

Document:-  
**A/CN.4/SR.387**

**Summary record of the 387th meeting**

Topic:  
**Diplomatic intercourse and immunities**

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

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view, the Commission should concentrate on reaching agreement as soon as possible on what constituted the basic points of existing law, and leave all controversial matters and innovations aside until a later stage.

51. Mr. SANDSTRÖM, Special Rapporteur, suggested that Mr. Bartos's point could be met by adding the words "or to receive them without its prior consent" to the second sentence of article 5, which would then read: "It may refuse to receive officials of a particular category or to receive them without its prior consent." He recognized, however, that that wording might be open to the objection voiced by Mr. García Amador.

52. Mr. BARTOS said he could accept the Special Rapporteur's suggestion in principle. It could be discussed later in conjunction with article 5, when some way of meeting Mr. García Amador's objection could be sought.

53. Mr. VERDROSS supported the Special Rapporteur's suggestion, which would also appear to cover the case where the receiving State found that one of the persons on the list communicated to its ministry of foreign affairs was objectionable to it, and refused to receive him.

*It was agreed that the Special Rapporteur's suggestion (para. 51 above) be considered further in conjunction with article 5.*

54. Mr. SANDSTRÖM, Special Rapporteur, supported Sir Gerald's suggestion (para. 46 above) for the addition of the words "Subject to the provisions of articles 4 (a) and 5" at the beginning of the text proposed by Mr. Tunkin for article 3.

55. Mr. TUNKIN said that, in principle, he had no objection to that suggestion, but merely doubted whether it was logically sound since all the draft articles were inter-connected and some such words could be inserted equally well in all of them.

56. Mr. PAL pointed out that logically the Commission could take no decision on Sir Gerald Fitzmaurice's suggestion until it had approved the articles referred to. The text of article 3 could not be put to the vote until the contents of articles 4 (a) and 5 had been settled.

57. Mr. SANDSTRÖM, Special Rapporteur, suggested that the matter be left to the drafting committee.

*It was so agreed.*

58. Mr. KHOMAN requested that the vote on Mr. Tunkin's text for article 3 be postponed until his text for articles 4 and 4 (a) and the Special Rapporteur's draft article 5 had been discussed.

*It was so agreed.*

59. Mr. VERDROSS said that, in principle, he had no objection to Mr. Tunkin's text for article 4, but merely wondered whether it was necessary in view of the provisions of article 2 and Mr. Tunkin's draft article 4 (a). It was nowadays very uncommon for the members of a diplomatic mission to be chosen from among the nationals of the receiving State.

60. Mr. EL-ERIAN said that he too had doubts regarding the need for, and even the advisability of, a provision specifically sanctioning a practice which was now regarded as quite exceptional—and rightly so if the whole purpose of diplomatic intercourse and the head of a diplomatic mission's special functions as the representative of the sending country were taken into account. Moreover, as could be seen from paragraphs

178 to 184 of the memorandum prepared by the Secretariat (A/CN.4/98), many States were unwilling to allow their nationals to act as the heads of foreign diplomatic missions, in view of the difficult and delicate problems that arose with regard to immunities and relations between the head of the mission and its other members if they were nationals of the sending State.

61. There were perhaps not quite such strong objections to the nationals of the receiving State being appointed as junior members of foreign diplomatic missions, and a distinction might possibly be made in that respect.

62. Mr. SANDSTRÖM, Special Rapporteur, said that his draft article 4, on which Mr. Tunkin's was modelled, was based on similar provisions in the Harvard Research draft<sup>2</sup> and the Havana Convention<sup>3</sup>. Similarly the resolution adopted by the Institute of International Law in 1929<sup>4</sup>, in stipulating that members of a diplomatic mission who were nationals of the receiving State should not enjoy diplomatic privileges and immunities, had implied that there could be employees in that category.

63. He saw no reason why the practice should not be referred to simply because it was not common. If the sending State had sufficient confidence in a national of the receiving State, was it for the International Law Commission to prevent it from appointing him its diplomatic agent? The receiving State, for its part, had every guarantee, since its express consent was required, and if it wished to lay down certain conditions it could always do so during the negotiations preceding such consent.

64. Mr. MATINE-DAFTARY said that he agreed with Mr. Verdross and Mr. El-Erian, particularly as far as heads of mission were concerned. The "demands of the office" theory stated that enjoyment of diplomatic privileges and immunities was necessary for the proper discharge of diplomatic functions; a diplomatic agent who did not enjoy such privileges and immunities, as was the case with most of those who were nationals of the receiving State, could not therefore under that theory discharge his functions properly. In his opinion, for example, an ambassador could not be a national of the receiving State.

65. Mr. Matine-Daftary formally proposed the omission of any provision along the lines of the Special Rapporteur's or Mr. Tunkin's draft article 4.

The meeting rose at 6 p.m.

### 387th MEETING

Tuesday, 30 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)

ARTICLES 2 TO 4 (continued)

1. The CHAIRMAN invited the Commission to continue its consideration of Mr. Tunkin's draft article 4

<sup>2</sup> *Ibid.*

<sup>3</sup> Convention regarding Diplomatic Officers, signed at Havana on 20 February 1928. See League of Nations, *Treaty Series*, Vol. CLV, 1934-1935, No. 3581.

<sup>4</sup> *Harvard Law School, op. cit.*, pp. 186 and 187.

(386th meeting, para. 3), which corresponded to article 4 of the Special Rapporteur's draft.

2. Sir Gerald FITZMAURICE agreed that the practice of choosing the head of a diplomatic mission from among the nationals of the receiving State could be regarded as obsolescent; he doubted, however, whether the Commission should attempt to eliminate it altogether. Moreover, as Mr. El-Erian himself had recognized, it was still a common and reasonable practice for diplomatic missions to engage subordinate staff locally, when a good knowledge of the language and of local conditions and customs was required. The interests of the receiving State were, as the Special Rapporteur had pointed out, fully safeguarded by the text he had proposed, as well as by that proposed by Mr. Tunkin. The sole effect of deleting the article, when a similar provision had been included in earlier texts, would be to raise possible doubts concerning the legality of a practice which no member of the Commission had suggested was contrary to international law.
3. Mr. TUNKIN explained that he had retained the substance of article 4 in the Special Rapporteur's draft in order that the matter might not be overlooked, and that the desirability of referring or not referring to it might be debated. He personally favoured the latter course, since to refer to it might be taken as signifying that the Commission approved a practice which the majority of States in fact disapproved.
4. He could not agree with Sir Gerald Fitzmaurice that omission of article 4 would give rise to any doubts. Naturally, any diplomatic mission would remain free to employ local nationals in a junior capacity. Such persons, however, were not usually granted diplomatic privileges and immunities.
5. Mr. SANDSTRÖM, Special Rapporteur, said that, in general, he agreed with Sir Gerald Fitzmaurice, but felt there would be no objection to deleting article 4 if article 5 were amended in the manner he had suggested at the 386th meeting (para. 51), namely, by the addition of the words "or to receive them without prior consent", since the words "officials of a particular category" could include officials chosen from among the receiving State's own nationals.
6. Mr. PAL said that article 4 had two aspects, one positive and the other, and more important one, negative; the positive aspect was the statement that the head and other members of the mission could be chosen from among the nationals of the receiving State; the negative aspect was the proviso that that could only be done with the consent of the receiving State. The true significance of the article might be clarified if it was expressed in a negative form such as, "The head and other members of the mission may not be chosen from nationals of the receiving State except with the express consent of this 'State'". In that form he could not see how the article could appear objectionable.
7. Moreover, to delete it would not necessarily have the effect of restricting the practice; on the contrary, it might raise doubts as to whether the express consent of the receiving State was, in fact, required before its nationals could be chosen as members of a foreign diplomatic mission.
8. Mr. YOKOTA said that, in his view, article 4 should be deleted for the reasons given by Mr. Verdross and Mr. El-Erian, and also because, as far as the procedure for appointment was concerned—and that was the matter at issue in articles 2 to 4—members of the mission who were nationals of the receiving State were in very much the same position as the other members of the mission.
9. Mr. EL-ERIAN recalled that the Special Rapporteur had said that his draft article 4 was based on similar provisions in the Harvard Research draft and the Havana Convention. Article 8 of the former instrument, however, concluded with the words: "provided, however, that a sending State may not send as a member of a mission a national of the receiving State without the express consent of the receiving State".<sup>1</sup> Chiefs of mission were dealt with in the succeeding article, where no reference was made to the possibility that they might be nationals of the receiving State. The Harvard Research draft, therefore, made a distinction in that respect between the head and the other members of a diplomatic mission, a distinction which had been obliterated in article 4 of the Special Rapporteur's draft.
10. As regards the need for engaging locally recruited staff in a subordinate capacity, Mr. Tunkin had rightly pointed out that such persons were not regarded as members of the mission, and did not enjoy diplomatic privileges and immunities.
11. He quite agreed that deletion of article 4 would not affect the right of the sending State and the receiving State to regulate by special agreement the conditions on which nationals of the latter could be appointed to the former's diplomatic mission. All he had in mind was that the Commission should not give express recognition to an out-moded practice. He would have no objection, however, if it was felt necessary, to a reference being included in the commentary to the effect that the practice, though nowadays rare, was not contrary to international law.
12. Mr. KHOMAN said that, strictly speaking, article 4 was perhaps unnecessary, since articles 2 and 3 fully covered the situation so far as the head and the other members of a diplomatic mission were concerned. And clerical and maintenance staff fell outside the scope of article 4, since their appointment did not require the consent of the receiving State.
13. Even so, it might be desirable to retain article 4, since the fact that the practice was still extant, save perhaps as far as the head of a mission was concerned, showed that it was found useful, particularly by smaller States which often had difficulty in finding a sufficient number of suitable personnel to staff their diplomatic missions abroad. Moreover, as the Special Rapporteur and Sir Gerald had pointed out, the position of the receiving State was fully safeguarded. If the choice was between deleting and retaining article 4, he would incline towards the latter course.
14. Mr. AGO said that he too was in favour of retaining article 4. The practice was not so rare as some supposed, and exceptionally the case might happen even where the head of a mission was concerned. For example, the Holy See's and San Marino's representatives to Italy might well be Italian citizens as well as representatives of the Sovereign Order of Malta and also of certain foreign States.

<sup>1</sup> Harvard Law School, *Research in International Law, I. Diplomatic Privileges and Immunities* (Cambridge, Mass., 1932), p. 20.

15. Mr. AMADO said that, even if article 4 were deleted, the practice would continue, despite all that had been said about its obsolescence, its desuetude and so on. To make a separate article of it, however, appeared to him to be placing undue emphasis on the matter. If the proposal to delete the article was put to the vote, therefore, he would probably be obliged to abstain.

16. Mr. TUNKIN said that, as Mr. Pal had rightly pointed out (para. 6 above), article 4 had two aspects, of which the second was the more important. In either form, the article would give the impression of encouraging the practice. Deletion of it would remove that impression, but the receiving State would still be in a position, by virtue of the other relevant provisions, to refuse to receive its own nationals as the members of foreign diplomatic missions.

17. Sir Gerald FITZMAURICE pointed out that there were other possibilities open to the Commission than simply to delete or retain the article in either of the forms suggested. It could, for example, re-word the article in a negative form, as suggested by Mr. Pal; it could delete it, but say in the commentary that the practice in question had not been referred to in the draft articles themselves since it was now comparatively rare, particularly as far as the head of a diplomatic mission was concerned, but that it was not, of course, contrary to international law; finally, it could delete the article but, as suggested by the Special Rapporteur, re-word article 5 in such a way as to cover its substance. He was prepared to agree to any of those three courses.

18. Mr. BARTOS expressed himself in favour of the second course referred to by Sir Gerald Fitzmaurice.

19. Mr. VERDROSS said that, although inclined to prefer the third, it was difficult to agree to the deletion of article 4 until article 5 had been discussed.

20. Faris Bey EL-KHOURI said that he could not support the proposal to delete article 4. It was a well-established practice to choose local advisers, interpreters and so on from among the nationals of the receiving State. If the Commission refused to recognize that practice, based as it was on the mutual consent of the sending and receiving States, it would be placing a quite unwarranted limitation on their freedom of action.

21. It was, however, true that the head of the mission was rarely chosen from among the nationals of the receiving State, so that the reference to the head of the mission might perhaps be deleted.

22. Mr. MATINE-DAFTARY felt that Faris Bey El-Khoury's remarks were based on a misunderstanding. Article 4 referred to the "members of the mission", who did not include such subordinate staff as interpreters, clerks and drivers.

23. In reply to a question by the CHAIRMAN, Mr. SANDSTRÖM, Special Rapporteur, agreed to withdraw article 4 provisionally, subject to the right to re-introduce it, if he felt that necessary, in the light of the discussion on article 5.

24. In reply to a question by Mr. GARCIA AMADOR, the CHAIRMAN agreed that, even if the Special Rapporteur thought it necessary to re-introduce article 4, discussion of it could now be regarded as closed.

25. He then invited the Commission to turn to Mr. Tunkin's draft article 4(a) (386th meeting, para. 3), which corresponded to article 2, paragraph 2, and the

last part of article 3, paragraph 1, in the Special Rapporteur's draft.

26. Mr. PAL said that he would prefer the text of article 12 of the Harvard Law School draft, since the word "declare", which was found in the first line of Mr. Tunkin's draft article as well as in the text proposed by the Special Rapporteur, suggested a public announcement, and that would hardly be consistent with the friendly relations assumed to exist between two States contemplating the establishment of diplomatic relations.

27. Mr. AMADO pointed out that the word "declare" was also used in article 12 of the Harvard draft, but only in connexion with the action to be taken by the receiving State in the event of the sending State's refusal to recall the member of a mission whose recall had been requested. In that connexion the word "declare" was appropriate, but he agreed with Mr. Pal that in connexion with the initial request for recall it was inappropriate.

28. Mr. KHOMAN agreed that in the case of an initial request for recall there was no question of a public declaration, and the head of the receiving State merely sent a private communication to the head of the sending State. He pointed out, however, that the word "declare" was also used in article 13 of the Harvard draft, in exactly the same sense as that in which it was used in Mr. Tunkin's. If it was nevertheless still found objectionable, the first sentence of Mr. Tunkin's text could be amended to read as follows: "The receiving State may at any time signify to the sending State that the head of the mission, or any other official of the mission, is no longer *persona grata*."

29. Mr. TUNKIN agreed to that suggestion.

30. Mr. SANDSTRÖM, Special Rapporteur, felt that the use of the words "no longer" was only appropriate in the case where the receiving State had given its *agrément*, in other words, in the case of the head of a mission.

31. Mr. MATINE-DAFTARY suggested to Mr. Pal that the mere fact of informing the sending State that its chosen representative was no longer *persona grata* was in itself a fairly serious step, which was bound to have some effect on relations between two countries. He could not understand why there was any hesitation in adopting the sentence whereby the mission would end if the official was not recalled.

32. Mr. EDMONDS said he could not understand why there was so much concern about the word "declare", which was to his mind entirely appropriate, meaning as it did "determine and state".

33. Mr. AGO agreed with Mr. Edmonds, but suggested the insertion of the words "to the sending State" so that the text would read:

"The receiving State may at any time declare to the sending State that the head of the mission, or any other official of the mission, is no longer *persona grata*."

In that way any suggestion of a public declaration would be avoided.

34. Mr. BARTOS said that, in his view, the word "declare" was inappropriate. What usually happened in practice was that the head of the receiving State politely intimated to the head of the sending State that the person in question was no longer entirely suitable for his post.

35. Mr. TUNKIN suggested that the point be left to the drafting committee.

*It was so agreed.*

*On that understanding, Mr. Tunkin's draft article 4(a) was adopted by 16 votes to none with 1 abstention.*

#### ARTICLE 5

36. Mr. SANDSTRÖM, Special Rapporteur, said that article 5 had no parallel in other texts. The Harvard draft dealt with both matters in the commentary.

37. In accordance with his suggestion at the 386th meeting (para. 51), the words "or to receive them without its prior consent" should be added at the end of the second sentence.

38. Mr. MATINE-DAFTARY said that, in principle, he fully supported article 5. His only doubt was concerning the use of the word "staff", which would cover interpreters, drivers, clerks, etc.

39. Mr. SANDSTRÖM, Special Rapporteur, said he had used the word "staff" deliberately in order that such categories might be covered.

40. Mr. MATINE-DAFTARY observed that in that case the article was very far-reaching.

41. Mr. LIANG (Secretary to the Commission) felt that the time had come when the Commission might consider the desirability of having an article on definitions, similar to article 1 of the Harvard draft.<sup>2</sup>

42. In that connexion it might seem desirable to limit the scope of the Commission's draft to the "members of a mission", in the sense in which that term was defined in article 1 of the Harvard draft, namely, persons "authorized by the sending State to take part in the performance of the diplomatic functions of a mission". That clearly excluded such locally recruited employees as drivers, clerks and even interpreters.

43. Mr. SANDSTRÖM, Special Rapporteur, agreed that the Commission must reach agreement on terminology but thought that could be done more profitably after it had discussed the articles on privileges and immunities.

44. Mr. VERDROSS felt that the second sentence of the Special Rapporteur's draft was too restrictive, since it dealt only with "categories", not with individual officials. A sentence along the following lines should be added to it or inserted at some other appropriate place: "It may also refuse to receive any person notified to it as having been appointed to a diplomatic mission."

45. Sir Gerald FITZMAURICE considered that the point raised by Mr. Verdross did not really relate to article 5 at all.

46. As it stood, article 5 was very wide, possibly too wide, in scope. So far as he could judge from the comment, the Special Rapporteur appeared to have in mind only the comparatively few cases where a State was establishing a diplomatic mission in another State's territory for the first time. In such cases it might be reasonable for the receiving State to have the power to say that the mission should not consist of more than a certain number of officials, or should include, for example, no press attachés or commercial attachés. The text of the article, however, did not limit its scope to such cases; and it was surely unreasonable that, where a mis-

sion had been long established, the receiving State should have the power suddenly to say that it must be reduced by half, or must no longer include officials of a particular category, despite the fact that it had included them for many years previously.

47. On the other hand, he agreed that the sending State could not be allowed to increase the size of a diplomatic mission indefinitely, and that some form of restriction or criterion must be recognized.

48. Mr. YOKOTA agreed with Sir Gerald Fitzmaurice. Too much emphasis was placed in the article on the power of the receiving State. If the latter enjoyed unlimited power to restrict their size, missions might be rendered incapable of performing their duties properly.

49. It would be better to state that the size of missions should be fixed by mutual agreement, especially when first established. The recent negotiations between the Soviet Union and Japan, arising out of the joint declaration concerning resumption of diplomatic relations of October 1956, provided a concrete example of the fixing of the size of missions by negotiation between the two Powers concerned. The size of missions could be limited by mutual agreement, even between States whose diplomatic relations were of long standing. Though he did not wish at that stage to submit a formal amendment, he would suggest that the first sentence of article 5 be redrafted on the following lines:

"The size of the staff composing the mission may be fixed by mutual agreement between the sending and the receiving State, either at the time of its establishment or at any later date. Failing such agreement, the receiving State may effect such limitation."

50. Mr. BARTOS said it was clear that the current tendency to swell the size of foreign diplomatic missions to enormous proportions was placing some States in a difficult position. His own country, Yugoslavia, where some foreign legations had a staff of as many as 600, had been obliged to limit the size of missions owing to the housing shortage in Belgrade. Italy appeared to have the same problem, to judge from its request to other States to select their permanent delegations to the United Nations Food and Agriculture Organization as far as possible from the staffs of their diplomatic missions to the Head of the Italian State. The first provision in article 5 was therefore necessary, and he was in favour of retaining it.

51. The second idea under discussion was the right of the receiving State either to refuse to receive officials of a certain category, or to refuse to accept them without its prior consent. He agreed to that idea, provided the category refused was not essential to the performance of diplomatic duties.

52. The third idea under discussion was the right of the receiving State to refuse to accept officials presented by the sending State as members of its mission. According to Oppenheim,<sup>3</sup> the general practice, evidenced by the refusal of the Swiss Government to recognize the claim to immunity of a Romanian economic counsellor, and by French and United Kingdom practice, was that a subordinate member of a diplomatic mission was not included in the diplomatic list, and hence he was not entitled to diplomatic status and privileges, until his name had

<sup>3</sup> L. Oppenheim, *International Law—A Treatise*, Vol. I, *Peace*, 8th ed., ed. H. Lauterpacht (London, Longmans, Green and Co., 1955), p. 784.

<sup>2</sup> *Ibid.*, p. 19.

been submitted by his head of mission and accepted by the receiving State. The only alternative to such a procedure would be for the receiving State to declare an unwanted official no longer *persona grata*, which it could not well do if he had committed no misdemeanour. He accordingly agreed with the proposal of Mr. Verdross (para. 44 above), which was in accordance with general practice and dealt with a problem not covered in the early articles of the draft.

53. Mr. VERDROSS said there were three ways in which the receiving State might reject diplomatic agents. In the case of the head of the mission it might refuse *agr ation* before he was appointed. It might refuse to accept a member of a mission when he was presented by the head of the mission, or, having accepted the head or a member of the mission, it might at any time declare him no longer *persona grata*.

54. No provision had as yet been made in the draft articles for the second method, so, since the provision in article 5 referred only to the right to refuse to receive a particular category of officials, he proposed that a sentence on the lines suggested in his previous remarks (para. 44 above) form the second sentence or paragraph of article 3 of Mr. Tunkin's amendments. The appointment of a member of a diplomatic mission was always dependent on the consent of the receiving State, even though that consent might be tacit and might be indicated merely by the inclusion of his name in the diplomatic list.

55. Faris Bey EL-KHOURI noted with pleasure that the Special Rapporteur had included in his draft an article dealing with the problem to which he had referred at the 384th meeting (para. 20). He agreed with Mr. Yokota that the size of missions must be limited by mutual agreement. It would be unfair to allow either the receiving or the sending State complete freedom in the matter.

56. Mr. KHOMAN observed that draft article 5 was very well conceived. However, as had been pointed out, it was necessary to strike a balance between the rights of the sending and of the receiving State. All were agreed that it was sometimes in the interest of the receiving State to limit the size of a mission. Such action, on the other hand, must not hamper the work of the mission or prejudice the interests of the sending State.

57. With regard to the second provision in the article, it was clear that a State should not refuse to accept an official, or category of official, except for sound reasons. He accordingly suggested the following modified wording for article 5:

"The receiving State may in certain circumstances and by agreement with the sending State limit the size of the staff composing the mission. It may refuse, on reasonable grounds, to accept a particular official or to admit a particular category of official."

58. Mr. AGO said that he shared the concern of previous speakers, both as to the increasing size of missions and as to the danger of giving the receiving State the right to limit their size unilaterally. Though diplomatic missions were sometimes of a size disproportionate to their needs, it must be admitted that the vast range of activities, many of them not purely diplomatic in character, covered by present-day inter-State relations made some expansion of staffs inevitable. That being so, a provision such as that in the first sentence of article 5,

which could even be interpreted as giving encouragement to States to limit the size of foreign missions, might seriously jeopardize the exercise of the diplomatic function.

59. Whether Mr. Khoman's suggestion would provide adequate safeguards, he was not at that moment prepared to say. Perhaps the Special Rapporteur would submit a redraft of the first sentence in the light of Mr. Khoman's remarks.

60. The second sentence of the article also inspired him with some misgivings, since there again it was a question of unilateral action in what were essentially bilateral relations.

61. Moreover, it was not clear whether the receiving State was to apply the same limitation to all foreign diplomatic missions in its territory, or whether it could refuse to receive a certain category of official in the case of one mission only. The Commission would do well to reflect before adopting such a provision, which might give rise to discrimination and grave international misunderstanding. Generally speaking, the less unilateral rights accorded to States in diplomatic intercourse the better it would be.

62. Mr. SANDSTR M, Special Rapporteur, replying to a question from the CHAIRMAN, said that any conclusions he had drawn from the discussion so far were merely tentative. When framing the first sentence of article 5, he had had in mind only the right of receiving States to limit the size of missions to reasonable proportions, and had not envisaged giving them the right to limit them to a degree that would cripple their activities.

63. The proviso that limitation should be only by mutual consent would not, he was afraid, really solve the problem, since any receiving State could avoid reaching an agreement and then exercise its right to unilateral limitation. Mr. Khoman's text would, in his opinion, actually give the sending State the upper hand.

64. His first reaction was to propose deleting the first sentence altogether and adding the words "or to receive them without its prior consent" at the end of the second sentence.

65. Mr. MATINE-DAFTARY, echoed by other members of the Commission, said that if it was the Special Rapporteur's intention to drop the first sentence of the article, then Mr. Matine-Daftary would certainly move that it be restored, by sponsoring the amendment which had been withdrawn.

66. Sir Gerald FITZMAURICE suggested that a provision on the following lines might be more equitable and generally acceptable:

"1. In the absence of any specific agreement as to the size of the mission, the receiving State may, within the bounds of what is reasonable and customary having regard to current circumstances and to the needs of the particular mission, effect (or impose) such limitation.

"2. The receiving State may also, within similar bounds and on a non-discriminatory basis, refuse to receive officials of a particular category or to receive them without previous consent."

67. Mr. TUNKIN agreed that the first sentence in the article might give rise to complications. On the other hand, Sir Gerald's amended version, with its introduc-

tion of so vague a criterion as "what is customary", might not clarify matters but prove still more confusing.

68. At that stage, he did not see any suitable wording for the first sentence of the article, and would therefore rather accept the Special Rapporteur's proposal to delete it. There would then be nothing either to prevent two States agreeing to limit the size of a mission if necessary, or to prevent the receiving State itself from limiting the size of the foreign mission.

69. The second sentence of the article as formulated by Sir Gerald Fitzmaurice was preferable to that in the draft. He particularly liked the reference to "non-discrimination" which, as Mr. Ago had made clear, was a most important consideration.

70. Mr. SANDSTRÖM, Special Rapporteur, pointed out that his proposal to delete the first sentence of his draft article had been only a tentative one.

71. He viewed Sir Gerald's suggestion with great sympathy, but doubted whether it was suitable for inclusion in the text of a convention. Though more precise than his own formulation, it was still too vague.

72. Mr. GARCIA AMADOR remarked that one fact which emerged from the discussion was the absence of any established and precise rule on the matter. Though Mr. Bartos had shown that a certain practice was followed by certain countries, the existence of a generally accepted principle either one way or the other had not been proved.

73. The Commission could not, therefore, do more than formulate a rule reflecting the existing state of affairs, or, in other words, frame a compromise rule adapted to the needs of the situation. The suggestion made by Sir Gerald Fitzmaurice seemed to offer a satisfactory compromise, and he would support it.

74. Sir Gerald FITZMAURICE explained that he had suggested an amended version of the first sentence merely because other members of the Commission had indicated their desire to keep it in some form, despite the Special Rapporteur's tentative proposal for its deletion. He himself saw no objection to deleting it, provided something on the lines he had suggested was included in the comment on the article.

75. Mr. FRANÇOIS doubted whether it was wise to relegate matters to the commentary merely because the Commission found it difficult to agree on the text of an article. He himself agreed with the text suggested by Sir Gerald Fitzmaurice, but would prefer to see it included in the draft itself.

76. Mr. YOKOTA said that he was anxious to keep the first provision in article 5 in some form or other. Perhaps the Special Rapporteur and Sir Gerald would consult together and produce an amended text for the next meeting.

77. Mr. MATINE-DAFTARY could not agree to the proposal to delete the first sentence. It would leave a vacuum—a gap that no statement in the commentary could fill.

78. Mr. AGO considered Sir Gerald Fitzmaurice's latest suggestion an excellent one. The more he reflected on the first provision in article 5 the more useless it seemed. If States could agree on the size of the mission, the provision was superfluous; if they could not, to introduce the principle of the power of the receiving

State to effect a limitation was extremely dangerous. It would be better to delete the provision.

79. It should be considered also that if Mr. Verdross's proposal was accepted, the receiving State would not be left without any means of protecting its interests, since the earlier articles would give it the right to refuse to accept individual officials.

80. Mr. EDMONDS observed that, whereas the first four articles were primarily concerned with individual officials, the fifth related to groups of officials. Sir Gerald Fitzmaurice's suggestion would make an excellent comment on the draft article as originally proposed by the Special Rapporteur, which he was in favour of retaining.

81. Mr. PAL said that the first part of Sir Gerald's suggestion would be an appropriate comment on article 1.

82. He then observed that too little attention had been paid to the important proposal made by Mr. Verdross (para. 44 above). If it was accepted, the sending State would not enjoy any greater freedom of choice in respect of other members than it had in respect of the head of the mission. The so-called freedom in that respect, originally accorded it under article 3 of the draft would become illusory. The procedure for acceptance of heads of missions and members of missions would be essentially the same, and if that position was accepted, both matters could be covered by a single article. According to Mr. Bartos, the practice was to seek the consent of the receiving State only in the case of certain categories of officials. Mr. Verdross, however, had gone further and wished to make it essential for all members of missions. That was hardly the recognized practice.

83. Mr. AMADO urged the Commission to consider carefully before accepting Mr. Verdross's proposal, which was tantamount to giving the receiving State a *droit de regard* over the diplomatic list of the sending State.

84. Mr. BARTOS said that if, for the sake of argument, Mr. Verdross's proposal were accepted, the second part of Sir Gerald Fitzmaurice's suggestion could be included in the appropriate comment.

85. The provision regarding the limitation of the size of missions was not essential and did not require a special article. The idea could be expressed by including the first part of Sir Gerald's suggestion in the comment on article 1.

86. Mr. HSU deplored the tendency to relegate everything to the commentary. The questions of limiting the size of missions and of the right to refuse certain categories of official were important enough to be covered in the draft itself.

87. As for the principle of non-discrimination, he doubted whether it would be advisable to stress it. In some cases, a State might object to the dissemination of certain types of information. If, however, the principle of non-discrimination were insisted on, it might be difficult for that State to refuse to accept the category of official sent for such a purpose.

88. The CHAIRMAN recalled that the Commission had postponed its decision on articles 3 and 4 pending its decision on article 5. It would therefore have to reach a decision on that article before it could go any further.

89. The position at the moment was that the first sentence of article 5 had been withdrawn by the Special

Rapporteur, though any member of the Commission was free to propose its restoration.

90. Sir Gerald Fitzmaurice's amended version of the second sentence (para. 66 above) appeared to enjoy general approval.

91. Mr. Verdross had proposed (paras. 44 and 54 above) an addition to article 3 of Mr. Tunkin's amendment (386th meeting, para. 3). The Chairman suggested that the Commission discuss that proposal at the earliest opportunity, without, however, re-opening the discussion on the remainder of the article.

The meeting rose at 1.5 p.m.

### 388th MEETING

*Wednesday, 1 May 1957, at 11.45 a.m.*

*Chairman: Mr. Jaroslav ZOUREK.*

#### Statement by Mr. Hsu

1. Mr. HSU regretted that his inability to attend the opening meetings of the session had prevented his replying to Mr. Tunkin's statement at the time it was made (383rd meeting). He was, however, glad to note the improvement in the tone of the annual statements by members from countries under communist régimes regarding the representation of the Chinese legal system.

2. If, in referring to the Chinese legal system, the distinguished members meant the system which was for the time being suppressed on the Chinese mainland, they would, on reflection, realise their mistake, for the General Assembly had duly elected a representative of that system. If, on the other hand they meant the system which for the time being prevailed on the Chinese mainland, they would realise the futility of their regret, because the absence of a representative of that system was due to the fact that the régime on the Chinese mainland had failed to win recognition by the United Nations on account of aggression, amongst other reasons.

3. The CHAIRMAN, speaking in a personal capacity, said that, where China was concerned, the only legal system whose representation on the Commission could be taken into account was the system of the People's Republic of China. That system existed, and must be represented on the Commission under the provisions of the Commission's Statute.

#### 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 5 (continued)

4. The CHAIRMAN outlined the position at the close of the previous meeting.

5. Mr. MATINE-DAFTARY said that, for the reasons he had already stated (387th meeting), he was anxious to retain a provision on the lines of that contained in the first sentence of draft article 5. He was, however, prepared to accept the first sentence in Sir Gerald Fitzmaurice's amendment (387th meeting, para. 66), if it met with the Commission's approval.

6. Sir Gerald FITZMAURICE said that he had no desire to retain the first provision in article 5, but if the

feeling of the Commission was that it should be kept, he would propose that it be enunciated in the qualified form given in the first sentence of his amendment. If, however, the Commission was in favour of omitting the provision, he would like the ideas contained in the first sentence of his amendment to be expressed in the commentary, though naturally in a somewhat different form.

7. Mr. PAL pointed out that the first provision of the Special Rapporteur's draft article 5 had been withdrawn by its author. Since there was no formal proposal for its reinstatement, the ideas contained in the first sentence of Sir Gerald's amendment should as suggested by Sir Gerald, be included in the commentary on the draft. The appropriate place would be under article 1, already accepted by the Commission.

8. Mr. MATINE-DAFTARY stated that, if Sir Gerald Fitzmaurice did not wish to maintain the first sentence of his amendment as part of the draft article, he would sponsor it himself for that purpose. He wished, however, to make a small change in the French text, namely, to delete at the beginning of the text the words "*du personnel*".

9. Mr. TUNKIN observed that Mr. Matine-Daftary had not submitted his amendment in writing, and to wait for it would prolong the discussion unduly. He was in favour of deleting the provision altogether.

10. Mr. AGO said that the question under discussion was important and delicate. He was not in favour of the adoption of any provision on the lines of the first sentence of the Special Rapporteur's draft which had been withdrawn by the Special Rapporteur himself; it would not reflect the practice of States, and the unilateral powers it would vest in the receiving State were not recognized by existing international law. If the Commission adopted such a provision, it would be introducing a major innovation which could have very serious implications.

11. As to the first sentence of Sir Gerald's amendment, the latter had himself proposed to delete it and to include the ideas mentioned therein in the commentary. If that were done, however, the ideas must be differently expressed. He would prefer the comment merely to state that, if any question of the size of a diplomatic mission arose between two States, it should be settled by mutual agreement.

12. Mr. YOKOTA supported Mr. Matine-Daftary's proposal.

13. Mr. AGO, in reply to a question by Mr. FRANÇOIS, explained that he would prefer that the Commission should confine itself in its comment to an expression of concern at the increasing size of diplomatic missions and to the suggestion, that, where necessary, the size be limited by agreement between the two States concerned.

14. The CHAIRMAN, speaking as a member of the Commission, said that he was opposed to the adoption of the first sentence of the Special Rapporteur's draft, or of any other text which contained the same idea of the right of unilateral limitation, which, as Mr. Ago had pointed out, was not recognized by international law. It was the very essence of diplomatic intercourse that it rested on agreement.

15. Mr. AMADO said that he would prefer the concept of reciprocity to that of mutual agreement, since