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Summary record of the 427th meeting

Topic:
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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

sentence of article 24, paragraph 3, should be amended to read simply: "An implied waiver is presumed to have occurred if a diplomatic agent appears as defendant without claiming any immunity".

It was so agreed.

Subject to the above amendment, to the amendments adopted at the previous meeting, and to one minor drafting change in paragraph 4, the text of article 24 was adopted.

Commentary on article 24

Paragraphs 1 to 4 of the commentary were adopted subject to a number of minor drafting changes.

2. Mr. VERDROSS suggested the deletion of paragraph 5. It went without saying that the general rules governing interpretation of declarations by States were applicable.

It was so agreed.

ARTICLE 25

3. Mr. KHOMAN suggested that the word "governmental" at the beginning of the text be replaced by "national".

It was so agreed.

The text of article 25, as amended, was adopted.

COMMENTARY ON ARTICLE 25

4. Mr. TUNKIN pointed out that it would be more in accordance with the text of the article if the first sentence of paragraph 1 were amended to read somewhat as follows:

"The general practice is to grant a diplomatic agent exemption from dues and taxes with certain exceptions, which are listed in the text of the article."

5. The last sentence should also be deleted since several countries granted diplomatic agents exemption from, for example, indirect taxes without making the exemption subject to reciprocity.

6. The CHAIRMAN thought it might be desirable to say something on the lines of the last sentence, but agreed that the words "subject to reciprocity" should be deleted.

7. He suggested that the Special Rapporteur should submit a redraft of paragraph 1 in the light of Mr. Tunkin's remarks.

It was so agreed.

8. Mr. LIANG (Secretary to the Commission) suggested with regard to paragraph 2 that a clearer wording than "the heading under which the charge is levied" might perhaps be found. He also felt that the words "the service must actually have been rendered" were unduly restrictive; in certain instances the charge could be levied in advance of the service being rendered, as in the case of a telephone subscription.

9. Mr. SCALLE suggested that it might be sufficient if paragraph 2 were amended to read simply:

"The Commission's intention in wording subparagraph (e) was to indicate that the charge must be in payment for a specific service, rendered or to be rendered."

It was so agreed.

ARTICLE 26

10. Mr. KHOMAN felt it was desirable that in subparagraph (b) of paragraph 1 some better French rendering of the English words: "belonging to his household" should be found than "*appartenant à son ménage*".

11. Mr. AMADO agreed that the expression used in the French text was most inelegant. He could not really see the force of the objections to the commonplace expression "*vivant sous le même toit*"; although it did not perhaps cover every case, no difficulties would arise provided it was interpreted in a reasonably liberal way. In any case "*faisant partie de son ménage*" would be less objectionable than "*appartenant à son ménage*".

12. Sir Gerald FITZMAURICE, Rapporteur of the Commission, said that in the English text at least, "belonging to his household" was infinitely better than "living under the same roof".

13. The CHAIRMAN suggested that the English text be retained and that some more elegant way be sought of rendering it in French.

It was so agreed.

14. Mr. FRANÇOIS said he regretted that he had been absent during the discussion of article 26, and wondered whether the Commission fully realized the implications of the words: "or articles the import or export of which is prohibited by the law of the receiving State" which appeared in paragraph 2. It followed logically from the text that an ambassador could not, for example, import a drug such as heroin whose import was prohibited by the law of the receiving State, even though he had a prescription for it from his doctor in the sending State. Many other examples came to mind where the text of paragraph 2 appeared to be directly contrary to accepted practice.

15. Sir Gerald FITZMAURICE, Rapporteur, thought that Mr. François had drawn attention to an important point. There were many countries which prohibited the import, for example, of certain plants, of bullion or of explosives. To take the example referred to by Mr. François, it would clearly be intolerable to a country which prohibited the import of heroin if diplomatic baggage were used for wholesale importation of the drug; but, as Mr. François had pointed out, it would be quite contrary to existing practice if the ambassador were prevented from importing for his own personal use proprietary medicines containing that drug. It might be preferable to say "or articles in circumstances in which their import or export is prohibited by the law of the receiving State or is permitted only subject to certain conditions".

16. Mr. AMADO said that the normal practice was for a diplomatic mission to refer the matter to the ministry of foreign affairs of the receiving State in all cases where one of its members or the mission itself wished to import prohibited goods.

17. Mr. BARTOS said that a distinction was usually made between accompanied and unaccompanied baggage. In the former case the normal practice was to take a diplomatic agent's word that his baggage contained no prohibited articles. In the latter case the same procedure was followed as for imported goods; an import licence was issued on the basis of a declaration sent to the ministry of foreign affairs of the receiving State.

ing State, whose customs officials could inspect the baggage to see that the contents corresponded to the declaration.

18. As regards prohibited goods generally, he recalled that in "prohibition" days diplomatic agents in the United States of America had been allowed to import a "reasonable quantity" of liquor. Similarly, the Fascist Government of Italy had at one time prohibited the import of publications printed in Serbo-Croat, but that prohibition had never been held to apply to printed matter addressed to the Yugoslav Ambassador. Again, certain countries prohibited the import of drugs that had not been tested by the national authorities, but ambassadors enjoyed exemption in that respect.

19. He proposed that the Commission should leave paragraph 2 as it stood, but refer in the commentary to the fact that a certain degree of latitude was allowed in that respect.

20. Mr. KHOMAN suggested that the scope of the paragraph could be restricted if the relevant words were amended to read: "or articles the import or export of which without special or prior permission is regarded by the law of the receiving State as a criminal offence".

21. Mr. FRANÇOIS pointed out that Mr. Khoman's suggestion did not meet his objection to the text of paragraph 2, which was much stricter than existing practice. If an ambassador wished to bring back with him, on his return from leave, certain drugs the import of which was prohibited, it was certainly not the existing practice for him to send them separately as goods; he just included them with his personal baggage, which was exempt from inspection.

22. The CHAIRMAN put to the vote Mr. Bartos's proposal that the text of paragraph 2 be left as it was, but that the Special Rapporteur be requested to make a suitable reference to the matter in the commentary.

The proposal was adopted by 12 votes to 2 with 3 abstentions.

The text of article 26 was adopted, subject to the decision regarding the French text of paragraph 1 and to certain minor drafting changes.

COMMENTARY ON ARTICLE 26

Paragraph 1 was adopted.

23. Mr. TUNKIN observed that paragraphs 2, 3 and 4 all related to personal effects; it would be clearer, therefore, if all three were merged in a single paragraph.

24. Regarding paragraph 4, moreover, he pointed out that the draft contained many provisions which were in the nature of progressive development, but that only in paragraph 4 was that fact stressed. He proposed that the paragraph be amended to read:

"In view of the wide-spread nature of these practices, the Commission considers that advantage should be taken of the present work of codification to suggest accepting them as rules of international law."

25. Mr. SANDSTRÖM, Special Rapporteur, suggested that he redraft the three paragraphs in the light of Mr. Tunkin's remarks.

It was so agreed.

26. Mr. BARTOS proposed that in paragraph 5 the word "reasonable" be inserted before the word "restrictions".

It was so agreed.

Paragraph 5, as amended, was adopted.

Paragraph 6 was adopted.

27. With regard to paragraph 7, Mr. BARTOS proposed that it should be stipulated that only a reasonable quantity of prohibited goods could be imported, and that they must be for the diplomatic agent's personal use.

28. Mr. LIANG, Secretary to the Commission, wondered whether the Special Rapporteur could agree to deleting the last sentence which was unnecessary and might be regarded as controversial.

29. Mr. KHOMAN felt that the entire paragraph was not in harmony with the text of paragraph 2 of the article.

30. Mr. PAL proposed that further consideration of paragraph 7 be deferred until the Special Rapporteur had submitted a revised text in the light of the decision that had been taken on the proposal of Mr. Bartos.

It was so agreed.

ARTICLE 27

31. Mr. KHOMAN suggested that the French title of the article be changed to "*Personnes bénéficiant de privilèges et immunités*".

It was so agreed.

32. Mr. TUNKIN suggested the addition of the words "apart from diplomatic agents" at the beginning of paragraph 1, in order to make it cover all persons entitled to privileges and immunities.

It was so agreed.

33. Mr. KHOMAN suggested that the words "*n'implique pas une gêne excessive pour*" in the French text of paragraph 3 be replaced by the words "*n'entrave pas d'une manière excessive*".

It was so agreed.

The text of article 27, as amended, was adopted.

COMMENTARY ON ARTICLE 27

34. Mr. SANDSTRÖM, Special Rapporteur, proposed the addition, at the end of paragraph 1, of the words "apart from that already mentioned".

It was so agreed.

Paragraph 1, as amended, was adopted.

35. Mr. TUNKIN said the meaning of the words "as a person on his own account" in paragraph 2 was not clear to him. Persons enjoyed privileges and immunities in their capacity as members of a diplomatic mission.

36. Mr. YOKOTA agreed with Mr. Tunkin. The sentence was neither clear nor necessary. He proposed its deletion.

37. Sir Gerald FITZMAURICE, Rapporteur, remarked that, although the idea might perhaps be better expressed, the sentence constituted an important link in the argument. After recalling the earlier discussion on the subject (407th meeting, paras. 85 to 91; 408th meeting, paras. 60 to 84), he proposed the following new wording:

"The answer to the question depends on whether it is regarded from the point of view of the work of the individual member or from that of the work of the mission as a whole."

It was agreed that paragraph 2 should be redrafted in the light of the discussion.

Paragraphs 3, 4 and 5 were adopted.

38. Mr. BARTOS proposed that the words "persons in the first group" at the beginning of paragraph 6 be replaced by the words "members of the administrative and technical staff" and that the words "by a majority vote" be inserted before the word "recommends" in the last sentence.

It was so agreed.

Paragraph 6, as amended, was adopted.

Paragraph 7 was adopted.

39. The CHAIRMAN suggested that the words "members of the groups" at the beginning of paragraph 8 be replaced by a specific reference to the categories of staff who enjoyed full privileges and immunities.

It was so decided.

40. Mr. LIANG, Secretary to the Commission, pointed out that it was not clear from the English text whether "close ties and special circumstances" in the last sentence but one were two separate qualifications or only one. The last sentence also was unsatisfactory; diplomatic protocol could not decide such matters, though the protocol section of the ministry of foreign affairs might frame rules on the subject.

It was agreed to delete the last sentence and, in the last sentence but one, to substitute "necessary qualifications" for "a necessary qualification".

Paragraph 8, as amended, was adopted.

41. Mr. SANDSTRÖM, Special Rapporteur, suggested the insertion of the words "in the case of those who are not nationals of the receiving State" after the words "dues and taxes" in paragraph 9.

It was so agreed.

42. Mr. YOKOTA pointed out that there were some States in which private servants did enjoy considerable privileges and immunities. He suggested that the words "should not enjoy" be replaced by "do not generally enjoy".

43. Mr. EL-ERIAN remarked that no point of theory was involved, but merely one of practice, and he, for one, was not at all clear as to the general practice of States in the matter.

44. He therefore suggested indicating that the Commission reserved its final position pending study of the observations of Governments.

45. Mr. LIANG, Secretary to the Commission, wondered whether the words "a majority of" at the beginning of the paragraph need be retained. On a number of more important points, the Commission had not indicated in its report that the decision had not been unanimous.

46. The CHAIRMAN, replying to Mr. El-Erain, pointed out that all the Commission's proposals on the subject of diplomatic intercourse and immunities were so far merely tentative, and that no final decision could be taken until the observations of Governments had been received. He thought it essential to include in the commentary some observation on paragraphs 3 and 4 of the article.

47. Sir Gerald FITZMAURICE, Rapporteur, suggested that the paragraph be redrafted to read:

"Paragraph 3 of the article is believed to reflect the existing law on the subject, but the matter is one on which the Commission would particularly welcome the comments of Governments."

48. Mr. TUNKIN considered the question not of sufficient importance to warrant a special invitation to Governments to comment on it.

49. Mr. PAL suggested inserting the words "as of right" between "they should not" and "enjoy any privileges or immunities".

50. Sir Gerald FITZMAURICE, Rapporteur, supported that proposal.

51. Mr. EL-ERIAN pointed out that some States attached much importance to the enjoyment of privileges and immunities by the private servants of the head of the mission at least, while others did not. In the absence of any clear principle, he would prefer the Commission to indicate that it reserved its final position.

52. Mr. SANDSTRÖM, Special Rapporteur, pointed out that the Commission had so far only issued a special invitation to Governments to comment where an article contained two alternatives. He agreed with Mr. Tunkin that to do so in the case in point would be attributing too much importance to the question.

53. The CHAIRMAN suggested leaving the text as it stood, except for the addition of the Special Rapporteur's amendment (para. 41 above).

54. After further discussion, Mr. EL-ERIAN withdrew his proposal.

It was agreed that paragraph 9 should be redrafted in the light of the discussion.

55. Mr. BARTOS considered that the second sentence in paragraph 10 did not give an entirely accurate reflection of the discussion on the question of diplomatic lists (411th meeting, paras. 6 to 23). Although the enjoyment of diplomatic privileges and immunities could not be made conditional on the formality of submitting a list of entitled persons, the fact remained that, without that formality, it was impossible for the local authorities to know whether a particular person enjoyed diplomatic immunities or not. He recalled in that connexion an incident involving an Ethiopian envoy who had recently arrived in the United States of America. The United States Government, though regretting the incident *in abstracto* claimed *in concreto* that its authorities could not be blamed, as the envoy had not notified his arrival and had no document to prove his diplomatic immunity. The presence of a person's name on a diplomatic list at least warranted the presumption that he was entitled to privileges and immunities.

56. Sir Gerald FITZMAURICE recalled that the question had been very fully discussed by the Commission, and that there was a considerable body of case law on the subject.

57. The English text of the second sentence in the paragraph should be amended so as to state that diplomatic lists could in no circumstances constitute conclusive evidence; they were obviously evidence of some sort, and no one denied that they were very useful. The point raised by Mr. Bartos was really covered by the last sentence of the paragraph.

58. Mr. BARTOS agreed that his point might be covered by the last sentence provided the words "and in that case only persons on the list can claim privileges and immunities" were added to it.

59. Mr. AGO remarked that the paragraph sought to deal with two distinct questions at once. The first and only real question was that of the value of the lists as evidence. The second, less important, question was that of the alleged obligation on missions to submit a list of members to the ministry of foreign affairs.

60. He suggested redrafting the beginning of the paragraph on the following lines:

"In connexion with this article, the Commission considered the value, as proof, of the lists of persons enjoying privileges and immunities normally submitted to the ministry of foreign affairs."

61. Mr. LIANG, Secretary to the Commission, thought it would be wiser to make no reference to the question of the obligation to submit lists. The last sentence in the paragraph need not be retained since the point was already covered by the previous sentence.

62. Mr. SANDSTRÖM, Special Rapporteur, said that although both questions covered in the paragraph had been raised during the discussion, there was no real reason why both should be referred to in the commentary. He therefore had no objection to Mr. Ago's proposal.

63. Mr. TUNKIN said that he could accept Mr. Ago's proposal with the addition of a sentence expressing Mr. Bartos's point that, when a person's name was on a diplomatic list, it might be presumed that he was entitled to privileges and immunities.

64. Mr. BARTOS said that he could accept Mr. Ago's proposal were it not for the fact that it appeared to assume that such lists would be submitted. It did not cover cases where no list had been submitted and the person had not been officially presented. There was, for example, no rule that the names of service staff should be submitted to the ministry of foreign affairs. In the event of incidents involving such staff, the impossibility of the local authorities' being aware that a person was privileged must prevail over the fact that he was legally entitled to privileges.

It was agreed to redraft paragraph 10 in the light of the discussion.

The meeting rose at 6.15 p.m.

428th MEETING

Thursday, 27 June 1957, at 9.30 a.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 28 AND COMMENTARY

1. The CHAIRMAN said that the terms in which the exception to the rule in the article was couched—"other than the child of one of its nationals"—appeared to suggest that diplomatic agents who were nationals of the receiving State were not themselves subject to its laws governing the acquisition of nationality. That was certainly not the Commission's intention.

2. Mr. AGO pointed out that, at any rate in the French text, the words quoted by the Chairman could also be interpreted to mean that a foreign diplomatic agent's child would come within the ambit of the local nationality laws if the other parent was a national of the receiving State. The case was common enough to warrant attention.

3. The article was also unsatisfactory in other respects. The Commission was solely concerned to avoid the possibility of the receiving State's nationality being imposed on a diplomatic agent's child by the operation of *jus soli*; but the case of the diplomatic agent who himself wished his child to have the receiving State's nationality should also be considered. He therefore proposed that the words "shall be subject to the laws of the receiving State" be replaced by "shall ever be obliged to acquire such nationality by virtue of the local laws".

4. Mr. BARTOS and Mr. FRANÇOIS both said they preferred the text in the draft report, since the child of a foreign diplomatic agent should not automatically acquire the receiving State's nationality by virtue of its laws, even if the parents were willing.

5. Mr. HSU thought that the scope of the words "no person enjoying diplomatic privileges and immunities" was not clear. Did they mean "no person enjoying the full diplomatic privileges and immunities enjoyed by diplomatic agents, administrative and service staff and their families", or did they mean "no person enjoying any of the privileges and immunities referred to in the draft"?

6. It seemed to him that the difficulties with which the Commission was faced were due to the attempt to draft the article in negative rather than in positive terms. He thought that it might be better to amend it to read as follows:

"A child born to members of a diplomatic mission other than nationals of the receiving State shall enjoy immunity from the operation of the nationality laws of the receiving State."

7. Mr. EL-ERIAN pointed out that, although the commentary was limited to the case of acquisition of nationality at birth *jure soli*—and that was, he thought, the only case the Commission had had in mind—the text of the article went much further and covered the case of the acquisition of nationality by naturalization or marriage. If the Commission really wished to broaden the scope of the article to that extent, it would clearly have to amend the commentary. In his view, however, it was sufficient to regulate the acquisition of nationality at birth, since the acquisition of nationality by naturalization entailed a voluntary act on the part of the