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Summary record of the 462nd meeting

Topic:
Diplomatic intercourse and immunities

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proper context for the second sentence of paragraph 1 was not the commentary rather than the article.

71. Observations on the members of the family of the diplomatic agent had been made by the Swiss (A/CN.4/114), Belgian (*ibid.*), and Italian Governments (A/CN.4/114/Add.3), and he had nothing to add to his written comment (A/CN.4/116) on those observations.

72. Mr. VERDROSS said that paragraph 1 of both the original text and the Special Rapporteur's version went beyond international practice, which entitled only the diplomat's wife and minor children to privileges and immunities. Various Governments had objected to a formulation in such wide terms, and he felt that their objection was justified.

73. Sir Gerald FITZMAURICE said that the status of the members of the family had been fully discussed at the ninth session, and it had been decided that if only the wife and minor children were included the article would be too restrictive, as it would not cover, for example, the case of a sister keeping house for a bachelor or widowed diplomatic agent. The Special Rapporteur's version did not change the substance of the 1957 text, and he had no objection to it.

The meeting rose at 1 p.m.

462nd MEETING

Thursday, 12 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 28 (continued)

Paragraphs 1 and 2 (continued)

11. Mr. SANDSTRÖM, Special Rapporteur, said that observations had been received from the Governments of Belgium (A/CN.2/114) and Finland (A/CN.4/114/Add.2) on the subject of members of the family of a diplomatic agent who were nationals of the receiving State. In his view, although the matter was debatable, it was necessary to change the article, as the situation would be very difficult if a member of the diplomat's family was subject to the jurisdiction of the receiving State. That was the reason for his redraft of paragraph 1 (A/CN.4/116/Add.1).

2. In reply to a question by Sir Gerald Fitzmaurice,

he said that administrative and technical staff were the subject of paragraph 2 of his redraft. He referred to the observations of the Governments of Belgium, Switzerland, the United States of America, Argentina (A/CN.4/114), USSR (A/CN.4/114/Add.1), Italy (A/CN.4/114/Add.3), China (A/CN.4/114/Add.4), Yugoslavia (A/CN.4/114/Add.5), Czechoslovakia (A/CN.4/114/Add.1), and Pakistan (A/CN.4/114/Add.6) and to their objections to article 28 as drafted at the previous session (A/3623, para. 16) which granted diplomatic privileges and immunities to a mission's administrative and technical staff. While he did not consider the reasons for those objections convincing, the opposition was so strong that the Commission's entire draft might be in danger if the objections were not taken into account.

3. Mr. VERDROSS recalled that one reason for the decision at the ninth session to grant privileges and immunities to the administrative and technical staff had been that small States frequently maintained small diplomatic missions with only one or two persons on the diplomatic staff and one or two on the administrative and technical staff, so that it was difficult to make a distinction between the two kinds of staff. The opposition of Governments to the 1957 text was great, however; perhaps with the addition of some such phrase as "on a reciprocal basis" the article might be generally acceptable.

4. He realized that, according to current practice, only the wife and minor children of a diplomatic agent were entitled to privileges and immunities. As the Commission, however, had established its rule in paragraph 1 in the knowledge that it was a step towards the progressive development of international law, he would be quite prepared to vote for that paragraph as drafted at the ninth session. But since the provisions of the paragraph as drafted in 1957 had encountered opposition, he suggested that in deference to the objections it might be revised to read: "Apart from the diplomatic agent, his wife and minor children forming part of his household in all cases shall, and, subject to reciprocity, other members of his family may..." The addition of the words "who are in the diplomatic list" after "members of the family" might also help to remove opposition.

5. Mr. TUNKIN said that the observations by Governments showed that it was not the rule in existing international law to grant privileges and immunities to persons who were not members of the diplomatic staff in the strict sense of the term. That had been recognized at the ninth session, but the Commission had intended to introduce an innovation which was manifestly not acceptable to Governments. It should therefore be abandoned. The first sentence of the Special Rapporteur's redraft of paragraph 1 was satisfactory in that respect.

6. As far as the administrative, technical and service staff was concerned, he said that diplomatic privileges and immunities could, naturally, be conferred on such personnel by virtue of bilateral or even multilateral

agreements. The Special Rapporteur's proposed redraft of paragraph 2 set out the existing situation, and was therefore acceptable.

7. With regard to members of the family of a diplomatic agent, he said the current practice in a great many States was to grant privileges and immunities to the wife and minor children only. The Special Rapporteur's proposed text would be more acceptable to Governments if it were altered to bring it into closer conformity with existing practice.

8. Finally, the second sentence of paragraph 1 of the Special Rapporteur's redraft of article 28 raised the complex question of dual nationality, which was closely linked with the internal legislation of countries. In practice problems of dual nationality were easily settled between States, but it would be difficult, and inadvisable, to establish a general rule. He thought therefore that it would be desirable not to deal with it in the draft articles, but to leave it to bilateral agreement between Governments.

9. Sir Gerald FITZMAURICE regretted that the Special Rapporteur had yielded to the views of Governments in the case of article 28, for that article had rightly sought to extend existing international law. The unfavourable comment it had elicited did not impress him, for it came from a minority of Governments, and in any case the practice set forth in article 28 of the 1957 draft was in fact the practice in many States. In some cases, indeed, the administrative and technical staff were put on the diplomatic list without any objection.

10. Most of the observations stated simply that the article did not reflect current practice or that it went beyond existing international law. That indeed had been the Commission's intention in paragraph (6) of the commentary. If the Commission thought that its proposals were right, it should maintain them against the opposition of some Governments. One very good reason for maintaining them was the difficulty in modern times of making a distinction between the diplomatic and the technical and administrative staff of a mission. The functions performed by technical and administrative staff had formerly been performed by the diplomatic staff and only because the latter was physically unable to cope with the workload had the assistance of the former become necessary. The function itself, however, still remained diplomatic. Furthermore, without the general immunity from arrest the administrative and technical staff would be unable to carry out its functions satisfactorily, and the inviolability of the mission's confidential material would be endangered. Much of the staff was making a more important and more essential contribution to the functioning of the mission than, say, some junior attaché. Lastly, unless the members of a diplomatic agent's family enjoyed immunity, pressure could be brought to bear on the diplomatic agent through his family. The same argument was equally applicable to the families of the technical and administrative staff, for such staff had access to the secrets of the mission. For all those reasons, he considered that article 28 as adopted at the ninth session

should be retained and that it should be explained in the commentary why the Commission had retained the text in spite of the criticisms of some Governments.

11. The suggestion of Mr. Verdross that the words "subject to reciprocity" be inserted could not be regarded as adequate. It was not inconceivable that a Government, considering it unlikely that a foreign State to which one of its diplomatic missions was accredited would arrest any of the staff, might regard it as favourable to its own interests not to grant diplomatic privileges and immunities to the administrative and technical staff of that State's mission. Again, the requirement of reciprocity existed already. Accordingly, it was not necessary to mention reciprocity specifically.

12. Mr. YOKOTA said that the question of the privileges and immunities of the members of the family of a diplomatic agent had been fully discussed at the ninth session, and no good reason had been advanced to change the wording of article 28. The words "forming part of his household" and "forming part of their respective households" provided sufficient limitation to the concept of members of a family.

13. It was clear from the observations of many Governments that the article went beyond current practice in granting the same privileges and immunities to the administrative and technical staff as those granted to the diplomatic staff. On the other hand it was unreasonable, in his opinion, that such staff should be treated on the same footing as members of the service staff as suggested by the new proposal of the Special Rapporteur; they should, he thought, be treated as an intermediate group. Administrative and technical staff should not be accorded the privileges mentioned in articles 22 and 23, but should enjoy those referred to in article 24. He was rather more doubtful concerning the exemptions mentioned in articles 26 and 27, but thought that such staff should be eligible for the exemptions mentioned in article 26, at least. Such a solution might not correspond with the practice current in some States, but current practice was not uniform and no formulation could possibly cover its variations. His suggestion might, if the draft articles became a convention, prove acceptable to the majority of States.

14. With regard to the principle of reciprocity, he felt that there should be a provision granting at least a minimum of privileges and immunities to the administrative and technical staff. It would be open to States to agree among themselves to grant more extensive privileges and immunities, but if the Commission left everything to be settled by States on a reciprocal basis it would not be offering a solution at all. The Commission should seek a solution acceptable to at least a majority of States.

15. Mr. HSU emphasized that the articles, although inspired by a spirit of idealism and a desire to contribute to the development of international law, were yet tentative. There were many objections to article 28 from Governments, and their objections were perhaps well founded. For, from the standpoint of a receiving State, diplomatic privileges and immunities were a

necessary evil, and the receiving State's tendency was to restrict them as much as possible. The Commission should be guided by similar considerations, provided that its draft did not impair the efficiency of the mission.

16. Diplomatic missions grew in size year by year, and if there was no check on the grant of privileges and immunities there would be an inordinate number of persons possessing such privileges, a situation which would be, to say the least, most inconvenient to Governments. It was a sound principle therefore to limit privileges and immunities to the diplomatic staff only and to treat members of the administrative, technical and service staffs differently. That did not mean that they could not enjoy such privileges and immunities in certain circumstances, e.g., in the performance of their official duties. If their official functions were protected that would be a sufficient safeguard for the mission. Sir Gerald Fitzmaurice had said that some of the members of the auxiliary staff were entrusted with very confidential matters, but in his view the diplomatic staff alone should deal with such matters. His conclusion was that it was inadvisable to assimilate the technical and administrative staff to the diplomatic staff.

17. With regard to the definition of the members of the family of a diplomatic agent, he suggested that it might be said that the wife and minor children should enjoy the privileges and immunities set out in articles 22 to 27, whereas other members of the household could only enjoy them subject to agreement with the receiving State. In the case of a sister keeping house for a bachelor, the receiving State would probably be reasonable and put her on the footing of a member of the family enjoying privileges and immunities. In the same way, if a State was willing to extend the privileges and immunities to its own nationals who were members of the family of a diplomatic agent, a satisfactory arrangement could be made.

18. Mr. AGO agreed with Sir Gerald Fitzmaurice that the Commission should resist the temptation of always acquiescing in the views expressed by a few critical Governments. Not to grant privileges and immunities to the technical and administrative staff, who sometime performed very delicate functions, might have graver consequences than not to grant them to certain members of the minor diplomatic staff. The service staff, on the other hand, were in a different category, however, and he could not approve of the Special Rapporteur's grouping that staff with the technical and administrative staff in paragraph 2 of his redraft of article 28. The service staff could not be assimilated to the diplomatic staff, but the administrative and technical staff certainly could.

19. He had no specific proposal to make in respect of the provisions concerning members of the family of a diplomatic agent forming part of his household. The qualification that they should form part of his household was liable to be equivocal, however, and there was some substance in the objection to extending the

diplomatic status beyond the diplomatic agent's wife and his children who were under the age of majority.

20. Mr. AMADO said that, as at the previous session, his approach to the question of diplomatic privileges and immunities was guided by the principle of functional necessity: the mission and its members had to be able to perform all acts associated with diplomatic intercourse, to carry out the instructions of its Government and to promote good relations between States. That being so, he could not agree with Mr. Yokota that members of the administrative and technical staff of a mission need not enjoy the immunities referred to in article 22 and 23, nor could he accept the redraft of article 28 proposed by the Special Rapporteur, Members of the administrative and technical staff might well be cognizant of all the secrets of the mission, including the secret intentions of the head of the mission himself, and it was quite inadmissible that such staff should be at the mercy of the police of the receiving State. Once a confidential clerk was in the hands of the police, the police could gain knowledge of the inmost thoughts of the head of the mission. That was why he fully agreed with Mr. Ago that, in the matter of immunities, administrative and technical staff should be treated on the same footing as the diplomatic members of the mission and as an entirely distinct category from service staff.

21. Referring to the meaning of "the family of a diplomatic agent" he said it was admittedly not always easy to determine what persons the expression comprised. But he thought the stipulation that the family had to form part of the diplomat's household could hardly be improved upon.

22. Article 28 had met with considerable criticism. But the criticism emanated from a small number of Governments, and in his opinion it was the Commission's duty to frame whatever provisions it considered to be in the best interests of the international community. The considerations put forward by Mr. Hsu concerning the excessive number of persons enjoying diplomatic privileges and immunities were, he thought, purely incidental to the main question.

23. The CHAIRMAN, speaking as a member of the Commission with reference to the question of defining a diplomatic agent's family, referred to his remarks at the previous session.¹

24. Mr. FRANÇOIS regretted that the Special Rapporteur had abandoned the text adopted at the previous session. It seemed that the Special Rapporteur had been greatly influenced by the observations of certain Governments. Speaking from his own experience as Special Rapporteur on the law of the sea, he said that such observations were of course valuable but they should not acquire too much prominence in the Commission's debate. The fact that a small number of Governments stated that their practice differed from that proposed by

¹ *Yearbook of the International Law Commission, 1957*, vol. I (United Nations publication, Sales No.: 1957.V.5, vol. I), 410th meeting, para. 26.

the Commission was not *per se* a sufficient reason for the Commission to change its position. The observations and criticisms of Governments should be weighed strictly on their merits.

25. He entirely agreed with Sir Gerald Fitzmaurice, Mr. Ago and Mr. Amado that privileges and immunities should be extended to the administrative and technical staff of missions. And he could not accept the view that such privileges and immunities should be confined strictly to the diplomatic members of the mission, for the whole purpose of privileges and immunities might be frustrated if they were not extended to other members of the staff. In that connexion, he said that in recent years many new States had come into existence which did not have the same established traditions or developed law and therefore did not have, perhaps, the same safeguards for members of diplomatic missions as the older countries. Accordingly, it seemed hardly a propitious moment to begin restricting the enjoyment of privileges and immunities.

26. The steady increase in the number of privileged persons which alarmed Mr. Hsu was accounted for mainly by the grant of certain privileges and immunities to officials of the United Nations and other international organizations, and was an unavoidable necessity. The fact that it had been found necessary to accord such treatment to officials of international organizations was scarcely an argument in favour of restricting the privileges and immunities of missions at a time when they were even more in need of them than were international organizations.

27. The system of reciprocity advocated by Mr. Verdross would be of no avail, since some countries could refuse to accord certain privileges and immunities to the missions of certain other countries in the secure knowledge that the rights of their own representatives would be sufficiently safeguarded in those countries. He was accordingly in favour of keeping article 28 as it stood.

28. Mr. BARTOS noted that many of the objections of Governments were based on considerations similar to those he had expressed in dissent from the majority view at the Commission's previous session. The extension of diplomatic privileges and immunities to the members of a diplomatic agent's family raised some very difficult problems in practice. Even close relatives of the diplomatic agent living under the same roof with him might lead their own lives and engage in commercial, political or cultural activities which could bring them into conflict with the laws of the receiving State or at least cause them to incur a certain civil and even penal responsibility. The daughter of a head of mission, for instance, though an eminent doctor, had had to be refused permission to serve on the staff of a medical establishment, because it was inadmissible that she should be immune from the consequences of any mistakes or even offences that she might commit in the exercise of her profession. It had been argued that, in cases of abuse of privilege, a member of the family of a diplomatic agent could always be declared *persona non grata*. But that was not always so easy, as had been

shown in the case of the wife of a diplomatic agent who, as a *prima donna*, had sung songs of a political nature which had given offence to the receiving State.

29. The administrative and technical staff of missions must certainly enjoy a measure of immunity. It was the usual practice, however, for such staff to enjoy the so-called *petite immunité*, namely, immunity in respect of acts performed in the course of their duties. Experience showed that, quite apart from their greater number, members of the subordinate staff of missions committed far more offences and caused far more incidents than the diplomatic agents themselves. One problem in such cases was that, unless such staff members could be interrogated by the authorities, it was very difficult to discover whether the offence had been committed in the course of their duties or in their private capacity. In any event, if they were to enjoy full immunity, there must be some safeguard such as the right to submit their case to the authorities of the sending State.

30. But though willing to extend privileges and immunities to members of the administrative and technical staff, he saw no justification for according them to the members of their families. Indeed it might be in the best interest of members of such staff not to do so, since, if such persons knew that their families enjoyed no immunity, they would exercise stricter control over their conduct.

31. In view of the foregoing considerations he wished to suggest that paragraph 1 of the article as far as the words "if they are not nationals" be amended to read:

"Apart from diplomatic agents, the members of the family [or: the spouse and minor children] of a diplomatic agent forming part of his household, provided that they do not engage in professional or political activities on their own account in the territory of the receiving State, and likewise the members of the administrative and technical staff of a mission, shall..."

32. The CHAIRMAN said that, while the difficulties of the receiving State in dealing with aliens in a privileged position should not be ignored, they should also not be exaggerated; the overriding consideration was that of the needs of the mission, which had to be able to discharge its functions properly.

33. Mr. ALFARO said that he was decidedly in favour of keeping article 28 as it stood, for the reasons stated by Sir Gerald Fitzmaurice and amplified by Mr. Ago, Mr. Amado and Mr. François. On the specific question of the definition of the members of a diplomatic agent's family, he was in favour of the wise general rule laid down in the text that they are those who form part of his household. To confine the family to the spouse and minor children would create difficulties in the case of unmarried diplomatic agents for whom a female relative acted as hostess or "mistress of the house".

34. In reply to Mr. Hsu, he said that in any particular case the question of the size of the mission could be dealt with effectively under article 7, paragraph 1.

35. Mr. GARCIA AMADOR said that, the question having been exhaustively discussed, he wished merely to state that he was in favour of retaining article 28 as it stood. A principle involved was that all members of a mission should enjoy the privileges and immunities necessary for the proper discharge of their functions.

36. Mr. MATINE-DAFTARY was also in favour of retaining the text of article 28 as drafted, after full discussion, at the Commission's previous session. The article was based on two main principles; first, diplomatic privileges and immunities belonged to the sending State and not to the members of its diplomatic mission personally; and secondly, they were necessary for the proper discharge of the mission's functions. Though the duties of the members of a mission fell into a variety of categories—purely diplomatic, consular, clerical and administrative, and technical—it was not for the receiving State to decide which of those duties could be regarded as serving the purpose of representation of the sending State.

37. Mr. ZOUREK recalled that at the preceding session it had been generally agreed that in extending to the administrative and technical staff of a mission the privileges and immunities granted to the diplomatic staff, the Commission had gone beyond the practice in existing international law. From the observations submitted by Governments, however, it was clear that a number of Governments regarded such an extension as unacceptable. Under general international law the administrative and technical staff of a mission did not enjoy the same diplomatic immunities as the diplomatic staff proper. No such extension was recognized, for example, by either the Havana Convention² or the Harvard draft.³ The 1957 text should therefore be amended, and the Special Rapporteur had been well advised in dealing separately with the two categories of officials. The revised text proposed by the Special Rapporteur did not mean that the administrative and technical staff should not be given any immunity; on the contrary it provided that they would enjoy immunity in respect of acts performed in the course of their duties. Thus the minimum immunity was assured.

38. Some would go even further, but he did not think a further extension was justified merely on the grounds of the importance of the functions discharged by technical and administrative staff. After all, the service staff also performed important duties. The stipulation that administrative and technical staff should enjoy diplomatic privileges and immunities subject to reciprocity was, however, a reasonable one.

39. In its task of codifying and developing international law, the Commission could not go beyond the needs recognized by States. If States considered that the privileges and immunities granted to diplomatic agents

should be extended to the administrative and technical staff of a mission, a rule to that effect would gradually be framed in the practice of States, though it could not, however, be binding on States which did not agree to the extension.

40. He could not support the view that a reciprocity clause would be of no use merely because States might refuse to apply it. States could also refuse to accept provisions of draft conventions which went beyond the framework of existing international law, and no such provision could be imposed on them against their will. He considered, therefore, that Mr. Verdross and others had made a good suggestion when they had proposed that the administrative and technical staff of a mission should enjoy diplomatic privileges and immunities in respect of all acts performed in the course of their duties, and complete diplomatic immunity on the basis of reciprocity.

41. At the Commission's preceding session, he had maintained that the circle of family members to whom the draft granted diplomatic privileges and immunities was too large. He thought that it was difficult to admit, for example, that adult children living in the household of the head of the mission should enjoy diplomatic immunities, and it was still more difficult to approve the extension of such immunities to more distant relatives.

42. The last sentence of paragraph 1 of the new text proposed by the Special Rapporteur should be deleted, because it introduced the very difficult question of dual nationality. A person might possess dual nationality, for example, through no choice of his own but merely because of a lacuna in national legislation. In such a case it was generally agreed that the nationality of the State where the person actually exercised his civil and political rights took precedence. In any case the problem was too complex to be adequately covered by a single sentence.

43. Mr. SANDSTRÖM, Special Rapporteur, said he would have no objection to withdrawing the proposal made in the last sentence of paragraph 1 of his revised text.

44. He explained that, so far as members of a diplomat's family were concerned, he had maintained the 1957 text largely because no change in the provisions in question had been proposed by Governments.

45. In reply to Mr. François' remarks concerning the treatment of the observations of Governments, he said that naturally objections concerning the substance of draft provisions should receive first attention. In addition, however, he thought the Commission should give due weight to such observations generally.

46. So far as the extension of diplomatic privileges and immunities to the administrative and technical staff of a mission was concerned, he agreed with Mr. Zourek that that was not a matter on which international law was firmly established. The Commission should go beyond the present stage of development of international law. In such cases it was advisable to see what

² Convention regarding Diplomatic Officers, signed at Havana on 20 February 1928. See League of Nations, *Treaty Series*, vol. CLV, 1934-1935, No. 3581.

³ Harvard Law School, *Research in International Law, I. Diplomatic Privileges and Immunities* (Cambridge, Mass., 1932), pp. 19-25.

was the attitude of Governments and ascertain the extent to which their observations could be taken into account. The Commission should also consider the chances of the draft's being accepted. The draft would be of little value unless it won the support of States. It was precisely in order to make the draft more generally acceptable that he had decided, although recognizing the excellence of the 1957 text, to redraft article 28 in the light of the observations of Governments. Accordingly, he maintained his proposed revised version of the article.

Paragraphs 1 and 2 of article 28 as drafted at the ninth session, subject to drafting changes, were adopted by 8 votes to 5, with 3 abstentions.

47. Mr. VERDROSS said that the question of service staff had not been discussed.

48. The CHAIRMAN observed that no proposal had been made regarding service staff.

49. Mr. ALFARO pointed out a discrepancy between the Spanish text and the English and French texts of paragraph 1. Whereas the latter referred only to members of families forming part of the household, the Spanish text added the words "*y dependan de el*" and "*y dependan de ellos*". He would be unable to accept the text unless the discrepancy was removed.

50. The CHAIRMAN said that the text would be rectified by the Drafting Committee.

51. Mr. AMADO said he was sorry the Commission had been so divided in its vote on such an important matter. While all recognized the need for extending to the administrative and technical staff of a mission the privileges and immunities referred to in the article, he thought that perhaps during the second reading of the draft, the phrase "together with the members of their families forming part of their respective households" might be deleted, as had been suggested by Mr. Bartos.

52. He also thought more consideration should have been given to the question of reciprocity of treatment, and to the question of the effect which the extension of privileges and immunities might have on the compilation of the diplomatic list, the value of which as presumptive evidence of entitlement to privileges and immunities was mentioned in paragraph (10) of the commentary.

53. Mr. ZOUREK said that he had voted against the retention of the 1957 text because in his opinion it went far beyond the scope of existing international law and because it was manifestly not acceptable to a large number of States.

54. Mr. AGO noted that many members of the Commission had cast their votes reluctantly. He agreed with Mr. Amado that while diplomatic privileges and immunities should obviously be extended to members of the administrative and technical staff of a mission, the need for extending them to their families was much less evident. Though the Commission had voted for the extension of privileges and immunities both to administrative and technical staff and to members of their

families, the two classes of persons should really be kept quite distinct. The Drafting Committee should find an appropriate solution. Administrative and technical staff might perhaps more appropriately be brought within the definition of the term "diplomatic agent" given in article 22, paragraph 2, by the addition of some such phrase as "and also administrative and technical staff of a mission whose names were on the diplomatic list".

55. Sir Gerald FITZMAURICE thought the Drafting Committee might well take Mr. Ago's suggestions into account. One way of meeting the points raised by Mr. Amado might perhaps be to provide a full commentary on the paragraphs, explaining in detail why, despite the observations of certain Governments, the Commission had felt it desirable to retain the 1957 text, and the commentary might suggest modifications which might be made if Governments felt the text went too far.

56. The commentary might point out, for example, that what the Commission wished to insist upon was the extension to administrative and technical staff not only of privileges and immunities in respect of acts performed in the course of their duties but also of the general immunity from civil and criminal jurisdiction. The commentary might go on to say that it would not be inconsistent with that basic principle not to extend to administrative and technical staff certain privileges, such as some of those mentioned by Mr. Yokota. The commentary might also say that it would not be contrary to the basic principle if the situation were modified in respect of the members of their families. Those possibilities could be taken into account by Governments or by the General Assembly as a means of modifying the basic principle without seriously harming it, if there was a general feeling that it went too far. It should be made quite clear, however, that there was no intention of implying any derogation from the important principle that privileges and immunities should be extended to actual members of the administrative and technical staff.

57. Mr. HSU thought the vote should be interpreted as an expression of the Commission's desire that the 1957 draft should be adopted as a basis for discussion and not as a final text.

58. Faris Bey EL-KHOURI said he had abstained from voting because he thought the 1957 text went too far, and there was no acceptable alternative.

59. Mr. TUNKIN thought it would not be enough to deal with the matter in the commentary as suggested by Sir Gerald Fitzmaurice. Some changes were obviously desired by the great majority of the members of the Commission, and the best procedure would be to refer the text back to the Drafting Committee and discuss the changes it proposed later.

60. Mr. ALFARO thought a point of substance was involved which should not be left to the Drafting Committee, and that preferably the Commission itself should decide on the deletion of the phrase "together with the

members of their families forming part of their respective households.”

61. The CHAIRMAN observed that since the paragraphs had been adopted by the Commission the text was now in the hands of the Drafting Committee.

Paragraphs 3 and 4

62. Mr. SANDSTRÖM, Special Rapporteur, introduced his revised draft paragraph 3, which was meant to replace paragraphs 3 and 4 of the 1957 text. Since it involved no change of substance, he suggested that the new text, which was based on a proposal by the Government of the Netherlands, be referred to the Drafting Committee.

63. The CHAIRMAN put to the vote paragraph 3 of article 28 of the Special Rapporteur's revised text (A/CN.4/116/Add.1), subject to drafting changes.

Paragraph 3 was adopted by 16 votes to none, with 1 abstention.

64. The CHAIRMAN put to the vote article 28, thus amended, subject to drafting changes.

Article 28, as amended, was adopted by 10 votes to 1, with 4 abstentions.

ARTICLE 29

65. Mr. SANDSTRÖM, Special Rapporteur, drew attention to the observations of the Governments of the United States of America, the Netherlands, Belgium (A/CN.4/116) and Finland (A/CN.4/114/Add.2). He agreed with the Belgian Government that the exception relating to the child of a national of the receiving State should be deleted. He had also accepted the suggestion of the Netherlands Government that the idea of the article was brought out more clearly in the commentary than in the text itself. He had therefore proposed a wording in line with those suggestions (A/CN.4/116/Add.1).

66. Sir Gerald FITZMAURICE recalled that the article had given the Commission a good deal of difficulty at its preceding session, and he agreed that the text was capable of improvement. He would hesitate, however, to accept the redraft now proposed by the Special Rapporteur, even though it was based on the Commission's own commentary.

67. In the first place, it was very seldom that there was any question of a diplomatic agent himself acquiring the nationality of the receiving State. In most cases, it was the children of diplomatic agents born in the receiving State who might acquire the receiving State's nationality, and in relation to children the use of the phrase “against his will” was inappropriate. The article was, in fact, meant to express the principle that birth in a foreign country did not confer the nationality of that country on a diplomat's child.

68. His second objection was that, even if the acquisition of the nationality of the receiving State by a diplomatic agent himself was involved, it was not enough to use the expression “against his will”. The

sending State should also have some say in the matter and might well regard the acquisition of the receiving State's nationality by its diplomatic agent as undesirable, even though the diplomatic agent himself was willing to accept that nationality. The sending State could no doubt deal with such a situation by expelling the diplomatic agent from the service, but that was hardly a satisfactory solution. It would therefore be better to adhere to the principle of the 1957 text, even though the wording might be amended. The article should lay down a definite rule that persons enjoying privileges and immunities as members of a diplomatic mission should not be subject to the laws of the receiving State in respect of nationality. In other words, diplomatic immunity carried with it immunity from the nationality laws of the receiving State.

69. The CHAIRMAN referred to the discussion at the preceding session and to Mr. García Amador's proposal which had formed the basis of the article then drafted.⁴

70. Mr. TUNKIN agreed with the remarks made by Sir Gerald Fitzmaurice. There was also another point to be remembered. Article 29 of the 1957 text would require modification if the meaning of the expression “person enjoying diplomatic privileges and immunities” were changed in consequence of amendments to article 28. In other words, if the categories of persons qualifying for diplomatic privileges and immunities under article 28 were restricted by amendments to that article, it should be made clear that the provisions of article 29 applied to the children of all members of a diplomatic mission, whatever their category.

The meeting rose at 1.5 p.m.

⁴ *Yearbook of the International Law Commission, 1957, vol. I* (United Nations publication, Sales No.: 1957.V.5, Vol. I), 411th meeting, para. 46.

463rd MEETING

Friday, 13 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 INTER-COURSE AND IMMUNITIES (A/3623, PARA. 16; A/CN.4/116/ADD.1-2) (continued)

ARTICLE 29 (continued)

1. The CHAIRMAN suggested that discussion of the article should be resumed after the Drafting Committee had considered the text.

It was so agreed.