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Summary record of the 410th meeting

Topic:
Diplomatic intercourse and immunities

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administrative staff or diplomatic staff proper; in fact it was less so, for not only could their immunity from jurisdiction be temporarily waived, but, in serious cases, they could be summarily dismissed and thus forfeit it altogether.

62. In his view, therefore, the Commission should revert to a simple, general rule of the kind proposed by the Special Rapporteur or Mr. François.

63. The CHAIRMAN pointed out that the Commission must necessarily be guided by the current practice of States, and, as far as he knew, no State gave service staff the same immunities as those enjoyed by other categories of mission staff. Exemption from taxation or from customs duty, for example, was never granted indiscriminately, but always to certain specified categories, such as diplomatic staff proper or diplomatic, administrative and technical staff.

64. In order to expedite matters, the Chairman proposed that the Commission take a decision on the principle reflected in the first sentence of the text proposed by Mr. Bartos (para. 9 above), as amended by Mr. Ago (namely, that all service staff should enjoy immunity in respect of acts performed in the course of their duties), and leave it to the Drafting Committee to propose an appropriate wording.

The principle was adopted by 12 votes to 4, with 4 abstentions.

65. Mr. AGO said he had voted in favour of the principle reflected in the first sentence of the text proposed by Mr. Bartos, on the understanding that it represented the minimum immunity which all service staff must enjoy. That should be made clear by adding a further sentence to the effect that service staff enjoyed also such other immunities as were accorded, in practice, by the receiving State.

66. Mr. VERDROSS and Mr. SPIROPOULOS felt that was unnecessary, since it went without saying that the receiving State could, if it wished, grant wider immunities.

67. Mr. AGO maintained that, if the Commission confined itself to saying simply that service staff should enjoy immunity in respect of acts performed in the course of their duties, it might wrongly be regarded as having advised against the much more generous practice followed by many States.

68. Mr. MATINE-DAFTARY suggested that Mr. Ago's point could be met by stating in the commentary that nothing in the text was to be regarded as preventing the receiving State from granting more extensive immunities than were there specified, if it so desired.

The suggestion was adopted.

The meeting rose at 6 p.m.

410th MEETING

Tuesday, 4 June 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 24 *(continued)*

1. The CHAIRMAN invited the Commission to consider paragraph 3 of the Special Rapporteur's article 24 (A/CN.4/91) and paragraph 2 of Mr. François's amended version of the article (407th meeting, para. 86). The position of members of the families of diplomatic agents and of their private servants would be best dealt with separately.

2. Mr. FRANÇOIS, explaining his amendment, said that there was wide variation in both dictrine and practice respecting the entitlement of members of the families of diplomatic agents and of their private servants to diplomatic privileges and immunities. As far as wives were concerned, practice was generally based on the traditional rule that they were entitled to the same privileges and immunities as their husbands, so long as they lived under the same roof. However, the criterion "living under the same roof" not being a very satisfactory one, as Mr. Amado had already pointed out in another connexion (386th meeting), he had omitted it in the case of both wives and children. In the case of children, however, he had included an age-limit, to be found in the municipal law of a number of countries, including the Netherlands. In his opinion, after the age of eighteen, when children frequently left home to attend some institution of higher education, they were no longer entitled to privileges and immunities.

3. In the case of private servants, since there was no family bond between them and the head, or the member, of the mission, he had, despite its imperfections, kept the qualification "living under the same roof", there being no point in extending privileges and immunities to private servants who lived out.

4. The CHAIRMAN proposed that the Commission first decide whether it wished to list the various members of the family entitled to privileges and immunities, or simply to adopt a general formula. Municipal law on the subject varied considerably, sometimes limiting the concept of the family to wives and children, but in other cases including parents, or even parents-in-law, living with the diplomatic agent. Some States would accordingly have difficulty in accepting anything more than a general formula.

5. The adoption of an age-limit of eighteen for children might also make the article difficult to accept. Children over eighteen might very well be still dependent on the diplomatic agent and living with him. As for the phrase "living under the same roof", many countries preferred a criterion such as "belonging to his household", or one based on the concept of economic dependence.

6. Mr. BARTOS, while agreeing as regards the great diversity of practice in the matter, noted a tendency to confine immunity as far as possible to the dependents of the diplomatic agent, largely in order to prevent abuse. There were three points to be borne in mind in that connexion. The first was that members of the family gainfully employed, or attending a university in the receiving State, were not generally regarded as entitled to privileges and immunities. The second was that the criterion of dependency should be taken in a social rather than a strictly financial sense, children or wives being still regarded as part of the household although they might enjoy a private income. The third was that the logical conclusions should be drawn from the principle of the equality of the sexes. That meant that unmarried

daughters who had attained their majority were no longer entitled to diplomatic privileges and immunities, and that husbands of women diplomats, if not gainfully employed in the receiving State, should be entitled to the same treatment as the wives of male diplomats.

7. Although he had originally been in favour of limiting the concept of the family strictly to wives and children, experience had shown him that a more elastic and human approach must be adopted. Since, however, the whole system was based on courtesy, it could be left to the protocol department in each State to settle the question of other members of the family in its own way.

8. Mr. MATINE-DAFTARY considered Mr. François's proposal too restrictive, and objected, in particular, to the age-limit in the case of children. He would much prefer a definition based on the concept of dependence. The Iranian Civil Code, like many others, regarded all persons who depended on the head of the household for their subsistence as members of his family.

9. Sir Gerald FITZMAURICE agreed that Mr. François's proposal was too restrictive, since heads or members of missions might well be either unmarried or widowers, and have a sister, grown-up daughter, or even a sister-in-law as mistress of their household. He accordingly thought it preferable to have a more general formula, such as "members of their family living with them."

10. Mr. AMADO said he too was opposed to the age-limit for children; it was quite common for heads of families to have dependent daughters at home over the age of eighteen.

11. He urged that a vote be taken on the desirability of adopting a general formula.

12. Mr. TUNKIN agreed that municipal law varied widely in its definition of the family for the purpose of entitlement to privileges and immunities. In some countries the definition covered only the wife, or husband, and children under a certain age. In others, there was no strict definition. He would therefore prefer a general formula, such as that suggested by Sir Gerald Fitzmaurice.

13. Mr. YOKOTA preferred the Special Rapporteur's general formula to Mr. François's restrictive list. The qualification "living under the same roof", criticized by Mr. Amado, might be replaced by the formula used in article 1 of the Harvard Law School draft[1], namely "members of his household."

14. He was also in favour of including a stipulation analogous to that made in the case of diplomatic agents themselves, that "diplomatic privileges and immunities shall not cover acts performed in the exercise of a professional activity by a member of the family of a head or member of a mission".

15. Mr. SPIROPOULOS doubted whether adopting a general formula, without an indication of the minimum definition of a family, and leaving the rest to municipal law would be a satisfactory solution. While States could not be expected, for instance, to regard sisters-in-law as members of a widower's family, he thought that there was no law in the world which did not regard the family as consisting of, at least, the husband, wife and children. The Commission might, therefore, adopt the general formula "members of his family," while specifying the above-mentioned minimum, and leave the rest to municipal law. Such a solution would make it unnecessary to mention other relatives, or even servants, and at the same time leave free scope for the extension of privileges and immunities to those categories.

16. The qualification "living under the same roof" was a well-established one; it should be kept, but interpreted liberally.

17. Mr. SANDSTRÖM, Special Rapporteur, said that the diversity of regulations in the various States made it so difficult to establish a list of those members of families entitled to privileges and immunities that he had found it preferable to adopt an elastic formula, namely, the term "members of their families" with the qualification "living under the same roof." He had no objection to replacing the latter phrase by "and to members of their households", but he was not sure that anything would be gained by it. As Mr. Spiropoulos had pointed out, the first phrase was well-established.

18. Mr. VERDROSS agreed with Mr. Spiropoulos. The principle that the wives and children of diplomatic agents living under the same roof with them were entitled to privileges and immunities was a rule of international law. The rest was a matter of courtesy.

19. He agreed too with Mr. Yokota that it would be illogical to give immunity from jurisdiction to members of families of diplomatic agents for acts performed in the exercise of professional activity, when the diplomatic agents themselves did not enjoy such immunity.

20. Mr. SANDSTRÖM, Special Rapporteur, remarked that the Commission had already agreed (402nd meeting, para. 81) to adopt an article on the lines of article 24, paragraph 2, of the Harvard draft, dealing with the professional activities of members of missions and their families outside the functions of the mission.

21. The CHAIRMAN observed that the Commission appeared to be generally agreed on the desirability of defining the family in general terms, while specifying a certain minimum, and of leaving it to municipal law and practice to decide what other relatives should also be entitled to privileges and immunities.

22. Mr. KHOMAN pointed out that, even if the Commission adopted a general formula, and he was in favour of that course, its application would be automatically restricted by paragraph 5 of article 24, which stipulated that only persons whose names were entered on the diplomatic list were entitled to diplomatic privileges and immunities. There was, therefore, no reason to fear an excessive extension of such privileges.

23. Mr. LIANG (Secretary to the Commission) observed that it would be difficult to adopt the age of majority as a criterion in the case of children, because it varied from country to country, and it would not be clear whether the valid age was that prevailing in the sending or in the receiving State. The extent of the diplomatic agent's "hold" over his dependents was, however, a useful criterion to adopt. The traditional formula used was that of "living under the same roof" or "forming part of the same household"; either was more satisfactory than the criterion of age or economic dependence.

24. Mr. MATINE-DAFTARY pointed out that, if dependence were adopted as a criterion, gainfully em-

[1] Harvard Law School, *Research in International Law, I. Diplomatic Privileges and Immunities* (Cambridge, Mass., 1932), p. 19.

ployed children would be automatically excluded. On the other hand, children could be "living under the same roof" as their father and not be dependent on him.

25. Mr. EDMONDS said that any rule the Commission adopted ought to be based on practice and offer the least difficulty in interpretation and application. Since, as Sir Gerald Fitzmaurice had pointed out, it was not uncommon for a person other than the wife of a diplomatic agent to be the hostess of his household, it would be better to adopt a general formula. Such a solution could not lead to much abuse. He would have no objection to including the criterion of close association by relationship or other close tie with the diplomatic agent. The best solution would be to adopt a general formula and leave the details to the Drafting Committee.

26. Mr. PAL said that the geography of international law had changed. The Commission should take account of the fact that in many countries of the world the pattern of family life and the constitution of the household were different from what they were in European countries.

27. Mr. FRANÇOIS agreed that, though it was essential not to go too far, his proposal was perhaps a little too restrictive. He would be willing to accept a general formula with a specification of a minimum acceptable to all. Then, if a State wished to accord privileges and immunities to other relatives of diplomatic agents, it would be at liberty to do so.

28. He would prefer the qualification "belonging to their household" to one based on the concept of dependence. A person could still be a dependent even though of age and living in a separate establishment.

29. Sir Gerald FITZMAURICE agreed that the qualification "member of their household" was preferable to one based on the concept of economic dependence. For instance, the sister of a head of mission running his household for him might be financially independent. The theoretical basis for the grant of diplomatic privileges and immunities in such cases was, he thought, the idea that certain persons could be regarded as extensions of the diplomatic agent's personality; the question should be approached in that light.

30. Sir Gerald would prefer a general formula. Mr. Pal had just supplied a further argument for that solution.

31. Mr. VERDROSS remarked that, if the Commission accepted the proposal made by the Chairman, it should explain in the commentary what it understood by the general formula, pointing out that it covered at least wives and children not of age.

32. Mr. SPIROPOULOS thought that the Commission should be careful what it said in the commentary, since such remarks would be taken as an interpretation of the article. It would be better simply to state that in municipal law the term "family" was always considered to cover at least the wife and the children.

33. Faris Bey EL-KHOURI, after recalling that privileges and immunities were accorded to facilitate the discharge of the diplomatic function, remarked that the members of a diplomatic agent's family had nothing whatsoever to do with the discharge of his functions. The grant of privileges and immunities to them was purely a matter of courtesy, often based on the principle of reciprocity. He was accordingly in favour of confining such rights strictly to the wives and children of diplomatic agents. Persons gainfully employed should certainly not enjoy any immunity. The Commission must bear in mind that many hundreds of people were involved in every capital.

34. The CHAIRMAN put to the vote the principle that diplomatic privileges and immunities should be enjoyed by the members of the families of diplomatic agents who were also members of their household, on the understanding that it be stipulated in the commentary that the term "family" covered at least the wife and the children not yet of age.

The principle was adopted by 20 votes to none, with 1 abstention.

35. The CHAIRMAN proposed that the Commission decide whether members of a diplomatic agent's family should enjoy the same immunities as the head of the family, or only inviolability and immunity from jurisdiction. He recalled that the Commission had already agreed that neither diplomatic agents nor members of their families should enjoy immunity in respect of outside professional activities.

It was decided to proceed in the manner proposed by the President.

36. The CHAIRMAN, speaking as a member of the Commission, said that he doubted whether full privileges and immunities should be accorded to members of diplomats' families. In practice, a distinction was generally drawn between members of missions and their families.

37. Mr. MATINE-DAFTARY considered that only wives and children should be accorded full diplomatic privileges and immunities. Any other members of the family should merely enjoy inviolability and immunity from jurisdiction.

38. Mr. VERDROSS observed that, in the matter of taxation, the practice was to exempt wives and children in the same way as the diplomatic agents themselves, partly in view of the difficulty of distinguishing their individual incomes. Income derived from professional activities was not, of course, exempt from taxation. The question of exemption from customs duty was rather a different matter.

39. Mr. SPIROPOULOS considered that there was no point in introducing a new concept of privileges and immunities to apply to the wives and children of diplomatic agents. They should enjoy the same rights as the head of the family. As far as customs duties were concerned, there would be no problem. It would mainly be a matter of personal effects, which were not liable to duty in any case.

40. Mr. EL-ERIAN said that the Commission could either agree that full diplomatic privileges and immunities should be accorded to the wives and children of diplomatic agents, or establish a distinction similar to that made in the case of the service staff of missions and accord them only immunities. He did not think that exemption from taxation would raise any difficulties. Minors living with their parents would either have no independent income or, if engaged in professional or commercial activities in the receiving State, would not qualify for immunity anyway. Since the Commission had decided on a general formula, he saw no reason to draw any distinction between the various categories of members of families in the matter of privileges and immunities.

41. The CHAIRMAN remarked that the principle that the members of a diplomatic agent's family should enjoy the same immunities as the agent himself appeared to enjoy general acceptance. As the Commission had already agreed, in adopting sub-paragraph 1(*c*) of article 22 (407th meeting), that income which had its source in the receiving State was not exempt from taxation, it was perhaps not necessary for it to take any decision regarding the exemption from taxation of members of diplomats' families. He thought, however, that mention should be made in the commentary that article 24 did not apply to the special, but not uncommon, case of members of diplomats' families who possessed the nationality of the receiving State.

It was so agreed.

42. The CHAIRMAN drew attention to an amendment by Mr. Yokota to paragraphs 3 and 4 of the Special Rapporteur's article 24. This amendment deleted the words "and their private servants of foreign nationality" from paragraph 3 and redrafted paragraph 4 to read as follows:

"Private servants of the head or members of the mission shall enjoy privileges and immunities only to the extent admitted by the receiving State.

"They shall not however be put under restraint without the consent of the head or members of the mission. When they have been caught in the act, the head or members of the mission shall immediately be informed.

"The head or members of the mission shall waive immunity of their servants in any case where, in their opinion, the immunity can be waived without prejudice to the exercise of the diplomatic functions.

"Private servants who are nationals of the sending State shall be exempt from dues and taxes on the emoluments they receive by reason of their employment."

43. There was, he continued, no general rule or practice on the matter. In Switzerland, for instances, only the private servants of heads of missions enjoyed privileges and immunities. Perhaps the Commission would find a satisfactory solution of the problem in the first sub-paragraph of Mr. Yokota's text.

44. Mr. SANDSTRÖM, Special Rapporteur, remarked that, in view of the diversity of national legislation on the question, the provision in his own article 24, paragraph 4, erred perhaps on the generous side.

45. Mr. FRANÇOIS said it could be considered to be the practice of most countries to accord a certain degree of immunity to the private servants of diplomatic agents, at least when they were housed under the same roof. He found it difficult to accept Mr. Yokota's amendment. It went too far in the other direction, since it accorded them no immunity at all except what the receiving State was prepared to grant.

46. Mr. YOKOTA, explaining his amendment, quoted Oppenheim's statement that there was no uniformity in the practice of States on the question. Some States granted full immunity to servants without qualification; some withheld immunity from servants who were nationals of the receiving State; some did not recognize the immunity of servants of any nationality.[2] In such a situation, he felt it advisable merely to state as the general rule that private servants should enjoy only those privileges and immunities admitted by the receiving State, and to specify in the second sub-paragraph the minimum to which they should be entitled, namely, not to be put under restraint without the consent of the head or a member of the mission. That was, he thought, the general practice. Under Japanese law, even Japanese nationals who were servants of diplomatic agents enjoyed such minimum immunity.

47. In order to prevent abuse of such privileges, he had included the stipulation in sub-paragraph 3 that immunity of servants should be waived whenever that was possible without prejudice to the exercise of diplomatic functions.

48. His sub-paragraph 4 was based on paragraph 4 of the Special Rapporteur's text, with the difference that it referred to the "sending" and not to the "receiving" State.

49. Mr. MATINE-DAFTARY pointed out that the Commission could not very well accord more privileges and immunities to the private servants of diplomatic agents than it had already agreed to accord to the official servants of the mission.

50. Mr. SANDSTRÖM, Special Rapporteur, agreed.

51. Mr. VERDROSS agreed with the Special Rapporteur that the question of the privileges and immunities of private servants had already been largely determined by the Commission's decision regarding the service staff of missions. He had, however, no objection to the second paragraph of the text proposed by Mr. Yokota, since the arrest of a private servant could cause serious inconvenience to the member of the mission for whom he worked, even to the extent of interfering with the performance of his diplomatic duties.

52. Mr. MATINE-DAFTARY also agreed with the Special Rapporteur. Unlike Mr. Verdross, however, he had considerable doubts about the second paragraph, since private servants either enjoyed immunity or they did not.

53. Mr. SANDSTRÖM, Special Rapporteur, observed that his previous remarks were not to be taken as meaning that he necessarily disagreed with the first paragraph, but only that it must be viewed in the light of the Commission's decision regarding service staff. In that light it was perhaps acceptable. He also had no objection to the second paragraph, although the wording might perhaps be improved.

54. The third paragraph, however, raised a much wider question; was it not the duty of the head of the mission to waive immunity in any case where that could be done without prejudice to the exercise of the diplomatic function and not merely in cases involving his private servants? It might perhaps be desirable to include in the draft some such provision as was contained in section 20 of the Convention on the Privileges and Immunities of the United Nations.[3]

55. Mr. SPIROPOULOS said that, if the Commission had not already distinguished provisionally between administrative and service staff, he personally would have been in favour of giving private servants the same immunities as any other member of a mission, of which they formed an integral part, at least if they had come

[2] L. Oppenheim, *International Law—A Treatise*, Vol. I, *Peace*, 8th ed., ed. H. Lauterpacht (London, Longmans, Green and Co., 1955), pp. 811 and 812.

[3] United Nations, *Treaty Series*, Vol. I, 1946-1947, p. 26.

with it from the sending State. Since the Commission had made such a distinction, however, he agreed that it could not now give private servants a greater degree of immunity than service staff; but that was what the second paragraph of Mr. Yokota's text appeared to do.

56. There seemed, moreover, to be some contradiction between the first paragraph and the third. Any immunities which private servants enjoyed, they enjoyed by virtue of the first paragraph, not as of right but as a matter of courtesy. Immunities which were extended as a matter of courtesy, at the discretion of the receiving State, could at any time be withdrawn at the discretion of the receiving State; the third paragraph, however, appeared to leave the matter of waiver entirely to the discretion of the servant's employer.

57. The second and third paragraphs of the text proposed by Mr. Yokota should therefore be deleted and only the first retained, possibly with the fourth, which related to a somewhat different matter.

58. Mr. TUNKIN said he shared the view that the Commission must be careful not to give private servants a greater degree of immunity than it had already given to the service staff of the mission.

59. Moreover, the great diversity of national laws in that respect clearly showed that there was no established rule of international law according to which States were under an obligation to grant any kind of immunity to private servants of diplomatic agents. The laws of some States which expressly stated that such servants should enjoy no immunities had never been criticized as contrary to international law on that account.

60. There was, of course, no inherent reason why the Commission should not act *de lege ferenda* in that respect, but, in his view, it would be inadvisable, quite apart from the decision the Commission had already taken with regard to service staff. The best course would be not to refer to private servants at all in the Commission's draft. The question of their immunities and privileges would then be left exactly where it stood today, as a matter to be settled by the receiving State purely on the basis of courtesy. He could, however, agree to the course proposed by Mr. Spiropoulos.

61. Mr. KHOMAN said he agreed with Mr. Tunkin that practice was not uniform. Since, however, the Commission had decided to recognize certain immunities in the case of the service staff of missions, it would be only logical to do the same for private servants, since it was often extremely difficult to draw a clear dividing line between the two categories. Moreover, as had already been pointed out, the arrest of private servants might seriously interfere with the working of the mission.

62. He agreed, however, with Mr. Spiropoulos that the second and third paragraphs of the text proposed by Mr. Yokota were incompatible with the first, and, in fact, went beyond what had been recognized in the case of service staff. In his view, the Commission should adopt for private servants precisely the same wording as it had adopted for service staff.

63. Mr. YOKOTA, in reply to a question by Mr. El-Erian, explained that he had used the term "put under restraint" in preference to "arrested" for the reason that, in some countries at least, "arrest" was a technical term relating to a clearly defined police procedure, and he had wished to cover all procedures by which a person could be deprived of his liberty. By "caught in the act" he meant "caught *in flagrante delicto*"; in such cases it was clearly impossible to obtain the consent of the head of the mission before putting the person concerned under restraint, but it was none the less desirable that he should be informed immediately.

64. Replying to the remarks made by Mr. Tunkin, he agreed that there was no established rule of international law with regard to the private servants of diplomatic agents, but even so he considered that the Commission should lay down a certain minimum of immunity, as it had done in the case of members of the mission who were nationals of the receiving State, where also there was no established rule of international law.

65. The CHAIRMAN pointed out that the commentary of the Harvard Law School draft contained the following sentence:

> "The present tendency in State practice with reference to the treatment of the members of the non-official personnel is undoubtedly in the direction of a curtailment of their privileges and immunities, and *de lege ferenda* the Governments of the world seem to be practically unanimous in the desire that all privileged standing be denied to this class."[4]

66. Mr. AMADO said that, if such was the case, he would be interested to know why the Special Rapporteur had proposed that private servants of foreign nationality should enjoy the same privileges and immunities as the diplomatic agents for whom they worked.

67. Mr. SANDSTRÖM, Special Rapporteur, replied that he did not regard the whole question of diplomatic privileges and immunities so much from the point of view of the individual beneficiaries as from the point of view of the mission as a whole and its ability to perform the functions for which it was intended.

68. Sir Gerald FITZMAURICE said he was by no means convinced that the Commission would be innovating if it recognized private servants as entitled to certain privileges and immunities. Referring to the Diplomatic Privileges Act of 1708 (7 Anne, c.12) which, as far as the United Kingdom was concerned, was the very cornerstone of all diplomatic privileges and immunities, and to the case of Gallatin's coachman,[5] one of the most celebrated cases that had arisen in that connexion, he pointed out that most States undoubtedly did grant private servants considerable immunities, whether they regarded themselves as obliged to do so or not.

69. He himself had voted against making any distinction between the privileges given to administrative and to service staff. In the event, the Commission had finally agreed that service staff should enjoy immunity in respect of acts performed in the course of their duties. He wondered whether there was any real basis for refusing such immunity to personal servants. He had been much struck by the following remarks regarding private servants in the Special Rapporteur's commentary:

> ". . . their services facilitate the task of the members of the mission. They have often been brought out with the mission and, by virtue of that fact, their employer and the head of the mission have incurred responsibility for them. Legal action against them can also have repercussions on their employer or the mission. Practice rather supports the idea that they should

[4] Harvard Law School, *op. cit.*, p. 120.

[5] John Bassett Moore, *A Digest of International Law* (Washington, D. C., Government Printing Office, 1906), Vol. IV, pp. 656 and 657.

enjoy the privileges of their employers and the Rapporteur has come to a similar conclusion." (A/CN.4/91, para. 62.)

Even if the Commission could not go so far, it should, he thought, at least agree that all private servants should enjoy immunity in respect of acts performed in the course of their duties.

70. Mr. AMADO pointed out that the Commission appeared to be faced with a complete disagreement on a point of fact. Either current practice was in favour of giving private servants diplomatic privileges and immunities, as the Special Rapporteur stated, or it was opposed to doing so, as the Harvard Law School had stated. The Commission must know which way the truth lay before it could vote.

71. The CHAIRMAN pointed out that, despite what was said in the commentary to the Harvard draft, the text of article 23 of that draft[6] made no distinction between administrative and service personnel. Since the expression "service personnel", used in the text of that article, was defined in article 1 as consisting of "the persons in the domestic service of a mission or of a member of a mission".

72. Mr. SPIROPOULOS further pointed out that article 2 of the resolution adopted in 1929 by the Institute of International Law[7] gave private servants who were not nationals of the receiving State full diplomatic privileges and immunities in the same way as had been proposed by the Special Rapporteur.

73. Mr. AGO felt that the formula used in the Harvard draft, namely "A 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" amounted to practically the same as the formula which the Commission had already adopted with regard to service staff, namely, that all service staff should enjoy immunity in respect of acts performed in the course of their duties. He agreed with Mr. Khoman that possibly that latter formula could also be adopted in the case of private servants.

74. Mr. YOKOTA recalled that, as he had already pointed out, some States gave no immunity to private servants who were nationals of the receiving State, while others gave no immunities to any private servants. The Commission must therefore appreciate that if it gave private servants immunity in respect of acts performed in the course of their duties, it would be acting *de lege ferenda.*

75. He could not agree that there was no distinction between service staff and private servants, since the former were appointed by the sending State while the latter were simply employed by a member of the mission in his private capacity.

76. Mr. MATINE-DAFTARY said the first paragraph of the text proposed by Mr. Yokota (para. 42 above) corresponded to current practice; he requested the Chairman to put it to the vote.

The first paragraph of the text proposed by Mr. Yokota was adopted by 10 votes to 4 with 6 abstentions.

77. Replying to Mr. MATINE-DAFTARY, Mr. YOKOTA said he could not agree to withdraw the second and third paragraphs of his text. He did not accept the argument that they were incompatible with the first paragraph. The first paragraph laid down a general principle; the second was in the nature of an exception to the principle, and the third was in the nature of a qualification placed on the exception.

78. Mr. TUNKIN thought that, although the second paragraph could conceivably be regarded as in the nature of an exception to the first, it was an exception of such scope as to nullify completely the principle which the first paragraph was supposed to lay down. In practice, the second paragraph would mean that private servants enjoyed immunity from jurisdiction.

79. Mr. Ago and Mr. Khoman had argued that private servants should be dealt with in the same way as service staff at the mission, but in that respect he entirely agreed with what had been stated by Mr. Yokota.

80. Mr. HSU said that, in his view, the second and third paragraphs of the text proposed by Mr. Yokota were unnecessary and impracticable.

81. Mr. VERDROSS said that the only reason why he had been able to vote for the first paragraph was because he intended to vote for an exception to that paragraph along the lines proposed by Mr. Yokota in his second and third paragraphs, or along those proposed by Mr. Khoman and Mr. Ago. In his view, there was no more inconsistency involved in recognizing such an exception than there had been in recognizing an exception to the principle that nationals of the receiving State should enjoy privileges and immunities only to the extent admitted by it.

82. Mr. MATINE-DAFTARY declared that the first sentence of the second paragraph of the text proposed by Mr. Yokota was entirely unacceptable, smacking as it did of a new form of capitulation.

83. Mr. AGO said there was no doubt that the second paragraph of the text proposed by Mr. Yokota, as at present worded, would give personal servants greater immunity than the Commission had recognized in the case of service staff. To remedy that state of affairs, he suggested that the words "for acts performed in the course of their duties" be inserted after the words "put under restraint".

84. Mr. YOKOTA emphasized that the crux of the matter lay not in the personal immunity or inviolability of the person concerned, but in the inconvenience caused to his employer.

85. Mr. SPIROPOULOS felt it was quite inappropriate, in the case of cooks, nursemaids, valets and so on, to speak of immunity in respect of "acts performed in the course of their duties". Those duties were of a purely menial nature and could have no possible bearing on the work of the mission as such.

86. Mr. KHOMAN pointed out that the arrest of the cook before an important dinner party might have considerable diplomatic consequences.

87. In his view, the only way out of the impasse was to take a vote on the principle whether private servants should enjoy the same privileges and immunities as the service staff of missions, and leave it to the Drafting Committee to propose appropriate wording.

88. After some further discussion, Mr. AGO, in order to expedite matters, withdrew the amendment he had suggested to the second paragraph of Mr. Yokota's text.

[6] Harvard Law School, *op. cit.*, p. 23.
[7] *Ibid.*, p. 186.

89. Mr. PADILLO NERVO thought that the first paragraph of Mr. Yokota's text, which had already been adopted by the Commission, was undoubtedly in accordance with current practice, but that there was, no less certainly, a legitimate restriction on the principle proclaimed therein. That restriction was, he thought, clearly expressed in article 23 of the Harvard draft, and he suggested that the Commission might instruct the Drafting Committee to supplement the paragraph that had already been adopted by a provision along similar lines.

90. Mr. YOKOTA said he withdrew the second and third paragraphs of his text in favour of Mr. Padilla Nervo's suggestion.

Mr. Padilla Nervo's suggestion was adopted by 16 votes to none with 5 abstentions.

The meeting rose at 1.5 p.m.

411th MEETING

Wednesday, 5 June 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 24 *(continued)*

1. The CHAIRMAN invited the Commission to consider the fourth paragraph of the text proposed by Mr. Yokota (410th meeting, para. 42).

2. It was, he thought, quite in accordance with current practice that private servants who were nationals of the sending, as opposed to the receiving, State should be exempt from dues and taxes on the emoluments they received by reason of their employment, a point that did not appear to be covered in article 22.

The fourth paragraph of the text proposed by Mr. Yokota was adopted in principle, subject to consideration by the Drafting Committee of how best to insert it in article 24.

3. The CHAIRMAN invited the Commission to consider an amended text for paragraph 5 of article 24 that had been proposed by the Special Rapporteur and that read as follows:

> "Diplomatic privileges and immunities may be refused to a person whose name is not on the list communicated to the ministry of foreign affairs, unless such person has been accepted or the omission is an obvious mistake."

4. Mr. SANDSTRÖM, Special Rapporteur, explained that the reason why he had amended the original text (A/CN.4/91) was in order to make the rule less rigid in its application.

5. He further recalled that the Commission had agreed at the 386th meeting to postpone further discussion of article 3, paragraph 2, pending consideration of article 24. The whole question of lists might now usefully be discussed.

6. Mr. PAL asked whether there was not some inconsistency between article 24, paragraph 5, either in its original or in its amended form, and article 25, paragraph 1, which stated that diplomatic privileges and immunities should be enjoyed from the moment a diplomatic agent presented himself at the frontier of the receiving State; the list referred to in article 24, paragraph 5, might not be communicated to the ministry of foreign affairs until some time afterwards.

7. He also wondered whether that paragraph should not form the subject of a separate article, which would deal also with the evidentiary value of the list. He referred, in that connection, to the case of *Engelke v. Musmann*, in which the House of Lords had reversed the decision of the Court of Appeal on the question of such evidentiary value.[1]

8. Mr. VERDROSS thought it was not normal practice for the names of service staff to be entered on the diplomatic list.

9. The CHAIRMAN pointed out that the list referred to in article 24, paragraph 5, was not the diplomatic list which was drawn up, published, and kept up to date by the ministry of foreign affairs, but a list communicated by the diplomatic missions to the ministry of foreign affairs for information.

10. Mr. TUNKIN felt that the whole question was extremely complicated. In the case, for instance, of a person requesting and receiving an entry visa, the person concerned would enjoy immunities, but his name might not be added to the list until some weeks later.

11. Therefore, for a person to be entitled to diplomatic privileges and immunities, it surely was not sufficient that his name should be placed on a list and the list communicated to the ministry of foreign affairs; the list must first be accepted by the ministry of foreign affairs. The Drafting Committee, acting in accordance with the decisions taken by the Commission, had already agreed on the following text for article 4 (*a*), paragraph 1:

> "The receiving State may at any time notify the sending State that the head of the mission, or any other member of the staff of the mission, is *persona non grata* or not acceptable. In such case, this person shall be recalled."

That text should be kept in mind.

12. Mr. LIANG (Secretary to the Commission) said that his experience in the United States of America and other countries had shown him that there were many kinds of list. The only list, however, which was valid for the granting of diplomatic privileges and immunities was that communicated by the head of the mission to the ministry of foreign affairs, and then only when it had been accepted by the ministry of foreign affairs. In addition, there was the published Diplomatic List. In the United States, that list was used, for example, by shops which wished to know whether to grant someone a rebate of a tax to which diplomatic agents were not subject, but he doubted whether it had any official significance as far as diplomatic privileges and immunities were concerned. The so-called "blue list" of the State Department of the United States gave the names of the members of foreign diplomatic missions. (At the time when he was serving in the Chinese Legation in Washington, there was a functionary in his legation called "the Chancellor". He was, in fact, no more than a clerk, but his name appeared on the "blue list".

[1] *Law Reports* [1928] A.C.433.