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Summary record of the 398th meeting

Topic:
Diplomatic intercourse and immunities

Extract from the Yearbook of the International Law Commission:-
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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.

5. The CHAIRMAN, speaking as a member of the Commission, suggested for the benefit of the Drafting Committee that the words "even in case of war" be replaced by "even in case of armed conflict".

Article 15, paragraph 1, was adopted by 18 votes to none, with 2 abstentions, subject to consideration by the Drafting Committee of the points raised.

6. With regard to a point raised by Mr. GARCIA AMADOR, concerning the last five words of paragraph 2, Mr. FRANÇOIS, Mr. SPIROPOULOS and Mr. TUNKIN all agreed that a custodian Power could be appointed without obtaining the receiving State's consent in advance, but that that State had the right to object to a particular custodial Power.

7. Mr. PADILLA NERVO said that provision should be made for two distinct cases: firstly, the case in which custody of the premises and archives was entrusted to another Power, and, secondly, the case in which that other Power was asked, in addition, to look after the interests of the accrediting State. In the second case, the custodial Power had to obtain the consent of the receiving State before it could discharge the functions entrusted to it. During the Spanish Civil War, for instance, the Mexican Government had informed the Government of Uruguay that it was responsible for Spanish interests and for the protection of the Spanish archives and mission premises in Uruguay. In its note, the Mexican Government had requested the Government of Uruguay to hand over to it the premises that had been used by the Spanish mission before diplomatic relations were broken off. The reason for that request had been that the former Spanish representative had continued to reside in the premises. To the best of his knowledge, however, that was the only case in which difficulties had occurred with regard to the custody of mission premises. In practice, the receiving State never refused to allow the custodian Power to discharge its responsibilities, though it might be slow about giving an answer to an official request.

8. Mr. SPIROPOULOS agreed with Mr. Padilla Nervo. He himself knew of only one case where the receiving State had objected to the custodian Power.

9. Mr. SANDSTRÖM, Special Rapporteur, suggested that, in order to bring the French text fully into accordance with existing practice, it would be sufficient if the words *"accepté par"* were amended to read *"acceptable à"* in conformity with the English.

10. Sir Gerald FITZMAURICE thought that the overwhelming majority of cases were of the kind mentioned by Mr. Padilla Nervo, where a State that had broken off diplomatic relations with another State asked a third State, not only to accept custody of its mission premises and archives, but also to protect its interests. The latter question was, if anything, more important than the custody of mission premises and archives, and should not be passed over in silence.

11. With regard to the actual working of article 15, he felt it should be made clear that both paragraphs, and not merely paragraph 1, were governed by the words "When a mission has been terminated or discontinued". In paragraph 2 some reference should perhaps be made to the necessity of notifying the custodian State that its mission had been entrusted with the task in question.

12. Mr. AGO agreed with Sir Gerald Fitzmaurice that the Commission should refer to the question of designating a third State to protect the sending State's interests and its nationals. Article 15, however, was in a section of the draft dealing solely with mission premises, archives and correspondence. In his view, all the duties of the custodian State should be dealt with in a single article, which would form part of a special section devoted to the question of the ending of diplomatic relations.

13. Mr. TUNKIN supported Mr. Ago's view.

14. The CHAIRMAN suggested that the Commission should adopt paragraph 2, on the understanding that the Drafting Committee would decide where it should be placed and that the Special Rapporteur would draft an article relating to the protection of the sending State's interests and its nationals for inclusion in a special section of the draft relating to the ending of diplomatic missions.

15. Mr. SPIROPOULOS asked why it should be necessary to appoint a custodian for mission premises in the event of the mission's being terminated.

16. Mr. AGO questioned whether, in practice, diplomatic relations were really terminated. All that ever happened was that diplomatic relations were discontinued.

17. Mr. SANDSTRÖM, Special Rapporteur, pointed out that there was at least one case in which a mission could be said to be terminated, namely, when the sending State ceased to exist. The point could, however, be taken into account by the Drafting Committee.

On the understanding suggested by the Chairman, and subject to any changes of wording by the Drafting Committee, article 15, paragraph 2, was adopted by 19 votes to none, with 1 abstention.

18. Mr. BARTOS said he had abstained from voting in order to draw the Drafting Committee's attention to cases where the receiving State was occupied by a third Power, or where the custodian State asked to be released from its duties.

19. Mr. AGO agreed that the question of occupation was important, but should be dealt with in a separate article. The Drafting Committee should also examine whether or not it should bear in mind the case in which the mission premises were not on the territory of the State to which the mission was accredited; for example, there were a considerable number of missions on Italian soil who were not accredited to Italy but to the Holy See or San Marino.

20. Mr. SPIROPOULOS said that the case referred to by Mr. Ago was quite exceptional and could safely be left aside. If the Commission looked hard enough, it would find similar exceptional cases in connexion with every article of its draft.

21. Mr. TUNKIN agreed that the Commission was engaged in laying down general rules and would not deal with all the details.

22. The question of occupation could, he thought, be classed among special cases. He would hesitate, therefore, to attempt to deal with it, though the Drafting Committee might consider the advisability of doing so.

23. Mr. SANDSTRÖM, Special Rapporteur, agreed with Mr. Spiropoulos and Mr. Tunkin, and asked whether there was not, in fact, a treaty between Italy and the Holy See governing the status of missions to the

Holy See with premises on Italian soil. If so, that was an additional reason why the Commission should not deal with the case referred to by Mr. Ago.

24. Mr. BARTOS agreed that there were many such exceptional cases; that of Governments in exile was another. As a general rule, they could be settled by agreement between the States concerned. Since it might be difficult for the Commission to deal with one of them without dealing with them all, he would have no objection to their being left aside.

25. Mr. AGO said that he too would have no objection if the Commission wished to leave aside, in its report, such special cases as he and Mr. Bartos had mentioned. He himself had mentioned a special case only so that the Commission might take its decision after having considered it.

26. The CHAIRMAN suggested that it was the view of most members of the Commission that such special cases should be left aside.

It was so agreed.

ARTICLE 16

27. The CHAIRMAN said that the Special Rapporteur had submitted the following text to replace article 16 of his draft (A/CN.4/91):

"B. *Facilitation of the work of the mission: protection of correspondence*

"Article 16

"1. The receiving State shall accord all necessary facilities for the performance of the work of the mission. In particular, it shall permit and protect communications by whatever means, including messengers provided with passports *ad hoc* and written messages in code or cipher, between the mission and the ministry of foreign affairs of the sending State or its consulates and nationals in the territory of the receiving State.

"2. The diplomatic pouch shall be exempt from inspection.

"3. The messenger carrying the dispatches shall be protected by the receiving State.

"4. Third States shall be bound to accord the same protection to dispatches and messengers in transit."

In the heading following article 16 of the original draft the letter "B" would consequently be replaced by "C".

28. He invited the Commission first to discuss paragraph 1.

29. Sir Gerald FITZMAURICE proposed firstly, for completeness' sake, that the words "telephoned, telegraphed or radio" be inserted after "and written" and before "messages", and secondly, that the phrase "between the mission . . . of the receiving State" be expanded to include all the categories comprised in article 14, paragraph 1, of the Harvard Law School draft.[1]

30. Mr. SANDSTRÖM, Special Rapporteur, said that the reason why he had refrained from including a long list of persons and institutions in paragraph 1 was in order to avoid giving the impression that the list was intended to be exhaustive. He had thought it preferable to refer only to such communications as it was essential to protect; since the mission clearly had to communicate with other persons and institutions, it was obvious that the list was incomplete.

31. Mr. LIANG (Secretary to the Commission) suggested in the first place that the general character of the first sentence of the new text proposed by the Special Rapporteur made its inclusion inappropriate in an article otherwise devoted exclusively to the question of communications.

32. Secondly, it might be thought that it was not sufficient for the receiving State simply to "permit and protect" the mission's communications, but that the concept of freedom of communications, which was clearly expressed in the Harvard draft and the Havana Convention[2], should also be introduced.

33. Thirdly, he agreed with the Special Rapporteur that the Harvard draft went into such detail regarding the persons and institutions with whom the mission could communciate freely as to suggest inevitably that the list was intended to be exhaustive. However, he feared that precisely the same impression would be gained even from Mr. Sandström's much shorter draft; the words "in particular" could not conceivably be made to refer to the three categories of correspondent that Mr. Sandström had mentioned. Instead of attempting to give any instances, it might be preferable to follow the example of the Havana Convention and refer simply to "official communications" or some other very general term.

34. Finally, as regards the reference to passports *ad hoc*, he pointed out that diplomatic couriers often had regular passports designating them as such.

35. Mr. VERDROSS agreed that the question of the protection of communications should be placed under a separate heading, as was done in the new text proposed by the Special Rapporteur, since there was very little connexion between it and the question of the inviolability of diplomatic premises. He noted that paragraph 1 was couched in absolute terms. It might, perhaps, be worth noting in the commentary that the freedom of diplomatic communications was occasionally restricted; for example, it had been restricted by the British authorities during the Second World War, immediately before the Normandy landings in 1944.

36. Sir Gerald FITZMAURICE agreed with the Secretary that the first sentence of paragraph 1 was inappropriate in article 16.

37. In principle, he agreed with the Special Rapporteur that there was a danger in particularizing, lest it be thought that the items cited formed a comprehensive list. The trouble with the Special Rapporteur's text, as regards both the points on which Sir Gerald had submitted amendments, was that it went some way towards particularizing; it quoted a few instances, not necessarily the most important, without indicating that they were only instances; it was in fact neither one thing nor the other. It would be perfectly satisfactory if in either case some general form of words could be found, but, failing that, he saw no alternative to listing all possible means of communication, and all those to whom official communications could possibly be sent.

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

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

38. Mr. YOKOTA pointed out that, according to the Special Rapporteur's text, it would be in order for a sending State's mission to communicate with its nationals in the territory of the receiving State in code or cipher. Since that was presumably not the Special Rapporteur's intention, he proposed that the words "and nationals" be deleted from the second sentence of paragraph 1 and the following added at the end of the paragraph:

> "The receiving State shall also permit and protect communications between the mission and the nationals of the sending State within the territory of the receiving State."

The Harvard draft also dealt separately with the question of communications between the mission and nationals of the sending State, while the Havana Convention did not refer to it at all.

39. Mr. VERDROSS supported Mr. Yokota's proposal in principle.

40. Mr. BARTOS also supported Mr. Yokota's proposal in principle.

41. In addition, Mr. Bartos requested the Drafting Committee to bear in mind, first, that, in French at least, it was inappropriate to use the term "passport" for the travel document carried by diplomatic couriers. It was the practice in Europe for such persons to receive from the head of the mission or the minister of foreign affairs special papers which showed the number and serial numbers of the letters or parcels entrusted to the couriers; in certain countries those papers had to be stamped. Admittedly, some States employed regular diplomatic couriers who carried regular diplomatic passports, but they too had to carry courier's papers. Moreover, in addition to pouches entrusted to the care of couriers, there were other strictly confidential diplomatic packages which were sent through the post or in the care of captains of aircraft; they, too, were not subject to inspection by the customs or the police.

42. As regards Sir Gerald Fitzmaurice's second amendment, he agreed that the list of persons and institutions given by the Special Rapporteur would have to be considerably expanded. However, paragraph 1 (*e*) of article 14 of the Harvard draft list would have to be modified in the light of post-war developments.

43. Mr. PAL said that, in his view, the first sentence of paragraph 1 was not out of place. The article began by a general statement and went on to particularize.

44. He agreed that Sir Gerald Fitzmaurice's first amendment was necessary if the Commission was to refer to "written messages in code or cipher". As regards the second, he reserved his observations.

45. The Secretary's second point could be met by inserting the words "freedom of" between "permit and protect" and "communications". He agreed that that amendment was necessary since the text as it was would not prevent the interception of communications provided that they were sent on subsequently. The principle underlying the privilege in paragraph 2 should be extended to all communications irrespective of the method of communication.

46. Mr. TUNKIN agreed with those members of the Commission who thought that the first sentence of paragraph 1 should be placed elsewhere.

47. He also agreed with those who thought the list of persons and institutions with whom the mission could freely communicate, given in the Special Rapporteur's draft, would have to be considerably expanded. The list contained in the Harvard draft, however, was also unsatisfactory; for example, it did not refer to communications with government agencies in a third State.

48. He also agreed in principle with Mr. Yokota's proposal, although it might require some redrafting. Perhaps the most expeditious course would be for the Commission to ask the Special Rapporteur to redraft paragraph 1 in the light of the discussion, and submit a text for consideration at the next meeting.

49. Mr. KHOMAN agreed that the first sentence should be placed elsewhere; it could be combined with the text which Mr. El-Erian had suggested for insertion at the beginning of section II (394th meeting, para. 10).

50. While he agreed with the Secretary that some reference should be made to freedom of communications, a difficulty arose with regard to radio transmitters, which a mission was often allowed to install only on the basis of reciprocity. In other words, the sending State did not enjoy unrestricted freedom in that respect thought it did in others.

51. In his view, it was not necessary to mention either passports *ad hoc,* since conditions varied so greatly in that respect, or all the persons and institutions with whom the mission could communicate freely. He was sure the Drafting Committee could find a suitable general formula.

52. Mr. AGO agreed that the Special Rapporteur might be asked to submit a revised text, all the members of the Commission having had an opportunity of expressing their views. In his opinion, there should be a separate section on freedom of communications, and the first sentence of paragraph 1 should therefore be removed.

53. In principle, he supported Sir Gerald Fitzmaurice's second amendment for the inclusion of all the categories, though the list which appears in the Harvard draft would have to undergo some modification.

54. Mr. Ago also agreed with Mr. Yokota that the question of communications with nationals of the sending State should be dealt with separately.

55. Mr. EL-ERIAN said he agreed with most of what had been said, particularly with Mr. Khoman's remarks concerning the first sentence of paragraph 1.

56. Regarding Sir Gerald Fitzmaurice's first amendment, he thought it would be preferable to employ a general formula similar to that used in the Harvard draft, i.e., "official communications by whatever available means", and to insert any necessary explanations in the commentary. Experience had often shown how dangerous it was to give a list which could be regarded as comprehensive.

57. Mr. SPIROPOULOS thought that the only point on which the Commission was possibly not in agreement was with regard to Sir Gerald Fitzmaurice's two amendments, to which some members might prefer some very general wording such as had been suggested by Mr. El-Erian. In those circumstances, the most expeditious course, in his view, would be, not to ask the Special Rapporteur to submit a revised text, as Mr. Tunkin had suggested, but simply to refer the paragraph to the Drafting Committee.

58. Mr. TUNKIN said that he was quite prepared to accept Mr. Spiropoulos's suggestion.

It was agreed to refer paragraph 1 to the Drafting Committee.

59. The CHAIRMAN pointed out that the Commission had still to decide the question mentioned by Mr. Spiropoulos: whether to give in the article complete lists of possible modes of communication and of persons and institutions with whom the mission could communicate freely, or whether, in each case, to use some general form of words and insert an enumeration in the commentary. The point should not be difficult to decide, seeing that Sir Gerald Fitzmaurice himself had indicated his willingness to accept a general formula if such could be found. A general formula in the article would be more in accordance with the other provisions of the draft than complete lists, and he accordingly suggested that the Drafting Committee be instructed to proceed accordingly.

It was so agreed.

60. Mr. PAL said that if the purpose of Mr. Yokota's amendment was to withdraw the privilege from the user of code or cipher in communications between missions and their nationals in the territory of the receiving State, he did not think that it served the purpose very well. It would be better to exclude such a user from the privilege explicitly, rather than by implication.

61. Mr. YOKOTA explained that, when communications between missions and their Governments were regulated in one paragraph, in which the use of code or cipher was permitted, and communications between missions and their nationals in the territory of the receiving State in a separate paragraph containing no reference to either code or cipher, the conclusion to be drawn was that the use of code or cipher was not permitted. That was presumably why the Harvard draft dealt with the two cases in separate paragraphs.

62. Mr. PADILLA NERVO said that before the Commission referred paragraph 1 to the Drafting Committee, it ought to give a clear ruling on the exact meaning of the phrase "communications by whatever means", since it might mean either "by the normal and public means available in the receiving State" or "by every means which it was technically possible for foreign missions to employ". If the phrase bore the latter meaning, the receiving State would be unable to refuse permission to operate a private radio transmitter in a foreign mission, and that was a very dubious principle. Such permission was usually granted only on a reciprocal basis and by bilateral agreement, and he knew of cases where it had been refused.

63. Mr. SANDSTRÖM, Special Rapporteur, said that he had drafted the paragraph with the idea in mind that the use of any means of communication was permitted, without the need for the consent of the receiving State.

64. Mr. SPIROPOULOS agreed with Mr. Khoman and Mr. Padilla Nervo that it was the general practice to require the consent of the receiving State before private wireless stations could be operated. Accordingly, if the Commission adopted a broad general formula, it must include a qualification to that effect, at least in the commentary. Allowance should also be made for the possibility of other means of communication being discovered and used.

65. Sir Gerald FITZMAURICE thought that the Commission should be as realistic as possible on the question. "Diplomatic wireless", as it was called, was now quasi-universal and had virtually superseded other means of transmitting messages. If the Commission wished to codify established practice, there was a good case for openly admitting the practice of using private transmitters and regulating the procedure for their use.

66. He was by no means sure that the operation of wireless transmitters was always conditional on the consent of the receiving State. The principle of the inviolability of missions made it very difficult for receiving States to prevent the use of transmitters. If the main object of previous speakers was to ensure reciprocity in the matter, the Commission could meet their wishes by stating as a general rule that the use of private wireless transmitters by missions was in all cases permissible. The phrase "by whatever means" was, he thought, to be interpreted literally.

67. The CHAIRMAN, speaking as a member of the Commission, pointed out that the International Telecommunication Convention, signed at Atlantic City in 1947,[3] placed States under certain obligations in the matter of wireless transmission. The permission of the receiving State was necessary before missions could operate their own wireless stations.

68. Mr. BARTOS observed that the International Telecommunication Convention provided for certain privileges to be accorded to diplomatic communications, namely, priority of calls and the right to use secret language.

69. Mr. SCELLE agreed with Sir Gerald Fitzmaurice that missions must be able to use all possible means, including wireless transmitters, when communicating with the authorities of their sending State. A distinction must, however, be drawn between the means usable on such occasions and those to be used in communications with the mission's nationals in the receiving State. The decision on that point should be taken by the Commission, and not be left to the Drafting Committee.

70. Mr. AMADO agreed with Mr. Scelle that the Commission could not refer to the Drafting Committee a text on which there was only apparent agreement. The phrase "communications by whatever means" must be qualified if missions were not to be given unbridled powers.

71. Mr. VERDROSS suggested that the points of view of Mr. Pal and Mr. Scelle could be met by including in the paragraph the proviso "according to the laws of the receiving State".

72. Mr. EL-ERIAN recalled that he had suggested the adoption of a general formula in the text of the article, coupled with an explanation in the commentary of what was meant by "available means". The use of private wireless transmitters having already proved a source of dispute, the Commission would be well advised to state specifically in the commentary that the receiving State was under no obligation to permit them. The sending State was entitled to use only the customary public facilities. To employ special means, it must obtain the free consent of the receiving State.

73. One practical objection to the uncontrolled use of private wireless transmitters was the fact that the receiving State would then be unable to fulfil its obligations under the international telecommunication conven-

[3] United Nations, *Treaty Series*, Vol. 193, 1954, No. 2616.

tions of Atlantic City (1947)[4] and Buenos Aires (1952)[5] with respect to the regulation of frequencies.

74. Mr. KHOMAN remarked that, although there were many cases of receiving States granting permission to operate private wireless transmitters on a reciprocal basis, such reciprocity was often more theoretical than real, since only States fortunate enough to have a whole chain of relay stations could communicate with distant missions by wireless. He would be content with a statement in the commentary that the operation of private wireless stations was subject to the consent and laws of the receiving State.

75. The CHAIRMAN enquired whether Mr. Padilla Nervo would be satisfied with a reference in the commentary to the fact that the need to obtain the permission of the receiving State to operate wireless stations followed from the provisions of the international telecommunication conventions.

76. Mr. PADILLA NERVO said that he would.

77. Mr. SPIROPOULOS thought that there was little doubt that the view expressed by Sir Gerald Fitzmaurice would come to be generally accepted. For the moment, however, public opinion was suspicious of private wireless stations operated by diplomatic missions, and would not agree to their free use.

78. He proposed that the Commission vote on the question whether a reference should be made in the commentary to the fact that it followed from the international telecommunication conventions that the use of wireless stations by missions was conditional on the consent of the receiving State.

79. Sir Gerald FITZMAURICE said that he had merely wished the Commission to accord some recognition to what had become the most normal means of diplomatic communication. Were the Commission to include anything in its commentary which appeared to condemn, or throw doubt on the validity of, such a means of communication, it might convey a wrong impression.

80. As for the provisions governing the regulation of frequencies, all States which had accepted the international telecommunication conventions would presumably, in their capacity as sending States, observe the provisions which related to transmitters used by diplomatic missions. Such stations must, naturally, not be used for public broadcasts, but solely for diplomatic communications. The question of secrecy did not arise. All confidential messages over the air being either in code or cipher, wireless ensured no greater or less secrecy than any other means of communication. It was used simply because it was more convenient and quicker than any other means. Its use should be recognized as part and parcel of diplomatic privileges, the object of which was to enable diplomatic missions to fulfil their functions.

81. Mr. PADILLA NERVO observed that, although diplomatic missions often used wireless to *receive* messages, he did not think it was the general practice for them to have *transmitting* stations. At least he had not come across any cases either in Mexico or in the countries to which he had been accredited. The operation of transmitters involved a question of public order. It would create an impossible situation if some forty embassies in the same capital went on the air over any channels they wished. The system of radio communication could not possibly function under such conditions. The receiving State was bound, under international conventions, to regulate the frequencies employed on its territory. The Commission should therefore state that missions could not use wireless transmitters without the consent of the receiving State, and without proper arrangements being made for their use in accordance with the laws of the receiving State and international regulations.

82. Mr. SCELLE pointed out that municipal law must not be confused with international law. It would be incorrect to say that diplomatic means of communication were subject to the laws of the receiving State. As Sir Gerald Fitzmaurice had shown, it was immaterial whether receiving States agreed or not; the use of wireless stations within missions could not be prevented, and any attempt to make their use conditional on the receiving State's consent would merely give rise to disputes. He did not think that the regulations of the telecommunication conventions affected diplomatic privileges in the matter of communications.

83. The CHAIRMAN put to the vote the question whether the Commission wished to refer in the commentary that it followed from the international telecommunication conventions that the use of wireless stations by missions was conditional on the consent of the receiving State.

The Commission decided in favour of such a reference by 11 votes to 3, with 7 abstentions.

84. The CHAIRMAN enquired whether the Special Rapporteur accepted the following amendment submitted by Mr. Tunkin to article 16, paragraph 2:

"Diplomatic despatches carried by diplomatic messengers shall in no circumstances whatsoever be subject to opening or detention."

85. Mr. SANDSTRÖM, Special Rapporteur, said that, although willing to agree to the stipulation respecting opening or detention, he doubted the advisability of including the phrase "in no circumstances whatsoever". What if the bag appeared to contain objects of danger to the public?

86. Mr. VERDROSS said that everything depended on what was understood by "diplomatic despatches". The diplomatic bag (or pouch) containing official papers should in all cases be immune from inspection, but other packages in the diplomatic mail, which often contained presents or food, were not entitled to such immunity.

87. Mr. SPIROPOULOS said that Mr. Verdross's point was mainly a matter of drafting. Essentially diplomatic mail was always contained in a sealed envelope with a covering letter, and might be carried either in the bag or by hand.

88. Mr. TUNKIN thought that the words *"la valise du courrier diplomatique"* in the French text perhaps corresponded more closely to the idea he had in mind than the words "diplomatic despatches", which might have too narrow a connotation.

89. Mr. BARTOS observed that the diplomatic mail of some embassies in Yugoslavia weighed as much as 300 to 500 kilograms per consignment and amounted in a year to 50 tons. Booksellers were regularly supplied through the medium of the diplomatic bag, and representations had been made in that connexion to the diplomatic missions by the Yugoslav protocol department.

[4] *Ibid.*

[5] *International Telecommunication Convention, Buenos Aires, 1952* (Geneva, General Secretariat of the International Telecommunication Union, 1953).

90. He was in favour of including a definition of the diplomatic bag in the commentary on the article, specifying that the bag should contain only correspondence and printed matter for the purposes of the mission, though in exceptional cases it might include other objects, such as articles transmitted for use as evidence. The practice adopted in the United Kingdom in cases of suspected irregularity seemed quite sound. If a customs officer suspected from external examination of the bag that it contained articles other than papers or printed matter, he asked the protocol department to intervene.

91. Mr. AGO doubted whether it would be possible to frame a definition which would prevent abuse of the diplomatic bag. Faced with a choice of two evils, that of incurring the risk of allowing presents to pass irregularly in the diplomatic bag, and that of consenting to the abuses which might follow free inspection of the diplomatic bag, he would certainly prefer the former. Any exception to the firm rule that diplomatic mail must be immune from inspection would open the door to all sorts of abuses.

92. Sir Gerald FITZMAURICE said that there was no doubt that, in principle, the diplomatic bag should be immune from inspection, but he questioned whether no exception at all should be allowed to that rule. It was common knowledge that diplomatic bags were regularly used for extremely undesirable purposes, illicit traffic in diamonds or in foreign currency, for instance. If no exceptions at all were allowed, such illicit traffic would be encouraged. It would be wiser, therefore, to keep in reserve some check on the contents of diplomatic bags, to be applied only when there were very serious grounds to suspect irregularity, and then only on the highest authority and after communication with the mission concerned.

93. He wondered why the Special Rapporteur had abandoned his original text, which ran:

> "The diplomatic pouch shall be exempt from inspection unless there are very serious grounds for presuming that it contains illicit articles. The pouch may be opened for inspection only with the consent of the ministry of foreign affairs of the receiving State and in the presence of an authorized representative of the mission." (A/CN.4/91).

He, personally, would have preferred that original text, subject to certain amendments.

94. Mr. AMADO said that, while understanding the concern of Mr. Bartos and Sir Gerald Fitzmaurice at the extent to which the privilege was abused, he remained faithful to the rule of absolute immunity of the diplomatic bag from inspection.

95. Mr. FRANÇOIS agreed entirely with Sir Gerald Fitzmaurice. Not only the diplomatic bag itself but a host of packages, and even cases, were brought in under the cover of immunity. Illicit traffic was carried on through the medium of the diplomatic mail, often without the knowledge of the head of the mission. The original text of the Special Rapporteur provided full safeguards against violation of the secrecy of diplomatic correspondence, and he could not see why the contents of diplomatic packages, other than such correspondence, should be treated in the way provided for in the amendment.

96. Mr. EDMONDS urged the Commission to give serious consideration to the consequences of allowing any exception to the rule of the inviolability of the diplomatic bag. Despite the existence of abuses, he was very much opposed to any whittling away of the principle.

97. The Special Rapporteur's original text, which admitted exceptions, was too general to be acceptable. It established no definite criteria, for the criterion of "very serious grounds" was too subjective. It was significant that neither the Harvard draft nor the Havana Convention provided for any exception to the rule. Should the Commission, nonetheless, decide to allow exceptions, its text would have to be very carefully framed and lay down clear criteria.

98. Mr. MATINE-DAFTARY shared the views of Sir Gerald Fitzmaurice and Mr. François. Absolute exemption from inspection would encourage abuses. He, too, wondered why the Special Rapporteur had abandoned his original text.

99. Mr. PADILLA NERVO declared himself in favour of unconditional immunity from inspection. Despite the dangers of abuse, he did not believe that the receiving State could unilaterally violated another State's diplomatic pouch. That did not mean, however, that the sending State did not owe a duty to use the pouch exclusively for the transmission of diplomatic correspondence. But—and that was the main point—even the non-observance of that duty did not create a right to inspect the diplomatic pouch; any such situation would have to be remedied by other means.

100. He proposed, firstly, that the Commission should lay down the principle of immunity from inspection, and, secondly, that it should stipulate, either in the article or in the commentary, that the sending State had the duty to use the pouch solely for the transmission of diplomatic correspondence and documentation.

The meeting rose at 1.5 p.m.

399th MEETING

Thursday, 16 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 16 *(continued)*

1. The CHAIRMAN invited the Commission to continue its consideration of paragraph 2 of the Special Rapporteur's redraft of article 16 (398th meeting, para. 27).

2. Mr. TUNKIN said that in stipulating, as he had proposed, that the diplomatic bag could not be subject to opening or detention, the Commission would simply be stating an existing rule of international law. Already, when dealing with article 12, the Commission had decided to omit all qualifications of the fundamental principle of the inviolability of the premises of missions, on the ground that to allow exceptions might lead to an abandonment of the general rule. The same considerations applied to paragraph 2 of article 16. Though abuses of the immunity of diplomatic mail were frequent and