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Summary record of the 389th meeting

Topic:
Diplomatic intercourse and immunities

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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.

it could lawfully refuse to receive other members of a mission, except its head.

4. In his view, the safeguard against the sending State's appointing a person who was objectionable to the receiving State had always lain in the latter's power to declare him *persona non grata.* If the sending State was doubtful whether the person it wished to appoint would be acceptable to the receiving State, it might well make the necessary enquiries in advance in order to avoid the embarrassment of having him subsequently declared *persona non grata,* but that was no more than a practice of expediency. Although Mr. Verdross's amendment possibly expressed no more than what was, in the last resort, the receiving State's actual power by virtue of that practice, he had never previously seen it expressed as a right.

5. Mr. LIANG (Secretary to the Commission) said that, in his experience, the difference between the accreditation of the head of the mission and the assignment of its other members was clear from the procedure employed in the two cases. It was the invariable practice for the sending State to submit the name of the head of a mission to the receiving State with an explicit request for *agrément,* whereas it submitted the names of other members through the head of the mission, with no request for *agrément* or approval in any form.

6. Moreover, the sending State did not consider it a serious affront if the receiving State withheld *agrément* from the proposed head of a mission, but took a much graver view if it subsequently declared him, or indeed any member of the mission, *persona non grata.*

7. Mr. VERDROSS maintained that his amendment was necessary despite what Sir Gerald Fitzmaurice had said, since the receiving State could refuse, before ever he took up his duties, to receive any person notified to it as appointed to a mission. In that case he would be regarded as never having become a member of the mission at all.

8. Mr. SANDSTRÖM, Special Rapporteur, agreed with Mr. Liang that a distinction should be made between the head and the other members of the mission so far as acceptance by the receiving State was concerned. In the former case, the sending State had necessarily to request *agrément* in advance. In the latter case, it could send the names of the persons concerned to the receiving State's ministry of foreign affairs.

9. That idea, which he had expressed in article 3 of his draft, was perhaps brought out rather more clearly in the text proposed by Mr. Verdross, and, in his view, the inclusion of that text was necessary to supplement Mr. Tunkin's article.

10. Mr. PAL pointed out that, in the draft articles proposed by Mr. Tunkin, there was nothing corresponding to article 3, paragraph 2, of Mr. Sandström's draft to suggest that the names of persons appointed to a diplomatic mission must be notified to the receiving State and must be so notified at any particular stage. The words "notified to it" in Mr. Verdross's amendment to Mr. Tunkin's draft article sought to introduce the requirement of notification by implication. If such notification was in fact the rule, a specific formulation in express terms should find place in the draft; but he doubted whether that was the recognized practice.

11. Mr. AMADO said that he could not support Mr. Verdross's amendment, which, in his experience, was not in accordance with current practice.

12. Mr. TUNKIN felt that Sir Gerald Fitzmaurice's question (para. 3 above) was extremely pertinent, and regretted that it had not yet received an answer. The Commission had first to decide, in the light of current practice, whether a person whom the sending State appointed to a diplomatic mission—other than as its head —was thenceforth regarded *ipso facto* as a member of the mission, or whether he was not so regarded until the receiving State had given its consent even tacitly. If the former was true, his draft article 4(*a*) appeared to be sufficient; if the latter, Mr. Verdross's amendment became necessary.

13. The CHAIRMAN, speaking as a member of the Commission, said that he had been impressed by Mr. Verdross's remark that, if the receiving State refused to receive a person notified to it as having been appointed to a diplomatic mission, such a person would be regarded as never having become a member of the mission at all. If the result of Mr. Verdross's amendment would be to make explicit or tacit *agrément* necessary before any member of a diplomatic mission could take up his duties, he wondered whether diplomatic intercourse would not be made more complicated.

14. The question would arise again when the Commission took up the question of the date with effect from which diplomatic privileges and immunities were enjoyed. What would be the position of a counsellor who was refused *agrément* a few days after arriving in the country where he was to work? Even without Mr. Verdross's amendment, the receiving State could declare him *persona non grata* under the provisions of Mr. Tunkin's draft article 4(*a*).

15. It was to be feared that, in attempting to make the text too precise, the Commission would create a category of persons whose status was open to question.

16. Mr. VERDROSS suggested that the whole difficulty might be solved by replacing the words "no longer *persona grata*" in Mr. Tunkin's article 4(*a*) by the words "*persona non grata*".

17. Sir Gerald FITZMAURICE was not sure that that would fully meet the point. The head of a mission was not allowed to leave for the country to which he was being sent until *agrément* had been received; but the other members of a mission frequently set off as soon as they had been appointed by their Government, and from the time of their appointment were regarded by all, including the authorities of the receiving country, as enjoying diplomatic privileges and immunities. If either of Mr. Verdross's suggestions were adopted, serious difficulties might arise in practice, since persons who had been appointed to a mission might reach the frontier of the receiving country, or even enter it, before finding that they did not enjoy diplomatic privileges and immunities after all.

18. He agreed that, in order for any member of a mission to remain at his post, the tacit or explicit consent of the receiving State was ultimately required, but, as regards the initial stage, he felt that Mr. Tunkin's draft article 3 reflected the situation correctly.

19. Mr. KHOMAN thought that the right which Mr. Verdross's amendment would recognize as pertaining to the receiving State—though but rarely exercised by it, since the main responsibility rested with the head of the mission—was the proper counterpart of the sending State's right to choose the members of its mission freely.

20. He agreed with Mr. Pal that, if Mr. Verdross's amendment was accepted, it would be not only in accordance with current practice but logical as well if the following was added to Mr. Tunkin's text for article 3: "whose names shall be notified to the receiving State before they take up their duties."

21. Finally, he suggested that the beginning of Mr. Verdross's amendment be re-worded as follows: "Any State may, however, *declare unacceptable* any person . . ."

22. Mr. EL-ERIAN said that he shared the view expressed by Mr. Tunkin and Sir Gerald Fitzmaurice. The Commission should not fight shy of all innovations, but at that juncture should abide by existing practice, in view of the special responsibilities and position of the head of the mission.

23. Faris Bey EL-KHOURI said that he, too, was very doubtful whether Mr. Verdross's amendment reflected the existing practice. If the majority of the Commission really wished to insert a provision along those lines, it should at least avoid placing so much emphasis on it. For his own part, he saw no reason why the Commission should make it possible for the receiving State to refuse to receive persons whom the sending State wished to accredit to it merely because it did not like some aspect of their past activities.

24. Mr. SANDSTRÖM, Special Rapporteur, said that he did not agree with Sir Gerald Fitzmaurice and Mr. Tunkin regarding the position of members of the mission from whom *agrément* was withheld after they had arrived in the receiving country.

25. If the Commission felt that Mr. Verdross's amendment was too categorical, it would have to find a reasonable compromise solution. That might be either along the lines suggested by Mr. Khoman, or by adding the words "Subject to the provisions of article 4(*a*)" at the beginning of Mr. Tunkin's draft article 3 and replacing the words "no longer *persona grata*" in the first paragraph of his draft article 4(*a*) by the words *"persona non grata"*.

26. Mr. AMADO said there was one very good practical reason for the current practice of not requiring *agrément* in advance for members of a mission other than its head. It would be quite impracticable for the receiving State to make enquiries concerning the previous activities of every third secretary accredited to it. It could only wait and judge from his conduct in his post whether he was suitable for it or not.

27. Mr. TUNKIN said that, in his experience, except in the case of the head of the mission for whom prior *agrément* was always obtained, any person was regarded as a member of the mission as soon as he had been appointed to it by the sending State. He fully agreed with Sir Gerald Fitzmaurice that any other solution would give rise to very serious difficulties in practice.

28. It had been said that there should be a counterpart to the sending State's right to choose freely whom it wished to appoint as a member of a mission. In his view, that counterpart was to be found in his article 4(*a*), and he understood that Mr. Verdross felt that his wishes would be met by replacing the words "no longer *persona grata*" in that article by the words *"persona non grata"*. That amendment Mr. Tunkin accepted.

29. He also accepted the Special Rapporteur's suggestion for the addition of the words "Subject to the provisions of article 4(*a*)" at the beginning of his draft article 3, although he did not feel they were really necessary.

30. Mr. KHOMAN drew Mr. Amado's attention to the fact that it was quite conceivable that a third secretary had previously written articles or made speeches hostile to the receiving State. Adoption of Mr. Verdross's amendment would not, of course, mean that the receiving State had to make enquiries in all cases, but merely that it had the right to refuse to receive anyone about whom it knew something which made him objectionable.

31. The answer to Sir Gerald's and Mr. Tunkin's objection surely was that a person who was appointed to a mission was to be regarded *provisionally* as a member of the mission until his name was entered on the diplomatic list.

32. Mr. AGO pointed out that, in speaking of consent as the basis for the diplomatic junction, it must not be forgotten that a diplomatic official was not a kind of international official appointed by agreement between the sending and the receiving State; he was purely and simply an official of the sending State. Even *agrément*, given, as far as the head of a mission was concerned, by the receiving State, was not a participation of that State in his appointment, but simply a condition that the sending State must fulfil before proceeding to appoint the head of its mission in order to ensure that he would be able to discharge his functions satisfactorily. On the other hand, the receiving State had the necessary safeguard, in the form of the right to declare later on the chief or any other member of a mission *persona non grata*—but that was something quite distinct from *agrément*.

33. Such was the practice, and, to his mind, Mr. Tunkin's text reflected it faithfully. If the Commission wished to introduce the idea of *agrément* for members of a mission other than the head, it ought to be quite clear that it was not codifying but innovating; and the possible advantages of such an innovation were, in his view, far outweighed by the disadvantages, not only those referred to by Sir Gerald Fitzmaurice, but also the formidable amount of extra work that would devolve on each ministry of foreign affairs' personnel department.

34. Although the idea of replacing the words "no longer *persona grata*" in Mr. Tunkin's draft article 4(*a*) by the words *"persona non grata"* was attractive, it would be seen, on consideration, that such a change would modify the system currently followed. For that reason he hesitated to accept it.

35. The CHAIRMAN pointed out that, as article 4(*a*) had already been voted on (387th meeting), any suggestions for changing its wording would have to be referred to the drafting committee.

36. Mr. MATINE-DAFTARY said he could vote for either of Mr. Verdross's alternative amendments. He felt that those who opposed them exaggerated their scope; they related only to the exceptional case where a person appointed to a mission was already known to the receiving State, either personally or by reputation, as someone whom it would be unwilling to receive; there was no question of making explicit *agrément* necessary for all persons appointed to diplomatic missions, irrespective of grade, or of the receiving State's having to undertake enquiries in every case. Moreover, from

the point of view of the person concerned, it was surely better that the sending State should be told in advance that he was unacceptable than for him to be declared *persona non grata* after his arrival.

37. Mr. VERDROSS reaffirmed his view that the appointment of the members of a diplomatic mission was an act of domestic law, but that the consent of the receiving State was necessary before he could take up his duties.

38. His amendment had been criticized as contrary to current practice, but there were a number of cases where the receiving State had refused to issue the necessary visa for a person already appointed by the sending State.

39. He could not see how any difficulties could arise in practice regarding privileges and immunities, since any person appointed to a mission and allowed to enter the territory of the receiving State was presumed to be a member of the mission until such time as the receiving State refused to receive him.

40. Mr. LIANG (Secretary to the Commission) suggested that Mr. Verdross's amendment was incompatible with Mr. Tunkin's draft article 3, since it robbed the word "freely" of all meaning.

41. If the words "no longer *persona grata*" were changed to *"persona non grata"* in Mr. Tunkin's article 4(*a*), that provision would appear, in one respect, to duplicate article 2, since it would refer equally to prior *agrément* of the head of a mission.

42. Finally, Mr. Liang suggested that there need not be any difficulty concerning the time at which a person appointed to a diplomatic mission began to enjoy diplomatic privileges and immunities if it was borne in mind that, under the generally accepted "functions of the office" theory, the sole purpose of such privileges and immunities was to enable him to assist the head of the mission in carrying out his duties.

43. Mr. BARTOS pointed out that several authors agreed that it was common practice to recognize the Chancery's right to refuse to receive a member of a diplomatic mission on being informed of his appointment. To take a case in point, the Yugoslav Government had sent as cultural attaché to Moscow an officer whom, when making application for his visa, it had described merely as a Third Secretary. When the Yugoslav Ambassador at Moscow notified the Soviet Protocol Department of the officer's arrival as Cultural Attaché, he received the reply that the Soviet Union Government was prepared to accept him as Third Secretary but not as Cultural Attaché, on the grounds that he had not been so described when application had been made for his visa. The Yugoslav Government had not objected to the Soviet decision as it considered it to be in conformity with the general practice. The Commission must decide whether to sanction that practice or whether to condemn it, but whatever it decided would not affect the practice.

44. Mr. PAL said that he was opposed both to Mr. Verdross's amendment and to the compromise just suggested by Mr. Tunkin. After listening to the discussion, he felt that the suggested amendment would be a departure from the accepted practice. It might be a new wisdom, but was not necessarily wiser. There was further the danger of new errors on every level of wisdom.

45. The cases referred to by Mr. Bartos (387th meeting) were exceptional ones which could be settled by special negotiations between the two States concerned. It was not necessary to formulate a new general rule to deal with them.

46. Mr. HSU pointed out that there were occasions when the activities of a member of a mission were quite as important as those of the ambassador. Since, however, many members of the Commission considered it inexpedient to establish a new rule simply to deal with a few exceptional cases, especially a new rule that would make the process of appointing subordinate members of a mission very cumbersome, he wondered whether Mr. Verdross would refrain from pressing his amendment.

47. Mr. GARCIA AMADOR expressed his support for Mr. Verdross's amendment.

48. Mr. TUNKIN said that, unlike Mr. Bartos, he did not believe it was the practice to make the appointment of subordinate members of a mission conditional on agreement between the two States concerned. The case cited by Mr. Bartos (para. 43 above) had no bearing on the question, since the point at issue there was not the person himself but the category of official, a matter dealt with elsewhere in the draft. In view of the concern of some members at the tendency to accord sweeping powers to the receiving State, it would be better not to adopt Mr. Verdross's amendment. The question was, in any case, adequately covered already by article 4(*a*), under which the receiving State could object to an official of the mission at any time, even before his arrival.

49. Mr. YOKOTA expressed support for Mr. Verdross's amendment or, failing its adoption, for the proposal to add a clause to article 3 of Mr. Tunkin's amendment (386th meeting, para. 3) making the article subject to the provisions of article 4(*a*). Article 3 laid considerable emphasis on the rights of the sending State, and some provision was needed to restore the balance. While it was true that there was no rule of international law requiring the sending State to notify the receiving State regarding the persons it appointed to its mission, the Commission need not be unduly concerned on that score, since it was a fairly general practice for the sending State to give such notification. A receiving State not so notified could always declare the unwanted official *persona non grata.* All the amendment did was to affirm the receiving State's right to refuse to accept the official from the outset, i.e., at the time of notification.

50. The fact that in many cases the receiving State would have no idea whether the person nominated was acceptable or not did not strike him as a serious objection. If it knew him beforehand to be unacceptable, it could act under the rule enunciated in the amendment; if it only realized the fact later, it could act under article 4(*a*).

51. The CHAIRMAN put Mr. Verdross's amendment (388th meeting, para. 48) to the vote.

The amendment was rejected by 9 votes to 8 with 1 abstention.

52. The CHAIRMAN invited the Commission to take a decision on Mr. Tunkin's article 3 (386th meeting, para. 3).

53. Mr. KHOMAN enquired whether Mr. Tunkin was willing to accept the amendment he had proposed (para. 20 above) regarding notification to the receiving State of the names of appointed members.

54. Mr. TUNKIN replied that the point seemed closely linked with the question of the list of members of a mission to be communicated to the ministry of

foreign affairs, dealt with in article 3, paragraph 2, of the Special Rapporteur's draft. He would prefer to see it discussed in that connexion.

55. Mr. MATINE-DAFTARY saw no point in such notification. The best time for the receiving State to refuse to accept a member of a mission was when his visa was applied for.

56. Mr. AMADO pointed out that in many cases no visa would be required.

57. Referring to Mr. Khoman's amendment, he said that the usual practice was for a foreign mission to notify the receiving State of appointments in the following manner: "Mr. X has been appointed Third Secretary to this Embassy."

58. Sir Gerald FITZMAURICE agreed with Mr. Amado on both points. It was, of course, customary to notify the receiving State of the appointment of a member of a mission; what was not customary was to warn it of the sending State's intention before the member was appointed.

59. The CHAIRMAN suggested deferring consideration of Mr. Khoman's amendment until the appropriate point in the Commission's consideration of the draft articles.

It was so agreed.

60. The CHAIRMAN put Mr. TUNKIN's article 3 (386th meeting, para. 3) to the vote.

Article 3 was adopted by 14 votes to none with 2 abstentions.

61. Mr. BARTOS, explaining his vote, said that he was not opposed to the principle enunciated in Mr. Tunkin's article 3, provided it was suitably qualified. As he had no means of knowing whether the proposed qualification of article 3 would be adopted, he had been forced to abstain.

ARTICLE 4 *(continued)*

62. The CHAIRMAN, after recalling that a decision on Mr. Tunkin's article 4 (386th meeting, para. 3) had been deferred pending the Commission's decision on related articles (387th meeting), put the article to the vote.

Article 4 was adopted by 11 votes to 5 with 2 abstentions.

63. Mr. EL-ERIAN explained that he had voted against the article because, as he had previously stated (387th meeting), it sanctioned and regulated an obsolete practice not in keeping with the functions of diplomatic agents.

64. The CHAIRMAN, speaking as a member of the Commission, said that he had abstained because he, too, regarded the principle as obsolete. In his opinion, the practice of appointing nationals of the receiving State as heads or members of a foreign diplomatic mission should not be encouraged. He agreed, however, that in the rare cases where a national of the receiving State was appointed as a member of a mission, the appointment was subject to the consent of that State, but he would have preferred that that should have been mentioned, and in greater detail, in the commentary on the draft.

[1] Resumed from the 387th meeting.

65. Speaking as Chairman, he recalled that article 4(*a*) had already been adopted (387th meeting).

66. Mr. KHOMAN enquired whether it would be in order at that stage to propose, in view of the decision taken with regard to article 3, the following addition to the first paragraph of article 4(*a*) for consideration by the drafting committee: "It (the receiving State) may also declare unacceptable any other official, whether or not he has been appointed."

67. The CHAIRMAN replied that the drafting committee would consider the amendment in so far as it did not conflict with previous decisions.

ARTICLE 5 *(continued)*[2]

68. The CHAIRMAN enquired whether the Commission was agreeable to replacing the first provision of article 5 by the following text submitted by Mr. Ago in pursuance of his suggestion at the 388th meeting:

> "1. In determining the size of its mission, the sending State must not exceed the bounds of what is reasonable and customary having regard to current circumstances, conditions in the receiving country and the needs of the particular mission."

69. Mr. SANDSTRÖM, Special Rapporteur, stated that he could accept Mr. Ago's amendment with a drafting change, namely the substitution of the words "The size of the mission of a State must" for the words "In determining the size of its mission, the sending State must". The object of the more neutral wording was to avoid giving the impression that the sending State had the right to fix the size of its mission.

70. Mr. AMADO said that he was opposed to the amendment and preferred the words of the Special Rapporteur's article 5.

71. Mr. MATINE-DAFTARY said that Mr. Ago's amendment was an acceptable, though not ideal, solution. He would prefer, however, the amendment originally proposed by Sir Gerald Fitzmaurice (387th meeting, para. 66), finally taken over by Mr. François (388th meeting, para. 28), and subsequently amended by Sir Gerald (388th meeting, para. 29).

72. Mr. EL-ERIAN said that, although appreciating Mr. Ago's efforts to find a solution, he could not accept his amendment, as it involved a complete change of approach. Mr. Ago's amendment implied that it was for the sending State to fix the size of its mission, despite the fact that the mission's activities would be conducted in the receiving State.

73. The amendment originally submitted by Sir Gerald Fitzmaurice, on the other hand, started from the principle that it was for the receiving State to determine the size of foreign missions, but qualified that principle by inviting the receiving State to seek agreement on the matter with the sending State and by providing that, failing such agreement, the receiving State should take certain facts into account when fixing the size of the mission.

74. Thus the powers of the receiving State were far from unlimited. As for the question of who was to decide what was "reasonable and customary", the discretion must clearly lie with the receiving State. That discretion would, however, be tempered by the consideration that an arbitrary decision on its part would incur the

[2] Resumed from the 388th meeting.

disapproval of the international community. It would be by no means the only case where fear of incurring such disapproval was the only curb on the discretion of States.

75. Mr. YOKOTA enquired whether Mr. Ago would agree to preface his amendment by the opening words of Sir Gerald Fitzmaurice's text: "In the absence of any specific agreement". Although there was no established rule that the size of missions should be fixed by agreement between the States concerned, he felt that the desirability of such agreement should be stressed.

76. Mr. FRANÇOIS said that, had Mr. Verdross's amendment or the compromise solution suggested in its place been accepted, he would have been prepared to withdraw the text he had taken over from Sir Gerald Fitzmaurice, since the receiving State would always have had the right to curtail the size of a mission by refusing to accept certain appointments.

77. The amendment had not been adopted, however, and he was not sure that the replacement of the words "no longer *persona grata*" in article 4(*a*) by the words *"persona non grata"* would meet the point, since it was by no means certain that the excessive size of a mission would be regarded as adequate ground for declaring a member of it *persona non grata.*

78. He was accordingly obliged to maintain the text he had sponsored, as Mr. Ago's text did not provide adequate safeguards for the interests of the receiving State.

79. Mr. AGO, replying to an enquiry from Mr. MATINE-DAFTARY, said that the words *"conditions du pays accréditaire"* in his amendment referred to the conditions "prevailing in" the country and not to any conditions "imposed by" that State.

80. The whole purpose of his amendment was to avoid according the receiving State power to fix unilaterally the size of foreign missions—a power unknown to international law currently in force and somewhat contrary to the principle that a State freely appoints its own agents to represent it. What was wanted was not to provide the receiving State with the right to fix or even to cut, the size of a foreign mission, but to establish that the sending State was under the obligation to keep its mission within reasonable bounds when fixing its size.

81. He did not wish to exclude altogether the idea of agreement, but was anxious to avoid giving the impression that the size of a mission should, on principle, be fixed by agreement between the sending State and the receiving State. Like Sir Gerald Fitzmaurice, he was in favour of pointing out in the commentary that when a difference occurred, between two States concerning the size of the mission of one of them, it would be advisable to settle that difference by agreement.

82. He was willing to accept the Special Rapporteur's more neutral wording of the opening words of his amendment, no substantial change being involved.

83. The CHAIRMAN, replying to Mr. BARTOS, agreed that Mr. Ago's amendment, as the furthest removed from the original proposal, should be put to the vote first.

84. Mr. MATINE-DAFTARY said that voting in that order would place some members of the Commission in a quandary. He, for instance, would prefer the text sponsored by Mr. François, but would rather have Mr. Ago's text than nothing at all. He would, therefore, be obliged to vote for the latter and perhaps contribute to its adoption, because he would have no opportunity of reviving it, were Mr. François's text subsequently rejected. He therefore moved that Mr. François's text be voted upon first.

85. After discussion, the CHAIRMAN put to the vote the proposal that Mr. François's text be voted upon first.

The proposal was adopted by 9 votes to 5 with 3 abstentions.

86. Mr. FRANÇOIS, replying to Mr. EL-ERIAN, said that he accepted his proposal (388th meeting, para. 31) to replace the words "current circumstances" by the phrase "the circumstances and conditions in the receiving State".

87. The CHAIRMAN put the following amended version of Mr. François's proposal to the vote:

> "In the absence of any specific agreement as to the size of the mission, the receiving State may effect such a limitation only within the bounds of what is reasonable and customary, having regard to the circumstances and conditions in the receiving State and to the needs of the particular mission."

The Proposal was adopted as paragraph 1 of article 5 by 10 votes to 5 with 3 abstentions.

The meeting rose at 1 p.m.

390th MEETING

Friday, 3 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 5 *(continued)*

1. The CHAIRMAN invited the Commission to take a decision on the second principle contained in the Special Rapporteur's article 5 (A/CN.4/91), concerning which Sir Gerald Fitzmaurice had submitted an amendment (387th meeting, para. 66).

2. Mr. SANDSTRÖM, Special Rapporteur, recalled that he had already accepted, in principle, the views of Mr. Bartos concerning the right of the receiving State to refuse to receive officials of certain categories without its previous consent.

3. Mr. HSU restated the objection he had made at the 387th meeting to the inclusion of the phrase "and on a non-discriminatory basis" in Sir Gerald's amendment. In his opinion, the words "within similar bounds', i.e., within the bounds of what was reasonable and customary having regard to the circumstances and conditions in the receiving State and to the needs of the particular mission, provided adequate safeguards.

4. The CHAIRMAN, speaking as a member of the Commission, enquired whether Mr. Hsu did not recognize it as an established practice of international law that a receiving State could not accept officials of a par-