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Summary record of the 394th meeting

Topic:
Diplomatic intercourse and immunities

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Havana Convention, stipulating that diplomatic officers should address themselves to the minister of foreign affairs only, and approach other authorities only through that channel. He had not included such a provision in his draft, because he did not consider that international law was infringed when a diplomatic agent approached authorities without passing through the minister of foreign affairs. The proper place for such a provision was, he thought, in the instructions to diplomats.

74. Mr. SPIROPOULOS remarked that the undecided question of whether the Commission was to frame a draft convention or a code arose again. If it was framing a code for the guidance of chancelleries, then all matters of detail such as that mentioned by the Special Rapporteur would have their place in it. Since, however, the initial question had not been settled, a decision regarding the provision under consideration was more difficult. The question of the channels through which diplomatic agents should deal was not an important legal problem, but rather a matter of protocol in the broadest sense. He formally proposed that no provision on the subject be included in the draft.

75. Mr. TUNKIN fully agreed with the Special Rapporteur that it was unnecessary to include such a provision in the draft. The matter could be decided irrespective of whether the set of articles was to become a code or a draft convention, since in either case the text would be a collection of rules on international law and not just a text book.

76. All States were free to determine through what organs their intercourse with other States should be conducted. Some might decide that the ministry of foreign affairs should be the sole channel of diplomatic intercourse, but some might decide that other organs might have direct intercourse with the organs of other States.

77. Mr. BARTOS considered that the question of the relations with the various authorities of the receiving State was a matter to be considered at a later stage under section III of the draft, "Duties of a diplomatic agent". If the receiving State had a strict rule that relations must be conducted solely through the minister of foreign affairs, diplomatic agents in that State must conform to it. In States where exceptions to that rule were allowed, however, diplomatic agents were free to approach other authorities direct.

78. Mr. MATINE-DAFTARY said that a distinction must be drawn between official and informal contacts. In some countries, the Soviet Union for instance, diplomatic intercourse was conducted solely through the medium of the minister of foreign affairs, and direct contacts with other authorities were forbidden. In other countries, however, informal contacts with other authorities were permitted because on many questions such contacts were necessary. He would be interested to learn whether article 13 of the Havana Convention was applied strictly in diplomatic intercourse between American States.

79. Mr. GARCIA AMADOR pointed out that the question under discussion should strictly be considered in connexion with section III of the draft. It was his intention to submit amendments, based on articles 12 and 13 of the Havana Convention, to that part of the draft. He had, however, been taken unawares by what he regarded as a premature discussion of the duties of a diplomatic agent. He urged that the Commission suspend discussion on what was really the substance of a later part of the draft.

80. Mr. KHOMAN said that it was a sound general principle that the official channel for diplomatic intercourse was the minister of foreign affairs. In practice, however, subordinate members of missions were often advised to approach other authorities directly, commercial attachés getting into touch with the ministry of commerce or of economic affairs, and service attachés with the defence ministries.

81. Sir Gerald FITZMAURICE felt that it would be inadvisable to include a provision on the subject. Although it was still the rule for the strictly diplomatic members of a mission to deal only with the minister of foreign affairs, it was a fairly settled practice for the numerous specialists who had been added to missions to have direct contact with the departments dealing with their speciality. Indeed, unless such direct contacts were permitted, it would be extremely difficult for the various attachés to discharge their functions. Most countries actually preferred them to address themselves to the competent departments. The principle was so generally accepted that it might be unnecessary to have an article on the subject, but, if the Commission decided otherwise, the provision must be carefully framed and ought to specify that departures from the general rule could be made in the case of specialist attachés to missions.

82. Mr. EL-ERIAN said that he shared Mr. Tunkin's and Sir Gerald Fitzmaurice's doubts on the advisability of including a provision which might restrict contacts in diplomatic intercourse. The Commission should not attempt to lay down a rule on the matter, but should leave it to the discretion of the receiving State. Quite apart from technical attachés, the heads of missions themselves might find it more conducive to an improvement in relations to contact other departments than the ministry of foreign affairs, or even to contact prominent members of the cabinet. Circumstances differed so much from country to country that a hard and fast rule on the matter would not help to improve international relations.

83. Mr. SPIROPOULOS asked for a vote on his proposal that no provision on the subject be included in the draft.

84. After further discussion, the CHAIRMAN suggested that the vote on the question of including such a provision in the draft be taken when the Commission considered section III of the draft, on the understanding that the discussion would not be re-opened.

It was so agreed.

The meeting rose at 1 p.m.

394th MEETING

Thursday, 9 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)*

SECTION II

1. Mr. SANDSTRÖM, Special Rapporteur, drew attention to the arrangement of Section II of his draft. He had adopted the view that the proper order in which to deal with immunities was to take first those attaching to the premises of diplomatic missions, then the facilities

which the receiving State must grant the mission to enable it to discharge its functions and, finally, the immunities attaching to the person of the diplomatic agent. To establish a clear distinction between the three sub-divisions, he proposed inserting the following new title before article 16: *"B. Facilitation of the work of the mission: protection of correspondence."* The change would involve the deletion of the words "and correspondence" from the title of sub-section A, and the existing sub-section B would become sub-section C.

2. The CHAIRMAN drew attention to the following addition proposed by Sir Gerald Fitzmaurice to the title of sub-section A: "Freedom and facilitation of communications and movement."

3. He proposed that the question of the arrangement of the section and the wording of the titles be referred to the Drafting Committee.

It was so agreed.

4. Mr. VERDROSS said that he had two preliminary points to raise. The first was purely a matter of terminology. He noted that the Special Rapporteur had used the traditional phrase "Diplomatic privileges and immunities" for the title of the section. In his opinion, it would be preferable to speak of "diplomatic privileges" only, since immunities were included in those privileges.

5. His second point had important legal implications. He regarded *franchise de l'hôtel* as being merely the logical consequence of the inviolability of the mission. The inviolability and immunities of the premises of the mission began only from the time that they were really in the service of the mission. That being so, it would seem more logical to discuss the privileges of the members of the mission before privileges *in rem*.

6. Mr. TUNKIN was sorry that he could not agree with Mr. Verdross on the legal basis of *franchise de l'hôtel*. At the time of the Congress at Vienna the entire diplomatic mission had been regarded as the appurtenance of the head of the mission, the other members of the mission being considered his retinue, and the premises his residence. Such a concept bore no relationship to present-day reality. A diplomatic mission was now regarded as an organ of the State, and the head of the mission as the person in charge of that organ, and his privileges derived primarily from that position and not from his being the personal representative of his sovereign. The order adopted by the Special Rapporteur was, therefore, quite correct.

7. Mr. PAL suggested that discussion of the order in which the articles should be presented was likely to cause confusion at that stage. It would be better first to consider the substance of the articles as presented, and then, when the entire draft was considered, to come back to the question of arrangement.

8. Mr. SANDSTRÖM, Special Rapporteur, referring to the phrase "privileges and immunities", said that he had not attached very great importance to the terminological question involved, but had simply taken over the traditional phrase, which was that used by the League of Nations.

9. On Mr. Verdross's second point, he agreed with Mr. Tunkin. The premises of the mission were, so to speak, its permanent headquarters and the concrete symbol of its presence. Incidentally, his arrangement of the subject was similar to that of the Harvard Law School draft[1].

10. Mr. EL-ERIAN proposed the following new article to precede article 12:

> "Diplomatic missions shall enjoy in the territory of the receiving State such privileges and immunities as are necessary for the exercise of their functions and the fulfilment of their purposes."

It was based on Article 105 of the Charter of the United Nations.

11. Mr. BARTOS, referring to Mr. Verdross's first point, recalled that there had been a prolonged discussion of the difference between privileges and immunities during the drafting of the Convention on the Privileges and Immunities of the United Nations. It had been decided to maintain a distinction between them, on the ground that immunities generally had a legal basis, whereas only some privileges were based on law, the others being a matter of courtesy.

12. Mr. AMADO pointed out that the term "privileges and immunities" had a very long history and was rich in associations. It was, moreover, the expression used both by the League of Nations and in the Charter of the United Nations.

13. The CHAIRMAN, speaking as a member of the Commission, said that the expression was justified on other grounds too. The term "immunity" had been associated since the Middle Ages with the idea of exemption from local jurisdiction. Privileges, or prerogatives, were something different. They were prerogatives based on international law, customary or written, and gave the diplomatic agents positive rights which other inhabitants of the receiving State did not possess. The right of unimpeded correspondence and the right to correspond by cipher could not be regarded as immunities. The term "privileges and immunities" was used in a number of international conventions as well as in the Charter.

14. Besides diplomatic privileges and immunities based on international law, there were the advantages (concessions) accorded out of international courtesy.

15. Mr. VERDROSS said that he did not wish to press the point of terminology.

16. The other problem was a legal one however. It was important to know when *franchise de l'hôtel* commenced; whether at the time the sending State bought or leased premises to be used for diplomatic purposes, or whether at the time the mission entered into possession. If *franchise de l'hôtel* dated from the time of entry into possession, it was a consequence of the immunity of the mission.

17. Mr. BARTOS said that it was customary to request *franchise de l'hôtel* for new buildings intended for diplomatic purposes when they had reached the installation stage. Matters connected with town planning, sanitation and soundness of the structure were recognized to be within the competence of the receiving State, but, to enable the mission to take the necessary measures to preserve secrecy, the interior installation and decoration of the building took place under the supervision of the sending state and under the protection of *franchise de l'hôtel*. The question of the exact moment from which

[1] Harvard Law School, *Research in International Law, I. Diplomatic Privileges and Immunities* (Cambridge, Mass., 1932), pp. 19-25.

inviolability of the premises started was a very thorny one, and in the absence of any established rule, it would be more prudent for the Commission to refrain from mentioning the matter.

18. Sir Gerald FITZMAURICE, referring to Mr. Verdross's first point, agreed with previous speakers on the advisability of retaining the phrase "privileges and immunities". The right of freedom of communication was not a matter of immunity nor a privilege accorded out of courtesy; it was a right with a legal foundation.

19. He doubted whether *franchise de l'hôtel* had any very direct connexion with the arrival of the head of the mission. It was rather a form of State immunity attaching to a building used for government purposes, though for the sake of convenience and for obvious reasons, it was classed as a diplomatic immunity. In the vast majority of cases there was no question of taking over a new building. Many missions had been established for two or three centuries and had seen a succession of ambassadors, with *chargés d'affaires* taking charge in the intervals between them, and *franchise de l'hôtel* continued to apply during the intervals between the departure of one ambassador and the arrival of his successor. Even when a building was first taken over for the use of a mission, it was customary for the premises to be acquired and the building to be staffed long before the head of the mission actually arrived. The inviolability of the premises in such cases began from the time they were put at the disposal of the mission.

20. Mr. SANDSTRÖM, Special Rapporteur, agreed with Mr. Bartos who had quoted Yugoslav case law in support of Sir Gerald's statement that the immunity of premises continued during intervals between ambassadors.

21. Mr. LIANG, Secretary to the Commission, suggested that the inviolability of premises was a concept distinct from the immunity of diplomatic agents as to their person. The fact that it had become usual, especially in the larger capitals, for the chancellery to be in a different building from the residence of the head of the mission was an additional argument in favour of such a distinction. Buildings used by foreign States for such purposes as trade or information, however, enjoyed a lower degree of immunity than diplomatic premises, as the customary law in their respect was not fully developed.

22. Referring to the words "or [belonging] to the head of the mission" in the Special Rapporteur's text, he remarked that it was very rare at the present time for the premises of the mission to belong to the head of the mission. In most cases it was the sending State that acquired the property. If the head of the mission acquired any property it was generally for use as a private residence. Perhaps the text might be clarified on the lines of the Harvard Law School draft.

23. Mr. SPIROPOULOS conceded that Mr. Verdross's view on privileges and immunities was defensible from the purely theoretical standpoint, but agreed with previous speakers on the desirability of keeping both terms.

24. There could be no doubt that *franchise de l'hôtel* dated from the time that the premises were at the disposal of the mission. It would be advisable, however, to avoid any attempt to fix the precise moment in the construction of a new building at which immunity began.

25. Mr. AGO agreed that the inviolability of the premises of a mission was not dependent upon the personal immunity of the head of the mission. As for the time from which that inviolability commenced, he understood that it was the practice of the sending State to notify the receiving State that certain premises had been acquired for use as the headquarters of its mission. The beginning of inviolability could, therefore, date from the time such notification reached the receiving State, even though the head of the mission might arrive much later.

26. Mr. HSU said that he shared Mr. Verdross's view regarding the basis of the *franchise de l'hôtel.* The time from which the inviolability of the premises of a mission began had some importance. The fact that on termination missions often burnt their archives suggested that they did not always attach great value to the guarantee of inviolability by the receiving State.

27. Mr. BARTOS suggested that, before embarking on a detailed study of diplomatic privileges and immunities, the Commission should determine what categories of diplomatic agents were to enjoy them. The old, liberal theory was that the full privileges and immunities enjoyed by the head of the mission extended to all his retinue. Since the Second World War, however, a more restrictive theory was applied by continental European countries, with the notable exception of the Federal Republic of Germany. The United Kingdom, which had hitherto accorded full privileges to all diplomatic agents, had recently issued an Order in Council modifying its practice. Under that Order, enunciating a new theory evolved by the Foreign Office, the grant of diplomatic privileges and immunities was subject to the condition of reciprocity.

28. If the Commission adopted the liberal theory, it could proceed forthwith to consider the various articles on the subject. If not, it would have to make clear in connexion with each provision to which categories of diplomatic agent it applied.

29. Sir Gerald FITZMAURICE said that he must refute the suggestion that any new theory evolved by the Foreign Office had been adopted in the United Kingdom. Until recently, it had been the rule in the United Kingdom for all persons entered on the diplomatic list to be accorded the full range of privileges and immunities. Some countries, however, had adopted the practice of granting privileges and immunities only to diplomatic agents above a certain level and refusing them to lower categories. The United Kingdom Government, considering such a distinction to be contrary to established practice, had come to the conclusion that the principle of reciprocity must apply, all the more so as it had been granting privileges and immunities in circumstances where they were not strictly required. Then and then only, had it introduced legislation to enable it to apply the same distinction to the members of missions of the countries concerned. However, the law provided that the moment the countries concerned included junior members of United Kingdom missions in the list of those entitled to privileges and immunities, the corresponding members of the missions of the countries concerned in London would automatically be accorded the same treatment. Thus, no new theory was involved—though there had perhaps been a change in practice.

30. After further discussion, the CHAIRMAN proposed that Mr. Bartos's points be considered in connexion with sub-section C (former sub-section B).

It was so agreed.

ARTICLE 12

31. The CHAIRMAN invited the Commission to consider article 12, paragraph by paragraph.

32. He said that the following amendments had been submitted in connexion with paragraph 1.

33. Sir Gerald FITZMAURICE had proposed:

(*a*) A new paragraph 1, to read:

"The sending State shall be free to acquire and hold in the receiving State the premises necessary for the appropriate housing and effective functioning of the mission and its staff."

(*b*) That the old paragraph 1 should become paragraph 2.

(*c*) A new paragraph 3, to read:

"Except to the extent recognized by any established local usage, or to save life or prevent grave physical injury in the face of an immediate threat or emergency, the premises of a mission shall not be used for giving shelter to persons charged with offences under the local law, not being charges preferred on political grounds."

Alternative text:

"Persons taking shelter in mission premises must be expelled upon a demand made in proper form by the competent local authorities showing that the person concerned is charged with an offence under the local law, except in the case of charges preferred on political grounds."

34. Mr. TUNKIN had submitted an amendment to insert the following text after the words "save with the consent of the head of the mission":

"such inviolability of the premises of the mission shall not however confer the right forcibly to detain therein any person whomsoever or to grant asylum therein to persons in respect of whom a warrant for arrest or detention has been issued by the competent State authorities".

35. Finally, the following amendments had been proposed by Mr. YOKOTA:

(*a*) Replace "the receiving Government" by "the receiving State".

(*b*) Replace "save with the consent of the head" by "save at the request or with the consent of the head".

(*c*) Replace "must, if possible, be obtained" by "must be obtained, unless it is absolutely impossible under the circumstances".

36. Mr. SANDSTRÖM, Special Rapporteur, introducing article 12 of his draft, said that it dealt with the principle of the inviolability of the premises of diplomatic missions. The rule contained two elements. The first was that the receiving State must abstain from hampering the activities of the mission and from intruding on its premises without the consent of the head of the mission. The second was that it must protect the premises from any intrusion of third parties. The principle was subject to certain limitations, since the premises of a mission could clearly not be used for the perpetration of crimes. The exceptions to the rule were, however, extremely difficult to define, and if the Commission regarded his list of them as unsatisfactory, it might simply delete the remainder of the paragraph, beginning with the words "or, in an extreme emergency".

37. Mr. TUNKIN, introducing his amendment (para. 34 above), observed that paragraph 1 of article 12 fell naturally into two parts. The first part merely reaffirmed the universally accepted international rule that the premises of diplomatic missions must be inviolable—a rule also enunciated in the draft regulations adopted by the Institute of International Law in 1895 (article 5)[2] and in the resolution adopted by the Institute in 1929 amending the 1895 draft regulations,[3] in articles 14 and 16 of the Havana Convention[4] and in article 3 of the Harvard draft.[5] The rule was a most important one from the standpoint of relations between sovereign Governments.

38. The second part of the paragraph, on the other hand, introduced some important qualifications which were tantamount to a provision that the receiving State might at any time violate the premises of a mission. He fully appreciated that, in providing for such exceptions, the Special Rapporteur was actuated both by a natural concern at the danger which the inviolability of the premises of a foreign mission might represent for the receiving State, and by a desire to prevent abuse of the privilege. It must be borne in mind, however, that there was no legal rule that did not carry its dangers, and no privilege that was not open to abuse. In thus seeking to limit dangers of a problematical kind, the Special Rapporteur was opening the door to a far more real danger, that of jeopardizing the effective enjoyment of the privilege of inviolability. Yet, in order to avoid conflicts between States and strengthen and develop friendly relations between them, it was essential that the principle of inviolability should be preserved intact.

39. He accordingly proposed the deletion of the remainder of paragraph 1, following the words "save with the consent of the head of the mission". The wording which he proposed in its place was designed to safeguard the principle of inviolability of diplomatic premises, but to qualify it in certain clearly defined ways.

40. He could not accept the view expressed by the Special Rapporteur in paragraph 12 of his commentary that the question where and in what circumstances a diplomatic mission could grant asylum to a person under prosecution for an offence should be dealt with not in connexion with *franchise de l'hôtel* but in connexion with the general question of asylum for political refugees. The two questions were separate and should be dealt with separately.

41. Mr. FRANÇOIS, on a point of order, submitted that the Commission would be going beyond its instructions if it took up the question of asylum at its current session. He recalled that, as was stated in paragraph 10 of the Secretariat's memorandum (A/CN.4/98), the Sixth Committee of the General Assembly, when considering the Yugoslav draft resolution that had led to General Assembly resolution 685 (VII) by virtue of which the Commission was dealing with diplomatic intercourse and immunities, had rejected a Colombian amendment to the effect that the Commission should deal not only with diplomatic privileges and immunities

[2] *Annuaire de l'Institut de droit international*, vol. XIV, *1895-1896* (Paris, A. Pedone), p. 240.

[3] Harvard Law School, *op. cit.*, pp. 186 and 187.

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

[5] Harvard Law School, *op. cit.*, pp. 19-25.

but also with the right of asylum, "the majority of the Committee holding that the two questions were distinct and had always been regarded as such by the International Law Commission". The Special Rapporteur had therefore been perfectly right to omit the question of asylum from his draft.

42. Moreover, in view of the time which the Commission had spent on the first eleven articles, it would be most unwise to broaden the scope of the draft so as to include an extremely complicated question on which it had not even the benefit of a preliminary study by the Special Rapporteur. He therefore proposed that the Chairman rule that the question of asylum should not be dealt with at the current session.

43. Mr. SANDSTRÖM, Special Rapporteur, said he was in entire agreement with Mr. François, as would be clear from what he had said in paragraph 12 of his commentary.

44. Sir Gerald FITZMAURICE said he was prepared to defer to the views expressed by Mr. François and Mr. Sandström, but, if the Commission did decide to leave the question aside for the current session, it should explain its reasons clearly in its report. Otherwise, no one would understand the Commission's failure to refer to a question which was so intimately bound up with that of the inviolability of diplomatic premises, unless he happened to be familiar with the history of events in the Sixth Committee of the General Assembly in 1952.

45. In any case, he wondered how far the issue was purely a question of asylum, in the sense in which that term was commonly understood. There had been cases, quite recent cases, where persons charged with ordinary criminal offences had taken refuge in an embassy and had not been surrendered in response to a demand transmitted in proper form by the local authorities. Such cases did not really raise the question of the right of asylum at all; on the other hand, they did raise the question of the inviolability of diplomatic premises, where such premises were used for purposes that were, in his view, inconsistent with the diplomatic function. And that was surely borne out by the Special Rapporteur's text, which gave the agents of the receiving Government the right to enter diplomatic premises in certain circumstances. If the Commission's draft was to be comprehensive, therefore, he was not at all sure that the question referred to in Mr. Tunkin's amendment (para. 34 above) and in paragraph 3 of the text which he himself had proposed to replace article 12 (para. 33 above) should not be included in it.

46. He also to some extent shared Mr. Tunkin's doubts regarding the wisdom of formulating exceptions to the principle of the inviolability of diplomatic premises, at any rate in the terms suggested by the Special Rapporteur. It might be possible, without formulating any such exceptions in article 12, to say something in section III, which dealt with the duties of a diplomatic agent, about activities in which it was improper for diplomatic missions to engage, and to refer in that connexion to giving shelter to persons charged with offences under the local law.

47. It was a much more serious matter to say that, in the event of a diplomatic mission's engaging in such activities, the receiving Government had the right to force an entry into its premises. To say that it could do so in order "to safeguard the security of the State" could mean almost anything; and he would be interested to hear what the Special Rapporteur had had in mind in referring to cases where there was "grave and imminent danger to . . . public health or property". There were, Sir Gerald pointed out, other remedies open to the receiving Government; if matters had got to such a pitch that it was prepared to force an entry into the mission's premises, the proper course for it would surely be to demand the mission's recall.

48. Mr. LIANG (Secretary to the Commission) said that Mr. François's account of events at the seventh session of the General Assembly in 1952 had been perfectly correct. During the course of discussion in the Sixth Committee the words "right of asylum" in the Colombian amendment had actually been altered to "diplomatic asylum",[6] but though the significance of the change had been the subject of some comment, no clear-cut agreement on the matter had been reached. Finally, as Mr. François had said, the Colombian amendment had been rejected.

49. In addition, at its first session, the Commission had invited Mr. Jesús M. Yepes to prepare a working paper on the right of asylum[7], but in fact Mr. Yepes had not done so, and the matter had not been taken up since.

50. Mr. TUNKIN pointed out that the General Assembly had given the International Law Commission the task of codifying the topic "Diplomatic intercourse and immunities". The question which was raised in his amendment, and Sir Gerald's, was a question of diplomatic immunity, although it was sometimes called a question of asylum. The problem was whether or not the principle of the inviolability of diplomatic premises gave the mission the right to prevent the receiving State from exercising jurisdiction over persons who did not enjoy diplomatic immunity. He could not, therefore, agree with Mr. François.

51. Mr. SPIROPOULOS said he was not sure that the Commission had no right to discuss the matter, as suggested by Mr. François. The fact that the General Assembly had rejected a proposal which would have made it compulsory for the Commission to take up the question of asylum along with diplomatic intercourse and immunities did not necessarily mean that the Assembly had wished to preclude the Commission from taking up that question if it so desired.

52. It was true that the Commission had asked Mr. Yepes to prepare a working paper on the subject, but it had done so before it knew that a case which bore on it was being submitted to the International Court of Justice. As soon as it had learnt of that case, it had thought it preferable to postpone its own study.

53. It was, of course, an entirely different question whether the Commission would be wise to take the matter up at the present time. In his view, there was no doubt that no mission had the right to grant asylum to persons who had violated the ordinary criminal law. The only question that arose related to political refugees. For the sake of a comprehensive draft, it might be desirable to insert a provision on that subject. On the other hand, many members of the Commission were, he thought, of the contrary view. He himself suspended judgment.

54. Mr. BARTOS agreed that the right of asylum was distinct from that of the inviolability of mission premises.

55. The question of the remedies available to the receiving State in cases where that right was thought to have been abused, and, in particular, the question whether the receiving State could enter the mission premises or

[6] *Official Records of the General Assembly, Seventh Session, Annexes*, agenda item 58, document A/2252, para. 16.
[7] *Ibid., Fourth Session, Supplement No. 10*, para. 23.

merely exert pressure from outside by cutting off electricity and water, for example, had frequently arisen in practice. The general view was that the premises remained inviolable even when used for purposes of asylum.

56. Latin American countries recognized the right of asylum provided there was a previous convention between the States concerned. The practice of granting asylum was therefore a regional custom governed by convention.

57. In view of those difficulties it did not seem advisable to take up the question of asylum at the current session.

58. Mr. GARCIA AMADOR said that the question of asylum was very closely linked with the principle of the inviolability of mission premises. Indeed it could almost be said that, in a sense, the two questions were inseparable. A further question which arose, however, was that of the nature of the crime, or alleged crime, for which the person concerned was sought by the authorities of the receiving State. In his view, the whole subject should be studied, but only when the Commission had time to study it properly. To deal with it as a mere adjunct to article 12 of the draft would be highly unsatisfactory, and would not be in accordance with the decision taken at the first session that it should be studied as a separate topic.

59. Mr. AGO said that, if the Commission wished its draft to be as comprehensive as possible, it could not afford to pass over in silence, not the general question of asylum, but the question of proper limitations on the purposes for which mission premises could be used. Nevertheless, he did not believe that that question could be treated under article 12. Both Mr. Tunkin's amendment and the relevant part of Sir Gerald's related in fact to the obligations of the sending State, and he believed that it was in Section III of the draft that the matter should be dealt with rather than in article 12, which related to the obligations of the receiving State. The danger of dealing with it in connexion with article 12 would be that that might give the impression that a State which complained that the premises of a foreign mission were being used for improper purposes, would have the right to consider itself exceptionally released from the obligation of respecting the inviolability of the premises and could enter them. That was certainly not the case.

60. Mr. EDMONDS said he shared the views expressed by Mr. François. The Commission should explain in its commentary why it was not dealing with the subject, and leave it to Governments to say whether they thought it should.

61. With regard to paragraph 1 of the article, in the form proposed by the Special Rapporteur, he agreed in general with Sir Gerald Fitzmaurice, but would go further and propose the deletion of everything following the words "save with the consent of the head of the mission". The exceptions to the principle of inviolability that were referred to by the Special Rapporteur were generally recognized—although he recalled a case in which entry to mission premises had been refused on the occasion of a fire, with the result that the building had been burned down; but there was all the difference in the world between referring to them in the commentary and attempting to formulate them in an article, which would give them a standing to which they were not entitled.

62. Mr. PAL said that Mr. François's point of order would not eliminate the question of asylum, unless the Commission was prepared to recognize inviolability as an absolute principle. Otherwise the question of its limitations and qualifications would inevitably come up for discussion, and in the course of such discussion the question of asylum.

63. In attempting to formulate those limitations and qualifications, however, the Commission should avoid doing anything which would result in whittling the principle of inviolability down to nothing. In that respect he agreed with Sir Gerald Fitzmaurice's criticisms of the Special Rapporteur's text. He, however, pointed out that even Sir Gerald's own amendment was not immune from the same infirmity. In suggesting that the use of the premises for "giving shelter to persons charged with offences under the local law" constituted an exception to inviolability, Sir Gerald's amendment also reduced inviolability to a precarious existence. In that connection Mr. Pal drew the Commission's attention to article 20, which declared the personnel of the mission immune from criminal jurisdiction. Regarding the suggested exception to that exception in the shape of "not being charges preferred on political grounds", Mr. Pal enquired who was to determine whether charges were "preferred on political grounds" or not, and when?

64. M. AMADO maintained that *franchise de l'hôtel* was an absolute principle. If a diplomatic mission abused the right of inviolability, the receiving State had other remedies open to it, but could not enter the premises, save with the specific consent of the head of the mission. One example had already been cited to show that the supposed exceptions referred to by the Special Rapporteur were not recognized in practice. To cite another, Brazil had on one occasion been faced with a yellow fever epidemic and the authorities had wished to enter a particular diplomatic mission's premises in order to trace a suspected source of infection; the head of the mission, however, had remained deaf to every appeal for co-operation, and the authorities had had no choice but to accept his refusal to allow them to enter.

65. Moreover, the terms in which the Special Rapporteur proposed to formulate the supposed exceptions to the principle of inviolability of mission premises were, as Sir Gerald Fitzmaurice had pointed out, exceedingly wide: the reference to "the security of the State", in particular, could cover anything.

66. On the other hand, he could not agree with Sir Gerald that the Commission should deal with certain aspects of the problem of asylum. In that connexion he agreed unreservedly with Mr. François, though it would be wise to explain the reasons for the Commission's course of action in the commentary.

67. Mr. PAL said that, if the inviolability of diplomatic premises was really an absolute right, admitting of no exception, the whole question naturally became much simpler. The first sentence of article 12, paragraph 1, should suffice.

68. Mr. FRANÇOIS said that his argument that the Commission had no right to take up the question of asylum at its current session had been contested; quite apart from the question of right, however, the Commission's previous approach precluded it from accepting the views of Mr. Tunkin and Sir Gerald Fitzmaurice. Asylum had always been treated as a separate question, not only at the first session, when it had been singled

out as one of the topics for codification and Mr. Yepes had been asked to prepare a working paper on it, but also by Mr. Sandström, the Special Rapporteur on the question of diplomatic intercourse and immunities, and by the Secretariat in its memorandum on that subject (A/CN.4/98). He could not agree with Sir Gerald Fitzmaurice that his text did not raise the whole question of diplomatic asylum in all its many complicated aspects. That question should undoubtedly be dealt with, but at another session, and after careful preparatory study by another special rapporteur.

69. He was, however, very doubtful whether it should be taken up at the Commission's next session merely on the ground that it was "related" to the question of diplomatic intercourse and immunities. In international law all subjects were related. In any case the Commission had other important topics on its programme of work. It should, therefore, simply appoint a special rapporteur on asylum, and decide at the same time what priority to give the topic.

70. Mr. SCELLE thought that the Commission could consider article 12 without first deciding whether to take up the question of asylum. He deplored the way in which the Commission was constantly limiting the scope of its work, and feared that the resulting draft would cover no more than the bare bones of the subject.

71. The point at issue in article 12 was whether the local authorities were under an absolute obligation to refrain from entering mission premises. In point of fact, however fundamental a principle might be, there were always exceptions to it. There were cases in which the local authorities would have no choice but to enter diplomatic premises, but such cases were very few and far between, and to attempt to enumerate them, as was done in article 12 of the Special Rapporteur's draft, would open the door to countless disagreements and might well undermine the very principle of inviolability. The right to enter diplomatic premises should be confined to exceptional cases of extreme urgency, and should be exercised subject to the express approval of the receiving Government and on its responsibility. It was just not possible to enumerate the cases in point. It was for courts of arbitration and the International Court of Justice to build up gradually a relevant body of case law.

72. The CHAIRMAN put to the vote Mr. François's proposal that the Commission should not deal with the question of diplomatic asylum at the current session.

The proposal was adopted by 12 votes to 1, with 8 abstentions.

The meeting rose at 1.10 p.m.

395th MEETING

Friday, 10 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 items 3]

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

ARTICLE 12 (*continued*)

1. The CHAIRMAN invited the Commission to continue consideration of article 12 of the Special Rapporteur's draft (A/CN.4/91) in the light of the decision it had taken at the close of the previous meeting not to deal with the question of diplomatic asylum at the current session.

2. Mr. SANDSTRÖM, Special Rapporteur, withdrew the second part of his article 12, paragraph 1, namely everything after the words "save with the consent of the head of the mission". As he had said in his introductory remarks on the article (394th meeting, para. 36), the exceptions to the rule of the inviolability of diplomatic premises were extremely difficult to define, and the discussion had convinced him that the passage in question should be deleted. The scope of the exceptions could perhaps be explained in the commentary, along the lines suggested by Mr. Scelle at the previous meeting (394th meeting, para. 71).

3. The CHAIRMAN thanked the Special Rapporteur for thus simplifying the Commission's task. The Commission had now to consider merely the amendments proposed by Mr. Yokota (394th meeting, para. 35), and Mr. El-Erian (*ibid.*, para. 10), and those parts of Sir Gerald Fitzmaurice's amendments (*ibid.*, para. 33) which did not relate to the question of asylum.

4. Mr. YOKOTA explained that the purpose of his first amendment, to replace "the receiving Government" by "the receiving State", was to avoid any doubt that might arise in the case of federal States. His second amendment, to add the words "at the request or" before "with the consent of the head of the mission", was necessary because the head of the mission could himself request the local authorities to enter the premises, for example in the event of fire or in order to apprehend a burglar. His third amendment, which related to the second part of article 12, paragraph 1, was unnecessary now that that part of the paragraph had been withdrawn.

5. Mr. VERDROSS, after apologizing for reverting to a matter which had been discussed at the previous meeting, said that he still felt that it was absolutely necessary to determine the time at which *franchise de l'hôtel* started. For that purpose, he proposed that the following words, which were based on a similar proviso in article 3 of the Harvard Law School draft[1] and took into account the points made by Mr. Tunkin, Sir Gerald Fitzmaurice and Mr. Ago, be inserted after the first sentence in paragraph 1: "provided that notification of diplomatic use of such premises has been previously given to the receiving State".

6. Mr. KHOMAN felt that the discussion at the previous meeting had shown the necessity of including in section II of the draft some statement to the effect that the rational basis for the privileges and immunities referred to lay in the nature of the diplomatic function. Both Mr. El-Erian and Sir Gerald Fitzmaurice had submitted proposals which would meet that need, and he could support either.

7. On the other hand, the deletion of the last part of article 12, paragraph 1, seemed to imply that the sending State's right to bar entry to its mission premises was absolute, which was surely not the case. There was, in fact, a conflict of sovereign rights, between those of the sending State and those of the State on whose territory the mission was situated. There might possibly be some doubt about some of the exceptions to the principle of inviolability mentioned by the Special Rapporteur,

[1] Harvard Law School, *Research in International Law, I. Diplomatic Privileges and Immunities* (Cambridge, Mass., 1932), pp. 19-25.