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Summary record of the 463rd meeting

Topic:
Diplomatic intercourse and immunities

Extract from the Yearbook of the International Law Commission:-
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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.

ARTICLE 30

2. Mr. SANDSTRÖM, Special Rapporteur, drew attention to the observations of the Governments of Cambodia, Switzerland, Luxembourg, the Netherlands, the United States of America (A/CN.4/116) and Italy (A/CN.4/114/Add.3).

3. In his revised draft of article 30 (A/CN.4/116/Add.1), paragraph 2 was new and was based on a proposal made by the Government of the Netherlands. The new paragraph dealt with the position of all members of the staff of a mission, other than diplomatic staff, who were nationals of the receiving State. Their position was also dealt with in the various paragraphs of article 28, but in that article no clear distinction was drawn between the treatment to be accorded to those who were and to those who were not nationals of the receiving State. The proposed new paragraph 2 related exclusively to those who were nationals of the receiving State. Their position had also been dealt with in paragraph (5) of the commentary to article 30 of the text drafted at the ninth session (A/3623, para.16). He suggested that the article be referred to the Drafting Committee.

4. With reference to the addition proposed by the Italian Government of the words "and any other privilege or immunity which is strictly related to the exercise of his functions", he wondered if Mr. Ago might explain the implications of the Italian Government's proposal.

5. Mr. AGO thought the purpose of the addition was to fill a lacuna in the 1957 text. Immunity from jurisdiction alone was not enough to ensure the unimpeded performance of a diplomatic agent's duties, and provision should be made for the granting of other privileges and immunities which were indispensable for this purpose even when the diplomatic agents were nationals of the receiving State.

6. Mr. SANDSTRÖM, Special Rapporteur, said he would have no objection to the insertion of the addition proposed by the Italian Government.

7. Mr. YOKOTA said that in principle he was in favour of the Italian Government's proposal.

8. He drew attention to a serious lacuna in the 1957 text affecting the position of the administrative and technical staff of a mission. Article 28, paragraph 2, provided that members of the service staff of the mission should enjoy immunity in respect of acts performed in the course of their duties. That provision presumably applied to all members of the service staff, whether they were nationals of the receiving State or not. Paragraph 1 of the same article, however, provided that the administrative and technical staff of a mission should enjoy privileges and immunities only if they were not nationals of the receiving State. Nothing was said about the position of members of the administrative and technical staff who were nationals of the receiving State.

9. The CHAIRMAN pointed out that their position was

dealt with in the Special Rapporteur's proposed new article 30, paragraph 2.

10. Mr. YOKOTA agreed, but said that that paragraph placed them on the same footing as the service staff and private servants of the head of a mission or a member of the mission. That was unjust, since administrative and technical staff had at least the same status as service staff and definitely a higher status than private servants. He thought the draft should expressly provide that members of the administrative and technical staff of a mission who were nationals of the receiving State should enjoy privileges and immunities in respect of acts performed in the exercise of their duties.

11. Mr. TUNKIN said that Mr. Yokota seemed to have overlooked the fact that article 30 dealt with nationals of the receiving State; he personally did not see why, for example, a national of the receiving State, who was employed as driver by the head of a foreign mission and who had caused a fatal accident while driving the ambassador, should be immune from jurisdiction. Some members of the Commission were even hesitant to agree to provisions extending privileges and immunities to diplomatic agents who were nationals of the receiving State. Thus, the Italian Government's proposal broadened the scope of a provision which as it stood was felt by many to be too wide. Moreover, the expression "which is strictly related" was not satisfactory, for it might have wider implications than the language used in the 1957 text.

12. Mr. SANDSTRÖM, Special Rapporteur, said it was because the Italian Government's proposal went somewhat beyond the terms of the 1957 text of article 30 that he was inclined to give it his approval. The immunity from jurisdiction provided for in article 30 as drafted in 1957 might not in itself be enough to ensure the inviolability which a diplomatic agent required. The addition proposed by the Italian Government made good that defect of the 1957 text.

13. Mr. ZOUREK explained that the addition proposed by the Italian Government would also cover such matters as the right to use cipher and to fly a flag. If the receiving State authorized one of its nationals to be appointed to the staff of a foreign mission, it would be requested to grant him the privileges and immunities which he needed in the exercise of his functions. The irregular situation arising therefrom could only be avoided by abandoning completely the practice of appointing nationals of the receiving State as diplomatic agents of the sending State.

14. Mr. YOKOTA, replying to Mr. Tunkin, said it had not been the Commission's intention at its preceding session to accord full privileges and immunities to members of the service staff of a mission in respect of the acts performed in the exercise of their functions. Under article 30 as then drafted, even diplomatic agents who were nationals of the receiving State would be granted privileges and immunities only in respect of official acts performed in the exercise of their functions. Consequently, to make similar provision for service staff

would be going too far. The first sentence of article 28, paragraph 2, however, might be interpreted as granting such privileges and immunities to service staff who were nationals of the receiving State. If that sentence related only to service staff who were not nationals of a receiving State the text required amendment so as to make the position quite clear.

15. Mr. AGO pointed out that he was not at all in favour of the appointment of officials of the receiving State as diplomatic agents, but if the receiving State allowed such appointments it should be prepared to grant such agents privileges and immunities necessary for the performance of their functions.

16. Mr. SANDSTRÖM, Special Rapporteur, said he realized the force of Mr. Yokota's objection to the new paragraph 2. He suggested that the paragraph should be considered by the Drafting Committee in conjunction with article 28.

17. Mr. VERDROSS recalled that in considering article 23 the Commission had decided not to take any decision on the question whether inviolability of residence and property should be extended to the private residence of a diplomatic agent who was a national of the receiving State until it came to the discussion of article 30 (459th meeting, paras. 20 and 23). He wondered what recommendation the Special Rapporteur had to make on that point.

18. He thought that the idea intended to be conveyed by the Italian Government's proposal might be more appropriately expressed in a negative form, e.g., "A diplomatic agent who is a national of the receiving State shall not enjoy immunity from jurisdiction in respect of acts performed in his private capacity." The implication would be that the person in question might enjoy all other privileges and immunities usually granted to diplomatic agents.

19. Mr. SANDSTRÖM, Special Rapporteur, said he thought Mr. Verdross' point about the private residence of a diplomatic agent who was a national of the receiving State was adequately covered by the addition proposed by the Italian Government.

20. Sir Gerald FITZMAURICE agreed with Mr. Ago's interpretation and supported the Italian Government's proposal. A receiving State was not bound to consent to the appointment of its own nationals either as diplomatic agents acting for other States or as members of the administrative and technical staff of a foreign mission, but if it did so, or at any rate if it consented to the appointment of its own nationals as diplomatic agents, it should extend to them all the privileges and immunities necessary for the exercise of their functions. That was the purpose of the existing text of article 30, but the Italian Government was right in saying that that text did not go far enough.

21. Mr. TUNKIN supported the views expressed by Mr. Yokota in relation to article 28, paragraph 2. In all probability the first sentence of that paragraph was intended to apply only to service staff who were not

nationals of the receiving State, but it could also be taken to apply to those who were. The Drafting Committee should make the necessary changes.

22. He was still not clear as to the exact meaning of the first sentence of the text proposed by the Italian Government, particularly the phrase "any other privilege or immunity which is strictly related to". He preferred the 1957 text of article 30, which was quite unambiguous. It did not imply that in every case the privileges and immunities would apply only to official acts performed in the exercise of the diplomatic agent's functions, for the second sentence recognized the right of the receiving State to grant full privileges and immunities. That was a matter, however, which should be left to the discretion of the receiving State.

23. Mr. BARTOS said he opposed the appointment of nationals of the receiving State as diplomatic agents of another State; but if the receiving State countenanced such appointments it should grant all the necessary privileges and immunities, for it was the immunity of the sending State itself which was involved and which must be respected. He agreed with Mr. Verdross that the privileges and immunities in question should include the inviolability of the diplomatic agent's private residence, for otherwise the diplomatic agent would be exposed to the risk of search. In the case of such diplomatic agents, their status as nationals of the receiving State was subsidiary to their status as diplomatic agents of the foreign State concerned.

24. Mr. SCALLE agreed with Mr. Bartos. In order to secure the diplomatic agent's freedom to express his views without fear of reprisal, the immunity from jurisdiction should subsist after the expiry of the diplomatic agent's employment in respect of acts performed in the exercise of his functions.

25. Mr. FRANÇOIS agreed with Mr. Tunkin's criticism of the expression "privilege or immunity which is strictly related to the exercise of his functions" in the Italian Government's proposal.

26. He also was of the view that, if the Government of the receiving State acquiesced in the appointment of one of its nationals as diplomatic agent of another State, it should grant all the necessary privileges and immunities.

27. Mr. MATINE-DAFTARY shared that opinion, though at the Commission's preceding session he had voted against the idea that nationals of the receiving State could be appointed diplomatic agents of another State and would do so again should another vote be taken. But since the majority of the Commission had endorsed that practice, these diplomatic agents who were nationals of the receiving State would have to be granted the privileges and immunities necessary for the efficient exercise of their official functions.

28. Mr. AMADO said that he found repugnant the idea of nationals of a receiving State acting as diplomatic agents for another State. There were exceptional cases in which persons did so act, but they were notable because they were exceptional. He would prefer the

whole article to be deleted, and made a proposal to that effect.

29. Mr. SCELLE said that if a national of the receiving State who was appointed diplomatic agent of a foreign State qualified for any privileges and immunities he should qualify for all. But the whole idea of the possible appointment of a national of the receiving State as representative of another State was objectionable and consequently he agreed with Mr. Amado that preferably the article should be omitted.

30. Mr. AGO considered that Mr. Scelle went too far in saying that if diplomatic agents who were nationals of the receiving State qualified for any privileges and immunities they should qualify for all; obviously they should not in every case be granted exemption from customs duties and similar privileges, nor immunity from jurisdiction in respect of acts done in their private capacity.

31. On the other hand, the problem was a real one, and the Commission obviously should take cognizance of it. Frequently certain States and especially small States employed nationals of the receiving State as diplomatic agents because they had no alternative. The terms of the Italian Government's proposal were perhaps vague, but the idea behind it was sound, and it was desirable that the Commission should find a formulation that better met the situation. Such diplomatic agents should clearly enjoy only those privileges and immunities which were strictly necessary for their functions, but they should enjoy all of these.

32. Replying to a point raised by Mr. Scelle, he said that by "privileges and immunities necessary for their functions" he meant to include immunity from criminal jurisdiction after the expiry of their term as diplomatic agents.

33. Sir Gerald FITZMAURICE said he could not share Mr. Amado's antipathy for the idea of nationals of one State acting as diplomatic agents for another. In fairness to the respectable and even eminent men who had acted as such, the Commission should recognize that they had often rendered service not only to the sending State but also to the receiving State in the inception and maintenance of satisfactory diplomatic relations. Such men had usually been appointed with the full approval of the receiving State. Especially in the case of a young State beginning its career of independence the practice was very useful.

34. If the article was accepted, as he thought it should be, the diplomatic agent who was a national of the receiving State should enjoy the privileges and immunities necessary for the exercise of his functions. Article 30 merely granted him immunity from jurisdiction, and did not therefore go far enough. He should be given other privileges and immunities, but not the full range of privileges and immunities granted to a diplomatic agent who was not a national of the receiving State.

35. Mr. ALFARO pointed out that, while it was rare for the head of a mission to be a national of the

receiving State, it was by no means rare in the case of the subordinate staff. He agreed therefore that there should be an article dealing with the problem. As Sir Gerald Fitzmaurice had said, article 30 did not go far enough; diplomatic agents who were nationals of the receiving State should have all the privileges and immunities required for the efficient functioning of the mission.

36. Mr. HSU thought that it was too extreme a view to hold that nationals of the receiving State should never be diplomatic agents for another country; it implied that States were at all times enemies of each other. Much loyal work had been done by agents of the receiving State's nationality. An article should therefore be inserted to deal with the problem raised by the existence of such agents. On the other hand, the terms of the Italian Government's proposal were vague. In his opinion it should be examined by the Drafting Committee.

37. Faris Bey EL-KHOURI said the last sentence of article 30 as drafted in 1957 appeared to allow the receiving State to limit the extent to which its nationals who acted as diplomatic agents for other countries would be entitled to privileges and immunities. That provision would not only enable the receiving State to establish discriminatory rules, but would destroy the uniformity and usefulness of the Commission's draft. In his view the last sentence should be deleted.

38. Mr. TUNKIN agreed with Mr. Scelle and Mr. Amado that article 30 should be deleted *in toto*; cases of diplomatic agents who were nationals of the receiving State were so rare that no article concerning them should be inserted in a draft intended to be applicable generally.

39. If, however, the majority of the members of the Commission considered that an article to deal with so specific a situation was necessary, then he thought the Italian Government's proposal, as interpreted by Mr. Ago, went too far. Moreover, it was a possible source of difficulties. How, for example, would one define the privileges and immunities necessary for the exercise of a diplomatic agent's functions? If any privileges and immunities were to be granted in the circumstances contemplated by article 30, they should be specified in precise language.

40. Mr. SANDSTRÖM, Special Rapporteur, said that the problem was a purely practical one, and an article to deal with the situation was required. Admittedly there was an element of vagueness in the Italian Government's proposal, but if the privileges and immunities to be granted to diplomatic agents who were nationals of the receiving State were specified, those persons would be given an exceptional status. It was strictly their personal inviolability which needed protection, and for the reasons he had stated he adhered to his view that the Italian Government's proposal was satisfactory.

41. Mr. AGO pointed out that the effect of the article was actually restrictive; for if there were no article

to make a distinction, a diplomatic agent who was a national of the receiving State would be treated exactly as any other diplomatic agent and would consequently enjoy too extended privileges and immunities; for example, he could not be prosecuted for acts done in his private capacity. Accordingly, the position of diplomatic agents who were nationals of the receiving State should be regulated in a special article.

42. He had no particular preference for any formulation. Clearly a diplomatic agent who was a national of the receiving State could not have full privileges and immunities. He could enjoy all those and only those which were readily necessary to him in the exercise of his functions.

43. Mr. BARTOS said that in principle he was opposed to the employment of diplomatic agents who were nationals of the receiving State. If they were used, they could be granted the full range of privileges and immunities; or they could be excluded from certain specified privileges and immunities. It would raise great difficulties if the receiving State were competent to decide what privileges and immunities were to be granted to such an agent in respect of official acts performed in the exercise of his functions. The Commission should endeavour to avoid differences between the sending State and the receiving State, and for that reason he would support the grant of full privileges and immunities to diplomatic agents who were nationals of the receiving State during their term of office and thereafter in respect of acts performed in the course of their official duties.

44. Mr. SCELLE reiterated his opposition to the article. Unless some provision was added safeguarding the immunity from jurisdiction of the diplomatic agent both during and after his term of office the article would be open to serious objections.

45. Mr. ZOUREK recalled that at the ninth session he had opposed the use of nationals of the receiving State as diplomatic agents of a foreign State because of the conflict which would obviously arise between the duty of such a diplomatic agent to his own State and his duty to the sending State. He felt that the Commission should first decide if it wished to maintain the article, and, if so, should then consider its terms. The positive and negative versions proposed would be either insufficiently clear or else too far-reaching. Article 30 should specify what privileges and immunities should be accorded to a diplomatic agent who was a national of the receiving State. To say simply that such an agent would not enjoy privileges and immunities in respect of acts done in his private capacity would be to go beyond existing measures. It would mean that he would enjoy all diplomatic privileges and immunities in respect of acts done in his capacity as diplomatic official. If there was to be an article, it should be clear, not open to misinterpretation.

46. With regard to Mr. Scelle's argument concerning immunity from jurisdiction after the expiry of the diplomatic agent's term of office, he thought the

question would be covered by article 31, paragraph 2. Alternatively, it could be dealt with either in the body of article 30 or in the commentary.

47. Mr. MATINE-DAFTARY said that he was opposed to the head of a mission being a national of the receiving State, but in the case of the subordinate staff he had no such objections. In all, or at least in many, missions the help of the nationals of the receiving State in subordinate capacities was a necessity and, indeed, contributed to good relations between States. He felt, therefore, that there should be an article dealing with the status of such persons.

48. Mr. AGO proposed the following text:

"A diplomatic agent who is a national of the receiving State shall enjoy immunity from jurisdiction only in respect of official acts performed in the exercise of his functions. Exemption from taxation and customs duties and inspection shall be granted to him only within the limits allowed by the receiving State."

49. The CHAIRMAN put to the vote the proposal that no article concerning diplomatic agents who were nationals of the receiving State should be included in the draft.

The proposal was rejected by 9 votes to 5, with 3 abstentions.

The text proposed by Mr. Ago was adopted by 9 votes to 2, with 4 abstentions, subject to drafting changes.

50. Mr. SCELLE said that he had voted against Mr. Ago's proposal because it was as ambiguous as the original draft article and left the receiving State the same opportunities for interference. For example, the receiving State would still have power to violate the secrecy of a diplomatic bag addressed to a head of mission who was a national of that State.

51. Faris Bey EL-KHOURI said that he had voted for Mr. Ago's proposal on the understanding that the Drafting Committee would so frame the final text that it would leave no freedom to the receiving State to enact regulations which departed from existing international law or to discriminate as between persons or mission.

52. Mr. ZOUREK said that he had voted against Mr. Ago's proposal because it still went too far, implying, for instance, that the private residence of a diplomatic agent who was a national of the receiving State must be inviolable. Such a provision was not strictly necessary, since all confidential material could be kept on the premises of the mission. He thought the provision would be unacceptable to many States. He reserved his final opinion until he had seen the text produced by the Drafting Committee.

53. Mr. AMADO, recalling Mr. Scelle's statement on the article, said that to prevent reprisals being taken against such a diplomatic agent by his State of nationality after he ceased to be a member of a foreign

mission it would be advisable to add to the text just adopted the last sentence of article 31, paragraph 2, as follows: "With respect to acts performed by him in the exercise of his functions as a member of the mission, immunity shall continue to subsist" (when his functions have come to an end).

54. Sir Gerald FITZMAURICE thought Mr. Scelle was mistaken in suggesting that the text just adopted would leave the receiving State the power to seize or interfere with a diplomatic bag addressed to a head of mission who was a national of that State. The inviolability of the diplomatic bag was a prerogative of the sending State, coming under sub-section B of the draft, and not a personal privilege, within the meaning of sub-section C of the draft, of the diplomatic agent to whom it was addressed.

55. Mr. SCELLE conceded Sir Gerald Fitzmaurice's point.

56. Mr. SANDSTRÖM, Special Rapporteur, said that his proposed new paragraph 2 (A/CN.4/116/Add.1) should be referred to the Drafting Committee and brought into line with the provisions of article 28.

Paragraph 2 of article 30 as proposed by the Special Rapporteur was adopted by 10 votes to none, with 7 abstentions, subject to drafting changes.

Article 30 as a whole, as amended, was adopted by 10 votes to none, with 7 abstentions.

ARTICLE 31

57. Mr. SANDSTRÖM, Special Rapporteur, said that he proposed the adoption of paragraph 1 of article 31 as drafted at the ninth session. He wished to withdraw the tentative proposal he had made (A/CN.4/116/Add.1), in response to an observation of the United States Government (A/CN.4/114), for the reason that the Commission had rejected—in connexion with article 4—the idea that the formality of *agrément* was required for all diplomatic agents. For the same reason he did not recommend the adoption of the Italian Government's proposal (A/CN.4/114/Add.3).

58. In paragraph 2 he had drafted an amendment to make it clear that exemption from customs duty, unlike other privileges and immunities, should cease as from the time when the functions of a person enjoying privileges and immunities came to an end. But he had reached the conclusion that the amendment was unnecessary and accordingly wished to withdraw it.

59. As far as paragraph 3 was concerned, he proposed an additional sentence (A/CN.4/116/Add.1), in response to an observation of the Government of Luxembourg on sub-paragraph (c) of article 26 (A/CN.4/114).

60. Sir Gerald FITZMAURICE said that he found it difficult to agree with the proposed amendment to paragraph 2. As far as export duties were concerned, he considered that a diplomatic agent should be allowed a reasonable time from the termination of his appointment in which to pack and export his personal effects

free of duty. Even in the case of import duties, he doubted whether it was right that exemption should cease abruptly as soon as the agent's appointment came to an end. He thought that at least duty-free admission should be accorded to any goods ordered by the diplomatic agent before the termination of his appointment, if they arrived in the receiving State between that date and the time of his departure.

61. Mr. TUNKIN said that he had been about to raise similar objections.

62. The CHAIRMAN put to the vote successively paragraphs 1 and 2 of article 31 as drafted at the ninth session.

Paragraph 1 was adopted unanimously.

Paragraph 2 was adopted unanimously.

63. The CHAIRMAN put to the vote paragraph 3 of article 31 as drafted at the ninth session, subject to the addendum proposed by the Special Rapporteur (A/CN.4/Add.1).

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

Article 31 as a whole, as amended, was adopted unanimously.

ARTICLE 32

64. Mr. SANDSTRÖM, Special Rapporteur, observed that, partly in response to an observation of the United States Government (A/CN.4/114), he proposed (A/CN.4/116/Add.1) an addendum to paragraph 1 of article 32 which would make it apply to members of missions other than diplomatic agents and to members of families enjoying privileges and immunities. He also proposed prefacing paragraph 2 by a text proposed by the Netherlands Government (A/CN.4/114/Add.1) to safeguard freedom of communication through third States.

65. Mr. ALFARO pointed out for the benefit of the Drafting Committee that the words "or return" at the end of paragraph 1 were superfluous, since the term "transit" applied equally to the outward and to the return journey.

66. Mr. YOKOTA observed that the addendum to paragraph 1 proposed by the Special Rapporteur appeared to conflict with article 28, paragraph 2, in that it would make members of the service staff of missions eligible to the same privileges and immunities as were enjoyed by a diplomatic agent passing through a third State, including the right of inviolability, which they were not recognized as possessing even in the receiving State. Some change in the drafting of the proposal was required.

67. Mr. SANDSTRÖM, Special Rapporteur, agreed that it would be excessive to accord inviolability to service staff passing through a third State. The words "some other member" in his proposed addendum might be changed to read "a member of the administrative or technical staff".

68. Sir Gerald FITZMAURICE suggested that it would be simpler to retain the addendum as it stood but to revise the last part of paragraph 1 to read: "the third State shall accord him . . . such immunities as may be required to ensure his transit."

69. Mr. TUNKIN was under the impression that, even after long discussion in the Commission and in the Drafting Committee, the Commission had not regarded the text ultimately adopted at the previous session as entirely satisfactory. He himself was in two minds as to whether a provision limiting immunities to "such immunities as may be required" to ensure the diplomatic agent's transit was not rather too narrow.

70. Mr. Yokota's remark on the illogicality of according service personnel passing through third States greater privileges than they enjoyed in the receiving State was perfectly justified. But that was only one point; the main question was whether it was necessary to require third States to accord, even with certain qualifications, the same degree of immunity to non-diplomatic as to the diplomatic staff of a mission. Such a provision would be going far beyond existing practice. What, after all, was the foundation for according immunities to diplomatic agents in third States? Since they performed no functions there, the concept of functional necessity applied only in so far as it was obviously essential for a diplomatic agent to be allowed to reach the country in which he was to take up his post. The main consideration appeared to be the respect due from third States to the State he was to represent. And that consideration did not really apply to the non-diplomatic staff of a mission.

71. Mr. SANDSTRÖM, Special Rapporteur, said that as far as other members of the mission were concerned, his addendum had been motivated by the consideration that it was necessary, or at least desirable, for diplomatic missions to have administrative, technical, and even service staff of their own nationality, if they so wished. He was willing to delete the word "inviolability".

72. Mr. TUNKIN pointed out that under existing practice, the subordinate staff of missions enjoyed no immunity in third States, but nonetheless passed through them without any difficulty.

73. Mr. ALFARO remarked that, apart from inviolability, which it was proposed not to mention in the article, there might be other privileges required to ensure transit. He therefore suggested amending the end of paragraph 1 to read "such immunities and privileges as may be required to ensure his transit".

74. Mr. VERDROSS proposed that paragraph 1 should be left as it stood, with the reference to inviolability, and that a paragraph should be interpolated stating that third States should accord to the subordinate staff of missions free transit through their territories.

75. Mr. ZOUREK thought that it would be necessary to include a reference to the members of the family of a diplomatic agent in paragraph 1. The solution proposed by Mr. Verdross concerning non-diplomatic

staff might be quite acceptable if the wording adopted was in accordance with the provisions of paragraph 1. He suggested that the text should provide that third States should accord "the necessary facilities" to other members of the mission if they passed through the territories of the third States or if they found themselves in the situation referred to in paragraph 1.

76. Sir Gerald FITZMAURICE said that Mr. Verdross' proposal impinged on a problem with which the Commission, as could be seen from paragraph 2 of the commentary on article 32, had deliberately refrained from dealing at its previous session. The question of the obligation to grant passage, which the Commission did not go into, was quite distinct from that of the obligation to accord certain immunities once that passage was granted. He would accordingly prefer not to use the exact form of words advocated by Mr. Verdross.

77. He thought that the proposal to include the families of members of missions on the same footing as the members of the missions themselves might be going too far. All members of the staff of a mission were presumably sent to their duty station because they were necessary for its proper functioning, and, on that ground, it was difficult to draw much distinction between the diplomatic and the non-diplomatic members of a mission. But, whereas it was desirable for third States, in the interests of the general process of diplomatic representation, to apply the same principles with respect to immunities to all working members of the staff of a mission, the need for them to do so in the case of the members' families might not be so apparent, since the immediate presence of the latter might not always be directly necessary for the functioning of the mission.

78. Mr. TUNKIN agreed with Sir Gerald Fitzmaurice on the undesirability of referring to freedom of transit in the article. He disagreed, however, with his implication that acceptance of the concept of functional necessity meant that every member participating in some way or other in the work of a mission was on the same level with regard to privileges and immunities. There was a very real difference between the function of diplomatic staff, which was a function of the State, and the function of, say, a chauffeur.

79. The families of diplomatic agents, on the other hand, should be granted the same immunities as the agent himself. If a diplomatic agent were travelling with his wife through a third State, it might greatly impede his transit if she were not accorded the same facilities.

80. Mr. LIANG, Secretary to the Commission, said that, while he agreed that inviolability should not be enjoyed by the administrative, technical or service staff of a mission, he thought it might be unwise to delete the term "inviolability" from paragraph 1 altogether. The question whether inviolability and immunity were synonymous was admittedly a matter of definition, but since the Commission had defined inviolability in article 22, he wondered whether the concept could now be regarded as included in that of "immunities".

Though it was a controversial question whether third States were under the same obligations in the matter as the receiving State, he thought that it was the practice that diplomatic agents should at least enjoy freedom from arrest or detention when passing through third States. This freedom was included in the concept of inviolability as found in article 22.

81. Mr. SANDSTRÖM, Special Rapporteur, remarked that, in view of the provisions adopted in article 28, it would be inconsistent not to require third States to accord the same treatment to all members of the staff of missions who enjoyed full privileges and immunities. He quite agreed, on the other hand, that service staff were in a different category.

82. Mr. YOKOTA was in favour of retaining the reference to inviolability in paragraph 1 and of adding a text on the lines of that suggested by Mr. Zourek as a new sentence or paragraph.

83. Mr. ZOUREK pointed out that any such addendum would have to be closely modelled on the wording of paragraph 1, making it clear, in order to avoid raising the question of freedom of transit, that the facilities were to be accorded only in the specific circumstances outlined.

84. Sir Gerald FITZMAURICE suggested that, since the terms of article 32 had to correspond to those of article 28, it would be advisable to await the Drafting Committee's text for article 28 before taking any decision on the other article.

The meeting rose at 1.10 p.m.

464th MEETING

Monday, 16 June 1958, at 3 p.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 32 (continued)

1. The CHAIRMAN, after recalling the discussion on article 32 at the previous meeting, put to the vote the proposal to retain, subject to drafting changes, paragraph 1 of article 32 as adopted at the ninth session (A/3623, para. 16), and to extend the scope of the paragraph to cover members of families of diplomatic agents as well.

Paragraph 1 as amended was adopted unanimously.

2. The CHAIRMAN put to the vote the proposal that the Drafting Committee be requested to insert a new paragraph 2 stating that, in circumstances similar to those described in paragraph 1, third States should accord to members of the administrative, technical or service staff of missions the facilities required to ensure their transit.

The proposal was adopted by 11 votes to none, with 2 abstentions.

3. The CHAIRMAN put to the vote, as a new paragraph 3, paragraph 2 as adopted at the ninth session, prefaced by the addendum proposed by the Special Rapporteur (A/CN.4/116/Add.1).

The new paragraph 3 was adopted by 13 votes to none, with 1 abstention.

Article 32 as a whole, as amended, was adopted by 13 votes to none, with 2 abstentions.

Planning of future work of the Commission (A/CN.4/L.76)

[Agenda item 8]

4. Mr. ZOUREK, introducing his comments and proposals on the planning of the future work of the Commission (A/CN.4/L.76), said that his decision to submit the paper sprang directly from his participation, as Chairman of the Commission, in the debates, at the twelfth session of the General Assembly, on the Commission's report of its ninth session (A/3623).¹

5. It would be recalled that the Commission had studied at its ninth session the problem set by the increase in its size and the question of ways and means of speeding up its work, and had included in its report on that session several paragraphs outlining the various considerations involved (A/3623, paras. 26 to 29).

6. From paragraphs 2 to 8 and 10 to 18 of his paper, it would be seen that the Sixth Committee had debated the working methods of the Commission at the eleventh and twelfth sessions of the General Assembly. On the latter occasion, a number of delegations had expressed, in one form or another, the desire that the methods of work of the Commission be improved. Four delegations had supported the suggestion of the representative of Sweden that in future the Commission should divide itself into two or even more sub-commissions working independently or along parallel lines on different topics. Two delegations, while approving that suggestion in principle, feared that it might have disadvantages, for example, a loss of unity of views. Several delegations, including those of Belgium and the Soviet Union, had opposed the Swedish suggestion, considering that the Commission should not press on too fast with the work of codification, which by its very nature required a considerable amount of time. However, the great majority of delegations seemed to agree that the Commission should be left to organize its work according to its needs and experience. He himself, in his reply as Chairman of the Commission, had

¹ See *Official Records of the General Assembly, Twelfth Session, Sixth Committee*, 509th to 513th meetings.