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Summary record of the 395th meeting

Topic:
Diplomatic intercourse and immunities

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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.

but in his view there could be no doubt about the fact that, where human life or the security of the receiving State was at stake, the local authorities could enter the mission's premises, in extreme cases without the head of the mission's consent. He therefore proposed that the following words: "or, in an extreme emergency, where human life or the security of the receiving State is seriously endangered" should be added after the words "save with the consent of the head of the mission" in the shortened text proposed by the Special Rapporteur.

8. Mr. FRANÇOIS said that he could not support Mr. Khoman's proposal, particularly the use of the words "security of the receiving State". The receiving State naturally had the right to take any necessary steps to protect its security, but that followed from its right of legitimate self-defence. He recalled that, when the Commission had been dealing with the contiguous zone, it had been proposed that the coastal State should be given special security rights. As was stated, however, in the comment on article 66 of the Commission's draft on the law of the sea:

> "The Commission did not recognize special security rights in the contiguous zone. It considered that the extreme vagueness of the term "security" would open the way for abuses and that the granting of such rights was not necessary. The enforcement of customs and sanitary regulations will be sufficient in most cases to safeguard the security of the State. In so far as measures of self-defence against an imminent and direct threat to the security of the State are concerned, the Commission refers to the general principles of international law and the Charter of the United Nations."[2]

The same considerations applied in the case under discussion.

9. He also thought it was unnecessary to say that the local authorities had the right to enter mission premises in order to avert an imminent danger to human life. If someone were shooting at passers-by from an embassy window, or if the building were on fire, surely no one would deny the right of the police or firemen to enter it.

10. There was, he submitted, no need whatsoever to mention special cases, which were already covered by other universally recognized principles of law.

11. Mr. LIANG (Secretary to the Commission) thought that the situation with regard to United Nations headquarters offered an illuminating analogy, though the principle of *franchise de l'hôtel* had been established hundreds of years before the United Nations came into existence. It was generally agreed, and had been emphasized at the time the Convention on the Privileges and Immunities of the United Nations was being drafted in London, that the headquarters of the organization should enjoy immunity from entry by the local authorities for the purpose of arresting anyone or serving a writ; any dispute between the United Nations and the local authorities which arose as a result of such immunity would be submitted to arbitration.

12. A similar situation had always prevailed as far as diplomatic missions were concerned. He agreed with Mr. Ago, and thought that it would be contrary to international law for the local authorities to force an entry into a diplomatic mission in order to arrest someone who was wanted for a common criminal offence, and any dispute that arose between the sending State and the receiving State in such cases must be settled by the same procedure as any other dispute in international law.

13. A classic case was that of Dr. Sun Yat-sen who, in 1896, was kidnapped by agents of the Chinese Legation in London and kept prisoner there. That was, of course, a violation of international law on the part of the mission of the sending State. The British Government, however, did not take any physical action to rescue Dr. Sun by effecting an entry into the Chinese Legation; it respected the inviolability of the Chinese mission. Only diplomatic pressure was exerted upon the Chinese Government, with the result that Dr. Sun was quickly released.

14. The only cases in which the local authorities possibly had the right to enter diplomatic premises without the head of the mission's consent were those referred to in that part of the Special Rapporteur's draft which he had withdrawn, not because it was not in accordance with existing practice, but because it was unnecessary, as Mr. François had pointed out.

15. Mr. GARCIA AMADOR said that the principle of the inviolability of diplomatic premises, like any other principle of law, admitted of exceptions and qualifications. If the Commission attempted to list those exceptions and qualifications, however, it would open the door to abuses. In his view, the wording proposed and withdrawn by the Special Rapporteur went considerably beyond what was generally recognized. Even with the article in its shortened form, the authorities of the receiving State would still be entitled, as Mr. François had pointed out, to enter the mission premises without the head of the mission's consent, whenever *force majeure* or the protection of its own security made that necessary. For the same reason, the amendment proposed by Mr. Khoman (para. 7 above) was unnecessary.

16. Mr. HSU said he agreed that no rule of law was absolute in the sense of admitting of no exceptions, but that he did not see how it would help to omit all mention of exceptions in the text they were discussing. For the inevitable result would be that disputes would continue to arise, and the fact that such disputes could be submitted to arbitration, or settled in some other way, did not alter the fact that they were not conducive to the existence of friendly relations between the States concerned. The Commission should not shrink from its responsibility merely because of the political and other difficulties involved; after all, the final responsibility did not rest with the Commission, but with the General Assembly. While therefore he had no objection to the Commission's leaving the question of asylum aside for the current session, he hoped it would make the necessary arrangements for a report on that subject to be submitted at its next session; and it might well be advisable to postpone further consideration of article 12 till then.

17. The CHAIRMAN pointed out that the Commission had already decided to leave the question of political asylum aside for the current session. The question it was considering was, in his view, quite different.

18. Mr. AGO welcomed the Special Rapporteur's action in withdrawing the last part of article 12, paragraph 1. As Mr. François had pointed out, emergency cases were already largely covered by accepted principles. Any attempt to enumerate such cases would be dangerous, since it would give the receiving State just so many excuses for not respecting the principle of inviolability whenever it so desired.

[2] *Official Records of the General Assembly, Eleventh Session, Supplement No. 9*, pp. 39 and 40.

19. The Special Rapporteur's draft, in contradistinction to that of Harvard, followed the system of dealing separately with the official mission premises and the private residences of diplomatic agents. That being so, he suggested that the words "or to the head of the mission" in the first sentence of article 12, paragraph 1, could be deleted. In fact, he wondered whether the whole clause, "whether in a property belonging to the sending State or to the head of the mission or leased" could not be deleted.

20. Finally, he agreed with Mr. Verdross that the Commission must make clear the date from which the mission premises became inviolable. He would suggest that that could be done by inserting the words "from the time of notification to the receiving State that they are being used for the purposes of the mission" in the first sentence of paragraph 1, which would then read: "The premises of the mission shall be inviolable from the time of notification to the receiving State that they are being used for the purposes of the mission."

21. Mr. VERDROSS accepted Mr. Ago's suggestion.

22. Mr. PADILLA NERVO supported Mr. Ago's suggestions. He also agreed that article 12, paragraph 1, should end at the words "save with the consent of the head of the mission". The Commission should not, by placing restrictions on the principle of inviolability, give the receiving State the power to decide unilaterally when it could enter mission premises. There would, of course, be exceptional cases where it would be absolutely necessary to enter the premises; but when they were truly justified, as in the case of danger to life or public disaster, the head of the mission would not normally object. In any event, the Commission could not hope to enumerate all the cases which might occur in practice; such broad concepts as "the security of the State" were particularly dangerous. The inviolability of the mission did not, however, mean that there was not at the same time a genuine legal obligation to use the mission premises only for legitimate purposes. But the important point was that the violation of that obligation did not create a right to effect a forcible entry into mission premises; rather, any such incident should be dealt with by the usual remedies. For those reasons, he would in due course propose that section III of the draft should contain a provision to the effect that mission premises were to be used exclusively for the normal and legitimate exercise of the diplomatic function, as defined in the articles being drafted by the Commission and in other rules of international law.

23. Mr. KHOMAN said that, since the majority of the Commission clearly appeared to be in favour of making no reference in the articles to the exceptions to the principle of the inviolability of diplomatic premises, he withdrew his proposal (para. 7 above). He would merely point out that the case cited by Mr. François did not afford an exact analogy with that under consideration, for the contiguous zone was not, like diplomatic missions, in the heart of the receiving State.

24. He noted that Mr. François agreed that the local authorities could enter the premises if human life were endangered; they would naturally first seek the consent of the head of the mission, and it was only in exceptional cases that they would be obliged to enter without his consent.

25. Mr. MATINE-DAFTARY supported Mr. Verdross's amendment, either in its original form (para. 5 above) or in the amended form suggested by Mr. Ago (para. 20 above).

26. He felt the Special Rapporteur had been right to withdraw the second part of article 12, paragraph 1, but he attached some importance to referring to the matter in the commentary, since the Commission must prevent abuses by the sending as well as by the receiving State.

27. Mr. GARCIA AMADOR said that research had led him to believe that it was the general tendency of domestic law to prohibit the entry of local authorities into foreign diplomatic premises, save in exceedingly few, quite exceptional cases. If that was indeed the general tendency, the Commission should not run counter to it by giving the authorities of the receiving State powers which it did not claim for them itself.

28. Mr. TUNKIN said he welcomed the deletion of the last part of article 12, paragraph 1, for the reasons he had given at the previous meeting; not, as some members of the Commission suggested, because it was self-evident and it was sufficient to refer to the matter in the commentary, but because it was not in accordance with existing practice.

29. He agreed with Mr. Padilla Nervo and Mr. García Amador that the Commission should state the principle unequivocally, without referring to any exceptions, either in the article itself or in the commentary.

30. Mr. Khoman had referred to a conflict of sovereignties. If, however, the receiving State agreed to receive a diplomatic mission from the sending State, it should accept the sending State's sovereignty and not seek to exercise jurisdiction over so important an organ as one of its foreign diplomatic missions.

31. It had also been argued that the rights of the receiving State should be respected. In the particular case under discussion there were, as several members of the Commission had pointed out, many remedies open to it, for example, to request the recall of the head of the mission. On the other hand, if the authorities of the receiving State entered the mission, no remedy was open to the sending State since, in the last resort, only the receiving State had the necessary force on the spot to put its wishes into effect.

32. Mr. SPIROPOULOS agreed with Mr. Ago that the words "whether in a property belonging to the sending State or to the head of the mission or leased" could be deleted. On the other hand he did not think that Mr. Ago's second suggestion, which had been accepted by Mr. Verdross, was necessary. It was implicit in the words "the premises of the mission" that they were being used for that purpose.

33. The only question with regard to which there did not appear to be general agreement was whether to refer in the commentary to possible exceptions to the principle of the inviolability of diplomatic premises. The commentary, however, was adopted by the Commission in precisely the same way as the articles, and had precisely the same force. The danger of abuse would not therefore be lessened by relegating the exceptions to the commentary rather than referring to them in the articles themselves. In his view, the Commission was not called upon to engage in casuistry, and could safely leave aside such cases of conscience as had been referred to by Mr. François.

34. Mr. AMADO welcomed the fact that the principle of inviolability had been recognized by all members of the Commission. With regard to the question whether to mention possible exceptions to that principle, it was worth pointing out that respect for it was ensured in practice by sundry provisions in the various countries' penal codes.

35. He had no objection to Mr. Verdross's amendment, although he did not think it necessary.

36. Mr. YOKOTA agreed that it was undesirable to try to list all the possible exceptions; on the other hand, there was an undeniable risk that the principle of inviolability itself might give rise to abuse. He was, therefore, in favour of indicating by some means or other that that principle was not unrestricted; the additional article proposed by Mr. El-Erian (394th meeting, para. 10) might possibly suffice for that purpose.

37. The CHAIRMAN, speaking as a member of the Commission, said that in his view it could not be argued that the exceptions to the principle of inviolability of diplomatic premises were covered by the general principles of law, in particularly by the principle of lawful self-defence.

38. There could be no question of granting the receiving State the unilateral right not to respect the principle of inviolability, which was one of the most firmly established principles of international law. Although it was always possible that the sending State might abuse the principle, in such cases the receiving State must seek a remedy by one or other of the means for the peaceful settlement of disputes. Consequently, he did not think that any reference to exceptions to the principle should be included in the comment on article 12.

39. Mr. EL-ERIAN said that he entirely agreed that the principle of inviolability was one of the fundamental, universally recognized, principles of international law. It could not, however, be denied that the right which it conferred on the sending State, like all rights in international law, was by its very nature restricted. The difficulty was to find a formula which would reflect that situation accurately. He suggested that the words "except in cases of extreme emergency" be inserted after the words "save with the consent of the head of the mission".

40. Mr. SANDSTRÖM, Special Rapporteur, said that he agreed with Mr. Spiropoulos regarding Mr. Ago's second suggestion, although he had no objection to it in substance.

41. In his view, the Commission could hardly decide whether it was necessary to refer to exceptions to the principle of inviolability in the commentary until it had his draft of the commentary before it.

42. Mr. BARTOS felt that Mr. Verdross's amendment, as modified by Mr. Ago, did not entirely cover the ground. For the principle of inviolability to come into play, it was not sufficient that the receiving State should be informed that the premises were being used as mission premises; they must genuinely be used for that purpose. In other words, the premises must have been vacated by all other tenants or occupants.

43. The presence of tenants had given rise to various incidents. Thus, it had happened in Belgrade that tenants had remained in part of a building which had been bought by a diplomatic mission for use as mission premises. The police had had cause to enter the premises in order to arrest one of the tenants who was charged with a criminal offence, and, in order to reach his dwelling, they had been obliged to use the main entrance to the diplomatic premises.

44. That was a special case, however, and he was not in favour of listing the exceptions to the rule. The Yugoslav fire service regulations, which he had helped to draft, stated that firemen must not enter diplomatic premises if any member of the mission objected; they could only take the necessary steps to localize the danger, and, before doing so, must notify the head of the protocol department.

45. Mr. VERDROSS suggested that Mr. Bartos's point might be met by inserting the word "exclusively" after the words "that they are being used" in the text suggested by Mr. Ago.

46. The CHAIRMAN said that the point would be considered by the Drafting Committee in connexion with Mr. Ago's suggestions.

Article 12, paragraph 1, in the shortened form proposed by Mr. Sandström (para. 2 above), was adopted by 16 votes to none with 4 abstentions.

47. Mr. MATINE-DAFTARY said that he had abstained from voting because he could not agree that the inviolability of diplomatic missions was an established rule which tolerated no exception. That view might be in accordance with the European interpretation of international law, but was out of place in the new international law of world-wide application which it was the task of the Commission to codify. His own country's experience when certain foreign missions even went so far as to foment civil war, amply justified some qualification of the general principle.

48. Mr. KHOMAN said that he had abstained because the provision as voted upon was one-sided and did not properly safeguard the interests of the receiving State. It had been argued that the receiving State could always fall back on the right to have the head of the mission recalled. That was a purely illusory safeguard, however, for if the political machinations of the foreign mission were successful, the Government of the receiving State would be ousted by one subservient to the mission, and there would then be no question of any recall.

49. Mr. HSU said that he had abstained, not because he was opposed to so universally accepted a principle of international law, but because he felt that the bare statement of the principle was not sufficient.

50. Mr. SANDSTRÖM, Special Rapporteur, suggested that the moment was appropriate to discuss Sir Gerald Fitzmaurice's amendments in connexion with article 12, paragraph 1 (394th meeting, para. 33).

51. Sir Gerald FITZMAURICE said that the new paragraph which he proposed for insertion before the paragraph just adopted had its counterpart in previous draft codifications of the subject. Its purpose was to establish the right of the sending State to obtain suitable premises for its mission in the receiving State, in view of certain difficulties that had arisen in that connexion in the past. In some countries missions had had to acquire premises by roundabout methods, such as purchasing them in the name of the head of the mission or of the sending State's central bank. There were other countries in which it was doubtful whether a foreign Government as such was entitled to acquire property at all.

52. Mr. BARTOS was opposed to the proposed new paragraph, which was based on obsolete *bourgeois* legal concepts. Diplomatic missions could not override the laws of a receiving State whose property system was not based on such concepts. It would be better simply to specify that it was the duty of the receiving State to ensure that the mission obtained suitable accommodation, or to add the proviso "subject to the law of the receiving State". The receiving State could not, however, be expected to evict persons in order to provide accommodation for a mission during a housing shortage.

53. Mr. PAL noted that the corresponding provision in article 2 of the Harvard Law School draft[3] contained the proviso "in accordance with the law of the receiving State". It being a very moot point, whether, in international law, a sending State had the right to acquire premises for its mission regardless of the law of the receiving State, it might be advisable to include such a proviso in the text proposed by Sir Gerald Fitzmaurice. It might also be useful to refer to the right of disposal as well as the right of acquisition.

54. The CHAIRMAN observed that the laws of some countries prohibited ownership of buildings by foreign States. It would be difficult to compel receiving States to disregard their own laws in such matters. Perhaps Sir Gerald Fitzmaurice's text could be amended so as to specify that it was the duty of the receiving State to ensure that suitable accommodation was provided for missions.

55. Mr. TUNKIN said that the proposed new paragraph, while designed to obviate a difficulty, brought other difficulties in its wake. In a number of countries, including his own, all land was the property of the State and could be bought neither by the citizens of the country, nor by alien persons or organizations. In the case of the Soviet Union, property could only be lent or leased to a mission. He doubted, therefore, whether it was possible to accept a provision which suggested that the sending State could acquire premises in the receiving State regardless of the latter's laws. On the other hand, it could easily be made acceptable by amending it on the lines suggested by the Chairman.

56. He wondered, however, whether the provision was necessary at all, and whether the problem it sought to solve really existed at the present time. There might admittedly be some difficulty in obtaining accommodation in certain countries owing to a housing shortage, but that was not really enough to justify the enunciation of the principle that the receiving State was obliged to allow a mission to acquire premises. Nevertheless, if the other members of the Commission felt that such a provision would meet a real need, he would have no formal objection to a suitably amended text.

57. Mr. EL-ERIAN said that, in comparing the amendment with article 2 of the Harvard draft, Mr. Pal had touched on an important point. Just as a head of a mission, though immune from arrest and the jurisdiction of the receiving State, was still responsible for any criminal act he might perform, so also a diplomatic mission was only immune from the jurisdiction, and not above the law, of the receiving State.

58. He agreed with the Chairman and Mr. Tunkin that the Commission might consider whether the provision was necessary at all, and, if it thought it was, include some such qualification as "subject to the laws of the receiving State".

59. Mr. SANDSTRÖM, Special Rapporteur, pointed out that he had refrained from including any provision on the lines of article 2 of the Harvard draft, because he was aware of the difficulties with respect to countries were the acquisition of real property by aliens was prohibited.

60. On the other hand, he considered that the receiving State's obligation towards the mission went further than just *permitting* it to obtain premises. It contained an active element, the duty to see that it obtained them. That was why he had included in article 17 a provision that the receiving State should accord the diplomatic agent all the necessary facilities for the exercise of his functions, a provision that he had later transferred to article 16 which referred to the work of the mission. The fact that such facilities included the provision of suitable premises could be explicitly mentioned.

61. Sir Gerald FITZMAURICE pointed out that article 17 came in the section dealing with the privileges and immunities attaching to the person of a diplomatic agent, whereas his amendment was concerned with the premises of the mission. He doubted, therefore, whether article 17 would be the proper place for the text he proposed.

62. It had not been his intention to imply that the sending State could acquire premises otherwise than in accordance with the laws of the receiving State, and he would have no objection to adding a proviso on the lines of that in the Harvard draft.

63. With reference to the observations of Mr. Bartos and Mr. Tunkin, he said that he had drafted his amendment in that form because, in the vast majority of States, persons wishing to acquire property were free to do so. He had no objection, however, to taking account of the different position in their countries. The following wording, offering two alternatives, might meet the case:

> "The receiving State shall permit the sending State to hold, or shall make available to it, the premises necessary for the appropriate housing and effective functioning of the mission and its staff."

with the addition, at an appropriate point, of the words "in accordance with the laws of the country". The question dealt with in his amendment was of considerable importance. Some sending States had experienced great difficulty in obtaining premises for their missions. In the absence of a provision such as he advocated, local authorities could make it extremely difficult for a mission to be housed.

64. He fully agreed with Mr. El-Erian's point that a mission's immunity from jurisdiction did not mean that it was above the law of the receiving State.

65. Mr. TUNKIN protested against Sir Gerald Fitzmaurice's implication that those States where it was not possible for foreigners to own land constituted a mere exception. The fact must be realized that there were two different economic systems in the present-day world. General international law must develop only in the light of that essential fact.

66. Mr. PAL said that, after the explanation offered by Sir Gerald of his proposal, and after his expression of willingness to modify his amendment so as to make it clear that the freedom claimed for the sending State in that respect was to be subject to the law of the receiv-

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

ing State, there should be no difficulty in accepting the proposal on the part of either group of States referred to by Mr. Tunkin. Thus modified, Sir Gerald's text recognized in full the view that international community life should be regarded, not as bound to any particular set of principles of internal order characteristic of only one group of States, but as a neutral system, so that there might be a place within its framework for every social structure known at the present time. With a text such as that proposed by Sir Gerald there would be no reason for any apprehension, since, if the property system of the State made it impossible to acquire property, the law of the State would obviously prevail. Sir Gerald was willing to give up the word "acquire" and to retain only the word "hold". The crucial point, indeed, was not the legal fiction of ownership but the operating reality of control.

67. Mr. VERDROSS proposed combining the two ideas of the right of the sending State and the obligation of the receiving State in a text on the following lines:

> "The receiving State is bound to permit the sending State to acquire and occupy on its territory the premises necessary for its mission, or to ensure in some other way adequate accommodation for its mission."

68. Mr. SPIROPOULOS said that there appeared to be no real divergence of view among the members of the Commission. In his opinion, the substitution of the word "hold" for "acquire", to which Mr. Pal had drawn attention, would meet the case.

69. Mr. TUNKIN pointed out that Sir Gerald Fitzmaurice's proposal and that of Mr. Verdross were not identical. The former, in effect, gave the sending State no real right at all, if it was to be subject to the laws of the receiving State. The latter, on the other hand, enunciated a positive duty on the part of the receiving State to help the mission to obtain suitable premises.

70. Sir Gerald FITZMAURICE said that he accepted Mr. Verdross's proposal.

71. Mr. EL-ERIAN said that he did not like the phrase "the receiving State is bound to". He would much prefer some such formulation as "shall permit". Furthermore, he had doubts as to the precise legal implications of the term "to hold" and would prefer the words "to acquire" or some such phrase as "the receiving State shall make available".

72. Mr. SPIROPOULOS did not think that the Commission need go so far as to introduce the idea of the obligation of the receiving State, since there was no country where foreigners did not enjoy the right at least "to hold" property.

73. Sir Gerald FITZMAURICE remarked that there was no obligation on the receiving State as long as there was complete freedom in the matter of acquiring property, but if there was no such freedom, then an obligation did arise and the receiving State must see that the sending State was able to obtain premises. Since, as Mr. Tunkin had pointed out, there were two different systems, of property in existence, it was essential to introduce the concept of obligation. Mr. Verdross's text, with the possible addition of the words "in accordance with the laws of the country", would be quite acceptable.

74. Mr. AMADO suggested that the words "shall enable" would be better than "is bound to permit".

75. Mr. LIANG (Secretary to the Commission) remarked that the relevant national legislation might throw some interesting light on the problem. In the District of Columbia in the United States, for instance, a statute of 1887 making it unlawful for persons not citizens of the United States to acquire, hold, or own real estate had been qualified in the following year by another statute stating that the provision should not apply to, or operate in, the District of Columbia so far as related to the ownership of legations or the ownership of residence by the representatives of foreign Governments, or attachés thereof.[4]

76. A provision such as that contemplated might therefore place States under the obligation either of enacting exceptions to existing law or of permitting missions to be exempted from it.

77. Mr. PADILLA NERVO said that when a State accepted a foreign mission it did so with the duty to enable the mission to be properly housed, though that did not imply the acquisition of the ownership of real property. The law relating to ownership varied greatly from country to country. In some countries, aliens could not acquire an absolute title of ownership, and in such cases the premises were usually let to foreign missions on a lease for ninety-nine years. In Mexico, on the other hand, foreign missions were not allowed to possess real property outside the capital. What mattered, however, was that the missions should have a guaranteed *possessio*, under whatever statutory provision was applicable in the country in question, which enabled the diplomatic agent to be housed properly and reasonably permanently. If the emphasis were placed on that notion instead of on the idea of ownership, the difficulties under discussion would disappear.

78. Mr. SANDSTRÖM, Special Rapporteur, observed that, the question of substance having been settled, the discussion was beginning to centre on questions of wording, which might well be referred to the Drafting Committee.

79. Mr. YOKOTA thought that the attention of the Drafting Committee should be drawn to the fact that the most important question was the obligation of the receiving State. In his opinion, the receiving State was not under any obligation either to permit or to help the sending State to obtain premises for its mission. Its only obligation was not to impede or prevent the acquisition of premises by the sending State.

80. Mr. BARTOS said that, since the Commission was tending towards a compromise text which respected municipal law, he withdrew his previous objection, though he would wish his views to be borne in mind by the Drafting Committee. It might be dangerous to introduce the concept of *possessio*, since the word "possession" might be interpreted in the sense of occupation without title.

81. A point to be borne in mind, in connexion with the immunity of missions from jurisdiction, was whether relations with adjoining owners or occupiers were to be governed by the principle of immunity or by the provisions of municipal law. The practice of States varied in that respect.

82. Mr. SPIROPOULOS thought Mr. Padilla Nervo's suggestion a very pertinent one. The essential point was that the mission must be able to enjoy the use of premises. The minimum to be guaranteed the sending

[4] Harvard Law School, *op. cit.*, p. 50.

State under international law must be the exercise of the right of occupation.

83. The CHAIRMAN observed that the only text on the subject before the Commission was that of Mr. Verdross (para. 67 above), to which various drafting changes had been suggested.

84. He proposed that the Commission defer its vote on the question until the Drafting Committee had prepared a text in the light of the discussion.

It was so agreed.

The meeting rose at 12.45 p.m.

396th MEETING

Monday, 13 May 1957, at 3 p.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 12 *(continued)*

1. The CHAIRMAN, inviting the Commission to consider paragraph 2 of article 12, pointed out that Sir Gerald Fitzmaurice had submitted two amendments relating to it. The first was to make the present paragraphs 2 and 3 into a separate article 12(*a*), and the second to substitute for the opening words of paragraph 2 "The receiving State shall take . . ." the words "The receiving State is under a special duty to take . . . ".

2. He suggested that the first amendment be referred direct to the Drafting Committee.

It was so agreed.

3. Sir Gerald FITZMAURICE explained that his second amendment was largely a drafting change. Since it was already an established principle of international law that States were always under a duty to protect the premises of foreign nationals, he felt that the paragraph should make clear that the State's duty to protect the premises of foreign missions came in a special category.

4. Mr. SANDSTRÖM, Special Rapporteur, said that he saw the point of Sir Gerald's amendment. However, while a reference to the special nature of the duty involved would be perfectly comprehensible in a paragraph following one enunciating a general duty, he thought it might cause some misunderstanding if it followed a paragraph enunciating another duty of equal importance. The problem was one which might well be settled by the Drafting Committee.

5. Mr. SPIROPOULOS recalled that the Special Commission of Jurists appointed by the Council of the League of Nations after the Janina-Corfu affair had stated that "the recognised public character of a foreigner . . . entail(s) upon the State a corresponding duty of special vigilance on his behalf".[1] There was some analogy between that case and the matter raised by Sir Gerald Fitzmaurice.

6. Mr. LIANG (Secretary to the Commission) suggested that the question was more than a mere matter of drafting. In many countries the penalties for inflicting an injury on a diplomat were more severe than in the case of injury to a private citizen. It would be preferable for the Commission to take a decision on the question instead of simply referring it to the Drafting Committee.

7. Mr. SCELLE thought it would be sufficient to refer the amendment to the Drafting Committee. Nothing would be gained by adding a reference to a "special" duty, since the Commission was not for the moment concerned with the general duty of States to protect the property of aliens.

8. Mr. GARCIA AMADOR observed that the amendment had considerable bearing on the subject of international responsibility, for which he was Special Rapporteur. Some of the drafts on the subject prepared for the Conference for the Codification of International Law held at The Hague in 1930 had referred to the rule that the State is bound to exercise "due diligence" in preventing injuries to aliens, and Basis for Discussion No. 10 drawn up by the Preparatory Committee of the Conference stated that "The fact that a foreigner is invested with a recognized public status imposes on the State a special duty of vigilance".[2]

9. Although the present amendment related to the protection of the premises of missions from invasion or damage and not to the protection of diplomatic agents from injury, the same principle, of a special duty to protect, was involved. The amendment proposed by Sir Gerald Fitzmaurice was perfectly in place in an article dealing with a subject which might involve the responsibility of States. It would, moreover, strengthen the claim of the aggrieved State to reparation in the event of damage to the premises of its mission.

10. Mr. AMADO said that he attached great importance to the principle enunciated in the last part of the paragraph, that the receiving State must prevent any detraction from the dignity of a mission. He would, therefore, support Sir Gerald Fitzmaurice's amendment, which emphasized the special nature of the State's duty in that connexion.

11. Mr. EL-ERIAN agreed with the Secretary that a principle was involved, and not a mere matter of drafting. The question was whether in the case of missions it was sufficient for the State to exercise due diligence, or whether more elaborate precautions were required. In the answer given by the Commission of Jurists appointed by the Council of the League of Nations after the Janina-Corfu affair in 1923, it had been pointed out that in the case of foreigners of recognized public character, the State was under a special obligation to protect them. He supported the amendment, which was in harmony with the position taken by the Commission in the earlier articles of the draft.

12. The CHAIRMAN put Sir Gerald Fitzmaurice's second amendment (para. 1 above) to the vote.

The amendment was adopted by 16 votes to 1 with 2 abstentions.

Paragraph 2, as amended, was adopted unanimously.

13. The CHAIRMAN, inviting the Commission to consider paragraph 3 of article 12, suggested that it would

[1] League of Nations, *Official Journal*, 5th year No. 4 (April 1924), p. 524.

[2] League of Nations publication, *V.Legal, 1929.V.3* (document C.75.M.69.1929.V), p. 67.