make no change in the position.

44. Mr. PAL recalled that, on the basis of a suggestion by Mr. Yokota, Sir Gerald Fitzmaurice had suggested (404th meeting, para. 80) that the paragraph proposed by Mr. François be amended to read as follows:

"The immunity of a diplomatic agent from the jurisdiction of the receiving State shall not exempt him from the jurisdiction of the sending State, to which he shall remain subject in accordance with the law of that State."

45. Mr. FRANÇOIS said he could accept that text in replacement of the first sentence of his own text.

46. Mr. SANDSTRÖM, Special Rapporteur, pointed out that the text proposed by Sir Gerald Fitzmaurice did not in fact meet Mr. François's main point any more than Mr. Tunkin's amendment, since it did not impose an obligation on the sending State to designate a tribunal if none was already designated by the existing law.

47. After further discussion, Mr. TUNKIN recalled that he had asked (404th meeting, para. 77) for separate votes on the two sentences of the text proposed by Mr. François.

48. The CHAIRMAN put to the vote the text proposed by Sir Gerald Fitzmaurice (para. 44 above), which had been accepted by Mr. François in place of the first sentence of the additional paragraph which he had proposed.

The text was adopted for the first sentence by 17 votes to none with 3 abstentions.

The second sentence of Mr. François's text was adopted by 10 votes to 1 with 10 abstentions.

49. Mr. BARTOS said that he had voted in favour of the second sentence, since he thought it would be of some practical benefit, even though it did not fully settle the question of the law applicable.

50. Mr. AMADO said that he had abstained on both sentences, because it was an accepted rule that diplomatic agents retained their former domicile. If the Commission had wished to reiterate that rule, it should have done so in terms clearer than those used in the first sentence. Mr. Amado had been in favour of the second sentence, but had been unable to vote for it since it depended on the first.

51. Mr. MATINE-DAFTARY said he had voted in favour of both sentences, even though they were not entirely satisfactory, since it would always be possible to amend them in the Drafting Committee, or in the light of the comments received from Governments.

52. The CHAIRMAN, speaking as a member of the Commission, said that he had voted for the two sentences of Mr. François's proposal as amended by Sir Gerald Fitzmaurice, although he was convinced that, in the example given in the second sentence, it was solely a matter for the State concerned to decide which court to designate as the competent court. As the Commission was preparing a draft convention, however, it seemed desirable to make some such provision for those States whose legislation did not designate any competent court for diplomatic agents serving abroad.

ARTICLE 24 (*continued*)²

53. The CHAIRMAN invited the Commission to resume consideration of article 24, paragraph by paragraph, and recalled Mr. François's proposal to replace the article by a new text (407th meeting, para. 86).

54. The Chairman said that Mr. Matine-Daftary had submitted an amendment to delete from Mr. François's text the phrase "if they are not nationals of the receiving State", on the ground that the question was covered by the Commission's decision concerning article 20, and to substitute the following: "within the limits and to the extent deemed appropriate and applied for by the head of the mission on his own responsibility."

55. He asked what the Special Rapporteur meant by the term "service staff" in his text, and whether he accepted Mr. François's amendment.

56. Mr. SANDSTRÖM, Special Rapporteur, said that the term covered official staff, such as messengers and chauffeurs, engaged in ancillary duties—in other words, what were known as *employés d'ambassade*.

² Resumed from 407th meeting.

57. He accepted Mr. François's amendment.

58. Mr. FRANÇOIS said that he had included the phrase "if they are not nationals of the receiving State" in order to cover any staff members who might have dual nationality, that of the sending and of the receiving State. The question whether to retain the phrase could be left to the Drafting Committee.

59. Mr. MATINE-DAFTARY remarked that the Commission's decision on article 20 related only to nationals of the receiving State.

60. The CHAIRMAN, speaking as a member of the Commission, thought that paragraph 1, by according full diplomatic privileges and immunities to every category of staff, went much further than the law of most countries, in particular so far as tax and customs exemptions were concerned.

61. Mr. TUNKIN thought that the members of the Commission would all agree that nowadays, according to general international law, only strictly diplomatic staff enjoyed all the immunities listed in the draft. Administrative, technical and service staff certainly enjoyed some privileges and immunities, but probably only on a courtesy basis, or as the result of an agreement between two States. Both the Special Rapporteur's text and Mr. François's amendment, therefore, went beyond existing rules and constituted proposals *de lege ferenda*. While he did not object in principle to extending entitlement to privileges and immunities to other categories than diplomatic officers, he wondered whether the Commission would not be going too far in putting all staff of foreign missions on the same level. A new rule of that kind would entail considerable amendment of the laws of certain countries.

62. The position, as he understood it, was that there was probably an obligation on States under international law to accord full diplomatic privileges and immunities to diplomatic staff proper, and that they might accord such privileges to administrative and service staff on a reciprocal basis. In the Soviet Union, for instance, under an act of 27 March 1956, the Government had been empowered to grant diplomatic immunity to all employees of foreign diplomatic missions on a basis of strict reciprocity in each case.

63. In view of such considerations, he was in favour of drawing a distinction in the paragraph between diplomatic staff and other staff with respect both to the obligation to accord privileges and immunities and their scope. A reference to the principle of reciprocity might be made in connexion with administrative, technical and service staff.

64. It would perhaps be better to leave the words "if they are not nationals of the receiving State" in the paragraph for the time being. The Drafting Committee could decide later whether the question was already covered by another text adopted by the Commission.

65. Sir Gerald FITZMAURICE said that, while appreciating the fact that the expansion of mission staffs had led some countries, quite understandably, to consider limiting the number of persons enjoying privileges and immunities, he was opposed to drawing a distinction between the diplomatic and administrative staff of missions, because of the difficulty of fixing any hard and fast dividing line between them. A century ago, when third secretaries and unpaid attachés had copied out the dispatches by hand, it had been quite sufficient to grant privileges

and immunities to diplomatic officers only. At the present time, however, the ambassador's stenographer might know more State secrets than some individual member of the diplomatic staff, and the same was true of archivists. Members of the administrative staff who often handled highly confidential matter were as much in need of protection from possible pressure from the receiving State as the diplomatic staff itself, and he failed to see how the Commission could avoid including them among those entitled, if not to all diplomatic privileges, at least and undoubtedly to full immunity.

66. Mr. Verdross's remarks regarding the staffing of the missions of smaller countries (407th meeting, para. 87) were an additional argument in favour of establishing no distinction.

67. Mr. SANDSTRÖM, Special Rapporteur, regretted that he had not been able to outline the considerations underlying his draft at the beginning of the discussion on the article. In the whole subject of diplomatic intercourse no question was so differently handled by States. It was impossible to talk of any fixed law. Many countries accorded diplomatic privileges and immunities only to diplomatic staff, while others accorded them to the whole staff of the mission. The difference in treatment was largely a question of approach, i.e., whether each category was considered singly or whether the mission was viewed as an integral whole, a sort of team. He preferred the latter approach, which appeared to be that adopted by Sir Gerald Fitzmaurice. The Commission could stipulate a certain minimum of privileges and immunities, and leave the rest for agreement between Governments. It would be preferable, however, to accord more immunities if possible.

68. Mr. YOKOTA was in favour of distinguishing between the diplomatic and the other staff of missions, the privileges and immunities of the latter not being so well-established. They were, it was true, generally accorded in practice, but partly as a matter of courtesy and sometimes on the basis of reciprocity. He noted that the Harvard Law School draft, in article 23, put the matter on a strictly functional basis, saying that the receiving State "may exercise jurisdiction over any member of the administrative or service personnel of a mission, only to an extent and in such a manner as to avoid undue interference with the conduct of the business of the mission".³

69. Mr. Yokota proposed that the Commission should recognize the entitlement of diplomatic members of the staff of missions to full privileges and immunities by drafting paragraph 1 as follows:

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

and should add, after paragraph 1 as thus amended, the following new paragraph:

"The administrative and service members of the staff of the mission enjoy, in the absence of special agreement, the same privileges and immunities as those of the diplomatic members of the staff."

70. Mr. SPIROPOULOS said that he was in favour of extending diplomatic privileges and immunities to

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

lower grades of staff on much the same grounds as Sir Gerald Fitzmaurice and the Special Rapporteur, namely, that the mission must be regarded as an entity in which each member of the staff, including chauffeurs and cooks, contributed to the successful functioning of the whole. He appreciated the difficulties caused by the large number of subordinate staff members in some missions, and the fact that offences were much more common amongst such staff than amongst diplomats; nevertheless, he considered such a course preferable. That was, however, merely his own view; he did not claim that it reflected the existing state of international law.

71. Mr. AMADO found it difficult to understand why cooks should enjoy the same privileges and immunities as first secretaries. In his opinion, it was impossible to discuss paragraph 1 without taking into account paragraph 5, which stated that the names of all persons entitled to diplomatic privileges and immunities must be entered on the diplomatic list.

72. Mr. KHOMAN said that, although he would like to see diplomatic privileges and immunities extended to administrative and service staff, he recognized that such did not appear to be the practice of all States. It might, therefore, be preferable to draw a distinction, on the lines proposed by Mr. Yokota, and state unequivocally that diplomatic staff were entitled to full privileges and immunities, and that administrative and service staff also enjoyed the same privileges and immunities, unless otherwise agreed. Such a solution would, he thought, meet all the different viewpoints expressed.

73. Mr. MATINE-DAFTARY agreed with Sir Gerald Fitzmaurice on the undesirability of drawing any distinction. In most missions there were persons doing work of a diplomatic nature who, often owing to the nature of the regulations, could not be classed as members of the diplomatic service. The Harvard draft, he thought, approached the matter from a rather academic standpoint, ignoring the difficulty of drawing clear-cut distinctions in practice.

74. Nevertheless, in view of the excessively large staffs of missions and the relatively unimportant tasks performed by certain members, he felt it necessary to provide for some curb. That was why he had proposed in his amendment (para. 54 above) that the choice of persons claiming benefit of privileges and immunities be left to the discretion of the head of the mission.

75. Mr. PAL did not think that any curb was necessary. The Commission, having already taken a decision on the desirability of limiting the size of missions, could proceed on the assumption that their size would not be excessive.

76. The CHAIRMAN suggested that the Commission endeavour to find a formula acceptable to the vast majority of States.

77. He drew attention to the following amendment submitted by Mr. Tunkin as an alternative to paragraph 1:

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

"The members of the administrative and service staff shall, if they are not nationals of the receiving State, also enjoy these privileges and immunities on the basis of reciprocity."

78. Mr. BARTOS observed that practice on the matter was so varied that it was impossible to formulate a uniform rule of positive law. The Commission could not do more than analyse the various practices and indicate which seemed most appropriate.

79. He doubted whether the "unity of function" or "entity" approach advocated by the Special Rapporteur and Mr. Spiropoulos was absolutely valid. Undoubtedly the jobs performed by certain members of the administrative and technical staff, archivists or wireless operators, for instance, were so closely bound up with the diplomatic work of the mission as to justify according them immunity. The problem was where the process should stop. It was rather ridiculous for diplomatic immunity to be invoked by office cleaners involved in brawls with costermongers—and such incidents were by no means uncommon. Indeed, staffs of missions were now so large that the according of diplomatic immunity to all categories was definitely prejudicial to public order. For instance, the position of "diplomatic" chauffeurs who exceeded the speed limit on higher orders was far from clear, and many States had found it necessary to subject them to their civil jurisdiction. Again, dealings on the "black market," though comparatively uncommon among diplomats, were frequent amongst ancillary staff. Yet, in many cases, the receiving State had no other remedy than the extreme measure of declaring the offender *persona non grata*.

80. Although there was much to be said for Mr. Matine-Daftary's attempt to solve the problem, it was open to the objection that heads of missions would be tempted to apply for diplomatic privileges and immunities for all their staff, because it was so much more convenient.

81. Personally, he found his desire to ensure that missions were protected from interference by the receiving State in conflict with the hard facts of the existing situation. He would suggest that all categories of staff whose tasks were bound up with the fulfilment of the function of the mission should enjoy diplomatic privileges and immunities. The other staff should be entitled only to "functional immunity", any other privileges and immunities being granted by bilateral agreement. In that connexion, he did not think that Mr. Tunkin's amendment was quite satisfactory. If one State accorded full privileges and immunities to all staff, the other State was not bound to do the same on the principle of reciprocity.

82. Though not in a position to suggest any alternative at that stage, he must say that he found both texts before the Commission unacceptable in their existing form.

83. Mr. TUNKIN agreed with the Chairman. The Commission should bear in mind how far States could be expected to go in the matter. His own amendment went beyond the existing rule of international law, but laid down the principle of reciprocity as a counter-weight. A recent agreement between the United Kingdom and the United States of America, on the one hand, and the Soviet Union, on the other, concerning the granting of privileges and immunities to the administrative and service personnel of missions, showed that the principle of reciprocity worked well.

84. The CHAIRMAN observed that the matter appeared ripe for decision and could perhaps be settled at the next meeting.

The meeting rose at 1.15 p.m.