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Summary record of the 411th meeting

Topic:
Diplomatic intercourse and immunities

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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.

It was understood, however, that he was not entitled to the privileges and immunities granted to diplomatic personnel proper.) Finally, there was often another list containing the names of domestic or service staff.

13. Mr. SPIROPOULOS thought there was general agreement that none of the lists referred to by the Secretary, not even that communicated to the ministry of foreign affairs, constituted conclusive evidence that all the persons named on it, and only they, were entitled to diplomatic privileges and immunities. It could be no more than a presumption that if a person's name was on the list he was entitled to diplomatic privileges and immunities; and so the matter was regarded in practice. He wondered, therefore, whether the Commission should not abandon altogether the idea of inclusion of a person's name in the list as a criterion of whether he was entitled to diplomatic privileges and immunities.

14. The CHAIRMAN suggested that the matter could at any rate be relegated to the commentary.

15. Mr. SANDSTRÖM, Special Rapporteur, pointed out that two questions were involved: first, whether the Commission should state that a list must be submitted; and secondly, what were the consequences and implications of non-inclusion of a name in such a list. As regards the first, he had felt that it was in the interest of the receiving State to know the names of all persons for whom diplomatic privileges and immunities might be claimed if occasion arose. As regards the second, he agreed that the list could not be regarded as conclusive evidence of entitlement to diplomatic privileges and immunities, but he hoped he had made that plain in his amended text.

16. Mr. EL-ERIAN said he shared the doubts expressed by Mr. Tunkin. It was, in his view, undesirable to make a substantive question of law depend on a purely procedural matter, one with regard to which, moreover, State practice was far from uniform. He felt that article 24, paragraph 5, could be omitted altogether.

17. Mr. SANDSTRÖM, Special Rapporteur, said he would withdraw article 24, paragraph 5, since the majority of the Commission appeared to be in favour of that course.

18. Mr. PADILLA NERVO said that he had no objection to the withdrawal of article 24, paragraph 5, but felt that there should be somewhere in the draft, possibly in article 25, a provision corresponding to article 11 of the Harvard Law School draft, which read:

> "A sending State shall communicate to the receiving State, upon request of the latter, a list of the members of its mission, of their families, and of the administrative and service personnel."[2]

19. Although such lists could not provide conclusive evidence of entitlement to diplomatic privileges and immunities, they were of great practical use to the receiving State, since they showed it, for example, whether a particular locally-recruited member of the mission staff was no longer employed by it and was therefore no longer entitled to any diplomatic privileges and immunities he might have been receiving, or whether a member of the mission had recently been joined by one of his family, about whose arrival it would otherwise remain in ignorance, at least in the case where no entry visa was required.

[2] Harvard Law School, *Research in International Law, I. Diplomatic Privileges and Immunities* (Cambridge, Mass., 1932), p. 21.

20. Mr. SANDSTRÖM, Special Rapporteur, pointed out that article 3, paragraph 2, of his draft was designed to correspond to article 11 of the Harvard draft. It seemed, however, that most members of the Commission were in favour of relegating all mention of official lists to the commentary.

21. Mr. TUNKIN said that he personally would be in favour of that course, since the question was one of protocol rather than of international law.

22. Mr. MATINE-DAFTARY said he agreed with Mr. Padilla Nervo that a provision along the lines of article 11 of the Harvard draft should be included somewhere among the articles themselves.

23. The CHAIRMAN suggested that it be left to the Drafting Committee to submit proposals as to whether the substance of article 3, paragraph 2, which corresponded to article 11 of the Harvard draft, should be inserted in the articles or in the commentary, and what form the insertion should take.

It was so agreed.

24. The CHAIRMAN then drew attention to a proposal by Mr. El-Erian for the insertion in article 24 of a new paragraph reading as follows:

> "A receiving State may at any time declare that a person who is a member of the administrative or service staff is objectionable, without obligation to state its reasons. In such case, the sending State shall terminate such person's connexion with its mission."

25. He wondered, however, whether the point was not already covered by the text which the Drafting Committee had adopted for article 4(*a*), paragraph 1.

26. Mr. EL-ERIAN agreed that the text adopted for article 4(*a*), paragraph 1, could be interpreted as applying to administrative and service staff, but since section I of the draft related almost entirely to the heads of missions and diplomatic staff proper, and since administrative and service staff were not referred to at all until article 24, he feared that it might not be interpreted in that way. It would accordingly be safer to make the point absolutely clear in article 24. He did not, however, insist on his amendment, and would be willing to leave the matter to the discretion of the Drafting Committee.

27. Mr. SPIROPOULOS said that he shared Mr. El-Erian's fears, at least as far as service staff were concerned, but felt the point could be met more conveniently by specifying in the comment on article 4(*a*) that it applied to administrative and service staff as well as diplomatic staff proper.

28. The Drafting Committee might also consider whether it should not incorporate the words "without obligation to state its reasons" in the text it had approved for article 4(*a*), since it was in accordance with international law that an alien could be asked to leave the country without any explanation.

29. Mr. TUNKIN said he agreed with Mr. El-Erian that article 4(*a*), in the form adopted by the Drafting Committee, would not necessarily be regarded as applying to administrative and service staff. He suggested, however, that it would be preferable to amend the text of article 4(*a*) by replacing the words "or any other member of the staff of the mission" by, for example, "or any other member of the diplomatic, administrative, technical or service staff of the mission".

30. The last sentence of the text proposed by Mr. El-Erian raised another point which was possibly not covered by the text of article 4(*a*). The Drafting Committee had felt that the phrase "In such case, this person shall be recalled" could be held to cover all eventualities, including, by extension, the case where the person concerned was not a national of the sending State; it might, however, be preferable to add some such words as "or his connexion with the mission terminated".

31. He suggested, therefore, that the Drafting Committee should be requested to reconsider article 4(*a*) in the light of the various points that had been raised in connexion with Mr. El-Erian's amendment.

It was so agreed.

ARTICLE 25

32. Replying to a question by the CHAIRMAN, Mr. SANDSTRÖM, Special Rapporteur, said that in article 25 he had deliberately dealt only with the question of the ending of a diplomatic agent's functions in the receiving State, not with the ending of a mission as such. The two questions were difficult to disentangle, but it was still his hope to be able to draft some provision covering the latter question, in accordance with a suggestion made during the course of the discussions.

33. Mr. BARTOS wondered, with regard to paragraph 1, whether the words "from the moment when he presents himself at the frontier of the receiving State" should not be replaced by "from the moment he enters the territory where the receiving State exercises its jurisdiction".

34. Under the first sentence of paragraph 2 it appeared that all members of diplomatic missions, including diplomatic staff proper, would lose all immunity in respect of acts that had not been performed in the exercise of their functions as soon as such functions came to an end. He wondered whether that was really the Special Rapporteur's intention. A point of special importance that arose in that connexion related to the position of the diplomatic agents of a State in which a change of government took place, when diplomatic agents to replace them were sent out by the new Government before it was recognized by the receiving State.

35. Mr. MATINE-DAFTARY asked, with regard to the second point raised by Mr. Bartos, whether the Special Rapporteur could agree to replace the words "in the exercise of his functions" by "during the exercise of his functions". The question was, in fact, whether diplomatic immunity could be entirely assimilated to parliamentary immunity in that respect.

36. Mr. VERDROSS pointed out that article 25 in its present form could only relate to official members of mission staff. The privileges and immunities enjoyed by private servants were clearly enjoyed from the date on which they entered service until the date on which their contract of employment ended.

37. Mr. SPIROPOULOS felt that the case of private servants should be left entirely aside. Since the receiving State had been given discretion to decide what privileges and immunities to grant to private servants, it was only logical that it should also be left free to decide when they should begin and end.

38. Mr. SANDSTRÖM, Special Rapporteur, in reply to Mr. Bartos and Mr. Matine-Daftary, said that, in his view, immunity should subsist only in respect of acts performed in the exercise of diplomatic functions. The point that Mr. Bartos had raised regarding the possible effects of a change of government could, he thought, be left aside, since in practice the determining factor would be whether or not the receiving State recognized the sending State's new Government and its acts.

39. Replying to Mr. Verdross, he felt it was unnecessary to mention private servants in article 25, since they could only be regarded as such while so employed.

40. The CHAIRMAN, speaking as a member of the Commission, drew the Drafting Committee's attention to the desirability of replacing the words "even in case of war" by "even in case of armed conflict".

41. Sir Gerald FITZMAURICE wondered whether it would not be desirable to insert in article 25 a provision along the lines of article 30 of the Harvard draft, which read:

> "Upon the death of a national of a sending State who is a member of a mission, a member of his family, or a member of the administrative or service personnel, the receiving State shall permit the withdrawal of the tangible movable property owned by such person, imposing upon such withdrawal no conditions or restrictions other than those which prevailed for the withdrawal of such property by the person at the time of his death; and it shall impose no tax upon the withdrawal or devolution of property so withdrawn."[3]

42. Mr. SANDSTRÖM, Special Rapporteur, said it had been his intention to ask the Commission whether it thought such a provision necessary. In his view, the point was covered implicitly by paragraphs 2 and 3 of article 25, but he would have no objection to making it explicitly.

43. Mr. PAL agreed with Sir Gerald Fitzmaurice that a provision along the lines suggested was desirable. In his view, paragraphs 2 and 3 of article 25 did not fully cover the point. It was to be noted that article 24 of the Havana Convention[4] also covered the case of the death of a diplomatic agent, though perhaps in a rather sketchy manner.

44. Sir Gerald FITZMAURICE suggested that, as the Special Rapporteur had no objection to including a provision along the lines he had suggested, the Drafting Committee should be asked to propose appropriate wording.

45. The CHAIRMAN suggested that article 25 as a whole should be referred to the Drafting Committee for consideration in the light of the various comments that had been made.

It was so agreed.

ARTICLE 26

46. Mr. GARCIA AMADOR said he had some doubts as to whether article 26 was appropriate in a draft on diplomatic intercourse and immunities. However, if it was to be retained, it should be worded in a positive rather than a negative form, somewhat as follows:

> "The child of a person enjoying diplomatic privileges shall have the nationality of the sending State even if it is born on the territory of the receiving State."

[3] *Ibid.*, p. 25.

[4] Convention regarding Diplomatic Officers, signed at Havana on 20 February 1928. See League of Nations, *Treaty Series*, Vol. CLV, 1934-1935, No. 3581, p. 271.

47. Mr. LIANG, Secretary to the Commission, agreed that the text was open to certain objections. In particular, the reference to the receiving State's "imposing" its nationality seemed to disregard the fact that nationality at birth was not acquired by some arbitrary act on the part of the State concerned, but in consequence of the operation of its laws.

48. Mr. BARTOS felt that the text did not cover all the cases which arose in practice. It was not enough to say that the receiving State should not impose its nationality solely by reason of the child's birth upon its territory; some *jus soli* countries stipulated that children born to aliens on their territory must have their habitual residence there for a given length of time, usually throughout their minority, in order for them to retain the nationality they had acquired by the accident of their birth. A child born to a foreign diplomatic agent might well find himself in that situation: the receiving State would not be imposing its nationality "solely" by reason of the child's birth upon its territory, but the result would be the same.

49. Mr. TUNKIN said that he entirely agreed with Mr. Bartos, and the Drafting Committee should take the point into account.

50. Another point which should be taken into account was that the article, as at present worded, applied equally to nationals of the receiving State, since the Commission had decided to give them certain privileges and immunities. Obviously, however, they should be excluded from its scope, and the article made to apply only to nationals of the sending State.

51. Mr. SPIROPOULOS agreed with Mr. Bartos. He also agreed in substance with Mr. Tunkin, although it would be preferable to speak of "nationals of States other than the receiving State" rather than "nationals of the sending State", since the person in question might come from a third State. Finally, the Drafting Committee should be careful not to exclude the possibility of acquiring the receiving State's nationality by option.

52. Mr. EL-ERIAN felt, with regard to the last point referred to by Mr. Spiropoulos, that article 26 related solely to nationality conferred *jure soli* at the time of birth, not to nationality acquired subsequently. All the article meant was that, in the case of diplomatic agents, the principle of *jus soli* should not apply automatically; in some *jus soli* countries, such as the United States of America, the principle did not apply automatically in every case, since the requirement of being subject to the jurisdiction of the country was taken into account. In countries where the place of birth was the sole criterion, the article was indispensable.

53. The CHAIRMAN suggested that article 26 be referred to the Drafting Committee for consideration in the light of the various comments that had been made.

It was so agreed.

ARTICLE 27

54. The CHAIRMAN invited Mr. Padilla Nervo to introduce the joint amendment submitted by him and Mr. García Amador to article 27 of the Special Rapporteur's draft.

55. Mr. PADILLA NERVO introduced the following text to replace the existing text of article 27:

"1. It is the duty of diplomatic agents to conduct themselves in a manner consistent with the internal order of the receiving State, to comply with those of its laws and regulations from whose application they are not exempted by the present provisions, and, in particular, not to interfere in the domestic or foreign politics of that State.

"2. All official business entrusted to a diplomatic mission by its Government shall be conducted with or through the ministry of foreign affairs.

"3. The premises of the mission shall be used solely for the performance of the functions recognized as normal and legitimate under the provisions herein laid down or other rules of general international law and any special agreements in force between the sending and the receiving States."

56. Paragraph 1 of the joint amendment was based on the Special Rapporteur's text. The words "notwithstanding those privileges and immunities" had, however, been omitted, as their precise implication was not clear, and the phrase might even be harmful. The privileges and immunities of diplomatic agents, on the one hand, and their duties, on the other, formed two distinct legal categories. The duties of the diplomatic agent, which lay essentially in conforming with the law of the receiving State, existed independently in their own right, and not merely as a counterpart to the privileges and immunities the law accorded. Inclusion of the phrase might give the impression that one of the categories had priority over the other, and that, in doubtful or marginal cases, privileges and immunities should override duties, which was, of course, not the case.

57. The clause "provided that they do not impede the exercise of his functions" had also been omitted from the end of the paragraph, as it appeared to be unsound and opened the door to abuse. He considered the legal position to be that diplomatic agents were obliged, in principle, to conform to all the laws of the receiving State, with the sole exception of any provisions which conflicted with the enjoyment of any privilege or immunity recognized by international law. In other words, the only exceptions were legal ones. The last phrase of the Special Rapporteur's draft, however lent itself to the interpretation that there were also cases in which the diplomatic agent could decide at his discretion not to conform to the laws of the receiving State if he considered that they might impede the discharge of his functions. That was an anti-legal principle.

58. On the other hand, there was one addition to the paragraph, namely a clause on the lines of article 12 of the Havana Convention,[5] enunciating the obligation not to intervene in the domestic or foreign politics of the receiving State. Such non-intervention was indisputably one of the elementary duties of States. And since such undue intervention on the part of States normally took place through the medium of their diplomatic representatives, it would be strange if a codification of the duties of diplomatic agents made no reference to that fundamental, though perhaps self-evident, duty. The words "to intervene", which he preferred to the words "to interfere" used in the English translation, should be understood as referring to illegitimate intervention, in the perfectly familiar connotation which the term had in international law. They naturally did not apply to legitimate representations which were a normal part of the diplomatic function.

59. The subject dealt with in paragraph 2 had already been discussed at some length by the Commission (393rd

[5] *Ibid.*, p. 267.

meeting, para. 73-84), and he need only affirm that the provision, generally speaking, reflected normal custom. Admittedly, there were numerous exceptions in practice, but he thought it none the less advisable to lay down the general principle. The exceptions in any case should not give rise to any difficulties, in view of the obligation on the receiving State not only to place no obstacles in the way of the mission but actually to assist it in establishing the necessary contacts with the authorities with which it had to deal in cases which seemed justified.

60. The true rule, as Mr. Tunkin had pointed out (393rd meeting, para. 76), was that the receiving State had, under international law, the right to designate the organs of diplomatic intercourse within its governmental system. He preferred his own formulation, however, as a simpler exposition of ordinary practice. Though it might well be argued that the proper place for the rule in question was in a treatise on diplomatic law rather than in a codification of diplomatic intercourse and immunities, he did not think that a sufficient reason to exclude a rule which was of some value and might help to avoid practical difficulties and abuses. It was to be noted that the rule was also included in the Havana Convention (article 13).[6]

61. The principle enunciated in paragraph 3 was an indirect condemnation of the improper use of the premises of missions. As he had previously pointed out (395th meeting, para. 22), the question was closely bound up with the principle of the inviolability of those premises enunciated in article 12. It would be recalled that, in that connexion, the Commission had decided by a majority, which included his own vote, not to state any exception to the principle of inviolability, thereby implying that even the improper use of mission premises, however grave it might be, was no legal justification of entry by the authorities of the receiving State. Unfortunately, the deletion of all reference to exceptions to the principle meant that there was no longer any mention, even indirect, of the fact that premises must not be used in an arbitrary and unrestricted fashion. The purpose of the third paragraph of his amendment was to repair that omission.

62. A clearer and more specific provision than the phrase "shall be used solely for the performance of the functions recognized as normal and legitimate" had proved difficult to find owing to the impossibility of enumerating all the uses included in, or excluded by, the term "normal and legitimate functions"; the remainder of the sentence was, however, designed to clarify the sense of the phrase. By "normal and legitimate" functions were understood those following from the provisions of the Commission's draft and from any other rules of general international law. Concerning the former, he had particularly in mind the draft article which the Special Rapporteur had been requested to prepare on the definition of the diplomatic function, which should provide certain criteria from which to judge the normal uses of mission premises. Further light on those uses might perhaps be shed by other rules of ordinary international law. He might add that he was using the term "general international law" in the sense used by Mr. Verdross in his treatise,[7] i.e. as the opposite of special international law derived from special agreements.

[6] *Ibid.*

[7] Alfred Verdross, *Völkerrecht,* 3rd ed. (Vienna, Springer-Verlag, 1955).

63. Finally, a word in explanation of the last clause in paragraph 3. The Commission had rightly decided not to deal with the question of asylum in the draft, and that decision must be respected. However, in enunciating the rule that the premises of missions should be used solely for normal and legitimate functions, it was impossible not to allude to certain special agreements in which diplomatic asylum was recognized as among the legitimate uses of mission premises. It might, of course, be argued that it was not necessary to mention special agreements at all, since their omission could not affect their validity for the contracting parties. It was, however, necessary, without prejudice to any decision on the question of asylum, to mention the existence of another legitimate use of mission premises, recognized by countries which had subscribed to conventions on diplomatic asylum. Failure to make such mention would be misunderstood in such countries, among which were a large number of Latin American States.

64. Mr. SANDSTRÖM, Special Rapporteur, read out the following draft article on the diplomatic function which he had intended to refer to the Drafting Committee before submitting it to the Commission:

"The functions of the diplomatic mission consist *inter alia* in:

"1. Ascertaining by all lawful means the conditions and development of the receiving country and reporting thereon to its Government;

"2. Protecting the interests of its country and of its nationals in the receiving country; and

"3. Negotiating, under instructions from its Government, with the Government of the receiving State or its agents on questions concerning relations between the two countries which require agreement."

The article was couched in very general terms because of the difficulty of entering into detail.

65. Referring to the differences between his own text for article 27 and the joint amendment by Mr. Padilla Nervo and Mr. García Amador (para. 55 above), he pointed out that he had no intention of implying by the phrase "notwithstanding those privileges and immunities" that the duties of a diplomatic agent were the mere counterpart to his privileges and immunities. He had merely included it as a useful reminder that the enjoyment of privileges and immunities did not place the diplomatic agent above the law, but on the contrary carried an added duty to respect it.

66. The purpose of including the clause "provided that they do not impede the exercise of his function" was to emphasize that the diplomatic agent might fulfil his duty towards his sending State as far as was possible without breaking the law of the State to which he was accredited.

67. He had decided against including a provision on the delicate question of non-intervention in the domestic and foreign politics of the receiving State, despite the presence of such a provision in the Havana Convention, partly on the ground that it lent itself to misinterpretation, but partly also because diplomatic agents almost invariably intervened only on the instructions of their Governments.

68. The point dealt with in paragraph 2 of the joint amendment had already been the subject of some discussion, during which it had been pointed out that on many questions it was preferable for diplomatic agents to deal

with the bodies which had a special knowledge of them (393rd meeting, para. 81). He presumed that the authors of the joint amendment had such exceptions in mind when limiting the scope of the provision to "official business". The term was, however, rather vague; all business of missions might be regarded as official. It was really on eminently political questions that the diplomatic agent should deal solely with the ministry of foreign affairs. If a more appropriate expression could be found he would have no objection to the paragraph.

69. He had less difficulty in accepting paragraph 3 which, though very general, was in accordance with international law.

70. Mr. KHOMAN said that he found the joint amendment fully acceptable, subject to a few drafting changes and some clarification. The term "diplomatic agents" used in paragraph 1 was, he thought, too restrictive. Since the Commission had recognized the right of all categories of the staff of missions to certain privileges and immunities, it would be better to refer to "all members of the mission" or "all the staff of the mission".

71. While fully agreeing with the principle of non-interference in the domestic or foreign policies of the receiving State, he thought it essential to specify what was meant by the concept. Representations made to the receiving State when it contemplated passing laws affecting the interest of the sending State or its nationals might be interpreted as interference, yet it was the positive duty of an ambassador to make them. By the duty of non-interference he understood the obligation not to take part in the formulation or execution of the domestic or foreign policies of the receiving State.

72. Again, while agreeing in principle with paragraph 2, Mr. Khoman thought that it should be construed as indicating that while the ministry of foreign affairs was the normal channel for diplomatic intercourse, it could advise members of missions to get into touch with other departments direct. The Commission had already discussed the question at the 393rd meeting and was, he thought, agreed on the interpretation of such a provision.

73. As for paragraph 3, he feared that the phrase "functions recognized as normal and legitimate" might be subject to various interpretations, and he would prefer to see it reinforced.

74. Sir Gerald FITZMAURICE said that he agreed with practically all that Mr. Khoman had said regarding the joint amendment, in particular on the desirability of substituting some other expression for "diplomatic agents".

75. In paragraph 1, he doubted the advisability of using the phrase "those of its laws and regulations from whose application they are not exempted". Enjoyment of privileges and immunities did not, in principle, give exemption from any of the laws and regulations of the receiving State.

76. He was also doubtful about the inclusion of the words "foreign politics" in that paragraph. While it was a firmly established principle that envoys must not interfere in the domestic politics of the receiving State, it might be argued that their role was precisely, if not to interfere, at least to concern themselves with its foreign policy. The difficulty was perhaps merely a question of drafting, but he thought that the words "or foreign" could conveniently be omitted.

77. Paragraph 2 appeared to imply that even the Government of the receiving State could not allow the diplomatic agents of other States to deal with other departments than its ministry of foreign affairs. Yet, as he had previously pointed out, it was the regular practice of Governments to invite the specialized attachés of missions, and in particular the service attachés, to deal directly with the competent departments (393rd meeting, para. 81). Naturally, in countries which made their ministry of foreign affairs the sole organ of diplomatic intercourse, members of missions must needs comply with that rule. Perhaps the authors of the amendment would agree to redrafting the provision in a less rigid form.

78. He had no comments to make for the moment on paragraph 3; he would prefer first to study the Special Rapporteur's new draft article with which it was so closely connected.

79. Mr. BARTOS welcomed the amendment which, if adopted and applied, would do much to improve international relations and obviate day-to-day conflicts between States. In paragraph 1, which enunciated the extremely important principle that diplomatic agents were still subject to the laws of the receiving State, a small correction appeared, however, to be necessary. Authors were generally agreed that it was the duty of diplomatic agents, without accepting the jurisdiction of the receiving State, to submit voluntarily to its laws and regulations, except when they were contrary to the rules of international law in general, and not only to the rules relating to privileges and immunities.

80. Non-intervention was the rule with reference not only to domestic but also to foreign policy, especially since the adoption of the Charter of the United Nations, under which all Members were pledged to respect the "political independence" (both internal and external) of any State (Article 2, para. 4). But non-intervention in domestic or foreign policy, though obviously precluding anything constituting a "diplomatic" ultimatum to the receiving State to change its policy, or public statements by diplomatic envoys against the policies of the receiving State, did not affect the right of such envoys to intervene in a proper diplomatic manner in order to defend the interests of their sending States even in matters of domestic policy.

81. Paragraph 2 contained a sound principle, which it was necessary to state explicitly. It should not, however, preclude the conduct of business with other organs than the ministry of foreign affairs, such as the ministry of foreign trade or the service ministries, when the receiving State saw no objection. As he understood it, the principle was that official business should not be conducted with other departments than the ministry of foreign affairs, except with the consent of the receiving State.

82. Paragraph 3 contained a rule which the tendency of missions to abrogate to themselves functions not belonging to the sphere of diplomacy made it essential to re-affirm. The qualification implying that exceptionally, and by special agreement, missions might be used for certain not strictly diplomatic purposes was a sound one, and he fully approved of the paragraph in that form.

83. Mr. PADILLA NERVO, clarifying the meaning of the concept of "intervention" in the context, said that it carried the connotations given to it by Professor

Lauterpacht,[8] namely, dictatorial interference in the sense of action amounting to a denial of the independence of the State and implying a peremptory demand for positive conduct or abstention—a demand which, if not complied with, involved threat to or recourse to compulsion, though not necessarily physical compulsion, in some form. Similar definitions, quoted by Lauterpacht, had also been formulated previously by Professors Brierly, Oppenheim and Verdross. The term did not therefore preclude normal diplomatic representations.

84. He accepted Mr. Khoman's suggestion for the replacement of the term "diplomatic agents".

85. As for the question of conducting official business with other departments than the ministry of foreign affairs, he agreed that it was a frequent practice for commercial or service attachés to deal directly with the competent department. He had thought, however, that the idea that they could do so with the knowledge and consent of the ministry of foreign affairs was more or less implied by the last two words of the phrase "with or through" the ministry of foreign affairs. The paragraph could, however, be redrafted as suggested by Sir Gerald Fitzmaurice.

The meeting rose at 1 p.m.

412th MEETING

Thursday, 6 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 27 *(continued)*

1. The CHAIRMAN invited the Commission to continue its consideration of article 27 and the amendment to that article submitted by Mr. Padilla Nervo and Mr. García Amador (411th meeting, para. 55).

2. Mr. AGO said that, as far as the last clause in paragraph 1 of the amendment was concerned, he differed from Mr. Padilla Nervo in preferring the word "interfere", originally proposed in the English text, to the word "intervene". "Intervention", in the sense in which Mr. Padilla Nervo had defined it at the previous meeting, was something quite different from what one should state here; it was an act of State involving normally the use of force or compulsion, and had nothing to do with simple meddling in the politics of the receiving State by the person of a diplomatic agent. Moreover, he agreed with Sir Gerald Fitzmaurice on the desirability of confining the reference to interference in domestic politics; any reference to non-interference by a diplomatic agent in the foreign politics of the receiving State might be misunderstood. Apart from that question and drafting points, the idea enunciated in the clause seemed to him quite clear.

3. Paragraph 2, he thought, might well be dispensed with. Cases where States insisted that foreign missions conduct all official business through the ministry of foreign affairs would be covered by the obligation enunciated in the previous paragraph that diplomatic agents must comply with the laws and regulations of the receiving State. Since, as several speakers had pointed out, it was a regular practice for specialist attachés to deal directly with the competent departments, it would be better not to give the impression that the Commission wished to discourage that practice, all the more so as relations between States were steadily broadening in scope.

4. Mr. TUNKIN said that he accepted the amendment in principle as a potential improvement on the draft, but on the understanding that the grant of privileges and immunities was not made conditional on the due fulfilment of their duty by diplomatic agents. That point might, however, be dealt with in the discussion on article 28.

5. He was doubtful about the phrase "to conduct themselves in a manner consistent with the internal order of the receiving State". The concept of "internal order" was a very broad one, and if taken literally might put the diplomatic agent in the awkward situation of having to observe all local customs and practise the established religion. He would prefer the words "internal legal order".

6. Although on the principle he differed very little from the authors of the amendment, he nevertheless considered that the phrase "from whose application they are not exempted" might be better worded. As it stood, it could be interpreted as meaning that a diplomatic agent should comply only with the laws and regulations from whose application he was not exempted. It had been rightly pointed out, in connexion with article 20, that it was incorrect to interpret immunity from criminal jurisdiction as placing the diplomatic agent above the law. On the other hand, an assertion of the contrary, i.e. that the diplomatic agent must obey all the laws of the State, would also be incorrect. He did not consider it incumbent on the diplomatic agent as a matter of duty to comply with every law of the receiving State. The matter might, however, be referred to the Drafting Committee.

7. On the matter of intervention, he was in favour of referring simply to the principle of non-intervention in the domestic affairs of the receiving State. As Sir Gerald Fitzmaurice had pointed out, it was to some extent the ambassador's duty at least to endeavour to influence the foreign policy of the receiving State.

8. Incidentally, "internal order" must not be taken as a territorial notion, but should be understood in the sense of the phrase "matters . . . within the domestic jurisdiction" used in Article 2, paragraph 7, of the Charter of the United Nations. The clause might also be referred to the Drafting Committee with a view to finding a wording more on the lines of that used in the Charter.

9. While he agreed in substance with Mr. Ago, he would not object to retaining paragraph 2. All States clearly had the right to decide which of their organs might enter into direct communication with the organs of other States. If the paragraph were retained, however, it would be desirable to add a phrase such as "unless the laws and regulations of the receiving State provide for a different procedure".

10. Mr. YOKOTA also agreed with the amendment in principle. As far as the last clause in paragraph 1 was concerned, Mr. Padilla Nervo having defined "intervention" as meaning "dictatorial interference", it fol-

[8] H. Lauterpacht, *International Law and Human Rights* (London, Stevens and Sons Limited, 1950), pp. 167 and 168.