Document:-
A/CN.4/SR.404

Summary record of the 404th meeting

Topic:
<multiple topics>

Extract from the Yearbook of the International Law Commission:-
1957 , **vol. I**

404th MEETING

Friday, 24 May 1957, at 9.30 a.m.

Chairman: Mr. Jaroslav ZOUREK.

Arbitral procedure: General Assembly resolution 989 (X)

[Agenda item 1]

ESTABLISHMENT OF A COMMITTEE

1. The CHAIRMAN recalled that the draft convention on arbitral procedure adopted by the Commission[1] had been considered by the General Assembly at its tenth session. In resolution 989 (X), the Assembly had invited the Commission "to consider the comments of Governments and the discussions in the Sixth Committee in so far as they may contribute further to the value of the draft on arbitral procedure, and to report to the General Assembly at its thirteenth session" and had decided "to place the question of arbitral procedure on the provisional agenda of the thirteenth session, including the problem of the desirability of convening an international conference of plenipotentiaries to conclude a convention on arbitral procedure".

2. Since then Mr. Scelle, the Special Rapporteur, had submitted a further report on the subject (A/CN.4/109), and the observations submitted by Governments had been distributed in documents A/2899, A/2899/Add. 1 and A/2899/Add. 2.[2]

3. In the light of those circumstances, the officers of the Commission proposed that, in order to expedite discussion in the Commission itself, a committee be set up to consider the situation and report back to the Commission during the current session. Bearing in mind that it was desirable for the committee to reflect in its composition the various views that had been expressed in the Commission and at the General Assembly, and bearing in mind also the fact that some members of the Commission were already fully occupied with their work in the Drafting Committee, the officers further proposed that the committee should consist of Mr. Ago, Mr. Amado, Mr. El-Erian, Mr. Khoman, Mr. Padilla Nervo, Mr. Scelle, Mr. Spiropoulos, Mr. Verdross and the Chairman himself.

The officers' proposals were adopted.

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*)

4. The CHAIRMAN invited the Commission to consider the remaining paragraphs of article 20, pending distribution of the revised text of paragraph 2.

5. Mr. TUNKIN said that the question dealt with in paragraph 3 had two aspects. In the first place, a diplomatic agent could not be compelled to give evidence at all. Secondly, if of his own accord he chose to give evidence, he could not be compelled to do so in court, but could, for example, submit an affidavit.

6. The text proposed by the Special Rapporteur might possibly be held to cover both aspects of the question, but, for clarity's sake, Mr. Tunkin proposed that it be amended to read as follows:

> "A diplomatic agent cannot be compelled to give evidence in legal proceedings and, in the event of his agreeing to give evidence, cannot be compelled to do so before a court."

7. Mr. SANDSTRÖM, Special Rapporteur, said that, though he was aware that the laws of many countries entered into considerable detail as to the procedure to be followed when it was desired that a diplomatic agent should give evidence in a court case, he had thought it unncessary for the Commission to do so in its draft. Mr. Tunkin's amendment, though it did enter into rather more detail than his own text, was not unduly detailed, and he could therefore accept it.

8. Mr. BARTOS proposed that it be clearly stated in the commentary that immunity from jurisdiction was not granted out of respect for the person of the diplomatic agent, but out of respect for the State which he represented and for the purpose of enabling the agent to perform his diplomatic functions, and that, if such immunity was abused, it was the duty of the sending State to waive it. The latter idea had found clear and formal expression in the case of international civil servants, but current practice also pointed in the same direction in the case of diplomatic agents. At present the whole matter was often clouded by considerations of prestige, with the result that the sending State refused to waive immunity even when it was well aware that it ought to do so.

9. Mr. MATINE-DAFTARY questioned whether the paragraph was necessary at all, since if a person enjoyed immunity from criminal and civil jurisdiction, he clearly could not be "compelled" to do anything.

10. Mr. EDMONDS said he saw no reason why the text proposed by Mr. Tunkin should not end with the words "in legal proceedings". If a diplomatic agent agreed to give evidence when he was not compelled to do so, it went without saying that he could attach conditions regarding the manner in which his evidence should be given.

11. The CHAIRMAN suggested that the point raised by Mr. Edmonds be considered by the Drafting Committee.

The text proposed by Mr. Tunkin (para. 6 above) was adopted by 15 votes to none with 4 abstentions, subject to consideration of Mr. Edmonds' point by the Drafting Committee.

12. Turning to paragraph 4, Mr. SANDSTRÖM, Special Rapporteur, said that the commentary on the Harvard Law School draft[3] appeared to express some doubt as to whether a diplomatic agent's immunity from executory measures should extend to property which was not essential to the diplomatic function. He had felt, however, that since no such distinction had been made in respect of immunity from jurisdiction generally, it would be illogical to introduce it solely in respect of exemption from executory measures.

13. Mr. LIANG, Secretary to the Commission, pointed out that the Special Rapporteur's text implied that execu-

[1] *Official Records of the General Assembly, Eighth Session, Supplement No. 9*, para. 57.

[2] *Ibid., Tenth Session, Annexes*, agenda item 52.

[3] Harvard Law School, *Research in International Law, I. Diplomatic Privileges and Immunities* (Cambridge, Mass., 1932), pp. 97 ff.

tory measures could not be taken even in respect of a diplomatic agent's private immovable property. He very much doubted whether that was in accordance with existing practice.

14. The CHAIRMAN agreed. Moreover, paragraph 1 already stated that a diplomatic agent should not enjoy immunity from jurisdiction in the case of a real action relating to the diplomatic agent's private immovable property; it was clearly essential, therefore, that any judgments or official acts relative to such immovable property should be enforceable.

15. Mr. BARTOS agreed with the Chairman's view, at least as far as indirect enforcement was concerned; in other words, where there was no violation of the diplomatic agent's personal immunity or of his premises.

16. Mr. MATINE-DAFTARY pointed out that the English and French texts of paragraph 4 did not correspond. The English referred only to court judgements and should be brought into line with the French, which was the original and which covered, in addition, documents served by judicial officers and self-executory documents, for example mortgage deeds containing a default clause.

17. The CHAIRMAN agreed that the English text should be brought into line with the French.

18. Mr. EL-ERIAN accordingly suggested that the text be amended to read:

"Nor can he be made subject to executory measures, except in the cases mentioned in paragraph 1(*a*) above."

19. Sir Gerald FITZMAURICE said that the paragraph required considerable modification. For one thing, it was by no means clear whether movable property was covered. It might be amended to read:

"Neither he nor his property shall be subject to executory measures, except in the cases mentioned in paragraph 1(*a*) above."

20. However, even in the case of private immovable property, executory measures could not, in Sir Gerald's view, be taken if they involved personal eviction of the diplomatic agent from his residence. If that was agreed, the precise wording could perhaps be left to the Drafting Committee.

21. Mr. SPIROPOULOS thought that in the case of movable property the determining factor was where it was situated. If it was situated in the diplomatic agent's residence, it was exempt from executory measures; otherwise it was not.

22. Mr. AMADO maintained that the present text was satisfactory, since no summons could ever be served on a diplomatic agent.

23. Mr. PAL and Mr. SPIROPOULOS pointed out that paragraph 1(*a*) already made a specific exception to the principle of immunity from jurisdiction in the case of real actions relating to private immovable property. In such actions, the diplomatic agent was in exactly the same position as anyone else.

24. Mr. VERDROSS pointed out that there might also be cases where a decision of the courts, relating, for example, to an easement on the real property of a diplomat, had to be entered in the land register. That was the execution of a judgment, even though no question arose of serving a summons on the diplomatic agent.

25. Mr. SANDSTRÖM, Special Rapporteur, suggested that, in order to take account of the points made by Sir Gerald Fitzmaurice and others, the text might be amended to read:

"Nor can he be subjected to executory measures, except in cases where he is subject to the jurisdiction of the receiving State by virtue of paragraph 1 above and where the executory measure can be taken without hindering the exercise of his diplomatic functions."

26. Mr. MATINE-DAFTARY observed that the new wording suggested by the Special Rapporteur did not cover all the cases he had mentioned—for example, the default clause in a mortgage agreement.

27. The CHAIRMAN suggested that Mr. Matine-Daftary's point could be met by using a somewhat broader form of words than "by virtue of paragraph 1 above".

28. Mr. SPIROPOULOS felt it was unrealistic for the Commission to try to cover every conceivable case in its draft. If a diplomatic agent was subject to executory measures in the case of a real action relating to private immovable property, he would be all the more so in the case referred to by Mr. Matine-Daftary.

The amended text suggested by the Special Rapporteur (para. 25 above) was adopted by 17 votes to none, with 2 abstentions, subject to consideration by the Drafting Committee.

29. Mr. FRANÇOIS proposed that a further paragraph be added to article 20, reading as follows:

"5. A diplomatic agent shall be justiciable in the courts of the sending State. The competent tribunal shall be that of the seat of the Government of the sending State, unless some other is designated under the law of that State."

30. The first sentence simply stated a principle that was universally recognized and was regarded in all manuals of international law as the necessary counterpart to immunity from jurisdiction in the receiving State.

31. With regard to the question which should be the competent tribunal in the sending State, practice was not at present uniform; in some countries the competent tribunal was that of the seat of government, in others it was that of the person in question's last domicile, in others, including his own, the law was silent on the matter. In the resolution which it adopted in 1929,[4] the Institute of International Law had favoured the second solution, but in his view the first was generally preferable, although he did not wish to lay down an inflexible rule and had therefore added an escape clause.

32. Sir Gerald FITZMAURICE said that while it was, he thought, true that all text-books of international law recognized that the mere fact of a diplomatic agent's immunity from the jurisdiction of the receiving State did not give him immunity from the jurisdiction of the sending State, international law did not, to the best of his knowledge, impose any positive obligation on States to allow their diplomatic agents to be sued before their own courts.

33. In addition to that question of international law, Mr. François's amendment raised questions of municipal law. The rules of the sending State on conflicts of jurisdiction might well make it impossible for the local courts

[4] *Ibid.*, pp. 186 and 187.

to hear cases where, for example, a diplomatic agent had contracted debts in the receiving State. Even without Mr. François's amendment, there was nothing to prevent anyone from attempting to sue a diplomatic agent in the sending State's courts, but whether he would be successful in his attempt would depend on the sending State's rules on conflicts of jurisdiction.

34. There was a further difficulty regarding service of process. It was not normally possible to bring proceedings against someone in his home country without serving a writ on him, but in the case of diplomatic agents, personal service could not be effected, though in some cases writs might perhaps be served through the post.

35. He wondered, therefore, whether the Commission should not content itself with saying that immunity in the receiving State did not confer immunity in the sending State, provided the rules in force in the sending State made it possible for the diplomatic agent in question to be brought before its courts.

36. Mr. MATINE-DAFTARY supported Mr. François's amendment in principle, but pointed out that it should be made clear, possibly in the commentary, that it did not apply to the two types of case referred to in paragraph 1, where a diplomatic agent was subject to the jurisdiction of the receiving State.

37. Mr. VERDROSS also supported Mr. François's proposal, since, in his view, it was quite correct to place such an obligation on the sending State.

38. Mr. EDMONDS thought that Mr. François's amendment would give rise to all kinds of difficulty, for the reasons mentioned by Sir Gerald Fitzmaurice. There was nothing in the present text of article 20 to suggest that a diplomatic agent was not subject to the jurisdiction of the sending State.

39. Faris Bey EL-KHOURI agreed with Mr. François's amendment in principle, and felt the points raised by Sir Gerald Fitzmaurice could be met by modifying the wording. In his view it would be sufficient to say:

> "A diplomatic agent shall enjoy no immunity in the courts of the sending State."

40. Mr. TUNKIN said he shared the doubts expressed by Sir Gerald Fitzmaurice and Mr. Edmonds. If Mr. François's amendment were adopted, a great many States might find themselves obliged to make far-reaching changes in their municipal law. In his view it was quite obvious that a diplomatic agent did not enjoy immunity from jurisdiction in the sending State, but he would have no objection to saying, for example:

> "A diplomatic agent shall be justiciable in the courts of the sending State in accordance with the laws of that State."

41. Mr. SPIROPOULOS said that a question of principle was involved. It was quite true that article 20 related to the jurisdiction of the receiving State; what happened in the sending State was another matter. Moreover, as Sir Gerald Fitzmaurice had pointed out, there was no rule of international law obliging sending States to provide a court competent to deal with actions involving diplomatic agents enjoying immunity in the country to which they were accredited. Nevertheless, if there were any countries which made no such provision—and he thought it highly improbable—he would have no objection to the Commission's referring to the question in order to have a more complete draft. Diplomatic agents could clearly not be allowed to enjoy complete impunity. The position in Greece was that they were justiciable in the courts of their last domicile, or failing that, in the courts of the capital.

42. Perhaps the Commission, without making any pronouncement on whether an obligation existed, could simply enunciate the principle stated in the first sentence of Mr. François's amendment.

43. Mr. AMADO drew attention to article 9 of the 1929 resolution of the Institute of International Law,[5] according to which the head of a mission and his family preserved their former domicile. The competent tribunal for trying diplomatic agents in their home State was normally that of their domicile, and he failed to see why the Commission should go out of its way to stipulate that the competent tribunal should be in the capital of the sending State.

44. Mr. FRANÇOIS observed that the standpoints of the critics of his amendment were not so far removed from his own as might appear at first sight. Mr. Tunkin had expressed doubt as to whether the amendment was necessary. Even if it were argued that it was not strictly relevant to the question of diplomatic immunity, it was undoubtedly relevant to the question of diplomatic intercourse, which was the subject of the draft. As for Mr. Spiropoulos's suggestion, that it was improbable that there were any countries which made no provision in their laws for the trying of diplomats accused of offences in the receiving State, he pointed out that cases did exist where no such provision was made.

45. He must dispel some misunderstandings as to the purpose of his amendment. His main concern was to establish the obligation on the part of States to have some court before which actions against diplomatic agents enjoying immunity in their receiving States could be brought. He had no intention of suggesting that the laws of States should be amended so as to enable their courts to deal with all the cases that might arise. The court competent to deal with cases involving diplomatic agents would apply the law of the country, and if the law of the country was such that the case was not covered, then nothing could be done. He was sure that it was possible to obtain general agreement in the Commission on the text, provided it was redrafted.

46. Sir Gerald FITZMAURICE thought that the first sentence of the new paragraph might be generally accepted with the addition of the words "in accordance with the laws of that [the sending] State", as proposed by Mr. Tunkin.

47. He found no difficulty in agreeing with the principle that States should provide a court competent to deal with diplomatic agents against whom action could not be brought in the receiving State, but it would be difficult to go any further than that. Many countries based their criminal jurisdiction on the principle of territoriality, their jurisdiction over their nationals for crimes committed abroad being extremely limited. Except in a few cases, such as murder, the United Kingdom, for instance, had no general jurisdiction over crimes committed by its nationals abroad. It would be impossible for the United Kingdom so to amend its legislation as to enable its courts to take cognizance of a theft committed by one of its diplomatic agents abroad. Though the Commis-

[5] *Ibid.*, p. 187.

sion could not impose any absolute obligation on States, it could make it clear that diplomatic agents should be justiciable in the courts of the sending State, according to its law.

48. Mr. SANDSTRÖM, Special Rapporteur, said that, since it might not have occurred to the Secretariat to include all the provisions dealing with the justiciability of diplomatic agents in its collection of national laws relevant to diplomatic intercourse, he was not prepared to say whether all or nearly all countries made provision for a tribunal competent to deal with actions involving diplomatic agents. It was a fact, however, that a very large number of countries did.

49. He had at one time contemplated including the following provision in his draft: "A diplomatic agent can be summoned before the court of the sending State designated by its law as competent"; but had been dissuaded from doing so by the same consideration as that just put forward by Sir Gerald Fitzmaurice, namely, that the matter was complicated by the question of criminal jurisdiction. He had thought of referring to the matter in the commentary, but would have no objection to dealing with it in the draft if the Commission so wished.

50. Mr. YOKOTA agreed with Sir Gerald Fitzmaurice in doubting that there was any obligation on the sending State to provide courts of the type mentioned. Perhaps the paragraph could be redrafted to read:

> "The immunity of a diplomatic agent from the jurisdiction of the receiving State does not preclude his being justiciable in the courts of the sending State".

Such a negative formulation of the principle would, he thought, be more in accordance with existing international law.

51. Mr. KHOMAN remarked that the first sentence of Mr. François's amendment appeared to present no difficulty, since all were agreed that diplomatic agents must not enjoy complete impunity.

52. The second sentence was more controversial, however, and would in any case have little practical significance. According to previous speakers, most countries already had such competent courts, and, since Mr. François himself said that he did not advocate anything which was contrary to local law, he did not see how the provision, if adopted, could have any practical implications for countries which did not have such courts.

53. The best course would be to omit the second sentence and to ask the Special Rapporteur to produce a new text incorporating the suggestions of Mr. Tunkin or Mr. Yokota.

54. Mr. SPIROPOULOS observed that the more the Commission discussed the question, the more complicated it appeared to be. Diplomatic agents might be justiciable in the courts of their home State for crimes committed in the receiving State, but it was doubtful whether they would be justiciable for less grave offences. What was to happen when the courts of the sending State had no jurisdiction for a particular offence? The intention appeared to be to establish such jurisdiction at all costs even where it did not exist.

55. Mr. LIANG, Secretary to the Commission, pointed out that, in general, a United States or United Kingdom national could not be tried for a criminal offence committed in another country. He did not believe, however, that Mr. François had contemplated establishing a rule that diplomatic agents must at all costs be tried for any offence they committed.

56. Mr. BARTOS cited a case of a foreign diplomat accredited to Belgrade who had disabled his landlady for life. In reply to a note from the Yugoslav Government transmitting the conclusions of the judicial enquiry into the case, the sending State had stated that the offending diplomat would be brought before its disciplinary court, as under its law only crimes committed on its territory were punishable by the criminal courts. That case clearly showed that if a State which based its criminal jurisdiction on the principle of territoriality refused to waive immunity, there were no means of bringing an action against an offending diplomat in any court whatever.

57. The Commission should consider whether the complete freedom of diplomatic agents from any liability for common law crimes committed by them when not in the exercise of their functions could be tolerated in international law, and whether courts should not be competent *ratione personae*, regardless of where the crime was committed. The Commission should draw attention to such anomalies in its commentary on the article, and even go so far as to declare that it was the duty of States to do all in their power either to waive immunity or to bring the offender to justice.

58. Mr. AMADO said that the principles formulated by Mr. Bartos were ideal principles with very grave practical implications. He was not enthusiastic for the amendment at all, but would accept it as amended by Mr. Tunkin.

59. Mr. FRANÇOIS said that he accepted Mr. Tunkin's amendment (para. 40 above) to his first sentence.

60. The CHAIRMAN regretted that the debate had turned to a question which, in his opinion, was completely irrelevant to the subject at issue, namely, to the question whether and to what extent penal legislation could have an extra-territorial effect. He thought it would be over-ambitious for the Commission to try to solve that extremely difficult problem within the limits of the subject with which it was dealing, and to enunciate as a principle the duty of the sending State to see that action could be brought against a diplomatic agent for any offence that he might commit in the receiving State. That would be overstepping the bounds of possibility.

61. Mr. SPIROPOULOS thought that Mr. Tunkin's amendment would deprive Mr. François's text of any force it had. If diplomatic agents were already justiciable in the courts of sending States, there was no point in stating the rule. And if they were not, the provision that they should be justiciable only in accordance with the laws of the sending State absolved the countries from any obligation to provide a competent court.

62. Mr. TUNKIN pointed out that he had already expressed the view that the paragraph might be unnecessary, and had suggested amending it only in the event of the Commission's wishing to adopt it.

63. Mr. SANDSTRÖM, Special Rapporteur, proposed that the Commission merely recommend in its commentary on the article that States so frame their laws as to ensure that diplomatic agents should not enjoy impunity simply because there was no court competent to try them.

64. Mr. FRANÇOIS maintained that it would not be sufficient simply to refer to the problem in the com-

mentary on the article. If the articles were to serve as a basis for a draft convention, something more positive was required.

65. Mr. EL-ERIAN considered that Mr. François's proposal served a useful purpose in that it gave the Commission an opportunity of lessening the undoubted inconvenience caused by the system of diplomatic immunity. He agreed with the Secretary of the Commission that the text placed no obligations on States to change their legislation. Indeed, he would go even further and state that it paid due regard to the law of sending States with respect both to substance and procedure.

66. As he had pointed out in a different connexion at the previous meeting (403rd meeting, para. 14), criminal jurisdiction in Egypt, under article 1 of its Penal Code, was governed by the principle of territoriality, but article 2 established certain exceptions to that rule, namely, crimes against the security of the State or the stability of the national currency. Article 3 provided that when an Egyptian national committed a crime abroad he could be tried in the Egyptian courts, provided that the crime was punishable under the law where the crime was committed, and provided he had not already been tried in the courts of that State. The Commission should not try to solve the question of extra-territoriality. It should confine itself to enunciating the principle that the sending State should provide institutions which would ensure that diplomatic agents were amenable to justice.

67. Mr. FRANÇOIS confirmed that, as the Secretary had thought, it was not his intention to propose that States must at all costs set up courts to deal with any action in which their diplomatic agents were involved. If the courts of the sending State were not competent to judge certain actions, there was nothing to be done about it. On the other hand, if his amendment were adopted, some civil actions, in respect of which the competent tribunal had not yet been designated, would be justiciable.

68. Mr. SPIROPOULOS remarked that there was a danger that the amendment would place diplomatic agents in a more unfavourable position than their fellow nationals. An ordinary citizen of one State who committed a crime in a second State might escape judgment if he went to a third State before his offence was discovered. Under the amendment, however, a diplomat who committed an offence in the receiving State, and then left for a third State, could be brought home and tried.

69. The CHAIRMAN remarked that the members of the Commission appeared to be preoccupied with the question of criminal jurisdiction to the exclusion of the important question of civil jurisdiction. The problems attending Mr. François's amendment would be more easily solved if its application were confined to civil jurisdiction.

70. The first sentence of Mr. François's amendment, as modified by Mr. Tunkin, (para. 40 above), seemed generally acceptable to the Commission. The text was, in fact, in accordance with existing international law.

71. The difficulty arose over the question whether the Commission should include a stipulation that it was the duty of States which had no court competent to deal with proceedings instituted against one of their diplomatic agents serving abroad to establish such a court. There could be no doubt that determination of the competence of courts was a purely domestic matter. The Commission might, however, make a proposal *de lege ferenda* which would draw the attention of States to the problem and prompt them to take whatever steps were necessary, as it would not be in the interests of diplomatic relations between States if a diplomatic agent enjoying immunity from the jurisdiction were also immune from the jurisdiction of the sending State, for the simple reason that the latter had omitted to decide upon the court competent to deal with the cases concerned.

72. Mr. FRANÇOIS said that the need for civil courts to deal with actions involving diplomatic agents was even more apparent than the need for criminal courts.

73. He could not agree with Mr. Spiropoulos that diplomatic agents would be worse off under his amendment than ordinary citizens of the same State resident abroad. They would still enjoy the privilege of immunity in the receiving State.

74. Mr. GARCIA AMADOR pointed out that Mr. François's amendment, especially with the proviso added by Mr. Tunkin, would not really solve the problem before the Commission. The rule it enunciated would have no efficacy. The real question was not which particular court should be competent, but whether there was an obligation on every State to change its laws, if necessary, so as to ensure that it had a court competent to deal with any offence committed by its diplomatic agents in the States to which they were accredited.

75. Mr. MATINE-DAFTARY suggested that, in making his last point, Mr. Spiropoulos had attributed excessive importance to a quite exceptional case. He himself was not a partisan of the principle of "all or nothing", and considered it essential to have a provision such as that proposed by Mr. François, even though it might not cover every possible case. The proposal filled a real need, and he was not in favour either of omitting the point or of dealing with it in the commentary.

76. Mr. FRANÇOIS pointed out that he had accepted Mr. Tunkin's proposal on the understanding that it applied only to the first sentence of his own amendment, and left the second sentence unaffected.

77. Mr. TUNKIN observed that the first sentence of Mr. François's amendment, together with his own addendum, could be regarded as a complete and self-sufficing provision. But, in that case, if the law of the sending State made no provision for a court to try diplomatic agents, there would be no means of bringing them to justice for offences committed in the receiving State. Acceptance of the second sentence, on the other hand, would mean that States in which no competent court existed, were under an obligation to effect some change in their laws. That being so, it would be preferable to vote on the two sentences separately.

78. Sir Gerald FITZMAURICE agreed with Mr. Tunkin's suggestion. There was not much difficulty over the question of providing a court. If, under its laws, a country had jurisdiction over offences committed by its nationals in foreign parts, the provision of a court was no problem.

79. The main difficulty was the question whether countries were to be obliged to provide a competent court regardless of their legislation. The problem was as great with respect to civil as to criminal jurisdiction. It might be, for instance, that the only contracts that could be enforced were those concluded or to be performed in the country concerned. Contracts entered into by diplo-

mats abroad and to be performed abroad might be outside the jurisdiction of the court of the country. Yet, without the addition of the proviso "in accordance with the laws of that [the sending] State", the amendment might place countries under the obligation of assuming in the case of diplomats a competence which they refused in every other case.

80. All things considered, he preferred the negative formulation advocated by Mr. Yokota, and would suggest wording the provision on the following lines:

"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".

The meeting rose at 1.5 p.m.

405th MEETING

Monday, 27 May 1957, at 3 p.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 announced that the Special Rapporteur, Mr. Sandström, and Mr. François unfortunately were indisposed and could not attend the meeting.

2. He invited the Commission to continue consideration of the additional paragraph proposed by Mr. François (404th meeting, para. 29).

3. Mr. EDMONDS said that he appreciated the concern expressed by several members of the Commission that a diplomatic agent should not enjoy complete immunity in the event of his having committed a criminal offence, and should not be entirely exempt from jurisdiction in a civil action brought against him. He pointed out, however, that the Commission was overlooking one or two fundamental points.

4. The section of the draft under discussion related solely to the diplomatic privileges and immunities enjoyed by a diplomatic agent in the receiving State, and had nothing to do with his position in the sending State. If the law of the sending State already made him subject to the jurisdiction of its courts, the text proposed by Mr. François was unnecessary; if it did not, the proposal could only give rise to difficulties. The Commission was tentatively working on the assumption that the draft would form the basis of a draft convention. The numerous States which did not already recognize the competence of their own courts in cases, civil or criminal, arising out of actions committed by their diplomatic agents while serving abroad would be unable, unless they were prepared to alter their laws very radically, to accede to the convention without making a serious reservation. Amongst the States which would have to make reservations would be of necessity all the federal States. If, on the other hand, the Commission's draft finally took the shape of a code, a paragraph along the lines proposed by Mr. François could amount to nothing more than a pious hope.

5. In his view, the Commission should be content in the knowledge that the laws of certain States made it impossible for their diplomats to enjoy complete immunity, in their own country as well as in the receiving State, and that, as far as other countries were concerned, there was nothing it could do about the matter.

6. Mr. HSU thought that, if the Commission was prepared to ask States whose laws did not already make their diplomatic agents subject to the jurisdiction of their domestic courts to change their laws in that sense, there was no reason why it should not do so. States could always make reservations at the time of acceding to the proposed convention, and he did not think such reservations would give rise to any objections, since it was obvious that the change was one which it would take some time to put into effect. On the other hand, if the majority of the members of the Commission were not prepared to ask governments to accept that obligation—and it seemed that they were not—the situation was clearly different, and the best course might be to use the commentary, as the Special Rapporteur had suggested, in order to draw the attention of Governments to the fact that in certain countries diplomatic agents enjoyed complete immunity in respect of acts committed in the receiving State, not only before that State's courts but also before the courts of the sending State.

7. The CHAIRMAN recalled that Mr. François had accepted Mr. Tunkin's suggestion (404th meeting, para. 59) that the words "in accordance with the laws of that State" be added at the end of the first sentence of the additional paragraph which he proposed.

8. Mr. BARTOS said that, although he was not opposed to Mr. François's amendment, he would be obliged to abstain from the vote on it, since it would not have the slightest effect in practice.

9. Mr. AGO agreed that, with the additional words suggested by Mr. Tunkin, the first sentence of Mr. François's amendment, which without them had been open to serious objections, became completely useless.

10. The second sentence was still open to the same kind of objections as had been lodged against the first. The competent tribunal was determined by the laws of the sending State, and the provision was therefore either superfluous or aimed at changing existing law, and that would be questionable.

11. Mr. AMADO felt that Mr. François's proposal was dictated by highly practical considerations. It was a matter of considerable importance to know where a diplomatic agent could be sued, and it seemed quite reasonable that he should retain his domicile in his country of origin, as provided in article 9 of the resolution adopted in 1929 by the Institute of International Law.[1] A provision of that nature, however, appeared to be quite out of place in one of the articles of a draft dealing with diplomatic immunities in the receiving State.

12. Mr. EL-ERIAN agreed that, with the additional words suggested by Mr. Tunkin, the first sentence of Mr. François's amendment was of very little, if any, practical importance. Such importance as the amendment possessed resided in the second sentence.

13. Mr. GARCIA AMADOR suggested that the Commission decide first whether a provision of the kind proposed by Mr. François should be included at all.

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