Document:-
A/CN.4/SR.460

Summary record of the 460th meeting

Topic:
Diplomatic intercourse and immunities

Extract from the Yearbook of the International Law Commission:-
1958 , **vol. I**

460th MEETING

Tuesday, 10 June 1958, at 9.45 a.m.

Chairman: Mr. Radhabinod PAL.

Diplomatic intercourse and immunities (A/3623, A/CN.4/114 and Add.1-6, A/CN.4/116 and Add.1-2, A/CN.4/L.72, A/CN.4/L.75) *(continued)*

[Agenda item 3]

DRAFT ARTICLES CONCERNING DIPLOMATIC INTERCOURSE AND IMMUNITIES (A/3623, PARA. 16; A/CN.4/116/ADD.1-2)

ARTICLE 24 *(continued)*

Paragraph 2 (continued)

1. Mr. EDMONDS observed that it was clear from paragraph 1 of article 24 that a diplomatic agent could, in addition to performing his official functions, also engage in private activities. All the exceptions to his immunity from jurisdiction mentioned in paragraph 1 related to cases in which he was acting in his private capacity. Paragraph 2 stated that a diplomatic agent was not obliged to give evidence. Surely, however, the immunity could not extend to cases in which the diplomatic agent had been acting in his private capacity. If a diplomatic agent could not be compelled to give evidence in such cases, he would be able to escape the consequences of any transaction into which he entered in his private capacity. That would be a most undesirable state of affairs, and for that reason the rule laid down in paragraph 2 should likewise be qualified by the exceptions provided for in paragraph 1.

2. Mr. HSU said that the discussion involved two main questions: should the exceptions provided for in paragraph 1 also be mentioned in paragraph 2, and should the rule stated in paragraph 2 be expressed in a modified form?

3. He was opposed to any attempt to modify the rule. It had been suggested, for example, that the paragraph should state that a diplomatic agent could decline a request to give evidence or that he could not be compelled to give evidence. Both those formulae would alter the rule and establish a moral obligation as distinct from a legal one. There was no need for any such change. Immunity from the obligation to give evidence was an important part of the diplomatic agent's immunity from jurisdiction generally and its effects were even more far-reaching than the effects of his immunity from criminal jurisdiction. If a sending State waived its right to a diplomatic agent's immunity from criminal jurisdiction, the position was clear and steps would be taken to replace the diplomatic agent in question, but if the immunity from the obligation to give evidence was waived the result would be to take the diplomatic agent away from his work and perhaps even prevent him from carrying out his functions as diplomat; and that would be true whether he was involved in the case in either his private or his official capacity. It would be better therefore not to attempt to modify the statement of the basic principle as contained in the provision drafted at the previous session. In actual practice, he added, there was hardly ever any difficulty and diplomatic agents usually consented to give evidence in writing when they could not appear in court. If a diplomatic agent was unreasonable in such a matter, it was always open to the Government of the receiving State to take suitable action, but there was no need to prescribe a specific procedure.

4. While he was not strongly opposed to the Special Rapporteur's revised draft of the provision (A/CN.4/116/Add.1), in which the exceptions provided for in paragraph 1 were mentioned in paragraph 2, he thought it would be better to avoid making the change, because its effect might be to hamper diplomatic agents in their activities. Had the question of giving evidence been more carefully considered at the Commission's preceding session, the exceptions might not even have been included in paragraph 1. If some change had to be made in paragraph 2, perhaps the best solution would be to provide that in cases of the kind mentioned in sub-paragraphs (*a*), (*b*) and (*c*) of paragraph 1, a diplomatic agent might be requested to give evidence, but could not be compelled, or might refuse, to do so.

5. Mr. LIANG, Secretary to the Commission, said that the paragraph raised interesting questions concerning the basis of diplomatic immunity and the application of theory. As stated in the commentary on section II of the draft (A/3623, para. 16), a theory which seemed to be gaining ground was the "functional necessity" theory. A diplomat's immunity from the obligation to give evidence was intimately connected with his functions in the sense that the giving of evidence would take up a great deal of his time.

6. The discussion had shown that all were agreed that, if there was an obligation to give evidence, it was not an enforceable one. It had nevertheless been urged that a legal, or at least a moral, obligation existed. In his opinion, the moral obligation was outside the scope of the Commission's work, and the legal obligation would be difficult to establish.

7. The theory that a diplomat was immune from process but not from the substantive law would be hard to apply. A citizen was obliged to give evidence because it was one of his duties as a citizen to do so, and a similar obligation rested upon foreigners by virtue of their qualified allegiance, but there was no doctrine to show that a diplomat was under any such obligation.

8. The attempt to establish a connexion between paragraphs 1 and 2 had not been altogether successful. It was an *a fortiori* argument to say that, in cases where a diplomat had consented to jurisdiction — which were in effect cases of the kind mentioned in sub-paragraphs (*a*), (*b*) and (*c*) of paragraph 1 — he was under an obligation to give evidence. Those cases were in fact cases in which the diplomat was a party to the proceedings and not a witness proper. It was therefore in his interest in those cases to consent to jurisdiction, for whether he was a plaintiff or a defendant he would

lose his case by failing to appear in court. It was questionable, however, whether the statements he made in court as a plaintiff or defendant could be regarded as evidence, for the term "evidence" meant the statements of witnesses. Consequently, if it was necessary to establish a legal obligation for the diplomatic agent to give evidence, it must be established separately and not upon the basis of the exceptions mentioned in sub-paragraphs (*a*), (*b*) and (*c*) of paragraph 1.

9. Mr. ALFARO said the discussion had shown that many members of the Commission were of the opinion that diplomatic agents had a moral or even a legal obligation to give evidence in cases of the kind mentioned in sub-paragraphs (*a*), (*b*) and (*c*) of paragraph 1. It was the unanimous view, however, that diplomatic agents could not be compelled to fulfil that obligation. Similarly, no compulsion could be exercised against diplomatic agents to carry out the obligations mentioned in article 33.

10. Mr. François and Mr. Scelle had expressed the view that paragraph 2 should state explicitly that it was the obligation of diplomatic agents to give evidence in civil cases of the kind mentioned in sub-paragraphs (*a*), (*b*) and (*c*) of paragraph 1. Mr. Bartos on the other hand had suggested that courts should be recognized as having the right to request diplomatic agents to give evidence in such cases in a form compatible with the dignity of their office. In order to safeguard the basic principle of the diplomatic agent's immunity, and to reconcile the two views to which he had referred, he would suggest that paragraph 2 should be revised to read:

> "A diplomatic agent may not be compelled to give evidence. Nevertheless, in the cases specified in sub-paragraphs (*a*), (*b*) and (*c*) of paragraph 1, the local courts may request him to make a statement as a witness, and if the diplomatic agent consents, he shall give his evidence either in writing or in some other form to be agreed upon with the court concerned."

11. If the diplomatic agent was prepared to give evidence, the only question to be settled would be the form in which the evidence should be given. To appear in court as a witness might in some circumstances be incompatible with the dignity and status of the diplomatic agent, who should therefore be able to give his evidence in writing or in some other convenient form.

12. Mr. VERDROSS observed that the term used in paragraph 2 was "obliged". The Commission should be clear as to the meaning of that term. If it was thinking of a legal obligation, the paragraph should state of what the obligation consisted. An obligation without any legal consequence was no juridical obligation at all. If, for example, a diplomatic agent failed to observe the obligations laid down in article 33, the sanction might be to declare him *persona non grata*. Such action could obviously not be taken, however, in the case of a refusal on the part of a diplomatic agent to give evidence. He therefore agreed with Mr. Amado that there was no such obligation.

13. Mr. AMADO said that the immunity of the sending State was involved. That immunity belonged to the sending State and not to the person of the diplomatic agent himself. The confusion in the current debate had arisen because of the exceptions provided for in paragraph 1. At the Commission's preceding session he had voted against those exceptions.

14. Mr. YOKOTA said the question was whether a diplomatic agent could be under legal obligation to give evidence, not whether such an obligation could be enforced.

15. If a diplomatic agent was involved in cases of the kind referred to in sub-paragraphs (*a*), (*b*) and (*c*) of paragraph 1 he was under the civil jurisdiction of the receiving State and therefore under an obligation to comply with the receiving State's law of civil procedure. If therefore he was required to give evidence under that law, there was no good reason why he should not comply.

16. In reply to Mr. Verdross, he said he could not agree that the sole test of the existence of a legal obligation was whether it was backed by legal sanctions. For example, a diplomatic agent had a duty to respect the laws and regulations of the receiving State, but could not be forced to respect them; the receiving State's remedy in serious cases of failure to respect the laws and regulations was to declare the diplomatic agent concerned unacceptable, and in less serious cases to express regret or lodge a protest.

17. He was therefore in favour of the Special Rapporteur's proposed amendment to paragraph 2.

18. Faris Bey EL-KHOURI said under the Islamic law the giving of evidence was regarded as a sacred duty. A witness was never compelled to give evidence, and was never summoned to appear in court, but failure to give evidence was regarded as a mortal sin. Witnesses had to be produced by the party whose case their evidence was intended to support.

19. The reason for the inclusion of paragraph 2 in article 24 was presumably to protect the diplomatic agent's immunity. That immunity, however, was already protected by article 22, which was so clearly worded that it was obvious that no sanction of any kind could be applied against a diplomatic agent. Paragraph 2 was therefore unnecessary and should be deleted. Its retention would have the disadvantage of giving the idea that any moral or legal obligation to give evidence was annulled.

20. Mr. TUNKIN said that the discussion had shown that a very broad meaning was to be attached to the word "evidence" as used in the English text. It covered both the statements which the plaintiff or defendant might make on his own behalf and also the evidence of witnesses. In those circumstances, the Special Rapporteur's proposal might lead to a misunderstanding, for if the words "except in cases coming under sub-paragraphs (*a*), (*b*) and (*c*) of paragraph 1" were added, they might be construed to mean that a diplomatic agent was under an obligation to give

evidence not only in his own case, if it came under sub-paragraphs (*a*), (*b*) or (*c*), but also as a witness in cases which might concern other diplomatic agents. The difficulty might be overcome by amending paragraph 2 to read: "A diplomatic agent is not obliged to give evidence as a witness."

21. He agreed with Mr. Yokota that in those cases the laws of the receiving State should be applied, since the diplomatic agent was under the civil or administrative jurisdiction of that State. In most of those cases, however, there would be no need to bring pressure upon him to give evidence, because he would be involved either as plaintiff or as defendant, as his own interests would suffer if he failed to appear in court.

22. He therefore thought paragraph 2 should be modified in the manner he had suggested.

23. Sir Gerald FITZMAURICE said it had emerged clearly from the discussion that no reference should be made in paragraph 2 to the exceptions provided for in paragraph 1. As the Secretary had very pertinently observed, in most cases of the kinds referred to in sub-paragraphs (*a*), (*b*) and (*c*) of paragraph 1, a diplomatic agent would be either a plaintiff or a defendant, and his interests would suffer if he failed to appear. It was therefore neither necessary nor desirable, in order to cover these cases, to provide for any special exception to the general principle that a diplomatic agent should not have to appear as a witness.

24. There was, however, a wider and much more difficult problem, namely, whether a diplomatic agent was in certain circumstances under a legal obligation to give evidence. One could visualize cases other than those mentioned in sub-paragraphs (*a*), (*b*) and (*c*) of paragraph 1; for example, if a crime was committed in the diplomat's house, or if his car was involved in an accident in which a person was killed, would not the diplomatic agent be at least under a strong moral obligation to give evidence? It could be argued that the general principle was that a diplomatic agent had a duty to respect the laws of the receiving State and was under an obligation to give evidence in cases where to do so would not be incompatible with the performance of his official duties.

25. Nevertheless, important though these considerations were, he thought that on balance the view expressed by Mr. Amado was the correct one. A State might have strong reasons for not wishing its diplomatic agent to give evidence. Mr. Tunkin's suggestion might be acceptable, but on the whole he thought it would be better to retain the wording of paragraph 2 as drafted at the previous session. It would certainly be inadvisable to qualify the paragraph by a reference to the exceptions provided for in paragraph 1, especially since such cases represented only a part, and that the least important part, of the whole problem.

26. Mr. ZOUREK said that it would be contrary to international law to oblige a diplomatic agent to give evidence. If it was desirable that he should give evidence, the receiving State and the sending State could reach an agreement enabling him to do so. The question of moral obligation, on the other hand, was one that went beyond the scope of the Commission's draft.

27. To oblige a diplomatic agent to give evidence would lead to great dangers; for he was not a simple private individual, but a representative of the sending State, and if he refused to give evidence he would be open to attack by the press and by public opinion in the receiving State. Indeed, a refusal might lead to his being declared *persona non grata*. The exceptions in paragraph 1 related to proceedings in which the diplomatic agent himself was an interested party, so that he would appear as a party and not as a witness. In other words, his position in those exceptional cases was different from that of a witness. In his opinion, it was the very essence of immunity from jurisdiction that a diplomatic agent, while under a strict duty to respect such laws of the receiving State as established substantive rules (material law), could not be made subject to that State's adjective laws, including rules on the giving of testimony in court or before the administrative authorities.

28. Mr. MATINE-DAFTARY agreed that a diplomatic agent enjoyed immunity not because of his person but because of his character as a representative. If the Commission admitted exceptions to his immunity from jurisdiction when he engaged in commercial activities in the receiving State, the assumption was that he did so not as a diplomatic agent but as a business man. If those exceptions were permitted, it did not seem unreasonable that the rigid rule that the diplomatic agent should not be obliged to give evidence should similarly have exceptions. In other words, the Commission must either admit exceptions or not, and if a diplomatic agent could be a party in proceedings, why should he not be a witness? As Mr. García Amador had said during the ninth session, incomplete rights existed, and if incomplete rights existed there seemed no good reason why incomplete obligations should not likewise exist. He was therefore in favour of a provision allowing the diplomatic agent to give evidence in certain circumstances.

29. Mr. AGO said that the problem raised by paragraph 2 had nothing to do with the special exceptions in paragraph 1, so that the text was in no way improved by a reference to those exceptions. The matters in which the problem of giving evidence might arise were much more important. It was right to hold that a diplomatic agent was, within certain limits, immune from jurisdiction. But the fact that he was thereby exempted, to some extent, from compliance with local procedural laws in no way meant that he could disregard the fundamental laws of the country. If he witnessed a crime, he was not relieved of his duty to testify by the mere fact that he could not be compelled to appear as a witness before a court.

30. Mr. FRANÇOIS held the view that the right of the diplomatic agent to refuse to give evidence was not unlimited. In some cases, naturally, the diplomatic agent might have cogent reasons for his refusal; but

if he had not, the receiving State would be free to complain to the sending State, and if it did not receive satisfaction it could even declare him *persona non grata*. He considered, therefore, that both the original and the amended paragraph 2 went too far; the provision should be drafted in less categorical terms.

31. Mr. TUNKIN said that if a diplomatic agent were compelled to give evidence, the distinction between an ordinary citizen and such an agent would disappear and the whole edifice of diplomatic immunities would crumble.

32. Mr. VERDROSS maintained that a diplomatic agent must necessarily respect the laws of the receiving State, for, if he did not, he could be declared *persona non grata* and would even be liable to punishment on return to the receiving State after the expiry of his term as diplomatic agent. By contrast, the refusal of a diplomatic agent to give evidence could not give rise to any sanction, inasmuch as his general immunity from jurisdiction in the receiving State extended to the giving of evidence. He considered the text as amended by the Special Rapporteur satisfactory.

33. Mr. LIANG, Secretary to the Commission, referred for purposes of illustration to the legislative provisions governing the testimony of diplomatic agents in force in Austria and Colombia.[1] In both countries, an elaborate procedure was prescribed in cases in which diplomatic agents were asked to testify. Neither of the two legislations in question, however, provided that the diplomatic agent was legally obliged to give evidence, and in that respect the legislation of other countries was analogous.

34. Sir Gerald FITZMAURICE said that from the illustrative examples cited by the Secretary it was clear that a diplomatic agent was not under a direct obligation to give evidence, or at least could not be required to give evidence in the same way as an ordinary private citizen of the receiving State. The implication was that he could refuse to give evidence.

35. At the ninth session there had been a long discussion on the provision which had become article 33, particularly regarding the subjection of the diplomatic agent to the laws of the receiving State. The Commission had held that he was not subject to all those laws but had the duty to respect in general the laws of the receiving State. In the same way, he could not be obliged to give evidence, which was, as had been pointed out, a matter of procedural law rather than of fundamental law, so that, in spite of what Mr. Ago had said, it would be difficult to say that he had a duty to give evidence. Nevertheless, the language of paragraph 2 might well be toned down, and he therefore suggested that it read either: "A diplomatic agent is not obliged to appear as a witness", or: "A diplomatic agent can decline to give evidence". He was against the suggestion that any basic obligation to do so be mentioned.

36. Mr. AMADO said that a diplomatic agent witnessing a murder could hardly refuse to give evidence. The vital point, however, was that he could not be compelled to give evidence.

37. Mr. SANDSTRÖM, Special Rapporteur, said that in view of the arguments advanced during the discussion, he withdrew his proposed amendment to paragraph 2 (A/CN.4/116/Add.1).

38. In his view paragraph 2 as drafted at the previous session meant that a diplomatic agent could not be compelled to give evidence. He should, however, use that privilege with caution, for the question was a delicate one and clearly involved co-operation between the diplomatic mission and the authorities of the receiving State. Obviously if a diplomatic agent witnessed a murder he would give evidence, but there was no need for him to appear in court for that purpose. Perhaps the text could be changed by the Drafting Committee in the light of the views expressed.

39. Mr. AGO agreed with Sir Gerald Fitzmaurice that the text might be revised in order to restrict its meaning. It might read: "A diplomatic agent shall be exempt from rules of procedure concerning evidence", or, as Sir Gerald had suggested: "A diplomatic agent is not obliged to appear as a witness". The wording could, however, be left to the Drafting Committee.

40. The CHAIRMAN said that, as the Special Rapporteur had withdrawn his amendment and as the paragraph had been fully discussed, he proposed that it be put to the vote, subject to any drafting improvements suggested by the Drafting Committee.

41. As there was no objection, the Chairman put to the vote paragraph 2 of article 24 as drafted at the ninth session, subject to drafting changes.

Paragraph 2 was adopted by 12 votes to none, with 4 abstentions.

42. Mr. ALFARO explained that in voting for paragraph 2 he understood the word "obliged" to mean "compelled" as the Special Rapporteur had interpreted it.

43. Mr. EDMONDS said that he had voted in favour of the retention of paragraph 2 on the assumption that the amendments proposed by the Drafting Committee would permit recognition of the exceptions made in paragraph 1.

44. Mr. BARTOS said he had voted in favour of paragraph 2 because he understood the paragraph to mean that the rules of immunity excluded evidence given without the consent of the diplomatic agent's Government.

Paragraph 3

45. In reply to a question by Mr. YOKOTA, Mr. SANDSTRÖM, Special Rapporteur, said that it was clear that the reference in paragraph 3 to execution

[1] *Laws and Regulations regarding Diplomatic and Consular Privileges and Immunities* (United Nations publication, Sales No.: 58.V.3) pp. 14 and 15 (Austria) and pp. 64 and 65 (Colombia).

in the cases referred to in paragraph 1 covered both administrative and judicial execution.

46. The CHAIRMAN put to the vote paragraph 3 of article 24 as drafted at the ninth session.

Paragraph 3 was adopted unanimously.

Paragraph 4

47. Mr. SANDSTRÖM, Special Rapporteur, introducing his proposed amendment (A/CN.4/116/Add.1), said that it was based on an observation of the Netherlands Government (A/CN.4/114/Add.1). The proposal of the Luxembourg Government (*ibid.*) should be dealt with at a later stage, when the question of an additional paragraph was discussed. The Governments of Switzerland (*ibid.*), United States (*ibid*), Finland (A/CN.4/114/Add.2) and China (A/CN.4/114/Add.4) all proposed the deletion of the last sentence of the paragraph (the Government of China proposed the deletion of the entire paragraph). He had not himself proposed the deletion of the last sentence because, if the draft articles were embodied in a convention, it seemed to him that the provision was in harmony with the concept of co-operation between the sending and the receiving States.

48. Mr. EDMONDS said that only the first phrase of paragraph 4, ending with the words "sending State", came within the scope of international law. It was not for the Commission to lay down what the competent court in the sending State should be. He proposed, therefore, that the second phrase of the first sentence and the whole of the second sentence should be deleted.

49. Sir Gerald FITZMAURICE agreed with Mr. Edmonds. It could not be certain that the sending State would be willing to assume jurisdiction in all cases, for that was a matter to be decided by national law. One of its diplomats in the receiving State, for example, might be held by a court in the sending State to be domiciled or resident in the receiving State, and in such circumstances the sending State might not have jurisdiction.

50. If, as the Special Rapporteur had proposed, the last phrase of the first sentence was deleted, the implication of the resulting text would be that the sending State always had jurisdiction over the diplomatic agent. As that was not invariably the case, he agreed that only the first phrase of the first sentence should be maintained, the rest of the paragraph being omitted.

51. Mr. HSU agreed with the two previous speakers. It would be quite sufficient to retain the first three lines of paragraph 4 in order to remind diplomatic agents that they could not escape the consequences of improper conduct and to remind Governments that they must provide for the punishment of such conduct.

52. Mr. FRANÇOIS said he was in favour of keeping paragraph 4 as it stood, subject to drafting changes. The last clause in the first sentence should be retained because the question whether a diplomatic agent could be brought before the courts of his own country had to be determined "in accordance with the law of that [the sending] State". In adopting that provision at its previous session, the Commission's intention had been that diplomatic agents should be tried not for all offences but only for those recognized by the law of the sending State.

53. The provision in the second sentence, concerning the designation of the competent court, had been included to assist States, such as the Netherlands, whose constitutional law gave no indication as to the court competent *ratione loci* to judge diplomatic agents resident abroad. He could not agree with Mr. Edmonds that the Commission was not competent to deal with the question or that the provision had nothing to do with international law. A number of authors, including von Liszt, regarded the principle that the competent court should be that of the seat of the home Government as part of the existing international law. In any case, it was the Commission's task to promote the progressive development of international law as well as to codify it. It would be noted, too, that the provision was usefully qualified by the words "unless some other (court) is designated under the law of that State".

54. Mr. SANDSTRÖM, Special Rapporteur, pointed out that, having some misgivings regarding the second sentence in paragraph 4, he had suggested merely stating in a commentary that, should a convention be concluded on the subject, the parties should undertake, as sending States, to provide a court competent to judge diplomatic agents resident abroad.

55. Mr. TUNKIN recalled that in the course of a long discussion on the paragraph at the ninth session many doubts had been expressed regarding it.[2] Since a diplomatic agent was clearly not exempt from the jurisdiction of his own State, it would make not the slightest difference whether the first part of the first sentence were included in the draft or not. The rest of the paragraph was something of an innovation and he agreed with Mr. Edmonds and Sir Gerald Fitzmaurice in doubting whether the Commission should go so far. Some States might object to it because its acceptance would mean revising their national legislation.

56. The CHAIRMAN put to the vote the proposal that the second sentence in paragraph 4 be deleted.

The proposal was adopted by 10 votes to 3, with 4 abstentions.

57. Mr. SANDSTRÖM, Special Rapporteur, withdrew his proposed amendment deleting the last clause in the first sentence of paragraph 4.

58. The CHAIRMAN observed that Mr. Edmonds had also proposed the deletion of the clause.

59. Mr. ZOUREK wondered whether Mr. Edmonds would reconsider his position. Now that the second

[2] *Yearbook of the International Law Commission, 1957*, vol. I (United Nations publication, Sales No.: 1957.V.5, Vol. I), 404th meeting, paras. 29 *et seq*; 405th meeting, paras. 1-15; 408th meeting paras. 37-48.

sentence had been deleted, the second part of the first sentence might well be retained.

60. The CHAIRMAN, speaking as a member of the Commission, suggested that the first sentence as it stood was somewhat tautological; persons subject to the jurisdiction of a State were always subject to that jurisdiction in accordance with the law of that State.

61. Mr. EDMONDS agreed that the second part of the first sentence was redundant. He would prefer the paragraph to confine itself strictly to the question of immunity from jurisdiction.

62. Mr. TUNKIN recalled that the clause under discussion had originally been proposed by him[3] as a necessary qualification of the additional provision proposed by Mr. François[4] that "A diplomatic agent shall be justiciable in the courts of the sending State". Now that the provision was worded differently, the subsidiary clause added little to what had already been said.

63. The CHAIRMAN put to the vote the proposal that the words "to which he shall remain subject in accordance with the law of that State" should be deleted.

The proposal was adopted by 11 votes to 2, with 4 abstentions.

Paragraph 4, as amended, was adopted unanimously.

Article 24 as a whole, as amended, was adopted unanimously.

ARTICLE 25

64. Mr. SANDSTRÖM, Special Rapporteur, drew attention to the observations of the Governments of Switzerland, the United States of America, Luxembourg, Sweden, the United Kingdom, the Union of Soviet Socialist Republics (A/CN.4/116), and Italy (A/CN.4/114/Add.3), and to his own conclusions (A/CN.4/116). Apart from the insertion in paragraphs 3 and 4 of the reference to administrative proceedings (A/CN.4/116/Add.1) in response to an observation of the Soviet Union Government, he proposed no change in the article as adopted at the Commission's ninth session.

65. Mr. AGO observed that the rule relating to waiver contained in article 25 drew a twofold distinction between criminal proceedings and civil proceedings. First, in criminal proceedings, the waiver of immunity always had to be express, whereas in civil proceedings it could be express or implied. The second, less clearly indicated distinction was that in criminal proceedings the waiver must always emanate from the Government of the sending State. As the text stood, however, it gave the impression that the actual decision to waive privilege must come directly from the Government of the sending State in all cases. While such a provision was logical enough when the immunity of the head of the mission was to be waived, it was superfluous in the case of the other members of the mission. He was accordingly in general agreement with the proposal made by the Italian Government (A/CN.4/114/Add.3), though he believed that the proposed addendum should appear in paragraph 2 rather than in paragraph 1.

66. Mr. VERDROSS agreed with Mr. AGO.

67. Mr. ALFARO also supported Mr. Ago. It was essential clearly to establish in what manner the sending State waived the immunity of its diplomatic agents. Paragraphs 1 and 2 seemed to state that such a waiver must always be the act of the foreign office of the sending State. But there was a difference between the cases involving the head of the mission and those involving the other members of the mission. Similarly, in the circumstances contemplated in paragraph 3, a distinction should be made between the position of the head of a mission and that of a member of his staff. In his opinion, the article should be amended so as to deal quite clearly with each of the cases that might arise. He accordingly supported Mr. Ago's proposal.

68. Sir Gerald FITZMAURICE, agreeing with previous speakers, suggested that the words "by the sending State" in paragraph 1 should be deleted. As so amended, the paragraph would then state the bare principle, while paragraphs 2 and 3 would deal with the methods of effecting the waiver. Paragraph 3 really presented no difficulty. After a long discussion at its previous session, the Commission had come to the conclusion that the problem could be dealt with only on those lines.[5] In the case of paragraph 2, however, some members, while not dissenting from the principle, had been dubious as to the wording. Mr. Ago's proposal would, however, meet that difficulty, since it must be presumed that, when the head of a mission waived the immunity of one of its members, he did so with the full authority of his Government. Thus, the proposal might also meet the objection of the United States Government.

69. Mr. AMADO said that, before hearing Sir Gerald Fitzmaurice's suggestion, he had been on the point of proposing a redrafting of the Italian Government's addendum. He did not like the phrase "The head of the mission may waive the immunity", since it might be interpreted to mean that the decision lay solely with the head of the mission. He would prefer the following wording: "Waiver of immunity from jurisdiction of members of the staff of a mission may emanate from the head of the mission."

70. Mr. TUNKIN could see no justification for deleting the words "by the sending State" in paragraph 1. If they were omitted, it would not be quite clear that the decision to waive immunity could be taken solely by the sending State. It would be recalled that the question of a waiver of immunity by the Government had been discussed at length at the previous session, particularly in the Drafting Committee, and the Commission had

[3] *Yearbook of the International Law Commission, 1957*, vol. I, 404th meeting, para. 40.

[4] *Ibid.*, para. 29.

[5] *Ibid.*, 405th meeting, paras. 21-55 *passim*; 420th meeting, para. 54.

reached the conclusion that it would be wiser not to specify through whom the communication was to be made, whether through the prime minister, the minister for foreign affairs, or the ambassador. One point which should be perfectly clear was that privileges and immunities did not vest in the diplomatic agent personally but were enjoyed by him simply in his capacity as member of a diplomatic mission. That being so, he agreed with Mr. Amado that the wording of the Italian proposal was unsuitable.

71. In paragraph 2 it should be made clear that the decision to waive immunity and the communication of the decision were always official acts of the Government, the question whether the Government delegated the power to its ambassador to decide in certain cases or not being a matter for the particular States. The question of the channel through which the communication was conveyed was immaterial. The paragraph, however, certainly did not mean that a head of mission was not qualified to convey his Government's decision to that of a receiving State. He would prefer article 25 to stand as drafted, subject to the drafting change proposed by the Special Rapporteur.

72. Mr. AGO agreed with Mr. Amado that the Italian Government's proposal also could be reworded. It could be left to the Drafting Committee to find the best form of words.

73. He could not agree with Mr. Tunkin that, according to the existing wording of paragraph 2, the decision of a Government to waive the immunity of an agent could be conveyed by the ambassador. The paragraph explicitly stated that the waiver must be effected by the Government of the sending State. The institution of ambassador was, however, a State institution; the ambassador was never part of the Government.

74. Mr. ALFARO said that Mr. Ago had clearly stated the point he had himself made previously, namely, that according to the text of article 25 waiver of immunity could not emanate from the head of the mission. The text accordingly should be amended.

75. Mr. YOKOTA recalled that, during the protracted discussion of the question at the previous session, some members had been of the same opinion as Mr. Tunkin, but others had doubted whether paragraph 2 really reflected the general practice of States. That practice appeared to be correctly stated in the observation of the Swedish Government (A/CN.4/116) and was supported by a number of judicial decisions. He was, therefore, in favour of amending the text on the lines proposed by the Italian Government.

76. Mr. BARTOS said that it clearly followed from an ambassador's letters of credence that, when he made a communication to the Government of the receiving State, he must be presumed to be speaking in the name of his Government. Though the decision to waive immunity lay with the Government of the sending State, it was perfectly in order for the decision to be communicated in a note from the heard of mission. Nothing to the contrary was indicated in the article, and he did not consider that the text detracted in any way from the authority of the head of a mission.

77. Mr. TUNKIN agreed with Mr. Bartos that it was customary to regard a note from an ambassador as expressing the will of his Government. Many problems were, however, dealt with at the mission level, without reference to the Government of the sending State, the ambassador stating in his communication that he agreed or did not agree on a certain point. Such a communication was not regarded as carrying the same weight as a communication between Governments.

78. It was completely erroneous to claim that paragraph 2 meant that the communication of the decision to waive immunity must emanate from the central office of the Government; it might emanate from any organ recognized under international law as competent to represent a State in its international relations.

79. Mr. AMADO said that the head of a diplomatic mission must always be presumed to be speaking in the name of his Government. If a note from a head of mission was sufficient to produce the severance of diplomatic relations between two countries or even more serious consequences, he could not understand why it should not be sufficient to waive the immunity of a third secretary, for example. It was difficult to conceive that a head of mission would not first have consulted his Government on a matter of such importance as a waiver of immunity, in which political issues out of all proportion to the person concerned might be involved. He did not regard paragraph 2 as implying that a special act of the Government of the sending State was required as distinct from the act of its head of mission. The text could be interpreted as admitting the use of the ordinary channels of diplomatic intercourse.

80. Mr. MATINE-DAFTARY agreed that an ambassador was always regarded as the spokesman of his Government. Since the trouble arose from the repetition of references to the sending State in paragraphs 1 and 2, the best solution would be to delete from paragraph 2 the words "by the Government of the sending State" which were open to misinterpretation and had given rise to much unnecessary discussion.

81. Mr. PADILLA NERVO said that the article had two objects: to state the principle that immunity could be waived and to indicate the various possible forms of the waiver, either express or implied. It was not essential that the article should refer to the procedure to be observed in communicating the decision to waive immunity; the communication should be made in the recognized form of diplomatic intercourse. The first three paragraphs of the article would be sufficiently clear if they were redrafted on the following lines with no reference to procedure: paragraph 1 to be retained in the passive form as in the English text; paragraph 2 to be worded: "In criminal proceedings, the waiver must always be express; in civil proceedings, waiver may be express or implied." The rest of existing paragraph 3 would then constitute a new paragraph 3.

82. The CHAIRMAN, speaking as a member of the Commission, said that Sir Gerald Fitzmaurice's suggestion (para. 68) would improve the drafting of the article. As it stood, the repetition in paragraph 2 of the words "by the Government of the sending State" after it had already been stated in paragraph 1 that immunity may be waived by the sending State, gave the impression that the Commission was indirectly including in paragraph 2 a rule of evidence, requiring proof that the waiver really emanated from the Government of the sending State. The deletion of the words "by the sending State" in paragraph 1 would dispose of that possible misunderstanding, and the resulting text would then make it clear that the Commission was simply laying emphasis on the authority which could effect a waiver. Mr. Yokota's suggestion, based on the Italian Government's proposal, could also be included in the text with appropriate drafting changes to make it clear that the authority of the head of the mission was to convey waiver in certain cases.

83. Sir Gerald FITZMAURICE said that after hearing the proposals of Mr. Matine-Daftary and Mr. Padilla Nervo, he though that either of them achieved more efficiently the same purpose as his own suggestion.

84. Mr. TUNKIN pointed out that much of the difficulty arose from a discrepancy between the English and the French text of paragraph 2.

The meeting rose at 1.10 p.m.

461st MEETING

Wednesday, 11 June 1958, at 9.45 a.m.

Chairman: Mr. Radhabinod PAL.

Diplomatic intercourse and immunities (A/3623, A/CN.4/114 and Add.1-6, A/CN.4/116 and Add.1-2, A/CN.4/L.72, A/CN.4/L.75) *(continued)*

[Agenda item 3]

DRAFT ARTICLES CONCERNING DIPLOMATIC INTERCOURSE AND IMMUNITIES (A/3623, PARA. 16; A/CN.4/116/ADD.1-2) *(continued)*

ARTICLE 25 *(continued)*

1. The CHAIRMAN, after recalling the proposals made at the 460th meeting by Mr. Matine-Daftary (para. 81) and Mr. Padilla Nervo (para. 82), invited the Commission to vote on article 25 paragraph by paragraph, as drafted at the ninth session (A/3623, para. 16).

2. Mr. ALFARO thought it would be very difficult to vote on each paragraph separately without prior agreement on the article as a whole. The chief cause of confusion was the patent contradiction between paragraph 1, under which only the sending State could waive immunity, and paragraph 3, which referred to implied waivers. For the purpose of overcoming the difficulty, he would prefer the words "by the sending State" in paragraph 1 to be deleted and paragraph 2 to read simply "In criminal proceedings, waiver must always be express." Several members of the Commission had made it perfectly clear that when the head of a mission communicated a waiver of immunity it must be taken as emanating from his Government. Yet, although it was undoubtedly incorrect to state, as did the existing text of paragraph 2, that the communication of a decision to waive immunity must always come from the Government and never from the head of the mission, it was true that the words "effected expressly by the Government of the sending State" gave rise to some misunderstanding.

3. Mr. SANDSTRÖM, Special Rapporteur, said that he could accept Mr. Padilla Nervo's proposal which would have the effect of omitting from the article all reference to the procedure of waiving immunity. He was anxious to retain paragraph 1 in full, though whether its sense was expressed in the active form or, as Mr. Padilla Nervo preferred, in the passive form was of no great importance. The principle, to which many speakers had referred, that immunity from jurisdiction was a prerogative of the State which could be waived only by the State was of considerable theoretical significance and he would prefer it to be stated explicitly.

4. Mr. MATINE-DAFTARY pointed out that Mr. Padilla Nervo's proposal was substantially the same as his own, except that in paragraph 1 the latter had used the passive form, as in the English text, which would not be suitable in the French text.

5. The CHAIRMAN observed that the choice between the active and passive form could be left to the Drafting Committee. On that understanding, he put to the vote paragraph 1 of article 25 as drafted at the ninth session.

Paragraph 1 was adopted by 11 votes to 1, with 2 abstentions.

6. The CHAIRMAN put to the vote paragraph 2 as proposed by Mr. Padilla Nervo: "In criminal proceedings, waiver must always be express."

Paragraph 2 was adopted by 13 votes to none, with 1 abstention.

7. The CHAIRMAN put to the vote paragraphs 3 and 4 as drafted at the ninth session.

Paragraph 3 was adopted by 13 votes to none, with 1 abstention.

Paragraph 4 was adopted unanimously.

Article 25 as a whole, as amended, was adopted unanimously.

8. Mr. ALFARO explained that he had abstained from voting on paragraph 3 because he considered it to be in conflict with paragraph 1 as just adopted.