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Summary record of the 397th meeting

Topic:
Diplomatic intercourse and immunities

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they did not consider it to be obviously in the public interest. The cases covered by the amendment were therefore very exceptional, but the disputes to which they might give rise were not easy to settle, since questions of national prestige were involved. He agreed that in the last resort international law gave the receiving State the right of expropriation, subject to payment of fair compensation, but in order to avoid disputes it was perhaps better to make that clear, as suggested by Mr. François.

The meeting rose at 6.5 p.m.

397th MEETING

Tuesday, 14 May 1957, at 9.30 a.m.

Chairman: Mr. Jaroslav ZOUREK.

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

[Agenda item 3]

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

ARTICLE 12 (*continued*)

1. The CHAIRMAN invited the Commission to continue its consideration of Mr. François's proposal for the insertion in article 12 of a further additional paragraph relating to the receiving State's right to expropriate diplomatic premises in the public interest (396th meeting, para. 49).

2. Mr. TUNKIN said that Mr. François's proposal raised a number of questions without answering any of them; nor had satisfactory answers been given in the course of the discussion. One thing was clear—that the property of the sending State could not be treated in the same way as private property. Furthermore, the fact that such cases as arose in practice were settled by negotiation between the sending and the receiving State seemed to show that the latter had not the right to expropriate the whole or part of a mission's premises unilaterally. The cases which arose in practice were few and far between, and it should, in his view, be left to the States concerned to settle them by agreement between themselves, as in the past.

3. Sir Gerald FITZMAURICE said that he fully appreciated the considerations that had inspired Mr. François's proposal. It was, however, couched in the form of an exception to the principle of the inviolability of diplomatic premises; it could therefore be inferred that if the mission refused to vacate the premises, the local authorities would be entitled to force an entry and evict the mission staff. And that was clearly inadmissible. The mission premises must be immune against enforcement measures if their inviolability was to be respected.

4. Nor could he agree that a foreign diplomatic mission was under an obligation to comply with local laws expropriating its property or interest—which was that of its State—even if those laws could not be enforced against it. It had always been recognized that one State was not in such matters subject to the governmental power of another (*par in parem non habet imperium*). State-owned ships could not be requisitioned while in foreign ports; no more, in his view, could mission premises, which were usually owned by the sending State, be requisitioned by the Government of the receiving State. Even if the sending State did not own them, it had some legal title to them.

5. As regards the actual wording of Mr. François's proposal, he agreed with Mr. Edmonds that the term "expropriation" had connotations which made its use undesirable; it might be better to speak of "acquisition". Moreover, the words "in the public interest" could be made to serve purposes quite other than those he understood Mr. François to have in mind.

6. Mr. Yokota had already pointed out (396th meeting, para. 50) that the text contained no mention of compensation; unless compensation was paid in advance on a sufficiently generous scale for the mission to be able to secure suitable alternative premises, there was an obligation on the receiving State to provide it with alternative premises itself.

7. He suggested that it would meet Mr. François's point if the Commission pointed out, in its commentary, that disputes would be found to arise if a foreign diplomatic mission refused to co-operate with the local authorities in the event of part, or all, of the area occupied by its premises being genuinely required in connexion with town planning projects, and that, while it was not subject to any legal obligation in that respect, the sending State had a moral duty to be as co-operative as possible.

8. Mr. AMADO fully agreed with Mr. Khoman that it would be illogical to make the exception to the principle of inviolability that was now proposed by Mr. François, after refusing to make an exception for the purpose of safeguarding human life. He appreciated, however, the practical considerations that had led Mr. François to submit his proposal. The problem was one which arose in practice, but the only way of settling it was by negotiation between the States concerned. Mr. François's proposal, in the terms in which it had been formulated, was not, and could not be, a rule of international law, and the Commission could not insert it in its draft. All it could do was to insert in section III, relating to the duties of a diplomatic agent, a statement along the lines suggested by Sir Gerald Fitzmaurice.

9. Mr. AGO said that he too was well aware of the considerations underlying Mr. François's proposal. And he was bound to say that some of the fears which had been expressed with regard to it seemed exaggerated. There could, he felt, be no misunderstanding of the term "expropriation in the public interest", well known by the public law of many States, and it was so generally recognized that that involved the payment of compensation as to go without saying.

10. Since, however, it was widely agreed that foreign diplomatic missions were subject to the local laws, if those laws provided for expropriation in the public interest, as was the case in almost all countries, Mr. François's proposal was unnecessary; first of all it could even be dangerous, since reference to the question of expropriation alone might be held to imply that diplomatic missions were not, after all, subject to the local laws in other respects. Moreover, he also agreed with Sir Gerald Fitzmaurice that the reference to that matter in the article dealing with inviolability suggested that the receiving State could, if occasion arose, resort to enforcement procedures, which was quite unthinkable.

11. A possible solution would be to refer to the matter under section III, as suggested by Sir Gerald Fitzmaurice and Mr. Amado, but in the commentary rather than in the articles themselves.

12. Faris Bey EL-KHOURI said that, in his view, every sovereign State had the right at any time to expropriate any property in its territory in the public interest. It was generally agreed that, if it did so, it must give compensation, but whereas the laws of some countries spoke of "full compensation", those of other referred to only "fair compensation"; and in some countries the compensation was payable in advance, while in others it was not. The way in which expropriation "in the public interest" was defined also differed from country to country; sometimes it was not defined at all, but left to the local authorities to interpret as they thought fit. Where there was so much uncertainty and diversity of practice, disputes were bound to occur if the Commission did not indicate clearly in its draft what the legal position was.

13. Mr. François's proposal was not perhaps as precise as might be desired, but at least it had the advantage that it would make it easier for the head of a mission to submit to the local laws without questions of prestige entering into consideration. In Damascus, the premises of one diplomatic mission still abutted on a main highway because the head of the mission refused to move, and the Government was prepared to accept that situation rather than become involved in a dispute with the sending State. If the Syrian Government had been able to point to some clear rule of international law, that situation would never have arisen.

14. Mr. SANDTRÖM, Special Rapporteur, agreed that it was sometimes desirable to expropriate diplomatic premises in the public interest, but wondered whether it was necessary to lay down a strict rule of law in so delicate a matter. If the Commission wished to do so, it would in any case have to circumscribe the receiving State's rights much more clearly, for example by stipulating that it must provide the mission whose premises it was taking away with suitable alternative accommodation.

15. He shared the views of those members of the Commission who had opposed the proposal, but recognized that it would be desirable to refer to the matter in the commentary.

16. Mr. YOKOTA said the discussion had convinced him that the proposal should not be adopted, even with addition of the words "with fair compensation", as he had suggested at the previous meeting (396th meeting, para. 50). For if it were adopted, the receiving State would thenceforth have a legal right to decide unilaterally what should be decided only by agreement between it and the sending State, and diplomatic premises would lose the specially protected status which the Commission recognized they should enjoy.

17. It had been suggested that it was sufficient to state that the premises were acquired and held subject to the local laws, but the receiving State might pretend to have the right to expropriate the premises if the law permitting expropriation was enacted *after* the premises were originally acquired. It ought to be clearly mentioned that such an interpretation should not be admitted.

18. Mr. PAL said that he agreed that the form in which the proposal was presented was not at all acceptable. The right of expropriation, whatever that might mean, was certainly not an exception to the privilege of inviolability of the mission premises. Presented in the form of an exception to inviolability, the right would mean that, in exercising it, the receiving State would be entitled to disregard inviolability. In his opinion, the suggested right of expropriation could not be allowed to operate in the field of inviolability in that way, and should not be considered as an exception to the inviolability envisaged either in paragraph 1 or 3 of article 12.

19. As regards the substance of the proposal, there was hardly any such absolute right recognized in international practice. Expropriation would always require the agreement of the other sovereign State: it was the duty of the State seeking to expropriate to secure the agreement of the other sovereign State concerned, which, for its part, should be as co-operative as possible. The so-called right of expropriation was thus hardly entitled to the name of right where the mission premises were concerned. In any case, the substance of the proposal should be placed elsewhere than under article 12—it could perhaps be more appropriately dealt with in section III of the draft.

20. Mr. LIANG, Secretary to the Commission, said that the discussion had raised certain questions of fundamental theory to which he thought due consideration should be given. It had been stressed by more than one member of the Commission that the immunity of diplomatic agents resided in their exemption from jurisdiction rather than in their exemption from obedience to local laws. If that was true, it was a remarkable development, which illustrated clearly the extent to which the theory of extraterritoriality had been left behind. The proposition was, however, he submitted, less true of such acts as *possessio* of diplomatic premises than of private law acts, such as incurring a business debt.

21. He agreed that it was misleading to refer to expropriation in conjunction with the principle of inviolability, which had to do essentially with the undisturbed functioning of the mission. Expropriation related to the right of eminent domain of the receiving State, and, if the problem of the validity of that right with respect to diplomatic premises was to be referred to, at any rate it should not be referred to in article 12. All the Commission appeared to be willing to say on the matter was that it was the mission's duty to enter into negotiations concerning it at the receiving State's request. Since it would be the mission's duty to enter into negotiations with the receiving State on all kinds of subjects, it appeared hardly necessary to make special mention of expropriation in the actual articles relating to the duties of a diplomatic agent, though the question might possibly be referred to in the commentary on those articles, if the Commission really felt that was necessary.

22. Mr. TUNKIN said that Faris Bey El-Khouri had brought out into the open a question which had been in his own mind when he had argued against Mr. François's proposal. In his view, there was no doubt that every State always had the sovereign right to place its entire land domain under public ownership, the only proviso being that any such measure should entail no discrimination as between, in the case in point, one mission and another. Although general nationalization measures were quite distinct from the particular expropriation measures which Mr. François had in mind, inclusion of his proposal might appear to deny the receiving State's right to take such general measures, by referring only to particular measures.

23. Mr. FRANÇOIS felt that his proposal had given rise to a very interesting discussion. With regard to the argument that matters of that kind should be settled by agreement between the States concerned, he would ask whether the Commission really thought it would be

carrying out the task assigned to it by the General Assembly if, whenever it came to a difficult question, it merely gave that reply. The Commission's task was not only to codify customary law; it was also concerned with the progressive development of the law. Where abuses existed, it should not shut its eyes to them on the pretext that customary law was silent on the point.

24. It had been suggested that his proposal would give the receiving State the right to force an entry into diplomatic premises if occasion arose. That had never been his intention, for the mission premises must enjoy inviolability until they were vacated. There was, however, a clear distinction between exemption from liability to enforcement procedures and exemption from jurisdiction. And, as regards jurisdiction, it was an accepted rule that one State could exercise jurisdiction over real estate in its territory, belonging to another State.

25. However, in view of the extent of the opposition to his proposal, he was prepared to withdraw it, on condition that the point was mentioned in the commentary, though not in the form suggested by Sir Gerald Fitzmaurice. In his opinion, the sending State was under a legal obligation to comply with the request of the receiving State if genuinely made in the public interest. Unless that was recognized, the fact that possession was nine points of the law would give the sending State the power to delay for years what might be urgent and important work. It was true that a solution was almost always reached, but frequently only after a long and vexatious delay.

26. The CHAIRMAN suggested that Mr. François and the Special Rapporteur together draft a suitable passage for insertion in the commentary.

It was so agreed.

ARTICLE 13

27. Mr. SANDSTRÖM, Special Rapporteur, said that his draft reproduced the existing rules as expressed in article 18 of the Havana Convention[1], article 4, paragraph 1, of the Harvard draft[2] and article 19 of the 1929 resolution of the Institute of International Law[3].

28. Replying to a question by Mr. KHOMAN, Mr. SANDSTRÖM explained that the changes he had made by comparison with the Harvard draft were designed merely to bring the wording into closer accordance with continental European terminology.

Article 13 was adopted by 20 votes to none, with 1 abstention.

ARTICLE 14

29. Mr. LIANG (Secretary to the Commission) suggested referring to "archives and documents" instead of simply to "archives". Current documents might be as much in need of protection as the mission's older records, or more.

30. He was somewhat doubtful regarding the words "of their confidential character". They introduced a qualification of the principle which might allow the receiving State to claim that certain documents were not entitled to protection. Not all documents were confidential, but all were inviolable. The Convention on the Privileges and Immunities of the United Nations merely enunciated the principle of "Inviolability for all papers and documents."[4]

31. Mr. AMADO felt that it was desirable to refer to the premises in which the archives were housed, as well as to the archives themselves. He proposed the inclusion in article 14 of a clause on the lines of that in article 5 of the Harvard draft: "wherever such archives may be located within the territory of the receiving State, provided that notification of their location has been previously given to the receiving State".[5] The mission's documents might not always be on the premises of the mission; the ambassador might take some with him when moving about the country. If the receiving State was to be responsible for protecting the documents, it must obviously know where they were.

32. He agreed with the Secretary that any document which the mission regarded as part of its archives was entitled to protection.

33. Sir Gerald FITZMAURICE said that, while he was naturally in entire agreement with the principle enunciated, he doubted whether a separate article on the subject was strictly necessary. If the archives were on the premises of the mission they would be covered by the inviolability of the premises already enunciated in article 12. Other possibilities could be dealt with in other parts of the draft. The Special Rapporteur had perhaps had in mind an attempt to compel the head of the mission to produce the mission's documents in court proceedings. If that was so, the matter could be covered in another way in article 20.

34. Mr. EL-ERIAN noted that there appeared to be no objection to the principle of the article. Since the Commission was merely concerned with the question whether the idea could be covered in other articles, the simplest course would be to refer the matter to the Drafting Committee.

35. Mr. SANDSTRÖM, Special Rapporteur, agreed that when the archives were on the premises of the mission, their inviolability followed from the general inviolability of those premises. The archives, however, would not necessarily be on the premises of the mission.

36. Another reason for his inclusion of the article had been to serve as an introduction to the provision in the next article that when a mission was terminated or discontinued, even in case of war, the receiving State must protect its premises and archives.

37. Mr. VERDROSS thought the provision was a most important one. He did not, however, think it sufficient to say that the receiving State must protect the archives from violation; it was also under the obligation to respect them itself. He therefore suggested the following wording:

> "The receiving State shall respect the archives of the mission and see that they are respected."

38. Mr. SPIROPOULOS agreed both with the principle of the article and with the idea of including a provision on the subject in the draft. He could not entirely agree with Mr. Verdross, however. Once it was stated that the receiving State must protect the archives, it went without saying that it must respect them also.

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

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

[3] *Ibid.*, pp. 186 and 187.

[4] United Nations, *Treaty Series*, Vol. I, 1946-1947, p. 20.

[5] Harvard Law School, *op. cit.*, p. 20.

39. Mr. SANDSTRÖM, Special Rapporteur, agreed with Mr. Spiropoulos, but suggested the following alternative wording for the article:

"The receiving State shall respect the archives of the mission and protect them from any violation."

40. Mr. TUNKIN agreed with the Secretary that the archives of a mission were inviolable, regardless of whether they were confidential or not. The last few words of the article were, therefore, quite unnecessary. He noted, in support of Mr. Verdross's suggestion, that the formula "shall respect and protect" was used in article 15, paragraph 1.

41. Mr. LIANG (Secretary to the Commission) drew attention to article II, section 4, of the Convention on the Privileges and Immunities of the United Nations which stated that:

"The archives of the United Nations, and in general all documents belonging to it or held by it, shall be inviolable wherever located."[6]

That text seemed to cover the points raised by Mr. Amado and Mr. Verdross, since it referred to the question of location and, by proclaiming the documents "inviolable", implied that they were to be both respected and protected. The Commission might consider a provision on those lines.

42. Mr. VERDROSS recalled that a distinction between "respecting" and "causing to be respected" was frequent in legal literature. He would be satisfied, however, with a note in the commentary that the article implied that the receiving State was also bound to respect the archives.

43. Mr. YOKOTA suggested as a possible wording:

"The archives of the mission shall be inviolable and protected from any violation whatsoever".

44. Mr. AMADO, recalling the embarrassment caused in the past by the revelation of ambassadors' confidences on the character and conduct of leading personalities in their receiving States, stressed the moral duty of the receiving State to respect the inviolability of a mission's archives.

45. Mr. BARTOS suggested that it would be better to concentrate on the purely legal aspect of the State's obligation. He agreed with Mr. Verdross.

46. Mr. SCELLE pointed out that adoption of the principle of the absolute inviolability of missions' archives would preclude their use as evidence by an international criminal court set up to judge those charged with the crime of aggression. The Commission would be ignoring the precedent established by the Nuremberg Tribunal.

47. Mr. SANDSTRÖM, Special Rapporteur, offered to draft a new text in the light of the discussion.

48. After further discussion, the CHAIRMAN observed that the Commission was agreed on the principle of the article. He proposed that it be left to the Drafting Committee to produce a satisfactory text in the light of the suggestions made by Mr. Amado, Mr. Verdross, Mr. Yokota and the Secretary.

It was so agreed.

[6] United Nations, *op. cit.*, p. 18.

QUESTION OF INCLUDING AN ADDITIONAL ARTICLE ON THE RIGHT OF CHAPEL (*droit de chapelle*)

49. Mr. VERDROSS proposed the inclusion of the following additional article 13(*a*):

"The head of the mission is entitled to have a chapel of his own faith within his residence."

The French text was taken word for word from article 8 of the resolution on diplomatic immunities adopted by the Institute of International Law in 1929.[7]

50. Although the ancient and generally accepted privilegs of *droit de chapelle* had lost much of its importance since the establishment of religious freedom, it might still serve a purpose in some cases, as every country did not recognize the right to freedom of worship. It therefore seemed necessary to retain the ancient privilege of *droit de chapelle*. The object of the article was to ensure freedom of worship for the members of the mission, even though the practice of their religion might be forbidden in the receiving State.

51. Mr. SANDSTRÖM, Special Rapporteur, explained that he had felt such a provision to be no longer necessary. In any case, the receiving State could hardly oppose the practice of a religion on the premises of the mission.

52. Mr. VERDROSS, in reply to a suggestion by Mr. SPIROPOULOS, agreed to the substitution of the words *"les locaux de la mission"* for *"son l'hôtel"*, the term used in the resolution of the Institute of International Law.

53. Mr. SPIROPOULOS pointed out that such chapels were not necessarily within the premises of the mission; they might be within the grounds or in another building regarded as part of the mission. Although the right was based on a well-established tradition, he did not object to having an article on the subject.

54. Mr. SCELLE said that the rule, essential during the Wars of Religion and still necessary in the seventeenth century, long since ceased to serve any purpose. He saw no point in including an article on the subject.

55. Mr. FRANÇOIS could not agree that the article was useless, in view of the fact that religious freedom was still far from universal. If the chapel was for the private use of the members of the mission only, the principle was axiomatic; if, however, the chapel catered for a wider circle, the colony of nationals of the head of the mission for instance, or even nationals of the receiving State, the article was sufficiently important.

56. Mr. BARTOS said that he regarded the provision as unnecessary, but would not oppose it, provided it was made clear that the chapel was for the mission's private use only. He recalled the case of the chapel of the Austro-Hungarian mission in Belgrade which had been thrown open to the public without the consent of the Serbian Government. The Roman Catholic chaplain, who enjoyed diplomatic immunity, had preached a sermon in favour of Austro-Hungarian policy that had led to public disturbances.

57. The CHAIRMAN thought the principle was now self-evident. If the chapel was on the premises of the mission, the principle was already covered by article 12.

58. Mr. VERDROSS said that, if the Commission considered the principle to be covered by *franchise de l'hôtel*, he would be satisfied with a reference to that fact in the commentary.

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

59. Mr. AGO said he could see little difference between an article and a reference in the commentary. He agreed with Mr. Verdross that the provision still had some practical value, since he understood that in some countries the prohibition of certain religions was strictly enforced. He would support the article on the understanding that the chapel was on the premises of the mission and for the private use of the members of the mission.

60. Mr. SANDSTRÖM, Special Rapporteur, said that he would have no objection to a reference to the principle in the commentary, provided the chapel was for the private use of the mission. To throw a chapel open to the public would be to overstep the functions of a diplomatic mission.

61. Mr. SPIROPOULOS agreed with the Special Rapporteur.

62. Mr. PAL said that, if the principle was to be referred to in general terms in the commentary, it should be made clear that it applied to all religions indiscriminately.

63. Mr. AMADO thought it would do no harm for the Commission to signify its sympathy for, and approval of, so ancient and laudable a principle. It would give a touch of poetry to the draft.

64. Mr. MATINE-DAFTARY pointed out that there was nothing to prevent the members of a mission worshipping on the premises of the mission. He would oppose any reference to the principle, however, unless it was qualified on the lines suggested by Mr. Bartos and other members. An ambassador could have a private chapel in the mission premises, but there could be no question of opening it to the public.

65. Mr. EL-ERIAN thought that, since it was impossible to list in full in the draft all the privileges enjoyed by the head of a mission, it was undesirable to single out a particular one for special mention. The same argument had been advanced against Mr. François's proposal regarding the serving of writs on the premises of the mission.

66. He proposed that the Commission refrain from adopting an article on the subject, but include a reference to it in the commentary on the following lines:

> "The Commission did not find it necessary to go into details regarding the various privileges enjoyed by the head of the mission. Certain members mentioned his right to have a private chapel."

67. Faris Bey EL-KHOURI thought that there was no need either for an article or for a reference to the principle in the commentary, since all heads of mission seemed to be able to practise their religion without interference. In any case, the question arose of what religion was to be practised: that of the established church, if any, of the sending State, or that of the head of the mission for the time being? Logically speaking, the mission should cater for all the creeds professed by the members of the mission, though that might mean a rather large number of places of worship on the mission's premises.

68. Mr. VERDROSS said that he accepted the qualifications of the principle proposed by Mr. Spiropoulos, Mr. Bartos, Mr. Pal and the other speakers.

69. The CHAIRMAN put to the vote Mr. Verdross's proposal that a reference be made in the commentary to the right of chapel, subject to the above qualifications.

The proposal was adopted by 10 votes to 3 with 8 abstentions.

ARTICLE 15

70. Mr. SANDSTRÖM, Special Rapporteur, pointed out that article 15 was based on article 7 of the Harvard draft, with the addition of the stipulation that the rule applied "even in case of war".

71. Replying to Mr. Scelle's earlier observation (para. 46 above), that the absolute inviolability of the archives of missions would prevent their being used after the war as evidence for the prosecution of persons accused of crimes against humanity, he suggested that the importance of the evidence to be found in the archives of diplomatic missions should not be exaggerated. When such special cases arose they could be settled on their merits, and it would be dangerous merely on that account to qualify the general rule that the archives of missions were inviolable even during or after a war.

72. Mr. FRANÇOIS agreed that the archives of missions must in all cases be respected. It was, of course, open to a new Government, set up in a defeated State after a war, to agree to disclose the contents of the archives of the diplomatic missions sent by the previous Government, but it would be an extremely grave step for the receiving State to violate those archives on its own responsibility.

73. The question of violation of premises was a different matter. During the Second World War the premises of missions had sometimes been seized by the receiving State, put to other uses, and never returned to their original tenants. The archives, however, should be respected.

74. Mr. BARTOS noted that the Special Rapporteur had, perhaps wisely, made no mention of the institution of *custos*. There had been a number of instances where receiving States had agreed to a member of the mission remaining behind as custodian of the premises after the mission had been terminated. The practice had not, however, been respected in all countries during the Second World War.

75. Another point to be considered was the position of missions in occupied countries. It had not been the practice of the Third Reich to respect the missions of enemy States in countries which it occupied. Buildings had been confiscated and archives violated. Accordingly, the Allied Commission on Reparations set up after the war, claiming the right of reprisal for the practices of the Axis Powers, excluded from the agreement with Germany the clause respecting the protection of diplomatic missions in time of war. Such a clause had, however, been included in the peace treaties with Italy, Finland, Hungary and other countries. The obligations enunciated in the article had not always been observed during and after the Second World War.

76. Mr. SPIROPOULOS proposed that, before embarking on a detailed discussion, the Commission settle the preliminary question whether it was to refer to the case of war in its draft.

77. Mr. AGO pointed out that the article was not really concerned with the consequences of the termination of a mission, but with the consequences of the termination or discontinuance of diplomatic relations, including their rupture. That being so, it would be difficult for the Commission to omit to consider what rule should

apply in case of war, when the fate of a mission's archives assumed very great importance. The principle of the inviolability of archives, even in case of war, must be affirmed.

78. Mr. MATINE-DAFTARY thought that any attempt by the Commission to regulate the situation during a state of war would be a waste of effort. International law in time of war left much to be desired, alas!

79. The CHAIRMAN pointed out that several consular conventions, including that of 31 December 1951 between France and the United Kingdom, recognized the principle of protection of archives even in case of war. It would be difficult for the Commission to avoid considering the immunity of archives in case of war when discussing the termination of diplomatic missions.

80. Mr. AMADO was in favour of retaining the phrase "even in case of war", as an act of faith on the part of the Commission in the principle that certain obligations were sacred even during wartime.

81. Mr. EL-ERIAN raised the question whether a State's duties in the event of war should be dealt with in the same article as the mere termination of a mission. The Commission must make some provision for eventualities in case of war. A number of international treaties, including the Geneva Conventions of 1949,[8] contained provisions based on the assumption that cases of armed conflict might arise.

82. Sir Gerald FITZMAURICE thought that the Commission could not avoid dealing with a State's duties in the event of war—not in general, but with reference to specific matters such as the fate of the premises and the archives of missions. War was, after all, one of the most common reasons for the rupture of diplomatic relations and the termination of missions. A distinction should, however, be drawn between the position of missions at the outbreak of, or during, the war, and their position after the war, which was a matter for settlement in the course of peace negotiations.

83. As far as the position of missions in occupied territories was concerned, it was a well-established rule of international law that no annexations could be effected in the course of the war. Similarly, diplomatic missions in occupied territories should be respected by the occupying Power until a peace settlement.

84. Mr. PAL did not think that article 15 was the proper place to introduce provisions applying in case of war. It would hardly be proper to pay only a casual attention to the subject by using an expression like "even in case of war". The subject involved a completely distinct set of considerations. The question whether an occupying Power was under the same obligations as the receiving State whose territory it had occupied was only one of the many questions which merited serious consideration. The archives of missions in occupied territories had not always been respected by the occupying Powers during the Second World War. Then again, a duty to protect and a duty not to violate might not be on the same footing—at least during a war.

85. Mr. SANDSTRÖM, Special Rapporteur, thought it was essential to affirm the inviolability of premises and archives in case of war. He also regarded article 25, dealing with the departure of members of missions in the event of war, as an indispensable provision.

[8] United Nations, *Treaty Series*, vol. 75 (1950).

86. Mr. LIANG (Secretary to the Commission) pointed out that the Commission had been faced with the question raised by Mr. Spiropoulos on previous occasions, the last being in connexion with its draft on the law of the sea, when it had decided against formulating rules applicable in time of war. A decision to include rules applying in the event of war would be a departure from the Commission's previous position, and he wondered whether the question should not be more thoroughly examined. If the Commission decided to envisage the consequences of a state of war in connexion with diplomatic missions, it would logically have to do the same in connexion with the law of treaties, for example.

87. Mr. SCELLE thought it essential to refer in the article to the rule in case of war, since it was then that the problem of respect for a mission's archives was most acute. He was in favour of stating that the receiving State was under the same obligation to protect the archives of missions in war as in peacetime.

88. He was not, however, in favour of making the inviolability of archives so absolute as to prevent the arraigning before an international court of those responsible for the supreme crime of aggression.

89. Mr. SPIROPOULOS said that, since the Commission appeared to be practically unanimous in wishing to envisage the position of archives during a state of war, he wished to withdraw his preliminary question.

The meeting rose at 1.5 p.m.

398th MEETING

Wednesday, 15 May 1957, at 9.30 a.m.

Chairman: Mr. Jaroslav ZOUREK.

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

[Agenda item 3]

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

ARTICLE 15 *(continued)*

1. The CHAIRMAN felt that now that it had decided to retain in its draft the reference to the eventuality of war, the Commission was perhaps in a position to vote on paragraph 1 of article 15.

2. Mr. BARTOS, with reference to Mr. Ago's remarks at the previous meeting, said that, in his view, the Special Rapporteur had been right to distinguish between the termination and the discontinuance of a mission. A mission could be closed down for reasons of economy, or because diplomatic relations between the two countries were no longer important.

3. The Commission should decide whether the practice of leaving a custodian in charge after a mission was closed down was merely a custom or was a legal institution.

4. Mr. AGO said that he was entirely convinced by what Mr. Bartos had said. He therefore felt that the Drafting Committee should be asked to consider whether the termination or discontinuance of a mission or of diplomatic relations should be mentioned.