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Summary record of the 384th meeting

Topic:
Diplomatic intercourse and immunities

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with at least some of them. For those reasons, he felt that the Commission should not attempt to codify the question of the privileges and immunities conferred on international organizations and permanent Government representatives accredited to them, at any rate for the present.

48. The CHAIRMAN, speaking as a member of the Commission, said that he fully shared the view that the Commission should be guided strictly by the letter and spirit of General Assembly resolution 685 (VII). The Special Rapporteur was to be congratulated on not having succumbed to the temptation to extend the scope of his report to cover privileges and immunities which, though to outward appearance similar, were by nature and origin very different. On the other hand, he saw no objection to some addition being made to the draft in order to cover *ad hoc* missions.

49. There were a number of points in the Special Rapporteur's draft which, in his view, merited special consideration. In the first place, the privileges and immunities which the Special Rapporteur proposed should be extended to diplomatic agents who were nationals of the receiving State were much greater than those recognized under the existing law. An analysis of national legislations and international practice clearly showed that States were not prepared to recognize diplomatic privileges and immunities as attaching to their nationals if they should become diplomatic officials of foreign States. While such cases were quite rare nowadays, the problem arose more frequently in cases where a diplomatic official married a national of the receiving State, or where the nationality of the latter was not affected by the marriage. Secondly, careful consideration should be given to the innovations which the Special Rapporteur proposed with regard to the universally recognized principles of the inviolability of mission premises and the inviolability of the diplomatic pouch.

The meeting rose at 12.50 p.m.

384th MEETING

Thursday, 25 April 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]

GENERAL DEBATE *(continued)*

1. Mr. EDMONDS congratulated the Special Rapporteur on a well-presented, concise and complete draft, (A/CN.4/91). The task of the Commission, as Mr. Edmonds understood it, did not extend beyond the rights and privileges of officers normally included in the category of those carrying out diplomatic duties. General Assembly resolution 685 (VII) appeared to confirm that impression, and, what was perhaps more important, the persons conducting negotiations or engaged in special diplomatic missions differed so greatly in status that it seemed almost impossible to generalize regarding them. Were the Commission to attempt to do so it might well lose itself in a mass of detail.

2. Mr. MATINE-DAFTARY, after congratulating the Special Rapporteur on his masterly report (A/CN.4/91) and the Secretariat on its well-documented study (A/CN.4/98), said he was interested to learn from paragraph 3 of the Special Rapporteur's commentary that one of the reasons given in the Yugoslav explanatory memorandum for urging that the Commission give priority to the codification of "diplomatic intercourse and immunities" was that "of late . . . the violations of the rules of diplomatic intercourse and immunities have become increasingly frequent".[1] He would be interested to hear whether Mr. Bartos considered the draft satisfactory from that standpoint.

3. He was glad that the draft submitted by the Special Rapporteur included provisions to put an end to certain abuses. Among other provisions, article 5 of the draft recognized the right of the receiving State to limit the number of members of a diplomatic mission. Though there could be no doubt of the theoretical soundness of that provision, he wondered how far it would be possible, in practice, for uninfluential States to exercise such a right.

4. Mr. YOKOTA said that the question of reciprocity in connexion with diplomatic immunities and privileges was a most important one. The statement in paragraph 36 of the Secretariat's memorandum (A/CN.4/98) that "it is also apparent from these various provisions that immunities are granted on a reciprocal basis; this point seems to be of paramount importance" was liable to misinterpretation. If States considered themselves free to grant immunities or not on a reciprocal basis, some might refuse to grant them at all. Such an interpretation was not in accordance with customary international law, under which States were bound to accord the recognized privileges and immunities to foreign diplomatic agents. If a State refused to do so, it was violating the customary rules of international law, and it was then that the institution of reprisals came into play, in so far as a State whose diplomatic agents had had their immunities restricted or refused by another State was entitled to take similar action with regard to the diplomatic agents of the second State. It might perhaps be desirable to include a provision to that effect in the draft.

5. Sir Gerald FITZMAURICE said that Mr. Yokota had raised a very important question. The case he had mentioned was rather one of reprisal than of reciprocity. It might be a moot point whether the principle of reciprocity was a matter of general international law, but in practice it was undoubtedly of great significance. While some countries were extremely liberal as regards privileges and immunities, others tended to limit the number of members of diplomatic missions entitled to them. Sometimes the dividing line was drawn at a certain level in the diplomatic hierarchy. In such cases, the principle of reciprocity must surely be valid. A State could, of course, continue to grant privileges and immunities to foreign diplomatic agents even when its own agents did not receive similar treatment, but it must be entitled to apply some restrictions if it wished.

6. Mr. BARTOS said that the Commission should not place too narrow an interpretation on its term of reference as embodied in the General Assembly resolution. The Yugoslav delegation, when proposing in 1952 the codification of the topic as a matter of priority, had admittedly had in mind intercourse between States, and not relations between States and international organizations. But international organizations were also possessed of personality in public international law, not merely on the basis of the advisory opinion of the International Court of Justice but on general grounds. There was therefore

[1] *Official Records of the General Assembly, Seventh Session, Annexes*, agenda item 58, document A/2144/Add.1.

nothing to prevent the framing of additional provisions governing the privileges and immunities of international organizations. They should not, however, be included in the present draft.

7. On the question of sources of international law, it was essential to be agreed on what was to be understood by a "source". The practice of nations, even though sometimes at variance, was a legitimate source. The main point, however, was to ascertain what rules of law, from whatever source, were acceptable to States. Though it was not possible accurately to predict to what points States would be opposed, some rules were clearly not acceptable and must be eliminated, thereby reducing the draft strictly to those rules which might be presumed to be acceptable. Incidentally, acceptability was not always a question of substance; the manner of formulating the rule counted for much.

8. Inconsistent as that view might seem with his insistence at the 383rd meeting on the practical criterion, he must say that he felt that the Commission should, if possible, adopt a clear theoretical standpoint and codify its rules of law on that basis. Exceptions could be made, but, in making them, the Commission must realise the extent to which it was departing from its theoretical position. At the same time, the draft must not become too theoretical; priority must be given to practical considerations.

9. He agreed with other speakers that the draft was somewhat lacking in precision on the nature of diplomatic functions. Quite sharp conflicts between nations otherwise on good terms had arisen in recent years precisely over the tendency to expand those functions and thereby extend protection far beyond the limits admitted by classical international law. Social protection, for instance, had never been a traditional function of diplomatic agents.

10. That point raised the question of the distinction between the codification and the progressive development of international law. Clearly, progressive development could not be neglected, and it was impossible to draw a hard-and-fast distinction between it and codification. On the other hand, he was not in favour of merging the two concepts completely. Only clearly marked new trends which enjoyed general acceptance could be regarded as suitable subjects for codification.

11. Another difficult point, at a time when more and more diplomatic conferences were being held under the auspices of international organizations, was how to draw a distinction between State intercourse within and without such organizations. Quite apart from special conferences, periodical meetings of groups of States, such as those held by the Organization of American States, were also a common phenomenon. It could, of course, be argued that in attending such conferences States were merely participating in the life of the international organization. So far, however, he had failed to find any clear dividing line between State diplomatic activity inside and outside international organizations.

12. Finally, he was not at all sure that the Convention on the Privileges and Immunities of the United Nations had in fact accorded diplomatic status to United Nations officials. Members of Government delegations had clearly been given a type of diplomatic privilege and immunity, and the Secretary-General had definitely been accorded full diplomatic status, but officials of lower rank enjoyed only those privileges and immunities which were necessary for the performance of their duties. The time was perhaps not ripe for codifying the privileges and immunities of international officials, or of persons, such as the members of the Commission, who were not Government representatives.

13. To sum up; he thought that two further points should be dealt with in the draft: the question of *ad hoc* diplomacy and that of conferences of States under the auspices of an international organization.

14. Mr. MATINE-DAFTARY, amplifying his previous question, enquired what violations the Yugoslav delegation had had in mind when submitting its explanatory memorandum, and whether Mr. Bartos considered that the Special Rapporteur's draft was calculated to prevent such violations in the future.

15. On the question of reciprocity, he would point out that General Assembly resolution 685 (VII) explicitly referred to the *common observance* "by all governments of existing principles and rules and recognized practice concerning diplomatic intercourse and immunities". All diplomats in the same capital must be treated on the same footing. Discrimination based on reciprocity would be like having "two different kinds of weather on the same roof" according to a Persian proverb—the sun and snow at the same time. The principle of reciprocity would be admitted in trade and business agreements, for example, but not in the according of customary privileges and immunities.

16. Mr. BARTOS said that, as a member of the Commission, he could not speak for the Yugoslav Government. The difficulties referred to in the Yugoslav Government's explanatory memorandum were fortunately a thing of the past and best forgotten. Yugoslavia was very glad that the draft had been produced, not because of any disputes that Yugoslavia might have had but because of the rules established in the draft.

17. Mr. LIANG (Secretary to the Commission), referring to paragraph 36 of the Secretariat's memorandum (A/CN.4/98), said that it had been far from the thoughts of the authors of the memorandum that reciprocity should be considered as the basis for the law governing diplomatic immunities. Reciprocity, however, played an important part in international law as embodied in treaties, particularly bilateral treaties. Some treaties merely mentioned the fact that the customary privileges and immunities were to be granted; others referred to immunities which were over and above the customary ones and to be accorded on a basis of reciprocity. He himself recalled that in treaties between China and other countries some thirty years ago, for instance, the privilege of *franchise de bagages* had been included on a basis of reciprocity, since it was not regarded as guaranteed by any established rule of customary international law.

18. Mr. KHOMAN remarked that the principle of reciprocity was at the very basis of the system of privileges and immunities. In practice, when one State failed to respect the privileges and immunities of the diplomatic agents of another State, the second State could take similar measures by way of reprisal. He wondered, however, what grounds there were in international law for such action. Naturally, if the draft articles were strictly applied, diplomatic privileges and immunities would always be respected. Provision should, nonetheless, be made for exceptional cases.

19. Mr. YOKOTA observed that a distinction must be drawn, in the matter of reciprocity, between those privileges and immunities which were firmly based on international custom and those which were not. Any restriction on privileges and immunities in the first category would constitute a violation of international law entitling the aggrieved State to adopt similar measures by way of reprisals. In the case of the second category of privileges and immunities, however, States were free to determine on a reciprocal basis what diplomatic officers were entitled to enjoy them.

20. Faris Bey EL-KHOURI said that another kind of restriction was that placed on the size of missions and on the numbers of officials in the various categories composing the mission. There was a tendency among some powerful States to swell their missions to excessive proportions, and to include in them all kinds of cultural and press attachés, etc., whose activities had nothing to do with diplomacy, and who were sometimes used for improper purposes. The Commission should consider whether some restrictions could be placed on the size of missions, and whether privileges and immunities should be granted to all the officers composing a mission.

21. Mr. AMADO felt that the discussion had been useful, even if it had related mainly to questions of theory. The value of a theory was determined, in practice, by the fruit it bore. Thus the theory of extraterritoriality, though based on a fiction, had been of practical value at a given stage of legal development.

22. In his view, however, the Commission's first task was to find out on what specific points international and domestic practice was already uniform, leaving aside not only the contentious points referred to in paragraph 28 of the Special Rapporteur's commentary but also such self-evident truths as were implicit in the principle of the equality of States and the principle of reciprocity. It would then have a solid factual basis for its work, and could, if it wished, go on to consider such other matters as the theoretical basis of the privileges and immunities that were recognized in practice.

23. The CHAIRMAN, speaking as a member of the Commission, said that, in his view, it did not seem possible to speak of diplomatic relations except on the basis of a right of legation, active and passive. Such a right existed only as between States. Although not necessarily any less important, relations between States and international organizations were on a different footing, and were, moreover, the subject of conventions, which regulated the position of permanent Government representatives to international organizations as well as that of the organizations themselves. For those reasons, he agreed that the Commission should confine itself to diplomatic intercourse and immunities in the sense in which those terms had always been understood, in other words, as applying to permanent or *ad hoc* missions sent by one State to another.

24. As regards the method to be followed, he agreed with Mr. Amado and previous speakers that the Commission should begin by determining what rules already enjoyed universal acceptance.

25. Mr. SANDSTRÖM, Special Rapporteur, said that the reasons why he had limited the scope of his draft were explained in paragraphs 10 to 13 of his commentary, and that the foregoing discussion had made him more convinced than ever that those reasons were sound. He was glad that the Commission was not being pressed to extend the draft to cover the privileges and immunities enjoyed by international organizations. The question whether it should study that topic later was a different one. In his view, it could be more appropriately studied by the Secretariat.

26. He had not overlooked the question of "roving" or *ad hoc* diplomacy, but had intended to raise it during the discussion of the relevant articles. There was, he felt, no doubt that the provisions relating to permanent diplomatic missions should also apply wherever possible to roving missions, but it might be desirable to include a specific statement to that effect.

27. He hesitated to accept Sir Gerald Fitzmaurice's suggestion that the Commission should refer in its draft to the theoretical basis of the recognized privileges and immunities, since many of the universally accepted rules were derived from theories that had now become outmoded. Moreover, judgments on questions of fact helped to determine the actual rules quite as much as the theories on which they were supposedly based. He was also doubtful about Sir Gerald's suggestion that the Commission should define the diplomatic function, since the present age was one of rapid development in that respect. Diplomatic missions nowadays dealt with many questions which had formerly lain outside their province, and any pronouncement by the Commission on the subject might well appear antiquated in a few years' time.

28. With regard to Mr. Bartos's remarks, it was true that Mr. Sandström's draft reflected certain tendencies, but it was nonetheless primarily based on the existing rules. Even where it reflected tendencies, he could not agree that it always went beyond existing practice, although such practice might not be universal; thus the exception which he proposed to the principle of *franchise de l'hôtel* in article 12, paragraph 1, was already part of international law, although it might be thought preferable to leave the matter out of the draft, to assure a more supple handling under the discreet direction of the ministry of foreign affairs concerned of any cases that might arise.

29. With regard to reciprocity, all members of the Commission would surely agree that ideally the rules should apply to all States on an equal footing. On the other hand, it was impossible not to be impressed by the number of times that national laws made reciprocal treatment an express condition for granting immunity in respect of taxation and customs duties. Such immunities were commonly regarded as matters of courtesy rather than as based on rules of international law, and the principle of reciprocity did not therefore seem out of place in connexion with them. A possible solution would be to lay down minimum privileges and immunities, which all States should extend to foreign diplomatic agents, and state that any State which so wished could grant further privileges and immunities to the diplomatic agents of other States, subject to reciprocity.

30. As regards the duties of diplomatic agents (articles 27 and 28 of the draft), his aim had been simply to avoid giving the impression that, by virtue of all the privileges and immunities referred to in the preceding articles, a diplomatic agent was at liberty to disregard the laws and regulations of the country to which he was accredited.

31. The other points that had been raised could best be dealt with during the discussion of the articles to which they related.

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

32. The CHAIRMAN invited the Commission to consider the Special Rapporteur's draft (A/CN.4/91) article by article.

33. He said that amendments which were accepted by the Special Rapporteur need not be voted on. Since the Special Rapporteur would have to redraft the comments on the individual articles in the light of the discussion, the Commission need not discuss their wording now. In the Commission's final draft, each article would, for the sake of convenience, be followed immediately by the comment relating to it.

ARTICLE 1

34. Mr. VERDROSS pointed out that article 1 referred to States possessing the right of legation, but did not specify which States possessed that right. It was evident that all independent or sovereign States possessed it, but so also might states members of a federal State. That was the case when, under the constitution of the federal State of which they formed part, they had the right to enter into diplomatic relations. Consequently, a choice had to be made between two possibilities: either article 1 should indicate which States possessed the right of legation, or the phrase "possessing the right of legation" should be deleted.

35. Sir Gerald FITZMAURICE said that, although the principle laid down in article 1 was in theory correct, in practice a State which was a member of the family of nations and belonged, as almost all States did now belong, to the United Nations would be acting in a highly unusual manner if it refused to institute diplomatic relations with another State, save for quite exceptional and temporary reasons such as non-recognition. It might be difficult to reflect that point in the text of the article itself, but it could perhaps be done in the commentary, which had often in the past been used to give effect to the wishes of particular members without altering the text of the actual articles.

36. Mr. PAL agreed with Mr. Verdross that the words "possessing the right of legation" should be deleted. The very basis of the diplomatic relation being the agreement of the States concerned, the operation of the rules thereinafter formulated would begin as soon as such an agreement was arrived at. The presence or absence of the so-called right of legation would hardly add or detract anything. Moreover, who was to determine whether or not a State possessed the right of legation, and by what test?

37. Mr. EL-ERIAN said that he too had doubts about those words since their inclusion would raise controversial questions. The whole concept was a complex one, involving as it did distinctions between the "perfect" and the "imperfect" and the "active" and the "passive" right of legation, and it was significant that such a right was not referred to in the draft Declaration on Rights and Duties of States.[2]

38. He also felt it would be unwise to bring in the concepts of independence and sovereignty.

39. Mr. BARTOS pointed out that two States which agreed to institute permanent diplomatic relations with one another did, on occasion, include in the instrument instituting such relations a provision which, in effect, curtailed the right of one or both of them to establish a diplomatic mission in the other's territory. Unless the Special Rapporteur could cover that point in the comment, he proposed the addition of the following words at the end of article 1: "unless another method of maintaining diplomatic relations has been agreed on between them".

40. Mr. AMADO felt that, as drafted, article 1 was redundant. To say that a State possessed the right of legation meant that it had the right to establish diplomatic missions abroad. The difficulties inherent in the text could be avoided, without omitting anything of value, if article 1 were deleted and the beginning of article 2, paragraph 1, amended to read: "A State maintaining permanent diplomatic relations with another State must make certain . . ."

41. Mr. GARCIA AMADOR supported Mr. Amado's suggestion. The so-called right of legation was not a right at all in the sense of being enforceable *vis-à-vis* other States. Deletion of article 1 would remove nothing that was not self-evident, and would at the same time obviate the difficulties inherent in the wording. Of course it would always be possible to include something in the comment on the lines suggested by Sir Gerald Fitzmaurice, but it was preferable to restrict the comment to matters that genuinely required explanation.

42. Mr. SCELLE also supported Mr. Amado's suggestion, since no State could legitimately refuse to institute diplomatic relations with another State that wished to enter into diplomatic relations with it, save in exceptional cases. The Commission was, therefore, perfectly entitled to take it as tacitly understood that all States had the right to institute diplomatic relations with all other States, and to establish diplomatic missions in their territory.

43. Mr. KHOMAN agreed that the reference to the right of legation should be omitted owing to the difficulties it raised. On the other hand, it was in accordance with existing practice to make the establishment of diplomatic relations subject to mutual agreement, and that concept should therefore be retained. It was not, however, entirely appropriate to speak of "permanent diplomatic relations", since diplomatic relations could always be severed. It would be preferable to place the word "permanent" before the words "diplomatic mission" so as to distinguish that type of mission from the *ad hoc* missions referred to by Mr. Bartos.

44. In general, he felt it would be desirable to retain article 1 in some form or other, since it served as a kind of introduction to the draft as a whole. He accordingly proposed, bearing in mind the remarks of previous speakers, that it be reworded as follows:

> "States, upon mutual consent, may enter into diplomatic relations with each other and may establish permanent diplomatic missions, either in their own or in a third State's territory."

45. Mr. VERDROSS withdrew his suggestion in favour of Mr. Khoman's proposal.

46. Mr. YOKOTA felt that the main point to be brought out in article 1 was that the consent of the receiving State was necessary. If that was agreed, and if no reference were made to the right of legation, which was irrelevant and raised many difficulties, the article could be very simply worded as follows: "A State may

[2] *Ibid., Fourth Session, Resolutions,* p. 67.

by agreement with another State establish a diplomatic mission with the latter."

47. Sir Gerald FITZMAURICE said that, while he appreciated the reasons for Mr. Amado's suggestion, he agreed with Mr. Khoman that it was desirable to have some form of introductory article, laying down a general principle. That was one reason why he would have preferred to begin the draft with some kind of definition of the diplomatic function. However, he would not press the point.

48. Mr. SANDSTRÖM, Special Rapporteur, and Mr. PAL both agreed that article 1 should be retained in one form or another, for the reasons given by Mr. Khoman and Sir Gerald.

49. Mr. PAL observed that the principle underlying the article was that the basis of the diplomatic relation was mutual agreement, and that principle should be retained in the draft. It was well established as a principle and universally recognized in international practice.

50. Faris Bey EL-KHOURI thought that the Special Rapporteur's text of article 1 could be retained, omitting the words "possessing the right of legation", which added nothing to the meaning and raised a number of controversial questions. All that mattered was that the two States concerned should agree to institute diplomatic relations with one another.

51. Mr. MATINE-DAFTARY agreed, and pointed out that if article 1 were deleted altogether, article 2 would become incomprehensible.

52. Mr. AMADO said that he had no desire to delete article 1 if the majority of the Commission wished to retain it. He only felt that, as expressed, it was tautological and contributed nothing to the text.

53. Mr. SCELLE said that he too was not opposed to having some form of introductory article, but only to article 1 as it was worded, containing as it did concepts that were either irrelevant or open to dispute.

The meeting rose at 12.55 p.m.

385th MEETING

Friday, 26 April 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)*

ARTICLE 1 *(continued)*

1. Mr. YOKOTA said that he wished to withdraw the amendment he had submitted at the previous meeting (384th meeting, para. 46) in favour of the amendment submitted by Mr. Khoman (384th meeting, para. 44), which was substantially the same.

2. Mr. TUNKIN said that, on both procedural and substantive grounds, he was in favour of deleting the words "possessing the right of legation". As Mr. Pal had rightly enquired (384th meeting, para. 36), who was to determine whether or not a particular State possessed the right of legation? It was a recognized rule of international law that every sovereign state was *ipso facto* a subject of international law and accordingly possessed the right of legation. The question whether the constituent States of a federal State possessed such right depended, as Mr. Verdross had remarked at the 384th meeting, on its federal constitution and was not a matter of international law.

3. The institution of permanent diplomatic relations and the establishment of diplomatic missions were, as Mr. Bartos had aptly observed, two different things, and a diplomatic mission could be recalled without diplomatic relations being severed. It would be undesirable for the article to give the impression that the establishment of a diplomatic mission must follow automatically on the institution of diplomatic relations. Were that so, a State which did not wish for the time being to establish a diplomatic mission with another State might be deterred from instituting diplomatic relations with it.

4. Mr. Tunkin was not in favour of Mr. Amado's proposal to omit the whole article (384th meeting, para. 40), since he agreed with Sir Gerald Fitzmaurice that, whenever possible, the Commission should state a principle. In his opinion, the principle might be formulated as follows: the establishment of diplomatic relations, as well as the exchange of diplomatic missions between two States, takes place on the basis of agreement between these States.

5. Although Mr. Khoman's amendment (384th meeting, para. 44) was acceptable in principle, he did not like the use of the verb "may", which suggested that such action was permitted by international law. Furthermore, the reference to the territory of a third State, though probably correct from the point of view of substance, simply complicated matters and would be better omitted.

6. He was not quite clear as to the purpose of the amendment submitted by Mr. Bartos (384th meeting, para. 39).

7. Mr. FRANÇOIS said that he was in favour of Mr. Amado's proposal to omit article 1. He had no serious objection to the original draft article, although the question as to what States possessed the right of legation might give rise to difficulties. Once that proviso was deleted, however, as in Mr. Khoman's amendment, the article became quite unacceptable. Certain entities, such as, sometimes, the States forming part of a federal State, protectorates or the former free city of Danzig, for example, had no right under their constitutional laws to enter into diplomatic relations with other States, and it was incorrect to declare that such States might under international law enter into diplomatic relations simply by mutual consent.

8. He, too, objected to the reference to the territory of a third State in Mr. Khoman's amendment, which he was afraid would be unintelligible to anyone who had not followed the Commission's discussions. The case it was designed to cater for, namely, where diplomatic relations between two States were maintained by their ambassadors in a third country, was a very special one and could, he thought, be covered by Mr. Bartos's formula of "another method of maintaining diplomatic relations". In any case, such a device could hardly be called a diplomatic mission.

9. Sir Gerald FITZMAURICE proposed the following somewhat simpler text for the article, inspired partly by the observations of Mr. Pal and Mr. Tunkin:

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

10. He quite agreed with Mr. François in his attitude to the introduction of a reference to the establishment of diplomatic missions on the territory of a third State, which was presumably designed to meet a case cited by Mr. Bartos (384th meeting). The device in question was a means of entering into diplomatic relations, and had nothing to do with the establishment of a mission. Reference could be made to such cases in the comment on the article, if necessary, but it would merely confuse matters to refer to them in the article itself.

11. Mr. PAL expressed support for Sir Gerald Fitzmaurice's amendment, which solved the difficulty while retaining the principle underlying the original draft article.

12. He was not happy about Mr. Khoman's amendment, which introduced a new question not to be found in the original draft article, namely, that of the territory on which a diplomatic mission was established. He could not see how a diplomatic mission could be established at all on the territory of a third State, but if it were, the consent of the third State would also be required.

13. The idea underlying Mr. Bartos's amendment could have been expressed by a reference in the comment on the article. But if Sir Gerald Fitzmaurice's amendment was accepted, even that would not be necessary.

14. Mr. AMADO observed that Sir Gerald's amendment was substantially the same as the Special Rapporteur's text, with the omission of any reference to the right of legation. He was at one with Mr. Scelle in his failure to understand why it should be necessary to devote an article to a statement of the obvious. If States entered into diplomatic relations with each other and established missions, it was self-evident that they were agreed to do so. He would, however, bow to the view of the majority.

15. Mr. PAL recalled that the Commission had been asked by the General Assembly to codify the topic, with a view to the common observance by all Governments of existing principles and rules and recognized practice; in other words, to codify the obvious. It was therefore better to state an obvious principle than to leave it out.

16. Mr. EL-ERIAN said that he was in favour of retaining article 1 in some form or other, since the draft codification in its existing form required an introductory article. Sir Gerald Fitzmaurice's amendment had several merits, one of them being that it enunciated the principle that diplomatic relations must be established by mutual consent. Though Mr. El-Erian fully appreciated Mr. Scelle's point, that all States ought to enter into diplomatic relations with each other, he did not regard such a consideration as relevant in a codification of positive international law. However desirable it might be from the idealistic standpoint for States to enter into diplomatic relations with each other, no State was under any legal obligation to do so.

17. As to the right of legation, the authors of the United Nations Charter, when dealing with the question of membership, had simply used the term "State", leaving it to the Security Council and the General Assembly to decide whether a particular entity qualified for statehood or not. The Commission itself had taken the same course when framing its draft Declaration on Rights and Duties of States.[1] Entering into diplomatic relations was merely an attribute of a subject of international law. It could not be referred to as a right, bearing in mind the circumstances under which a State might come into existence, and the current rules of international law on recognition.

18. Mr. El-Erian said that he would support Sir Gerald Fitzmaurice's amendment (para. 9 above).

19. Mr. KHOMAN, replying to observations on his amendment (384th meeting, para. 44), said that the verb "may" as used therein did not have a permissive sense, but merely expressed the idea of possibility. The reference to diplomatic missions in the territory of a third State had been introduced in order to cover every possibility. When two States were in diplomatic relations with each other, they did not necessarily have missions on each other's territory. There were, for instance, cases of ambassadors accredited to several countries and resident in only one of them. He would not insist on that part of his amendment, however. He found Sir Gerald's text generally acceptable.

20. Mr. BARTOS observed that the Commission seemed to be drawing closer to agreement on a suitable text. The case just mentioned by Mr. Khoman, of ambassadors accredited to several countries, was not the same as the one he had had in mind. When ambassadors were accredited to several countries they visited each of them from time to time, and there was, therefore, an embassy of the sending State in each of the countries, regardless of whether the ambassador happened to be present. Since, however, the case he himself had in mind was an exceptional one (the case where two States did not have mutual representation—even when they had a permanent mission established in a third State where they were both represented—but announced that representatives accredited to a third State would be the channel for diplomatic relations), he would be willing to accept Sir Gerald's amendment, provided that the Special Rapporteur was willing to include a reference to the case in the comment on the article.

21. Mr. MATINE-DAFTARY found Sir Gerald Fitzmaurice's text generally acceptable. In its existing form, however, it gave the impression that diplomatic missions were not part and parcel of diplomatic relations between States. He wondered whether the correct impression could be given by the insertion of words corresponding to the French *"entre autres"*, instead of *"et"*.

22. Mr. TUNKIN said that, since Sir Gerald Fitzmaurice's amendment expressed substantially what he had said, he had abandoned his intention of formally submitting an amendment.

23. Mr. SANDSTRÖM, Special Rapporteur, said that he accepted Sir Gerald Fitzmaurice's amendment. The Commission appeared to be practically unanimous in desiring to omit any reference to the right of legation, and he did not wish to press that point. Though no great harm would be done were Mr. Amado's amendment accepted, he thought it preferable to have an introductory article.

24. Mr. YOKOTA, although prepared to support Sir Gerald Fitzmaurice's amendment generally, wondered whether it would not be advisable to delete the words "of diplomatic relations between States and", thus leaving the text as:

> "The establishment of permanent diplomatic missions takes place by mutual consent."

[1] *Official Records of the General Assembly, Fourth Session, Resolutions*, p. 67.

The draft was, after all, dealing mainly with permanent rather than *ad hoc* diplomatic agents.

25. Mr. Scelle had said that States were under an obligation to enter into diplomatic relations with each other and could not refuse to receive any diplomatic agents whatsoever—including, presumably, permanent diplomatic agents. He was sorry that he could not go so far as Mr. Scelle on that point. Although it was an established rule of international law that diplomatic agents could be sent only with the consent of the receiving State, according to a number of authors, including Oppenheim, States could refuse to receive some diplomatic agents, but were bound to receive *ad hoc* agents despatched to discuss some specific matter of importance. Since there was some difference of opinion as to whether the establishment of diplomatic relations and the sending of *ad hoc* diplomatic agents were conditional on mutual consent, it would be better to omit all reference to them and refer merely to the establishment of permanent diplomatic missions.

26. Sir Gerald FITZMAURICE said that, while he appreciated Mr. Yokota's point, he would be reluctant to abandon the reference to the establishment of diplomatic relations, especially as several members of the Commission attached considerable importance to it. Were it omitted, for instance, Mr. Bartos's point would not be met. Even from the standpoint of Mr. Yokota's argument, no harm would be done if the phrase were retained, since, regardless of whether States were bound or not to establish diplomatic relations, the establishment of diplomatic relations did in fact take place by mutual consent.

27. He appreciated Mr. Matine-Daftary's point too, but had so far been unable to think of a stylistically satisfactory redraft of his text to meet it. It could perhaps be left to the drafting committee which would undoubtedly be set up at a later stage.

28. Mr. AMADO said that he would not press for a vote on his amendment, as he was prepared to accept that of Sir Gerald Fitzmaurice. He would, however, appreciate it if, to make the text sound less like a truism, it could be prefaced by some such phrase as "It is an established practice in international law for . . . ".

29. The CHAIRMAN said that Mr. Amado's observations would be brought to the notice of the drafting committee.

30. Mr. GARCIA AMADOR observed that the Commission appeared to be generally in favour of Sir Gerald Fitzmaurice's text. He himself was prepared to accept it on the same terms as Mr. Amado.

31. The CHAIRMAN said that, since all other amendments had been withdrawn, either absolutely or conditionally, he would put Sir Gerald Fitzmaurice's amendment (para. 9 above) to the vote, subject to its redrafting in the light of the observations of Mr. Matine-Daftary and Mr. Amado.

The amendment was unanimously adopted.

ARTICLES 2 AND 3

32. Mr. SANDSTRÖM, Special Rapporteur, said that for the sake of convenience it would be preferable to discuss the first paragraph of article 3 in conjunction with article 2.

33. Mr. Sandström had attempted in those provisions to state the existing rules of international law. Some doubts might be felt regarding the provision in article 3, paragraph 1, as he understood that it was sometimes the practice to seek the receiving State's approval of the principal officers subordinate to the head of the mission.

34. Mr. LIANG (Secretary to the Commission) remarked that the words "is acceptable to" in the English text did not exactly correspond to the sense of the original French *"est agréée par"*, which implied a definite act of *agréation.*

35. Mr. VERDROSS proposed that the second sentence in article 2, paragraph 1, "If he is not acceptable, he shall not be appointed", be deleted, on the ground that appointment of the head of a mission was a matter of domestic and not international law. A State was free to appoint whomsoever it chose as head of mission, but if he was not acceptable to the other State, he could not be sent.

36. Mr. FRANÇOIS doubted whether the provision in article 2, paragraph 2, that the receiving State might, *without stating its reasons,* declare the head of the mission no longer *persona grata,* and the similar provision in article 3, paragraph 1, were in accordance with international practice. It was not necessary for a receiving State to give its reasons for regarding a proposed head of mission as unacceptable, but once he had been accredited, it was contrary to good relations for the receiving State to demand his recall without giving reasons. The reasons given should not be subject to discussion, but the sending State was entitled to some explanation when its head of mission was declared no longer *persona grata.* A large number of writers supported that view.

37. With regard to the second sentence of article 2, paragraph 2, "In such case, he shall be recalled", he suggested that it would be more correct to state "In such case, the receiving State shall have the right to require him to leave"; that was what happened in practice. The receiving State did not wait for the long procedure of recall to be gone through, but gave the *persona non grata* his passport and asked him to leave.

38. Mr. BARTOS said that he was not in favour of Mr. Verdross's proposal to delete from article 2 the words, "If he is not acceptable, he shall not be appointed". There had been several cases of States appointing ambassadors to another State to which, for political reasons, they had not the slightest intention of sending them. The practice was discourteous, to say the least.

39. On the question of the desirability of a State's giving its reasons for declaring a diplomatic agent *persona non grata,* he agreed with Mr. François, with the reservation, however, that it was not the general practice for States to do so. He thought, however, that article 2, paragraph 2 and article 3, paragraph 1, should be reworded so as to make it clear that the State was "under no explicit obligation to state its reasons".

40. A distinction should be made between the withdrawal of a diplomatic agent and his recall; the latter could only be effected by the dispatch of a formal letter of recall by the head of State. There had been many cases of ambassadors being withdrawn until a dispute had been settled without their being formally recalled. The important point was that they should be withdrawn.

41. Another point, perhaps more appropriate for inclusion in the commentary, was that States should not refuse to accept a diplomatic agent on grounds of sex or religion, or other discriminatory reasons, as such an attitude was due merely to prejudice.