

Document:-
A/CN.4/SR.388

Summary record of the 388th meeting.

Topic:
<multiple topics>

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

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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

the latter might introduce an element of political bargaining.

16. Mr. MATINE-DAFTARY pointed out that the text he now proposed included the idea of agreement between the States concerned.

17. The CHAIRMAN, speaking as a member of the Commission, remarked that the opening phrase of Sir Gerald Fitzmaurice's, now Mr. Matine-Daftary's, amendment, "In the absence of any specific agreement", was ambiguous and placed the receiving State under no obligation to seek agreement before taking unilateral action.

18. Mr. MATINE-DAFTARY replied that, to meet the Chairman's criticism, he would propose the following modified wording:

"The receiving State may, by agreement with the sending State, limit the size of the mission, within the bounds of what is reasonable and customary, having regard to current circumstances and to the needs of the particular mission."

The Commission could choose whichever version it preferred.

19. Mr. BARTOS said that, although willing to support Mr. Matine-Daftary's previous proposal, he could not agree to the modified version.

20. Sir Gerald FITZMAURICE, replying to an enquiry from Mr. FRANÇOIS, said that his position was very similar to that of Mr. Ago. He would vote against the retention of the principle enunciated in the first sentence of the Special Rapporteur's draft, which he regarded as an innovation. If, however, the Commission preferred to retain the principle, he would press for it to be stated in the qualified form employed in his own amendment, now taken over by Mr. Matine-Daftary.

21. Mr. EL-ERIAN said that, in view of the recent tendency of diplomatic missions to swell to excessive proportions, there was room for a rule on the subject. He was accordingly in favour of retaining the principle enunciated in the first sentence of article 5, provided it was hedged around with adequate safeguards.

22. The CHAIRMAN suggested that, to clarify the situation, the Commission should first decide whether or not it wished to retain the principle enunciated in the first sentence of article 5 of the Special Rapporteur's draft. It could then vote, if necessary, on the various amendments.

23. Mr. GARCIA AMADOR said that voting in that order would place him in an invidious position. He was opposed to the unqualified statement of principle contained in the Special Rapporteur's draft, but might vote for the principle as qualified in Mr. Matine-Daftary's amendment. If the order suggested by the Chairman was followed, he would have to vote first against the principle and then for it.

24. Mr. KHOMAN urged that the amendments to the Special Rapporteur's draft be voted on first.

25. Mr. BARTOS said that he, too, was in favour of the principle as stated in the qualified form put forward by Mr. Matine-Daftary.

26. Mr. TUNKIN supported Mr. Khoman's proposal. He fully appreciated the embarrassment of those members who were opposed to the bare principle but who

were prepared to accept it if accompanied with certain qualifications.

27. The CHAIRMAN said that he was perfectly willing to put the amendments to the vote, but found that difficult so long as two alternative texts, neither of which had been submitted in writing, were sponsored by the same member of the Commission.

28. Mr. FRANÇOIS said that to obviate that difficulty he would sponsor the first paragraph of Mr. Matine-Daftary's amendment and propose that it be included in article 5.

29. Sir Gerald FITZMAURICE said that if the first paragraph of that amendment was to be voted on for inclusion in the draft, he would like to insert the word "only" before the words "within the bounds".

30. Mr. BARTOS expressed his approval of that change.

31. Mr. EL-ERIAN proposed that, in the text now sponsored by Mr. François, the words "current circumstances" be replaced by "the circumstances and conditions in the receiving State".

32. Mr. AGO said that, even though the text originally proposed by Sir Gerald Fitzmaurice was vastly preferable to the original text proposed by the Special Rapporteur, he was doubtful whether he could vote for it. In the first place, it implied that the general rule was that agreement should be reached between the sending and receiving States as to the size of the mission; in fact, the usual practice was for the sending State to have full freedom in that respect, and it was only when the receiving State felt that the mission was becoming excessively large that any question arose of limiting it by mutual agreement. Secondly, the text proposed would give rise to considerable difficulties in practice, since there was no indication as to who was to determine what was "reasonable and customary", or what were "the needs of the particular mission".

33. Mr. AMADO and Mr. PAL agreed with Mr. Ago, Mr. Pal pointing out that the effect of Mr. El-Erian's amendment would only be to make an unworkable provision still more unworkable.

34. Mr. EDMONDS agreed that the Commission must choose between giving the receiving State the power to restrict the size of the mission unilaterally and saying nothing at all, since to introduce all the subjective criteria referred to in Mr. François's amendment would lead to an impossible situation.

35. Mr. BARTOS said that, in principle, he supported the text originally submitted by Sir Gerald Fitzmaurice, which restricted the receiving State's power to limit the size of the mission, but did so in such a way as not to prejudice its established rights in that respect.

36. Mr. MATINE-DAFTARY said that, although he had no desire to cite instances in which States had abused their right to decide the composition and size of their foreign diplomatic missions, especially since the Second World War, he would merely ask how other members of the Commission intended to guard against such abuses.

37. Mr. KHOMAN said he supported the text proposed by Sir Gerald Fitzmaurice, which would do no more than set the stamp of legal approval on a well-established practice.

38. With regard to Mr. Ago's remarks, he felt it would clearly be for the two States concerned to determine, by negotiation, what was "reasonable and customary". He did not see how the Commission could be any more precise.

39. Mr. YOKOTA agreed that the Commission could not hope to arrive at a text that was open to no conceivable objections. The text proposed by the Special Rapporteur had been definitely dangerous. That proposed by Sir Gerald Fitzmaurice was not perhaps as precise as might be wished, but it would be difficult to word it more precisely, and he supported it.

40. Mr. TUNKIN felt that the Commission should vote on the text proposed by Sir Gerald Fitzmaurice and leave its exact wording to the drafting committee. In his own view, it was in accordance with current practice that the receiving State should be able to limit the size of the mission in certain circumstances and to a certain extent.

41. Mr. VERDROSS said that, if the Commission omitted to include any provision along the lines of the Special Rapporteur's draft or Sir Gerald's amendment, it would mean that the sending State could inflate the mission to any size it liked. All international intercourse was based on mutual consent, and in the case in question the sending State had no unrestricted right to increase the size of the mission unilaterally, any more than the receiving State had the right to limit it unilaterally. He agreed with Mr. Tunkin that some form of words might be found by the drafting committee to reflect the situation accurately.

42. Mr. SANDSTRÖM, Special Rapporteur, said that he would vote against the amendment originally submitted by Sir Gerald Fitzmaurice and now taken up by Mr. François, since the discussion had convinced him that it was unnecessary and undesirable.

43. To meet Mr. Verdross's point, the Commission might say in the commentary that the sending State had not an unrestricted right to increase the size of its mission unilaterally, and that it should seek agreement on the matter with the receiving State, on the basis of the criteria mentioned in Sir Gerald's text.

44. Sir Gerald FITZMAURICE said that, now that the Commission was voting at one and the same time on the question of principle whether to refer in article 5 to the receiving State's power to limit the size of the mission and on the form such reference should take, he would be obliged to vote against the amendment which he had himself proposed and which had now been taken up by Mr. François.

45. Mr. AGO wondered whether all the difficulties might not be avoided if, instead of speaking of the receiving State's power to limit the size of the mission, the Commission were to speak of the sending State's obligation to keep the size within reasonable bounds.

46. Mr. BARTOS supported Mr. Ago's suggestion, which amounted to precisely the same thing but avoided giving the appearance of attacking what had always been regarded as an established rule of international law.

47. The CHAIRMAN suggested that further discussion of article 5 be deferred until Mr. Ago had had an opportunity to submit a specific proposal, possibly after consultation with Mr. Matine-Daftary and the Special Rapporteur.

It was so agreed.

ARTICLE 3 (continued)¹

48. Mr. VERDROSS proposed that the following be added as paragraph 2 of Mr. Tunkin's draft article 3 (386th meeting, para. 3), with which he was in other respects in entire agreement.

"Any State may, however, refuse to receive any person notified to it as having been appointed to a diplomatic mission."

49. He was glad that the discussion had revealed that there was general agreement that mutual consent was the necessary basis of diplomatic intercourse, since that was the assumption underlying his proposal. In his view, the consent of the receiving State was required not only for the head of a diplomatic mission but also for its other members; it was only the form of consent that differed. In the case of the head of the mission, consent was given explicitly in advance, in the form of *agrément*; in the case of other members it was given implicitly, either before their arrival by granting them an entry visa, or after their arrival by entering their names on the diplomatic list. It was, after all, only reasonable that the consent of the receiving State should be required, even for junior members of missions, since the duties of the head of the mission might at any moment devolve on them, in the event of illness or injury.

The meeting rose at 1 p.m.

389th MEETING

Thursday, 2 May 1957, at 9.45 a.m.

Chairman: Mr. Jaroslav ZOUREK.

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

[Agenda item 3]

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

ARTICLE 3 (continued)

1. The CHAIRMAN invited the Commission to continue its consideration of Mr. Verdross's amendment (388th meeting, para. 48) to Mr. Tunkin's draft article 3 (386th meeting, para. 3).

2. Mr. SANDSTRÖM, Special Rapporteur, felt that Mr. Tunkin's draft article 3 left a gap which was made only the more obvious by the fact that his draft article 4(a) contained the expression "no longer *persona grata*", which implied prior acceptance by the receiving State. That gap was filled by Mr. Verdross's amendment, which he accordingly supported.

3. Sir Gerald FITZMAURICE asked whether Mr. Verdross and the Special Rapporteur were quite sure that the former's amendment represented current practice. It reduced the distinction between the head of the mission and the other members to the fact that, in the case of the former *agrément* had to be obtained in advance, while in the case of the latter it was presumed but could be rebutted later. It was significant that Mr. Bartos had laid a great deal of stress on the fact that the receiving State could, in his view, refuse to receive military, naval and air attachés, but had not suggested that

¹ Resumed from the 387th meeting.