

Document:-
A/CN.4/SR.455

Summary record of the 455th meeting

Topic:
Diplomatic intercourse and immunities

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

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

80. Sir Gerald FITZMAURICE noted that according to article 10 both ambassadors and ministers were accredited to heads of State, so that clearly no distinction should be made between them conferring only upon ambassadors right of access to heads of State.

81. On the question whether such a right existed now, he could not speak with much certainty, but such a right had undoubtedly existed in the past; it had been based on the conception of the ambassador as the representative of his sovereign or the head of his State. Even then, it had clearly been exercised sparingly, but merely because a right was exercised sparingly and tactfully it did not mean that it did not exist. At present, in any grave issue, on instructions from his Government, the head of the mission might ask for an interview with the head of the State or Government, although normally he would ask to see the Minister of Foreign Affairs; and in such a case it would be difficult for the authorities of the receiving State to refuse it. Satow's *Guide* was not very categorical in the matter, merely saying that an ambassador dealt "as a rule" with the Minister of Foreign Affairs.² In the circumstances, he was inclined to agree with Mr. François that there was a right, even if it was little used.

82. If it was possible to draft a suitable text, he was prepared to agree with the Netherlands Government that reference to the matter should be included in the commentary.

The meeting rose at 6 p.m.

² Sir Ernest Satow, *A Guide to Diplomatic Practice*, 4th ed., Sir Neville Bland (ed.) (London, Longmans, Green and Co., 1957), p. 167.

455th MEETING

Tuesday, 3 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)

OBSERVATIONS OF THE CZECHOSLOVAK GOVERNMENT ON SECTION I

1. Mr. SANDSTRÖM, Special Rapporteur, drew attention to the Czechoslovak Government's proposal (A/CN.4/114/Add.1) that section I of the draft should deal with the rank and precedence, not only of the heads of mission, as in article 10, but also of the other diplomatic staff of the mission.

2. For the reasons he had given in his report (A/CN.4/116), he was not in favour of the proposal.

3. Mr. ZOUREK observed that the diplomatic staff of a mission, other than the head, were ranked according to a well-established hierarchical order which was the same in all countries. Though he appreciated the force of the Special Rapporteur's arguments, he thought that perhaps the matter could be dealt with in an article of the draft; or, if the Special Rapporteur considered that such a solution would exceed the scope of the draft, some reference might be made to the subject in the commentary. Another solution might be to add to article 12, dealing with the precedence of heads of mission, a clause indicating how the precedence of other diplomatic staff of the mission was to be determined.

4. If the Special Rapporteur agreed, he was willing to prepare a suitable text.

It was decided to defer consideration of the proposal.

5. Mr. SANDSTRÖM, Special Rapporteur, drew attention to the Czechoslovak Government's proposal that section I of the draft should also stipulate the right of individual diplomatic members of a mission to exercise diplomatic activities in accordance with the instructions of their Governments (A/CN.4/114/Add.1).

6. He was of the opinion that such a provision would be superfluous, especially if the proposal of the Netherlands Government regarding a definitions clause was adopted.

7. The CHAIRMAN, speaking as a member of the Commission, said he did not see the need for including in the draft a stipulation that individual diplomatic members of a mission should have the right to exercise diplomatic activities "in accordance with the instructions of their Governments". Whether a particular diplomatic activity was in accordance with the instructions of the Government of the sending State was a question strictly between that Government and the member of the mission concerned. Instead of being his right, it would rather be his duty to follow such instructions. But so long as his activity was within diplomatic bounds, nobody else would be entitled to question it or to withdraw the privileges and immunities from the agent on the ground of want of such instructions. For that reason he was opposed to the inclusion in the draft of a provision on the lines proposed by the Czechoslovak Government.

It was agreed not to proceed with the consideration of the proposal.

ADDITIONAL ARTICLE (ARTICLE 14 A)

8. Mr. SANDSTRÖM, Special Rapporteur, drew attention to the Czechoslovak Government's proposal that the draft should provide for the right of a diplomatic mission, and of the head of a mission, to use the flag and emblem of the sending country (A/CN.4/114/Add.1).

9. He was of the opinion that that proposal might be considered for adoption, and he had therefore embodied it in a draft additional article (A/CN.4/116/Add.1, article 14 A).

10. Mr. AMADO observed that in the proposed additional article it would be better to use the expression "motor vehicles" than "means of transport".

11. Mr. ZOUREK pointed out that the term "motor vehicles" would not cover boats and ships which the head of a mission might also have at his disposal. He suggested that the text drafted by the Special Rapporteur might be adopted in principle, subject to any changes which the Drafting Committee might make for purposes of clarification.

Article 14 A as proposed by the Special Rapporteur was adopted, subject to drafting changes, by 14 votes to none, with 1 abstention.

ARTICLE 14 (continued)

12. The CHAIRMAN recalled the main points of the discussion which had taken place at the 454th meeting concerning the suggestion of the Netherlands Government (A/CN.4/114/Add.1) that the commentary should clarify the question whether the term "etiquette" included the special privilege which ambassadors were supposed to possess of being allowed to apply directly to the head of the receiving State. The records of the ninth session seemed to indicate that the Commission had not then accepted any distinction in that respect between ambassadors and heads of mission in other classes. At the preceding meeting of the Commission, Mr. Zourek had suggested that a statement should be included in the commentary to the effect that no such privilege existed.

13. Mr. ZOUREK said that the point he wished to make was that heads of mission other than ambassadors also had the right of applying to the head of the receiving State. Whether they could do so directly or through the Ministry for Foreign Affairs would depend on the rules of protocol in the different States. To maintain that only ambassadors had that right would be at variance with the principle of equality which the Commission had already accepted in article 14 of the draft.

14. Mr. TUNKIN thought it would be improper to include in the commentary any statement implying that there was a difference between ambassadors and ministers in the matter of access to the head of State. The discussion at the previous meeting and the practice of States clearly showed that, whatever might be the position in some countries, the distinction between ambassadors and heads of mission of other classes was in that respect losing its force. Such a distinction would in fact conflict with the general idea underlying the draft that the trend should be towards the abolition of the diversity of classes of diplomatic agents and towards the evolution of a single class of diplomatic representative.

15. Article 14 as it stood was quite clear. It was in fact stated in the draft that the article required no commentary. It would therefore be wrong to include in the commentary a statement to the effect that ambassadors were especially privileged in the matter of access

to the head of State, since it was only in matters of precedence and etiquette that there could be any differentiation between heads of mission by reason of their class.

16. Mr. AMADO also opposed the inclusion in the commentary of any statement implying that ambassadors were especially privileged in the matter of access to the head of State. Such a position would mean that heads of State would be unable to receive the diplomatic representatives of States whose missions were headed only by ministers, no matter how important the cultural and economic relations between the two States might be. At one time, Switzerland, for example, had been represented in Brazil by a minister, not by an ambassador. Furthermore, if heads of State could receive only ambassadors, there could be no contact between the head of State and a *chargé d'affaires* in an emergency if at the time the ambassador himself should happen to be absent.

17. Mr. FRANÇOIS said he agreed with Mr. Tunkin that the supposed privilege of ambassadors in the matter of access to the head of State could not be regarded as a question of etiquette. He considered, however, that in order to make the position clear some explanation should be provided. The reason why ambassadors had been given special privileges in the matter of access to the head of State was that in former times they alone had represented the sovereign of their country. At no time had it been held that the right of access to the head of State extended to ministers or *chargés d'affaires*. Consequently, the idea that in that respect there should be no differentiation between heads of mission by reason of their class was a complete innovation. In his opinion, an observation in the commentary would not be enough to make the position clear, and the draft should include a separate article on the subject.

18. Mr. YOKOTA said it was not in keeping with the modern development of diplomatic intercourse to give ambassadors special privileges. The modern tendency was to give equal treatment to ambassadors and ministers. In practice, ambassadors did not in fact enjoy any special right of access to the head of State. If there was such a right, the heads of State would be under an obligation to receive ambassadors desiring to exercise that right, but no such obligation existed. Even in matters of etiquette, it was doubtful whether ambassadors were treated more favourably than ministers in the matter of obtaining direct access to the head of State.

19. He reminded the Commission that at its ninth session it had not endorsed the article of the Vienna Regulation which stated that only ambassadors, legates or nuncios should possess the representative character (A/3623, para. 16, commentary on articles 10-13). Furthermore, the Special Rapporteur had quoted Sir Ernest Satow as saying that it was not the case that ambassadors could demand access to the person of the head of the State at any time, since the occasions on which an ambassador could speak with the head of the State were limited by the etiquette of the court or

Government to which he was accredited (see A/CN.4/116).

20. He was therefore opposed to the inclusion of any reference to the right of access to heads of State in the commentary, though he realized that it would be premature to conclude that the supposed privileges of ambassadors in that respect had been abolished.

21. Mr. BARTOS drew attention to the distinction which had been made in the Commission's discussions at its ninth session between the representative character of ambassadors, under the terms of the Vienna Regulation, and the functions of heads of mission as described in the Commission's draft. It had been generally agreed that from the point of view of representative character ambassadors no longer enjoyed unique status, and that in modern times ministers were also regarded as having representative character. The reason was that the head of a diplomatic mission no longer represented the monarch but the State.

22. In reality, the treatment accorded to ambassadors and ministers depended on the situation in individual countries. There was no uniform practice.

23. The Commission had not included a reference to the matter of right of access to the head of State in the draft articles or in the commentary prepared at the previous session, and he was still of the opinion that no such reference should be included in the text to be adopted at the current session. The records of the discussion would themselves provide a sufficient explanation.

24. Mr. MATINE-DAFTARY agreed with the view expressed by previous speakers that, especially since the Second World War, ambassadors no longer had the same pre-eminence of rank as formerly. Since the point had been raised by the Netherlands Government, the Commission should consider the exact meaning to be attached to the word "etiquette" as used in article 14. The question whether the word should be retained or defined should be settled.

25. Sir Gerald FITZMAURICE said he was inclined to agree that no reference to the right of access to the head of State should be made in the commentary, but the Commission should be clear as to the basis on which it reached its decision. Since the right of access was not a matter of etiquette, there was no reason why that word should be omitted from article 14. Actually, a matter of substance was involved, for the article implied that there should be no differentiation between heads of mission by reason of their class in the matter of securing interviews with the head of State or Government. It was going too far, however, to suggest that ambassadors no longer fulfilled any representative function. There was in fact a definite representative element in the functions, privileges and immunities of heads of mission. If there was a right of access to the head of the receiving State, that right was vested in the sending State. If the sending State desired, or considered it necessary, that representations should be made directly to the head of the receiving State or

Government, and instructed its diplomatic representative in that sense, it would be extremely difficult for the receiving State to refuse to accede to that wish. Though there might be no absolute right, there was an established practice in the matter.

26. If the Commission decided not to include in the draft or commentary any reference to the question of access to the head of the receiving State, its silence would not mean that no such practice existed. The point was that for the purposes of such practice there should be no difference between ambassadors and ministers.

27. The CHAIRMAN, speaking as a member of the Commission, pointed out that, once the principle of the equality of States had been established, the question whether heads of mission were regarded as having a representative or functional character was no longer of any importance. At the ninth session, there had even been a proposal that distinctions in title should be abolished and that there should be only one designation for all heads of mission.

28. He also was of the opinion that no reference to the matter should be made in the commentary.

The Commission decided, by 15 votes to 1, with 2 abstentions, that no reference should be made in the commentary to the question of access by heads of mission to the head of the receiving State.

29. Mr. MATINE-DAFTARY asked for a clarification of the word "etiquette" in article 14.

30. Mr. PADILLA NERVO said that the term was used in the Havana Convention,¹ under which diplomatic officers had the same privileges except so far as precedence and etiquette were concerned. What was meant by "etiquette" depended largely on usage. In his opinion, the word should be retained.

31. Mr. ZOUREK thought that the commentary might state, in response to the Netherlands Government's question, (A/CN.4/114/Add.1) that the term "etiquette" did not mean preferential treatment for heads of mission in the sense that they had a right of access to heads of State.

32. Sir Gerald FITZMAURICE cited article 13 as a simple example of etiquette. It dealt with the ceremonial of reception, which was not a matter of precedence.

33. Mr. AMADO expressed the view that etiquette was to a large extent the survival of the traditions of an earlier age. It had been very creditable for the Commission to decide to omit any reference in the commentary to what in his view was the outmoded concept of an ambassador's right of access to the head of the receiving State. Etiquette in diplomacy was similarly becoming outmoded, but precisely because it had become of relatively minor importance it would do no harm to leave the reference to it in article 14.

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

34. Mr. BARTOS noted the differences between the mode of reception of ambassadors and of, say, *chargés d'affaires ad interim*. However, the title of article 14 laid stress on the essential equality of status of heads of mission, and in the circumstances he had no objection to the retention of the word "etiquette".

35. Mr. PADILLA NERVO observed that in diplomatic practice there were differences in the ceremonial character of the treatment of various classes of heads of mission. For example, in his country an ambassador was received in public audience on his arrival, whereas a minister was received privately. The question of etiquette was one of local significance and, one might say, of local psychology, and in the circumstances he advocated the retention of the term in article 14.

36. Mr. LIANG, Secretary to the Commission, cited other instances in diplomatic practice where the question of etiquette arose. For example, in some States an ambassador on his arrival or departure was attended by the chief of protocol, whereas a minister was attended by the assistant chief; an ambassador bore the title "His Excellency", which was not applicable to ministers; and in some countries a solemn ceremony was held on the arrival of an ambassador, but not of a minister.

37. Mr. TUNKIN said that in the modern world there was a general tendency in diplomatic practice to put ambassadors and ministers on the same footing, and in the Soviet Union the same etiquette was observed towards those classes of heads of mission, for example, on their presentation of their letters of credence. But if the reference to etiquette was omitted it might conceivably make it more difficult for some States to accept the draft articles. It had to be admitted, too, that the question of etiquette was of minor importance, and did not involve any inequality of status among heads of mission. He had therefore no objection to the retention of the word "etiquette" in article 14.

38. Mr. MATINE-DAFTARY explained that he had not proposed that the word be deleted, but had merely asked for a clarification. The clarification had been given, and he was now quite content to see the word retained in the text.

39. The CHAIRMAN put article 14 to the vote, reminding the Commission that, in conformity with the decision adopted at the previous meeting (454th meeting, para. 18), it would become paragraph 2 of article 10.

Article 14 was adopted.

ARTICLE 15

40. Mr. SANDSTRÖM, Special Rapporteur, said that articles 15, 16, 17 and 23 all dealt with mission premises.

41. He referred to the observation of the Governments of the United States of America, Sweden and Switzer-

land and to his comments on those observations (A/CN.4/116). He had taken those observations into account in his revised draft article 15 (A/CN.4/116/Add.1).

42. The Italian Government's proposed amendment of article 15 (A/CN.4/114/Add.3) went rather too far, he thought; article 19 gave general authority to the receiving State to do all that could be regarded as reasonable in helping a mission to find accommodation.

43. Mr. ALFARO thought that the Italian Government's amendment was judicious for it allowed for the not infrequent case of the sending State's not obtaining adequate accommodation. There was, however, a contradiction between the first and second sentence of the amendment, in that the permission granted in the first sentence by no means constituted a right. It would be better to amend the second sentence to read:

"If the sending State is unable to acquire adequate premises, the receiving State shall be obliged to ensure adequate accommodation for the mission in some other way."

44. Mr. ZOUREK said that, while he had no objection to the Special Rapporteur's proposed addition to article 15, he did not consider it really essential. The article as drafted at the ninth session was satisfactory.

45. The CHAIRMAN, speaking as a member of the Commission, said that the purpose of the article was to facilitate adequate accommodation for the mission of the sending State, and as such it had been adopted by the Commission. The Italian Government's proposal, however, appeared to make it the duty of the receiving State to provide adequate accommodation, and in his view it went beyond what the Commission had intended.

46. He agreed that there was some ambiguity in the expression "premises necessary for its mission". It might be desirable to add an explanation somewhere stating that the expression covered also the needs of the staff of the mission.

47. Mr. TUNKIN felt that the term "premises necessary for its mission" did not include premises for the staff of the mission. Article 16 also mentioned the premises of the mission, but article 23 specifically differentiated the mission premises from the private residence of the diplomatic agent. If the Commission meant to provide that adequate accommodation should be ensured by the receiving State for members of the mission staff, it would be advisable to make an addition to that effect. He doubted, however, whether it was desirable to do so.

48. Mr. SANDSTRÖM, Special Rapporteur, said that he had understood the words "premises necessary for its mission" to mean the official premises of the mission, and in drafting his revised text he had some hesitation in extending the meaning to include accommodation for members of the mission staff. That hesitation had been increased by the Italian Government's proposal, which in his view was liable to provoke invidious comparisons among States.

49. Mr. BARTOS pointed out that article 19 provided that the receiving State should accord "full facilities" for the performance of the mission's function. It should therefore supply adequate accommodation for the staff of the mission, and he consequently favoured any amendment to that effect.

50. Sir Gerald FITZMAURICE said that to insist that the receiving State provide accommodation for the staff of the mission would impose an undue burden upon it. In actual practice no attempt was made by States to provide accommodation, but no obstacles as a rule were put in the way of the acquisition by the sending State itself of suitable accommodation. The vital thing was adequate accommodation for the official premises of the mission. The subject had been discussed at the ninth session, and the conclusion then reached was that article 15 provided a just balance, in that it did not oblige the receiving State to do more than permit the sending State to acquire the necessary premises; if it did not permit the sending State to acquire such premises, it was only right—as the article provided—that it should ensure adequate accommodation in some other way. The amendment proposed by the Swedish and Swiss Governments merely weakened the text by removing the obligations placed upon the receiving State.

51. In the circumstances, he preferred the Commission's text as adopted at the previous session, without amendment.

52. Mr. YOKOTA thought that, as far as the official premises of the mission were concerned, the existing text should be retained. In respect of accommodation for the staff of the mission, he considered it would be better either to add a second paragraph requiring the receiving State to facilitate as far as possible the acquisition of adequate accommodation or, alternatively, to add a remark to the same effect in the commentary.

53. Mr. SANDSTRÖM, Special Rapporteur, said that he wished to withdraw his proposed addition to article 15. The idea which Mr. Yokota proposed to incorporate in a new paragraph might be regarded as covered by the stipulation in article 19 that the receiving State should accord "full facilities" for the performance of the mission's functions.

54. Mr. YOKOTA withdrew his proposal.

Article 15 as drafted at the ninth session (A/3623, para. 16) was adopted unanimously.

ARTICLE 16

55. Mr. SANDSTRÖM, Special Rapporteur, drew attention to his proposal (A/CN.4/116/Add.1) to insert the word "official" before the word "premises" in paragraph 1 of article 16.

56. The indication "whether owned by or leased to the sending State", which he had thought of adding, might be relegated to the commentary, since the point was really already covered by article 15 as just adopted.

57. To meet the desire of the Japanese and United

States Governments for a definition of mission premises (A/CN.4/116) he suggested explaining in a commentary what was meant by the premises of the mission and its appurtenances. Incidentally, the definition given in the United States comment struck him as far too broad, including, as it did, the residences for officials and employees of the mission.

58. With reference to paragraph 1 of the article, three Governments referred to the need to enter mission premises in extreme emergencies, that of Japan (A/CN.4/116), in particular, considering that a provision that the head of a mission was under an obligation to co-operate with the authorities in such cases should be included in the article. It would be recalled that after thorough discussion of the question at the ninth session, the general consensus of the Commission had been against including any exceptions to the rule of inviolability in the text.²

59. During the discussion of the Commission's draft in the Sixth Committee at the twelfth session of the General Assembly, the delegation of Colombia had urged that the question of the inviolability of the mission premises be studied in the light of the fact that the Latin American countries accepted the right of political asylum inside their embassies or legations (see A/CN.4/L.72). Again, it would be recalled that the Commission at its ninth session had decided that the question of asylum was a separate topic not to be dealt with in the draft.³

60. Mr. VERDROSS said that he appreciated the point made by the Japanese Government. Since the Commission had decided not to deal with the subject of conduct in emergencies in the article, it would, however, be necessary to make a general statement in a preamble that the draft was not meant to be exhaustive and that points not covered by it were governed by the general principles of international law.

61. Mr. YOKOTA said that, since some Governments were anxious that some reference should be made to the position with regard to inviolability in extreme emergencies, it might be advisable to refer in a commentary to the obligation on the head of a mission to co-operate with the authorities in such cases. Though not opposed to Mr. Verdross' suggestion, he preferred the former solution.

62. Mr. FRANÇOIS considered that Mr. Verdross' suggestion went too far. It would be most inadvisable to give the impression that the set of rules elaborated by the Commission left many points uncovered. Since there appeared to be general agreement on the desirability of making some reference to extreme emergencies, the best place for it would be in the commentary.

63. As for the Special Rapporteur's proposal to insert the word "official" before "premises", he was at a

² See *Yearbook of the International Law Commission, 1957*, vol. I (United Nations publication, Sales No. : 1957.V.5, vol. I), 394th meeting, paras. 31 ff., and 395th meeting, paras. 1-46.

³ *Ibid.*, 394th meeting, para. 72.

loss to understand the purpose of it; he wondered what parts, if any, of a mission's premises were to be regarded as unofficial and hence not inviolable. The change was presumably not designed to distinguish between the mission premises and the private residences of the head and members of the mission, as that distinction was clear enough from article 23.

64. Mr. SANDSTRÖM, Special Rapporteur, said that as not strictly "official" premises he had had in mind dwellings specially provided by the mission for its staff.

65. Mr. TUNKIN remarked that the view that the rule of inviolability admitted of some exceptions in cases of extreme emergency had been advanced at the ninth session by some, but by no means all, members of the Commission. Others, and he among them, considered that the possible threat to property through failure to deal with an emergency promptly was far less formidable than the danger of embittering relations between States through failure to respect the inviolability of the premises of a diplomatic mission. Respect for such inviolability must take precedence over all other considerations.

66. Though he was firmly opposed to referring to any possible exceptions in the article, he regarded Mr. Yokota's suggestion as worthy of consideration, provided that it was not taken to mean that the authorities could enter the premises of a mission without the consent of the head of the mission.

67. Mr. Verdross' suggestion on the other hand was open to two objections. Apart from the one already pointed out by Mr. François, there was the consideration that opinions differed on what was meant by the general principles of law. It would hardly be much of an explanation to refer to something which already stood in need of explanation itself.

68. He agreed with Mr. François, too, in opposing the addition of the word "official"; it was clear enough from the text as it stood that the mission's premises were the premises used for the functions of the mission. The addition would merely lead to confusion and might be interpreted as implying that only the offices of the mission were to be regarded as official premises.

69. Sir Gerald FITZMAURICE considered it of the utmost importance to maintain the rule of the inviolability of mission premises without any qualification. He was prepared to support Mr. Yokota's suggestion but, for the reasons already stated, would prefer not to include any general reference to the principles of international law.

70. He agreed with previous speakers in opposing the addition of the word "official" and, indeed, was unable to follow the Special Rapporteur's explanation of his reason for doing so. A description of part of the premises of a mission as "unofficial" seemed to be a contradiction in terms. In any case the distinction appeared to be without purpose since, under article 23, the private residences of diplomatic agents enjoyed the same inviolability and protection as the premises of the mission.

71. The CHAIRMAN pointed out that the corresponding article in the original draft submitted by the Special Rapporteur to the Commission at its ninth session (A/CN.4/91, article 12) had contained a clause providing for an exception to the rule of inviolability in an extreme emergency. The clause had, however, been withdrawn by the Special Rapporteur in the course of the discussion.⁴

72. Mr. BARTOS agreed that the rule of inviolability should take precedence over any possible threat to life and property. When relations between the sending and the receiving State were normal, the head of the mission would in any case call in assistance in case of emergency. But when relations were not normal, there was a danger that an emergency might be used, or even created, as a pretext for entering the premises of the mission. He could recall a case where an incendiary bomb had been thrown, allegedly by an indignant crowd, into the premises of a Yugoslav mission manifestly in order to give the local authorities an excuse to enter the building.

73. As for Mr. Verdross' suggestion, he doubted whether there were enough points not covered in the articles to justify such a preamble. It would be better not to deal with the question of emergencies in the draft at all, but to leave it to the good sense of heads of mission and the local authorities.

74. The insertion of the word "official" before "premises" would only cause confusion. Everything under the roof of the premises occupied by the diplomatic mission must be covered by the rule of inviolability. Incidentally, the delegation of the Philippines had raised an important point in asking for clarification of the situation when a mission occupied only an apartment in a building (see A/CN.4/L.72).

75. Mr. ALFARO said that in addition to the excellent reasons already advanced against the insertion of the word "official" there was the consideration that any such insertion would make it necessary for the Commission to specify what parts of a mission's premises were unofficial. And that would give rise to far greater difficulties than if the term "mission premises" were left to be interpreted in the light of common sense. He would not oppose Mr. Yokota's suggestion if other members of the Commission were in favour of it.

76. Mr. SANDSTRÖM, Special Rapporteur, said that although the distinction between official and unofficial parts of the premises of a mission did not, as Sir Gerald Fitzmaurice had pointed out, affect the question of inviolability, it might be relevant to article 17, which dealt with the exemption of premises from taxation.

77. In view of the trend of the discussion, he preferred to withdraw his proposal for the insertion of the word "official".

78. Mr. ZOUREK, after recalling the Commission's previous decision to make no mention of any possible exception to the rule of inviolability in case of

⁴ See *Yearbook of the International Law Commission*, 1957, vol. I, 395th meeting, para. 2.

emergency, expressed entire agreement with Mr. Tunkin, Sir Gerald Fitzmaurice and Mr. Bartos on the point. Once exceptions were admitted the principle would be completely undermined. He would prefer the text adopted at the ninth session to stand, with the possible addition of a reference to Mr. Yokota's point in the commentary.

Paragraph 1 was adopted unanimously.

Paragraph 2 was adopted unanimously.

The meeting rose at 1.5 p.m.

456th MEETING

Wednesday, 4 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 16 (continued)

1. Mr. YOKOTA, enlarging upon his proposal that the commentary to article 16 should contain a reference to the duty of heads of diplomatic missions to co-operate with the local authorities in case of fire or other extreme emergencies, said that such a comment would leave the principle of the absolute inviolability of the premises of the mission intact. Even if the head of a mission failed to co-operate with the authorities in an emergency, the latter were not at liberty to enter the mission without his consent. The only recourse then open to the authorities was to express regret at his attitude, or even lodge a formal protest.

2. Mr. FRANÇOIS said that, after hearing Mr. Yokota's interpretation of his proposal, he was resolutely opposed to it. It was not always possible to get in touch with a responsible member of a diplomatic mission at short notice, and it was inconceivable that in such a case buildings must be left to burn down, or, for example, a madman allowed to fire upon passers-by from a mission window without any intervention of the authorities. If the draft was to provide for no exception to the rule in such extreme cases of emergency, he would prefer to have no reference to such cases at all.

3. Mr. TUNKIN pointed out that the question had been thoroughly discussed at the Commission's ninth session and the views then put forward by Mr. François had not been accepted. What was proposed now was merely that a comment should be added concerning the obligation of heads of missions to co-operate with the

authorities, which involved no departure from the rule of absolute inviolability.

4. The CHAIRMAN pointed out that in the original draft the corresponding provisions were in article 12. At the ninth session, the Special Rapporteur, after some discussion, had withdrawn the part of the article providing for exceptions in cases of emergency, suggesting that the scope of the exceptions could perhaps be explained in the commentary.¹ When considering the commentary, the Commission had not at first reached any decision. At its 395th meeting the Special Rapporteur had said that the Commission could hardly decide whether it was necessary to refer to exceptions to the principle of inviolability in the commentary until it had his draft of the commentary before it.² At its 425th meeting the Commission had adopted without protest a commentary on article 16 which contained no reference to the question of exceptions.³ Accordingly, the Commission had in effect endorsed the view just expressed by Mr. François that it would be better to say nothing on the subject.

5. Mr. YOKOTA observed that, since several Governments had expressed some apprehension at the absence of any reference to the action to be taken in extreme emergencies, he felt strongly that the subject should be mentioned, and several members of the Commission had supported his proposal to insert an appropriate reference in the commentary. He drew a parallel with the case of the expropriation of the land on which the premises of a mission stood, where the Commission, while enunciating the principle that such land could be expropriated only with the consent of the sending State, had added, as a counterpoise, that it was the duty of the sending State to co-operate.

6. Sir Gerald FITZMAURICE supported Mr. Yokota's proposal. His impression was that the Commission had accepted the text of paragraphs 1 and 2 of article 16 on the tacit understanding that some reference on the lines proposed by Mr. Yokota would be added in the commentary. Perhaps the comment could take the form of a reference to article 33, paragraph 1, which enunciated the duty of diplomatic agents to respect the laws and regulations of the receiving State, without prejudice to their diplomatic privileges and immunities.

7. Mr. TUNKIN said that he was not particularly anxious that any such comment should be included but, on the other hand, would not object to its inclusion.

8. Mr. AMADO thought that it was impossible to make provision for every contingency in the draft. It was hardly conceivable that a head of mission would fail to co-operate with the authorities in an emergency and he was opposed to the idea of a body of international

¹ *Yearbook of the International Law Commission, 1957*, vol. I (United Nations publication, Sales No. : 1957.V.5, vol. I), 395th meeting, para. 2.

² *Ibid.*, para. 41.

³ *Ibid.*, 425th meeting, paras. 60-65.