

Document:-  
**A/CN.4/SR.393**

**Summary record of the 393rd meeting**

Topic:  
**Diplomatic intercourse and immunities**

Extract from the Yearbook of the International Law Commission:-  
**1957 , vol. I**

*Downloaded from the web site of the International Law Commission  
(<http://www.un.org/law/ilc/index.htm>)*

84. The CHAIRMAN suggested that the Commission first decide in principle whether to include an article on interim *chargés d'affaires*.

*It was agreed to include such an article by 16 votes to 1, with 2 abstentions.*

85. Mr. BARTOS proposed that the exact wording of the article be left to the Drafting Committee.

86. The CHAIRMAN agreed. He pointed out that in the practice of States the office of *chargé des affaires* was also not uncommon. By contrast with the *chargé d'affaires ad interim*—a diplomatic agent exercising general functions—the *chargé des affaires* of a diplomatic mission, who was appointed when there were no diplomatic agents on the spot, exercised strictly limited functions only.

87. Mr. SPIROPOULOS wondered whether it was really necessary for a *chargé d'affaires* to be appointed by the sending State in cases where the head of mission was absent or temporarily incapacitated.

88. Mr. BARTOS pointed out that it was usually the head of the mission who informed the receiving State's ministry of foreign affairs of his absence or inability to perform his functions, and at the same time designated a member of the embassy staff to act on his behalf. The second sentence of paragraph 2 of his proposal referred particularly to the case where the death of the head of the mission prevented him from doing so.

*Article 10 (a) (para. 80 above) was adopted in principle, the exact wording being left to the Drafting Committee.*

#### QUESTION OF INCLUDING ADDITIONAL ARTICLES IN SECTION I

89. Mr. LIANG (Secretary to the Commission) suggested that, in view of the fact that the title of the draft referred to diplomatic intercourse as well as diplomatic immunities, the Commission ought at some stage to consider whether it should not insert, possibly after article 11, an article along the lines of that contained in the Havana Convention relating to the beginning and end of diplomatic missions.

90. Mr. SANDSTRÖM, Special Rapporteur, said he had wondered whether to take up in his draft the question of extraordinary missions, which was referred to in the Vienna Regulation and was also dealt with in the 1928 Havana Convention, but eventually he had come to the view that it was sufficient to deal with permanent missions.

91. With regard to Mr. Liang's point, he felt the most important thing was to specify when diplomatic immunities should begin and end, and that question was dealt with in article 25 of his draft. He had not thought it necessary to refer to the beginning and end of a diplomatic mission.

92. Mr. SPIROPOULOS pointed out that the contents of the Commission's draft would to a great extent be determined by its form. He was becoming more and more convinced that the Commission's drafts should not be draft conventions but only re-statements of the law. That was particularly so in the present case, where the Commission was not making any important innovations, and it might be desirable for it to enter into rather more detail than would be appropriate in a convention. The questions referred to by the Special Rap-

porteur and the Secretary were both real problems which should be dealt with in the Commission's draft, but which could be dealt with more easily if it were in the nature of a simple restatement.

The meeting rose at 1.15 p.m.

### 393rd MEETING

*Wednesday, 8 May 1957, at 9.45 a.m.*

*Chairman:* Mr. Jaroslav ZOUREK.

#### Diplomatic intercourse and immunities (A/CN.4/91, A/CN.4/98) (continued)

[Agenda item 3]

#### CONSIDERATION OF THE DRAFT FOR THE CODIFICATION OF THE LAW RELATING TO DIPLOMATIC INTERCOURSE AND IMMUNITIES (A/CN.4/91) (continued)

#### QUESTION OF INCLUDING ADDITIONAL ARTICLES IN SECTION I (continued)

1. The CHAIRMAN invited the Commission to consider the suggestions made by the Special Rapporteur and the Secretary at the close of the previous meeting that additional articles be inserted in section I of the draft, dealing with extraordinary missions and the date of commencement and termination of diplomatic functions. During the general debate many members of the Commission had expressed the view that it should deal with extraordinary missions, which nowadays formed a large and fruitful part of diplomatic intercourse.

2. Speaking as a member of the Commission, he agreed with that view. He also felt it should not prove too difficult a matter to draft a provision relating to the date of commencement and termination of diplomatic functions, as suggested by the Secretary.

3. Mr. TUNKIN doubted whether it would be so easy to draft such a provision, and also doubted whether it was necessary. As the Special Rapporteur had pointed out at the 392nd meeting, article 25 of his draft already settled the only matter which was of any practical importance in that respect, namely, the duration of privileges and immunities. On the other hand, if the majority of the Commission was in favour of including an article along the lines suggested by the Secretary, he would have no objection.

4. With regard to the other suggestion, there was no denying the fact that extraordinary missions presented a vast and difficult problem. For that very reason he felt that the Commission should for the present confine itself to diplomatic intercourse and immunities in the strict sense of the word. It would be time enough for it to take up the question of extraordinary missions once it had seen the fate of the draft under discussion.

5. Mr. YOKOTA submitted that, in practice, it was important to know the date on which a diplomatic agent began or ceased to exercise his functions, as distinct from the date on which he began or ceased to enjoy diplomatic privileges and immunities. The two dates were not necessarily the same. He was not sure what the general practice was, but the question should at least be clarified and rules laid down.

6. The CHAIRMAN said he would accordingly put to the vote the question whether to include an article on the date of commencement and termination of diplomatic missions.

7. Mr. SANDSTRÖM, Special Rapporteur, intervening, pointed out that the article could relate either to the dates on which a permanent mission was to be regarded as beginning or ending, or to the dates on which the head of a mission was to be regarded as taking up or laying down his duties. In which sense was the term "diplomatic mission" to be understood?

8. Mr. BARTOS felt that both questions were important and that there should therefore be two additional articles—one for each question.

9. Mr. LIANG, Secretary to the Commission, agreed that both questions were important, and pointed out that they were both implicitly raised in the text which the Commission had adopted for article 1, namely:

"The establishment of diplomatic relations between States, and of permanent diplomatic missions, takes place by mutual consent."

10. On the other hand, the commencement and termination of diplomatic relations between States did not, he thought, give rise to many difficulties in practice, whereas the commencement and termination of the functions of the head of a diplomatic mission did.

11. Mr. GARCIA AMADOR felt that the Commission had not yet discussed the matter sufficiently to decide whether or not it wished to include provisions along the lines suggested.

12. Mr. TUNKIN agreed. The Commission could not decide the matter until it had a text before it.

13. The CHAIRMAN accordingly suggested that the Special Rapporteur be asked to draft an article, or articles, along the lines suggested, for consideration later in the session.

*The suggestion was adopted by 18 votes to none, with 1 abstention.*

14. With regard to the suggestion for additional provisions on extraordinary missions, Mr. KHOMAN said he had no objection to Mr. Tunkin's proposal, but wondered whether in that case too the Special Rapporteur could not draft a text for subsequent consideration by the Commission.

15. Mr. BARTOS agreed with Mr. Khoman that the Commission should request the Special Rapporteur to begin study of the immense question of "roving diplomacy", with regard to which there had been radical changes before, during, and since the Second World War. Nowadays, it was a commonplace for ministers of state to undertake missions in foreign capitals. Sometimes one and the same delegation (for example to a diplomatic conference) comprised staff of such extraordinary missions alongside staff of permanent missions, and the whole delegation then assumed the character of an *ad hoc* mission. The Special Rapporteur would submit a report either at the current session or at the next.

16. Mr. TUNKIN felt that, in view of the complicated and novel nature of the subject, it would be inadvisable to request the Special Rapporteur to submit a text for consideration at the current session. It would be easier to deal with the subject once the Commission had received the comments of Governments on the draft now under consideration.

17. Mr. YOKOTA said he was in full agreement with Mr. Tunkin, especially as the question of extraordinary missions raised the questions of delegations to confer-

ences held under the auspices of international organizations and of delegations to the international organizations themselves, and it had already been agreed in principle to leave those questions aside until work had been completed on diplomatic intercourse and immunities in the strict sense of the term.

18. Mr. EL-ERIAN associated himself with the views expressed by Mr. Tunkin and Mr. Yokota, particularly bearing in mind the already heavy agenda for the current session.

19. Mr. KHOMAN thought there was no disagreement. He had only suggested that the Special Rapporteur should be requested to prepare a draft, and quite agreed that that would take time.

20. The CHAIRMAN agreed with Mr. Yokota that the Commission had decided to leave the whole question of privileges and immunities of international organizations aside. In his view, however, that question was not linked with the question of extraordinary missions.

21. Mr. SANDSTRÖM, Special Rapporteur, said it would be out of the question to submit a draft for consideration by the Commission at its current session if the draft were to cover also the question of privileges and immunities of delegations to international organizations and of the international organizations themselves. He was at the Commission's disposal, but definitely felt that those questions should be left aside.

22. The CHAIRMAN said that the only question under discussion was that of extraordinary or *ad hoc* missions. It appeared that some members thought the Commission would have time to study that question at its current session.

23. Mr. SCELLE said it was becoming more and more common for States to send out extraordinary or *ad hoc* missions. The United States Government, for example, sent out ambassadors at large, while ministers of foreign affairs undertook many extraordinary missions abroad.

24. If the Commission confined itself to reproducing, with a few changes, the decisions taken at the Congress of Vienna, public opinion would consider, and would have reason for considering, that it had dealt with only a part of the question, and was trailing a long way behind the latest developments. There ought not to be any great difficulty in devoting a few articles to a new form of diplomacy which was being increasingly adopted for relations both between States and between States and international organizations.

25. Mr. GARCIA AMADOR, while agreeing that during the general debate the majority of the Commission appeared to have been in favour of limiting work at the current session to permanent and also, perhaps, extraordinary missions, urged that there had been no fixed decision to leave aside the question of privileges and immunities of delegations to international organizations and of international organizations themselves.

26. Faris Bey EL-KHOURI said that, if the Commission's draft was to be a comprehensive set of rules on diplomatic intercourse and immunities, it must deal with all types of missions which could properly be regarded as diplomatic. He agreed that such questions as extraordinary missions raised complex problems, but the Commission should not fight shy of them for that reason. It would have, in any case, an opportunity of revising its draft at the next session, in the light of

comments received from Governments. And Governments would certainly be quick to draw attention to any omissions in the draft. For example, the Commission had dealt with questions of precedence among heads of missions, but had not dealt with a related question, with regard to which there existed no uniformity of practice and which gave rise to frequent misunderstanding and disputes, namely, that of their precedence over local dignitaries at official banquets, receptions and such like. Only the Commission could give guidance on such matters, and countries were undoubtedly expecting it to do so.

27. Mr. SPIROPOULOS agreed that extraordinary or *ad hoc* missions were a matter of great and growing importance, which it was desirable for the Commission to study. He also agreed that at its current session the Commission must needs confine itself to diplomatic intercourse and immunities in the ordinary sense. He would, however, have no objection to asking the Special Rapporteur to undertake a preliminary study of extraordinary or *ad hoc* missions, in the light of which the Commission could decide at its next session whether special provisions were required in that connexion, and, if so, of what kind.

28. Mr. MATINE-DAFTARY agreed that, in view of its heavy agenda, the Commission had not had time at the current session to draft separate rules on extraordinary missions, particularly in view of the fact that the ground had not been prepared by a study by the Special Rapporteur. The Commission should, however, make it clear that it intended to take up the question later, by referring in the title of the draft only to the permanent diplomatic missions.

29. He felt that the text of article 10 already went some way towards meeting Faris Bey El-Khourî's point regarding precedence. Possibly the Drafting Committee could find some way of widening the scope of that article a little in order to meet the point fully.

30. Mr. BARTOS said he shared the view of those members of the Commission who thought it would be a mistake simply to reproduce the provisions of the Regulation adopted by the Congress of Vienna, many of which were outdated.

31. Even at the time of the Congress of Vienna, the existence of *ad hoc* diplomacy had been recognized, though mainly, it was true, with regard to the questions of protocol which it raised. Now that *ad hoc* diplomacy had become the general practice, it was necessary to make a long and thorough study of it, in view of the extreme difficulty of laying down law and custom in that field.

32. The Commission could certainly not deal with the question at its current session, but he proposed that, without fixing a date, it request the Special Rapporteur to study the matter and submit a report thereon.

33. Sir Gerald FITZMAURICE felt there was only one point on which there was not yet general agreement, namely, whether the Commission should request the Special Rapporteur to submit a report in time for consideration at the tenth session. In his view that was essential, for if the Special Rapporteur's report was not available at the tenth session the Commission would be in the same position as it was at the ninth session, and would not be able to include provisions on extraordinary diplomacy in its final draft.

34. Mr. EL-ERIAN agreed with Mr. García Amador that the Commission had taken no decision regarding extraordinary or *ad hoc* missions, international organizations and delegations to international conferences, all questions which were intimately related to those the Commission was discussing, and which it certainly should consider in due course, though it had not time to do so at the current session. The Commission might, however, find it advisable to insert in its report on the current session a paragraph requesting the views of Governments on the other three matters referred to.

35. Mr. HSU said he could support Mr. Bartos's proposal, although he would have preferred to see a text submitted at the current session.

36. In view of the emergence of so many new States, it was highly desirable for the Commission to afford guidance on all points which gave rise to difficulties in practice, such as the one referred to by Faris Bey El-Khourî (para. 26 above).

37. Mr. TUNKIN said that, in deference to the wishes expressed by many members of the Commission, he could agree to Mr. Bartos's proposal, on the understanding that the subject of extraordinary or *ad hoc* diplomacy would be dealt with as a separate problem from that which was the subject of the draft under consideration, and that study of it would not delay presentation of that draft.

38. Mr. AGO thought that all members of the Commission agreed that the draft which it was considering covered only a part of a much wider field. If the Commission had chosen to deal with one part first—as it had done in the case of the law of the sea—it was because it could not deal with all parts simultaneously; and if it had chosen that particular part, it was no doubt because it was with regard to it that international law was most highly developed. He could, therefore, support Mr. Bartos's proposal, since it would enable the Commission to take up the second part of its work as soon as it had completed the first.

39. Replying to a question by Mr. GARCÍA AMADOR, the CHAIRMAN pointed out that the term "extraordinary missions" was not to be understood in the sense in which that term was used in the Havana Convention,<sup>1</sup> but as any mission undertaken abroad for a specific purpose.

40. He put to the vote the proposal that the Special Rapporteur be asked to study the question of extraordinary or *ad hoc* missions, as distinct from permanent diplomatic missions, and to submit a report thereon for consideration by the Commission at its tenth session.

*The proposal was adopted unanimously.*

41. Mr. SCELLE, explaining his vote, pointed out that the text on which the Commission was working was a provisional text. When the related question of extraordinary missions had been studied, the Commission would undoubtedly have to modify it in various respects—for example, by inserting some provision regulating precedence as between heads of missions and ambassadors at large.

42. The CHAIRMAN recalled that, when being sent to Governments for comment, the articles drafted by the Commission had always been known as provisional arti-

<sup>1</sup> Convention regarding Diplomatic Officers, signed at Havana on 20 February 1928. See League of Nations, *Treaty Series*, vol. CLV, 1934-1935, No. 3581.

cles; it was only when the comments of Governments had been received that the draft articles could be put into a final form—"final" as far as the Commission was concerned.

43. Mr. SANDSTRÖM, Special Rapporteur, enquired whether the Commission invited him to prepare for possible inclusion in the set of articles a draft article on the functions of permanent missions, a point already raised by Sir Gerald Fitzmaurice (383rd meeting, para. 11). When preparing his draft he had not thought it expedient to deal with the question, but, since the Commission had taken decisions which might lead him to deal with certain other questions, he would reconsider his attitude.

44. Sir Gerald FITZMAURICE recalled that he had raised the question of defining the diplomatic function during the general debate at the 383rd meeting. It would be useful if the question, which had been the subject of a certain amount of controversy in recent years, were at least examined by the Commission. It might, in fact, be of advantage to include a definition in the draft articles themselves. He hoped that the Special Rapporteur would prepare a draft article for consideration.

45. Mr. KHOMAN said that much turned on the question, already raised by Mr. Spiropoulos, as to whether the Commission's object was to frame a draft convention or simply a model code for the guidance of States. If the object was to formulate a model code, he would be in favour of including an article defining the diplomatic function.

46. The CHAIRMAN, while agreeing with Mr. Spiropoulos that the purpose to be served by the draft would have some repercussions on its content, thought that the form it should take could best be discussed later in the session. The Commission would not know until its next session, when it had received the comments of Governments on its initial draft, whether there was any chance of a draft convention on the subject being adopted.

47. Mr. SPIROPOULOS said that the Commission must, nevertheless, make up its mind as to the purpose it thought its draft articles should serve.

48. Mr. EL-ERIAN was in favour of postponing consideration of that question.

49. Mr. BARTOS said that, if the Commission did not carefully delimit the field of activity of diplomatic missions, it would be unable to deal with the manner in which they worked or the measures necessary for them to discharge their functions. The definition of the diplomatic function was a fundamental question which would arise regardless of whether the Commission wished to frame a code or a draft convention.

50. Mr. AMADO said that it would be an extremely difficult task for the Special Rapporteur to define the diplomatic function, and pointed out that it seemed necessary to envisage in the draft the status of non-permanent missions. The Havana Convention had solved the latter problem quite simply in its article 9.

51. Mr. SPIROPOULOS pointed out that it was a question of defining the powers of heads of permanent missions and not of defining permanent missions. He thought the Special Rapporteur should be asked to prepare an article on the former subject.

52. Mr. LIANG (Secretary to the Commission) said that he had been in favour of articles on diplomatic

intercourse as distinct from privileges and immunities. It would be extremely difficult, however, to define diplomatic functions. States, nevertheless, had a clear idea of the bounds of those functions, and if a receiving State considered that the head of a mission accredited to it had overstepped those bounds, the only course it could take was to declare him no longer *persona grata*.

53. Mr. PAL took the view that the Commission should refrain from attempting any definition of a matter like "diplomatic function". If there were dangers in every definition, there was an even greater danger in seeking to define a function which was more easily understood than expressed. It was not possible to offer any useful definition of such a function *per genus et species*. Any definition by description, enumeration or exclusion would be calculated only to mislead, unless the Commission could accomplish the feat of making its enumeration exhaustive so as to mark out clearly the limits—the outline—of what was precisely comprised in it. If any definition was needed, it was needed for the guidance of the parties concerned, including the members of the mission. Unless the definition really defined so as to clarify unequivocally where the border-line cases lay, it would serve no useful purpose in that respect. In such border-line cases the diplomat would necessarily be left to his own resources and to act at his own risk.

54. As the Secretary had pointed out, when a diplomatic agent overstepped the bounds of his functions, the consequence, perhaps, for him would be to be declared no longer *persona grata*. According to an earlier decision of the Commission (387th meeting), however, the receiving State was not bound to give any reason when declaring a diplomatic agent *persona non grata*. Thus, even if the Commission inserted a definition of diplomatic functions, the decision as to whether those functions had been exceeded or not would always be in the hands of the receiving State.

55. Sir Gerald FITZMAURICE said that the problem he envisaged was quite different from that referred to by the Secretary and Mr. Pal. He was not concerned with the situation when a diplomatic agent attempted to exceed his functions. What he wished to have specified were the types of function in which a receiving State might not refuse to allow a diplomatic mission to engage. The Commission should at least examine that question, even though it might decide it was inadvisable to deal with it in the draft articles.

56. Mr. BARTOS remarked that, to reduce the question of overstepping the limits of diplomatic functions to the single question of declaring a diplomatic agent *persona non grata*, was to oversimplify the problem. A diplomatic agent might go beyond the limits of his functions through no fault of his own but as a result of instructions based on a different concept of diplomatic functions.

57. It was very difficult to say where the legitimate activities of observation and information began and ended. Some States had, possibly in good faith, allowed their diplomatic agents to indulge in activities which the receiving States regarded as espionage. Other States appointed attachés for public relations—presumably accredited to the general public. Such cases, and the somewhat irregular conduct of certain missions in Yugoslavia, which had distributed essential drugs in time of shortage directly to the public without passing through normal trade or Red Cross channels, showed that activities of

diplomatic missions went far beyond the four or five functions traditionally attributed to diplomatic agents.

58. States could not always declare a diplomatic agent *persona non grata*, and if a warning, unofficial representations and a formal protest were of no avail, there was little they could do, short of breaking off diplomatic relations, which they were not always willing to do.

59. The normal functions of diplomatic missions therefore needed defining. Such a definition would be of great assistance to small countries which had recently acquired independence. Precisely those States which stood by the Regulation of the Congress of Vienna were very "progressive" on the question of the scope of diplomatic functions, defending its steady extension on the plea of ever-broadening international co-operation.

60. The CHAIRMAN pointed out that the question before the Commission was not whether to include an article on the subject in the draft, but whether the Special Rapporteur should be asked to prepare a text.

61. Mr. AMADO observed that the duties of diplomatic officers had been summarized in section III of the Havana Convention. He was opposed to the Commission's attempting to define the diplomatic function, since in so doing it would lose itself in a maze of detail. The task before the Commission was arduous enough without that.

62. Mr. EL-ERIAN said that, while not underestimating the difficulty of defining the diplomatic function, and while aware that definitions were primarily the concern of doctrine and not of legislation, he thought that the Commission should consider, and if necessary adopt, such a definition.

63. There were at least four reasons why an attempt should be made. Firstly, diplomatic functions had undergone very considerable and fundamental changes in recent years. Secondly, the trend towards rationalization of the system of immunities on the basis of the theory of "functional necessity" made it essential to state what diplomatic functions were. Thirdly, there were several references to diplomatic functions in the draft articles; both article 17, paragraph 1, which referred to "all necessary facilities for the exercise of his functions", and article 27, which contained the clause "provided that they do not impede the exercise of his functions", seemed to call for some indication of the exact nature of the functions of a diplomatic agent. Finally, the problem of the nature of the diplomatic function would arise in connexion with diplomatic immunities in countries which did not accord immunity from civil jurisdiction. In such cases it was essential to be able to distinguish between acts performed by a diplomatic agent in a private capacity and those performed in the exercise of his functions.

64. The definition need not be precise and restrictive, but should be illustrative and provide guidance for States on the nature of diplomatic functions at the present day. It would not be concerned with the respective roles of the head of a mission and its previous members, but with the essential characteristics of the diplomatic function in general. It could form the subject either of an article or of a paragraph in the commentary.

65. Mr. AGO agreed with the Chairman; the question before the Commission was whether or not to ask the Special Rapporteur to explore the possibility of including a draft article defining the functions of diplomatic missions. The Special Rapporteur might conclude that it was

possible, or that the functions of diplomatic missions could be defined only by a negative formula, or that an article on the subject could not be included. The Commission should, however, adopt the latter pessimistic view only after mature consideration.

66. He himself would welcome the inclusion of an article on the subject. The Commission had already found it necessary to include articles on the beginning and termination of diplomatic missions, and its draft would be more complete if it also stated what were the functions of such missions. A definition of what came within diplomatic functions would also be of assistance in settling disputes that sometimes arose between States on that subject.

67. He agreed that the question of knowing when a diplomatic agent was overstepping the bounds of his functions was not identical with the question of when a diplomatic agent could be declared *persona non grata*. Disputes on the scope of diplomatic functions could arise between States without the conduct of persons being involved, while on the other hand, diplomatic agents could be declared *persona non grata* for other reasons than that of exceeding their functions.

68. Mr. SCALLE said that a set of articles on diplomatic intercourse which contained no definition of the diplomatic function would be a strangely truncated body.

69. Almost 100 years before the Congress of Vienna, Montesquieu had first sought to define the role of the ambassador, calling him the voice, eye and ear of his sovereign, in which capacities he had the right to be heard and the right to listen and to have collaborators to collect information—who might overstep the limits of their functions. Ambassadors had a variety of duties to perform in the receiving State: representation, negotiation, the collection of information and, last but not least, the act of signature. All those points might be quite familiar, but it was nevertheless essential to state them, for they constituted the essential functions of diplomatic missions.

70. Mr. LIANG (Secretary to the Commission) agreed that a general article on the lines indicated by Sir Gerald Fitzmaurice would be a useful contribution to a complete code of diplomatic intercourse. A definition would not, however, be easy to formulate. It was largely a question of determining what should be excluded from the concept of diplomatic functions.

71. The CHAIRMAN agreed with Mr. El-Erian that, references to diplomatic functions having been made in the draft articles, it would be necessary to attempt to define the nature of the diplomatic function. There was moreover another argument in favour of doing so. After diplomatic functions had terminated, acts which took place during the exercise of official functions continued to be immune from jurisdiction. In order to determine the dividing line between the diplomatic agent's official acts and his acts as a private individual, a definition of diplomatic functions would be very useful.

72. He presumed from the absence of any formal opposition that the Commission wished the Special Rapporteur to prepare a text on the diplomatic function.

*It was so agreed.*

73. Mr. SANDSTRÖM, Special Rapporteur, enquired whether it was the wish of the Commission that he should include a provision on the lines of article 13 of the

Havana Convention, stipulating that diplomatic officers should address themselves to the minister of foreign affairs only, and approach other authorities only through that channel. He had not included such a provision in his draft, because he did not consider that international law was infringed when a diplomatic agent approached authorities without passing through the minister of foreign affairs. The proper place for such a provision was, he thought, in the instructions to diplomats.

74. Mr. SPIROPOULOS remarked that the undecided question of whether the Commission was to frame a draft convention or a code arose again. If it was framing a code for the guidance of chancelleries, then all matters of detail such as that mentioned by the Special Rapporteur would have their place in it. Since, however, the initial question had not been settled, a decision regarding the provision under consideration was more difficult. The question of the channels through which diplomatic agents should deal was not an important legal problem, but rather a matter of protocol in the broadest sense. He formally proposed that no provision on the subject be included in the draft.

75. Mr. TUNKIN fully agreed with the Special Rapporteur that it was unnecessary to include such a provision in the draft. The matter could be decided irrespective of whether the set of articles was to become a code or a draft convention, since in either case the text would be a collection of rules on international law and not just a text book.

76. All States were free to determine through what organs their intercourse with other States should be conducted. Some might decide that the ministry of foreign affairs should be the sole channel of diplomatic intercourse, but some might decide that other organs might have direct intercourse with the organs of other States.

77. Mr. BARTOS considered that the question of the relations with the various authorities of the receiving State was a matter to be considered at a later stage under section III of the draft, "Duties of a diplomatic agent". If the receiving State had a strict rule that relations must be conducted solely through the minister of foreign affairs, diplomatic agents in that State must conform to it. In States where exceptions to that rule were allowed, however, diplomatic agents were free to approach other authorities direct.

78. Mr. MATINE-DAFTARY said that a distinction must be drawn between official and informal contacts. In some countries, the Soviet Union for instance, diplomatic intercourse was conducted solely through the medium of the minister of foreign affairs, and direct contacts with other authorities were forbidden. In other countries, however, informal contacts with other authorities were permitted because on many questions such contacts were necessary. He would be interested to learn whether article 13 of the Havana Convention was applied strictly in diplomatic intercourse between American States.

79. Mr. GARCIA AMADOR pointed out that the question under discussion should strictly be considered in connexion with section III of the draft. It was his intention to submit amendments, based on articles 12 and 13 of the Havana Convention, to that part of the draft. He had, however, been taken unawares by what he regarded as a premature discussion of the duties of a diplomatic agent. He urged that the Commission suspend discussion on what was really the substance of a later part of the draft.

80. Mr. KHOMAN said that it was a sound general principle that the official channel for diplomatic intercourse was the minister of foreign affairs. In practice, however, subordinate members of missions were often advised to approach other authorities directly, commercial attachés getting into touch with the ministry of commerce or of economic affairs, and service attachés with the defence ministries.

81. Sir Gerald FITZMAURICE felt that it would be inadvisable to include a provision on the subject. Although it was still the rule for the strictly diplomatic members of a mission to deal only with the minister of foreign affairs, it was a fairly settled practice for the numerous specialists who had been added to missions to have direct contact with the departments dealing with their speciality. Indeed, unless such direct contacts were permitted, it would be extremely difficult for the various attachés to discharge their functions. Most countries actually preferred them to address themselves to the competent departments. The principle was so generally accepted that it might be unnecessary to have an article on the subject, but, if the Commission decided otherwise, the provision must be carefully framed and ought to specify that departures from the general rule could be made in the case of specialist attachés to missions.

82. Mr. EL-ERIAN said that he shared Mr. Tunkin's and Sir Gerald Fitzmaurice's doubts on the advisability of including a provision which might restrict contacts in diplomatic intercourse. The Commission should not attempt to lay down a rule on the matter, but should leave it to the discretion of the receiving State. Quite apart from technical attachés, the heads of missions themselves might find it more conducive to an improvement in relations to contact other departments than the ministry of foreign affairs, or even to contact prominent members of the cabinet. Circumstances differed so much from country to country that a hard and fast rule on the matter would not help to improve international relations.

83. Mr. SPIROPOULOS asked for a vote on his proposal that no provision on the subject be included in the draft.

84. After further discussion, the CHAIRMAN suggested that the vote on the question of including such a provision in the draft be taken when the Commission considered section III of the draft, on the understanding that the discussion would not be re-opened.

*It was so agreed.*

The meeting rose at 1 p.m.

### 394th MEETING

*Thursday, 9 May 1957, at 9.45 a.m.*

*Chairman:* Mr. Jaroslav ZOUREK.

#### **Diplomatic intercourse and immunities (A/CN.4/91, A/CN.4/98) (continued)**

[Agenda item 3]

CONSIDERATION OF THE DRAFT FOR THE CODIFICATION  
OF THE LAW RELATING TO DIPLOMATIC INTERCOURSE  
AND IMMUNITIES (A/CN.4/91) (continued)

#### SECTION II

1. Mr. SANDSTRÖM, Special Rapporteur, drew attention to the arrangement of Section II of his draft. He had adopted the view that the proper order in which to deal with immunities was to take first those attaching to the premises of diplomatic missions, then the facilities