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**Summary record of the 426th meeting**

Topic:  
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87. Mr. TUNKIN said that that suggestion certainly improved the text, but that he was still sceptical about the intent of the paragraph as a whole.

88. Mr. BARTOS recalled that the whole question had been discussed at length, and that the Commission had finally adopted a proposal that it should be referred to in the commentary (399th meeting, para. 56). It could not now delete paragraph 3 without going back on that decision.

89. Sir Gerald FITZMAURICE agreed that it was desirable to retain some reference to a question on which public opinion in many countries felt very strongly.

90. The CHAIRMAN suggested that the Rapporteur of the Commission and the Special Rapporteur submit a redraft of paragraph 3.

*It was so agreed.*

91. The CHAIRMAN suggested that the words "normally, courier's papers" be inserted after the words "a document testifying to his status" in paragraph 4.

*It was so agreed.*

*Paragraph 4 was adopted.*

*Sub-section C. Personal privileges and immunities*

*1. Diplomatic agents other than those having local nationality*

92. Mr. SANDSTRÖM, Special Rapporteur, proposed that the following sentence be inserted immediately after the heading "Diplomatic agents other than those having local nationality":

"For the purposes of the present draft articles, the term 'diplomatic agent' shall denote the head of the mission and members of the diplomatic staff of the mission (article 21, paragraph 2)".

That was the text of article 21, paragraph 2, which had not yet been approved by the Commission, but, for clarity's sake, he thought it desirable that it should also be inserted in the introductory comments on sub-section C.

*It was so agreed.*

93. Mr. TUNKIN felt that the heading "Diplomatic agents other than those having local nationality" gave the impression that diplomatic agents having local nationality were of at least equal, if not greater, importance, instead of being an insignificant minority. There was no reason for the heading at all, for if it were deleted, articles 21 to 28 would be understood to lay down the rules applicable to diplomatic agents generally, while article 29 would be understood as being in the nature of *lex specialis*, an exception to the general rule.

94. Mr. EL-ERIAN and Mr. AMADO associated themselves with Mr. Tunkin's remarks.

The meeting rose at 1.5 p.m.

## 426th MEETING

*Tuesday, 25 June 1957, at 3.30 p.m.*

*Chairman: Mr. Jaroslav ZOUREK.*

### Consideration of the Commission's draft report covering the work of its ninth session (A/CN.4/L.70 and Add.1 to 3) (continued)

#### CHAPTER II: DIPLOMATIC INTERCOURSE AND IMMUNITIES (A/CN.4/L.70/ADD.1) (continued)

#### II. DRAFT ARTICLES CONCERNING DIPLOMATIC INTERCOURSE AND IMMUNITIES (continued)

#### SECTION II. DIPLOMATIC PRIVILEGES AND IMMUNITIES (continued)

##### *Sub-section C. Personal privileges and immunities (continued)*

##### *1. Diplomatic agents other than those having local nationality (continued)*

1. The CHAIRMAN recalled that at the previous meeting Mr. Tunkin had suggested that the heading "Diplomatic agents other than those having local nationality" could well be deleted.

2. Mr. LIANG, Secretary to the Commission, suggested that it be replaced by the heading "Foreign diplomatic agents".

3. Mr. SANDSTRÖM, Special Rapporteur, observed that, though that wording was not ideal, it was convenient and might well be adopted.

4. Mr. BARTOS said the term "Foreign diplomatic agents", in its French rendering at least, was ambiguous, for it could apply equally to agents of foreign nationality and to agents in the service of a foreign State.

5. Mr. AGO said that, as already pointed out by Mr. Tunkin, there was a special article, article 29, dealing with diplomatic agents who were nationals of the receiving State, and he thought it could therefore be assumed without explanation that the provisions of articles 21 to 28 applied to foreign diplomatic agents.

6. He therefore suggested that both the first heading under sub-section C and the introductory paragraph which followed it should be deleted.

*It was so agreed.*

7. Sir Gerald FITZMAURICE, Rapporteur, suggested that the remaining headings in sub-section C corresponding to that just deleted should be made the headings for the relevant articles.

*It was so agreed.*

#### ARTICLE 21

*Paragraph 1 was adopted.*

*Paragraph 2 was adopted.*

#### COMMENTARY ON ARTICLE 21

8. Mr. VERDROSS, referring to the last sentence, suggested that it was inappropriate to describe inviolability as an "abstract principle". The principle of inviolability was generally accepted and applied in prac-

tice, while "self-defence" and "measures to prevent the diplomatic agent from committing crimes or offences" were simply exceptions to the application of the principle.

9. Mr. SANDSTRÖM, Special Rapporteur, said that the purpose of that sentence was to indicate that a diplomatic agent might not always be able to claim inviolability.

10. Mr. VERDROSS conceded that some such reservation might be necessary, but insisted that the mode of expression was logically unsound.

11. Mr. LIANG, Secretary to the Commission, suggested that the first and last sentences should be reworded as follows:

"This article confirms the principle of the personal inviolability of the diplomatic agent."

and

"This principle does not exclude either self-defence or, in exceptional circumstances, measures to prevent the diplomatic agent from committing crimes or offences."

*It was so agreed.*

*The commentary, as amended, was adopted.*

#### ARTICLE 22

*Paragraph 1 was adopted.*

*Paragraph 2 was adopted.*

#### COMMENTARY ON ARTICLE 22

12. Sir Gerald FITZMAURICE pointed out that article 22 dealt exclusively with the inviolability of residence and property, and proposed the deletion of the last sentence of the commentary.

*It was so decided.*

*The commentary, as amended, was adopted.*

#### ARTICLE 23

13. Mr. EL-ERIAN proposed the deletion of the words "of foreign nationality" at the beginning of paragraph 1.

*It was so decided.*

14. The CHAIRMAN proposed that in the French text of sub-paragraph (b) the word "*testamentaire*" should be added after "*exécuteur*" to reproduce the distinction between "executor" and "administrator" in the English text.

15. Mr. BARTOS objected that the term "*exécuteur testamentaire*" had a restricted sense and was not applicable to the case in point.

16. Mr. LIANG, Secretary to the Commission, pointed out that the difficulty in reconciling the French and English texts arose from differences between the legal systems of various countries. In the United Kingdom, an administrator was appointed by the court in cases where a deceased person had not nominated an executor, but there was no corresponding institution in France. The problem was to find a form of words which could be applied equally to different legal systems.

17. The CHAIRMAN observed that that was a problem of comparative law, and suggested that the Commis-

sion defer further consideration of paragraph 1 until it had an opportunity of consulting Mr. Scelle.

*It was so agreed.*

18. Mr. BARTOS objected to the wording of paragraph 2 and asked if there were good grounds for altering the original wording, namely, "A diplomatic agent is exempted from giving evidence".

19. Mr. TUNKIN, supporting Mr. Bartos's objection, pointed out that, according to the present wording, even though no compulsion could be brought to bear upon him, a diplomatic agent might be under a legal obligation to give evidence.

*It was agreed that the word "compelled" be replaced by the word "obliged".*

*Paragraph 2, as amended, was adopted.*

20. Mr. LIANG, Secretary to the Commission, thought the English text of paragraph 3 was confusing, due to the occurrence of the words "subjected" and "subject" so close together in the same sentence.

21. He also thought it would be desirable to list the circumstances in which the diplomatic agent was subject to the jurisdiction of the receiving State, namely, those described in sub-paragraphs (a), (b) and (c) of paragraph 1. He suggested, therefore, that the words "in accordance with the provisions of sub-paragraphs (a), (b) and (c) of paragraph 1" should be inserted after the words "receiving State".

22. Sir Gerald FITZMAURICE agreed that the meaning of paragraph 3 was perhaps obscured by the use of the words "subjected" and "subject".

23. Both the Secretary's points would be met if the phrase "except in cases where he is subject to the jurisdiction of the receiving State" were replaced by "except in the cases coming under sub-paragraphs (a), (b) and (c) of paragraph 1".

*It was so agreed.*

*Paragraph 3, as amended, was adopted.*

*Paragraph 4 was adopted.*

24. The CHAIRMAN recalled that Mr. Ago had drawn attention to a fourth case in which a diplomatic agent could not claim immunity from the civil jurisdiction of the receiving State, namely, the case of counter-claims directly connected with the diplomatic agent's principal claim (406th meeting, paras. 11 to 13). In the draft under consideration there was a reference to the case of counter-claims both in paragraph 6 of the commentary to article 23 and in paragraph 3 of article 24. A decision must be taken as to whether the provision relating to counter-claims should be placed in article 23 or in article 24.

*It was agreed to place the provision relating to counter-claims in article 24, and to amend the text of paragraph 3 of that article accordingly.*

#### COMMENTARY ON ARTICLE 23

25. Mr. TUNKIN thought the wording of the second and third sentences of paragraph 1 was not especially felicitous. The second sentence in particular was far too wide in scope, for there were some laws to which diplomatic agents were not subject at all.

26. The CHAIRMAN, speaking as a member of the Commission, pointed out, in support of Mr. Tunkin's

view, that diplomatic agents were not subject to the laws of the receiving State which made personal service compulsory, in the case, for instance, of a public disaster. The principle expressed in the second sentence of the commentary was sound, but some revision of the wording was obviously required.

27. Mr. BARTOS recalled that, when the problem had been discussed at an earlier meeting, he had advocated that the words "insofar as international law may require" should be inserted in the second sentence after the words "receiving State". It was quite clear that diplomatic agents were not subject to laws imposing personal service on the inhabitants of a country.

28. He agreed with the Chairman that the principle expressed in paragraph 1 of the commentary was sound; the Rapporteur of the Commission and the Special Rapporteur should be asked to redraft the second sentence in a more precise form.

29. Mr. SANDSTRÖM, Special Rapporteur, observed that article 32 of the draft contained a provision regarding the duty of diplomatic agents to comply with the laws and regulations of the receiving State. He suggested therefore that one remedy might be to insert the words "(article 32)" after the words "receiving State" in the second sentence.

*It was agreed that paragraph 1 should be redrafted in the light of the discussion.*

*Paragraph 2 was adopted.*

30. With regard to paragraph 3, Mr. FRANÇOIS suggested the deletion of the end of the paragraph, after the words "for the purposes of the mission". Inclusion of those final phrases might give the impression that it was only in the case envisaged that a diplomatic agent could claim immunity in respect of his property.

*It was so agreed.*

31. Mr. AGO suggested a small drafting change at the beginning of the paragraph, namely, that the word "private" should be deleted and the words "of the diplomatic agent" should be replaced by the words "belonging to the diplomatic agent personally".

*It was so agreed.*

*Paragraph 3, as amended, was adopted.*

32. Mr. AGO stated that he was still in doubt as to what was meant by the phrase "relating to a succession there" in the first sentence of paragraph 4, and asked if it referred to a succession to property situated in the receiving State, or to a succession to which there was an entitlement in the receiving State. The phrase concerning the requirement of "the presence of the diplomatic agent" was also ambiguous. With reference to the second sentence, he pointed out that the issue was not whether the proceedings could be held in abeyance, but whether they could be held at all. He suggested therefore that the second sentence should be deleted.

33. Mr. FRANÇOIS suggested that the word "there", following "succession", be deleted.

34. Sir Gerald FITZMAURICE found the phrase "which require the presence of the diplomatic agent" difficult to follow. He suggested its replacement by the phrase "in which the diplomatic agent is concerned".

35. Mr. LIANG, Secretary to the Commission, agreed that the word "presence" was confusing, particularly

since it had been stated in an earlier paragraph of the commentary that a diplomatic agent could not be brought before the courts against his will. He believed that the intention was to refer to proceedings in which the diplomatic agent was a party.

36. Mr. SANDSTRÖM, Special Rapporteur, suggested that paragraph 4 be amended to read:

"The second exception arises in the case of proceedings against the diplomatic agent relating to a succession, whether he is involved as executor or administrator of the will or as heir or legatee."

37. Sir Gerald FITZMAURICE wondered whether the exception really was limited to the case of proceedings against the diplomatic agent. For example, if a will was contested, it might be necessary to cite a large number of persons with a potential interest, and the diplomatic agent might be amongst them, but that could not be regarded as proceedings against him.

38. Mr. SANDSTRÖM, Special Rapporteur, suggested that he prepare a further redraft of paragraph 4, taking into account what Sir Gerald Fitzmaurice had said.

*It was so agreed.*

39. With regard to paragraph 5, Mr. TUNKIN pointed out that, although it might be true that the diplomatic agent himself should not engage in professional or commercial activities outside his official functions, the same could not be said of members of his family who were, however, assimilated to him by virtue of article 27. The second sentence of paragraph 5 should, therefore, be amended to read: "If the diplomatic agent engages in such an activity, those with whom . . ."

*It was so agreed.*

*Paragraph 5, as amended, was adopted.*

*Paragraph 6 was adopted.*

40. Sir Gerald FITZMAURICE and Mr. BARTOS proposed that in paragraph 7 the words "evidence in writing" be replaced by "written or oral testimony".

*It was so agreed.*

*Paragraph 7, as amended, was adopted.*

*Paragraph 8 was adopted.*

41. Mr. FRANÇOIS said that the last sentence of paragraph 9 implied that it was for Governments to take action in order that diplomatic agents should retain a domicile in the sending State. In his view, that was rather a matter of international law and the responsibility, therefore, rested primarily with the Commission.

42. Mr. TUNKIN pointed out that in the preceding sentence it seemed inappropriate, to say the least, to speak of "the drawbacks" of the diplomatic agent's immunity from jurisdiction. The last two sentences might well be deleted since the first three said all that was necessary.

43. Mr. SANDSTRÖM, Special Rapporteur, said he feared that without the last two sentences it might be thought that the text proposed by the Commission removed all existing difficulties, whereas, in fact, it did not. It did not cover the case where the diplomatic agent had not retained domicile in the sending State and

he saw no reason why the Commission should not suggest that all States might ensure that their diplomatic agents retained a domicile within their own territory. What he had in mind was some system such as that used in his own country, where all diplomats on service abroad had fictitious domicile in a certain parish of Stockholm so that they were subject to the jurisdiction of the Swedish courts.

44. Mr. BARTOS felt it was at any rate essential to delete the second part of the last sentence since domicile was no longer the important matter it had once been in determining the competence of courts.

*After further discussion it was agreed to delete the end of the last sentence, after the word "further".*

45. Mr. BARTOS also proposed the deletion of the end of the first sentence, which read: "but one condition of his being amenable to the courts of that country is that they should be competent to try a case like the one concerned under the country's laws".

46. Mr. FRANCOIS and Mr. SANDSTRÖM, Special Rapporteur, felt that those words were essential since they showed that the Commission's aim was to provide for the case where no competent court had been designated in the sending State.

47. The CHAIRMAN said that there was no question about the principle that the diplomatic agent remained subject to the jurisdiction of the sending State. If, however, the sending State had neglected to designate a competent court, such jurisdiction remained without effect.

48. Mr. BARTOS said that the first sentence laid down the principle, while the third sentence covered the case where the sending State had omitted to designate a competent court within its territory—the case dealt with in the second sentence of paragraph 4 of the article. He would not, however, insist on his proposal if other members of the Commission did not agree with him.

49. Sir Gerald FITZMAURICE, replying to a remark by Mr. EDMONDS, said there had never been any intention of making a diplomatic agent's immunity in a receiving State conditional on his being amenable to the courts of the sending State.

*It was agreed that the Special Rapporteur should prepare a redraft of the first part of paragraph 9 in the light of Mr. Bartos's remarks.*

#### ARTICLE 24

50. Mr. AGO proposed the insertion of the words "of its diplomatic agents", in paragraph 1, in order to make it quite clear that the paragraph did not refer to the State's own immunity from jurisdiction.

51. In paragraph 2, the statement in the French text that the waiver must "*émaner*" from the sending State did not make it clear whether the waiver must always come directly from the Government of the sending State, or whether it might be made through the diplomatic agent himself.

52. Paragraph 3, unlike paragraph 2, did not say from whom the waiver must come. He presumed that in the case of the head of mission the waiver must be made by his Government, but that the immunity from jurisdiction of other members of the mission could be waived by the head of the mission himself.

53. Sir Gerald FITZMAURICE remarked that, in the English text, Mr. Ago's first two points were obvious from the context.

54. As for paragraph 3, the Drafting Committee had decided to express it in rather vague terms because of the difficulty of framing a satisfactory detailed provision. It was an essential point that immunity from civil proceedings could be waived by the diplomatic agent himself, the assumption being that he did so with the consent either of his Government or of the head of the mission. He knew of no instance, however, of the question whether the diplomatic agent had obtained such consent having been raised in court.

55. The CHAIRMAN suggested that the first three paragraphs of the article might be redrafted so as to state in the first that the waiver must come from the Government of the sending State, in the second that it must be made expressly in the case of criminal proceedings, and in the third that it might be express or implied in the case of civil proceedings.

56. Mr. AGO thought that that would be going too far.

57. Mr. LIANG, Secretary to the Commission, did not see how paragraph 1 could possibly be interpreted as applying to the immunity of the State itself. If Mr. Ago's amendment were adopted, however, it should be added to both the English and the French texts.

*It was agreed to insert the words "of its diplomatic agents" in paragraph 1.*

58. Mr. AGO supported the insertion of the word "always" after the words "waiver must" in the second paragraph, not because the sense required it, but in order to bring out the contrast with the following paragraph where the waiver need not always be express.

*It was so agreed.*

The meeting rose at 6.5 p.m.

### 427th MEETING

*Wednesday, 26 June 1957, at 3 p.m.*

*Chairman: Mr. Jaroslav ZOUREK.*

#### Consideration of the Commission's draft report covering the work of its ninth session (A/CN.4/L.70 and Add.1 to 3 (continued))

##### CHAPTER II: DIPLOMATIC INTERCOURSE AND IMMUNITIES (A/CN.4/L.70/ADD.1) (continued)

##### II. DRAFT ARTICLES CONCERNING DIPLOMATIC INTERCOURSE AND IMMUNITIES (continued)

##### SECTION II. DIPLOMATIC PRIVILEGES AND IMMUNITIES (continued)

##### Sub-section C. Personal privileges and immunities (continued)

#### ARTICLE 24 (continued)

1. The CHAIRMAN said that, in the light of the discussion at the previous meeting on article 23, paragraph 1, the Special Rapporteur suggested that the second