

YEARBOOK  
OF THE  
INTERNATIONAL  
LAW COMMISSION  
1957

*Volume I*

*Summary records  
of the ninth session*

*23 April-28 June 1957*

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UNITED NATIONS





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## INTRODUCTORY NOTE

The summary records which follow were originally distributed in mimeographed form as documents A/CN.4/SR.382 to A/CN.4/SR.430. They include the corrections to the provisional summary records that were requested by the members of the Commission and such drafting and editorial modifications as were considered necessary.

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## MEMBERS OF THE COMMISSION

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<i>Second Vice-Chairman:</i>	Mr. Luis Padilla Nervo
<i>Rapporteur:</i>	Sir Gerald Fitzmaurice
<i>Secretary to the Commission:</i>	Mr. Yuen-li Liang, Director of the Codification Division of the Office of Legal Affairs.

## AGENDA

*Document A/CN.4/105*  
*12 February 1957*

The Commission adopted the following agenda at its 382nd meeting, held on 23 April 1957:

1. Arbitral procedure: General Assembly resolution 989 (X).
2. Law of treaties.
3. Diplomatic intercourse and immunities.
4. Consular intercourse and immunities.
5. State responsibility.
6. Date and place of the tenth session.
7. Planning of future work of the Commission.
8. Other business.

# INTERNATIONAL LAW COMMISSION

## SUMMARY RECORDS OF THE NINTH SESSION

*Held at the Palais des Nations, Geneva, from 23 April to 28 June 1957*

### 382nd MEETING

*Tuesday, 23 April 1957, at 3 p.m.*

*Chairman:* Mr. Francisco V. GARCIA AMADOR;  
*later:* Mr. Jaroslav ZOUREK.

#### Opening of the session

1. The CHAIRMAN declared the ninth session of the International Law Commission open.
2. He welcomed the newly-elected members of the Commission: Mr. Ago, Mr. Bartos, Mr. El-Erian, Mr. Khoman, Mr. Matine-Daftary, Mr. Tunkin, Mr. Verdross and Mr. Yokota. The session, he said, was opening on a note of optimism, the United Nations General Assembly having been practically unanimous in declaring the Commission's work on the law of the sea to be the most valuable contribution so far made to the subject. The Commission's proposal that an international conference of plenipotentiaries be convoked to examine the law of the sea had been adopted by the Assembly, and a tribute had been paid to the work of the Special Rapporteur, Mr. François, who had represented the Commission during the discussion of its report in the Sixth Committee.
3. Mr. LIANG (Secretary to the Commission), after recalling the circumstances in which it had been decided to increase the membership of the Commission, extended a cordial welcome to the new members on behalf of the Secretary-General.

#### Election of Officers

4. The CHAIRMAN called for nominations for the offices of chairman, first and second vice-chairman and rapporteur.
5. Mr. FRANÇOIS proposed Mr. Zourek for the office of chairman, Mr. Pal for first vice-chairman, Mr. Padilla Nervo for second vice-chairman and Sir Gerald Fitzmaurice for rapporteur.
6. Mr. SANDSTRÖM seconded the nominations.  
*Mr. Zourek was unanimously elected Chairman.*  
*Mr. Pal was unanimously elected First Vice-Chairman.*  
*Mr. Padilla Nervo was unanimously elected Second Vice-Chairman.*  
*Sir Gerald Fitzmaurice was unanimously elected Rapporteur.*  
*Mr. Zourek took the Chair.*

#### Statement by the Chairman

7. The CHAIRMAN thanked the members of the Commission for the honour done to him, and on their behalf congratulated the retiring Chairman on the able manner in which he had filled his office.

8. The Commission had several texts before it for consideration, and he hoped that during the session at least one draft would be prepared for submission to Governments and two others adopted on first reading.

#### Adoption of the agenda (A/CN.4/105)

9. The Chairman invited the members of the Commission to give their views, first on the content of the agenda and then on the order in which the items should be studied.
10. In the absence of any observations on the content of the agenda, he suggested the following order of discussion for the various items: Diplomatic intercourse and immunities. Arbitral procedure, Law of Treaties, State responsibility, and Consular intercourse and immunities, the remaining business items to be dealt with at the most convenient opportunity.
11. Mr. FRANÇOIS proposed that since, under General Assembly resolution 989 (X), the report on arbitral procedure was not to be submitted to the General Assembly until 1958, that item be placed last.
12. Mr. LIANG, Secretary to the Commission, observed that the discussion of the Commission's draft convention on arbitral procedure at the tenth session of the General Assembly had put the question in an entirely new light. The Special Rapporteur, Mr. Scelle, would no doubt wish to make an oral report on the comments made at that session in addition to his written report.<sup>1</sup> That being so, the best course would perhaps be to hold a general discussion early in the Commission's session on the manner in which the item should now be handled by the Commission.
13. Mr. SCELLE said that the law of treaties would seem to have priority in the Commission's work. What he had to say on the discussions at the tenth session of the General Assembly would not take very long. It was his intention merely to propose that, instead of framing a draft convention which would run very little chance of adoption by States, the Commission should establish a model text on arbitral procedure to which States could refer whenever they desired.
14. Mr. FRANÇOIS accepted the Secretary's suggestion.
15. The CHAIRMAN said that, bearing in mind the suggestion made by the Secretary to the Commission, the Chairman's proposal concerning the order of discussion of the agenda items would be considered as adopted, if there was no objection.

*It was so decided.*

*The agenda (A/CN.4/105) was adopted.*

The meeting rose at 3.40 p.m.

<sup>1</sup> Later issued as document A/CN.4/109.

### 383rd MEETING

Wednesday, 24 April 1957, at 9.45 a.m.

Chairman: Mr. Jaroslav ZOUREK.

#### Statement by Mr. Tunkin

1. Mr. TUNKIN expressed his profound regret that the legal system of the great People's Republic of China was not represented on the Commission. He was aware of the fact that the Commission was unable to correct the situation when China, although a Great Power and a Member of the United Nations, was not represented there; but he thought it proper to remind the members of the Commission before they started their work of that grave injustice to the Chinese people and flagrant violation of international law.

2. He believed that most of the members of the Commission would share his hope that the time was near when representatives of the great modern China would be welcomed by all the organs of the United Nations, and the sooner that happened the better for international relations in general and for the international law the Commission had to deal with.

3. The CHAIRMAN, speaking as a member of the Commission, recalled that he had already drawn attention at previous sessions, and in 1955 in particular, to the fact that the legal system of the People's Republic of China was not represented on the Commission. At the time, he had expressed the hope that the next elections to the Commission would ensure representation of the legal system of that great nation. He deeply regretted that his hope had not been fulfilled, and was convinced that the Commission would not be properly constituted, in accordance with article 8 of its Statute, until representation of the civilization and legal system of the People's Republic of China was provided by the electing of a candidate nominated by the Central People's Government of the People's Republic of China.

4. Sir Gerald FITZMAURICE said that, without wishing to enter into a controversy, he would point out that all members of the Commission were appointed in their personal capacity.

5. The CHAIRMAN said that the Commission took note of Mr. Tunkin's statement.

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

[Agenda item 3]

6. The CHAIRMAN suggested that the Commission hold a general debate on the draft for the codification of the law relating to diplomatic intercourse and immunities (A/CN.4/91) submitted by the Special Rapporteur, Mr. Sandström, without going into questions of drafting.

*It was so agreed.*

#### GENERAL DEBATE

7. Mr. SANDSTRÖM, Special Rapporteur, introducing his report (A/CN.4/91), recalled that the Commission, which had had the codification of diplomatic intercourse and immunities on its list of topics from the outset, had been requested in General Assembly resolution 685 (VII) to undertake the codification of the topic as soon as possible and to treat it as a priority topic.

Various amendments had been proposed to the Yugoslav draft resolution,<sup>1</sup> on which the General Assembly resolution was based, including one that the scope of the draft should be extended to include the right of asylum. The fact that the Sixth Committee of the General Assembly had rejected that amendment<sup>2</sup> suggested, however, that it regarded the right of asylum, though in some ways connected with diplomatic intercourse and immunities, as a separate subject to be dealt with under the general question of asylum.

8. In preparing his draft, he had been able to draw on a wealth of documentation, including international conventions, national laws, draft regulations prepared by scientific institutes and scholars, and numerous theoretical studies. The collection of laws and regulations in course of preparation by the Secretariat had proved particularly valuable. Perhaps the most comprehensive text was the Convention regarding Diplomatic Officers adopted at Havana on 20 February 1928, to which he would have occasion to refer when considering the various articles of his draft.

9. Sir Gerald FITZMAURICE thought he perceived a certain difference in emphasis between the Special Rapporteur's commentary and the articles of his draft. The draft itself plunged *in medias res* without attempting to set out the theoretical aspects of the diplomatic function. The commentary, on the other hand, contained a very interesting discussion of those aspects, which, incidentally, were also thoroughly dealt with in the excellent memorandum prepared by the Secretariat on the codification of the international law relating to diplomatic intercourse and immunities (A/CN.4/98).

10. It would be useful, however, to include at the beginning, either of the draft or of the part dealing with privileges and immunities, an article setting out the view of the Commission—if it were possible to arrive at a common view—as to the basis of the diplomatic function. The Special Rapporteur described the various theories on the subject—the exterritoriality theory, the dignity or sovereignty theory, the representational theory, and the theory of functional necessity—and pointed out that all had been subject to criticism; but he came to no conclusion as to their respective merits, although, to judge from paragraph 22 of his commentary (A/CN.4/91), he seemed to imply that the functional theory was the most satisfactory. He himself would like to go further and say that it was the correct one. The theory of exterritoriality would not bear close examination, and the other opinions were open to serious criticism. The functional theory, on the other hand, though it had been criticized, was very near to the truth, for the simple reason that, in the last analysis, it was impossible for a diplomatic agent to carry out his duties unless accorded certain immunities and privileges.

11. It might also be useful to include a definition of the diplomatic function, which might be said to consist of two elements: the more obvious representational element and another element, often misunderstood, which was that of keeping the Government of the sending State accurately informed of any matters in the receiving country which might be of interest. It being essential for Governments to have sources of information other than the newspapers, the transmission of proper information was a very important function of all diplomatic missions,

<sup>1</sup> See *Official Records of the General Assembly, Seventh Session, Annexes*, agenda item 58, document A/C.6/L.248.

<sup>2</sup> *Ibid.*, document A/2252.

and one which they were intended to carry out. Naturally, such a definition of the diplomatic function would have some bearing on the conception of the functions and privileges of diplomatic agents. He did not wish to make any definite proposal for the moment, but would be grateful if the Special Rapporteur would consider the two points he had mentioned.

12. Mr. YOKOTA pointed out that, under General Assembly resolution 685 (VII), the Commission's task was to ascertain existing principles and rules and recognized practice among States with regard to diplomatic intercourse and immunities; and the best way to ascertain them was to examine the contents of treaties, multi-lateral or bilateral, and recognized practice.

13. Like the Special Rapporteur, he was not greatly concerned with theories, such as those of extritoriality or of functional necessity. They did no more than attempt to explain positive rules and principles already in existence, and were largely of academic interest. In any case, widely divergent views were held as to the theoretical basis of the diplomatic function. He would prefer the draft articles to begin by stating the positive rules of law.

14. Mr. LIANG (Secretary to the Commission) explained that the collection of laws and regulations relating to diplomatic and consular intercourse and immunities, referred to by the Special Rapporteur, existed only in draft form. Only two copies were available, and those had been placed at the disposal of the two Special Rapporteurs concerned. The collection, which was still incomplete, would probably be published in 1958 as part of the *Legislative Series*.

15. The memorandum on the codification of the international law relating to diplomatic intercourse and privileges (A/CN.4/98), though issued in 1956, had been prepared by the Secretariat soon after the Commission had decided to place the topic on its agenda. Since the collection of laws and regulations was still far from complete at that time, the memorandum was based largely on theory and such documents as were then available.

16. Mr. BARTOS said that the excellent draft codification produced by the Special Rapporteur (A/CN.4/91) was in itself sufficient evidence of the existence of a body of general rules of positive law. His criterion in marshalling the rich collection of material ripe for codification had clearly been to formulate rules of practical significance. Every rule in the draft was derived not from rational law but from day-to-day diplomatic reality. Consequently, the draft, with some reservations, could be put to practical use, and embodied in a convention or other appropriate instrument.

17. Since the First World War, a new form of diplomatic activity—roving or *ad hoc* diplomacy—and emerged, and, partly owing to the establishment of the League of Nations and the United Nations, had assumed such proportions that there was now no problem that could not be handled by such special envoys. The Special Rapporteur had preferred to confine his draft to the rules of “sedentary” diplomacy. Since, however, there was a considerable body of rules governing the exercise of *ad hoc* diplomatic functions, in the shape of the different conventions on the privileges and immunities of the United Nations and the specialized agencies and the provisional regulations for various special conferences, he wondered whether the Special Rapporteur could not extend the scope of his draft to include the codifica-

tion of that second aspect of day-to-day diplomatic activity.

18. It was typical of the Special Rapporteur that he had not flinched from taking a positive stand, even on points which were open to doubt. There was, for instance, a tendency either to reduce or to increase not only the number of persons enjoying diplomatic immunities but also the scope of those immunities. To take a case in point, in relations between Yugoslavia and the United Kingdom, the latter had recently withdrawn diplomatic immunity from certain categories of Yugoslav staff on the ground that such treatment was not reciprocated by Yugoslavia. The Special Rapporteur, however, had carried the concept of the unity of the diplomatic service to its logical conclusion, claiming protection for all diplomatic agents, whether diplomats proper, experts, or personal servants, and regardless of whether they had the nationality of the sending State or not.

19. The concept of diplomatic immunity could not be rigidly applied when there was a conflict of rights of protection: the diplomat's right of *franchise de l'hôtel* on the one hand, and the right of the receiving State to intervene, in an emergency, to protect persons and buildings near to diplomatic residences. The general rule appeared to be that intervention in such cases was permitted; indeed there were instances where such action had been approved by the sending State. Thus, there were exceptions to the general principle, and, if the draft was to be accepted by States, the Commission should hesitate to include anything other than generally accepted rules.

20. Mr. GARCIA AMADOR observed that from the outset the Commission had disregarded the strict sense of the term “codification” in order to include well-established and desirable innovations in international law. That tendency was particularly apparent in the Commission's draft articles on the law of the sea,<sup>3</sup> and, to judge from the favourable reception of the latter by the General Assembly, might be said to have won its approval.

21. Diplomatic intercourse and immunities was one of the subjects least open to innovation. As Mr. Bartos had pointed out, however, some developments had taken place, and the rules might well be made extensible, by analogy, to special missions, which had already been the subject of international conventions. But a distinction must be drawn between permanent missions, such as those accredited to offices of the United Nations or those maintained in Washington by members of the Organization of American States, which bore a strong analogy to traditional diplomatic missions, and *ad hoc* missions to a particular conference, where the analogy was less marked.

22. A third category whose diplomatic immunity required codification was the officials of international organizations. Officials of the United Nations and other international organizations with political functions were sometimes entrusted, under the terms of the organization's charter or by special resolution, with diplomatic tasks far exceeding in scope and importance those which fell to the lot of traditional diplomats. Such officials should have the rights and immunities appropriate to their position in the diplomatic hierarchy. From the form in which the International Court of Justice had expressed its advisory opinion of 11 April 1949 on reparation for

<sup>3</sup> *Ibid.*, Eleventh Session, Supplement No. 9, chap. II.

injuries suffered in the service of the United Nations,<sup>4</sup> it was clear that it regarded such international organizations as possessing an objective international personality. It was therefore logical that their officials be included in a codification of diplomatic immunity.

23. As for the right of diplomatic asylum, a subject in which a Latin-American jurist was understandably interested, he would be grateful if the Commission would study the matter when it had time and include appropriate provisions in a separate draft.

24. Mr. PAL drew the Commission's attention to the terms of General Assembly resolution 685 (VII), and observed that the task entrusted to the Commission was to formulate with precision the existing principles and rules and recognized practices concerning diplomatic intercourse and immunities. The Special Rapporteur in his draft had presented what he considered to be such existing rules and practices, and had given his own formulation of those rules and practices. He had rightly confined himself to recognized fields where there existed accepted and recognized principles, rules and practices. Bases like extraterritoriality were mere covering generalizations, and the Commission would do better to avoid any formulation of such bases. No such basis was universally recognized, and such bases were not existing principles within the meaning of the terms of the General Assembly resolution.

25. The Commission's immediate efforts should be directed to see if the draft presented the existing rules and recognized practices, and if the formulation thereof was precise. If the Commission desired to go further and traverse the field where the practices and rules were still unsettled, it would be welcome to do that afterwards.

26. Mr. KHOMAN suggested that it might be possible to combine the approach adopted by the Special Rapporteur with that advocated by Sir Gerald Fitzmaurice, namely, to introduce some general propositions from which the draft rules derived. If that were done, however, the Commission would have to allow for a lengthy discussion of the draft in the General Assembly.

27. He fully concurred with the view that *ad hoc* diplomacy had introduced new elements into international life which it was difficult to disregard. He wished particularly to draw attention to the phenomenon of special missions exchanged by States between which there was no regular diplomatic intercourse. For instance, the fact that, up to the present, Thailand had had little permanent diplomatic intercourse with Latin-American countries did not prevent either side from establishing temporary intercourse through the medium of special missions. The draft might well include provisions regulating such developments.

28. Though Mr. Pal had rightly drawn attention to the limited scope of the task of codification entrusted to the Commission, the fact remained that there were numerous international organizations in existence which constituted a very important development in international life, and one which must be taken into consideration.

29. Mr. AMADO regretted that his inability to attend the opening of the session had deprived him of the pleasure of voting for a group of officers of whose election he so heartily approved.

30. In the matter of codification, the Commission was faced with a choice of method. It could either keep

strictly to the subjects which the Special Rapporteur, with his sense of practical possibility, had endeavoured to formulate, or it could try to codify matters whose codification had not so far been envisaged, and on which, in some cases, no positive rules existed. The best course might be to survey the ground first, and see if there were any rules on which opinion was not divided. The Commission could then go on to the next stage, always with the basic principles in mind.

31. Mr. EL-ERIAN fully agreed with Sir Gerald Fitzmaurice that the Commission's draft should include a clear expression of its views as to the basis of the privileges and immunities that were recognized. Although he did not underestimate the part that other theories had played in the development of diplomatic intercourse, he felt the time had come for the International Law Commission to come out plainly in favour of the realistic modern theory as to the basis of diplomatic privileges and immunities, namely, the so-called functional or "demands of the office" theory which found expression in Articles 104 and 105 of the United Nations Charter. It was true that the theory of extraterritoriality had found favour for a time, not only in connexion with diplomatic privileges and immunities but also as the justification for ascribing jurisdiction over a ship on the high seas to the flag state. It was not, however, in accordance with modern thinking to base international law on a fiction. Moreover, the theory of extraterritoriality could give rise to confusion and anomalies; for example, although, in accordance with that theory, a child born on diplomatic premises should receive the sending State's nationality where that State was a *jus soli* country, in practice it did not.

32. With regard to the form and arrangement of the report, the Special Rapporteur had rightly deemed it necessary to include provisions on the duties of a diplomatic agent, but had placed them at the very end of his draft, so that they appeared to be in the nature of qualifications to all the preceding provisions relating to privileges and immunities. It might be preferable to place them at the beginning, so as to bring out the fact that the privileges and immunities conferred on diplomatic agents resulted from the nature of their duties.

33. Mr. SCALLE said that, if the Commission wished, it could of course confine itself to the question of relations between States, but in that case it should change the title of the topic to "Diplomatic intercourse and immunities in relations between States". There were many other types of diplomatic intercourse and immunity, and it was to them that the functional or "demands of the office" theory, which had been defended by a number of previous speakers, was particularly relevant. He was not urging that the Commission necessarily enlarge the scope of the Special Rapporteur's report but only that it should immediately afterwards take up such questions as the privileges and immunities conferred on international organizations. If it omitted to do so, it would be disregarding article 1 of its Statute, which placed the progressive development of international law on an equal footing with its codification as one of the Commission's objectives.

34. Mr. YOKOTA asked whether it had been the Special Rapporteur's intention to exclude from the scope of his draft the permanent Government representatives accredited to international organizations, or whether he considered they could be assimilated to diplomatic agents accredited to States. They were different with regard to

<sup>4</sup> *I.C.J. Reports 1949*, p. 174.

the manner of appointment, but almost identical with regard to the privileges and immunities conferred. Any way it might be more convenient for the Commission to begin by confining itself to diplomatic agents in the strict sense, provided that at a later stage it went on to study the position with regard to the category to which he had referred, one that was increasing continually in numbers and in importance.

35. Mr. TUNKIN felt that the Commission must bear in mind that it was engaged in preparing drafts which States would be asked to accept and to apply in practice. While, therefore, it could not by-pass theoretical problems altogether, and must deal resolutely with such as arose in its path, it should concentrate on achieving practical results. Moreover, it was often easier to reach agreement on practical points than on theory.

36. The Special Rapporteur had accordingly been right to attempt to base his draft on existing international rules. There were, however, some places where the draft departed from the existing rules. He had in mind particularly article 12, paragraph 1, relating to *franchise de l'hôtel*, and article 16, paragraph 2, relating to the diplomatic pouch. He appreciated the dangers which the Special Rapporteur sought to counteract by the innovations he proposed, although to Mr. Tunkin's mind they were probably more theoretical than real; but he feared that the difficulties and disputes to which they might themselves give rise would be only too real.

37. On the other hand, he agreed with the Special Rapporteur that the report should be confined to the question of diplomatic privileges and immunities in the strict sense. It was undeniable that there was also a problem of the privileges and immunities enjoyed by international organizations, but that was quite a different problem.

38. Mr. VERDROSS pointed out that people often arrived at the same practical conclusion, though arguing from different premises. He was therefore inclined to agree that the Commission should not bother unduly about theoretical points, but should proceed at once to study specific problems.

39. With regard to the scope of the future draft, he agreed that the question of relations between international organizations and between them and States was one that had to be regulated by international law, but felt that the Commission would be wise to begin by regulating the classical field of diplomatic relations before considering how far the rules it had laid down were applicable to international organizations.

40. Mr. LIANG (Secretary to the Commission) recalled that on more than one occasion in the past he had expressed the Secretariat's considered view that, despite any similarity of the basic problems involved, it might be somewhat inconvenient to deal with the making of treaties by international organizations at the same time as the making of treaties between States. What he had said on those occasions applied with equal, if not more, force to the present case. Reading the text of General Assembly resolution 685 (VII), it seemed clear that the General Assembly—like, he thought, the Yugoslav Government, in submitting the draft resolution from which that resolution had sprung—had had in mind diplomatic privileges and immunities as between States.

41. The status of international organizations, and the privileges and immunities conferred on their agents and the permanent Government representatives accredited

to them, unlike the privileges and immunities conferred on diplomatic agents in the strict sense, were matters that had been regulated almost exclusively by conventional law and to which international custom had not yet made any appreciable contribution. It might possibly be desirable for the Commission to analyze the text of Articles 104 and 105 of the United Nations Charter, the Conventions on the privileges and immunities of the United Nations and of the specialized agencies and related instruments, and to study the way in which they had worked in practice; but that would clearly be a very different task from that with which it was faced in connexion with diplomatic privileges and immunities in the strict sense. For those reasons, he thought that the approach adopted by the Special Rapporteur, which was also that adopted by the Institute of International Law and the Harvard Research, was the correct one.

42. On the other hand, it might well be appropriate to include *ad hoc* and other forms of "roving" diplomacy in the Commission's draft.

43. Mr. BARTOS said that, as he had been its chief legal adviser at the time, he could confirm that the purpose of the Yugoslav Government's proposal at the seventh session of the General Assembly had been to secure the study not only of what he had called "sedentary" diplomacy but also of all other forms of diplomatic relations *between States*. It had not had in mind, nor had he mentioned in his statement earlier in the meeting, the question of the staff of international organizations, who could not be regarded as diplomats properly speaking.

44. Mr. SCELLE said that he had no objection to the Commission's limiting itself for the present to diplomatic intercourse between States. He merely wished to avoid its giving the impression of entirely overlooking all other forms of diplomatic intercourse.

45. International organizations necessarily enjoyed certain diplomatic privileges and immunities. Their role was already a very important one, and would become still more so; and as it did so the sovereign jurisdiction of States would diminish. For international law was made up exclusively of matters which had been successively removed from the sovereign jurisdiction of individual States, in the same way as Roman law had been made up exclusively of matters that it had once been the *paterfamilias'* sole responsibility to decide.

46. If the Commission appeared to be simply disregarding the existence of privileges and immunities other than those conferred in relations between States, it would be flying in the face of a tendency which had been gaining strength for over fifty years. Even before the First World War there had been international organizations with international responsibilities and an international personality, which necessarily entailed their being allowed to maintain international relations.

47. Sir Gerald FITZMAURICE said that, while he sympathized with much of what Mr. Scelle had said, he was bound to admit the force of Mr. Liang's remarks. Moreover, the fact that the relations of international organizations were regulated by convention made it dangerous to attempt to codify them, since, unless the Commission adopted exactly the same rules as were to be found in the instruments already in force, it would give rise to conflicts of law. In fact, the various instruments were not identical, so that it would be impossible for the Commission to lay down rules which did not conflict

with at least some of them. For those reasons, he felt that the Commission should not attempt to codify the question of the privileges and immunities conferred on international organizations and permanent Government representatives accredited to them, at any rate for the present.

48. The CHAIRMAN, speaking as a member of the Commission, said that he fully shared the view that the Commission should be guided strictly by the letter and spirit of General Assembly resolution 685 (VII). The Special Rapporteur was to be congratulated on not having succumbed to the temptation to extend the scope of his report to cover privileges and immunities which, though to outward appearance similar, were by nature and origin very different. On the other hand, he saw no objection to some addition being made to the draft in order to cover *ad hoc* missions.

49. There were a number of points in the Special Rapporteur's draft which, in his view, merited special consideration. In the first place, the privileges and immunities which the Special Rapporteur proposed should be extended to diplomatic agents who were nationals of the receiving State were much greater than those recognized under the existing law. An analysis of national legislations and international practice clearly showed that States were not prepared to recognize diplomatic privileges and immunities as attaching to their nationals if they should become diplomatic officials of foreign States. While such cases were quite rare nowadays, the problem arose more frequently in cases where a diplomatic official married a national of the receiving State, or where the nationality of the latter was not affected by the marriage. Secondly, careful consideration should be given to the innovations which the Special Rapporteur proposed with regard to the universally recognized principles of the inviolability of mission premises and the inviolability of the diplomatic pouch.

The meeting rose at 12.50 p.m.

### 384th MEETING

Thursday, 25 April 1957, at 9.45 a.m.

Chairman: Mr. Jaroslav ZOUREK.

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

[Agenda item 3]

##### GENERAL DEBATE (continued)

1. Mr. EDMONDS congratulated the Special Rapporteur on a well-presented, concise and complete draft, (A/CN.4/91). The task of the Commission, as Mr. Edmonds understood it, did not extend beyond the rights and privileges of officers normally included in the category of those carrying out diplomatic duties. General Assembly resolution 685 (VII) appeared to confirm that impression, and, what was perhaps more important, the persons conducting negotiations or engaged in special diplomatic missions differed so greatly in status that it seemed almost impossible to generalize regarding them. Were the Commission to attempt to do so it might well lose itself in a mass of detail.

2. Mr. MATINE-DAFTARY, after congratulating the Special Rapporteur on his masterly report (A/CN.4/91) and the Secretariat on its well-documented study (A/CN.4/98), said he was interested to learn from paragraph 3 of the Special Rapporteur's

commentary that one of the reasons given in the Yugoslav explanatory memorandum for urging that the Commission give priority to the codification of "diplomatic intercourse and immunities" was that "of late . . . the violations of the rules of diplomatic intercourse and immunities have become increasingly frequent".<sup>1</sup> He would be interested to hear whether Mr. Bartos considered the draft satisfactory from that standpoint.

3. He was glad that the draft submitted by the Special Rapporteur included provisions to put an end to certain abuses. Among other provisions, article 5 of the draft recognized the right of the receiving State to limit the number of members of a diplomatic mission. Though there could be no doubt of the theoretical soundness of that provision, he wondered how far it would be possible, in practice, for uninfluential States to exercise such a right.

4. Mr. YOKOTA said that the question of reciprocity in connexion with diplomatic immunities and privileges was a most important one. The statement in paragraph 36 of the Secretariat's memorandum (A/CN.4/98) that "it is also apparent from these various provisions that immunities are granted on a reciprocal basis; this point seems to be of paramount importance" was liable to misinterpretation. If States considered themselves free to grant immunities or not on a reciprocal basis, some might refuse to grant them at all. Such an interpretation was not in accordance with customary international law, under which States were bound to accord the recognized privileges and immunities to foreign diplomatic agents. If a State refused to do so, it was violating the customary rules of international law, and it was then that the institution of reprisals came into play, in so far as a State whose diplomatic agents had had their immunities restricted or refused by another State was entitled to take similar action with regard to the diplomatic agents of the second State. It might perhaps be desirable to include a provision to that effect in the draft.

5. Sir Gerald FITZMAURICE said that Mr. Yokota had raised a very important question. The case he had mentioned was rather one of reprisal than of reciprocity. It might be a moot point whether the principle of reciprocity was a matter of general international law, but in practice it was undoubtedly of great significance. While some countries were extremely liberal as regards privileges and immunities, others tended to limit the number of members of diplomatic missions entitled to them. Sometimes the dividing line was drawn at a certain level in the diplomatic hierarchy. In such cases, the principle of reciprocity must surely be valid. A State could, of course, continue to grant privileges and immunities to foreign diplomatic agents even when its own agents did not receive similar treatment, but it must be entitled to apply some restrictions if it wished.

6. Mr. BARTOS said that the Commission should not place too narrow an interpretation on its term of reference as embodied in the General Assembly resolution. The Yugoslav delegation, when proposing in 1952 the codification of the topic as a matter of priority, had admittedly had in mind intercourse between States, and not relations between States and international organizations. But international organizations were also possessed of personality in public international law, not merely on the basis of the advisory opinion of the International Court of Justice but on general grounds. There was therefore

<sup>1</sup> Official Records of the General Assembly, Seventh Session, Annexes, agenda item 58, document A/2144/Add.1.

nothing to prevent the framing of additional provisions governing the privileges and immunities of international organizations. They should not, however, be included in the present draft.

7. On the question of sources of international law, it was essential to be agreed on what was to be understood by a "source". The practice of nations, even though sometimes at variance, was a legitimate source. The main point, however, was to ascertain what rules of law, from whatever source, were acceptable to States. Though it was not possible accurately to predict to what points States would be opposed, some rules were clearly not acceptable and must be eliminated, thereby reducing the draft strictly to those rules which might be presumed to be acceptable. Incidentally, acceptability was not always a question of substance; the manner of formulating the rule counted for much.

8. Inconsistent as that view might seem with his insistence at the 383rd meeting on the practical criterion, he must say that he felt that the Commission should, if possible, adopt a clear theoretical standpoint and codify its rules of law on that basis. Exceptions could be made, but, in making them, the Commission must realise the extent to which it was departing from its theoretical position. At the same time, the draft must not become too theoretical; priority must be given to practical considerations.

9. He agreed with other speakers that the draft was somewhat lacking in precision on the nature of diplomatic functions. Quite sharp conflicts between nations otherwise on good terms had arisen in recent years precisely over the tendency to expand those functions and thereby extend protection far beyond the limits admitted by classical international law. Social protection, for instance, had never been a traditional function of diplomatic agents.

10. That point raised the question of the distinction between the codification and the progressive development of international law. Clearly, progressive development could not be neglected, and it was impossible to draw a hard-and-fast distinction between it and codification. On the other hand, he was not in favour of merging the two concepts completely. Only clearly marked new trends which enjoyed general acceptance could be regarded as suitable subjects for codification.

11. Another difficult point, at a time when more and more diplomatic conferences were being held under the auspices of international organizations, was how to draw a distinction between State intercourse within and without such organizations. Quite apart from special conferences, periodical meetings of groups of States, such as those held by the Organization of American States, were also a common phenomenon. It could, of course, be argued that in attending such conferences States were merely participating in the life of the international organization. So far, however, he had failed to find any clear dividing line between State diplomatic activity inside and outside international organizations.

12. Finally, he was not at all sure that the Convention on the Privileges and Immunities of the United Nations had in fact accorded diplomatic status to United Nations officials. Members of Government delegations had clearly been given a type of diplomatic privilege and immunity, and the Secretary-General had definitely been accorded full diplomatic status, but officials of lower rank enjoyed only those privileges and immunities which were neces-

sary for the performance of their duties. The time was perhaps not ripe for codifying the privileges and immunities of international officials, or of persons, such as the members of the Commission, who were not Government representatives.

13. To sum up; he thought that two further points should be dealt with in the draft: the question of *ad hoc* diplomacy and that of conferences of States under the auspices of an international organization.

14. Mr. MATINE-DAFTARY, amplifying his previous question, enquired what violations the Yugoslav delegation had had in mind when submitting its explanatory memorandum, and whether Mr. Bartos considered that the Special Rapporteur's draft was calculated to prevent such violations in the future.

15. On the question of reciprocity, he would point out that General Assembly resolution 685 (VII) explicitly referred to the *common observance* "by all governments of existing principles and rules and recognized practice concerning diplomatic intercourse and immunities". All diplomats in the same capital must be treated on the same footing. Discrimination based on reciprocity would be like having "two different kinds of weather on the same roof" according to a Persian proverb—the sun and snow at the same time. The principle of reciprocity would be admitted in trade and business agreements, for example, but not in the according of customary privileges and immunities.

16. Mr. BARTOS said that, as a member of the Commission, he could not speak for the Yugoslav Government. The difficulties referred to in the Yugoslav Government's explanatory memorandum were fortunately a thing of the past and best forgotten. Yugoslavia was very glad that the draft had been produced, not because of any disputes that Yugoslavia might have had but because of the rules established in the draft.

17. Mr. LIANG (Secretary to the Commission), referring to paragraph 36 of the Secretariat's memorandum (A/CN.4/98), said that it had been far from the thoughts of the authors of the memorandum that reciprocity should be considered as the basis for the law governing diplomatic immunities. Reciprocity, however, played an important part in international law as embodied in treaties, particularly bilateral treaties. Some treaties merely mentioned the fact that the customary privileges and immunities were to be granted; others referred to immunities which were over and above the customary ones and to be accorded on a basis of reciprocity. He himself recalled that in treaties between China and other countries some thirty years ago, for instance, the privilege of *franchise de bagages* had been included on a basis of reciprocity, since it was not regarded as guaranteed by any established rule of customary international law.

18. Mr. KHOMAN remarked that the principle of reciprocity was at the very basis of the system of privileges and immunities. In practice, when one State failed to respect the privileges and immunities of the diplomatic agents of another State, the second State could take similar measures by way of reprisal. He wondered, however, what grounds there were in international law for such action. Naturally, if the draft articles were strictly applied, diplomatic privileges and immunities would always be respected. Provision should, nonetheless, be made for exceptional cases.

19. Mr. YOKOTA observed that a distinction must be drawn, in the matter of reciprocity, between those privileges and immunities which were firmly based on international custom and those which were not. Any restriction on privileges and immunities in the first category would constitute a violation of international law entitling the aggrieved State to adopt similar measures by way of reprisals. In the case of the second category of privileges and immunities, however, States were free to determine on a reciprocal basis what diplomatic officers were entitled to enjoy them.

20. Faris Bey EL-KHOURI said that another kind of restriction was that placed on the size of missions and on the numbers of officials in the various categories composing the mission. There was a tendency among some powerful States to swell their missions to excessive proportions, and to include in them all kinds of cultural and press attachés, etc., whose activities had nothing to do with diplomacy, and who were sometimes used for improper purposes. The Commission should consider whether some restrictions could be placed on the size of missions, and whether privileges and immunities should be granted to all the officers composing a mission.

21. Mr. AMADO felt that the discussion had been useful, even if it had related mainly to questions of theory. The value of a theory was determined, in practice, by the fruit it bore. Thus the theory of extraterritoriality, though based on a fiction, had been of practical value at a given stage of legal development.

22. In his view, however, the Commission's first task was to find out on what specific points international and domestic practice was already uniform, leaving aside not only the contentious points referred to in paragraph 28 of the Special Rapporteur's commentary but also such self-evident truths as were implicit in the principle of the equality of States and the principle of reciprocity. It would then have a solid factual basis for its work, and could, if it wished, go on to consider such other matters as the theoretical basis of the privileges and immunities that were recognized in practice.

23. The CHAIRMAN, speaking as a member of the Commission, said that, in his view, it did not seem possible to speak of diplomatic relations except on the basis of a right of legation, active and passive. Such a right existed only as between States. Although not necessarily any less important, relations between States and international organizations were on a different footing, and were, moreover, the subject of conventions, which regulated the position of permanent Government representatives to international organizations as well as that of the organizations themselves. For those reasons, he agreed that the Commission should confine itself to diplomatic intercourse and immunities in the sense in which those terms had always been understood, in other words, as applying to permanent or *ad hoc* missions sent by one State to another.

24. As regards the method to be followed, he agreed with Mr. Amado and previous speakers that the Commission should begin by determining what rules already enjoyed universal acceptance.

25. Mr. SANDSTRÖM, Special Rapporteur, said that the reasons why he had limited the scope of his draft were explained in paragraphs 10 to 13 of his commentary, and that the foregoing discussion had made him more convinced than ever that those reasons were sound. He was glad that the Commission was not being pressed

to extend the draft to cover the privileges and immunities enjoyed by international organizations. The question whether it should study that topic later was a different one. In his view, it could be more appropriately studied by the Secretariat.

26. He had not overlooked the question of "roving" or *ad hoc* diplomacy, but had intended to raise it during the discussion of the relevant articles. There was, he felt, no doubt that the provisions relating to permanent diplomatic missions should also apply wherever possible to roving missions, but it might be desirable to include a specific statement to that effect.

27. He hesitated to accept Sir Gerald Fitzmaurice's suggestion that the Commission should refer in its draft to the theoretical basis of the recognized privileges and immunities, since many of the universally accepted rules were derived from theories that had now become outmoded. Moreover, judgments on questions of fact helped to determine the actual rules quite as much as the theories on which they were supposedly based. He was also doubtful about Sir Gerald's suggestion that the Commission should define the diplomatic function, since the present age was one of rapid development in that respect. Diplomatic missions nowadays dealt with many questions which had formerly lain outside their province, and any pronouncement by the Commission on the subject might well appear antiquated in a few years' time.

28. With regard to Mr. Bartos's remarks, it was true that Mr. Sandström's draft reflected certain tendencies, but it was nonetheless primarily based on the existing rules. Even where it reflected tendencies, he could not agree that it always went beyond existing practice, although such practice might not be universal; thus the exception which he proposed to the principle of *franchise de l'hôtel* in article 12, paragraph 1, was already part of international law, although it might be thought preferable to leave the matter out of the draft, to assure a more supple handling under the discreet direction of the ministry of foreign affairs concerned of any cases that might arise.

29. With regard to reciprocity, all members of the Commission would surely agree that ideally the rules should apply to all States on an equal footing. On the other hand, it was impossible not to be impressed by the number of times that national laws made reciprocal treatment an express condition for granting immunity in respect of taxation and customs duties. Such immunities were commonly regarded as matters of courtesy rather than as based on rules of international law, and the principle of reciprocity did not therefore seem out of place in connexion with them. A possible solution would be to lay down minimum privileges and immunities, which all States should extend to foreign diplomatic agents, and state that any State which so wished could grant further privileges and immunities to the diplomatic agents of other States, subject to reciprocity.

30. As regards the duties of diplomatic agents (articles 27 and 28 of the draft), his aim had been simply to avoid giving the impression that, by virtue of all the privileges and immunities referred to in the preceding articles, a diplomatic agent was at liberty to disregard the laws and regulations of the country to which he was accredited.

31. The other points that had been raised could best be dealt with during the discussion of the articles to which they related.

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

32. The CHAIRMAN invited the Commission to consider the Special Rapporteur's draft (A/CN.4/91) article by article.

33. He said that amendments which were accepted by the Special Rapporteur need not be voted on. Since the Special Rapporteur would have to redraft the comments on the individual articles in the light of the discussion, the Commission need not discuss their wording now. In the Commission's final draft, each article would, for the sake of convenience, be followed immediately by the comment relating to it.

ARTICLE 1

34. Mr. VERDROSS pointed out that article 1 referred to States possessing the right of legation, but did not specify which States possessed that right. It was evident that all independent or sovereign States possessed it, but so also might states members of a federal State. That was the case when, under the constitution of the federal State of which they formed part; they had the right to enter into diplomatic relations. Consequently, a choice had to be made between two possibilities: either article 1 should indicate which States possessed the right of legation, or the phrase "possessing the right of legation" should be deleted.

35. Sir Gerald FITZMAURICE said that, although the principle laid down in article 1 was in theory correct, in practice a State which was a member of the family of nations and belonged, as almost all States did now belong, to the United Nations would be acting in a highly unusual manner if it refused to institute diplomatic relations with another State, save for quite exceptional and temporary reasons such as non-recognition. It might be difficult to reflect that point in the text of the article itself, but it could perhaps be done in the commentary, which had often in the past been used to give effect to the wishes of particular members without altering the text of the actual articles.

36. Mr. PAL agreed with Mr. Verdross that the words "possessing the right of legation" should be deleted. The very basis of the diplomatic relation being the agreement of the States concerned, the operation of the rules thereafter formulated would begin as soon as such an agreement was arrived at. The presence or absence of the so-called right of legation would hardly add or detract anything. Moreover, who was to determine whether or not a State possessed the right of legation, and by what test?

37. Mr. EL-ERIAN said that he too had doubts about those words since their inclusion would raise controversial questions. The whole concept was a complex one, involving as it did distinctions between the "perfect" and the "imperfect" and the "active" and the "passive" right of legation, and it was significant that such a right was not referred to in the draft Declaration on Rights and Duties of States.<sup>2</sup>

38. He also felt it would be unwise to bring in the concepts of independence and sovereignty.

39. Mr. BARTOS pointed out that two States which agreed to institute permanent diplomatic relations with

one another did, on occasion, include in the instrument instituting such relations a provision which, in effect, curtailed the right of one or both of them to establish a diplomatic mission in the other's territory. Unless the Special Rapporteur could cover that point in the comment, he proposed the addition of the following words at the end of article 1: "unless another method of maintaining diplomatic relations has been agreed on between them".

40. Mr. AMADO felt that, as drafted, article 1 was redundant. To say that a State possessed the right of legation meant that it had the right to establish diplomatic missions abroad. The difficulties inherent in the text could be avoided, without omitting anything of value, if article 1 were deleted and the beginning of article 2, paragraph 1, amended to read: "A State maintaining permanent diplomatic relations with another State must make certain . . ."

41. Mr. GARCIA AMADOR supported Mr. Amado's suggestion. The so-called right of legation was not a right at all in the sense of being enforceable *vis-à-vis* other States. Deletion of article 1 would remove nothing that was not self-evident, and would at the same time obviate the difficulties inherent in the wording. Of course it would always be possible to include something in the comment on the lines suggested by Sir Gerald Fitzmaurice, but it was preferable to restrict the comment to matters that genuinely required explanation.

42. Mr. SCELLE also supported Mr. Amado's suggestion, since no State could legitimately refuse to institute diplomatic relations with another State that wished to enter into diplomatic relations with it, save in exceptional cases. The Commission was, therefore, perfectly entitled to take it as tacitly understood that all States had the right to institute diplomatic relations with all other States, and to establish diplomatic missions in their territory.

43. Mr. KHOMAN agreed that the reference to the right of legation should be omitted owing to the difficulties it raised. On the other hand, it was in accordance with existing practice to make the establishment of diplomatic relations subject to mutual agreement, and that concept should therefore be retained. It was not, however, entirely appropriate to speak of "permanent diplomatic relations", since diplomatic relations could always be severed. It would be preferable to place the word "permanent" before the words "diplomatic mission" so as to distinguish that type of mission from the *ad hoc* missions referred to by Mr. Bartos.

44. In general, he felt it would be desirable to retain article 1 in some form or other, since it served as a kind of introduction to the draft as a whole. He accordingly proposed, bearing in mind the remarks of previous speakers, that it be reworded as follows:

"States, upon mutual consent, may enter into diplomatic relations with each other and may establish permanent diplomatic missions, either in their own or in a third State's territory."

45. Mr. VERDROSS withdrew his suggestion in favour of Mr. Khoman's proposal.

46. Mr. YOKOTA felt that the main point to be brought out in article 1 was that the consent of the receiving State was necessary. If that was agreed, and if no reference were made to the right of legation, which was irrelevant and raised many difficulties, the article could be very simply worded as follows: "A State may

<sup>2</sup> *Ibid.*, Fourth Session, Resolutions, p. 67.

by agreement with another State establish a diplomatic mission with the latter.”

47. Sir Gerald FITZMAURICE said that, while he appreciated the reasons for Mr. Amado's suggestion, he agreed with Mr. Khoman that it was desirable to have some form of introductory article, laying down a general principle. That was one reason why he would have preferred to begin the draft with some kind of definition of the diplomatic function. However, he would not press the point.

48. Mr. SANDSTRÖM, Special Rapporteur, and Mr. PAL both agreed that article 1 should be retained in one form or another, for the reasons given by Mr. Khoman and Sir Gerald.

49. Mr. PAL observed that the principle underlying the article was that the basis of the diplomatic relation was mutual agreement, and that principle should be retained in the draft. It was well established as a principle and universally recognized in international practice.

50. Faris Bey EL-KHOURI thought that the Special Rapporteur's text of article 1 could be retained, omitting the words “possessing the right of legation”, which added nothing to the meaning and raised a number of controversial questions. All that mattered was that the two States concerned should agree to institute diplomatic relations with one another.

51. Mr. MATINE-DAFTARY agreed, and pointed out that if article 1 were deleted altogether, article 2 would become incomprehensible.

52. Mr. AMADO said that he had no desire to delete article 1 if the majority of the Commission wished to retain it. He only felt that, as expressed, it was tautological and contributed nothing to the text.

53. Mr. SCALLE said that he too was not opposed to having some form of introductory article, but only to article 1 as it was worded, containing as it did concepts that were either irrelevant or open to dispute.

The meeting rose at 12.55 p.m.

### 385th MEETING

Friday, 26 April 1957, at 9.45 a.m.

Chairman: Mr. Jaroslav ZOUREK.  
**Diplomatic intercourse and immunities**  
**(A/CN.4/91, A/CN.4/98) (continued)**

[Agenda item 3]

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

#### ARTICLE 1 (continued)

1. Mr. YOKOTA said that he wished to withdraw the amendment he had submitted at the previous meeting (384th meeting, para. 46) in favour of the amendment submitted by Mr. Khoman (384th meeting, para. 44), which was substantially the same.

2. Mr. TUNKIN said that, on both procedural and substantive grounds, he was in favour of deleting the words “possessing the right of legation”. As Mr. Pal had rightly enquired (384th meeting, para. 36), who was to determine whether or not a particular State possessed the right of legation? It was a recognized rule of international law that every sovereign state was *ipso facto* a subject of international law and accordingly possessed

the right of legation. The question whether the constituent States of a federal State possessed such right depended, as Mr. Verdross had remarked at the 384th meeting, on its federal constitution and was not a matter of international law.

3. The institution of permanent diplomatic relations and the establishment of diplomatic missions were, as Mr. Bartos had aptly observed, two different things, and a diplomatic mission could be recalled without diplomatic relations being severed. It would be undesirable for the article to give the impression that the establishment of a diplomatic mission must follow automatically on the institution of diplomatic relations. Were that so, a State which did not wish for the time being to establish a diplomatic mission with another State might be deterred from instituting diplomatic relations with it.

4. Mr. Tunkin was not in favour of Mr. Amado's proposal to omit the whole article (384th meeting, para. 40), since he agreed with Sir Gerald Fitzmaurice that, whenever possible, the Commission should state a principle. In his opinion, the principle might be formulated as follows: the establishment of diplomatic relations, as well as the exchange of diplomatic missions between two States, takes place on the basis of agreement between these States.

5. Although Mr. Khoman's amendment (384th meeting, para. 44) was acceptable in principle, he did not like the use of the verb “may”, which suggested that such action was permitted by international law. Furthermore, the reference to the territory of a third State, though probably correct from the point of view of substance, simply complicated matters and would be better omitted.

6. He was not quite clear as to the purpose of the amendment submitted by Mr. Bartos (384th meeting, para. 39).

7. Mr. FRANÇOIS said that he was in favour of Mr. Amado's proposal to omit article 1. He had no serious objection to the original draft article, although the question as to what States possessed the right of legation might give rise to difficulties. Once that proviso was deleted, however, as in Mr. Khoman's amendment, the article became quite unacceptable. Certain entities, such as, sometimes, the States forming part of a federal State, protectorates or the former free city of Danzig, for example, had no right under their constitutional laws to enter into diplomatic relations with other States, and it was incorrect to declare that such States might under international law enter into diplomatic relations simply by mutual consent.

8. He, too, objected to the reference to the territory of a third State in Mr. Khoman's amendment, which he was afraid would be unintelligible to anyone who had not followed the Commission's discussions. The case it was designed to cater for, namely, where diplomatic relations between two States were maintained by their ambassadors in a third country, was a very special one and could, he thought, be covered by Mr. Bartos's formula of “another method of maintaining diplomatic relations”. In any case, such a device could hardly be called a diplomatic mission.

9. Sir Gerald FITZMAURICE proposed the following somewhat simpler text for the article, inspired partly by the observations of Mr. Pal and Mr. Tunkin:

“The establishment of diplomatic relations between States, and of permanent diplomatic missions, takes place by mutual consent.”

10. He quite agreed with Mr. François in his attitude to the introduction of a reference to the establishment of diplomatic missions on the territory of a third State, which was presumably designed to meet a case cited by Mr. Bartos (384th meeting). The device in question was a means of entering into diplomatic relations, and had nothing to do with the establishment of a mission. Reference could be made to such cases in the comment on the article, if necessary, but it would merely confuse matters to refer to them in the article itself.

11. Mr. PAL expressed support for Sir Gerald Fitzmaurice's amendment, which solved the difficulty while retaining the principle underlying the original draft article.

12. He was not happy about Mr. Khoman's amendment, which introduced a new question not to be found in the original draft article, namely, that of the territory on which a diplomatic mission was established. He could not see how a diplomatic mission could be established at all on the territory of a third State, but if it were, the consent of the third State would also be required.

13. The idea underlying Mr. Bartos's amendment could have been expressed by a reference in the comment on the article. But if Sir Gerald Fitzmaurice's amendment was accepted, even that would not be necessary.

14. Mr. AMADO observed that Sir Gerald's amendment was substantially the same as the Special Rapporteur's text, with the omission of any reference to the right of legation. He was at one with Mr. Scelle in his failure to understand why it should be necessary to devote an article to a statement of the obvious. If States entered into diplomatic relations with each other and established missions, it was self-evident that they were agreed to do so. He would, however, bow to the view of the majority.

15. Mr. PAL recalled that the Commission had been asked by the General Assembly to codify the topic, with a view to the common observance by all Governments of existing principles and rules and recognized practice; in other words, to codify the obvious. It was therefore better to state an obvious principle than to leave it out.

16. Mr. EL-ERIAN said that he was in favour of retaining article 1 in some form or other, since the draft codification in its existing form required an introductory article. Sir Gerald Fitzmaurice's amendment had several merits, one of them being that it enunciated the principle that diplomatic relations must be established by mutual consent. Though Mr. El-Erian fully appreciated Mr. Scelle's point, that all States ought to enter into diplomatic relations with each other, he did not regard such a consideration as relevant in a codification of positive international law. However desirable it might be from the idealistic standpoint for States to enter into diplomatic relations with each other, no State was under any legal obligation to do so.

17. As to the right of legation, the authors of the United Nations Charter, when dealing with the question of membership, had simply used the term "State", leaving it to the Security Council and the General Assembly to decide whether a particular entity qualified for statehood or not. The Commission itself had taken the same course when framing its draft Declaration on Rights and Duties of States.<sup>1</sup> Entering into diplomatic relations was merely an attribute of a subject of international

law. It could not be referred to as a right, bearing in mind the circumstances under which a State might come into existence, and the current rules of international law on recognition.

18. Mr. El-Erian said that he would support Sir Gerald Fitzmaurice's amendment (para. 9 above).

19. Mr. KHOMAN, replying to observations on his amendment (384th meeting, para. 44), said that the verb "may" as used therein did not have a permissive sense, but merely expressed the idea of possibility. The reference to diplomatic missions in the territory of a third State had been introduced in order to cover every possibility. When two States were in diplomatic relations with each other, they did not necessarily have missions on each other's territory. There were, for instance, cases of ambassadors accredited to several countries and resident in only one of them. He would not insist on that part of his amendment, however. He found Sir Gerald's text generally acceptable.

20. Mr. BARTOS observed that the Commission seemed to be drawing closer to agreement on a suitable text. The case just mentioned by Mr. Khoman, of ambassadors accredited to several countries, was not the same as the one he had had in mind. When ambassadors were accredited to several countries they visited each of them from time to time, and there was, therefore, an embassy of the sending State in each of the countries, regardless of whether the ambassador happened to be present. Since, however, the case he himself had in mind was an exceptional one (the case where two States did not have mutual representation—even when they had a permanent mission established in a third State where they were both represented—but announced that representatives accredited to a third State would be the channel for diplomatic relations), he would be willing to accept Sir Gerald's amendment, provided that the Special Rapporteur was willing to include a reference to the case in the comment on the article.

21. Mr. MATINE-DAFTARY found Sir Gerald Fitzmaurice's text generally acceptable. In its existing form, however, it gave the impression that diplomatic missions were not part and parcel of diplomatic relations between States. He wondered whether the correct impression could be given by the insertion of words corresponding to the French "*entre autres*", instead of "*et*".

22. Mr. TUNKIN said that, since Sir Gerald Fitzmaurice's amendment expressed substantially what he had said, he had abandoned his intention of formally submitting an amendment.

23. Mr. SANDSTRÖM, Special Rapporteur, said that he accepted Sir Gerald Fitzmaurice's amendment. The Commission appeared to be practically unanimous in desiring to omit any reference to the right of legation, and he did not wish to press that point. Though no great harm would be done were Mr. Amado's amendment accepted, he thought it preferable to have an introductory article.

24. Mr. YOKOTA, although prepared to support Sir Gerald Fitzmaurice's amendment generally, wondered whether it would not be advisable to delete the words "of diplomatic relations between States and", thus leaving the text as:

"The establishment of permanent diplomatic missions takes place by mutual consent."

<sup>1</sup> *Official Records of the General Assembly, Fourth Session, Resolutions*, p. 67.

The draft was, after all, dealing mainly with permanent rather than *ad hoc* diplomatic agents.

25. Mr. Scelle had said that States were under an obligation to enter into diplomatic relations with each other and could not refuse to receive any diplomatic agents whatsoever—including, presumably, permanent diplomatic agents. He was sorry that he could not go so far as Mr. Scelle on that point. Although it was an established rule of international law that diplomatic agents could be sent only with the consent of the receiving State, according to a number of authors, including Oppenheim, States could refuse to receive some diplomatic agents, but were bound to receive *ad hoc* agents despatched to discuss some specific matter of importance. Since there was some difference of opinion as to whether the establishment of diplomatic relations and the sending of *ad hoc* diplomatic agents were conditional on mutual consent, it would be better to omit all reference to them and refer merely to the establishment of permanent diplomatic missions.

26. Sir Gerald FITZMAURICE said that, while he appreciated Mr. Yokota's point, he would be reluctant to abandon the reference to the establishment of diplomatic relations, especially as several members of the Commission attached considerable importance to it. Were it omitted, for instance, Mr. Bartos's point would not be met. Even from the standpoint of Mr. Yokota's argument, no harm would be done if the phrase were retained, since, regardless of whether States were bound or not to establish diplomatic relations, the establishment of diplomatic relations did in fact take place by mutual consent.

27. He appreciated Mr. Matine-Daftary's point too, but had so far been unable to think of a stylistically satisfactory redraft of his text to meet it. It could perhaps be left to the drafting committee which would undoubtedly be set up at a later stage.

28. Mr. AMADO said that he would not press for a vote on his amendment, as he was prepared to accept that of Sir Gerald Fitzmaurice. He would, however, appreciate it if, to make the text sound less like a truism, it could be prefaced by some such phrase as "It is an established practice in international law for . . .".

29. The CHAIRMAN said that Mr. Amado's observations would be brought to the notice of the drafting committee.

30. Mr. GARCIA AMADOR observed that the Commission appeared to be generally in favour of Sir Gerald Fitzmaurice's text. He himself was prepared to accept it on the same terms as Mr. Amado.

31. The CHAIRMAN said that, since all other amendments had been withdrawn, either absolutely or conditionally, he would put Sir Gerald Fitzmaurice's amendment (para. 9 above) to the vote, subject to its redrafting in the light of the observations of Mr. Matine-Daftary and Mr. Amado.

*The amendment was unanimously adopted.*

#### ARTICLES 2 AND 3

32. Mr. SANDSTRÖM, Special Rapporteur, said that for the sake of convenience it would be preferable to discuss the first paragraph of article 3 in conjunction with article 2.

33. Mr. Sandström had attempted in those provisions to state the existing rules of international law. Some

doubts might be felt regarding the provision in article 3, paragraph 1, as he understood that it was sometimes the practice to seek the receiving State's approval of the principal officers subordinate to the head of the mission.

34. Mr. LIANG (Secretary to the Commission) remarked that the words "is acceptable to" in the English text did not exactly correspond to the sense of the original French "*est agréée par*", which implied a definite act of *agrément*.

35. Mr. VERDROSS proposed that the second sentence in article 2, paragraph 1, "If he is not acceptable, he shall not be appointed", be deleted, on the ground that appointment of the head of a mission was a matter of domestic and not international law. A State was free to appoint whomsoever it chose as head of mission, but if he was not acceptable to the other State, he could not be sent.

36. Mr. FRANÇOIS doubted whether the provision in article 2, paragraph 2, that the receiving State might, *without stating its reasons*, declare the head of the mission no longer *persona grata*, and the similar provision in article 3, paragraph 1, were in accordance with international practice. It was not necessary for a receiving State to give its reasons for regarding a proposed head of mission as unacceptable, but once he had been accredited, it was contrary to good relations for the receiving State to demand his recall without giving reasons. The reasons given should not be subject to discussion, but the sending State was entitled to some explanation when its head of mission was declared no longer *persona grata*. A large number of writers supported that view.

37. With regard to the second sentence of article 2, paragraph 2, "In such case, he shall be recalled", he suggested that it would be more correct to state "In such case, the receiving State shall have the right to require him to leave"; that was what happened in practice. The receiving State did not wait for the long procedure of recall to be gone through, but gave the *persona non grata* his passport and asked him to leave.

38. Mr. BARTOS said that he was not in favour of Mr. Verdross's proposal to delete from article 2 the words, "If he is not acceptable, he shall not be appointed". There had been several cases of States appointing ambassadors to another State to which, for political reasons, they had not the slightest intention of sending them. The practice was discourteous, to say the least.

39. On the question of the desirability of a State's giving its reasons for declaring a diplomatic agent *persona non grata*, he agreed with Mr. François, with the reservation, however, that it was not the general practice for States to do so. He thought, however, that article 2, paragraph 2 and article 3, paragraph 1, should be reworded so as to make it clear that the State was "under no explicit obligation to state its reasons".

40. A distinction should be made between the withdrawal of a diplomatic agent and his recall; the latter could only be effected by the dispatch of a formal letter of recall by the head of State. There had been many cases of ambassadors being withdrawn until a dispute had been settled without their being formally recalled. The important point was that they should be withdrawn.

41. Another point, perhaps more appropriate for inclusion in the commentary, was that States should not refuse to accept a diplomatic agent on grounds of sex or religion, or other discriminatory reasons, as such an attitude was due merely to prejudice.

42. Mr. YOKOTA said that any State was of course entitled to declare another State's nominee as head of a diplomatic mission to it *persona non grata*, but, before doing so, it must have good reasons; otherwise the sending State might feel its dignity affronted, and relations between the two States might suffer. He instanced the case of Mr. Keiley, whom the United States Government had, in 1885, proposed to appoint United States Ambassador to Italy, but whom the Italian Government had refused to accept, owing to the fact that he had, in 1871, severely protested against Italy's annexation of the Papal States. The United States Government had accepted the situation, and appointed another ambassador to Italy. In the same year, however, it had appointed Mr. Keiley United States Ambassador to the Austro-Hungarian Empire, which, in turn, had refused to accept him on the ground that his wife was said to be a Jewess. The United States Government had protested strongly that the Imperial Government's action was based on improper reasons, and had shown its displeasure by refusing to appoint another ambassador to the Austro-Hungarian Empire for several years. It was in order to avoid such difficulties that certain writers had sought to compile a list of valid reasons for declaring the head of a mission *persona non grata*. On the other hand, if the Commission adopted the present text of article 2, paragraph 2, it would be giving the impression that States were entirely free to declare the head of a diplomatic mission *persona non grata* without any good reason at all.

43. He therefore proposed the deletion of the words "and without stating its reasons". The effect of that amendment would not be to place the receiving State under an obligation to state its reasons, but to enable it to do so if it deemed fit.

44. Mr. PAL thought there was little dispute over article 2, paragraph 1, or article 3, paragraph 1, both of which were in accordance with existing practice. The Special Rapporteur appeared also to believe that article 2, paragraph 2, was also in accordance with existing practice. If it was—and Mr. Pal considered that it was the practice that the receiving State could at any time declare the head of the mission no longer *persona grata* and that it could, but need not, state its reasons for doing so—then the Commission had no choice but to accept it, without enquiring whether such practice was reasonable or not. If such was the practice, moreover, it would not alter it in the direction desired by Mr. François just to delete the words "and without stating its reasons". As Mr. Yokota had pointed out, even without those words States would still be able to withhold any explanation if they thought fit.

45. Mr. AMADO entirely agreed with Mr. Pal. It was impossible to enumerate all the reasons for which a receiving State might wish an ambassador to be recalled. There might well be cases in which it would be extremely embarrassing for it to have to state its reasons, for example where the personal conduct of the ambassador's wife or family was concerned.

46. With regard to article 2, paragraph 1, he agreed with Mr. Verdross that the words "he shall not be appointed" did not entirely correspond to existing practice. Otherwise he was perfectly content with the text of article 2 as it stood.

47. Mr. FRANÇOIS said that he could not accept Mr. Pal's suggestion that the Commission was solely concerned with recording existing practice. In its previous work, in particular on the law of the sea, the

Commission had always regarded its task as comprising not only the codification of law but also its progressive development. That was in accordance with its Statute, and he did not think that the reference in General Assembly resolution 685 (VII) to the Assembly's "desire for the common observance by all governments of existing principles and rules and recognized practice concerning diplomatic intercourse and immunities" implied that the Commission should depart from its usual approach in the present case.

48. Sir Gerald FITZMAURICE said he saw no objection to deleting the second sentence of article 2, paragraph 1.

49. He also agreed with the Secretary to the Commission that in the first sentence the English words "is acceptable to" were not an exact rendering of the French "*est agréée par*". He suggested retaining the French term "*agrément*", which was commonly used in English in that context. The English text would then read:

"The sending State must make certain that the person it proposes to appoint head of the mission has received the *agrément* of the receiving State."

50. With regard to article 2, paragraph 2, he agreed with Mr. Pal and Mr. Amado that States could not be obliged to give their reasons for declaring the head of a mission *persona non grata*. However, he was inclined to agree with Mr. Yokota that the best way of dealing with the matter might be not to mention it at all. It was curious that the Special Rapporteur had mentioned it in paragraph 2, but not in paragraph 1: if the words "and without stating its reasons" were included in one case but not in the other, the implication was that in the latter case reasons must be stated. What was still more curious was that in the draft of the Harvard Law School (Harvard Research),<sup>2</sup> exactly the contrary procedure had been followed: the provision corresponding to article 2, paragraph 1, of the Special Rapporteur's draft read ". . . the receiving State shall indicate, without obligation to communicate reasons, whether or not such person is acceptable", while the provision corresponding to article 2, paragraph 2, stated merely "A receiving State may at any time request a sending State to recall a member of a mission who has become *persona non grata*". He wondered why the Special Rapporteur had reversed the procedure followed in the Harvard draft. In any case, the Commission should be consistent and either not include the words in question in either paragraph or include them in both. In his view, they could be safely omitted from both. Where the law was silent, no obligation could be said to exist. It was revealing that no comment had been made on the fact that the words in question were not included in article 2, paragraph 1.

51. Mr. AMADO felt that the cases dealt with in paragraphs 1 and 2 of article 2 could not be regarded as on an equal footing. When, as in paragraph 1, it was asked to give its *agrément*, the receiving State had usually no personal knowledge of the person proposed; in the case in paragraph 2, it had. In his view, therefore, it was perfectly logical to omit the words "and without stating its reasons" from paragraph 1 and to include them in paragraph 2.

52. Mr. SANDSTRÖM, Special Rapporteur, said that he entirely agreed with Mr. Amado. Article 2 of his draft

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

was based on the Havana Convention.<sup>3</sup> When a State was asked to give its *agrément* to the head of a mission, it was scarcely supposed to give the reasons for its refusal; all that mattered to the sending State was whether the person received the *agrément* of the receiving State or not. Once such a person was in office after *agrément*, the claim for reasons might be stronger.

53. The CHAIRMAN, speaking as a member of the Commission, pointed out that the two cases also differed in respect of the gravity of the act. To refuse a person *agrément* was a much less serious step than to declare him *persona non grata* once he had been appointed.

54. Mr. KHOMAN said that he too saw no objection to deleting the second sentence of article 2, paragraph 1.

55. As regards article 2, paragraph 2, he pointed out that the receiving State might wish to state its reasons in order that there might be no misunderstanding of the grounds for its action. The present text implied that the receiving State should never state its reasons. He therefore supported Mr. Yokota's proposal to delete the words "and without stating its reasons", but suggested that the following sentence be then inserted between the first and second sentences: "It may or may not state the reasons for such action."

56. A similar change should be made in article 3, paragraph 1.

57. Mr. MATINE-DAFTARY, referring to Mr. Verdross's remarks, observed that the appointment of an ambassador was not only a domestic matter but also an act of international consequence, as the nomination of an ambassador was by means of credentials sent by one head of State to another head of State. For that reason he felt that the second sentence of article 2, paragraph 1, should be retained.

58. The sense of Mr. Khoman's amendment to article 2, paragraph 2, might be met more simply, without deleting the phrase "and without stating its reasons", by altering "stating" to "being obliged to state".

59. He also agreed with Mr. François's criticism of the last sentence of paragraph 2, and proposed that it be replaced by the following: "In such cases his mission shall be at an end."

60. Mr. AMADO suggested that in the first sentence of paragraph 2 it would be neater to say "... and without *having to* state its reasons ...".

61. Mr. TUNKIN said that he could agree to the deletion of the last sentence of article 2, paragraph 1, not because it related to a matter of purely domestic concern but because it was redundant; the obligation not to appoint as head of a mission a person who was not acceptable to the receiving State was already recognized in the first sentence.

62. The first sentence of article 2, paragraph 2, was in accordance with current practice. It was not obligatory for the receiving State to give its reasons, but it could do so if it wished. He agreed, however, that the position might be expressed more clearly by some such wording as that suggested by Mr. Khoman, Mr. Matine-Daftary or Mr. Amado.

63. As regards the second sentence of article 2, paragraph 2, Mr. François's criticism was possibly justified. On the other hand, it would not be sufficient to say that the receiving State could demand recall, since there

<sup>3</sup> Convention regarding Diplomatic Officers, signed at Havana on 20 February 1928. See League of Nations, *Treaty Series*, vol. CLV, 1934-1935, No. 3581.

would then be nothing to indicate that the sending State must comply with such demand.

64. Mr. SANDSTRÖM, Special Rapporteur, said he quite agreed with Mr. Tunkin that the second sentence of article 2, paragraph 1, was superfluous in view of the first. He therefore withdrew it.

65. On the other hand, he could not agree with Mr. François that it would tend to obviate international misunderstanding and disputes if the receiving State were obliged to state its reasons for declaring the head of a diplomatic mission no longer *persona grata*. However, he appreciated the fact that the deletion of the words "and without stating its reasons" would not mean that such an obligation existed. It might perhaps be possible to refer in the comment to the fact that the receiving State might or might not state its reasons. He had thought that the last sentence of article 2, paragraph 2, would be sufficient, and that a party to a convention would execute the recall, but he would have no objection to amending the sentence to read: "If in such case the head of the mission is not recalled, the receiving State shall be entitled to require his departure."

66. Mr. VERDROSS, replying to Mr. Matine-Daftary, reiterated that the act of appointment was purely and simply a matter of domestic law. The act which was international was the act of accrediting. He therefore suggested that the first—or, now that the Special Rapporteur had agreed to the deletion of the second, the only—sentence of article 2, paragraph 1, be amended to read: "The sending State must make certain that the person it proposes to accredit as head of the mission to another State has received the *agrément* of that State."

67. Mr. SANDSTRÖM, Special Rapporteur, and Mr. FRANÇOIS said that, on reflection, they were prepared to accept Mr. Verdross's suggestion.

*Mr. Verdross's suggestion was adopted by 16 votes to none with 1 abstention.*

68. Mr. SANDSTRÖM, Special Rapporteur, suggested that the wording proposed by Mr. Matine-Daftary for the second sentence of article 2, paragraph 2 would read better if recast as follows: "In such case his mission shall be regarded as at an end."

69. Mr. AMADO, Mr. PAL and Mr. LIANG (Secretary to the Commission) all expressed serious doubts as to whether such wording would be in accordance with existing practice, since the recall of the head of the mission did not necessarily entail the recall of its other members.

The meeting rose at 12.50 p.m.

### 386th MEETING

*Monday, 29 April 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)

ARTICLES 2 AND 3 (continued) AND ARTICLE 4

1. The CHAIRMAN invited the Commission to continue its consideration of the draft articles from article 2, paragraph 2, onwards. He recalled that Mr. Yokota had

proposed the deletion of the words "and without stating its reasons" from that paragraph (385th meeting, para. 43). The Special Rapporteur had redrafted the second sentence of the paragraph in the light of the discussion at the 385th meeting, and proposed the following text: "If in such case he is not recalled, the receiving State may declare his functions terminated."

2. Mr. TUNKIN said that, as he wished to propose some rearrangement of articles 2 to 4, which dealt with related matters, he trusted that the members of the Commission would not object to his dealing with all three articles together.

3. As far as article 2 was concerned, he proposed that it consist only of the paragraph adopted towards the close of the previous meeting. He also wished to propose the following three articles to replace article 2, paragraph 2, article 3 and article 4:

"Article 3. The sending State may freely choose the other officials which it appoints to the mission.

"Article 4. The head and other members of the mission may be chosen from among the nationals of the receiving State only with the express consent of this State.

"Article 4(a). 1. The receiving State may at any time declare the head of the mission, or any other official of the mission, no longer *persona grata*. In such case, this person shall be recalled.

"2. If a sending State refuses, or after a reasonable time fails, to recall the head of the mission or other official of the mission whose recall has been requested by the receiving State, the receiving State may declare the functions of such person as an official of the mission to have been terminated."

4. It would be noted that, while advocating the deletion of article 2, paragraph 2, and part of article 3, paragraph 1, he had combined the questions they dealt with in a new article 4(a). The reason for that was that, although it was desirable to deal with the appointment of the head of the mission and of the other members of the mission in separate articles, the position regarding the declaration of a person as no longer *persona grata* and regarding his recall was substantially the same, whether he was the head of a mission or merely a member of it. So far as could be judged, the Special Rapporteur appeared to be of the same view.

5. He proposed deleting paragraph 2 of article 3 on the ground that it did not appear to be necessary, the question of the list of members of the mission being dealt with later in article 24 in connexion with entitlement to privileges and immunities.

6. Since the problem of the appointment of nationals of the receiving State as members of a foreign diplomatic mission was referred to in article 4, he wondered whether it would not be advisable also to refer to the question of the appointment of nationals of a third State, or to delete the article altogether.

7. As would be seen, his proposal kept very close to the sense of the Special Rapporteur's draft, the sole difference of importance being a certain rearrangement of the subject matter and the omission of the words "and without stating its reasons" and "without obligation to state its reasons".

8. Mr. SANDSTRÖM, Special Rapporteur, said that, though the question of the appointment of nationals of the third State might well arise, he had not felt it neces-

sary to make any reference to that eventuality. Indeed, he had only mentioned the question of the appointment of nationals of the receiving State as heads or members of foreign missions because of the somewhat abnormal situation in which they would be placed *vis-à-vis* the State of their nationality in the matter of privileges and immunities. Mr. Tunkin's proposals did not differ greatly in substance from his own. The arrangement of the subject matter proposed by him might be an improvement, and he was quite willing to consider it.

9. One objection to the deletion of article 3, paragraph 2, was that it was not at all certain at that stage that article 24, paragraph 5, would be retained. Article 24 dealt with the very difficult question of entitlement to privileges and immunities, regarding which he himself entertained some doubt.

10. The CHAIRMAN proposed that, pending the distribution of the text of Mr. Tunkin's amendments, the Commission consider his proposal to delete article 3, paragraph 2.

*It was so agreed.*

11. Mr. FRANÇOIS suggested that it would be advisable to retain the provision, since it was extremely useful for the authorities of the receiving State, more particularly the tax authorities, to have full details of the membership of foreign missions. The provision could be retained without prejudice to the question as to which members of a mission were entitled to diplomatic privileges and immunities.

12. Sir Gerald FITZMAURICE agreed that the provision should be retained, though he would propose the replacement of the word "must" by the words "shall, if the authorities of the receiving State so require". He thought it desirable for the authorities of the receiving State to have some means of ascertaining who was included in the diplomatic staff of foreign missions, irrespective of the quite distinct question of entitlement to privileges or immunities, which was dealt with in article 24, paragraph 5.

13. Mr. PAL also agreed as to the desirability of retaining the provision regarding the submission of a list of members of foreign diplomatic missions even if only for the purpose of protection.

14. Mr. AMADO, too, favoured retaining the provision, provided the words "living under the same roof" were interpreted liberally. The children of a member of a diplomatic mission might well be living away from their family for part of the time, at a school or university in the receiving State, and nevertheless form an integral part of the family.

15. Mr. KHOMAN said that it would be possible to deal with the idea contained in article 3, paragraph 2, under article 24. From the point of view of presentation, however, it would be useful to have such a provision at the beginning of the draft.

16. The phrase "living under the same roof" did not strike him as a very important element, and he wondered whether it was necessary to keep it.

17. He approved the amendment proposed by Sir Gerald Fitzmaurice.

18. Mr. BARTOS said that article 3, paragraph 2, was a very important provision, since it was essential to know who was entitled to be regarded as a member of a diplo-

matic mission. The question of the definition of members of the families of those composing a mission was also of great significance. Under present-day conditions, the wives and children of diplomatic agents often led a fairly independent existence; they might engage in some occupation or, in the case of the children, take part in student politics in a university in the receiving State. He was strongly in favour of defining clearly the membership of a mission and, in particular, the meaning of the word "family" in that connexion.

19. Mr. VERDROSS said that the question of who was to be regarded as a member of a diplomatic mission, with particular reference to the members of officials' families, was undoubtedly a most important and difficult matter which would require thorough discussion. Since, however, the question arose merely in connexion with entitlement to privileges and immunities, it would be better discussed in conjunction with article 24.

20. Mr. SANDSTRÖM, Special Rapporteur, agreed that the question of families of foreign diplomatic agents was one of the most difficult. He had used the words "living under the same roof" in order to bring out that the members of the family must have some intimate connexion with the diplomatic agent. Members of the family of a foreign diplomatic agent who led a comparatively independent existence should obviously not be entitled to all the privileges and immunities enjoyed by the diplomatic agent himself.

21. He had no objection to the inclusion of Sir Gerald's amendment, which was in accordance with the text of the Harvard Law School draft.<sup>1</sup>

22. Mr. MATINE-DAFTARY thought it would be inadvisable to pass over article 3, paragraph 2, pending consideration of article 24. He wondered why the Special Rapporteur wished the names of servants of members of missions to be entered on the list to be communicated to the receiving State. In Iran the practice was to include only the names of the actual members of the mission and their wives and children. The words "living under the same roof" could clearly not be interpreted *stricto sensu*—a diplomatic agent sometimes lived in the town while his family was in the country.

23. Sir Gerald FITZMAURICE said that, in principle, he agreed with the use of the words "living under the same roof", since it conveyed the traditional idea that close relatives of a member of a mission who were living in a separate establishment could not be regarded as members of his family for the purposes of diplomatic protection. In view of present-day conditions, however, when even ambassadors were often unable to live in their own embassies for lack of room, it might perhaps be better to use some other wording such as "forming part of their household".

24. Mr. FRANÇOIS said that, so long as the term "member of a mission" had not been clearly defined, it would be difficult to grasp the proper meaning of some of the articles in the draft. The Special Rapporteur, he noted, used two terms, "member of a mission" and "official"; and, while apparently drawing the distinction, common in the literature on the subject, between official persons, i.e. those appointed by the sending State, and unofficial persons in the personal service of the officials, Mr. Sandström nonetheless regarded both categories as members of a diplomatic mission. The Harvard Law

School draft adopted a different classification, namely, "members of the mission", their "families", "administrative personnel" and "service personnel".

25. Mr. SANDSTRÖM, Special Rapporteur, said that his choice of terms had been deliberate, as he wished to include in the mission not only official staff but also administrative and service staff. He had not thought it necessary to preserve the distinctions made in the Harvard draft.

26. Mr. PAL said that he agreed with the Special Rapporteur that some definition of members of the families of those composing a foreign diplomatic mission was necessary, even for the limited purposes of the list under consideration.

27. He appreciated Mr. Amado's point as to the inadequacy of the phrase "living under the same roof". The question was one of interpretation only. There was nothing in the expression which would prevent the members of the diplomatic agent's family living in an establishment maintained by him from being regarded as living under the same roof. A list of the members of missions was clearly required, but it need not contain the names of all the members of the families of those composing the mission who only happened to be on the territory of the receiving State.

28. Mr. KHOMAN suggested replacing the words "members of their families living under the same roof" by the words "members of their households"—a term which accurately reflected the general practice with regard to foreign diplomatic missions.

29. Mr. YOKOTA remarked that article 3, paragraph 2, was closely bound up with the question of entitlement to privileges and immunities. Though it could be more thoroughly discussed in connexion with article 24, at least the principle of the provision must be decided before proceeding any further.

30. Mr. TUNKIN said the problem had two aspects: the purely technical question of the communication of a list to the ministry of foreign affairs for its information, and the legal question of entitlement to be regarded as a member of a diplomatic mission. The latter was a very important and difficult question on which municipal law varied from country to country. He did not think it appropriate for it to be discussed at length, as it properly came under article 24.

31. Since some members of the Commission were unwilling to delete the provision, he would agree to retaining it provisionally, pending discussion of the question of entitlement to privileges and immunities.

32. Mr. AMADO said that if the members of families and the servants of every member of a diplomatic mission were all to be entered on a list, the list would be a very long one. He was not quite clear whether the head of the mission had to submit the list, or whether each individual member of the mission had to submit his own.

33. As a matter of drafting, he would suggest replacing the words "living under the same roof and their servants" by the words "under their authority and persons in their service".

34. The CHAIRMAN pointed out that the definition of members of the families of persons composing diplomatic missions was often based, in national regulations concerning diplomatic agents and consular representatives, on the concept of economic dependence.

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

35. It appeared to be the feeling of the Commission that article 3, paragraph 2, should be retained provisionally, and reviewed when the Commission came to discuss article 24 on entitlement to diplomatic privileges and immunities. Some points of terminology might be referred to the drafting committee, when appointed.

36. Mr. TUNKIN referred to his previous statement, and pointed out that the questions of definition involved were more than mere questions of drafting.

37. Mr. SANDSTRÖM, Special Rapporteur, replying to Mr. Amado, said that he had in mind only one list, which would be submitted on the responsibility of the head of the mission.

38. Mr. BARTOS said that he agreed with the suggestion made by Mr. Verdross (para. 19 above). At some time or other the Commission must decide who was entitled to be regarded as a member of a diplomatic mission. He understood it to be the practice of the United States Government to treat any members of families of a foreign diplomatic mission who were gainfully employed as subject to ordinary United States law governing the employment of aliens, even though they might be exempt from the customary visa regulations. If the Commission decided to retain the provision as it stood, the legal consequences might be serious. Even a list such as that proposed in article 3, paragraph 2, which was merely for the information of the ministry of foreign affairs, could have far-reaching implications. It might, for instance, give rise to a conflict of jurisdiction, since aliens registered with a ministry of foreign affairs were not normally regarded as obliged to register with the local authorities.

39. Mr. AMADO said that the draft provision obviously did not give all members of the Commission complete satisfaction, and should be reconsidered in the light of article 24. To refer it to the drafting committee in its existing form would be to burden that committee with a number of unsolved problems.

*It was decided that further discussion of article 3, paragraph 2, be postponed pending consideration of article 24.*

40. The CHAIRMAN invited the Commission to take up article 3 of Mr. Tunkin's draft (para. 3 above).

41. Mr. BARTOS said that his willingness to discuss the amendments submitted by Mr. Tunkin, even though no French translation of them was available, should not be regarded as a precedent; he asked that that be specially noted.

42. Article 3, in the form proposed by Mr. Tunkin, did not entirely reflect existing practice in two respects. Firstly, it was the established custom, even before the Second World War, for the sending Government to give the receiving Government the name of anyone whom it intended to appoint as a naval, military or air attaché, and to await its consent before making the appointment. Secondly, since the Second World War, it had become the custom in a number of States for the ministry of foreign affairs not to issue an entry visa to any member of a foreign diplomatic mission until his name had been cleared by the Chancellery, which thus possessed, and had in certain cases exercised, the power to refuse entry. Admittedly the latter custom was not in accordance with traditional diplomatic practice, and the Commission might well prefer not to recognize it; but it should at least recognize the former, which was not only well-

established, but seemed reasonable enough if one took into account the delicate nature of the service attaché's duties.

43. Mr. PAL pointed out that the text proposed by Mr. Tunkin was simply a rearrangement of that proposed by the Special Rapporteur. If one was not in accordance with existing practice, neither was the other. Was it not, in fact, the position that the prior consent of the receiving State was needed only for the head of a diplomatic mission?

44. Mr. SANDSTRÖM, Special Rapporteur, observed that there was nothing in the text proposed by him, or in that proposed by Mr. Tunkin, to prevent the sending State from making prior enquiries of the receiving State as to whether it was willing to accept a certain person for certain categories of diplomatic post, where the duties were of a delicate nature. If it made such enquiries, however, it was solely in order not to suffer the embarrassment of having the receiving State declare the official concerned *persona non grata* after he had assumed his duties at the mission. There was no question of its submitting to a recognized rule of international law in that case, as it did in seeking the receiving State's *agrément* for the head of a mission.

45. Sir Gerald FITZMAURICE said that he personally agreed with the Special Rapporteur. The Commission might, however, seek expert advice on the matter before taking a final decision.

46. He had been somewhat disquieted by the bald terms in which article 3 was presented by Mr. Tunkin. One merit of the Special Rapporteur's draft was that the categorical statement—"the sending State may freely choose the other officials whom it appoints to the mission"—was immediately qualified by a reference to the receiving State's right at any time to declare an official *persona non grata*. In Mr. Tunkin's text it was not qualified at all. He accordingly suggested that the following words be prefaced to the text proposed by Mr. Tunkin for article 3: "Subject to the provisions of articles 4 (a) and 5, . . .".

47. Mr. BARTOS, to meet the point he had already made (para. 42 above), suggested the addition of the following sentence at the end of Mr. Tunkin's text for article 3: "The receiving State may declare its refusal to receive mission officials in certain categories without its prior consent."

48. Mr. GARCIA AMADOR pointed out that Mr. Bartos had referred earlier to the specific case of service attachés. The amendment which he now suggested, with its reference merely to "certain categories" of mission official, would make it possible for the receiving State to make prior consent a condition for receiving officials of whatever category. That would be entirely contrary to traditional practice, and he could not believe that it was what Mr. Bartos intended.

49. Mr. BARTOS explained that he had borrowed the phrase "certain categories" from the Special Rapporteur. He agreed, however, that it might be better to refer specifically to service attachés, for the reason given by Mr. Garcia Amador.

50. Mr. AMADO felt that Mr. Bartos had raised a sound point, but that there might be some better way of meeting it. He drew Mr. Bartos's attention to the fact that the section of the draft under discussion was headed "Diplomatic intercourse in general". In his own

view, the Commission should concentrate on reaching agreement as soon as possible on what constituted the basic points of existing law, and leave all controversial matters and innovations aside until a later stage.

51. Mr. SANDSTRÖM, Special Rapporteur, suggested that Mr. Bartos's point could be met by adding the words "or to receive them without its prior consent" to the second sentence of article 5, which would then read: "It may refuse to receive officials of a particular category or to receive them without its prior consent." He recognized, however, that that wording might be open to the objection voiced by Mr. García Amador.

52. Mr. BARTOS said he could accept the Special Rapporteur's suggestion in principle. It could be discussed later in conjunction with article 5, when some way of meeting Mr. García Amador's objection could be sought.

53. Mr. VERDROSS supported the Special Rapporteur's suggestion, which would also appear to cover the case where the receiving State found that one of the persons on the list communicated to its ministry of foreign affairs was objectionable to it, and refused to receive him.

*It was agreed that the Special Rapporteur's suggestion (para. 51 above) be considered further in conjunction with article 5.*

54. Mr. SANDSTRÖM, Special Rapporteur, supported Sir Gerald's suggestion (para. 46 above) for the addition of the words "Subject to the provisions of articles 4 (a) and 5" at the beginning of the text proposed by Mr. Tunkin for article 3.

55. Mr. TUNKIN said that, in principle, he had no objection to that suggestion, but merely doubted whether it was logically sound since all the draft articles were inter-connected and some such words could be inserted equally well in all of them.

56. Mr. PAL pointed out that logically the Commission could take no decision on Sir Gerald Fitzmaurice's suggestion until it had approved the articles referred to. The text of article 3 could not be put to the vote until the contents of articles 4 (a) and 5 had been settled.

57. Mr. SANDSTRÖM, Special Rapporteur, suggested that the matter be left to the drafting committee.

*It was so agreed.*

58. Mr. KHOMAN requested that the vote on Mr. Tunkin's text for article 3 be postponed until his text for articles 4 and 4 (a) and the Special Rapporteur's draft article 5 had been discussed.

*It was so agreed.*

59. Mr. VERDROSS said that, in principle, he had no objection to Mr. Tunkin's text for article 4, but merely wondered whether it was necessary in view of the provisions of article 2 and Mr. Tunkin's draft article 4 (a). It was nowadays very uncommon for the members of a diplomatic mission to be chosen from among the nationals of the receiving State.

60. Mr. EL-ERIAN said that he too had doubts regarding the need for, and even the advisability of, a provision specifically sanctioning a practice which was now regarded as quite exceptional—and rightly so if the whole purpose of diplomatic intercourse and the head of a diplomatic mission's special functions as the representative of the sending country were taken into account. Moreover, as could be seen from paragraphs

178 to 184 of the memorandum prepared by the Secretariat (A/CN.4/98), many States were unwilling to allow their nationals to act as the heads of foreign diplomatic missions, in view of the difficult and delicate problems that arose with regard to immunities and relations between the head of the mission and its other members if they were nationals of the sending State.

61. There were perhaps not quite such strong objections to the nationals of the receiving State being appointed as junior members of foreign diplomatic missions, and a distinction might possibly be made in that respect.

62. Mr. SANDSTRÖM, Special Rapporteur, said that his draft article 4, on which Mr. Tunkin's was modelled, was based on similar provisions in the Harvard Research draft<sup>2</sup> and the Havana Convention<sup>3</sup>. Similarly the resolution adopted by the Institute of International Law in 1929<sup>4</sup>, in stipulating that members of a diplomatic mission who were nationals of the receiving State should not enjoy diplomatic privileges and immunities, had implied that there could be employees in that category.

63. He saw no reason why the practice should not be referred to simply because it was not common. If the sending State had sufficient confidence in a national of the receiving State, was it for the International Law Commission to prevent it from appointing him its diplomatic agent? The receiving State, for its part, had every guarantee, since its express consent was required, and if it wished to lay down certain conditions it could always do so during the negotiations preceding such consent.

64. Mr. MATINE-DAFTARY said that he agreed with Mr. Verdross and Mr. El-Erian, particularly as far as heads of mission were concerned. The "demands of the office" theory stated that enjoyment of diplomatic privileges and immunities was necessary for the proper discharge of diplomatic functions; a diplomatic agent who did not enjoy such privileges and immunities, as was the case with most of those who were nationals of the receiving State, could not therefore under that theory discharge his functions properly. In his opinion, for example, an ambassador could not be a national of the receiving State.

65. Mr. Matine-Daftary formally proposed the omission of any provision along the lines of the Special Rapporteur's or Mr. Tunkin's draft article 4.

The meeting rose at 6 p.m.

### 387th MEETING

Tuesday, 30 April 1957, at 9.45 a.m.

Chairman: Mr. Jaroslav ZOUREK.

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

[Agenda item 3]

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

ARTICLES 2 TO 4 (continued)

1. The CHAIRMAN invited the Commission to continue its consideration of Mr. Tunkin's draft article 4

<sup>2</sup> *Ibid.*

<sup>3</sup> Convention regarding Diplomatic Officers, signed at Havana on 20 February 1928. See League of Nations, *Treaty Series*, Vol. CLV, 1934-1935, No. 3581.

<sup>4</sup> *Harvard Law School, op. cit.*, pp. 186 and 187.

(386th meeting, para. 3), which corresponded to article 4 of the Special Rapporteur's draft.

2. Sir Gerald FITZMAURICE agreed that the practice of choosing the head of a diplomatic mission from among the nationals of the receiving State could be regarded as obsolescent; he doubted, however, whether the Commission should attempt to eliminate it altogether. Moreover, as Mr. El-Erian himself had recognized, it was still a common and reasonable practice for diplomatic missions to engage subordinate staff locally, when a good knowledge of the language and of local conditions and customs was required. The interests of the receiving State were, as the Special Rapporteur had pointed out, fully safeguarded by the text he had proposed, as well as by that proposed by Mr. Tunkin. The sole effect of deleting the article, when a similar provision had been included in earlier texts, would be to raise possible doubts concerning the legality of a practice which no member of the Commission had suggested was contrary to international law.
3. Mr. TUNKIN explained that he had retained the substance of article 4 in the Special Rapporteur's draft in order that the matter might not be overlooked, and that the desirability of referring or not referring to it might be debated. He personally favoured the latter course, since to refer to it might be taken as signifying that the Commission approved a practice which the majority of States in fact disapproved.
4. He could not agree with Sir Gerald Fitzmaurice that omission of article 4 would give rise to any doubts. Naturally, any diplomatic mission would remain free to employ local nationals in a junior capacity. Such persons, however, were not usually granted diplomatic privileges and immunities.
5. Mr. SANDSTRÖM, Special Rapporteur, said that, in general, he agreed with Sir Gerald Fitzmaurice, but felt there would be no objection to deleting article 4 if article 5 were amended in the manner he had suggested at the 386th meeting (para. 51), namely, by the addition of the words "or to receive them without prior consent", since the words "officials of a particular category" could include officials chosen from among the receiving State's own nationals.
6. Mr. PAL said that article 4 had two aspects, one positive and the other, and more important one, negative; the positive aspect was the statement that the head and other members of the mission could be chosen from among the nationals of the receiving State; the negative aspect was the proviso that that could only be done with the consent of the receiving State. The true significance of the article might be clarified if it was expressed in a negative form such as, "The head and other members of the mission may not be chosen from nationals of the receiving State except with the express consent of this 'State'". In that form he could not see how the article could appear objectionable.
7. Moreover, to delete it would not necessarily have the effect of restricting the practice; on the contrary, it might raise doubts as to whether the express consent of the receiving State was, in fact, required before its nationals could be chosen as members of a foreign diplomatic mission.
8. Mr. YOKOTA said that, in his view, article 4 should be deleted for the reasons given by Mr. Verdross and Mr. El-Erian, and also because, as far as the procedure for appointment was concerned—and that was the matter at issue in articles 2 to 4—members of the mission who were nationals of the receiving State were in very much the same position as the other members of the mission.
9. Mr. EL-ERIAN recalled that the Special Rapporteur had said that his draft article 4 was based on similar provisions in the Harvard Research draft and the Havana Convention. Article 8 of the former instrument, however, concluded with the words: "provided, however, that a sending State may not send as a member of a mission a national of the receiving State without the express consent of the receiving State".<sup>1</sup>
- Chiefs of mission were dealt with in the succeeding article, where no reference was made to the possibility that they might be nationals of the receiving State. The Harvard Research draft, therefore, made a distinction in that respect between the head and the other members of a diplomatic mission, a distinction which had been obliterated in article 4 of the Special Rapporteur's draft.
10. As regards the need for engaging locally recruited staff in a subordinate capacity, Mr. Tunkin had rightly pointed out that such persons were not regarded as members of the mission, and did not enjoy diplomatic privileges and immunities.
11. He quite agreed that deletion of article 4 would not affect the right of the sending State and the receiving State to regulate by special agreement the conditions on which nationals of the latter could be appointed to the former's diplomatic mission. All he had in mind was that the Commission should not give express recognition to an out-moded practice. He would have no objection, however, if it was felt necessary, to a reference being included in the commentary to the effect that the practice, though nowadays rare, was not contrary to international law.
12. Mr. KHOMAN said that, strictly speaking, article 4 was perhaps unnecessary, since articles 2 and 3 fully covered the situation so far as the head and the other members of a diplomatic mission were concerned. And clerical and maintenance staff fell outside the scope of article 4, since their appointment did not require the consent of the receiving State.
13. Even so, it might be desirable to retain article 4, since the fact that the practice was still extant, save perhaps as far as the head of a mission was concerned, showed that it was found useful, particularly by smaller States which often had difficulty in finding a sufficient number of suitable personnel to staff their diplomatic missions abroad. Moreover, as the Special Rapporteur and Sir Gerald had pointed out, the position of the receiving State was fully safeguarded. If the choice was between deleting and retaining article 4, he would incline towards the latter course.
14. Mr. AGO said that he too was in favour of retaining article 4. The practice was not so rare as some supposed, and exceptionally the case might happen even where the head of a mission was concerned. For example, the Holy See's and San Marino's representatives to Italy might well be Italian citizens as well as representatives of the Sovereign Order of Malta and also of certain foreign States.

<sup>1</sup> Harvard Law School, *Research in International Law, I. Diplomatic Privileges and Immunities* (Cambridge, Mass., 1932), p. 20.

15. Mr. AMADO said that, even if article 4 were deleted, the practice would continue, despite all that had been said about its obsolescence, its desuetude and so on. To make a separate article of it, however, appeared to him to be placing undue emphasis on the matter. If the proposal to delete the article was put to the vote, therefore, he would probably be obliged to abstain.

16. Mr. TUNKIN said that, as Mr. Pal had rightly pointed out (para. 6 above), article 4 had two aspects, of which the second was the more important. In either form, the article would give the impression of encouraging the practice. Deletion of it would remove that impression, but the receiving State would still be in a position, by virtue of the other relevant provisions, to refuse to receive its own nationals as the members of foreign diplomatic missions.

17. Sir Gerald FITZMAURICE pointed out that there were other possibilities open to the Commission than simply to delete or retain the article in either of the forms suggested. It could, for example, re-word the article in a negative form, as suggested by Mr. Pal; it could delete it, but say in the commentary that the practice in question had not been referred to in the draft articles themselves since it was now comparatively rare, particularly as far as the head of a diplomatic mission was concerned, but that it was not, of course, contrary to international law; finally, it could delete the article but, as suggested by the Special Rapporteur, re-word article 5 in such a way as to cover its substance. He was prepared to agree to any of those three courses.

18. Mr. BARTOS expressed himself in favour of the second course referred to by Sir Gerald Fitzmaurice.

19. Mr. VERDROSS said that, although inclined to prefer the third, it was difficult to agree to the deletion of article 4 until article 5 had been discussed.

20. Faris Bey EL-KHOURI said that he could not support the proposal to delete article 4. It was a well-established practice to choose local advisers, interpreters and so on from among the nationals of the receiving State. If the Commission refused to recognize that practice, based as it was on the mutual consent of the sending and receiving States, it would be placing a quite unwarranted limitation on their freedom of action.

21. It was, however, true that the head of the mission was rarely chosen from among the nationals of the receiving State, so that the reference to the head of the mission might perhaps be deleted.

22. Mr. MATINE-DAFTARY felt that Faris Bey El-Khoury's remarks were based on a misunderstanding. Article 4 referred to the "members of the mission", who did not include such subordinate staff as interpreters, clerks and drivers.

23. In reply to a question by the CHAIRMAN, Mr. SANDSTRÖM, Special Rapporteur, agreed to withdraw article 4 provisionally, subject to the right to re-introduce it, if he felt that necessary, in the light of the discussion on article 5.

24. In reply to a question by Mr. GARCIA AMADOR, the CHAIRMAN agreed that, even if the Special Rapporteur thought it necessary to re-introduce article 4, discussion of it could now be regarded as closed.

25. He then invited the Commission to turn to Mr. Tunkin's draft article 4(a) (386th meeting, para. 3), which corresponded to article 2, paragraph 2, and the

last part of article 3, paragraph 1, in the Special Rapporteur's draft.

26. Mr. PAL said that he would prefer the text of article 12 of the Harvard Law School draft, since the word "declare", which was found in the first line of Mr. Tunkin's draft article as well as in the text proposed by the Special Rapporteur, suggested a public announcement, and that would hardly be consistent with the friendly relations assumed to exist between two States contemplating the establishment of diplomatic relations.

27. Mr. AMADO pointed out that the word "declare" was also used in article 12 of the Harvard draft, but only in connexion with the action to be taken by the receiving State in the event of the sending State's refusal to recall the member of a mission whose recall had been requested. In that connexion the word "declare" was appropriate, but he agreed with Mr. Pal that in connexion with the initial request for recall it was inappropriate.

28. Mr. KHOMAN agreed that in the case of an initial request for recall there was no question of a public declaration, and the head of the receiving State merely sent a private communication to the head of the sending State. He pointed out, however, that the word "declare" was also used in article 13 of the Harvard draft, in exactly the same sense as that in which it was used in Mr. Tunkin's. If it was nevertheless still found objectionable, the first sentence of Mr. Tunkin's text could be amended to read as follows: "The receiving State may at any time signify to the sending State that the head of the mission, or any other official of the mission, is no longer *persona grata*."

29. Mr. TUNKIN agreed to that suggestion.

30. Mr. SANDSTRÖM, Special Rapporteur, felt that the use of the words "no longer" was only appropriate in the case where the receiving State had given its *agrément*, in other words, in the case of the head of a mission.

31. Mr. MATINE-DAFTARY suggested to Mr. Pal that the mere fact of informing the sending State that its chosen representative was no longer *persona grata* was in itself a fairly serious step, which was bound to have some effect on relations between two countries. He could not understand why there was any hesitation in adopting the sentence whereby the mission would end if the official was not recalled.

32. Mr. EDMONDS said he could not understand why there was so much concern about the word "declare", which was to his mind entirely appropriate, meaning as it did "determine and state".

33. Mr. AGO agreed with Mr. Edmonds, but suggested the insertion of the words "to the sending State" so that the text would read:

"The receiving State may at any time declare to the sending State that the head of the mission, or any other official of the mission, is no longer *persona grata*."

In that way any suggestion of a public declaration would be avoided.

34. Mr. BARTOS said that, in his view, the word "declare" was inappropriate. What usually happened in practice was that the head of the receiving State politely intimated to the head of the sending State that the person in question was no longer entirely suitable for his post.

35. Mr. TUNKIN suggested that the point be left to the drafting committee.

*It was so agreed.*

*On that understanding, Mr. Tunkin's draft article 4(a) was adopted by 16 votes to none with 1 abstention.*

#### ARTICLE 5

36. Mr. SANDSTRÖM, Special Rapporteur, said that article 5 had no parallel in other texts. The Harvard draft dealt with both matters in the commentary.

37. In accordance with his suggestion at the 386th meeting (para. 51), the words "or to receive them without its prior consent" should be added at the end of the second sentence.

38. Mr. MATINE-DAFTARY said that, in principle, he fully supported article 5. His only doubt was concerning the use of the word "staff", which would cover interpreters, drivers, clerks, etc.

39. Mr. SANDSTRÖM, Special Rapporteur, said he had used the word "staff" deliberately in order that such categories might be covered.

40. Mr. MATINE-DAFTARY observed that in that case the article was very far-reaching.

41. Mr. LIANG (Secretary to the Commission) felt that the time had come when the Commission might consider the desirability of having an article on definitions, similar to article 1 of the Harvard draft.<sup>2</sup>

42. In that connexion it might seem desirable to limit the scope of the Commission's draft to the "members of a mission", in the sense in which that term was defined in article 1 of the Harvard draft, namely, persons "authorized by the sending State to take part in the performance of the diplomatic functions of a mission". That clearly excluded such locally recruited employees as drivers, clerks and even interpreters.

43. Mr. SANDSTRÖM, Special Rapporteur, agreed that the Commission must reach agreement on terminology but thought that could be done more profitably after it had discussed the articles on privileges and immunities.

44. Mr. VERDROSS felt that the second sentence of the Special Rapporteur's draft was too restrictive, since it dealt only with "categories", not with individual officials. A sentence along the following lines should be added to it or inserted at some other appropriate place: "It may also refuse to receive any person notified to it as having been appointed to a diplomatic mission."

45. Sir Gerald FITZMAURICE considered that the point raised by Mr. Verdross did not really relate to article 5 at all.

46. As it stood, article 5 was very wide, possibly too wide, in scope. So far as he could judge from the comment, the Special Rapporteur appeared to have in mind only the comparatively few cases where a State was establishing a diplomatic mission in another State's territory for the first time. In such cases it might be reasonable for the receiving State to have the power to say that the mission should not consist of more than a certain number of officials, or should include, for example, no press attachés or commercial attachés. The text of the article, however, did not limit its scope to such cases; and it was surely unreasonable that, where a mis-

sion had been long established, the receiving State should have the power suddenly to say that it must be reduced by half, or must no longer include officials of a particular category, despite the fact that it had included them for many years previously.

47. On the other hand, he agreed that the sending State could not be allowed to increase the size of a diplomatic mission indefinitely, and that some form of restriction or criterion must be recognized.

48. Mr. YOKOTA agreed with Sir Gerald Fitzmaurice. Too much emphasis was placed in the article on the power of the receiving State. If the latter enjoyed unlimited power to restrict their size, missions might be rendered incapable of performing their duties properly.

49. It would be better to state that the size of missions should be fixed by mutual agreement, especially when first established. The recent negotiations between the Soviet Union and Japan, arising out of the joint declaration concerning resumption of diplomatic relations of October 1956, provided a concrete example of the fixing of the size of missions by negotiation between the two Powers concerned. The size of missions could be limited by mutual agreement, even between States whose diplomatic relations were of long standing. Though he did not wish at that stage to submit a formal amendment, he would suggest that the first sentence of article 5 be redrafted on the following lines:

"The size of the staff composing the mission may be fixed by mutual agreement between the sending and the receiving State, either at the time of its establishment or at any later date. Failing such agreement, the receiving State may effect such limitation."

50. Mr. BARTOS said it was clear that the current tendency to swell the size of foreign diplomatic missions to enormous proportions was placing some States in a difficult position. His own country, Yugoslavia, where some foreign legations had a staff of as many as 600, had been obliged to limit the size of missions owing to the housing shortage in Belgrade. Italy appeared to have the same problem, to judge from its request to other States to select their permanent delegations to the United Nations Food and Agriculture Organization as far as possible from the staffs of their diplomatic missions to the Head of the Italian State. The first provision in article 5 was therefore necessary, and he was in favour of retaining it.

51. The second idea under discussion was the right of the receiving State either to refuse to receive officials of a certain category, or to refuse to accept them without its prior consent. He agreed to that idea, provided the category refused was not essential to the performance of diplomatic duties.

52. The third idea under discussion was the right of the receiving State to refuse to accept officials presented by the sending State as members of its mission. According to Oppenheim,<sup>3</sup> the general practice, evidenced by the refusal of the Swiss Government to recognize the claim to immunity of a Romanian economic counsellor, and by French and United Kingdom practice, was that a subordinate member of a diplomatic mission was not included in the diplomatic list, and hence he was not entitled to diplomatic status and privileges, until his name had

<sup>3</sup> L. Oppenheim, *International Law—A Treatise*, Vol. I, *Peace*, 8th ed., ed. H. Lauterpacht (London, Longmans, Green and Co., 1955), p. 784.

<sup>2</sup> *Ibid.*, p. 19.

been submitted by his head of mission and accepted by the receiving State. The only alternative to such a procedure would be for the receiving State to declare an unwanted official no longer *persona grata*, which it could not well do if he had committed no misdemeanour. He accordingly agreed with the proposal of Mr. Verdross (para. 44 above), which was in accordance with general practice and dealt with a problem not covered in the early articles of the draft.

53. Mr. VERDROSS said there were three ways in which the receiving State might reject diplomatic agents. In the case of the head of the mission it might refuse *agr ation* before he was appointed. It might refuse to accept a member of a mission when he was presented by the head of the mission, or, having accepted the head or a member of the mission, it might at any time declare him no longer *persona grata*.

54. No provision had as yet been made in the draft articles for the second method, so, since the provision in article 5 referred only to the right to refuse to receive a particular category of officials, he proposed that a sentence on the lines suggested in his previous remarks (para. 44 above) form the second sentence or paragraph of article 3 of Mr. Tunkin's amendments. The appointment of a member of a diplomatic mission was always dependent on the consent of the receiving State, even though that consent might be tacit and might be indicated merely by the inclusion of his name in the diplomatic list.

55. Faris Bey EL-KHOURI noted with pleasure that the Special Rapporteur had included in his draft an article dealing with the problem to which he had referred at the 384th meeting (para. 20). He agreed with Mr. Yokota that the size of missions must be limited by mutual agreement. It would be unfair to allow either the receiving or the sending State complete freedom in the matter.

56. Mr. KHOMAN observed that draft article 5 was very well conceived. However, as had been pointed out, it was necessary to strike a balance between the rights of the sending and of the receiving State. All were agreed that it was sometimes in the interest of the receiving State to limit the size of a mission. Such action, on the other hand, must not hamper the work of the mission or prejudice the interests of the sending State.

57. With regard to the second provision in the article, it was clear that a State should not refuse to accept an official, or category of official, except for sound reasons. He accordingly suggested the following modified wording for article 5:

"The receiving State may in certain circumstances and by agreement with the sending State limit the size of the staff composing the mission. It may refuse, on reasonable grounds, to accept a particular official or to admit a particular category of official."

58. Mr. AGO said that he shared the concern of previous speakers, both as to the increasing size of missions and as to the danger of giving the receiving State the right to limit their size unilaterally. Though diplomatic missions were sometimes of a size disproportionate to their needs, it must be admitted that the vast range of activities, many of them not purely diplomatic in character, covered by present-day inter-State relations made some expansion of staffs inevitable. That being so, a provision such as that in the first sentence of article 5,

which could even be interpreted as giving encouragement to States to limit the size of foreign missions, might seriously jeopardize the exercise of the diplomatic function.

59. Whether Mr. Khoman's suggestion would provide adequate safeguards, he was not at that moment prepared to say. Perhaps the Special Rapporteur would submit a redraft of the first sentence in the light of Mr. Khoman's remarks.

60. The second sentence of the article also inspired him with some misgivings, since there again it was a question of unilateral action in what were essentially bilateral relations.

61. Moreover, it was not clear whether the receiving State was to apply the same limitation to all foreign diplomatic missions in its territory, or whether it could refuse to receive a certain category of official in the case of one mission only. The Commission would do well to reflect before adopting such a provision, which might give rise to discrimination and grave international misunderstanding. Generally speaking, the less unilateral rights accorded to States in diplomatic intercourse the better it would be.

62. Mr. SANDSTR M, Special Rapporteur, replying to a question from the CHAIRMAN, said that any conclusions he had drawn from the discussion so far were merely tentative. When framing the first sentence of article 5, he had had in mind only the right of receiving States to limit the size of missions to reasonable proportions, and had not envisaged giving them the right to limit them to a degree that would cripple their activities.

63. The proviso that limitation should be only by mutual consent would not, he was afraid, really solve the problem, since any receiving State could avoid reaching an agreement and then exercise its right to unilateral limitation. Mr. Khoman's text would, in his opinion, actually give the sending State the upper hand.

64. His first reaction was to propose deleting the first sentence altogether and adding the words "or to receive them without its prior consent" at the end of the second sentence.

65. Mr. MATINE-DAFTARY, echoed by other members of the Commission, said that if it was the Special Rapporteur's intention to drop the first sentence of the article, then Mr. Matine-Daftary would certainly move that it be restored, by sponsoring the amendment which had been withdrawn.

66. Sir Gerald FITZMAURICE suggested that a provision on the following lines might be more equitable and generally acceptable:

"1. In the absence of any specific agreement as to the size of the mission, the receiving State may, within the bounds of what is reasonable and customary having regard to current circumstances and to the needs of the particular mission, effect (or impose) such limitation.

"2. The receiving State may also, within similar bounds and on a non-discriminatory basis, refuse to receive officials of a particular category or to receive them without previous consent."

67. Mr. TUNKIN agreed that the first sentence in the article might give rise to complications. On the other hand, Sir Gerald's amended version, with its introduc-

tion of so vague a criterion as "what is customary", might not clarify matters but prove still more confusing.

68. At that stage, he did not see any suitable wording for the first sentence of the article, and would therefore rather accept the Special Rapporteur's proposal to delete it. There would then be nothing either to prevent two States agreeing to limit the size of a mission if necessary, or to prevent the receiving State itself from limiting the size of the foreign mission.

69. The second sentence of the article as formulated by Sir Gerald Fitzmaurice was preferable to that in the draft. He particularly liked the reference to "non-discrimination" which, as Mr. Ago had made clear, was a most important consideration.

70. Mr. SANDSTRÖM, Special Rapporteur, pointed out that his proposal to delete the first sentence of his draft article had been only a tentative one.

71. He viewed Sir Gerald's suggestion with great sympathy, but doubted whether it was suitable for inclusion in the text of a convention. Though more precise than his own formulation, it was still too vague.

72. Mr. GARCIA AMADOR remarked that one fact which emerged from the discussion was the absence of any established and precise rule on the matter. Though Mr. Bartos had shown that a certain practice was followed by certain countries, the existence of a generally accepted principle either one way or the other had not been proved.

73. The Commission could not, therefore, do more than formulate a rule reflecting the existing state of affairs, or, in other words, frame a compromise rule adapted to the needs of the situation. The suggestion made by Sir Gerald Fitzmaurice seemed to offer a satisfactory compromise, and he would support it.

74. Sir Gerald FITZMAURICE explained that he had suggested an amended version of the first sentence merely because other members of the Commission had indicated their desire to keep it in some form, despite the Special Rapporteur's tentative proposal for its deletion. He himself saw no objection to deleting it, provided something on the lines he had suggested was included in the comment on the article.

75. Mr. FRANÇOIS doubted whether it was wise to relegate matters to the commentary merely because the Commission found it difficult to agree on the text of an article. He himself agreed with the text suggested by Sir Gerald Fitzmaurice, but would prefer to see it included in the draft itself.

76. Mr. YOKOTA said that he was anxious to keep the first provision in article 5 in some form or other. Perhaps the Special Rapporteur and Sir Gerald would consult together and produce an amended text for the next meeting.

77. Mr. MATINE-DAFTARY could not agree to the proposal to delete the first sentence. It would leave a vacuum—a gap that no statement in the commentary could fill.

78. Mr. AGO considered Sir Gerald Fitzmaurice's latest suggestion an excellent one. The more he reflected on the first provision in article 5 the more useless it seemed. If States could agree on the size of the mission, the provision was superfluous; if they could not, to introduce the principle of the power of the receiving

State to effect a limitation was extremely dangerous. It would be better to delete the provision.

79. It should be considered also that if Mr. Verdross's proposal was accepted, the receiving State would not be left without any means of protecting its interests, since the earlier articles would give it the right to refuse to accept individual officials.

80. Mr. EDMONDS observed that, whereas the first four articles were primarily concerned with individual officials, the fifth related to groups of officials. Sir Gerald Fitzmaurice's suggestion would make an excellent comment on the draft article as originally proposed by the Special Rapporteur, which he was in favour of retaining.

81. Mr. PAL said that the first part of Sir Gerald's suggestion would be an appropriate comment on article 1.

82. He then observed that too little attention had been paid to the important proposal made by Mr. Verdross (para. 44 above). If it was accepted, the sending State would not enjoy any greater freedom of choice in respect of other members than it had in respect of the head of the mission. The so-called freedom in that respect, originally accorded it under article 3 of the draft would become illusory. The procedure for acceptance of heads of missions and members of missions would be essentially the same, and if that position was accepted, both matters could be covered by a single article. According to Mr. Bartos, the practice was to seek the consent of the receiving State only in the case of certain categories of officials. Mr. Verdross, however, had gone further and wished to make it essential for all members of missions. That was hardly the recognized practice.

83. Mr. AMADO urged the Commission to consider carefully before accepting Mr. Verdross's proposal, which was tantamount to giving the receiving State a *droit de regard* over the diplomatic list of the sending State.

84. Mr. BARTOS said that if, for the sake of argument, Mr. Verdross's proposal were accepted, the second part of Sir Gerald Fitzmaurice's suggestion could be included in the appropriate comment.

85. The provision regarding the limitation of the size of missions was not essential and did not require a special article. The idea could be expressed by including the first part of Sir Gerald's suggestion in the comment on article 1.

86. Mr. HSU deplored the tendency to relegate everything to the commentary. The questions of limiting the size of missions and of the right to refuse certain categories of official were important enough to be covered in the draft itself.

87. As for the principle of non-discrimination, he doubted whether it would be advisable to stress it. In some cases, a State might object to the dissemination of certain types of information. If, however, the principle of non-discrimination were insisted on, it might be difficult for that State to refuse to accept the category of official sent for such a purpose.

88. The CHAIRMAN recalled that the Commission had postponed its decision on articles 3 and 4 pending its decision on article 5. It would therefore have to reach a decision on that article before it could go any further.

89. The position at the moment was that the first sentence of article 5 had been withdrawn by the Special

Rapporteur, though any member of the Commission was free to propose its restoration.

90. Sir Gerald Fitzmaurice's amended version of the second sentence (para. 66 above) appeared to enjoy general approval.

91. Mr. Verdross had proposed (paras. 44 and 54 above) an addition to article 3 of Mr. Tunkin's amendment (386th meeting, para. 3). The Chairman suggested that the Commission discuss that proposal at the earliest opportunity, without, however, re-opening the discussion on the remainder of the article.

The meeting rose at 1.5 p.m.

### 388th MEETING

*Wednesday, 1 May 1957, at 11.45 a.m.*

*Chairman: Mr. Jaroslav ZOUREK.*

#### Statement by Mr. Hsu

1. Mr. HSU regretted that his inability to attend the opening meetings of the session had prevented his replying to Mr. Tunkin's statement at the time it was made (383rd meeting). He was, however, glad to note the improvement in the tone of the annual statements by members from countries under communist régimes regarding the representation of the Chinese legal system.

2. If, in referring to the Chinese legal system, the distinguished members meant the system which was for the time being suppressed on the Chinese mainland, they would, on reflection, realise their mistake, for the General Assembly had duly elected a representative of that system. If, on the other hand they meant the system which for the time being prevailed on the Chinese mainland, they would realise the futility of their regret, because the absence of a representative of that system was due to the fact that the régime on the Chinese mainland had failed to win recognition by the United Nations on account of aggression, amongst other reasons.

3. The CHAIRMAN, speaking in a personal capacity, said that, where China was concerned, the only legal system whose representation on the Commission could be taken into account was the system of the People's Republic of China. That system existed, and must be represented on the Commission under the provisions of the Commission's Statute.

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

[Agenda item 3]

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

#### ARTICLE 5 (continued)

4. The CHAIRMAN outlined the position at the close of the previous meeting.

5. Mr. MATINE-DAFTARY said that, for the reasons he had already stated (387th meeting), he was anxious to retain a provision on the lines of that contained in the first sentence of draft article 5. He was, however, prepared to accept the first sentence in Sir Gerald Fitzmaurice's amendment (387th meeting, para. 66), if it met with the Commission's approval.

6. Sir Gerald FITZMAURICE said that he had no desire to retain the first provision in article 5, but if the

feeling of the Commission was that it should be kept, he would propose that it be enunciated in the qualified form given in the first sentence of his amendment. If, however, the Commission was in favour of omitting the provision, he would like the ideas contained in the first sentence of his amendment to be expressed in the commentary, though naturally in a somewhat different form.

7. Mr. PAL pointed out that the first provision of the Special Rapporteur's draft article 5 had been withdrawn by its author. Since there was no formal proposal for its reinstatement, the ideas contained in the first sentence of Sir Gerald's amendment should as suggested by Sir Gerald, be included in the commentary on the draft. The appropriate place would be under article 1, already accepted by the Commission.

8. Mr. MATINE-DAFTARY stated that, if Sir Gerald Fitzmaurice did not wish to maintain the first sentence of his amendment as part of the draft article, he would sponsor it himself for that purpose. He wished, however, to make a small change in the French text, namely, to delete at the beginning of the text the words "*du personnel*".

9. Mr. TUNKIN observed that Mr. Matine-Daftary had not submitted his amendment in writing, and to wait for it would prolong the discussion unduly. He was in favour of deleting the provision altogether.

10. Mr. AGO said that the question under discussion was important and delicate. He was not in favour of the adoption of any provision on the lines of the first sentence of the Special Rapporteur's draft which had been withdrawn by the Special Rapporteur himself; it would not reflect the practice of States, and the unilateral powers it would vest in the receiving State were not recognized by existing international law. If the Commission adopted such a provision, it would be introducing a major innovation which could have very serious implications.

11. As to the first sentence of Sir Gerald's amendment, the latter had himself proposed to delete it and to include the ideas mentioned therein in the commentary. If that were done, however, the ideas must be differently expressed. He would prefer the comment merely to state that, if any question of the size of a diplomatic mission arose between two States, it should be settled by mutual agreement.

12. Mr. YOKOTA supported Mr. Matine-Daftary's proposal.

13. Mr. AGO, in reply to a question by Mr. FRANÇOIS, explained that he would prefer that the Commission should confine itself in its comment to an expression of concern at the increasing size of diplomatic missions and to the suggestion, that, where necessary, the size be limited by agreement between the two States concerned.

14. The CHAIRMAN, speaking as a member of the Commission, said that he was opposed to the adoption of the first sentence of the Special Rapporteur's draft, or of any other text which contained the same idea of the right of unilateral limitation, which, as Mr. Ago had pointed out, was not recognized by international law. It was the very essence of diplomatic intercourse that it rested on agreement.

15. Mr. AMADO said that he would prefer the concept of reciprocity to that of mutual agreement, since

the latter might introduce an element of political bargaining.

16. Mr. MATINE-DAFTARY pointed out that the text he now proposed included the idea of agreement between the States concerned.

17. The CHAIRMAN, speaking as a member of the Commission, remarked that the opening phrase of Sir Gerald Fitzmaurice's, now Mr. Matine-Defatary's, amendment, "In the absence of any specific agreement", was ambiguous and placed the receiving State under no obligation to seek agreement before taking unilateral action.

18. Mr. MATINE-DAFTARY replied that, to meet the Chairman's criticism, he would propose the following modified wording:

"The receiving State may, by agreement with the sending State, limit the size of the mission, within the bounds of what is reasonable and customary, having regard to current circumstances and to the needs of the particular mission."

The Commission could choose whichever version it preferred.

19. Mr. BARTOS said that, although willing to support Mr. Matine-Defatary's previous proposal, he could not agree to the modified version.

20. Sir Gerald FITZMAURICE, replying to an enquiry from Mr. FRANÇOIS, said that his position was very similar to that of Mr. Ago. He would vote against the retention of the principle enunciated in the first sentence of the Special Rapporteur's draft, which he regarded as an innovation. If, however, the Commission preferred to retain the principle, he would press for it to be stated in the qualified form employed in his own amendment, now taken over by Mr. Matine-Defatary.

21. Mr. EL-ERIAN said that, in view of the recent tendency of diplomatic missions to swell to excessive proportions, there was room for a rule on the subject. He was accordingly in favour of retaining the principle enunciated in the first sentence of article 5, provided it was hedged around with adequate safeguards.

22. The CHAIRMAN suggested that, to clarify the situation, the Commission should first decide whether or not it wished to retain the principle enunciated in the first sentence of article 5 of the Special Rapporteur's draft. It could then vote, if necessary, on the various amendments.

23. Mr. GARCIA AMADOR said that voting in that order would place him in an invidious position. He was opposed to the unqualified statement of principle contained in the Special Rapporteur's draft, but might vote for the principle as qualified in Mr. Matine-Defatary's amendment. If the order suggested by the Chairman was followed, he would have to vote first against the principle and then for it.

24. Mr. KHOMAN urged that the amendments to the Special Rapporteur's draft be voted on first.

25. Mr. BARTOS said that he, too, was in favour of the principle as stated in the qualified form put forward by Mr. Matine-Defatary.

26. Mr. TUNKIN supported Mr. Khoman's proposal. He fully appreciated the embarrassment of those members who were opposed to the bare principle but who

were prepared to accept it if accompanied with certain qualifications.

27. The CHAIRMAN said that he was perfectly willing to put the amendments to the vote, but found that difficult so long as two alternative texts, neither of which had been submitted in writing, were sponsored by the same member of the Commission.

28. Mr. FRANÇOIS said that to obviate that difficulty he would sponsor the first paragraph of Mr. Matine-Defatary's amendment and propose that it be included in article 5.

29. Sir Gerald FITZMAURICE said that if the first paragraph of that amendment was to be voted on for inclusion in the draft, he would like to insert the word "only" before the words "within the bounds".

30. Mr. BARTOS expressed his approval of that change.

31. Mr. EL-ERIAN proposed that, in the text now sponsored by Mr. François, the words "current circumstances" be replaced by "the circumstances and conditions in the receiving State".

32. Mr. AGO said that, even though the text originally proposed by Sir Gerald Fitzmaurice was vastly preferable to the original text proposed by the Special Rapporteur, he was doubtful whether he could vote for it. In the first place, it implied that the general rule was that agreement should be reached between the sending and receiving States as to the size of the mission; in fact, the usual practice was for the sending State to have full freedom in that respect, and it was only when the receiving State felt that the mission was becoming excessively large that any question arose of limiting it by mutual agreement. Secondly, the text proposed would give rise to considerable difficulties in practice, since there was no indication as to who was to determine what was "reasonable and customary", or what were "the needs of the particular mission".

33. Mr. AMADO and Mr. PAL agreed with Mr. Ago, Mr. Pal pointing out that the effect of Mr. El-Erian's amendment would only be to make an unworkable provision still more unworkable.

34. Mr. EDMONDS agreed that the Commission must choose between giving the receiving State the power to restrict the size of the mission unilaterally and saying nothing at all, since to introduce all the subjective criteria referred to in Mr. François's amendment would lead to an impossible situation.

35. Mr. BARTOS said that, in principle, he supported the text originally submitted by Sir Gerald Fitzmaurice, which restricted the receiving State's power to limit the size of the mission, but did so in such a way as not to prejudice its established rights in that respect.

36. Mr. MATINE-DAFTARY said that, although he had no desire to cite instances in which States had abused their right to decide the composition and size of their foreign diplomatic missions, especially since the Second World War, he would merely ask how other members of the Commission intended to guard against such abuses.

37. Mr. KHOMAN said he supported the text proposed by Sir Gerald Fitzmaurice, which would do no more than set the stamp of legal approval on a well-established practice.

38. With regard to Mr. Ago's remarks, he felt it would clearly be for the two States concerned to determine, by negotiation, what was "reasonable and customary". He did not see how the Commission could be any more precise.

39. Mr. YOKOTA agreed that the Commission could not hope to arrive at a text that was open to no conceivable objections. The text proposed by the Special Rapporteur had been definitely dangerous. That proposed by Sir Gerald Fitzmaurice was not perhaps as precise as might be wished, but it would be difficult to word it more precisely, and he supported it.

40. Mr. TUNKIN felt that the Commission should vote on the text proposed by Sir Gerald Fitzmaurice and leave its exact wording to the drafting committee. In his own view, it was in accordance with current practice that the receiving State should be able to limit the size of the mission in certain circumstances and to a certain extent.

41. Mr. VERDROSS said that, if the Commission omitted to include any provision along the lines of the Special Rapporteur's draft or Sir Gerald's amendment, it would mean that the sending State could inflate the mission to any size it liked. All international intercourse was based on mutual consent, and in the case in question the sending State had no unrestricted right to increase the size of the mission unilaterally, any more than the receiving State had the right to limit it unilaterally. He agreed with Mr. Tunkin that some form of words might be found by the drafting committee to reflect the situation accurately.

42. Mr. SANDSTRÖM, Special Rapporteur, said that he would vote against the amendment originally submitted by Sir Gerald Fitzmaurice and now taken up by Mr. François, since the discussion had convinced him that it was unnecessary and undesirable.

43. To meet Mr. Verdross's point, the Commission might say in the commentary that the sending State had not an unrestricted right to increase the size of its mission unilaterally, and that it should seek agreement on the matter with the receiving State, on the basis of the criteria mentioned in Sir Gerald's text.

44. Sir Gerald FITZMAURICE said that, now that the Commission was voting at one and the same time on the question of principle whether to refer in article 5 to the receiving State's power to limit the size of the mission and on the form such reference should take, he would be obliged to vote against the amendment which he had himself proposed and which had now been taken up by Mr. François.

45. Mr. AGO wondered whether all the difficulties might not be avoided if, instead of speaking of the receiving State's power to limit the size of the mission, the Commission were to speak of the sending State's obligation to keep the size within reasonable bounds.

46. Mr. BARTOS supported Mr. Ago's suggestion, which amounted to precisely the same thing but avoided giving the appearance of attacking what had always been regarded as an established rule of international law.

47. The CHAIRMAN suggested that further discussion of article 5 be deferred until Mr. Ago had had an opportunity to submit a specific proposal, possibly after consultation with Mr. Matine-Daftary and the Special Rapporteur.

*It was so agreed.*

#### ARTICLE 3 (*continued*)<sup>1</sup>

48. Mr. VERDROSS proposed that the following be added as paragraph 2 of Mr. Tunkin's draft article 3 (386th meeting, para. 3), with which he was in other respects in entire agreement.

"Any State may, however, refuse to receive any person notified to it as having been appointed to a diplomatic mission."

49. He was glad that the discussion had revealed that there was general agreement that mutual consent was the necessary basis of diplomatic intercourse, since that was the assumption underlying his proposal. In his view, the consent of the receiving State was required not only for the head of a diplomatic mission but also for its other members; it was only the form of consent that differed. In the case of the head of the mission, consent was given explicitly in advance, in the form of *agrément*; in the case of other members it was given implicitly, either before their arrival by granting them an entry visa, or after their arrival by entering their names on the diplomatic list. It was, after all, only reasonable that the consent of the receiving State should be required, even for junior members of missions, since the duties of the head of the mission might at any moment devolve on them, in the event of illness or injury.

The meeting rose at 1 p.m.

### 389th MEETING

*Thursday, 2 May 1957, at 9.45 a.m.*

*Chairman:* Mr. Jaroslav ZOUREK.

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

[Agenda item 3]

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

#### ARTICLE 3 (*continued*)

1. The CHAIRMAN invited the Commission to continue its consideration of Mr. Verdross's amendment (388th meeting, para. 48) to Mr. Tunkin's draft article 3 (386th meeting, para. 3).

2. Mr. SANDSTRÖM, Special Rapporteur, felt that Mr. Tunkin's draft article 3 left a gap which was made only the more obvious by the fact that his draft article 4(a) contained the expression "no longer *persona grata*", which implied prior acceptance by the receiving State. That gap was filled by Mr. Verdross's amendment, which he accordingly supported.

3. Sir Gerald FITZMAURICE asked whether Mr. Verdross and the Special Rapporteur were quite sure that the former's amendment represented current practice. It reduced the distinction between the head of the mission and the other members to the fact that, in the case of the former *agrément* had to be obtained in advance, while in the case of the latter it was presumed but could be rebutted later. It was significant that Mr. Bartos had laid a great deal of stress on the fact that the receiving State could, in his view, refuse to receive military, naval and air attachés, but had not suggested that

<sup>1</sup> Resumed from the 387th meeting.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

20. He agreed with Mr. Pal that, if Mr. Verdross's amendment was accepted, it would be not only in accordance with current practice but logical as well if the following was added to Mr. Tunkin's text for article 3: "whose names shall be notified to the receiving State before they take up their duties."
21. Finally, he suggested that the beginning of Mr. Verdross's amendment be re-worded as follows: "Any State may, however, *declare unacceptable* any person . . ."
22. Mr. EL-ERIAN said that he shared the view expressed by Mr. Tunkin and Sir Gerald Fitzmaurice. The Commission should not fight shy of all innovations, but at that juncture should abide by existing practice, in view of the special responsibilities and position of the head of the mission.
23. Faris Bey EL-KHOURI said that he, too, was very doubtful whether Mr. Verdross's amendment reflected the existing practice. If the majority of the Commission really wished to insert a provision along those lines, it should at least avoid placing so much emphasis on it. For his own part, he saw no reason why the Commission should make it possible for the receiving State to refuse to receive persons whom the sending State wished to accredit to it merely because it did not like some aspect of their past activities.
24. Mr. SANDSTRÖM, Special Rapporteur, said that he did not agree with Sir Gerald Fitzmaurice and Mr. Tunkin regarding the position of members of the mission from whom *agrément* was withheld after they had arrived in the receiving country.
25. If the Commission felt that Mr. Verdross's amendment was too categorical, it would have to find a reasonable compromise solution. That might be either along the lines suggested by Mr. Khoman, or by adding the words "Subject to the provisions of article 4(a)" at the beginning of Mr. Tunkin's draft article 3 and replacing the words "no longer *persona grata*" in the first paragraph of his draft article 4(a) by the words "*persona non grata*".
26. Mr. AMADO said there was one very good practical reason for the current practice of not requiring *agrément* in advance for members of a mission other than its head. It would be quite impracticable for the receiving State to make enquiries concerning the previous activities of every third secretary accredited to it. It could only wait and judge from his conduct in his post whether he was suitable for it or not.
27. Mr. TUNKIN said that, in his experience, except in the case of the head of the mission for whom prior *agrément* was always obtained, any person was regarded as a member of the mission as soon as he had been appointed to it by the sending State. He fully agreed with Sir Gerald Fitzmaurice that any other solution would give rise to very serious difficulties in practice.
28. It had been said that there should be a counterpart to the sending State's right to choose freely whom it wished to appoint as a member of a mission. In his view, that counterpart was to be found in his article 4(a), and he understood that Mr. Verdross felt that his wishes would be met by replacing the words "no longer *persona grata*" in that article by the words "*persona non grata*". That amendment Mr. Tunkin accepted.
29. He also accepted the Special Rapporteur's suggestion for the addition of the words "Subject to the provisions of article 4(a)" at the beginning of his draft article 3, although he did not feel they were really necessary.
30. Mr. KHOMAN drew Mr. Amado's attention to the fact that it was quite conceivable that a third secretary had previously written articles or made speeches hostile to the receiving State. Adoption of Mr. Verdross's amendment would not, of course, mean that the receiving State had to make enquiries in all cases, but merely that it had the right to refuse to receive anyone about whom it knew something which made him objectionable.
31. The answer to Sir Gerald's and Mr. Tunkin's objection surely was that a person who was appointed to a mission was to be regarded *provisionally* as a member of the mission until his name was entered on the diplomatic list.
32. Mr. AGO pointed out that, in speaking of consent as the basis for the diplomatic junction, it must not be forgotten that a diplomatic official was not a kind of international official appointed by agreement between the sending and the receiving State; he was purely and simply an official of the sending State. Even *agrément*, given, as far as the head of a mission was concerned, by the receiving State, was not a participation of that State in his appointment, but simply a condition that the sending State must fulfil before proceeding to appoint the head of its mission in order to ensure that he would be able to discharge his functions satisfactorily. On the other hand, the receiving State had the necessary safeguard, in the form of the right to declare later on the chief or any other member of a mission *persona non grata*—but that was something quite distinct from *agrément*.
33. Such was the practice, and, to his mind, Mr. Tunkin's text reflected it faithfully. If the Commission wished to introduce the idea of *agrément* for members of a mission other than the head, it ought to be quite clear that it was not codifying but innovating; and the possible advantages of such an innovation were, in his view, far outweighed by the disadvantages, not only those referred to by Sir Gerald Fitzmaurice, but also the formidable amount of extra work that would devolve on each ministry of foreign affairs' personnel department.
34. Although the idea of replacing the words "no longer *persona grata*" in Mr. Tunkin's draft article 4(a) by the words "*persona non grata*" was attractive, it would be seen, on consideration, that such a change would modify the system currently followed. For that reason he hesitated to accept it.
35. The CHAIRMAN pointed out that, as article 4(a) had already been voted on (387th meeting), any suggestions for changing its wording would have to be referred to the drafting committee.
36. Mr. MATINE-DAFTARY said he could vote for either of Mr. Verdross's alternative amendments. He felt that those who opposed them exaggerated their scope; they related only to the exceptional case where a person appointed to a mission was already known to the receiving State, either personally or by reputation, as someone whom it would be unwilling to receive; there was no question of making explicit *agrément* necessary for all persons appointed to diplomatic missions, irrespective of grade, or of the receiving State's having to undertake enquiries in every case. Moreover, from

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

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

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

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

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

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

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

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

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

45. The cases referred to by Mr. Bartos (387th meeting) were exceptional ones which could be settled by special negotiations between the two States concerned.

It was not necessary to formulate a new general rule to deal with them.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

*It was so agreed.*

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

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

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

#### ARTICLE 4 (*continued*)

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

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

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

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

<sup>1</sup> Resumed from the 387th meeting.

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

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

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

#### ARTICLE 5 (*continued*)<sup>2</sup>

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

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

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

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

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

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

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

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

<sup>2</sup> Resumed from the 388th meeting.

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

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

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

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

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

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

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

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

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

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

84. Mr. MATINE-DAFTARY said that voting in that order would place some members of the Commission in a quandary. He, for instance, would prefer the text sponsored by Mr. François, but would rather

have Mr. Ago's text than nothing at all. He would, therefore, be obliged to vote for the latter and perhaps contribute to its adoption, because he would have no opportunity of reviving it, were Mr. François's text subsequently rejected. He therefore moved that Mr. François's text be voted upon first.

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

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

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

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

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

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

The meeting rose at 1 p.m.

### 390th MEETING

Friday, 3 May 1957, at 9.45 a.m.

Chairman: Mr. Jaroslav ZOUREK.

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

[Agenda item 3]

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

ARTICLE 5 (continued)

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

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

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

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

tical category in the case of certain missions accredited to it and refuse to accept them in the case of others.

5. Mr. HSU said that he did not wish to propose any change in established practice. The practices must, however, be flexible enough to cover a state of affairs which actually existed.

6. Mr. GARCIA AMADOR said that, although prepared to accept a proposal reflecting the views of Mr. Bartos that a State might, for security reasons, refuse to accept service attachés, he was not in favour of the very general proposal before the Commission, which extended the right of refusal to any category of official. Sir Gerald's amendment accorded the receiving State what was tantamount to the right of dictating to the sending State the composition of its mission. Such a provision would open the door to all kinds of abuse. The composition of a mission should be decided not by the receiving State but by the sending State, with due regard to the former's interests.

7. Mr. PAL agreed with Mr. Garcia Amador's comments on Sir Gerald's amendment. His further objection to the amendment was the vagueness of the conditions proposed. The words "within similar bounds", namely, "within the bounds of what is reasonable and customary having regard to current circumstances", would, instead of eliminating the possibility of discrimination, only supply a convenient pretext for arbitrary action in that respect. The Commission, however, had already accorded its sanction to the phrase by accepting paragraph 1 of the amendment.

8. Mr. KHOMAN agreed that it was beyond dispute that the principle of non-discrimination should govern international relations in general. He noted, however, that the first paragraph of Sir Gerald Fitzmaurice's text, which had later been sponsored by Mr. François and adopted at the 389th meeting, contained no reference to that principle. While he had no objection to its inclusion in paragraph 2, he thought that it would be more logical under the circumstances for it to be omitted.

9. Mr. BARTOS recalled that he had first raised the question of the appointment of service attachés to diplomatic missions (386th meeting, para. 42). It was the general practice for the sending State, after nominating them, to seek the approval of the receiving State, such approval being assumed when no objections were raised. The attaché then presented himself to the intelligence department of the general staff of the receiving country, and only when that *démarche* had been completed was he entitled to take up his duties. In Sir Gerald's text, such an approval procedure was extended to other categories of officials of missions. He would not oppose that generalization, but must point out that he had originally had in mind only service attachés.

10. He approved of the inclusion in Sir Gerald's text of the proviso "and on a non-discriminatory basis", but must emphasize the difference between discrimination and reciprocity. The refusal of one State to accept a certain category of official, because the other State had already refused to accept the same category of official in the former's mission, did not constitute discrimination, but was merely an application of the principle of reciprocity.

11. In the absence of a clearly established international rule, States had the right to grant or refuse diplomatic status to special categories of diplomatic official.

12. Sir Gerald FITZMAURICE observed, with reference to Mr. García Amador's remarks, that there were two different points in the part of his amendment under consideration. It was only the second point, that of the right of the State to refuse to receive officials without previous consent, that was inspired by Mr. Bartos's observations. The first point, namely, the right to refuse to receive officials of a particular category, was based on the original provision in the Special Rapporteur's article 5, and was designed to qualify the rather sweeping statement of principle in that text.

13. Referring to Mr. Khoman's remarks on non-discrimination, he said that paragraphs 1 and 2 of his amendment could not be compared in that respect. The question of the right to limit the size of a mission, dealt with in the first paragraph, must obviously depend on circumstances peculiar to the particular mission. To have introduced the principle of non-discrimination in that paragraph would have been to imply that all missions in a given capital must be of the same size, which was absurd. The principle of non-discrimination must, however, be applied in the matter of refusing to receive officials of a particular category. Were a receiving State to refuse to receive officials of a particular category at all, its conduct might be abnormal, but at least there would be no discrimination.

14. As for the idea of appointment only with previous consent, there had appeared to be general agreement in principle with Mr. Bartos's views, but the idea had widened somewhat in the course of the discussion. The views of Mr. Bartos and Mr. García Amador were, however, largely met by his text, since it gave the receiving State the right to refuse to receive officials of a particular category without previous consent only in cases where that was compatible with what had been customary.

15. Mr. TUNKIN remarked that the type of provision favoured by Mr. García Amador and that contained in Sir Gerald Fitzmaurice's amendment both contradicted article 3, as adopted, which stated that "the sending State may freely choose the other officials which it appoints to the mission".

16. He would prefer to limit the application of the second part of article 5 to service attachés.

17. Mr. HSU said that the important point was not that there should be no discrimination between missions in the same capital but that there should be reciprocity between States.

18. He agreed with Mr. Khoman that it was illogical to mention the principle of non-discrimination in paragraph 2 of Sir Gerald's text and not in paragraph 1. But to mention it in paragraph 2 was undesirable as well. A State might, for instance, wish to exclude such press attachés as those sent by the former national socialist régimes, who indulged in undesirable propaganda, yet might regard press attachés in general as legitimate members of diplomatic missions. Under the principle of non-discrimination, however, it would have to exclude all or none. The reference to non-discrimination in the text was unnecessary and might even be dangerous, and he wished formally to propose its deletion.

19. Mr. SANDSTRÖM, Special Rapporteur, remarked that the Commission might have to consider the general question of non-discrimination when it came to examine the application of the principle of reciprocity and the most-favoured-nation clause. Be that as it might,

the limitations placed on the powers of the receiving State, and the proviso regarding non-discrimination in particular, were essential in order to prevent abuse.

20. The CHAIRMAN put to the vote Mr. Hsu's proposal that the words "and on a non-discriminatory basis" be deleted from Sir Gerald Fitzmaurice's text.

*The proposal was rejected by 11 votes to 1 with 5 abstentions.*

21. The CHAIRMAN proposed that Sir Gerald Fitzmaurice's text be put to the vote.

22. Mr. MATINE-DAFTARY asked to be allowed time to prepare an amendment to it in concert with Mr. García Amador, in view of the apparent desire of several members of the Commission to render the text more specific.

23. Mr. GARCIA AMADOR said that, on reflection, he could not see how the text could be amended. After hearing Sir Gerald Fitzmaurice's statement, he would be satisfied with a clear explanation of the scope of the provision in the commentary, assuming the text was adopted.

24. Mr. TUNKIN asked for separate votes on the words "the receiving State may also, within similar bounds and on a non-discriminatory basis, refuse to receive officials of a special category", and on the words "or to receive them without previous consent", which should be applied only to service attachés.

*It was so agreed.*

25. The CHAIRMAN put the first part of Sir Gerald Fitzmaurice's text to the vote.

*The first part of the text was adopted by 15 votes to none with 3 abstentions.*

26. Mr. AGO pointed out that Mr. Tunkin had used the words "special category" whereas the actual text said "particular category". There was a difference between the two terms, and the drafting committee might well consider which was preferable.

*It was so agreed.*

27. The CHAIRMAN put to the vote the remaining words of Sir Gerald Fitzmaurice's text, "or to receive them without previous consent", subject to reference to the drafting committee with a view to confining the provision to naval, military and air attachés.

*On that understanding, the text was adopted by 7 votes to 5 with 5 abstentions.*

28. The CHAIRMAN, replying to Mr. KHOMAN and Mr. SANDSTRÖM, said that since the text had been adopted in two parts, one at least of which was subject to redrafting, the Commission would have an opportunity to decide at a later stage whether it approved the final text as a whole.

#### ARTICLES 6 TO 11

29. Mr. SANDSTRÖM, Special Rapporteur, introducing articles 6 to 11 of his draft, expressed the view that the Commission should consider them together, and first settle the general question of principle: whether to revise the classification of diplomatic agents, in three classes, established by the Regulation adopted at the Congress of Vienna and later supplemented by the Protocol of the Conference of Aix-la-Chapelle, which had added a new class, that of "ministers resident" (A/CN.4/98, paras. 21-26).

30. The question of revising the classification of diplomatic agents had already been raised in the course of the work of codification undertaken by the League of Nations, when a negative conclusion had been reached (*Ibid.*, paras. 105-112).

31. Various considerations had prompted Mr. SANDSTRÖM to re-open the question. In the first place, the reasons given in 1927 in favour of such revision by the Sub-Committee set up by the Committee of Experts for the Progressive Codification of International Law (*Ibid.*, paras. 107-110) seemed still to hold good, whereas the arguments against revision (*Ibid.*, para. 112) were not very convincing. There did not, for instance, appear to be any need for States wishing to mark special bonds between them to do so by according a higher rank to their diplomatic representatives.

32. Furthermore, the existence of two classes of representative heads of missions, namely, ambassadors and ministers plenipotentiary, was contrary to the principle of the formal equality of States. Such a distinction might have been justified when the sending of ambassadors was a prerogative of the great Powers, or even at the time of the League of Nations. Since then, however, the practice of exchanging ambassadors had been considerably extended, and the distinction was no longer justified. It also had the disadvantage of not being conducive to the stability of the diplomatic corps in small capitals.

33. The question of the classification of diplomatic representatives had been raised at the tenth session of the General Assembly, when the representative of Sweden had stated in the Sixth Committee on 3 November 1955 that "the Committee should bear in mind the urgent need of revising the classification of diplomatic agents . . . In view of the growing tendency on the part of States to appoint ambassadors, the old distinction between embassies and legations was no longer justified. The resulting situation caused irritation and inconvenience to a number of States. The remaining anomalies should therefore be eliminated . . . It was to be hoped the International Law Commission would . . . submit to the General Assembly a set of proposals designed to dispose of the classification question. There might, indeed, be some advantage in having that question treated as a wholly separate item".<sup>1</sup> The Norwegian representative had also expressed the view that "the existing system of classification had sometimes caused inconvenience, and a speedy remedy of the situation would be welcomed by everyone".<sup>2</sup>

34. The Commission would, of course, appreciate that there had been no collusion between him and the Scandinavian representatives on the Sixth Committee. Their Governments had raised the question without consulting him.

35. The discussion had been summed up in the following terms in the Sixth Committee's report: "Some representatives recalled the urgent need of revising the classification of diplomatic agents, and expressed the hope that the Commission, at its eighth session, could frame a proposal on the topic for transmission to the General Assembly, treating the problem of classification, if need be, as a separate matter."<sup>3</sup>

<sup>1</sup> *Official Records of the General Assembly, Tenth Session, Sixth Committee*, 453rd meeting, paras. 12-14.

<sup>2</sup> *Ibid.*, para. 18.

<sup>3</sup> *Ibid.*, Tenth Session, Annexes, agenda item 50, document A/3028, para. 5.

36. The CHAIRMAN invited the Commission to take a decision regarding article 6, which did not appear to contain anything controversial.
37. Mr. AGO pointed out that, should the Commission decide to have only one class of head of mission, article 6, as worded, would no longer be relevant.
38. Mr. SANDSTRÖM, Special Rapporteur, agreed that the article might need redrafting.
39. The CHAIRMAN pointed out that, even if the Commission decided to advocate the abolition of the intermediate class of ministers plenipotentiary, there still remained the third class of *chargés d'affaires*.
40. Mr. YOKOTA was in favour of discussing the articles and even the paragraphs, one by one, in accordance with the procedure already decided upon by the Commission.
41. Mr. KHOMAN thought it would be more logical to discuss articles 6 to 11 together. He agreed with Mr. Ago's point. Incidentally, he would prefer article 6 to speak of "status" rather than "class".
42. He did not think that *chargés d'affaires* really constituted a definite class; though temporary *chargés d'affaires* were not uncommon, accredited *chargés d'affaires* were very rare.
43. Mr. AMADO observed that there were cases of *chargés d'affaires* accredited as such. If he was not mistaken, the United Kingdom was represented at Peking by a *chargé d'affaires*.
- It was agreed to defer further consideration of article 6 until the question of classification of heads of missions had been settled.*
44. Mr. VERDROSS, referring to article 7, said that some redrafting appeared advisable, since legates were never heads of permanent missions but were sent for individual special affairs, and were not normally accredited to heads of States.
45. He wondered whether it would be possible to abolish the category of ministers plenipotentiary recognized by the Congress of Vienna.
46. Mr. BARTOS said that the idea of abolishing the intermediate category of ministers plenipotentiary and other ministers was entirely in accordance with the trend of modern international law, and he fully supported it. The category was a relic from the days when ambassadors were regarded as having the right to treat directly with the sovereign, whereas ministers were not. That right being long defunct, the subsidiary category had become an obsolete institution.
47. The whole trend of modern international law sanctioned its abolition. The United Nations, under Article 2 of its Charter, was based on the principle of the sovereign equality of all its Members, and it was an obvious corollary of that principle that the diplomatic representatives of States should also be equal in status.
48. As early as 1918, an abortive attempt to abolish the distinctions between diplomatic envoys had been made by the Soviet Union, when it had established a single class of "plenipotentiary representatives". As, however, other States had classed such representatives along with *chargés d'affaires*, the Soviet Union had been obliged to conform to tradition.
49. Since then the move towards general representation by ambassadors had steadily gained ground. Quite apart from those States, such as Poland and Spain, which claimed the right to such representation on historical or legal grounds, there was the case of the Latin-American States which had decided before the Second World War to exchange only envoys of ambassador status. In 1942, the States allied against the Axis Powers had come to the same decision. Switzerland, where there was only one embassy, the French embassy (Swiss missions in other capitals being merely legations) had recently fallen into line with other countries in the matter of exchange of ambassadors.
50. The distinction between ambassadors and ministers plenipotentiary was a purely theoretical one, at any rate so far as the privileges and immunities granted in the receiving State were concerned. Thus, after the First World War, the Romanian, Turkish and Yugoslav Governments had agreed to exchange ambassadors rather than ministers as in the past, but at the same time had made it clear that the ambassadors should enjoy no privileges not enjoyed by the ministers of other States in their respective capitals. Moreover, certain countries, such as Belgium, did not for internal purposes recognize the rank of ambassador at all, but nevertheless gave the title of ambassador to their diplomatic representatives to certain other countries.
51. In order to help get rid of what he had thus shown to be no more than a vestige from the past, he would be glad to vote for the reform proposed by the Special Rapporteur.
52. Mr. MATINE-DAFTARY said that, before agreeing to what would be a very important innovation, he would like to hear more about the difficulties to which the current system gave rise in practice. It had been said that, in conformity with the principle of the equality of States, the diplomatic representatives of States should all be in one class. However, the fact that all men were equal before the law did not mean that the relations between them all must be on precisely the same footing. It was inevitable that a man's relations with some of his fellow men were closer and of more consequence to him than his relations with others, and the same would appear to be true of States.
53. If the Commission agreed that the sovereign no longer represented the apex of power, it should logically get rid of the term "ambassador", since the ambassador, having been up to now the sovereign's personal representative, conjured up the idea of the Congress of Vienna. The term "plenipotentiary representative" could be adopted for all States, if it was decided to have only one class.
54. *Chargés d'affaires* were simply interim heads of missions, and he was inclined to agree that they should not be made a class apart.
55. Mr. AMADO pointed out that there were *chargés d'affaires* on a quasi-permanent basis, for example, in the case where an ambassador was withdrawn as a result of a deterioration in relations between the two States concerned. He agreed, however, that *chargés d'affaires* could not be said to constitute a distinct class, since there were almost as many different types of *chargé d'affaires* as there were *chargés d'affaires*.
56. Mr. FRANÇOIS agreed that ministers plenipotentiary as a class should be abolished. The present division of heads of missions into two main classes, am-

bassadors and ministers plenipotentiary, resulted in discrimination against certain States. At the time of the Congress of Vienna, the distinction between them had been justified by the special position which the Great Powers then enjoyed, in law as well as in fact. Even after the First World War, when Belgium had favoured retention of the system, it had been possible to argue that there were cases in which a State might wish to place a mark of distinction on its relations with certain other States. Nowadays, however, the appointment of an ambassador in no way signified that relations between the two States in question were specially close or of special importance. More and more, ambassadors had been appointed where they were nothing of the kind; as a result, the ministers plenipotentiary now found themselves in an inferior position, ill-befitting their dignity. For example, they might rank below the representatives of States whose relations with the receiving State were much less close and of much less consequence to it, simply because the latter called their representatives ambassadors.

57. It might be argued that if two States wanted to go on exchanging ministers plenipotentiary rather than ambassadors, there was no reason why the Commission should prevent them from doing so; but the commoner case was where one State was willing to raise its representative to the rank of ambassador and the other State was not.

58. While he was accordingly in full agreement with the Special Rapporteur that ministers plenipotentiary as a class should be abolished, he pointed out that article 7 would not necessarily achieve that purpose. If the Commission's draft was to be the basis for a draft convention, the States which ratified it would thereby undertake to make all their ministers plenipotentiary into ambassadors. But if the Commission's draft was to be merely a kind of model code, its promulgation would not cause the class of ministers plenipotentiary to disappear; and, in that case, it would be preferable to retain mention of them in article 7 and refer to the abolition of that class only in the commentary.

59. Mr. TUNKIN said there was no doubt that great changes in practice had occurred since the Congress of Vienna and the Conference of Aix-la-Chapelle, and it would theoretically be desirable for them to be reflected in the Commission's draft. He appreciated the fact that the Special Rapporteur's proposal was based on the principle of the equality of States. It was on the same principle that, as Mr. Bartos had already remarked, a decree had been issued in the Soviet Union in 1918 according to which all diplomatic representatives of the Soviet State were named plenipotentiary representatives. There was no doubt that the general tendency, especially since the Second World War, was towards the disappearance of ministers plenipotentiary as a separate class. Moreover, in most, if not all, countries, ambassadors and ministers were accorded the same status.

60. The fact, however, remained that some States continued to appoint ministers plenipotentiary, and he was not sure that the Commission should attempt to outrun events. Omission of any reference to ministers plenipotentiary would certainly arouse objections from a number of States. Regardless of the form the Commission's draft was to take, it seemed wise not to court such objections unnecessarily, and it was unnecessary in the present instance since, if ministers plenipotentiary were treated on the same footing as ambassadors, and States

were free to appoint either ambassadors or ministers, the question of classes was of no importance and in no way infringed the principle of equality of States.

61. Mr. EL-ERIAN agreed that the Commission must take into account the realities of international life, in particular the general acceptance of the principle of the equality of States. Provided the current system recognized the equal right of all States to appoint ministers plenipotentiary or ambassadors as they thought fit, and provided it made no distinction between the duties and the privileges of ministers plenipotentiary and ambassadors respectively, he felt the Commission should not be in too much of a hurry to change it. Before it took a final decision, it would, in any case, have the comments of Governments on its initial draft.

62. He was doubtful about Mr. Khoman's suggestion for replacing the word "class" by "status" in article 6, since the status of heads of diplomatic missions was governed by international law. It was in very fact the class to which they were to belong that was decided by agreement between States.

63. Mr. HSU agreed with Mr. Tunkin that there was no harm in retaining ministers plenipotentiary as a separate class. The current system of classification had been criticized on the ground that it was contrary to the principle of the equality of States, but that criticism would never have been heard if the system had not been abused. Such abuse of it as there had been was now, fortunately, largely a matter of past history, though, of course, it would be very desirable if the Commission could secure the removal of the few remaining abuses, which centred on the question of reciprocity.

64. It was, in fact, convenient for certain States, particularly the smaller States, to retain two classes of foreign diplomatic mission, both for financial reasons and owing to the scarcity of suitable personnel.

65. If the majority of the Commission favoured Mr. Sandström's proposal, however, he would have no objection.

66. Mr. AGO said that, even if it was true nowadays that there was a tendency to make all heads of missions ambassadors, he wondered whether it was politically desirable for the Commission to precipitate matters. Mr. François had clearly listed the arguments in favour of the Special Rapporteur's proposal. On the other hand, Mr. Matine-Daftary had rightly pointed out that the equality of States was not the only relevant factor, and the fact that a State was not entertaining the same closeness of relations with every other State had also to be taken into account. The maintenance of different classes of diplomatic missions was therefore to be recommended.

67. Moreover, the Commission could not disregard the fact that some States had agreed between themselves to exchange only ministers, while the laws in force in other States did not provide for the appointment of ambassadors. In his view, therefore, the Commission had no choice but to refer to ministers plenipotentiary in article 7, although it could say, in the commentary, that it would be desirable for all heads of missions to be ambassadors if it really felt that to be the case.

68. Sir Gerald FITZMAURICE agreed with Mr. Ago and Mr. Tunkin that the Commission must refer to ministers plenipotentiary, although it might, in the commentary, draw the attention of Governments to the desirability of changing the current system of classifica-

tion. If it did so, however, it should make it clear that two questions were involved: first, whether to continue to use both terms, "ambassadors" and "ministers plenipotentiary"; and secondly, whether to make what might appear to be an invidious distinction in treatment corresponding to the difference in terms. Several States which had, for external purposes, raised their foreign legations to the status of embassies, continued to distinguish between first class and second class ambassadors for internal purposes, especially for questions of finance. It was, therefore, perfectly possible to abolish all distinction between ambassadors and ministers plenipotentiary in a receiving State, while retaining a distinction in the sending State. The Commission could, however, do no more than draw attention to those points in the commentary.

69. Mr. KHOMAN pointed out that it was a fairly common practice for States which had just entered into diplomatic relations with each other to begin by exchanging ministers, and, later, as relations between them developed, to raise them to the status of ambassadors. He agreed, therefore, that the Commission, engaged as it was on a task of codification, could not completely ignore the existence of ministers plenipotentiary. The difference between them and ambassadors was, in any case, very slight; so far as the United Nations was concerned, it was merely that the latter were entitled to the form of address "His Excellency". The Commission's efforts should be directed to getting rid of such differences as remained. As Sir Gerald Fitzmaurice had pointed out, the question of the continued use of two different terms or appellations was another matter.

70. Mr. YOKOTA agreed that the principle of the equality of States was a fundamental rule of international law, but it was not an absolute principle. It admitted of many exceptions, even in the United Nations where certain States occupied a permanent seat in the Security Council and enjoyed the right of veto. With regard to the matter under discussion, the principle, in his view, entailed no more than the equal right of all States to agree what class of diplomatic agent they wished.

71. As to the classes of diplomatic agents, there were, in practice, no real differences between ambassadors and ministers plenipotentiary as regards either privileges and immunities, the form of their appointment or their functions. The difference was purely nominal. He was, therefore, inclined to support the Special Rapporteur's proposal.

72. *Chargés d'affaires*, on the other hand, formed a different class, since they were appointed by and accredited to ministers of foreign affairs.

73. Mr. AMADO agreed that, in general, the only difference between ambassadors and ministers plenipotentiary was in respect of precedence. It might be that there was a tendency to combine them in a single class, but it was no part of the Commission's task to encourage any more than to discourage that tendency.

74. The CHAIRMAN, speaking as a member of the Commission, said that he agreed that ministers plenipotentiary still existed as a class, a class which met a real need, unlike that of ministers resident, which had almost disappeared and retention of which had not been urged by any member of the Commission.

75. It was true that the only difference between an ambassador and a minister plenipotentiary was in re-

spect of precedence. There was undoubtedly a tendency to group heads of missions in a single class, but as the General Assembly had given the Commission the task of codifying international law in the field of diplomatic intercourse and immunities, it would be difficult for it not to mention the class of ministers plenipotentiary. It should, however, state in the commentary that, in practice, there was a tendency to group in one class of diplomatic agent the first two classes established by the Regulation adopted in 1815 at the Congress of Vienna. (A/CN.4/98, para. 22)

76. The Commission would be able to take a final decision at its next session when it had before it the comments of Governments on its draft. If Governments were in favour of abolishing the class of ministers plenipotentiary, it could modify its draft accordingly.

77. Mr. SANDSTRÖM, Special Rapporteur, said he had been impressed by the arguments of Mr. François, who had been supported by other members of the Commission. Ministers plenipotentiary existed and would continue to exist for a number of years. That made him think that, instead of following in his draft the work of the League of Nations, he might have recommended, not the abolition of a class, but the abolition of any distinction in precedence between classes.

78. He would endeavour to present a new text along those lines to the Commission at its next meeting.

79. Mr. EDMONDS thought that all members of the Commission agreed that the differences between ambassadors and ministers plenipotentiary could not be disregarded, and that there were good reasons for them, at least as far as the internal arrangements of the sending State were concerned. He was not convinced that the powers and duties of the two classes were identical. At any rate, the Commission should not go so far as to delete all reference to one of those classes.

80. Mr. GARCIA AMADOR said that the Latin countries had replaced many of their ministers plenipotentiary by ambassadors, in accordance with the general trend, but that by doing so they had created all manner of difficulties for themselves. To generalize the practice would lead to still greater difficulties. The Commission should therefore be realistic and agree to the retention of ministers plenipotentiary as a separate class.

The meeting rose at 1 p.m.

### 391st MEETING

Monday, 6 May 1957, at 3 p.m.

Chairman: Mr. Jaroslav ZOUREK.

#### Appointment of a drafting committee

1. The CHAIRMAN proposed that the Drafting Committee which the Commission had already agreed in principle to set up should be constituted as follows: Mr. Pal as Chairman, Sir Gerald Fitzmaurice, Mr. García Amador, Mr. François, Mr. Sandström and Mr. Tunkin.

*It was so agreed.*

2. The Chairman thought that it would be desirable for the Drafting Committee to begin work as soon as possible.

**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*)

ARTICLES 6 TO 11 (*continued*)

3. The CHAIRMAN requested the Special Rapporteur to inform the Commission of the results of the study he had promised to undertake at the close of the 390th meeting.

4. Mr. SANDSTRÖM, Special Rapporteur, recalled that he had then suggested that one possible way of avoiding the difficulties that had arisen during the discussions regarding the classification of heads of missions would be to abide by the Regulation adopted on 19 March 1815 by the Congress of Vienna (A/CN.4/98, para. 22) as far as the titles of heads of missions were concerned, and to concentrate on the question of precedence. To give effect to that idea he had drafted the following text to replace articles 6 to 9:

*"Article 6*

"The sending and receiving States shall agree on the title to be conferred on the heads of their missions.

*"Article 7*

"1. Ambassadors, (legates or) nuncios, envoys ministers, resident ministers or other agents accredited to Heads of States shall take precedence over *chargés d'affaires* accredited to ministers of foreign affairs and shall rank among themselves according to the date on which their arrival was officially notified.

"2. Any change in the credentials of an agent through some circumstance or other shall not affect the order thus established.

"3. The present regulations shall not occasion any change respecting the representatives of the Pope.

"4. Ties of consanguinity or family alliances between Courts shall confer no rank on their diplomatic agents. The same shall apply to political alliances."

5. That text was not, however, to be regarded as in any way a proposal, since it, too, raised various doubts: in particular, article 7, paragraph 1, appeared to present almost greater disadvantages than the articles it was designed to replace. It would bring into being a new system alongside the old, and States would proceed differently depending on whether they accepted the new system or not. The Vienna Regulation had the advantage of uniformity.

6. In those circumstances, it seemed preferable to retain the text adopted by the Congress of Vienna and simply to express the hope, in the commentary, that future years would see a strengthening of the already marked tendency to do away with ministers plenipotentiary and legations, and that the question of the classification of heads of missions would thereby be automatically solved.

7. Mr. FRANÇOIS agreed that by removing the last remaining difference between ministers and ambassadors, but retaining both terms as though they were distin-

guishable, the alternative text suggested by the Special Rapporteur would be a fruitful source of confusion and difficulties in practice, particularly if the Commission's draft was to take the form of a convention. For States which had not adhered to the convention would continue to regard ambassadors and ministers as two distinct classes, the former taking precedence over the latter, while States which had adhered to it would regard them as equal in rank. It would therefore be preferable to maintain the classification laid down by the Congress of Vienna in 1815, and use the commentary to express the hope that ministers would be increasingly replaced by ambassadors.

8. Mr. VERDROSS said it had been his intention to propose that the words "Heads of missions" at the beginning of article 7 of the Special Rapporteur's original draft be replaced by "Diplomatic agents". Since those words did not appear in the alternative text, his amendment was unnecessary. For the same reason, the reference to "Legates" could be retained.

9. With regard to the second sentence of article 7, paragraph 4, of the alternative text, he pointed out that the 1936 Treaty of Alliance between Egypt and the United Kingdom had provided that the British Ambassador in Cairo should have precedence over all others. A similar provision was to be found in a Treaty between France and Morocco. While he had no objection to the sentence as it stood, the Commission should be clear that it did not entirely reflect past practice.

10. Mr. TUNKIN asked whether the Special Rapporteur knew of any instance since the Second World War of the appointment of permanent *chargés d'affaires* or resident ministers.

11. Mr. SANDSTRÖM, Special Rapporteur, said that, if his memory served him right, Sweden had on occasion appointed *chargés d'affaires* to the Governments of States with which it had no intimate relations. He also thought that Sweden was represented in one country by a minister resident.

12. With regard to the question as a whole, he felt that, unless it accepted the reform he had proposed, the Commission need not deal with the classification of heads of missions at all in its draft; it could simply leave things as they stood, in other words, keep the Vienna Regulation unchanged.

13. Mr. EL-ERIAN said he had some doubts about the Special Rapporteur's alternative text for article 6. The Commission was, he thought, in general agreement that it would be desirable for all heads of missions to form a single class. In certain cases and for certain reasons, constitutional or other, it might be necessary for States to designate their heads of missions by particular titles, but such cases were altogether exceptional and merited, at most, a brief mention in the commentary. The Commission's articles should reflect not the exception but the rule.

14. Regarding article 7 he agreed in general with Mr. François.

15. He was doubtful about the desirability of referring to political alliances in article 9, paragraph 4, of the Special Rapporteur's original draft (article 7, paragraph 4, of his alternative text). It was even held by some that such alliances were not in harmony with the collective security system established by the United Nations Charter.

16. The 1936 Treaty between Egypt and the United Kingdom, which was referred to by Mr. Verdross, had since been abrogated. In any case, the provision referred to by Mr. Verdross had in practice applied only to the ambassador in office at the time the treaty had been signed; his successors had been on precisely the same footing as the ambassadors of other countries.

17. Mr. PAL pointed out that, in providing for special precedence, the Treaty between Egypt and the United Kingdom and that between France and Morocco appeared to have been in violation of article IV of the Vienna Regulation. In his view, the question of precedence could not be left to States to decide by agreement between themselves; it must be settled by some rule of international law.

18. Sir Gerald FITZMAURICE expressed his agreement with what had been said by Mr. François.

19. Mr. EL-ERIAN had stated the position correctly with regard to the 1936 Treaty between Egypt and the United Kingdom. Provisions of the sort referred to by Mr. Verdross were becoming increasingly rare and could be disregarded in the Commission's draft. He therefore saw no objection to saying that political alliances should confer no rank on the diplomatic agents of allied States.

20. Mr. BARTOS said that in Moscow the Austrian representative, who was termed a political representative, and the Italian representative, who was termed a diplomatic representative, had at one time been regarded as *chargés d'affaires*; the Soviet Union Government had also recognized heads of missions who held the title of ambassador or minister on a personal basis. He had been unable to discover any other cases of heads of diplomatic missions who were resident ministers or permanent *chargés d'affaires* in Moscow.

21. Mr. MATINE-DAFTARY said that, like Sir Gerald Fitzmaurice, he found himself in complete agreement with Mr. François.

22. Mr. KHOMAN supported the Special Rapporteur's alternative text for article 6. The word "class" in the original text was inappropriate, since there was no difference in class between States, and there should, therefore, be none between their diplomatic representatives. In his view "title" was the appropriate word, but if it gave rise to difficulties some such words as "category" might be used.

23. He noted that in the alternative text for article 7 the Special Rapporteur referred not only to ministers but also to envoys and resident ministers. As far as he was aware, no member of the Commission had urged that reference be made to either of those categories. Resident ministers were not mentioned in the Vienna Regulation, and the distinction between envoys and ministers was now negligible.

24. In general, he felt that the Commission, whose current task was one of codification, should not attempt to go beyond the existing practice of States, unless all States were in general agreement that it should do so. In the present instance it should ascertain whether States were, in fact, willing to abolish the distinction between ministers and ambassadors; once it had their views it should have no difficulty in drafting a suitable text.

25. Mr. TUNKIN said he sympathized with the aim of the alternative text for article 7, since he personally agreed that it would be desirable for all heads of diplo-

matic missions to be placed on the same footing, in accordance with the principle of the equality of States. As he had already pointed out, however, any proposal to abolish the current distinction between ambassadors and ministers would inevitably arouse opposition from a considerable number of States. It would therefore be preferable to abide by the Vienna Regulation, in other words to retain the text of articles 6 and 7, given in the Special Rapporteur's original draft (A/CN.4/91), subject to the addition to article 7 of the class of ministers accredited to heads of States.

26. Mr. AMADO supported Mr. Tunkin's view, and formally proposed that article 7 be worded as follows:

"Heads of missions shall be divided into three classes:

"(a) That of ambassadors, legates or nuncios accredited to heads of States;

"(b) That of ministers accredited to heads of States;

"(c) That of *chargés d'affaires* accredited to ministers of foreign affairs."

That wording was an exact reflection of the true situation. Attention could then be drawn in the commentary to the current tendency to replace ministers by ambassadors.

27. Mr. YOKOTA supported Mr. Amado's proposal. In his view, though, the Commission's draft articles should be confined to dealing with the ordinary, normal, established practice in which the three classes mentioned by Mr. Amado were generally recognized. Rare cases and exceptional categories could be referred to in the commentary. For that reason, he felt it was unnecessary for article 7 to mention resident ministers who were few, if any, at present and would disappear totally in the future.

28. Mr. SPIROPOULOS, after expressing his regret at his inability to attend the earlier meetings of the Commission's current session, said that, in his view, article 7 was of no legal importance, provided all heads of missions enjoyed the same rights. Although he personally was in favour of the reform proposed by the Special Rapporteur, he agreed with Mr. Amado that the Commission should abide by the Vienna Regulation, at any rate in its initial draft. Only in the light of the comments from Governments would it be able to take a final decision.

29. No action was needed on the part of the Commission to encourage the tendency to replace ministers by ambassadors.

30. Mr. AGO' felt that in certain cases there were good reasons for retaining both classes. For that reason the Commission, in its commentary, should not lay too much stress on the desirability of combining them in a single class.

31. In substance, therefore, he agreed to the proposal made by Mr. Amado, but suggested the following drafting changes in order to meet points raised by Mr. Verdross and others: the words "the heads of their missions" in article 6 and "Heads of missions" in article 7 could be replaced by "their diplomatic agents" and "Diplomatic agents" respectively, since legates, for example, were not heads of missions; under (b) in article 7 the word "ministers" should be replaced by "envoys, ministers or others," which would be wider and would correspond to

the Vienna Regulation; and under (a) and (b) the words "accredited to heads of States" should be replaced by "accredited to the supreme organs of States", since such organs were not always individuals but sometimes collective bodies.

32. Finally, he proposed the deletion of article 8, which was not in accordance with accepted doctrine.

33. Mr. SANDSTRÖM, Special Rapporteur, said he had no objection to deleting article 8, which he had only retained in his draft for the reason that it appeared in the Vienna Regulation.

34. If the Commission preferred not to revise the classification of heads of missions in the manner recommended in his report, and urged by various States, it need not include any provision on the subject, which was purely one of etiquette. In other words it could delete articles 6 to 11 of his original draft (A/CN.4/91).

35. The Vienna Regulation had not given rise to great difficulties in practice. On the other hand, there would be no point in the Commission's conferring its *imprescritur* on distinctions that were doomed to disappear.

36. Mr. SCALLE supported Mr. Amado's proposal, which did no more than reflect the current situation and was in harmony with the tendency to claim theoretical equality for all States.

37. He agreed that article 8 should be deleted, since it ran directly counter to article 7.

38. Mr. AMADO said, with regard to the amendments suggested by Mr. Ago, that he preferred the words "heads of missions" as being more in accordance with modern conceptions; that addition of the words "or others" needlessly complicated the text; and that the words "heads of States" could, if necessary, cover collective organs as well as individuals.

39. Mr. LIANG (Secretary to the Commission), referring to Mr. Ago's first amendment, pointed out that the term "diplomatic agents" was used in articles 27 and 28 of the Special Rapporteur's draft to cover all members of a mission.

40. Sir Gerald FITZMAURICE said he personally saw no reason why the text of articles 6 and 7 should not be made a little more flexible, for example by qualifying the reference to heads of missions by the words "or other chief diplomatic agents", and the reference to heads of States by the words "or the other supreme organ of the State".

41. Mr. KHOMAN proposed that the words "classes" be replaced by "categories".

42. Mr. AMADO suggested that all those points should be left to the Drafting Committee.

*It was so agreed.*

43. Mr. BARTOS said that, in his view, it followed logically from the principle of the equality of States—which was a principle of positive law hallowed by the United Nations Charter and by practice—that the diplomatic representatives of all States should have the same title. He recognized, however, that it was impossible to disregard a survival of the days when States had been unequal before the law. They could, however, be referred to in the commentary.

44. He asked that a vote be taken on the principle that all heads of missions should have the same title. Once

the Commission had decided that question it would be freer to take up questions of detail. If the principle was rejected, he would vote for Mr. Amado's proposal, which was the least far removed from it.

45. The CHAIRMAN pointed out that, since the Commission had a specific proposal before it, it was bound to vote on it.

46. Mr. TUNKIN emphasized, in connexion with Mr. Bartos's remarks, that if the Commission voted in favour of three classes, that in no way meant that it was voting against the principle of the equality of States.

47. The CHAIRMAN put to the vote the text proposed by Mr. Amado (para. 26 above), subject to further consideration by the Drafting Committee of points of detail.

*The text was adopted by 17 votes to none, with 2 abstentions.*

48. Mr. BARTOS said he had abstained from voting because he considered that the principle of the equality of States required that the heads of missions accredited to the heads of States should all form a single class.

49. Mr. MATINE-DAFTARY said he would never have voted in favour of any provision which ran counter to the principle of the equality of States. That principle, however, had nothing whatever to do with the fact that States were free to choose whichever mode of diplomatic representation they preferred, depending on the closeness of the relations between them.

50. The CHAIRMAN, after recalling that the vote on article 6 had been deferred pending a decision as to the classification of heads of missions (390th meeting), invited the Commission to vote on article 6, on the understanding that the question of an alternative for the term "class" would be referred to the Drafting Committee.

*Article 6 was unanimously adopted.*

51. The CHAIRMAN, after observing that article 8 had been withdrawn by the Special Rapporteur (para. 33 above), invited the Commission to consider the article 9 of the Special Rapporteur's draft.

52. He said that Mr. Tunkin had proposed that the words "or to the date of remitting their letters of credence" should be added at the end of paragraph 1.

53. Mr. SANDSTRÖM, Special Rapporteur, pointed out that the text of article 9 was closely modelled on articles IV and VI of the Regulation of the Congress of Vienna.

54. Mr. EL ERIAN, referring to paragraph 4 of the article, said that the provision that ties of consanguinity or family alliances between Courts should confer no rank on their diplomatic agents, though perhaps necessary at the time of the Congress of Vienna, was irrelevant to present-day conditions. The question of precedence being already regulated by article 7 and the first paragraph of article 9, there was no need to retain such a provision.

55. Mr. AMADO, referring to paragraph 1 of the article, thought the term "heads of missions" more appropriate than "diplomatic agents", a term which also covered subordinate members of missions with whom the question of precedence did not arise.

56. He wondered how Mr. Tunkin's amendment would apply in the case of *chargés d'affaires*, who did not present letters of credence to the head of State.

57. Mr. MATINE-DAFTARY agreed with Mr. Amado in preferring the term "heads of missions". In his opinion it would be preferable for precedence to be decided according to the date of official notification of arrival. The arrival of a head of mission was something which he himself could time, whereas the date of presentation of his letters of credence was a matter outside his control.

58. Mr. TUNKIN, referring to his amendment, said that, to the best of his knowledge, it was the practice of States for heads of missions to rank in their respective classes according to the date on which they presented their letters of credence.

59. He agreed with Mr. Amado on the desirability of substituting "heads of missions" for "diplomatic agents", and with Mr. El-Erian on the superfluity of the first sentence in paragraph 4 of article 9.

60. Mr. VERDROSS, referring to Mr. Tunkin's amendment, said that it was impossible to have two alternative criteria for fixing the precedence of heads of missions. The Commission must adopt either one or the other, and he regarded the criterion given in the Special Rapporteur's draft as preferable. The presentation of letters of credence might be delayed by sickness or some other eventuality.

61. Mr. YOKOTA, observing that the four paragraphs of article 9 dealt with different matters, urged that they be discussed in turn.

*It was so agreed.*

62. Mr. SANDSTRÖM, Special Rapporteur, pointed out that, if paragraph 1 was amended, States would be faced with two different systems, that of the Congress of Vienna and that advocated by the Commission, and it was difficult to tell which they would choose.

63. Mr. BARTOS declared himself in favour of Mr. Tunkin's amendment. All kinds of problems arose in connexion with the fixing of the precedence of heads of missions. If two heads of mission arrived in the receiving State by the same airplane, which was to take precedence over the other? France had adopted the ingenious solution in that case of calling on the older of the two to present his letters of credence first. Was an ambassador who was unable to present his letters of credence at the appropriate time, because he had not received them, to lose precedence because of that fact? Or again, if an ambassador, after arriving in the receiving State, returned home on private business before presenting his letters of credence, were other heads of mission arriving after him to be forced to await his return before presenting their letters of credence? The presentation of letters of credence might also be deliberately delayed by the receiving State, as had happened in one case where a receiving State, after giving its *agrément* to the appointment of the head of mission, had changed its mind and, rather than withdraw its *agrément*, had several times postponed the date of presentation of his letters of credence in the hope that the sending State would ask for an explanation, and thus give it an opportunity of intimating that the chief of mission in question was *persona non grata*.

64. Another problem had arisen when the Yugoslav Protocol Department had noticed in the copy of an ambassador's letters of credence that the titles of the head of State included a reference to a country which had acquired independence and been recognized by Yugoslavia.

The necessary correction was ultimately made, but the question then arose of the time from which precedence should date; from the submission of the original or of the corrected letters of credence?

65. Such problems did not, however, alter the fact that, in general practice, precedence was reckoned from the date on which the head of mission officially took up his duties, i.e., on which he presented his letters of credence. Though it was customary for heads of missions to be called upon to present their letters of credence in the order in which their arrival had been officially or semi-officially notified, that was purely a matter of courtesy on the part of the receiving State.

66. Mr. LIANG (Secretary to the Commission) recalled two cases in his own experience where ambassadors had been unable to present their letters of credence soon after arrival. Such delays were particularly likely to occur in monarchies, where ambassadors could present their credentials only when the monarch was holding court.

67. It was difficult to say which practice was correct, that of basing precedence on date of arrival or that of basing precedence on date of presentation of letters of credence. One school of thought held that the presentation of credentials was a pure formality, and not an essential act indicating the acceptance of the ambassador by the receiving State. In any case, it was rather a matter of standardizing protocol than of codifying a rule of law, and he doubted whether the Commission could properly make a recommendation on the subject.

68. Mr. KHOMAN said that the problem was not so much one of choosing between two practices as of finding a formula which would embrace them both. Though heads of missions might have unofficial conversations with the officials of the receiving State before presenting their letters of credence, they did not officially take up their duties until they had performed that act. He thought that the Congress of Vienna in framing its Regulation had had in mind the date of official assumption of office rather than the actual time of arrival of diplomatic officials. There was no need to be too precise on the matter, and he would suggest the adoption of a general formula such as "the date on which they officially take up their respective duties". If the suggestion met with the Commission's approval, he would submit it as a formal amendment.

69. He agreed with previous speakers on the preferability of the term "heads of mission".

70. Mr. SPIROPOULOS agreed with Mr. Amado's observations and with those of Mr. El-Erian. The question of precedence was no longer the subject of bitter dispute that it once had been, and the point before the Commission was not of great importance. It was obvious, however, that there should be only one criterion. He was not in favour of revising so long-established a text as that of the Regulation of the Congress of Vienna unless there was a sound reason for doing so, but if it had become the general practice to base precedence on the date of presenting letters of credence, he would have no objection to altering the provision accordingly.

71. Mr. AMADO agreed with Mr. Spiropoulos on the inadvisability of changing long-established provisions unnecessarily. Incidentally, the date of notification of arrival referred to in the Regulation of the Congress of Vienna was the date of arrival of the diplomatic official in the capital.

72. Mr. YOKOTA doubted whether there were strong enough grounds for changing the provision. Exceptional cases, for instance where ambassadors arrived by the same airplane, could be settled between the States concerned as they arose.

73. Mr. TUNKIN wondered whether the Commission was not discussing the provision from a rather too abstract standpoint. All the members of the Commission presumably knew what was the practice in their respective countries. In the Soviet Union, the date of official notification of arrival was interpreted as the date on which the head of the mission presented his letters of credence.

74. Mr. PAL said that if the provision had worked satisfactorily hitherto, with States putting their own interpretation on it, there seemed to be no point in changing it.

75. Mr. TUNKIN replied that it was not so much a point of changing the provision as of making its exact meaning clear.

76. Mr. BARTOS remarked that about two-thirds of the sovereign States of the world followed the practice advocated in Mr. Tunkin's amendment.

77. The CHAIRMAN, speaking as a member of the Commission, said that, while the Regulation of Vienna selected the date of official notification of arrival as the criterion for establishing precedence in each category of diplomatic representative, the practice in most countries, and more particularly in Czechoslovakia, appeared to be based on the date of the official presentation of letters of credence, which was the easiest to establish. He wondered whether the Commission, taking account of the established practice, might not adopt the date of presenting letters of credence to the head of State as the main criterion, and the official notification of arrival as the secondary criterion to cover the case where two or more diplomatic representatives had presented their credentials on the same day.

The meeting rose at 6.5 p.m.

### 392nd MEETING

Tuesday, 7 May 1957, at 9.45 a.m.

Chairman: Mr. Jaroslav ZOUREK.

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

[Agenda item 3]

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

##### ARTICLES 6 TO 11 (continued)

1. The CHAIRMAN recalled that the Commission had still to come to a decision regarding article 9, paragraph 1, of the Special Rapporteur's draft. A possible solution would be for precedence to be based on the date of presentation of letters of credence, with the date of official notification of arrival as a subsidiary criterion. The question was of no great importance, and the provision would be submitted to Governments for their comments.

2. The Chairman said that Mr. Matine-Daftary had submitted the following amendment:

"1. Heads of missions shall take precedence in their respective classes according either to the date of the

official notification of their arrival or to the date of presentation of their letters of credence, according to the protocol rules in the capital concerned, that shall be applied consistently and without discrimination."

3. Mr. SANDSTRÖM, Special Rapporteur, quoted Genet<sup>1</sup> in support of the view that diplomatic envoys took precedence within each class according to the date on which official notification of their arrival, accompanied by a copy of their letters of credence, was sent to the ministry of foreign affairs of the receiving State. The author added, however, that, by convenient custom, receiving States draw up a list of heads of missions giving the date of presentation of their letters of credence, thereby placing the emphasis on the presentation of the original letters rather than on the transmission of copies.

4. Mr. Sandström, at all events, had preferred to reproduce the text of the Regulation of the Congress of Vienna (A/CN.4/98, para. 22), considering it pointless to change a rule which had proved convenient for nearly a century and a half.

5. Mr. EL-ERIAN agreed with the Secretary to the Commission that the paragraph dealt with a matter of protocol rather than with a rule of law (391st meeting, para. 67). That did not, however mean that the provision was unnecessary. In resolution 685 (VII) the General Assembly appeared to be concerned at the possibility of controversy due to ambiguity both in the law and in the practice concerning diplomatic intercourse and immunities, and the same attitude was stated at greater length in the explanatory memorandum submitted by the Yugoslav delegation,<sup>2</sup> the original sponsor of the resolution. There was, therefore, room in the draft for a provision of the kind, if it could help to remove a possible source of friction.

6. As for the actual text of the paragraph, it was essential to realize that the criterion for deciding the question of precedence was quite distinct from the criterion for determining when entitlement to diplomatic privileges and immunities began. He noted in that connexion that both the Havana Convention<sup>3</sup> and the Harvard Law School draft<sup>4</sup> included a provision fixing the time at which entitlement to diplomatic privileges and immunities began, but that neither contained any reference to a criterion for establishing precedence. The Commission had the option of reaffirming the practice based on the Regulation of the Congress of Vienna or of introducing a new system. As Mr. Bartos had pointed out (391st meeting), there were drawbacks to either system. He suggested that the Commission first settle the question of principle as to whether the matter should be dealt with in the draft at all, and then, if it decided that it should, submit the alternatives to Governments, and frame a provision in the light of their comments.

7. Mr. PAL remarked that the question of precedence among diplomatic representatives had been of importance only so long as the order in which they were placed was an indication of the standing of the States that sent

<sup>1</sup> Raoul Genet, *Traité de diplomatie et de droit diplomatique* (Paris, A. Pedone, 1931), vol. 1 para. 376.

<sup>2</sup> *Official Records of the General Assembly, Seventh Session, Annexes*, agenda item 58, document A/2144/Add.1.

<sup>3</sup> Convention regarding Diplomatic Officers, signed at Havana on 20 February 1928. See League of Nations, *Treaty Series*, vol. CLV, 1934-1935, No. 3581.

<sup>4</sup> Harvard Law School, *Research in International Law, I, Diplomatic Privileges and Immunities* (Cambridge, Mass., 1932), pp. 19-25.

them. Now that precedence was determined by such fortuitous circumstances as the date of arrival, the date of presenting credentials or the like, the question was only of minor interest, and was devoid of any grave consequences.

8. The difficulties to which Mr. Bartos had referred were not merely difficulties likely to arise in the future; they were inherent in the nature of the subject, and had arisen, and been settled, in the past. Since article IV of the Regulation of the Congress of Vienna did not appear to have given rise to any serious dispute in its application, he failed to see what ground there was for departing from the rule it contained. He was, therefore, in favour of adopting paragraph 1 of the Special Rapporteur's article 9, and referring in the commentary to the practices adopted by the various countries in interpreting the provision.

9. Mr. AMADO pointed out that the provision fixed precedence as between heads of missions only, and the relative standing of States did not enter into the question.

10. In Brazil, the head of a mission was recognized as such from the time he touched Brazilian soil; he quoted Oppenheim in support of that view.<sup>5</sup> In the matter of precedence, on the other hand, the decisive date was that of presentation of his letters of credence. He was willing, however, to accept either method of determining precedence.

11. Sir Gerald FITZMAURICE agreed with Mr. Pal and Mr. Amado that the question was merely one of precedence as between individuals and not as between States. He also agreed with Mr. El-Erian that the provision had no bearing whatever on the question of the date from which the head of mission was regarded as discharging his functions. Presentation of the original letters of credence was regarded as largely a formality, and was undoubtedly an event subject to considerable natural delays. However long that formality might be delayed, the head of mission was nonetheless considered to be officially discharging his functions in the meantime.

12. The best practice was to base precedence on the date of official notification of arrival.

13. Mr. TUNKIN agreed with previous speakers on the relative unimportance of the point. Discussion had been prolonged mainly because of uncertainty regarding the practice in the matter of precedence. Since it was not clear whether all States accepted the criterion of the date of presentation of letters of credence, although most undoubtedly did, there was nothing for it but to include both criteria.

14. He accordingly withdrew his own amendment (391st meeting, para. 52) in favour of Mr. Matine-Daftary's which left it to States to choose between the two criteria, on the understanding that whichever they adopted must be applied without discrimination.

15. Mr. MATINE-DAFTARY said that, though originally in favour of the provision as formulated in the Regulation of the Congress of Vienna, he had been convinced by the description of State practice given at the 391st meeting by Mr. Bartos and Mr. Tunkin that the practice based on a different interpretation of the provision could not be ignored. He had therefore evolved

a compromise solution whereby, each State could apply whichever criterion was in accordance with its practice, provided that it applied the criterion consistently and without discrimination.

16. He had also substituted the term "heads of missions" for "diplomatic agents" to bring the paragraph into line with articles 6 and 7.

17. Mr. HSU said that, although the question was of secondary importance and merely one of protocol, it was better to have a clear rule concerning it if disputes might thereby be avoided. He had been in favour of Mr. Tunkin's amendment since it gave recognition to a tendency which it was impossible to arrest. As that amendment had been withdrawn, however, he had no objection to stating the two alternatives and leaving the choice to Governments.

18. Mr. SPIROPOULOS could not agree that the question did not form part of the law concerning diplomatic intercourse. The Regulation of the Congress of Vienna had established a rule which, in the absence of any different rule in customary international law, was binding on States. He favoured the provision as stated in the Regulation. Precedence should depend on the acts of sending States and never on the receiving State, as in that way there was less danger of abuse.

19. Mr. Matine-Daftary's proposal, nonetheless, offered an acceptable solution.

20. Mr. BARTOS declared that he could not accept Mr. Amado's interpretation of the rule regarding the official assumption of their functions by heads of missions, although it might be accepted in Brazil. An ambassador was admittedly *presumed* to be such from the moment he arrived in the receiving State, but he was not officially recognized until he had presented his letters of credence.

21. The question of precedence was not so nugatory as some speakers inclined to believe. It sometimes had important implications. If two envoys sought an audience at the same time, the senior in precedence would be received first, and in times of crisis that might be of considerable importance. Order of precedence also determined the appointment of the doyen of the diplomatic corps, an officer whose functions were not always purely formal.

22. Although belonging to the group which regarded the time of presenting letters of credence as the decisive date, he was prepared to accept Mr. Matine-Daftary's proposal, not merely as a convenient way out of the problem, but as an accurate statement of the existing position.

23. Faris Bey EL-KHOURI declared that the time of presenting letters of credence was the decisive date for the recognition of diplomatic envoys. It was a date duly recorded by all ministries of foreign affairs, which kept lists of envoys classified on that basis.

24. In the matter of precedence, however, some States applied one criterion and some another, and diplomatic representatives had to accept the protocol of the State to which they were accredited. Mr. Matine-Daftary's proposal included both criteria, and was an accurate codification of current practice, leaving no door open to controversy.

25. Mr. MATINE-DAFTARY, replying to Mr. VERDROSS, agreed to change the words "in the capital" in his amendment to "in the country".

<sup>5</sup> L. Oppenheim, *International Law—A Treatise*, Vol. I, *Peace*, 8th ed., ed. H. Lauterpacht (New York, Longmans, 1955), para. 376.

26. The CHAIRMAN suggested that other points of wording could be referred to the Drafting Committee, and on that understanding put to the vote paragraph 1 as proposed by Mr. Matine-Daftary (para. 2 above).

*Paragraph 1 was adopted by 10 votes to 1 with 8 abstentions.*

27. Mr. AMADO, explaining his abstention, said that the quality of head of mission was regarded as dating not from the time of his official reception but from the time his letters of credence were handed to him by the State that sent him.

28. Mr. SPIROPOULOS said that, although in favour of the provision contained in the Regulation of the Congress of Vienna, he had abstained from voting against the proposal because it offered a convenient way out of the problem.

29. The CHAIRMAN invited the Commission to consider paragraph 2 of article 9.

30. Mr. YOKOTA said that, while having no objection to the principle enunciated in the paragraph, he was in favour of deleting the words "through some circumstance or other" which appeared to have no legal implication or meaning.

31. Mr. SPIROPOULOS agreed with Mr. Yokota that the phrase was devoid of meaning. He wondered what changes the Special Rapporteur had in mind. If, for instance, the credentials of a minister were changed because his post had been raised to ambassador status, "the order thus established" would be affected, since he would be accredited as the last ambassador to have arrived.

32. Mr. SANDSTRÖM, Special Rapporteur, said that he had had in mind such events as the death of the head of State or a change in the form of government.

33. Mr. TUNKIN said there was justification for the provision contained in paragraph 2. It would, however, require redrafting to cover the case mentioned by Mr. Spiropoulos, which did, of course, affect the order of precedence. He proposed that the Commission adopt the paragraph as it stood, subject to redrafting on the lines he had indicated.

34. The CHAIRMAN put paragraph 2 of article 9 to the vote on that understanding.

*Paragraph 2 was adopted by 18 votes to none with 2 abstentions.*

35. The CHAIRMAN invited the Commission to consider paragraph 3 of article 9.

36. Mr. HSU wondered whether it was necessary to take over the provision in question from the Regulation of the Congress of Vienna.

37. Mr. SANDSTRÖM, Special Rapporteur, explained that, at the time of the adoption of the Regulation, in many Roman Catholic countries the representative of the Vatican was automatically the doyen of the diplomatic corps. The provision had been inserted in the Regulation because there had been some discussion on the subject.

38. Mr. VERDROSS said that the paragraph dealt with an established practice. The representative of the Vatican still had precedence over other diplomatic representatives in many countries where he had enjoyed that right prior to the Congress of Vienna.

39. Faris Bey EL-KHOURI did not see the point of including a provision from a body of law applying a long time ago in a codification of present-day international law and practice, which might ultimately be adopted as an international convention governing diplomatic intercourse throughout the world.

40. Mr. AGO pointed out that the provision merely sanctioned a practice current in his own country and in almost all Roman Catholic countries. The provision gave rise to no difficulties. Its abolition, on the other hand, would give rise to difficulties.

41. Mr. SPIROPOULOS remarked that principally Christian States had been represented at the Congress of Vienna. A very large proportion of the countries which would be affected by the codification, however, were not Christian States and might wish to have the provision omitted. He himself was not opposed to its retention, but thought that it might be expressed a little more clearly, so that all would realize that only order of precedence was involved.

42. Mr. BARTOS said that, although the provision might appear somewhat naïve, it did have important implications. It had, in fact, given rise to difficulties when Catholic Croatia and Slovenia were merged with Greek Orthodox Serbia and Montenegro in the Kingdom of the Serbs, Croats and Slovenes. In Serbia the Papal nuncio had had no special rank. In the new kingdom, however, where Roman Catholicism and Greek Orthodoxy were on an equal footing, the nuncio had been accorded precedence, presumably because diplomatic relations with the Vatican could not have been maintained on any other basis. Though he was opposed to the provision in principle, he recognized that it was in accordance with current practice and would not therefore oppose it.

43. Sir Gerald FITZMAURICE observed that far more than a question of practice was involved. By accepting the custom in those countries where the representative of the Vatican had precedence over all other diplomatic representatives, other States had accepted it as a rule of law.

44. He agreed with Mr. Spiropoulos that it might be better drafted. Perhaps the words "in existing practices respecting the precedence of representatives of the Pope" could be substituted for the words "respecting the representatives of the Pope". Another solution would be to combine the provision with paragraph 1 of the article, prefacing the existing text of paragraph 1 by the words "Subject to existing practices respecting the precedence of representatives of the Pope,".

45. Mr. HSU said he was not opposed to the purpose of paragraph 3, but agreed with Sir Gerald Fitzmaurice that the Commission should take the opportunity offered by the drafting of a new code or convention to make its meaning clear to the present-day reader.

46. Mr. MATINE-DAFTARY said that he too had no objection to States which so desired giving precedence to the representatives of the Pope. The provision had been drafted, however, with the European States primarily in mind. Now that international law had to be world-wide in scope, its retention among the articles themselves might not appear altogether appropriate. Instead, the Commission might say in the commentary that Roman Catholic countries could, if they so wished, continue to give precedence to the representatives of the Pope, although Moslem countries had no corresponding

custom. No distinction was made in those countries between Moslem and Christian States.

47. Mr. KHOMAN said that the clause reflected a special situation which had been of some significance at a particular stage of history. The custom had not become any more wide-spread, however, and the Commission should therefore at least make clear exactly what it entailed. It might, for example, add at the end of the text the words "in countries which give such representatives precedence or a special rank".

48. Mr. SPIROPOULOS pointed out that the text of paragraph 3 could be interpreted in two ways: as meaning either that the precedence given the representatives of the Pope in each country would necessarily remain as in the past, or that all States would be free to decide what precedence to give such representatives. The Commission must choose between those two interpretations. If it decided in favour of the first, the further question would arise what rules would govern a newly created State.

49. Mr. GARCIA AMADOR pointed out that no corresponding clause was to be found in the Harvard Law School draft or the Havana Convention. In the latter case the omission was particularly significant, since the vast majority of the States that had signed the Havana Convention were Catholic States.

50. Even without paragraph 3, the Commission's draft would not, in his view, prevent States from giving precedence to the representative of the Pope, any more than the Havana Convention had done. On the other hand, now that the provision had been included in the Special Rapporteur's original draft, its omission might be misinterpreted as meaning that the Commission was opposed to the practice. If it deleted the provision, therefore, the Commission should explain in the commentary that it was not opposed to the practice, and that States were free to adopt it if they wished. He would, however, not oppose retention of the clause, possibly amended so as to make its meaning clear.

51. Mr. AGO said that the only purpose of the clause was to give a State which so desired the right to give the Papal nuncio precedence over all other heads of missions. It was not true that the practice was only a vestige of past times and that conditions had changed so much in that respect since the Congress of Vienna. Some of the States which had taken the most active part in that Congress had not been Catholic States but Orthodox or Protestant States. That had not prevented them from agreeing to special arrangements being made for the representatives of the Pope. Nowadays it could be said that the proportion of non-Catholic to Catholic Powers was not substantially different from that at the time of the Congress of Vienna; against the non-Catholic countries of Asia and the Far East must be set all the Catholic countries of Latin America, a great majority of which had adopted the practice in question.

52. He stressed that there was no question of obliging States to give precedence to Papal nuncios: it was simply a question of allowing them to do so if they so desired. He agreed with Sir Gerald Fitzmaurice that the text could be amended so as to make that clear, and felt that could be left to the Drafting Committee.

53. Mr. PAL drew Mr. García Amador's attention to the fact that neither the Havana Convention nor the Harvard Law School draft dealt with the question of precedence at all.

54. As the Commission's draft was to deal with precedence, he agreed that it could not pass over in silence the question of the special rank conferred on Papal nuncios. He suggested that the provision in question be worded as follows:

"The present regulations shall not affect any existing practice regarding the representatives of the Pope."

55. Mr. FRANÇOIS questioned whether the Regulation of the Congress of Vienna had really given States complete freedom to grant Papal nuncios precedence or not, as they desired. In his view, its intention had been solely to enable those States which had previously given Papal nuncios precedence to continue to do so. A limitation on their freedom seemed reasonable, for it was not only relations between the State concerned and the Holy See that were involved; the rank of the representatives of other States was necessarily affected also.

56. Mr. VERDROSS drew Mr. François's attention to the fact that two treaties, that between Italy and the Holy See in 1929 and that between Germany and the Holy See in 1933, had given the Papal nuncios to those two countries a precedence which they had not, and could not have, enjoyed at the time of the Congress of Vienna, seeing that Italy and Germany had not existed as independent States in 1815.

57. Mr. SANDSTRÖM, Special Rapporteur, agreed that the meaning of the provision could be made clearer if its wording were changed. He had preferred to keep the wording of the Regulation of the Congress of Vienna unchanged, and the discussions that had taken place had shown him the danger of tampering with a text of long standing which recognized an established tradition and had given rise to no difficulties.

58. He saw no need to replace the words "respecting the representatives" by "respecting the precedence of the representatives". It was clear from the context what paragraph 3 referred to. The whole of article 9 was devoted to the question of the precedence of heads of missions.

59. Mr. SPIROPOULOS said that, unlike Mr. François, he inclined to the belief that the provision in the Regulation of the Congress of Vienna meant that a general practice had arisen that Papal nuncios should have precedence over all other heads of missions, and that that practice should remain in force, notwithstanding the other provisions of the Regulation.

60. While he agreed with the Special Rapporteur that there was a danger in changing texts which had long been in force, the Commission must be clear in its mind as to whether it was interpreting the text in the manner that Mr. Pal and Mr. François had done or in the manner that Mr. Ago had done.

61. Mr. AGO felt that the correctness of his interpretation was demonstrated not only by the examples quoted by Mr. Verdross, but also by the fact that none of the Latin-American States, which nearly all gave precedence to Papal nuncios, had existed in 1815. Moreover, the freedom afforded by the Regulation of the Congress of Vienna did not work in one direction only; a State which had previously given precedence to Papal nuncios could stop doing so, if it was not bound by a special agreement with the Holy See. If the contrary interpretation was accepted, that would be impossible, as it would likewise be impossible for new States to adopt the practice giving precedence to the nuncios.

62. Since there were apparently some doubts on the matter, it would perhaps be wise to take the opportunity of clarifying the clause.

63. Mr. BARTOS wondered whether, in the event of Tibet's becoming independent, the Buddhist States would have the right to give the Dalai Lama's representative precedence over other heads of missions.

64. The clause in the Regulation of the Congress of Vienna relating to the representatives of the Pope was a survival from the past. He would not oppose its retention, but urged that its scope be clearly defined.

65. Mr. SPIROPOULOS pointed out that the Dalai Lama was the temporal head of a State as well as the spiritual head of a religious community. The question under discussion could arise only for the representatives of the Pope.

66. Mr. BARTOS recognized the force of Mr. Spiropoulos's observation, but pointed out that at the time of the Congress of Vienna the Pope also had "his territorial States" (Romagna).

67. The CHAIRMAN agreed that there was a clear distinction between Mr. Ago's and Mr. Pal's interpretations of article 9, paragraph 3. He suggested, however, that the Commission might first decide whether it wished to deal with the matter in the articles themselves or in the commentary. Once it had done that, it could decide between the two interpretations, vote on the text submitted by the Special Rapporteur and then leave it to the Drafting Committee to make any necessary changes.

*It was agreed, by 9 votes to 5 with 4 abstentions, to insert a provision relating to the representatives of the Pope in the draft articles, the drafting to be left to the Drafting Committee.*

68. Mr. MATINE-DAFTARY pointed out that, as some members of the Commission believed that the Regulation of the Congress of Vienna gave States complete freedom in that respect, the draft that was to be submitted by the Drafting Committee should not make it binding on the Catholic States to continue to give precedence to the representatives of the Pope.

69. Faris Bey EL-KHOURI said he had voted in favour of retaining the provision in the articles on the understanding that the necessary explanations would be inserted in the commentary, so that the Commission's draft would be clear and self-explanatory, as the text they were discussing was not.

70. Mr. SPIROPOULOS said he had voted in favour of including among the Commission's articles, not a provision designed merely to give a retrospective interpretation of the Vienna Regulation, but a provision which would give satisfaction in the future.

71. The CHAIRMAN invited the Commission to consider paragraph 4 of article 9, and recalled Mr. El-Erian's proposal to delete that paragraph (391st meeting, para. 54).

72. Mr. HSU said he realised that the position had changed since 1815, but that, if the Commission attached so much importance to the principle of the equality of States, it was surely illogical for it to omit a provision which was clearly designed to safeguard that principle.

73. The CHAIRMAN, speaking as a member of the Commission, agreed with Mr. El-Erian that the provision in question was an anachronism. It had been only

natural to deal with it at the Congress of Vienna, at a time when the principle involved had still been a matter of controversy. Today it was so generally accepted that there would be no disadvantage in not stating it.

74. Mr. SANDSTRÖM, Special Rapporteur, agreed, and accordingly withdrew article 9, paragraph 4, of his draft.

75. The CHAIRMAN invited the Commission to vote on article 10.

*Article 10 was adopted unanimously, subject to any changes made by the Drafting Committee.*

76. The CHAIRMAN invited the Commission to consider article 11.

77. Mr. LIANG (Secretary to the Commission) suggested that the question dealt with in article 11 related rather to the law of treaties.

78. Mr. SPIROPOULOS, Mr. FRANÇOIS and Mr. TUNKIN agreed.

79. Mr. SANDSTRÖM, Special Rapporteur, accordingly withdrew article 11, although he thought it could be argued equally well that it concerned a question of etiquette.

80. Mr. BARTOS proposed the insertion of a new article 10(a), worded as follows:

"1. If the post of head of the diplomatic mission is vacant or if the head of the mission is absent or unable to perform his duties, the affairs of the mission shall be handled by a *chargé d'affaires ad interim*.

"2. The *chargé d'affaires ad interim* is the member of the diplomatic mission appointed for that purpose by the sending State. In the absence of notification to the contrary, the member of the mission placed immediately after the head of the mission on the mission's diplomatic list shall be presumed to be appointed."

81. The Regulation of the Congress of Vienna did not mention interim *chargés d'affaires*. In practice, they were not always selected in the same way, and their selection could sometimes give rise to difficulties. In Europe, it was always the senior member of the mission (in rank) who was chosen as *chargé d'affaires*, except in the countries which followed the French system, for example Yugoslavia, where the *chargé d'affaires ad interim* was always a general diplomatic collaborator of the head of the mission. The post could not be held by an official with special duties; thus an economic counsellor would not be appointed *chargé d'affaires*, but the next senior official, who might be a first secretary. It could also happen that both the head of the mission and the *chargé d'affaires* were absent or unable to perform their duties.

82. Leaving those special cases aside, he had simply wished to draw the Commission's attention to the matter, in order that it might decide whether to give official recognition to a category about whose existence there could be no doubt.

83. Mr. SANDSTRÖM, Special Rapporteur, said he had not felt it necessary to mention interim *chargés d'affaires* in his draft, as he had wished to avoid excessive detail. It was true that the 1928 Havana Convention dealt with the question in article 11, which was very similar to the text proposed by Mr. Bartos. He would have no objection if the Commission decided to include a provision along those lines.

84. The CHAIRMAN suggested that the Commission first decide in principle whether to include an article on interim *chargés d'affaires*.

*It was agreed to include such an article by 16 votes to 1, with 2 abstentions.*

85. Mr. BARTOS proposed that the exact wording of the article be left to the Drafting Committee.

86. The CHAIRMAN agreed. He pointed out that in the practice of States the office of *chargé des affaires* was also not uncommon. By contrast with the *chargé d'affaires ad interim*—a diplomatic agent exercising general functions—the *chargé des affaires* of a diplomatic mission, who was appointed when there were no diplomatic agents on the spot, exercised strictly limited functions only.

87. Mr. SPIROPOULOS wondered whether it was really necessary for a *chargé d'affaires* to be appointed by the sending State in cases where the head of mission was absent or temporarily incapacitated.

88. Mr. BARTOS pointed out that it was usually the head of the mission who informed the receiving State's ministry of foreign affairs of his absence or inability to perform his functions, and at the same time designated a member of the embassy staff to act on his behalf. The second sentence of paragraph 2 of his proposal referred particularly to the case where the death of the head of the mission prevented him from doing so.

*Article 10 (a) (para. 80 above) was adopted in principle, the exact wording being left to the Drafting Committee.*

#### QUESTION OF INCLUDING ADDITIONAL ARTICLES IN SECTION I

89. Mr. LIANG (Secretary to the Commission) suggested that, in view of the fact that the title of the draft referred to diplomatic intercourse as well as diplomatic immunities, the Commission ought at some stage to consider whether it should not insert, possibly after article 11, an article along the lines of that contained in the Havana Convention relating to the beginning and end of diplomatic missions.

90. Mr. SANDSTRÖM, Special Rapporteur, said he had wondered whether to take up in his draft the question of extraordinary missions, which was referred to in the Vienna Regulation and was also dealt with in the 1928 Havana Convention, but eventually he had come to the view that it was sufficient to deal with permanent missions.

91. With regard to Mr. Liang's point, he felt the most important thing was to specify when diplomatic immunities should begin and end, and that question was dealt with in article 25 of his draft. He had not thought it necessary to refer to the beginning and end of a diplomatic mission.

92. Mr. SPIROPOULOS pointed out that the contents of the Commission's draft would to a great extent be determined by its form. He was becoming more and more convinced that the Commission's drafts should not be draft conventions but only re-statements of the law. That was particularly so in the present case, where the Commission was not making any important innovations, and it might be desirable for it to enter into rather more detail than would be appropriate in a convention. The questions referred to by the Special Rap-

porteur and the Secretary were both real problems which should be dealt with in the Commission's draft, but which could be dealt with more easily if it were in the nature of a simple restatement.

The meeting rose at 1.15 p.m.

### 393rd MEETING

*Wednesday, 8 May 1957, at 9.45 a.m.*

*Chairman:* Mr. Jaroslav ZOUREK.

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

[Agenda item 3]

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

#### QUESTION OF INCLUDING ADDITIONAL ARTICLES IN SECTION I (continued)

1. The CHAIRMAN invited the Commission to consider the suggestions made by the Special Rapporteur and the Secretary at the close of the previous meeting that additional articles be inserted in section I of the draft, dealing with extraordinary missions and the date of commencement and termination of diplomatic functions. During the general debate many members of the Commission had expressed the view that it should deal with extraordinary missions, which nowadays formed a large and fruitful part of diplomatic intercourse.

2. Speaking as a member of the Commission, he agreed with that view. He also felt it should not prove too difficult a matter to draft a provision relating to the date of commencement and termination of diplomatic functions, as suggested by the Secretary.

3. Mr. TUNKIN doubted whether it would be so easy to draft such a provision, and also doubted whether it was necessary. As the Special Rapporteur had pointed out at the 392nd meeting, article 25 of his draft already settled the only matter which was of any practical importance in that respect, namely, the duration of privileges and immunities. On the other hand, if the majority of the Commission was in favour of including an article along the lines suggested by the Secretary, he would have no objection.

4. With regard to the other suggestion, there was no denying the fact that extraordinary missions presented a vast and difficult problem. For that very reason he felt that the Commission should for the present confine itself to diplomatic intercourse and immunities in the strict sense of the word. It would be time enough for it to take up the question of extraordinary missions once it had seen the fate of the draft under discussion.

5. Mr. YOKOTA submitted that, in practice, it was important to know the date on which a diplomatic agent began or ceased to exercise his functions, as distinct from the date on which he began or ceased to enjoy diplomatic privileges and immunities. The two dates were not necessarily the same. He was not sure what the general practice was, but the question should at least be clarified and rules laid down.

6. The CHAIRMAN said he would accordingly put to the vote the question whether to include an article on the date of commencement and termination of diplomatic missions.

7. Mr. SANDSTRÖM, Special Rapporteur, intervening, pointed out that the article could relate either to the dates on which a permanent mission was to be regarded as beginning or ending, or to the dates on which the head of a mission was to be regarded as taking up or laying down his duties. In which sense was the term "diplomatic mission" to be understood?

8. Mr. BARTOS felt that both questions were important and that there should therefore be two additional articles—one for each question.

9. Mr. LIANG, Secretary to the Commission, agreed that both questions were important, and pointed out that they were both implicitly raised in the text which the Commission had adopted for article 1, namely:

"The establishment of diplomatic relations between States, and of permanent diplomatic missions, takes place by mutual consent."

10. On the other hand, the commencement and termination of diplomatic relations between States did not, he thought, give rise to many difficulties in practice, whereas the commencement and termination of the functions of the head of a diplomatic mission did.

11. Mr. GARCIA AMADOR felt that the Commission had not yet discussed the matter sufficiently to decide whether or not it wished to include provisions along the lines suggested.

12. Mr. TUNKIN agreed. The Commission could not decide the matter until it had a text before it.

13. The CHAIRMAN accordingly suggested that the Special Rapporteur be asked to draft an article, or articles, along the lines suggested, for consideration later in the session.

*The suggestion was adopted by 18 votes to none, with 1 abstention.*

14. With regard to the suggestion for additional provisions on extraordinary missions, Mr. KHOMAN said he had no objection to Mr. Tunkin's proposal, but wondered whether in that case too the Special Rapporteur could not draft a text for subsequent consideration by the Commission.

15. Mr. BARTOS agreed with Mr. Khoman that the Commission should request the Special Rapporteur to begin study of the immense question of "roving diplomacy", with regard to which there had been radical changes before, during, and since the Second World War. Nowadays, it was a commonplace for ministers of state to undertake missions in foreign capitals. Sometimes one and the same delegation (for example to a diplomatic conference) comprised staff of such extraordinary missions alongside staff of permanent missions, and the whole delegation then assumed the character of an *ad hoc* mission. The Special Rapporteur would submit a report either at the current session or at the next.

16. Mr. TUNKIN felt that, in view of the complicated and novel nature of the subject, it would be inadvisable to request the Special Rapporteur to submit a text for consideration at the current session. It would be easier to deal with the subject once the Commission had received the comments of Governments on the draft now under consideration.

17. Mr. YOKOTA said he was in full agreement with Mr. Tunkin, especially as the question of extraordinary missions raised the questions of delegations to confer-

ences held under the auspices of international organizations and of delegations to the international organizations themselves, and it had already been agreed in principle to leave those questions aside until work had been completed on diplomatic intercourse and immunities in the strict sense of the term.

18. Mr. EL-ERIAN associated himself with the views expressed by Mr. Tunkin and Mr. Yokota, particularly bearing in mind the already heavy agenda for the current session.

19. Mr. KHOMAN thought there was no disagreement. He had only suggested that the Special Rapporteur should be requested to prepare a draft, and quite agreed that that would take time.

20. The CHAIRMAN agreed with Mr. Yokota that the Commission had decided to leave the whole question of privileges and immunities of international organizations aside. In his view, however, that question was not linked with the question of extraordinary missions.

21. Mr. SANDSTRÖM, Special Rapporteur, said it would be out of the question to submit a draft for consideration by the Commission at its current session if the draft were to cover also the question of privileges and immunities of delegations to international organizations and of the international organizations themselves. He was at the Commission's disposal, but definitely felt that those questions should be left aside.

22. The CHAIRMAN said that the only question under discussion was that of extraordinary or *ad hoc* missions. It appeared that some members thought the Commission would have time to study that question at its current session.

23. Mr. SCELLE said it was becoming more and more common for States to send out extraordinary or *ad hoc* missions. The United States Government, for example, sent out ambassadors at large, while ministers of foreign affairs undertook many extraordinary missions abroad.

24. If the Commission confined itself to reproducing, with a few changes, the decisions taken at the Congress of Vienna, public opinion would consider, and would have reason for considering, that it had dealt with only a part of the question, and was trailing a long way behind the latest developments. There ought not to be any great difficulty in devoting a few articles to a new form of diplomacy which was being increasingly adopted for relations both between States and between States and international organizations.

25. Mr. GARCIA AMADOR, while agreeing that during the general debate the majority of the Commission appeared to have been in favour of limiting work at the current session to permanent and also, perhaps, extraordinary missions, urged that there had been no fixed decision to leave aside the question of privileges and immunities of delegations to international organizations and of international organizations themselves.

26. Faris Bey EL-KHOURI said that, if the Commission's draft was to be a comprehensive set of rules on diplomatic intercourse and immunities, it must deal with all types of missions which could properly be regarded as diplomatic. He agreed that such questions as extraordinary missions raised complex problems, but the Commission should not fight shy of them for that reason. It would have, in any case, an opportunity of revising its draft at the next session, in the light of

comments received from Governments. And Governments would certainly be quick to draw attention to any omissions in the draft. For example, the Commission had dealt with questions of precedence among heads of missions, but had not dealt with a related question, with regard to which there existed no uniformity of practice and which gave rise to frequent misunderstanding and disputes, namely, that of their precedence over local dignitaries at official banquets, receptions and such like. Only the Commission could give guidance on such matters, and countries were undoubtedly expecting it to do so.

27. Mr. SPIROPOULOS agreed that extraordinary or *ad hoc* missions were a matter of great and growing importance, which it was desirable for the Commission to study. He also agreed that at its current session the Commission must needs confine itself to diplomatic intercourse and immunities in the ordinary sense. He would, however, have no objection to asking the Special Rapporteur to undertake a preliminary study of extraordinary or *ad hoc* missions, in the light of which the Commission could decide at its next session whether special provisions were required in that connexion, and, if so, of what kind.

28. Mr. MATINE-DAFTARY agreed that, in view of its heavy agenda, the Commission had not had time at the current session to draft separate rules on extraordinary missions, particularly in view of the fact that the ground had not been prepared by a study by the Special Rapporteur. The Commission should, however, make it clear that it intended to take up the question later, by referring in the title of the draft only to the permanent diplomatic missions.

29. He felt that the text of article 10 already went some way towards meeting Faris Bey El-Khourî's point regarding precedence. Possibly the Drafting Committee could find some way of widening the scope of that article a little in order to meet the point fully.

30. Mr. BARTOS said he shared the view of those members of the Commission who thought it would be a mistake simply to reproduce the provisions of the Regulation adopted by the Congress of Vienna, many of which were outdated.

31. Even at the time of the Congress of Vienna, the existence of *ad hoc* diplomacy had been recognized, though mainly, it was true, with regard to the questions of protocol which it raised. Now that *ad hoc* diplomacy had become the general practice, it was necessary to make a long and thorough study of it, in view of the extreme difficulty of laying down law and custom in that field.

32. The Commission could certainly not deal with the question at its current session, but he proposed that, without fixing a date, it request the Special Rapporteur to study the matter and submit a report thereon.

33. Sir Gerald FITZMAURICE felt there was only one point on which there was not yet general agreement, namely, whether the Commission should request the Special Rapporteur to submit a report in time for consideration at the tenth session. In his view that was essential, for if the Special Rapporteur's report was not available at the tenth session the Commission would be in the same position as it was at the ninth session, and would not be able to include provisions on extraordinary diplomacy in its final draft.

34. Mr. EL-ERIAN agreed with Mr. García Amador that the Commission had taken no decision regarding extraordinary or *ad hoc* missions, international organizations and delegations to international conferences, all questions which were intimately related to those the Commission was discussing, and which it certainly should consider in due course, though it had not time to do so at the current session. The Commission might, however, find it advisable to insert in its report on the current session a paragraph requesting the views of Governments on the other three matters referred to.

35. Mr. HSU said he could support Mr. Bartos's proposal, although he would have preferred to see a text submitted at the current session.

36. In view of the emergence of so many new States, it was highly desirable for the Commission to afford guidance on all points which gave rise to difficulties in practice, such as the one referred to by Faris Bey El-Khourî (para. 26 above).

37. Mr. TUNKIN said that, in deference to the wishes expressed by many members of the Commission, he could agree to Mr. Bartos's proposal, on the understanding that the subject of extraordinary or *ad hoc* diplomacy would be dealt with as a separate problem from that which was the subject of the draft under consideration, and that study of it would not delay presentation of that draft.

38. Mr. AGO thought that all members of the Commission agreed that the draft which it was considering covered only a part of a much wider field. If the Commission had chosen to deal with one part first—as it had done in the case of the law of the sea—it was because it could not deal with all parts simultaneously; and if it had chosen that particular part, it was no doubt because it was with regard to it that international law was most highly developed. He could, therefore, support Mr. Bartos's proposal, since it would enable the Commission to take up the second part of its work as soon as it had completed the first.

39. Replying to a question by Mr. GARCÍA AMADOR, the CHAIRMAN pointed out that the term "extraordinary missions" was not to be understood in the sense in which that term was used in the Havana Convention,<sup>1</sup> but as any mission undertaken abroad for a specific purpose.

40. He put to the vote the proposal that the Special Rapporteur be asked to study the question of extraordinary or *ad hoc* missions, as distinct from permanent diplomatic missions, and to submit a report thereon for consideration by the Commission at its tenth session.

*The proposal was adopted unanimously.*

41. Mr. SCELLE, explaining his vote, pointed out that the text on which the Commission was working was a provisional text. When the related question of extraordinary missions had been studied, the Commission would undoubtedly have to modify it in various respects—for example, by inserting some provision regulating precedence as between heads of missions and ambassadors at large.

42. The CHAIRMAN recalled that, when being sent to Governments for comment, the articles drafted by the Commission had always been known as provisional arti-

<sup>1</sup> Convention regarding Diplomatic Officers, signed at Havana on 20 February 1928. See League of Nations, *Treaty Series*, vol. CLV, 1934-1935, No. 3581.

cles; it was only when the comments of Governments had been received that the draft articles could be put into a final form—"final" as far as the Commission was concerned.

43. Mr. SANDSTRÖM, Special Rapporteur, enquired whether the Commission invited him to prepare for possible inclusion in the set of articles a draft article on the functions of permanent missions, a point already raised by Sir Gerald Fitzmaurice (383rd meeting, para. 11). When preparing his draft he had not thought it expedient to deal with the question, but, since the Commission had taken decisions which might lead him to deal with certain other questions, he would reconsider his attitude.

44. Sir Gerald FITZMAURICE recalled that he had raised the question of defining the diplomatic function during the general debate at the 383rd meeting. It would be useful if the question, which had been the subject of a certain amount of controversy in recent years, were at least examined by the Commission. It might, in fact, be of advantage to include a definition in the draft articles themselves. He hoped that the Special Rapporteur would prepare a draft article for consideration.

45. Mr. KHOMAN said that much turned on the question, already raised by Mr. Spiropoulos, as to whether the Commission's object was to frame a draft convention or simply a model code for the guidance of States. If the object was to formulate a model code, he would be in favour of including an article defining the diplomatic function.

46. The CHAIRMAN, while agreeing with Mr. Spiropoulos that the purpose to be served by the draft would have some repercussions on its content, thought that the form it should take could best be discussed later in the session. The Commission would not know until its next session, when it had received the comments of Governments on its initial draft, whether there was any chance of a draft convention on the subject being adopted.

47. Mr. SPIROPOULOS said that the Commission must, nevertheless, make up its mind as to the purpose it thought its draft articles should serve.

48. Mr. EL-ERIAN was in favour of postponing consideration of that question.

49. Mr. BARTOS said that, if the Commission did not carefully delimit the field of activity of diplomatic missions, it would be unable to deal with the manner in which they worked or the measures necessary for them to discharge their functions. The definition of the diplomatic function was a fundamental question which would arise regardless of whether the Commission wished to frame a code or a draft convention.

50. Mr. AMADO said that it would be an extremely difficult task for the Special Rapporteur to define the diplomatic function, and pointed out that it seemed necessary to envisage in the draft the status of non-permanent missions. The Havana Convention had solved the latter problem quite simply in its article 9.

51. Mr. SPIROPOULOS pointed out that it was a question of defining the powers of heads of permanent missions and not of defining permanent missions. He thought the Special Rapporteur should be asked to prepare an article on the former subject.

52. Mr. LIANG (Secretary to the Commission) said that he had been in favour of articles on diplomatic

intercourse as distinct from privileges and immunities. It would be extremely difficult, however, to define diplomatic functions. States, nevertheless, had a clear idea of the bounds of those functions, and if a receiving State considered that the head of a mission accredited to it had overstepped those bounds, the only course it could take was to declare him no longer *persona grata*.

53. Mr. PAL took the view that the Commission should refrain from attempting any definition of a matter like "diplomatic function". If there were dangers in every definition, there was an even greater danger in seeking to define a function which was more easily understood than expressed. It was not possible to offer any useful definition of such a function *per genus et species*. Any definition by description, enumeration or exclusion would be calculated only to mislead, unless the Commission could accomplish the feat of making its enumeration exhaustive so as to mark out clearly the limits—the outline—of what was precisely comprised in it. If any definition was needed, it was needed for the guidance of the parties concerned, including the members of the mission. Unless the definition really defined so as to clarify unequivocally where the border-line cases lay, it would serve no useful purpose in that respect. In such border-line cases the diplomat would necessarily be left to his own resources and to act at his own risk.

54. As the Secretary had pointed out, when a diplomatic agent overstepped the bounds of his functions, the consequence, perhaps, for him would be to be declared no longer *persona grata*. According to an earlier decision of the Commission (387th meeting), however, the receiving State was not bound to give any reason when declaring a diplomatic agent *persona non grata*. Thus, even if the Commission inserted a definition of diplomatic functions, the decision as to whether those functions had been exceeded or not would always be in the hands of the receiving State.

55. Sir Gerald FITZMAURICE said that the problem he envisaged was quite different from that referred to by the Secretary and Mr. Pal. He was not concerned with the situation when a diplomatic agent attempted to exceed his functions. What he wished to have specified were the types of function in which a receiving State might not refuse to allow a diplomatic mission to engage. The Commission should at least examine that question, even though it might decide it was inadvisable to deal with it in the draft articles.

56. Mr. BARTOS remarked that, to reduce the question of overstepping the limits of diplomatic functions to the single question of declaring a diplomatic agent *persona non grata*, was to oversimplify the problem. A diplomatic agent might go beyond the limits of his functions through no fault of his own but as a result of instructions based on a different concept of diplomatic functions.

57. It was very difficult to say where the legitimate activities of observation and information began and ended. Some States had, possibly in good faith, allowed their diplomatic agents to indulge in activities which the receiving States regarded as espionage. Other States appointed attachés for public relations—presumably accredited to the general public. Such cases, and the somewhat irregular conduct of certain missions in Yugoslavia, which had distributed essential drugs in time of shortage directly to the public without passing through normal trade or Red Cross channels, showed that activities of

diplomatic missions went far beyond the four or five functions traditionally attributed to diplomatic agents.

58. States could not always declare a diplomatic agent *persona non grata*, and if a warning, unofficial representations and a formal protest were of no avail, there was little they could do, short of breaking off diplomatic relations, which they were not always willing to do.

59. The normal functions of diplomatic missions therefore needed defining. Such a definition would be of great assistance to small countries which had recently acquired independence. Precisely those States which stood by the Regulation of the Congress of Vienna were very "progressive" on the question of the scope of diplomatic functions, defending its steady extension on the plea of ever-broadening international co-operation.

60. The CHAIRMAN pointed out that the question before the Commission was not whether to include an article on the subject in the draft, but whether the Special Rapporteur should be asked to prepare a text.

61. Mr. AMADO observed that the duties of diplomatic officers had been summarized in section III of the Havana Convention. He was opposed to the Commission's attempting to define the diplomatic function, since in so doing it would lose itself in a maze of detail. The task before the Commission was arduous enough without that.

62. Mr. EL-ERIAN said that, while not underestimating the difficulty of defining the diplomatic function, and while aware that definitions were primarily the concern of doctrine and not of legislation, he thought that the Commission should consider, and if necessary adopt, such a definition.

63. There were at least four reasons why an attempt should be made. Firstly, diplomatic functions had undergone very considerable and fundamental changes in recent years. Secondly, the trend towards rationalization of the system of immunities on the basis of the theory of "functional necessity" made it essential to state what diplomatic functions were. Thirdly, there were several references to diplomatic functions in the draft articles; both article 17, paragraph 1, which referred to "all necessary facilities for the exercise of his functions", and article 27, which contained the clause "provided that they do not impede the exercise of his functions", seemed to call for some indication of the exact nature of the functions of a diplomatic agent. Finally, the problem of the nature of the diplomatic function would arise in connexion with diplomatic immunities in countries which did not accord immunity from civil jurisdiction. In such cases it was essential to be able to distinguish between acts performed by a diplomatic agent in a private capacity and those performed in the exercise of his functions.

64. The definition need not be precise and restrictive, but should be illustrative and provide guidance for States on the nature of diplomatic functions at the present day. It would not be concerned with the respective roles of the head of a mission and its previous members, but with the essential characteristics of the diplomatic function in general. It could form the subject either of an article or of a paragraph in the commentary.

65. Mr. AGO agreed with the Chairman; the question before the Commission was whether or not to ask the Special Rapporteur to explore the possibility of including a draft article defining the functions of diplomatic missions. The Special Rapporteur might conclude that it was

possible, or that the functions of diplomatic missions could be defined only by a negative formula, or that an article on the subject could not be included. The Commission should, however, adopt the latter pessimistic view only after mature consideration.

66. He himself would welcome the inclusion of an article on the subject. The Commission had already found it necessary to include articles on the beginning and termination of diplomatic missions, and its draft would be more complete if it also stated what were the functions of such missions. A definition of what came within diplomatic functions would also be of assistance in settling disputes that sometimes arose between States on that subject.

67. He agreed that the question of knowing when a diplomatic agent was overstepping the bounds of his functions was not identical with the question of when a diplomatic agent could be declared *persona non grata*. Disputes on the scope of diplomatic functions could arise between States without the conduct of persons being involved, while on the other hand, diplomatic agents could be declared *persona non grata* for other reasons than that of exceeding their functions.

68. Mr. SCALLE said that a set of articles on diplomatic intercourse which contained no definition of the diplomatic function would be a strangely truncated body.

69. Almost 100 years before the Congress of Vienna, Montesquieu had first sought to define the role of the ambassador, calling him the voice, eye and ear of his sovereign, in which capacities he had the right to be heard and the right to listen and to have collaborators to collect information—who might overstep the limits of their functions. Ambassadors had a variety of duties to perform in the receiving State: representation, negotiation, the collection of information and, last but not least, the act of signature. All those points might be quite familiar, but it was nevertheless essential to state them, for they constituted the essential functions of diplomatic missions.

70. Mr. LIANG (Secretary to the Commission) agreed that a general article on the lines indicated by Sir Gerald Fitzmaurice would be a useful contribution to a complete code of diplomatic intercourse. A definition would not, however, be easy to formulate. It was largely a question of determining what should be excluded from the concept of diplomatic functions.

71. The CHAIRMAN agreed with Mr. El-Erian that, references to diplomatic functions having been made in the draft articles, it would be necessary to attempt to define the nature of the diplomatic function. There was moreover another argument in favour of doing so. After diplomatic functions had terminated, acts which took place during the exercise of official functions continued to be immune from jurisdiction. In order to determine the dividing line between the diplomatic agent's official acts and his acts as a private individual, a definition of diplomatic functions would be very useful.

72. He presumed from the absence of any formal opposition that the Commission wished the Special Rapporteur to prepare a text on the diplomatic function.

*It was so agreed.*

73. Mr. SANDSTRÖM, Special Rapporteur, enquired whether it was the wish of the Commission that he should include a provision on the lines of article 13 of the

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

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

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

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

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

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

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

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

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

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

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

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

*It was so agreed.*

The meeting rose at 1 p.m.

### 394th MEETING

*Thursday, 9 May 1957, at 9.45 a.m.*

*Chairman:* Mr. Jaroslav ZOUREK.

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

[Agenda item 3]

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

#### SECTION II

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

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

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

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

*It was so agreed.*

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

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

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

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

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

9. On Mr. Verdross's second point, he agreed with Mr. Tunkin. The premises of the mission were, so to speak, its permanent headquarters and the concrete symbol of its presence. Incidentally, his arrangement of the sub-

ject was similar to that of the Harvard Law School draft<sup>1</sup>.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

*It was so agreed.*

## ARTICLE 12

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

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

33. Sir Gerald FITZMAURICE had proposed:

(a) A new paragraph 1, to read:

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

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

(c) A new paragraph 3, to read:

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

*Alternative text:*

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

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

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

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

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

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

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

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

simply delete the remainder of the paragraph, beginning with the words "or, in an extreme emergency".

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

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

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

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

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

<sup>2</sup> *Annuaire de l'Institut de droit international*, vol. XIV, 1895-1896 (Paris, A. Pedone), p. 240.

<sup>3</sup> Harvard Law School, *op. cit.*, pp. 186 and 187.

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

<sup>5</sup> Harvard Law School, *op. cit.*, pp. 19-25.

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

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

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

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

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

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

47. It was a much more serious matter to say that, in the event of a diplomatic mission's engaging in such activities, the receiving Government had the right to force an entry into its premises. To say that it could do so in order "to safeguard the security of the State" could mean almost anything; and he would be interested to hear what the Special Rapporteur had had in mind in referring to cases where there was "grave and imminent

danger to . . . public health or property". There were, Sir Gerald pointed out, other remedies open to the receiving Government; if matters had got to such a pitch that it was prepared to force an entry into the mission's premises, the proper course for it would surely be to demand the mission's recall.

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

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

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

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

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

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

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

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

<sup>6</sup> *Official Records of the General Assembly, Seventh Session, Annexes*, agenda item 58, document A/2252, para. 16.

<sup>7</sup> *Ibid.*, *Fourth Session, Supplement No. 10*, para. 23.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

The meeting rose at 1.10 p.m.

### 395th MEETING

Friday, 10 May 1957 at 9.45 a.m.

Chairman: Mr. Jaroslav ZOUREK.

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

[Agenda items 3]

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

ARTICLE 12 (continued)

1. The CHAIRMAN invited the Commission to continue consideration of article 12 of the Special Rapporteur's draft (A/CN.4/91) in the light of the decision it

had taken at the close of the previous meeting not to deal with the question of diplomatic asylum at the current session.

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

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

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

5. Mr. VERDROSS, after apologizing for reverting to a matter which had been discussed at the previous meeting, said that he still felt that it was absolutely necessary to determine the time at which *franchise de l'hôtel* started. For that purpose, he proposed that the following words, which were based on a similar proviso in article 3 of the Harvard Law School draft<sup>1</sup> 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,

<sup>1</sup> 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."<sup>2</sup>

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 dis-

pute 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.

<sup>2</sup> 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 particular 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<sup>3</sup> 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, in-

clude 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 where 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-

<sup>3</sup> 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.<sup>4</sup>

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

<sup>4</sup> 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".<sup>1</sup> There was some analogy between that case and the matter raised by Sir Gerald Fitzmaurice.

<sup>1</sup> League of Nations, *Official Journal*, 5th year No. 4 (April 1924), p. 524.

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. SCALLE 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".<sup>2</sup>

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

<sup>2</sup> League of Nations publication, *V. Legal, 1929.V.3* (document C.75.M.69.1929.V), p. 67.

be advisable to discuss, at the same time, Sir Gerald Fitzmaurice's proposal to add to article 13 a new paragraph 3, reproducing the text of article 4, paragraph 2, of the Harvard Law School draft,<sup>3</sup> namely:

"A receiving State shall exempt from any form of attachment or execution the interest of a sending State in movable or immovable property owned, leased or possessed by the sending State for the purposes of its mission".

14. Replying to Mr. PAL, he explained that Sir Gerald's amendment to article 13 dealt with a similar subject, and if it was not considered at the same time as article 12, paragraph 3, there was a danger that its fate might be prejudged by the Commission's decision on article 12, paragraph 3.

15. Sir Gerald FITZMAURICE said that he had submitted his amendment largely in order to discover why what he considered a useful point had not been included in the Special Rapporteur's draft. The question dealt with in article 4, paragraph 2, of the Harvard draft was not quite the same as that covered by paragraph 3 of article 12, since an "interest" in property was rather less than full ownership. The point could, however, be covered by simply adding the words "or any interest therein" after the words "the premises and their furnishings" in paragraph 3. If the Commission did not consider the matter important enough to warrant amending the draft, he would not press it.

16. Mr. SANDSTRÖM, Special Rapporteur, felt that the idea of interest was covered by the wording of article 12. Were Sir Gerald Fitzmaurice's amendment adopted and inserted before article 13, it might give the impression that the interests of the sending State were not immune from seizure for non-payment of taxes. To avoid such a misunderstanding, the provision might be inserted elsewhere.

17. Mr. AMADO noted that the Harvard draft referred to property owned, leased, or possessed by the sending State "for the purposes of its mission". That was an important qualification which he thought should be made in the Commission's draft as well.

18. Mr. BARTOS recalled that a civil action involving property purchased by the Yugoslav Government to house members of its mission in Italy had raised the question whether the quarters of members of missions were exempt from search, requisition, attachment or execution in the same way as the official premises of the mission. The dispute having been settled by friendly negotiations between the two Governments, the question was never decided by the court to which the suit had been referred. The problem of defining what premises were essential to the mission for the fulfilment of its purpose might be considered by the Drafting Committee when it discussed the final wording of the article.

19. Mr. SCELLE remarked that, to judge from the French translation of paragraph 2 of article 4 of the Harvard draft, the text which Sir Gerald Fitzmaurice proposed for insertion in article 13 was inadequate, since it merely stated that the receiving State "*déclarera insaisissables*" the property of the mission. It was essential to refer to "search, requisition, attachment or execution" in full.

<sup>3</sup> Harvard Law School, *Research in International Law, I. Diplomatic Privileges and Immunities* (Cambridge, Mass., 1932), pp. 19-25.

20. Mr. AGO agreed with Mr. Scelle. The expression "*déclarera insaisissables*" was inadequate because the duties of the receiving State in the matter were essentially duties of abstention—obligations assumed by the State not to perform certain specific acts—whereas the French text seemed to imply that the State had a positive obligation to issue a statement with respect to the property of the mission, which was not what was actually needed.

21. The point made by Mr. Bartos was a good one. However, the arrangement of the Harvard draft was different from that of the Special Rapporteur's draft. In the former, the premises of the mission and those occupied by members of the mission were covered by the same article, whereas in the latter they were dealt with separately in articles 12 and 18. Therefore, it would be better to deal with that point when article 18 was examined.

22. Referring to Mr. Amado's proposal, he pointed out that the Commission could not very well abruptly introduce the qualification "required for the purposes of the mission" in paragraph 3 of article 12. It was essential to refer to exactly the same premises throughout the article, and to use the same expression in every paragraph of that article.

23. Mr. SANDSTRÖM, Special Rapporteur, observed that the original text of article 4, paragraph 2, of the Harvard draft appeared to cover all the measures mentioned by Mr. Scelle.

24. By "premises of the mission" in his own article 12, he understood only the official premises and not those used for dwelling purposes, even if owned or leased by the sending State.

25. Mr. AMADO said that he did not wish to press his proposal.

26. Sir Gerald FITZMAURICE said that, after hearing the discussion to which his amendment had given rise, he wished to withdraw it.

27. The CHAIRMAN put paragraph 3 of article 12 (A/CN.4/91) to the vote.

*Paragraph 3 was adopted by 18 votes to none with 1 abstention.*

28. The CHAIRMAN invited the Commission to consider Mr. François's amendment to add the following sentence as paragraph 4 of the article:

"No process may be served at the premises of the mission".

29. Mr. FRANÇOIS said he had submitted his amendment because he thought it would be useful to include a provision dealing with a subject that had given rise, and was still giving rise, to difficulties in various countries. Sir Cecil Hurst, in his course of lectures on diplomatic immunities,<sup>4</sup> quoted various cases in which courts and authorities in Prussia (as early as 1723), France (1834) and the United Kingdom had condemned the serving of writs at the premises of diplomatic missions as an act contrary to international law. There appeared, in fact, to be almost unanimous agreement on the point.

30. Mr. MATINE-DAFTARY, although not opposed to the principle of Mr. François's amendment, wondered

<sup>4</sup> *International Law: The Collected Papers of Sir Cecil Hurst* (London, Stevens and Sons Limited, 1950), part four.

whether the idea was not already covered by the word "execution" in article 12, paragraph 3.

31. Mr. SANDSTRÖM, Special Rapporteur, suggested that the point was covered by paragraph 1 of article 12 rather than by paragraph 3. A specific reference could however be made to the point in the article, if Mr. François wished.

32. Mr. BARTOS pointed out that the civil codes of some countries contained provisions governing the serving of writs on missions and heads of missions, despite the fact that any such act was contrary to international law. He supported Mr. François's amendment, and did not consider that the point was covered by article 12, paragraph 3.

33. Mr. AMADO also found the amendment acceptable.

34. Mr. TUNKIN agreed with the Special Rapporteur. Though no harm would be done by adding the provision to article 12, he felt that the point was already covered by the positive rule stated in the first paragraph of the article, since a writ could not be served without entering the premises of the mission. One objection to mentioning such a specific case in the article was that it might leave some doubt as to whether other specific cases were also covered.

35. Mr. FRANÇOIS said he could not agree with Mr. Matine-Daftary that his point was already covered by paragraph 3. The case of a writ served on a national of the receiving State living in the premises of the mission was not covered by the provisions regarding execution.

36. Nor could he agree with Mr. Tunkin that the prohibition on entry without consent in paragraph 1 covered his point. If the article were left as it stood, it would not be clear whether it was permitted to serve writs without crossing the threshold of the mission. The fact that the question had given rise to difficulties in practice, and had been the subject of court judgements in a number of countries, was, he thought, adequate justification for mentioning it specifically in the article. He would not, however, press for it to be mentioned in the draft itself, and would be satisfied with a reference in the commentary.

37. Mr. SCELLE, in support of Mr. François's amendment, cited a decision<sup>5</sup> by the Administrative Tribunal of the International Labour Office (ILO) that a summons served on a UNESCO staff member by a United States court ought not to have been served on him at the headquarters of that Organization.

38. It would be desirable to include in the draft a provision to the effect that any summons served on a member of the mission staff, or on anyone living under the same roof as the head of the mission, should be sent to the head of the mission in order that he might decide whether or not to pass it on to the person concerned. In that way his prerogatives would be left intact.

39. Mr. SANDSTRÖM, Special Rapporteur, said that the laws of many countries laid down the way in which the notice of a summons was to be communicated to diplomatic missions. He had decided to omit that question from his draft, but he had not thought of the case where a summons was put in the post outside the mission's premises. He was, on balance, in favour of Mr. François's proposal.

40. Mr. SPIROPOULOS said that, in his view, paragraph 1 of the Special Rapporteur's text did not cover the case in point, and supported Mr. François's amendment, which was in harmony with paragraph 3.

41. Mr. PAL felt that the proposed amendment was either superfluous, having been covered by the provisions already adopted, or out of place in article 12, not being related to the principle of inviolability. If the object of the amendment was to prevent violation of the premises or of the dignity of the mission, the mischief was already covered by paragraphs 1 and 2 of the article. There were, indeed, many different ways of serving a process provided for in the various national systems. If the process could not be served without entering the diplomatic premises, paragraph 1 was sufficient; if it could be served without entering the premises, the principle of inviolability was only involved, perhaps to the extent that the dignity of the mission was affected, and paragraph 2 should suffice. If the object was to invalidate the service, the amendment would be altogether out of place in the draft.

42. Mr. MATINE-DAFTARY said that, although the purpose of the amendment was clear, it was still not clear what would happen in the event of its being necessary, for example, to serve a summons on someone who was staying with the ambassador but did not enjoy diplomatic privileges.

43. Mr. FRANÇOIS said that the answer to Mr. Pal and Mr. Matine-Daftary was the same, namely, that the purpose of his amendment was to make it unlawful to serve a process at the door of the mission. It was therefore a special application of the principle laid down in the Special Rapporteur's paragraph 1, since, even though the premises were not actually entered, the dignity attaching to the mission was at stake.

44. Mr. SCELLE said that, in his view, Mr. François's amendment was useful for two reasons: it ensured the inviolability of diplomatic premises and it avoided the risk of incidents.

45. Mr. PADILLA NERVO said he could accept Mr. François's amendment. That did not mean that there were no cases where diplomatic officials could not be legally summoned, as, for example, when the official concerned voluntarily waived his immunity. Even in such cases the process should not be served directly, but normally through the ministry of foreign affairs. What the Commission was concerned with preventing was the serving of writs on diplomatic premises by an act of authority.

46. Sir Gerald FITZMAURICE said he also supported Mr. François's amendment, the aim of which was to prevent an "act of authority" from being performed on diplomatic premises. The inviolability of the premises would not *per se* prevent that, since the process-server might enter quite normally and peaceably.

47. With regard to the English text of the amendment, he felt that the words "No process may be served" were too wide in scope, since they would also prevent the serving of a process through the post, which was not, he thought, Mr. François's aim. He suggested that they be replaced by "No personal service of process may be carried out".

48. The CHAIRMAN put to the vote Mr. François's amendment (para. 28 above), subject to a decision by the Drafting Committee as to whether it should be placed in article 12 or in the commentary and as to the wording of the English text.

<sup>5</sup> International Labour Office, *Official Bulletin*, vol. XXXVII, No. 7, 31 December 1954, p. 285.

*The amendment was adopted by 17 votes to none with 4 abstentions.*

49. Mr. FRANÇOIS said that on a number of occasions it had been necessary for the receiving State to expropriate all or part of a foreign diplomatic mission's premises, in order, for example, to widen a road, but the head of the mission had resisted, invoking the principle of extra-territoriality. The purpose of extra-territoriality, however, was merely to enable the staff of a diplomatic mission to do their work without interference from the nationals or the authorities of the receiving State. In his view, it could not be invoked in order to resist a claim for expropriation which was in the genuine public interest of the receiving State. He accordingly proposed the insertion in article 12 of a further additional paragraph, reading as follows:

"The inviolability referred to in paragraph 1 above shall not prevent expropriation in the public interest by the receiving State."

It went without saying that the receiving State must pay fair compensation for any property expropriated.

50. Mr. YOKOTA said that the amendment referred to what were extremely rare cases, which could well be left out of account. Moreover, it necessarily raised the question of compensation for property expropriated in the public interest, on which there was no general agreement. In his view, it would be difficult to lay down a rule regarding compensation without studying the whole question; and if the Commission did not mention it at all, disputes would be bound to occur. He therefore felt it would be wiser to omit the provision altogether. But if the majority of the Commission was in favour of inserting it, it was absolutely necessary that the words "with fair compensation" should be added.

51. Mr. KHOMAN said that the Commission, which had refused to mention exceptions to the principle of inviolability in the event of a grave and imminent danger to human life or the security of the receiving State, was now being asked to mention exceptions which were simply "in the public interest". In his experience, the cases referred to by Mr. François were always settled by negotiation between the two States concerned, and he could not agree to giving the receiving State the right to expropriate property belonging to a foreign diplomatic mission.

52. Mr. EDMONDS said he, too, was not in favour of the proposed amendment. In particular, the reference to expropriation was inappropriate. What Mr. François surely had in mind was the right of eminent domain, which entailed the compulsory transfer of property to the public authorities, but for a specified purpose and subject to fair compensation. Even if the text of the amendment were modified in order to make that clear, however, he would be obliged to vote against it, since in those cases where the right of eminent domain had been claimed in order to oblige a foreign mission to transfer mission property to the local authorities, the matter had usually been settled by negotiation between the two States concerned, and not by ordinary legal processes.

53. Mr. EL-ERIAN expressed himself in favour of the amendment, not only for the practical reasons instanced by Mr. François but also because when a foreign diplomatic mission purchased premises for diplomatic use it only acquired private property rights, which were subject to the right of *imperium* or eminent domain, which rested with the State in whose territory the premises were located.

54. It had been suggested that the receiving State's right to expropriate mission premises in the public interest was incompatible with the principle of inviolability, but in his view the question of inviolability did not arise in that connexion, since there was no question of forcibly entering the premises or interfering with whatever work was being done there.

55. The point was of more practical importance than some members of the Commission had suggested. In 1952 the Egyptian Government had been obliged to ask the British Embassy in Cairo to give up a few metres of its outer yard in order to make room for the new Nile River Road. Fortunately, the matter had been settled amicably, but that might not always be the case, and it was therefore essential to remove any doubts as to the receiving State's rights. Mr. Pal's suggestion for inclusion of the words "in accordance with the law of the receiving State" in the text that was to be inserted at the beginning of article 12 (395th meeting, para. 53) might be held to cover the point, but it was better to make it absolutely clear.

56. Mr. MATINE-DAFTARY associated himself with what had been said by Mr. El-Erian. In his view, the term "expropriation in the public interest" was not likely to give rise to any misunderstanding. The domestic laws of most civilised countries recognized such a restriction on private property rights, and formulated it in terms which would make it impossible for the receiving State to abuse its rights in the matter. He agreed with Mr. François that it went without saying that fair compensation must be paid in advance.

57. Mr. SPIROPOULOS doubted whether the amendment was of much importance in practice. Certainly it expressed what was no more than the receiving State's right, but if the concept of *possessio* rather than ownership was introduced into the new paragraph 1 of the article, as suggested by Mr. Padilla Nervo (395th meeting, para. 77), the Commission's draft would contain nothing to suggest that a foreign diplomatic mission which owned property was not in exactly the same position as regards expropriation as any other private property owner.

58. There was, of course, the possibility that the receiving State might abuse its right, but any dispute on that score was a matter for settlement by the ordinary procedures applicable to disputes.

59. Mr. HSU agreed that the amendment was unnecessary. Mr. François had said it was necessary in order to rebut arguments based on the theory of extra-territoriality, but that theory was now generally discredited.

60. Mr. SCELLE thought that Mr. François's amendment might give rise to serious difficulties. No precautions could prevent the body responsible for the decision to expropriate (in France, the *jury d'expropriation*) from being sometimes swayed by nationalist fervour or political considerations. Consequently, he could not accept Mr. François's amendment, unless the Commission included in the draft a provision to the effect that any disputes that might arise between States concerning the exercise of diplomatic functions should be referred to an impartial judicial authority. He would submit an amendment along those lines in due course.

61. Mr. PADILLA NERVO pointed out that normally diplomatic missions would not object to being dispossessed when the Government so requested, even when

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-Khoury 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<sup>1</sup>, article 4, paragraph 1, of the Harvard draft<sup>2</sup> and article 19 of the 1929 resolution of the Institute of International Law<sup>3</sup>.

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."<sup>4</sup>

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".<sup>5</sup> 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.

<sup>4</sup> United Nations, *Treaty Series*, Vol. I, 1946-1947, p. 20.

<sup>5</sup> Harvard Law School, *op. cit.*, p. 20.

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

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

<sup>3</sup> *Ibid.*, pp. 186 and 187.

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.”<sup>6</sup>

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.*

#### 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.<sup>7</sup>

50. Although the ancient and generally accepted privileges 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.

<sup>6</sup> United Nations, *op. cit.*, p. 18.

<sup>7</sup> 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,<sup>8</sup> 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.

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.

<sup>8</sup> United Nations, *Treaty Series*, vol. 75 (1950).

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 designat-

ing 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.<sup>1</sup>

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<sup>2</sup>, 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 communicate 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.

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

<sup>2</sup> 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 though 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,<sup>3</sup> 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-

<sup>3</sup> United Nations, *Treaty Series*, Vol. 193, 1954, No. 2616.

tions of Atlantic City (1947)<sup>4</sup> and Buenos Aires (1952)<sup>5</sup> 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. SCALLE 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.

<sup>4</sup> *Ibid.*

<sup>5</sup> *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 violate 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

serious, he did not think that they justified renouncing the principle of absolute inviolability. The dangers of abuse involved in that absolute rule were not so great as those which might arise if departures from the rule were permitted. He was surprised to hear that some members of the Commission preferred the Special Rapporteur's original text (A/CN.4/91), since acceptance of that text would lead, in practice, to the abandonment of the very principle of inviolability.

3. He understood the Special Rapporteur to be willing to accept his amendment (398th meeting, para. 84), with the exception of the words "in no circumstances whatsoever". In that case, he was willing to delete them.

4. Mr. YOKOTA thought that the best way to preserve intact the rule of the inviolability of the diplomatic bag, while preventing possible abuse, was to give a clear definition of the diplomatic bag. The definition might be based on the statement by Oppenheim that "according to general usage, those parts of their luggage [the luggage of couriers] which contain diplomatic despatches and are sealed with the official seal must not be opened and searched".<sup>1</sup>

5. If absolute inviolability were confined to diplomatic mail, not only sealed but also certified by the head of the mission or the foreign minister, there would be little, if any, possibility of abuse. Other diplomatic bags or packages, which were only sealed and not certified, would be subject to opening in the exceptional circumstances and on the special conditions set out in the Special Rapporteur's original text. The Drafting Committee might be asked to prepare a text on those lines.

6. Mr. FRANÇOIS, referring to the grave objection of some members to the system originally proposed by the Special Rapporteur, said that the rule that diplomatic mail could be opened in exceptional circumstances and on special conditions was already applied by some countries, where it was considered to reflect the existing state of international law. Indeed, the Commission could be certain that many countries would refuse to accept the absolute prohibition of the opening of diplomatic bags as a rule of existing international law.

7. Perhaps the two schools of thought could find some common ground. The Commission might, for instance, enunciate the general principle of inviolability of diplomatic bags in the article, but add something on the following lines in the commentary:

"The Commission felt bound to lay down the general principle of the absolute inviolability of diplomatic bags, but in doing so did not wish to stigmatize as contrary to international law the practice in some countries of claiming the right to open such bags in quite special cases and only with the consent of the minister of foreign affairs and in the presence of a representative of the mission."

Such a solution would both provide for exceptions and ensure the necessary safeguards.

8. Mr. SCALLE said that, although in general he favoured Mr. Amado's view that diplomatic immunities should be as absolute as possible, he feared the increasing danger arising out of the absolute inviolability of diplomatic bags. There were already more than eighty independent States in the world, and not all of them were

bound by the same traditions as the older Powers. Were it merely a question of smuggling diamonds or perfume, he would not be so concerned at the prospect of abuse, but he understood from some members of the United Nations Commission on Narcotic Drugs that traffic in dangerous drugs was blatantly conducted under cover of the diplomatic bag. Although the smuggling of the vital parts of atomic bombs in the diplomatic bag was still confined to the realms of fiction, there was nothing to prevent its becoming an actual fact. In view of such considerations, he thought it necessary to permit the opening of the diplomatic bag in exceptional circumstances and with due safeguards. Mr. François's proposal was perfectly sound.

9. Mr. SPIROPOULOS confessed to some misgivings regarding Mr. François's proposal. If certain countries were allowed a comparatively free hand, there would soon be no rule at all. Yet the Commission could not close its eyes to the very real abuses which occurred. A possible solution would be to define the diplomatic bag as a means of conveying diplomatic correspondence and official documents. Such matter, whether in a sealed bag or sealed envelope, would enjoy full immunity. If States wished to send other articles under seal, they must be prepared to submit to their inspection.

10. The text originally proposed by the Special Rapporteur did not, in his opinion, provide adequate safeguards, for the decision to open diplomatic bags was entirely at the discretion of the receiving State. It would be better to stipulate that the diplomatic bag could be opened for inspection only with the consent of the sending State and in the presence of its authorized representative. The Drafting Committee might be asked to frame an article on those lines.

11. Mr. AMADO conceded that abuses of the immunity of diplomatic bags occurred almost daily, and that States had been powerless to prevent them. The Commission should consider, however, whether the abuses were serious enough to justify accepting Mr. François's proposal. The opening of diplomatic bags in exceptional circumstances was admittedly an accepted practice, but it was not sanctioned by any rule of international law.

12. Since it was impossible to define abuses of the diplomatic bag, the Commission might define the diplomatic bag itself and state:

"The diplomatic bag, as a means of conveying diplomatic correspondence between States and their missions, shall be inviolable."

It could then add in the commentary that, if there were serious grounds for presuming that it contained illicit articles, it might be opened with due precautions.

13. Mr. LIANG (Secretary to the Commission) remarked that abuses occurred chiefly in connexion with the baggage accompanying the courier. The diplomatic bag itself, usually sealed by a senior official of the mission or ministry, did not easily lend itself to abuse, and he could recall no instance of illicit articles having been discovered in it.

14. He thought it desirable for the Commission to affirm the inviolability of the diplomatic bag in unequivocal terms. The question of abuse could be settled in other ways. When a receiving State had serious grounds for suspecting some irregularity, it could approach the sending State, which would normally agree to an inspection of the contents. If the sending State clung to its

<sup>1</sup> L. Oppenheim, *International Law—A Treatise*, Vol. I, Peace, 8th ed., ed. H. Lauterpacht (London, Longmans, Green and Co., 1955), p. 813.

technical right to refuse to open the bag, the receiving State would have grounds for lodging a claim against it. He could not, however, recall any case of a sending State's taking such an attitude.

15. Mr. PADILLA NERVO recalled that he had urged at the previous meeting that the Commission, instead of defining the diplomatic bag, should state that it was the duty of the sending State to use the bag only for diplomatic correspondence with its missions (398th meeting, para. 100). Such a statement could be added to Mr. Tunkin's text, or, failing that, included in the commentary. Once their duty was clearly established, any violation would give rise to an international responsibility. Abuses could be remedied by lodging a claim against the State responsible.

16. Mr. MATINE-DAFTARY supported Mr. François's proposal, which enunciated the principle of inviolability in the article but provided remedies for abuse in the commentary. If diplomatic bags had to be opened, the diplomatic correspondence must, of course, be left untouched. In any case, the presence of illicit articles in mail could be detected by X-ray apparatus and other means, without the packages being opened.

17. Mr. BARTOS pointed out that the character of diplomatic bags had changed. Couriers travelling by train had a whole compartment full of diplomatic packages, all sealed, but mostly containing other matter than diplomatic correspondence.

18. He agreed with Mr. François that certain States claimed the right to open diplomatic bags in special circumstances; he would even add that the practice was based on the right of States to defend their interests and prevent infringements of their laws. In all cases, the opening of diplomatic bags was attended by adequate safeguards, the consent of the minister of foreign affairs, the intervention of the protocol department, and the presence of the courier and a representative of the mission concerned. Moreover, as Mr. Matine-Daftary had pointed out, illicit matter could be detected without the bag's being opened.

19. He had never opposed the rule of the absolute inviolability of the diplomatic bag, but felt that the Commission could not simply enunciate that general rule and ignore both the notorious abuses and the acknowledged practice of States based on established rights. He was, therefore, in favour of the solution advocated by Mr. François. There should be a further proviso, however, namely, that the practice must not be turned into a means of petty annoyance. He would recommend that proviso to the Drafting Committee for inclusion either in the article or in the commentary.

20. Mr. TUNKIN associated himself with the views of Mr. Spiropoulos and Mr. Amado. He also agreed with Mr. Padilla Nervo's proposal to specify the duties of States with respect to the diplomatic bag, though he would prefer the definition to appear in the commentary.

21. The diplomatic bag, despite the change in its character described by Mr. Bartos, remained a most important means of communication between Governments and their missions. Although the scope and volume of diplomatic correspondence had greatly increased in recent years, he did not consider that the change justified making exceptions to the rule of inviolability.

22. Mr. PAL said that he was in favour of the Special Rapporteur's revised draft of paragraph 2 (398th meet-

ing, para 27). To judge from the discussion, it was not States themselves that were accused of abusing the immunity of the diplomatic bag but their individual officials. The Commission, however, was codifying rules for States. As the Secretary had pointed out, the abuses complained of could be remedied in another way, and were not in themselves any justification for qualifying the rule of absolute inviolability.

23. The question of abuses could be dealt with by a note in the commentary specifying the legitimate contents of a diplomatic bag, leaving it to the States to deal with the illegitimate use of such a bag by their officials. The abuses complained of had insignificant consequences, but the proposed qualifications of the privilege would open the door to abuses which could have serious consequences affecting the whole diplomatic relationship. Moreover, one qualification led to others, with the inevitable result that the entire privilege would be obscured.

24. Mr. KHOMAN thought it was necessary to draw a distinction between diplomatic bags accompanied by couriers and those sent unaccompanied.

25. The question was whether the Commission should affirm the rule of the inviolability of the diplomatic bag without qualification, as it had done in the case of the premises of the mission. It would be more logical to enunciate the general principle in the article and deal with abuses in the commentary by means of a text on the lines of the proposals made by Mr. François and Mr. Padilla Nervo.

26. Mr. AMADO suggested that it be made clear in the commentary that inviolability extended only to the courier's baggage and not to the baggage of members of diplomatic missions or articles carried by them.

27. The CHAIRMAN, speaking as a member of the Commission, said that he supported the principle of absolute inviolability as formulated by Mr. Tunkin, Mr. Amado and Mr. Padilla Nervo.

28. Since it was the absence of any definition of the diplomatic bag which made abuses possible, he was in favour of including a definition in the commentary on the article. He agreed with the Secretary that disputes regarding alleged abuses could be settled by the normal means available. The question of unaccompanied diplomatic packages also needed to be covered.

29. Mr. SANDSTRÖM, Special Rapporteur, explaining why he had abandoned his original text, said that it was drafted before he had been able to study the municipal laws on the subject. On discovering that none of the many municipal laws dealing with the question of the diplomatic bag provided for any exception to the principle of inviolability, he had come to the conclusion that it would be better to state the bare principle in the article, and see whether the Commission wished to include in the commentary qualifications on the lines of those made in his original text.

30. He naturally supported Mr. François's proposal, but thought it would also be useful to include a definition of the diplomatic bag in the article; that would make it easier to draft the text of the commentary.

31. Mr. AMADO withdrew his proposal in favour of that of Mr. Padilla Nervo.

32. The CHAIRMAN put to the vote the following text proposed by Mr. Padilla Nervo:

“The diplomatic bag shall be used only for the transmission of diplomatic correspondence.”

The decision whether to insert the text in article 16, paragraph 2, or in the commentary on the article could be left to the Drafting Committee.

*The text was adopted by 17 votes to none with 4 abstentions.*

33. Mr. FRANÇOIS said that, although in favour of the text, he had been forced to abstain from voting because his approval depended on the nature of the text to be included in the commentary.

34. Mr. SCELLE said that he had abstained because the text did not give a clear idea of the principle on which the Commission was voting.

35. Mr. MATINE-DAFTARY said that his vote in favour of the text did not mean that he ruled out Mr. François's proposal.

36. Mr. BARTOS said that he had voted for the text because it represented at least a step towards qualification of the principle.

37. Mr. PADILLA NERVO pointed out that Mr. Tunkin's text (398th meeting, para. 84) in its existing form did not deal with unaccompanied diplomatic mail.

38. Mr. TUNKIN agreed to delete the words “carried by diplomatic messengers” from the English version and the words “*du courrier*” from the French, in order to meet Mr. Padilla Nervo's point.

39. The CHAIRMAN put Mr. Tunkin's amendment to the vote in the following revised French version: “*La valise diplomatique ne peut être ouverte ni retenue.*”

*The amendment was adopted by 14 votes to 3 with 2 abstentions.*

40. Mr. BARTOS said that he had abstained from voting because, although in favour of the principle, he felt that it needed some qualification in the way of exceptions, in order to help prevent abuses of the principle from the outset.

41. Mr. MATINE-DAFTARY said that he had abstained from voting, although he accepted the principle of inviolability of diplomatic mail, because some provision was essential for the prevention of abuses.

42. Mr. GARCIA AMADOR said that, although he had voted for Mr. Tunkin's amendment, he had serious doubts as to whether it was compatible in theory and practice with Mr. Padilla Nervo's text, for which he had also voted. Logically, if the Commission enunciated the duty of the sending State to see that the diplomatic bag contained only diplomatic correspondence, it must recognize the right of the receiving State to ensure that the condition was complied with. The general principle just voted deprived the receiving State of that right. He therefore reserved the right to vote against the final text submitted by the Drafting Committee, if the contradiction was not resolved, and to move that the existence of the contradiction be pointed out in the commentary on the article.

43. Mr. EDMONDS said that he had not voted for Mr. Tunkin's amendment because of the duplication involved.

44. Mr. PADILLA NERVO, referring to Mr. García Amador's problem, said that Mr. Tunkin's text enunciated the right of the sending State to have its diplomatic

bag treated as inviolable, while his own text established the duty corresponding to that right, namely to use the bag for diplomatic purposes only. There was no contradiction between the two texts.

45. Mr. EL-ERIAN said that he had voted for Mr. Tunkin's amendment in order to associate himself with the principle of the inviolability of the diplomatic bag, which was fundamental to the law of diplomatic intercourse and immunities. In doing so, however, he had borne in mind the point added by Mr. Padilla Nervo for inclusion in the commentary, and other provisions of the draft which would form the necessary counterpart to those dealing with diplomatic immunities.

46. Mr. PADILLA NERVO said that, although he could agree to his text that had been adopted being included either in the article or in the commentary, he would prefer it to be included in the article, since in that way the Commission would establish a clear legal obligation, on the basis of which it could give whatever explanations were necessary in the commentary. Moreover, once a clear legal obligation had been established, the Commission could expect ministers of foreign affairs to exercise greater vigilance in ensuring that the diplomatic pouch was used only for the purpose for which it was intended.

47. He therefore formally proposed that his text, which had been adopted, should be included in article 16 itself.

48. With regard to Mr. François's proposal, that the Commission should state in the commentary that the diplomatic pouch could be inspected if there were very serious grounds for presuming that it contained illicit articles, Mr. Padilla Nervo pointed out that a similar exception to the rule that the personal baggage of members of missions should be exempt from inspection was proposed in article 23, paragraph 2 of the draft (A/CN.4/91). It was, of course, too early to say whether the Commission would retain that provision, but, in practice, customs officials never did open the personal baggage of members of missions. It would hardly be proper to exercise greater caution when dealing with parcels sent by ministries of foreign affairs than with the baggage of an ordinary member of a diplomatic mission.

49. Mr. SPIROPOULOS agreed that Mr. Padilla Nervo's text which had just been adopted should be included in article 16 itself, since that would give it greater force. There was nothing new about it; it expressed only what was universally recognized and might, indeed, be thought to be self-evident.

50. Mr. TUNKIN said that, in his view, the rule itself should be stated in the article but if the Commission wished to include what was, in fact, a definition of the diplomatic pouch, what it contained and what it was for, that should be done in the commentary. If the Commission included a definition in the text of article 16 itself, that might give rise to considerable confusion and even result in violation of the rule.

51. Mr. YOKOTA said that, although he was not, in principle, opposed to Mr. Padilla Nervo's proposal, he saw no need to include his text in the article itself, as the Commission had decided to give a definition of the diplomatic pouch in the commentary.

52. The CHAIRMAN put to the vote Mr. Padilla Nervo's proposal that his text be included in article 16 itself.

*The proposal was adopted by 11 votes to 6 with 3 abstentions.*

53. The CHAIRMAN recalled that various members of the Commission had suggested that a definition of the diplomatic bag be inserted in the commentary; so far no objection had been raised to that suggestion, and the Chairman proposed that the Commission should adopt it.

*It was so agreed.*

54. The CHAIRMAN also recalled that Mr. Spiropoulos had suggested, as a compromise between Mr. François's proposal (para. 7 above) and the views of other members, that in cases where there were very serious grounds for presuming that the diplomatic bag contained illicit articles, it could be inspected by agreement between the sending and the receiving State (para. 10 above).

55. Mr. SPIROPOULOS withdrew his suggestion, since it really went without saying that the diplomatic bag could be inspected if the sending State agreed.

56. Mr. MATINE-DAFTARY, having formally requested during the discussion that a vote should be taken on Mr. François's proposal to insert in the commentary a provision that the diplomatic pouch could be opened in exceptional circumstances and on certain conditions, the CHAIRMAN called for a vote on that proposal (para. 7 above), on the understanding that a final vote could not be taken until the commentary on all the draft was put before the Commission.

*The proposal was adopted by 12 votes to 7 with 1 abstention.*

57. Mr. AMADO expressed the opinion that by its vote the Commission had just buried the principle of the inviolability of the diplomatic bag.

58. Mr. GARCIA AMADOR agreed that inviolability of the diplomatic bag was a sacred principle. That did not mean, however, that it was not open to abuse. The only way in which the Commission could guard against such abuse was by giving the receiving State certain clearly circumscribed rights, as Mr. François had proposed. In his view, Mr. François's proposal took the interests of both sides into account, and left the principle of the inviolability of the diplomatic bag intact; he had therefore voted for it.

59. Mr. TUNKIN said that, in his view, rules of law should be stated in the articles themselves, not in the commentary. In general, therefore, he did not regard the commentary as binding.

60. Mr. SPIROPOULOS observed that, if the commentary had no binding force, it was difficult to see why the Commission troubled to adopt it. In his view, it had some value as an interpretation of the articles, and if it had some value, it necessarily had some force.

61. He agreed that the right which Mr. François's proposal conferred on the receiving State was circumscribed, but it was none the less deplorable that the Commission should have agreed to something in the commentary which it had just refused to agree to in the text.

62. Mr. PADILLA NERVO said that he had voted against Mr. François's proposal because it was incompatible with Mr. Tunkin's amendment to paragraph 2 (para. 39 above), which the Commission had already adopted. The only useful purpose which its inclusion

in the commentary could serve was to draw attention to the fact that the Commission had been in some perplexity; but the contradiction between the article and the commentary would have to be removed before the draft was presented to Governments for signature, and that could logically only be done by making the commentary compatible with the provisions of the article.

63. Mr. MATINE-DAFTARY said that he saw no contradiction between Mr. Tunkin's amendment and Mr. François's proposal, especially if it was borne in mind that the former was qualified to some extent by Mr. Padilla Nervo's amendment. The safeguards included in Mr. François's proposal were, in his view, perfectly sufficient: inspection would be directed solely towards finding illicit articles, and the authorities of the receiving State would have no excuse and no chance to peruse the diplomatic documents contained in the bag.

64. Mr. AGO said that he had voted against Mr. François's proposal, which he regarded as a dangerous departure from the principle of the inviolability of diplomatic correspondence—perhaps the most important of all diplomatic immunities. Moreover, he thought that the adoption of Mr. Padilla Nervo's amendment already provided a sufficiently adequate safeguard where Mr. François's misgivings were concerned.

65. Mr. LIANG (Secretary to the Commission) pointed out that, according to article 20 of the Commission's Statute, a commentary should contain:

“(a) Adequate presentation of precedents and other relevant data, including treaties, judicial decisions and doctrine;

“(b) Conclusions relevant to:

“(i) The extent of agreement on each point in the practice of States and in doctrine;

“(ii) Divergencies and disagreements which exist, as well as arguments invoked in favour of one or another solution.”

66. It was true that the Commission had previously included in its commentaries passages which did not fall within any of those three categories, but never one which bore such a close resemblance to what was normally inserted in the articles as that which was now to be included on Mr. François's proposal. It gave the impression of a detailed regulation enacted for the purpose of putting a particular law into effect. The position would no doubt be reconsidered later.

67. Mr. TUNKIN thought the Commission should be grateful to the Secretary for reminding it of the proper purpose of the commentary, which was not to introduce new rules—especially if they were inconsistent with those already contained in the articles, as he believed was the case in the present instance.

68. Mr. SCALLE said that he fully agreed with the Secretary. If there was a contradiction between the articles and the commentary, it must be removed. The Commission should not take it on itself to lay down absolute rules; there was in fact no such thing as an absolute rule. Every rule was subject to exceptions, and if the exceptions were not recognized, the rule was not workable. The decision as to whether particular departures from the rule were recognized exceptions or infringements must be left to an independent organ of absolute impartiality.

69. Mr. BARTOS said that he had voted in favour of Mr. François's proposal as he saw no conflict between

it and Mr. Tunkin's. The commentary did not formulate a new rule, but simply stated what should happen in the event of grave suspicion that the rule stated in the article itself had been violated. It was becoming much more common for international law to deal with such cases of abuse or violation of rights, and with good reason, since they were a fruitful source of disputes.

70. Mr. HSU said he had voted for all three proposals, Mr. Tunkin's, Mr. Padilla Nervo's and Mr. François's. In his view they were complementary rather than contradictory.

71. Faris Bey EL-KHOURI said he had voted in favour of Mr. François's proposal because the purpose of the recognized rule was to confer immunity on the diplomatic communications themselves, and not on any articles illicitly included with them. He fully agreed with Mr. Matine-Daftary that, under the text proposed by Mr. François, the authorities of the receiving State would have neither the excuse nor the chance to read the diplomatic communications.

72. Mr. KHOMAN said he had voted for Mr. François's proposal because he thought it was in accordance with existing practice. Its sole purpose was to lay down the procedure to be followed in what was clearly an exceptional case. He quite agreed with Mr. Scelle that there were no absolute rules, and that all rules must be considered in their relation to each other. In the case under consideration there was undoubtedly some conflict of rights. The sending State's right could not be regarded as overriding the receiving State's. In Mr. François's proposal the rights of both States were respected. He agreed with Mr. Matine-Daftary and Faris Bey El-Khoury that there was no reason why the sanctity of the documents contained in the pouch should be violated.

73. Mr. SANDSTRÖM, Special Rapporteur, said that, in voting for Mr. François's proposal, he had not overlooked the points made by various speakers; he had felt, however, that the proposal was compatible with the text of the article as amended by Mr. Padilla Nervo.

74. He agreed with the Secretary of the Commission that the commentary should not contain detailed regulations, but he was confident that such a contingency could be avoided, and the commentary drafted in such a way as not to give the impression of rules inconsistent with the provisions of the article.

75. Mr. EL-ERIAN said that, despite the fact that he had voted for Mr. Tunkin's amendment, he had also voted for Mr. François's, although he had been in some doubt before doing so. On consideration, however, it had seemed that there was not necessarily any inconsistency between expressing the principle of inviolability of the diplomatic bag in the text of the article itself, and stating in the commentary that the bag could be opened in extremely exceptional circumstances and subject to certain clearly defined safeguards.

76. The CHAIRMAN, speaking as a member of the Commission, said that he had voted against Mr. François's proposal, since he thought it was incompatible with the text of paragraph 2 as adopted, and contrary to current international law. Moreover, it might give rise to serious abuses such as could demolish the whole principle of the inviolability of diplomatic correspondence, one of the three great principles on which diplomatic intercourse was based: the inviolability of premises, the in-

violability of correspondence, and the immunity of the person.

77. Nowhere else in its draft had the Commission attempted to lay down what should happen if its provisions were violated; it had always proceeded on the assumption that any violations would be dealt with in the same way as any other breach of international law.

78. The Chairman invited the Commission to consider paragraph 3 of the Special Rapporteur's redraft (398th meeting, para. 27).

79. Mr. TUNKIN proposed that the following words be added at the end of the text:

"He shall enjoy personal inviolability and shall not be liable to arrest or detention of an administrative or judicial nature."

80. Mr. SANDSTRÖM, Special Rapporteur, accepted Mr. Tunkin's amendment.

81. Mr. KHOMAN suggested that the phrase "The messenger carrying the despatches" be brought into conformity with the remainder of the text. The point could be left to the Drafting Committee.

*It was so agreed.*

82. Mr. FRANÇOIS pointed out that, if the captain of an aircraft was entrusted with a diplomatic bag, as frequently happened, he would, under Mr. Tunkin's amendment, enjoy personal inviolability and not be liable to detention or arrest.

83. Mr. TUNKIN said that that had certainly not been his intention. He had only had regular diplomatic couriers in mind. A bag entrusted to the captain of an aircraft should be regarded as unaccompanied.

84. Mr. BARTOS thought that, in the case referred to by Mr. François, the captain of an aircraft ought not to be liable to arrest until he had delivered the bag, since otherwise there would be a danger of its being mislaid.

85. The CHAIRMAN agreed with Mr. Tunkin that no difficulty would arise if the Commission adhered firmly to the well-established idea of a diplomatic courier as someone who carried special papers showing his official status as a courier.

86. Mr. PADILLA NERVO agreed. In his view the confusion arose from the use of the phrase "the messenger carrying the despatches". If that were replaced by some such phrase as "the person accredited as diplomatic courier" no difficulty would arise.

87. Sir Gerald FITZMAURICE said that, as far as he knew, diplomatic immunity had never been accorded to any messenger who was not employed as a diplomatic courier, either on a regular or on an *ad hoc* basis. Anyone so employed was usually given special papers, and sometimes a badge or some other mark of recognition. The pilot of an ordinary commercial aircraft carrying passengers or freight could not be regarded as employed as a diplomatic courier simply because he was entrusted with a diplomatic bag. Consequently, the fact that he did not enjoy diplomatic immunity meant that a small element of risk was involved, but Governments deliberately accepted the risk in view of the great practical convenience of sending diplomatic bags in that way.

The meeting rose at 1 p.m.

**400th MEETING**

Friday, 17 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, inviting the Commission to continue consideration of article 16, paragraph 3 (398th meeting, para. 27 and 399th meeting, para. 79), suggested that, in the light of the discussion, the first sentence be amended as follows: "The diplomatic courier shall be protected by the receiving State."
2. Mr. MATINE-DAFTARY, referring to the question of captains of aircraft carrying diplomatic mail, said that, unless they were provided with a diplomatic passport, they were in exactly the same position as ordinary postmen.
3. Mr. TUNKIN said that the "diplomatic courier" was a well-known concept which was best left alone. The entrusting of diplomatic mail to pilots was not a general practice, and the problems to which it gave rise should be left to the States concerned to settle. States might raise objections to the inclusion of a special provision on the subject in the draft, and it would be better simply to refer to the problem in the commentary.
4. Mr. BARTOS remarked that pilots carrying diplomatic mail could be divided into three categories. The first was the ordinary commercial airline pilot, carrying diplomatic mail merely as part of the aircraft's payload, and naturally not entitled to any diplomatic privileges. The second was the commercial airline pilot who was also accredited as diplomatic courier. Cases of the kind were quite common. In his opinion, such pilots enjoyed the privilege of inviolability until they handed over their diplomatic mail to a representative of the mission, a formality generally carried out at the airport itself. There was, however, a third, quite new category, of flying couriers operating planes allocated to embassies for the sole purpose of carrying diplomatic mail. The United States Embassy in Belgrade had had two such planes for the last two years. Since the innovation had not been introduced by agreement with the Yugoslav Government, the latter had protested. On further consideration, however, it had agreed that the practice was in accordance with international law. States were entitled to use any means of communication in their relations with their missions, and all civil planes had the right to fly over countries signatories to the conventions of the International Civil Aviation Organization (ICAO). The practice was not confined to Yugoslavia or to United States embassies.
5. Mr. FRANÇOIS observed that the privilege of inviolability was enjoyed by diplomatic couriers only as long as they were carrying the diplomatic bag.
6. Mr. TUNKIN thought it would be inadvisable to limit the inviolability of diplomatic couriers strictly to the periods during which they were carrying diplomatic bags. Diplomatic couriers usually moved from capital to capital, spending a short time in each, and it would only create confusion if they were inviolable for part of the time and not for the rest.
7. He did not think it necessary to include in the article any reference to air pilots carrying diplomatic bags. It would be sufficient to use the term "diplomatic courier" in the article, and to specify in the commentary that to claim inviolability diplomatic couriers must carry a diplomatic passport or *laissez-passer*.
8. Mr. VERDROSS thought that, if the same person combined the functions of pilot and diplomatic courier, he was entitled to protection. If he was merely a pilot and not an accredited courier, he was not entitled to protection.
9. Mr. SANDSTRÖM, Special Rapporteur, suggested that, in the case of commercial airline pilots who were also accredited couriers, the second function was a secondary one.
10. Mr. SPIROPOULOS said that the right of States to use aeroplanes for communication with their embassies was an established right regulated by the ICAO conventions. When the pilot of an aeroplane was at the same time a diplomatic courier, the aeroplane could be regarded merely as his means of travel. No one contemplated special provisions for diplomatic couriers who travelled by car.
11. Mr. AMADO said that if the sending State chose a means of communication such as the aeroplane, which prevented the receiving State according the diplomatic courier proper protection, the sending State must bear the consequences.
12. Mr. BARTOS pointed out that the use of aircraft pilots as couriers raised an important legal problem. Under the ICAO conventions, aircraft pilots were liable to arrest on personal grounds, for instance if they were not properly qualified, or on grounds involving third party liability. Pilots accredited as diplomatic couriers, though still subject to the law, would have to be immune from arrest on such grounds.
13. Mr. SPIROPOULOS agreed with that view.
14. Mr. SANDSTRÖM, Special Rapporteur, said he appreciated that the third type of pilot mentioned by Mr. Bartos should enjoy inviolability. In the case of commercial airline pilots, however, the position was different.
15. The CHAIRMAN observed that the majority of the Commission appeared to be agreed that, where commercial airline pilots were involved, it was the diplomatic pouch only that enjoyed immunity and not the pilot.
16. He put to the vote the following text, which combined the Special Rapporteur's article (398th meeting, para. 27) and the amendment proposed by Mr. Tunkin (399th meeting, para. 79):
 

"The diplomatic courier shall be protected by the receiving State. He shall enjoy personal inviolability and shall not be liable to arrest or detention of an administrative or judicial nature."

*The text was adopted by 19 votes to none, with 1 abstention.*
17. The CHAIRMAN invited the Commission to consider paragraph 4 of article 16 (398th meeting, para. 27).

18. He suggested that the question whether the paragraph be included in article 16, or in an article dealing with the obligations of third States in general (article 19), be referred to the Drafting Committee.

*It was so agreed.*

19. The CHAIRMAN suggested replacing the words "dispatches and messengers" by the words "diplomatic couriers" in order to avoid misunderstanding.

20. Mr. YOKOTA, referring to the words "accord the same protection", pointed out that by its last decision the Commission had recognized that diplomatic couriers enjoyed personal inviolability in the receiving State. Third States could not however be expected to accord them the same privileges. He, therefore, suggested amending the paragraph to read as follows:

"The diplomatic courier shall have the right of innocent passage through third States."

21. Mr. EL-ERIAN doubted the advisability of introducing the concept of "innocent passage". To the best of his knowledge, the term was used only with reference to the passage of ships through the territorial sea of other States, and the Commission would undoubtedly recall the difficulty it had had in defining its implications when preparing its draft of the law of the sea. A further objection to Mr. Yokota's amendment was that it imposed on third States the obligation to admit diplomatic couriers in transit. If third States were willing to admit diplomatic couriers, they were, of course, bound to protect them. But there was no rule of law which said that they must admit them.

22. Mr. SANDSTRÖM, Special Rapporteur, said that it would be possible to say that third States "shall be bound to accord free passage and protection".

23. Mr. GARCIA AMADOR supported Mr. El-Erian and the Special Rapporteur's suggestion. Except on the term "innocent passage", he agreed with Mr. Yokota's views.

24. Mr. AMADO considered that the right of free passage was included in the concept of "protection".

25. Mr. TUNKIN said that it would be inadvisable to accept Mr. Yokota's text, since it applied only to the so-called "innocent passage" of the diplomatic courier but did not protect him from measures of constraint on the part of the local authorities. The inviolability of the diplomatic courier arose out of the fact that he was carrying a diplomatic bag. If third States admitted diplomatic couriers they must respect their inviolability, which was so closely connected with the inviolability of the diplomatic bag.

26. The addition suggested by the Special Rapporteur was not necessary, and introduced a new obligation on third States, i.e., that they must admit diplomatic couriers. Since the Commission had already recognized the right of receiving States to refuse to accept members appointed to missions accredited to them, it was hardly logical to adopt a principle that third States must admit any diplomatic courier who wished to cross their frontier.

27. Mr. AGO asked that the Drafting Committee be requested to specify that Powers occupying the territory of third States were under the same obligations with respect to diplomatic couriers as the third States themselves.

*It was so agreed.*

28. The CHAIRMAN put to the vote the following text for paragraph 4:

"Third States shall be bound to accord the same protection to diplomatic couriers in transit."

*The text was adopted by 16 votes to none with 4 abstentions.*

29. Mr. EL-ERIAN said that, although he had voted for the paragraph, he wished to dissociate himself entirely from the interpretation that the provision involved an obligation on third States to admit diplomatic couriers. In the current state of international law no such obligation existed.

30. Mr. KHOMAN suggested modifying the text to bring it into line with that of article 19, which said "the third State shall accord".

31. The CHAIRMAN said that Mr. Khoman's observation would be taken into account by the Drafting Committee.

32. Faris Bey EL-KHOURI said that he had abstained from voting because he objected to the use of the word "protection", which seemed to imply that third States must have diplomatic couriers escorted throughout their territories. The provision should merely convey the idea that diplomatic couriers must not be interfered with by third States.

33. Mr. SANDSTRÖM, Special Rapporteur, pointed out that the previous paragraph of article 16 made clear what was meant by protection.

#### QUESTION OF INCLUDING AN ADDITIONAL ARTICLE (ARTICLE 16 (a))

34. The CHAIRMAN invited the Commission to consider the following additional article, which Sir Gerald Fitzmaurice proposed should be inserted in the draft after article 16:

"The receiving State shall permit and facilitate full freedom of movement and circulation in its territory to all members of the mission in the exercise of their functions, including the provision of any necessary special facilities for the ownership, driving and use of motor vehicles, whether self- or chauffeur-driven."

35. Sir Gerald FITZMAURICE said that, thirty years ago, a provision such as that which he was proposing would not have been necessary. It had always been traditional and regarded as axiomatic that members of diplomatic missions enjoyed full freedom of movement on the territory of the receiving State, subject to a few minor exceptions in the case of fortified zones to which entrance was prohibited on strategic grounds. The right involved was of great importance. Unless members of missions were able to move about the country freely, they could not keep their Governments accurately informed of local conditions, and lack of accurate information, it need hardly be said, was prejudicial to good relations between States.

36. In recent years, some countries had placed drastic restrictions on freedom of movement. He did not wish to mention any specific instances. Cases had, however, occurred where members of missions had been confined to an area within a radius of 15 or 20 kilometres of the capital of the country to which they were accredited. In addition, they had been shadowed wherever they went, had been obliged to obtain a special permit for any jour-

ney they wished to make, and had been escorted on such journeys, albeit at a discreet distance, by members of the police. Every kind of material obstacle had been put in the way of their driving motor cars with the object of forcing them to employ chauffeurs. The tests for driving licences, in particular, had been made so severe that even the most skilled racing driver would have failed to pass them.

37. Normally, the statement in paragraph 1 of article 16 that "The receiving State shall accord all necessary facilities for the performance of the work of the mission" (398th meeting, para. 27) would have been quite sufficient, but the practices he had described made a more specific provision advisable. Though he did not really see why members of missions should not have freedom of movement as private persons too, in order to make the amendment more acceptable he had limited its scope by the qualification "in the exercise of their functions".

38. Mr. TUNKIN pointed out that the task of the Commission was to codify existing rules and practices. The rule enunciated by Sir Gerald Fitzmaurice in his amendment did not, however, exist in practice. Each Government established regulations respecting the movement of members of diplomatic missions on its territory in the light of the prevailing situation, and specifically took into consideration reasons of security. Many, if not all, States had such regulations.

39. As far as the general principle of freedom of movement was concerned, nobody would object to it. On the other hand, all members of the Commission would agree that its task was to produce a text capable of adoption and application by States and not one that would simply be put on the shelf. That being so, the Commission should not confine itself to establishing sound principles in the abstract, but must take into account the facts of the existing situation.

40. Since the question had been raised—and he regretted that it ever had been raised—he would explain why, for instance, the Soviet Union had applied restrictions on the movement of members of missions, closing certain parts of the country and requiring special permits for certain journeys. It had never wanted those restrictions, but had been unable to act otherwise in face of the existing international situation, characterized by the race of armaments initiated by certain States, which had set up close to the borders of the Soviet Union military bases equipped with atom bombs, atomic weapons, and so on. Any State in like circumstances would have been bound to consider such a situation as a threat to the security of the country and its people, and to take appropriate measures to safeguard that security. Though he could not speak on behalf of the Government of the Soviet Union, as a private citizen of that country he did not think that its Government could have acted in any other way.

41. He must, therefore, oppose Sir Gerald Fitzmaurice's amendment as not corresponding to the existing rules of international law, and infringing upon the rights of States to take the necessary measures on their own territories to safeguard their security, measures which in no way prejudiced the security or rights of other States.

42. Mr. SANDSTRÖM, Special Rapporteur, fully agreed with the principle enunciated by Sir Gerald Fitzmaurice. If he had included no provision on the point, it was because he realized that the rule could not be

enunciated without some qualification, since every State had the right to prohibit entry to certain areas of its territory. Once such exceptions were allowed, however, the door was open to practices such as Sir Gerald Fitzmaurice had described. Little would, therefore, have been gained by including an article enunciating a rule of principle only. In formulating the first sentence of article 16, paragraph 1, he had had in mind primarily the principle of freedom of movement.

43. Mr. SPIROPOULOS thought that Sir Gerald Fitzmaurice's amendment might have been discussed in connexion with article 17. Since the general principle was accepted even by the speaker opposing the amendment as a whole, while all were agreed that some qualification was necessary, he proposed the insertion of the words "in so far as compatible with public security", after the words "in its territory".

44. Mr. YOKOTA said that Sir Gerald Fitzmaurice's amendment, that members of missions must enjoy freedom of movement in so far as necessary for the performance of their functions, was entirely acceptable in principle. The Commission had already agreed, in connexion with the first paragraph of article 16, that the receiving State must accord all necessary facilities. According to General Assembly resolution 685(VII), the task of the Commission was to codify existing principles and rules and recognized practice. The restriction of members of diplomatic missions to a narrow radius from the capital of the receiving State was a comparative innovation, and though it had become the practice in recent years in certain countries, he very much doubted whether it could be regarded as a "recognized practice" within the meaning of the resolution.

45. Mr. AGO observed that all members of the Commission appeared to be agreed in recognizing the principle enunciated by Sir Gerald Fitzmaurice as constituting an essential factor in ensuring the proper functioning of diplomatic missions abroad. It therefore seemed desirable to include such a statement of principle. He agreed with the qualification proposed by Mr. Spiropoulos, recognizing the right of the receiving State to close certain areas. Such a practice, however, ought to be the exception and not the rule. To declare, for instance, 80 per cent of a country closed to members of foreign missions would be to violate the principle of freedom of movement itself.

46. Mr. AMADO suggested inserting the qualification "outside areas prohibited for security reasons" after the words "in its territory", in Sir Gerald Fitzmaurice's amendment.

47. Mr. KHOMAN remarked that the principle of freedom of movement appeared to be accepted by all members of the Commission, as part of the diplomatic privileges which should be accorded to missions. Sir Gerald Fitzmaurice's amendment was in complete accord with the principles pervading the whole draft. In most, if not all, countries, however, some restrictions were placed on freedom of movement in areas which were also closed to the general civil population as well. The whole question lay in the extent of the areas thus closed. The closing of vast areas was contrary to the general principle.

48. Mr. Spiropoulos and Mr. Amado had suggested including qualifying clauses based on the criterion of the security of the State. However, the Commission, when dealing with the inviolability of the premises of mis-

sions (article 12), had refused to qualify that principle on the grounds of the security of the State. To be consistent, therefore, it could not reject that qualification on one occasion and adopt it on another. To affirm the principle would not mean that States would not be able to take security measures. In a public emergency or in time of war, it would be permissible for them to close certain areas to the members of missions without drastically curtailing their freedom of movement.

49. Mr. TUNKIN said it was essential to draw a line between matters coming under international law and matters for domestic jurisdiction. Most members had already expressed the view that diplomatic agents, while enjoying certain privileges and immunities, were not thereby placed above the local law, and, in the case in point, members of missions could not enjoy freedom of movement regardless of the laws and regulations of the receiving State. Mr. Yokota argued that the restrictions on the movement of members of missions as applied in the Soviet Union was not a recognized practice. It had, however, no need to be recognized. Every State was free to take such measures, and many States did that.

50. Referring to Mr. Khoman's observations, he said that he was still of the opinion that the Commission must take account of existing facts as well as of principles, which were never absolute.

51. Sir Gerald FITZMAURICE said he quite appreciated that in many countries there were prohibited zones, for example, adjoining their frontiers; they were the exception, however, and over by far the greater part of the country foreign diplomats were free to come and go as they chose. But in the cases he had in mind—they were not confined to only one country—the exception had become the rule: the greater part of the country, including even areas in the vicinity of the capital, was closed to foreign diplomats, who were thus prevented from obtaining the intimate knowledge of the country and its inhabitants that their duties required.

52. It was to some extent true that the Commission must preserve the distinction between international and municipal law. All international law, however, was in the nature of a restriction of national sovereignty; and a State which recognized the value of diplomatic intercourse, to the extent of allowing a foreign State to maintain a diplomatic mission in its territory, could not consistently lay down a rule which, for example, made it well-nigh impossible for members of the mission to use motor cars.

53. He did not insist on his proposal as it stood, and would accept any of the suggestions put forward by Mr. Ago, Mr. Amado, or Mr. Spiropoulos. However, if the last-named's suggestion were adopted it should be stated in the commentary that prohibited areas were to be the exception rather than the rule.

54. Mr. SPIROPOULOS drew Mr. Khoman's attention to the fact that the present case was quite different from the one he had referred to. In article 12 the Commission had refused to make provision for exceptional cases of an emergency nature; but it was a normal, recognized practice for Governments to designate prohibited areas.

55. Mr. YOKOTA said that, though it might be true as a general principle that the receiving State had the

right to regulate the movement of foreigners throughout its territory, he was by no means sure that that was true where members of diplomatic missions were concerned. If, as he believed to be the case, they had always enjoyed free movement—outside certain prohibited areas—he did not think the receiving State could suddenly enact a law depriving them of their rights in that respect.

56. The question of expropriation provided an analogy. As a general principle, every State had the right to enact legislation enabling it to expropriate foreign property, subject to payment of compensation; but the Commission had recognized that it had no such right in the case of the premises of foreign missions, where the existing practice was that agreement must first be reached between the sending and receiving State.

57. Mr. EL-ERIAN said that, in his view, it was necessary to arrive at a form of words that would reconcile two principles—which he was glad to note almost all members of the Commission had expressly recognized—that of freedom of movement for the purpose of exercising the diplomatic function, and that of the receiving State's right to protect its own security by designating prohibited zones. That could easily be done by incorporating Mr. Spiropoulos's amendment (para. 43 above) in the text proposed by Sir Gerald Fitzmaurice (para. 34 above), though the words "and the laws of the receiving State" might be inserted after "public security", so as to cover cases where foreigners were banned from certain areas for religious reasons.

58. He also suggested that the Drafting Committee might consider deleting the words "and circulation" and referring simply to "freedom of movement", as in article 13, paragraph 1, of the Universal Declaration of Human Rights.<sup>1</sup>

59. Mr. KHOMAN recalled that many members of the Commission had previously criticized the term "security of the State" on the grounds that it could be used to cover almost anything. If reference was to be made to the laws of the receiving State, as Mr. El-Erian suggested, it was perhaps unnecessary to retain the term "security"; it would be sufficient, in order to conform to decisions taken previously by the Commission, to state in the commentary that the laws which the Commission had in mind included those designed to protect the security of the State against armed attack.

60. The CHAIRMAN recalled that Sir Gerald Fitzmaurice had already expressed his willingness to accept Mr. Spiropoulos's amendment, subject to an explanatory note in the commentary.

61. He suggested that the Special Rapporteur be requested to submit a revised text for consideration at an early meeting. In his view, the text might well be combined with the sentence reading: "The receiving State shall accord all necessary facilities for the performance of the work of the mission", which most members had agreed (398th meeting) should be removed from article 16.

*The Chairman's suggestion was adopted.*

GENERAL DEBATE ON THE FINAL FORM OF THE DRAFT

62. The CHAIRMAN felt that, before passing on to sub-section B of section II of the draft (articles 17 to 26), it would be desirable to consider further a point already raised by Mr. Spiropoulos, namely, what form

<sup>1</sup> *Official Records of the General Assembly, Third Session, Part I, Resolutions, p. 74.*

the draft should finally take: that of a convention, of a model code, or of what he had termed a "simple restatement".

63. A decision on that point would inevitably affect the method of work and the terms of many of the articles, particularly those of sub-section B of section II. Thus, for example, the contents of article 23, on customs immunities, must necessarily differ according to whether the Commission decided merely to formulate the existing law in a code, or whether it wished to prepare a draft convention. In the latter case, it might go beyond the international law in force by proposing to codify a practice which had not yet become law, but which was general enough to warrant the reasonable expectation that the texts proposed by the Commission would be accepted by Governments.

64. Speaking as a member of the Commission, Mr. Zourek said that, in his view, it was only by means of a convention that the Commission could bring about a uniformity of practice, thereby removing the causes of friction between States, which was its goal.

65. Mr. SANDSTRÖM, Special Rapporteur, said that he had worked on the assumption that his draft would form the basis for a draft convention, not only for the reason given by Mr. Zourek, but also because there was already a fair measure of agreement in that particular field of international law.

66. Mr. EL-ERIAN and Mr. SCALLE agreed that the Commission should aim at a draft convention, and that it was more realistic for it to do so for diplomatic intercourse and immunities than for any other subject on its programme.

67. Sir Gerald FITZMAURICE, while he quite agreed that the draft being discussed stood as good a chance of developing into a convention as any the Commission was likely to submit, doubted whether a draft convention was the most desirable form. It was most improbable either that the General Assembly would simply approve a draft convention in the form in which it was submitted by the Commission and open it for signature, or that it would convene a special conference to consider it, as it had done in the case of the draft articles on the law of the sea. It would be much more likely to examine it itself, with far less time for careful study of it than the Commission had been able to afford; and in those circumstances, any changes it made might not be for the better. Moreover, even after the General Assembly had approved the convention and opened it for signature, there was no knowing how many States would ratify it; and difficulties would inevitably arise between those who did and those who did not. There was also the problem of reservations. He was not, therefore, sure that a convention would necessarily be of more value than a model code, which the General Assembly could simply take note of, possibly with some expression of approval.

68. It might be wise to defer any final decision in the matter till the next session of the Commission. If the comments of Governments on the draft indicated that the great majority of them would be prepared to accede to a convention along those lines, he agreed that they should be given an opportunity of doing so; if not, the situation would require further consideration.

69. Mr. LIANG (Secretary to the Commission) recalled that there had been a similar discussion at the

eight session of the Commission in connexion with Sir Gerald Fitzmaurice's report on the law of treaties.<sup>2</sup> Sir Gerald Fitzmaurice, as Special Rapporteur, had then argued that the draft articles contained in his report could not form the basis of a draft convention unless they were radically altered; and the Commission had accordingly agreed that in that field it would not aim at a draft convention. Had it decided otherwise, it would have been necessary for the Special Rapporteur to begin his work all over again.

70. In the present case, however, he agreed with Sir Gerald Fitzmaurice that there was no urgency about taking a final decision, although the articles would undoubtedly have to be reconsidered if they were to be presented in the form of a code, in the sense in which Sir Gerald Fitzmaurice had used that term.

71. Mr. AGO said that he agreed with Sir Gerald Fitzmaurice and the Secretary that the Commission should not take any final decision in the matter until its next session.

72. Mr. TUNKIN felt the Commission should at least take a provisional decision at its current session so that, in submitting its draft to Governments, it could indicate what form, in its view, the final document should take; that was, after all, an important matter. It was also of some importance to the Commission to know just what it was aiming at.

73. In his view, it should, wherever possible, aim at a draft convention, and there was reason to believe that in the present instance the great majority of States would be willing to accede to a convention. If their comments indicated otherwise, the Commission could always reconsider the matter at its next session.

74. Mr. SPIROPOULOS said that, since the Special Rapporteur had drafted his articles with a draft convention in mind, and since more than half of them had already been considered on that understanding, the Commission had in fact no choice but to continue as it had begun. It could not change horses in mid-stream.

75. After further discussion, the CHAIRMAN suggested that the Commission proceed on the understanding that its draft was to form the basis of a draft convention, subject to reconsideration of the matter at the next session, if necessary.

*It was so agreed.*

#### SECTION II, SUB-SECTION B

76. The CHAIRMAN recalled Mr. Bartos's suggestion (394th meeting, paras. 27 and 28) that, before taking up sub-section B of Section II of the draft (articles 17 to 26) the Commission should discuss the question of the categories of persons which should enjoy diplomatic privileges and immunities.

77. Mr. BARTOS pointed out that the Commission had so far distinguished only between heads of missions and other members of missions. There were, however, many other categories that could be distinguished. In the first place, there were the technical collaborators of heads of missions (special attachés), who were usually treated as a category apart. Secondly, there were the administrative personnel, who might or might not be recruited locally, and who in some countries enjoyed diplomatic privileges and immunities only so far as their official

<sup>2</sup> *Yearbook of the International Law Commission, 1956*, Vol. I, 368th to 370th meetings.

duties were concerned, while in other countries they enjoyed full diplomatic privileges and immunities. Thirdly, there were servants, who could also be recruited locally, or brought from the sending State. Fourthly, there were wives and families; in that connexion, some countries distinguished between married and unmarried daughters. Fifthly, other close relatives were also granted certain privileges and immunities, as a matter of courtesy in some countries, such as France, and as a matter of right in others, such as the United States of America. Finally, there were various minor special categories, such as personal chaplains to ambassadors.

78. If the Commission accepted the old theory of extra-territoriality, or even if it accepted the modern theory of "representative character", it followed that all those categories should enjoy full diplomatic privileges and immunities. On the other hand, if it accepted the "demands of the office" theory, the situation was obviously different.

The meeting rose at 1.5 p.m.

### 401st MEETING

Tuesday, 21 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 17

1. Mr. SANDSTRÖM, Special Rapporteur, introduced article 17 of his draft (A/CN.4/91) and said he proposed to omit the phrase "shall accord him all necessary facilities for the exercise of his functions" which had been transferred to article 16, paragraph 1.

2. He had been in two minds as to whether to include a provision that diplomatic agents should not be subject to any constraint, arrest, extradition or expulsion, on the lines of article 7 of the resolution adopted by the Institute of International Law in 1929,<sup>1</sup> but had decided not to do so, because he considered that such acts were covered by article 20 on immunity from jurisdiction. He was willing to include such a provision if the Commission so desired.

3. Mr. VERDROSS observed that the previous articles dealt with "heads of missions". To make it clear that sub-section B of section II dealt with diplomatic agents in general, he thought it might be better to use the plural throughout.

4. Mr. SPIROPOULOS drew attention to article 24, which stated that the privileges and immunities set forth in articles 12 to 20 applied equally to the staff of the mission. He therefore proposed that the Commission refer for the moment to "heads of missions" in article 17 and subsequent articles, and leave the final drafting to the Drafting Committee. Another possible alternative was to amend article 24.

5. Mr. AGO said that, if article 17 and those immediately following it were made to refer to heads of mis-

sions only, it would be necessary to refer to other diplomatic agents later on.

6. He proposed that the first sentence in paragraph 1 should be redrafted to read: "The person of the diplomatic agent is inviolable", a wording more in line with that of previous articles.

7. Mr. SANDSTRÖM, Special Rapporteur, accepted Mr. Ago's proposal.

8. In reply to Mr. Spiropoulos, he said that he had chosen the term "diplomatic agent" because of its more general sense.

9. Mr. PADILLA NERVO suggested including an article similar to article 2 of the 1929 resolution of the Institute of International Law, showing what categories were entitled to the various immunities.

10. Mr. SANDSTRÖM, Special Rapporteur, pointed out that article 24 performed the same function in a different way.

11. Mr. LIANG, Secretary to the Commission, observed that the whole of sub-section B consisted of provisions covering all diplomatic members of missions. If the term "heads of missions" were substituted for "diplomatic agent" in the group of articles, it would be necessary to have a similar group of articles referring to subordinate members of missions, and that would be a rather clumsy arrangement. The idea of making the articles apply to heads of missions and then pointing out in article 24, paragraph 1, that they applied to the staff of the missions as well, was not a particularly happy one either. It implied too sharp a distinction between the head of the mission and the rest of his diplomatic staff. He wondered whether the whole sub-section could not be preceded by some general provision indicating what categories of diplomatic staff were entitled to the various privileges and immunities.

12. Mr. TUNKIN thought that whatever term was adopted would only be provisional. He noted that the terms "members of a diplomatic mission" and "members of the diplomatic staff" were used in the draft articles already prepared by the Drafting Committee.

13. After further discussion, Mr. SPIROPOULOS withdrew his proposal.

14. Mr. AMADO said he would have preferred the wording "all necessary steps" to "all reasonable steps", which was rather subjective.

15. The CHAIRMAN, speaking as a member of the Commission, doubted the wisdom of stating that diplomatic agents were never subject to expulsion. There had been cases, admittedly very rare, where receiving States had been obliged to order a diplomatic agent to leave the country after the sending State had refused to recall him.

16. Mr. AMADO remarked that the text presumably referred to a formal measure of expulsion, as practised in the case of criminals and undesirables.

17. Mr. MATINE-DAFTARY considered the statement that the person of a diplomatic agent was inviolable to be quite sufficient. Elaboration merely detracted from its force.

18. The CHAIRMAN put to the vote the following amended text for paragraph 1, subject to drafting changes:

<sup>1</sup>Harvard Law School, *Research in International Law, I. Diplomatic Privileges and Immunities* (Cambridge, Mass., 1932), pp. 186 and 187.

"The person of a diplomatic agent shall be inviolable. He shall not be subject to any constraint, arrest, extradition or expulsion. The receiving State shall ensure his treatment with due respect and take all reasonable steps to prevent any offence against his person, freedom or dignity."

*The text was adopted unanimously on that understanding.*

19. The CHAIRMAN observed that paragraph 2 appeared to be somewhat elliptic and open to a variety of interpretations. It was not clear whether it referred to the legitimate defence of the receiving State or to the legitimate defence of an individual. It might perhaps be better to omit the paragraph and deal with the matter in the commentary.

20. Mr. VERDROSS considered the reference to the right of self-defence to be insufficient. The police had the right to take coercive action to prevent diplomatic agents from committing illegal acts, such as entering prohibited areas or photographing fortifications. He would suggest adding the following provision: "Acts of constraint are permitted only in order to prevent the commission of an offence by the diplomatic agent."

21. Mr. SPIROPOULOS said that he did not favour either the Special Rapporteur's provision or Mr. Verdross's. It went without saying that private persons were entitled to defend themselves when attacked by diplomatic agents. It would be better to say nothing at all on the subject.

22. Mr. SANDSTRÖM, Special Rapporteur, pointed out that a similar provision to his own was to be found in other drafts. The paragraph was not absolutely necessary, however, and he would be content to deal with the question in the commentary.

23. Mr. EL-ERIAN said that, since the principle of the right of self-defence clearly applied only between two individuals or two States, but not between an individual and a State, he would like it to be specified in the commentary that the inviolability of diplomatic agents did not preclude the receiving State from taking all the necessary steps in the event of an imminent threat to its security from a diplomatic agent.

24. Mr. SPIROPOULOS doubted whether it was necessary to mention such extreme cases as those referred to by Mr. Verdross and Mr. El-Erian. When dealing with the question of the inviolability of the premises of the mission in article 12, the Commission had decided against qualifying the general principle.

25. The CHAIRMAN proposed deleting paragraph 2 of article 17, and dealing with the question of the right of self-defence in the commentary, in the light of the observations made during the discussion.

*It was so agreed.*

#### ARTICLE 18

26. Mr. TUNKIN, referring to paragraph 1 of article 18, suggested that the Drafting Committee be asked to consider the advisability of substituting the words "the same inviolability" for the words "the same freedom from intrusion".

*It was so agreed.*

*Paragraph 1 was adopted unanimously on that understanding.*

27. Mr. EL-ERIAN remarked that the word "property" in paragraph 2 was rather too general a term. It might be interpreted as applying to the assets of a diplomatic agent who also engaged in commerce.

28. Mr. SPIROPOULOS agreed with Mr. El-Erian. As the provision was worded, it would be an offence even to cross land which had been acquired in the territory of the receiving State by a diplomatic agent before his appointment.

29. Mr. BARTOS said that case law on the question was fairly well developed, particularly in France, where the assets of a diplomatic agent, with the exception of bank accounts, were not entitled to protection. The position with regard to bank accounts was far from clear, but current accounts were generally immune from seizure because they were essential for the day-to-day existence of the diplomatic agent. Land was entitled to protection if the diplomatic agent lived on it while performing his functions, but in that case the immunity sprang not from the fact of his ownership, but from the fact of its use by him. Furniture and other personal effects were always regarded as entitled to protection.

30. Some definition of the term "property" ought to be included, either in the article or in the commentary. The matter could, however, be referred to the Drafting Committee.

31. Mr. YOKOTA, noting that private immovable property was dealt with under article 20, drew the conclusion that the property referred to in article 18 must be movable property. He saw no objection to the principle that the movable property of a diplomatic agent should enjoy immunity, but thought it should be specified that it was the property "in his residence". Furthermore, he would welcome an explicit reference to "papers and correspondence", since that kind of property was most in need of protection.

32. Mr. PAL remarked that, even if Mr. Yokota's qualification "in his residence" were added to the text, it would still not exclude all commercial assets. The diplomatic agent might very well store his stock-in-trade in his residence. Some other means must be found of confining the term to the personal possessions of the diplomatic agent entitled to protection.

33. Mr. SPIROPOULOS said that, although it was of fundamental importance to specify what was meant by "property" in the context, it would waste too much time to hammer out a definition there and then. The best course would be to request the Special Rapporteur to prepare another, more specific, text.

34. Mr. TUNKIN agreed that a new text should be prepared, but thought it preferable to hear the views of the members of the Commission first, and then refer the matter direct to the Drafting Committee.

35. He found it difficult to accept Mr. Yokota's conclusion, for some types of property other than movable property were also entitled to protection. He suggested adding the qualification "not constituting a source of income" after the word "property".

36. He had no objection in principle to including an explicit reference to "papers and correspondence", but was not sure that they were not already covered by other articles. That again was a matter for the Drafting Committee to explore.

37. Sir Gerald FITZMAURICE agreed that the paragraph needed clarification. If its purpose was to extend

protection to the property in the diplomatic agent's private residence, it should not be difficult to redraft it accordingly. He presumed that the article was established on the analogy of article 12, the first paragraph of which enunciated the principle of the inviolability of the premises of the mission, and the second the principle of the duty of the receiving State to protect them. If, on the other hand, the Special Rapporteur had in mind a provision of broader scope, other considerations would be involved and the paragraph would need qualification.

38. Mr. EL-ERIAN said that, if the titles of sub-section B and of the article itself were any guide, it was hardly possible to accept the view that the paragraph referred exclusively to the private residence of the diplomatic agent. Mr. Yokota's contention that article 18 must relate to movable property, because immovable property was dealt with under article 20, was not conclusive. The two articles dealt with different matters: article 18 with inviolability and article 20 with immunity from jurisdiction.

39. Mr. SANDSTRÖM, Special Rapporteur, said that the "protection" he had in mind in article 18 was merely protection from attack. Immunity from jurisdiction was dealt with in article 20. By "property" he had had in mind the personal property of the diplomatic agent in his private residence, but had interpreted the term rather liberally so as to include such things as his motor car, even when not in the garage.

40. Mr. GARCIA AMADOR drew attention to article 14 of the Havana Convention,<sup>2</sup> which dealt with the question in a very satisfactory manner. The manner of wording the article clearly implied that only the personal property of the diplomatic agent was involved. The Drafting Committee might be requested to consider adopting a similar presentation of the subject.

41. The CHAIRMAN said that Mr. García Amador's observations would be taken into account by the Drafting Committee.

42. Mr. BARTOS said that only property necessary to the diplomatic agent for the exercise of his functions, or of use to him in his private life, was entitled to protection. Thus, property used for professional purposes, even though the professional services might be rendered free of charge, was excluded from the benefit of the provision.

43. Mr. AMADO was opposed to any attempt to specify the types of property entitled to protection, since such lists could never be exhaustive. The formula adopted in the Havana Convention was very satisfactory. It would be better to frame the provision in general, but not vague, terms, e.g., by referring to "property attaching to the private residence of the diplomatic agent", a formula which would include such things as motor cars.

44. Mr. SANDSTRÖM, Special Rapporteur, observed that, in the past, it had been customary to include the "equipage" of the ambassador in the property entitled to protection.

45. The CHAIRMAN proposed that paragraph 2 should be referred to the Drafting Committee.

*It was so agreed.*

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

#### ARTICLE 19

46. Mr. TUNKIN proposed the insertion of the phrase "in accordance with the provisions of sub-section B" after the words "its protection" in article 19. The term "protection" being rather vague, a reference to sub-section B was advisable in order to make clear what obligations were implied.

47. Sir Gerald FITZMAURICE considered that third States were under an obligation to provide rather more than mere protection to diplomatic agents passing through their territory. It was, after all, a general duty of States to protect all persons on their territory, including foreigners, whether performing diplomatic functions or not.

48. He noted in that connexion that the Special Rapporteur in his commentary on the article (A/CN.4/91, para. 47) had referred to the claim that the diplomatic agent should enjoy all his privileges and immunities when on the territory of a third State in the circumstances indicated in the text of the article, but had taken the view that the claim was excessive and found no support in practice. He could not entirely agree with that view. He considered it an established rule that, when a diplomatic agent was travelling to or from the country to which he was accredited, the third States through which he passed, provided they were duly notified of his intentions, were at least under the obligation to take no action which might prevent his continuing his journey. In other words, he should enjoy not only protection but immunity from arrest, and even from criminal jurisdiction, though perhaps not from civil jurisdiction. Paragraph 303 of the memorandum prepared by the Secretariat (A/CN.4/98) appeared to bear him out on that point, even if the claim made by Sir Cecil Hurst that a diplomatic agent in such circumstances was "exempt from the jurisdiction of the courts"<sup>3</sup> might, perhaps, be thought rather too wide.

49. The formulation of the principle in article 15 of the Harvard draft<sup>4</sup> struck him as preferable to that adopted by the Special Rapporteur. Sir Gerald would, if necessary, submit an amendment on those lines, but would first like to hear the Special Rapporteur's reasons for framing the article as he had.

50. Mr. SPIROPOULOS agreed with Sir Gerald Fitzmaurice that diplomatic agents in transit through third States, in the circumstances mentioned in the article, were immune from arrest and criminal jurisdiction. They were, in fact, often accorded immunity from civil jurisdiction too, though purely as a matter of courtesy.

51. He wondered, however, whether the article was in its right place. All the other articles in sub-section B referred to the duties of the receiving State. Would it not be better to assemble all the provisions involving third States in a group of articles which might be placed at the end of the draft?

52. Mr. FRANÇOIS agreed with Sir Gerald Fitzmaurice that a diplomatic agent should enjoy full diplomatic privileges and immunities while passing through the territory of a third State in order to take up his post or return to his own country. On the other hand, it did not seem necessary for him to enjoy them whenever he visited a third State, on holiday, for example. The

<sup>3</sup> *International Law—The Collected Papers of Sir Cecil Hurst* (London, Stevens and Sons Limited, 1950), p. 279.

<sup>4</sup> Harvard Law School, *op. cit.*, pp. 19-25.

words "or is temporarily on such territory while occupying his post" should therefore be deleted, or at any rate qualified.

53. He asked the Special Rapporteur whether his article 19 was intended to apply also in case of war.

54. Mr. SANDSTRÖM, Special Rapporteur, said that he had deliberately left aside the question what should happen in time of war, except in the instances where he had specifically referred to it. In the present instance, he did not think the question was of much practical importance.

55. He had intended the term "protection" to cover freedom of passage, and if it did not, he agreed that it should be changed; but the reference in the Harvard draft to "such privileges and immunities as are necessary to facilitate his transit"<sup>5</sup> was far from satisfactory, since the question inevitably arose what such privileges and immunities comprised.

56. Mr. VERDROSS said that in support of the principle that diplomatic agents were entitled to full diplomatic privileges and immunities while on the territory of third states, the situation of United Nations delegates under the Convention on the Privileges and Immunities of the United Nations might be mentioned.

57. Mr. EDMONDS pointed out that, quite apart from the question of what happened in war-time, article 19, as it was drafted, placed a third State under an obligation to accord protection to the diplomatic agents of States with which it was not in diplomatic relations. Though he had no doubt that in ordinary circumstances the third State would accord such protection, it was, in his view, essential to include either in the article or in the commentary something along the lines of the proviso in the Harvard draft, "provided that the third State has recognized the Government of the sending State".<sup>6</sup>

58. Mr. BARTOS said that, in his view, a State was under a legal obligation to grant another State's diplomatic agents freedom of passage across its territory, even if the two States were not in diplomatic relations with each other. The obligation resulted from the duty of all States to further friendly international relations, and also from the fact that it was in accordance with existing practice; Yugoslavia, for example, allowed Spanish diplomats to cross its territory to and from eastern Europe, even though it had broken off diplomatic relations with Spain during the Second World War.

59. In ordinary circumstances, the third State was, in his view, obliged to grant foreign diplomatic agents freedom of passage for whatever purpose; even in time of war or national emergency, it was obliged to grant them freedom of passage for the purpose of taking up their posts or returning to their own countries.

60. Mr. KHOMAN agreed with Sir Gerald Fitzmaurice that diplomatic agents travelling through a third State should be immune from arrest and from criminal jurisdiction in general. On the other hand, he thought it was obvious that the third State could not be required to grant foreign diplomatic agents freedom of passage through its territory, regardless of the circumstances; that it should be in diplomatic relations with the sending State was a possible qualification, but he was not sure

it was the most appropriate. It might be preferable simply to recognize the third State's right to object to the passage of foreign diplomatic agents across its territory, without attempting to list the circumstances in which it could do so.

61. He suggested that a possible solution would be to change the last word of the text, "presence", to "passage" which would, in any case, be more appropriate—and continue "and has raised no objections thereto".

62. The CHAIRMAN, speaking as a member of the Commission, agreed that diplomatic agents travelling through a third State were entitled to immunity, not only from criminal jurisdiction but also from civil jurisdiction. Regarding other cases where a diplomatic agent was in the territory of a third State, it would probably be necessary to determine whether or not his sojourn was rendered necessary by the exercise of official duties (for example, participation in a conference with a diplomatic agent of the receiving State).

63. Mr. TUNKIN noted that the purpose of his amendment was identical with what Sir Gerald Fitzmaurice had in mind. He would therefore have no objection to withdrawing it, if the Commission preferred to make a specific reference to immunities.

64. He could not altogether agree with Mr. Bartos that there was a legal obligation on the third State to grant free passage across its territory. He recalled that, in connexion with section I of the draft, the Commission had recognized that the receiving State always had the right to refuse to issue an entry visa; having done so, it could not consistently deny the third State's right to refuse a transit visa. It would be better to leave the whole question of entry into the third State's territory aside, and say simply that if a diplomatic agent were on such territory he should enjoy diplomatic privileges and immunities.

65. Mr. SPIROPOULOS said that the Commission should at any rate be quite clear about the fact that article 19, in its present form, did not cover the question of freedom of passage across a third State's territory. However, since that question related rather to the very difficult problems of recognition and non-recognition and their effects, he was inclined to agree with Mr. Tunkin that it should be left aside.

66. In his view, the article should state simply that, in cases where a diplomatic agent passed through the territory of a third State in order to take up his post or return to his own country, the third State should grant him diplomatic privileges and immunities, provided it was notified of his presence. It was true that, in practice, the third State gave the same privileges and immunities to a diplomatic agent who visited its territory temporarily while occupying his post, but that was a matter of courtesy.

67. In general, the Commission should beware of arguing from the existence of a practice to the existence of an obligation, particularly in the field of diplomatic intercourse and immunities where courtesy played so large a part.

68. Mr. EL-ERIAN agreed that article 19 could not be regarded as imposing an obligation on the third State to grant a diplomatic agent free passage across its territory, even for the purpose of proceeding to his post or returning to his own country. For the article, like every

<sup>5</sup> *Ibid.*, p. 22.

<sup>6</sup> *Ibid.*

other article in the draft, could not be considered in isolation, but must be set beside the other accepted principles of international law, including those relating to the admission of aliens. Ever since the First World War, it had been an accepted principle that no individual had the right to enter the territory of any State without its free consent.

69. Sir Gerald FITZMAURICE wondered whether the entry of foreign diplomatic agents really presented a problem at all. The third State either required entry visas for all those entering its territory or, by agreement with a number of other States, it waived the requirement as far as their nationals were concerned. In the first case, a foreign diplomatic agent had to obtain a visa like anybody else; and if the third State objected to him, his visa could be refused. In the second case, where any member of the public was admitted freely, it would hardly be possible to refuse entry to a diplomat. He therefore agreed with Mr. Spiropoulos that the Commission could leave the question of entry aside.

70. Mr. SANDSTRÖM, Special Rapporteur, said he shared that view. On the other hand, he thought it was going too far to grant a diplomatic agent who was passing through the territory of a third State complete immunity from criminal jurisdiction. If the offence was a minor one, the authorities could be expected to overlook it, but if it was serious, there was no reason inherent in the nature of the diplomatic function why they should.

71. Mr. YOKOTA agreed with Mr. Tunkin that, once a diplomatic agent was on the territory of a third State, he should enjoy full diplomatic privileges and immunities, whether the sending State was recognized by the third State or not. The only reason why the Harvard draft contained a proviso regarding recognition was that it dealt not only with the question of privileges and immunities during transit but also with the question of freedom of passage, which included the right freely to enter the country. He was by no means sure that the Commission should not do likewise.

72. At any rate, in his view no final decision should be taken on the matter until the definitive text of article 16, paragraph 4, was adopted, since it would be illogical if the third State were obliged to grant freedom of passage to diplomatic couriers but not to diplomatic agents themselves.

73. Mr. BARTOS felt that, in the light of the Convention on the Privileges and Immunities of the United Nations, it was undeniable that, generally speaking, a third State was under a legal obligation to allow foreign diplomatic agents free passage across its territory. In particular cases it could refuse to issue the necessary visa, but the question of visas had to be dealt with separately from the main problem, and it was actually reduced to the question of hindering the free exercise of the right to passage by *personae non gratae*. Further, the fact that in war time there existed the right to free passage was *a fortiori* an argument that States must mutually concede that right in time of peace.

74. He agreed that the Commission could not insert in its draft rules which were based only on courtesy. The Commission was, however, elaborating obligatory rules for States, and at the same time drafting rules relating to free passage, which meant that free passage became a legal obligation unless it was stated in the rule that it was not an obligatory rule.

75. Mr. BARTOS proposed that the article be referred to the Drafting Committee for further consideration in the light of the discussion.

76. Mr. MATINE-DAFTARY observed that, before referring the article to the Drafting Committee, the Commission must decide whether it wished it to cover the question of freedom of passage or not. In his view, the article need not do so, and should merely state that, when on the territory of a third State, a diplomatic agent should enjoy, not full immunity, but such immunities as were necessary to facilitate his transit.

77. Mr. AGO felt that, though the question of freedom of passage should not perhaps be dealt with in article 19, it was of such practical importance that it should not be overlooked altogether. In cases where, for example, the receiving State was entirely surrounded by a State or States which had not recognized the sending State, all diplomatic intercourse between the sending and the receiving States might itself be impossible unless the principle of freedom of passage for diplomatic agents as well as diplomatic couriers was respected.

78. Mr. SPIROPOULOS thought that the cases referred to by Mr. Ago were quite exceptional; he also thought no parallel could be drawn between the rules of international law, which applied to the whole international community, and the provisions of a convention, which bound only those States that had ratified it.

79. To get out of the difficulty, however, he wondered whether the Commission could not indicate in the commentary that "as a general rule" the third State should accord freedom of passage—the Conference for the Codification of International Law which was held at The Hague in 1930 had already used that formula with regard to the passage of foreign warships through the territorial sea of a coastal State (article 12 of the articles concerning the legal status of the territorial sea).<sup>7</sup>

80. After further discussion, the CHAIRMAN pointed out that there was no definite proposal before the Commission for dealing with the question of freedom of passage in article 19. In those circumstances before referring the article to the Drafting Committee as Mr. Bartos had proposed, the Commission need merely vote on the proposal, just outlined by Mr. Tunkin and Sir Gerald Fitzmaurice, that reference should be made not only to "protection" but also to diplomatic privileges and immunities.

*The proposal was adopted by 12 votes to 1 with 6 abstentions.*

81. Mr. MATINE-DAFTARY said he had abstained because, in his view, a diplomatic agent in transit through the territory of a third State should not enjoy full diplomatic privileges and immunities but only such as were necessary to facilitate his transit.

82. Mr. KHOMAN said he had abstained because it was not clear whether the third State would have the right to object to a foreign diplomatic agent's passage. If it did not object, he agreed that it should accord him full diplomatic privileges and immunities.

*Article 19 was referred to the Drafting Committee.*

The meeting rose at 1.10 p.m.

<sup>7</sup> League of Nations publications, *V. Legal*, 1930.V.14 (document C.351.M.145.1930.V), p. 169.

**402nd MEETING***Wednesday, 22 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 20**

1. The CHAIRMAN invited the Special Rapporteur to introduce article 20, after which the Commission could consider it paragraph by paragraph.

2. Mr. SANDSTRÖM, Special Rapporteur, said that the most important elements in the article, which enunciated the principle of immunity for diplomatic agents from the criminal and civil jurisdiction of the receiving State, were the exceptions to it. One of them was that a diplomatic agent who was a national of the receiving State enjoyed immunity from its criminal jurisdiction only. As would be seen from the amendments submitted, opinions differed on that point. Another exception covered real actions relating to private immovable property and actions relating to successions.

3. Mr. BARTOS said that a question to be considered in connexion with article 20 was whether diplomatic agents in transit enjoyed immunity from jurisdiction in third States. There appeared to be tacit agreement that they did. The Drafting Committee might be asked to consider inserting a reference to the problem at an appropriate point.

4. Mr. TUNKIN proposed the insertion in sub-paragraph 1 (a) of the phrase "and representing a source of income" after the words "receiving State".

5. His amendment was designed to cover cases where immovable property used for the purposes of a mission was held in the name of the head of the mission, because local law did not permit it to be acquired by a foreign State. He had in mind a case which had occurred in New York, where a property for the use of the Permanent Delegation of the Soviet Union to the United Nations had had to be acquired in the name of the head of the delegation. Some qualification of the rule was necessary in order to make diplomatic agents immune from civil jurisdiction in such cases.

6. Mr. VERDROSS, pointing out that many countries also had administrative and financial courts, proposed the addition of the words "and administrative" between the words "criminal and civil" and "jurisdiction".

7. Mr. GARCIA AMADOR said that, although he was in favour of some qualification to meet cases of the kind mentioned by Mr. Tunkin, he doubted whether the wording of his amendment was quite appropriate. A diplomatic agent might buy a piece of waste land which brought in no regular income but which might yield a large profit years later if sold for building purposes. Perhaps it would be simpler to qualify the principle in the commentary.

8. Sir Gerald FITZMAURICE remarked that, according to the existing wording of the paragraph, the exceptions mentioned applied to criminal as well as civil jurisdiction. It was a long-established practice, however,

for diplomatic agents to enjoy absolute immunity from criminal jurisdiction. In any case, it was difficult to see how a real action relating to private immovable property or an action relating to a succession could possibly be a matter for criminal courts.

9. Perhaps the Special Rapporteur would agree to reword the first part of the paragraph as follows:

"A diplomatic agent of foreign nationality shall enjoy immunity from the criminal jurisdiction of the receiving State. He shall also enjoy immunity from its civil jurisdiction, save in the case of: . . ."

10. Mr. PADILLA NERVO doubted whether Mr. Tunkin's amendment was a suitable way of dealing with the problem he had raised. The qualification, "representing a source of income", introduced a concept which would be very difficult to define in practice. In real actions, the proceedings related to the property and not to the person owning it, so the property could be the subject of an action irrespective of whether the diplomatic agent acquired income from it or not.

11. Furthermore, as Mr. García Amador had pointed out, property, though not a source of regular income, might have been acquired as an investment with a view to an eventual profit.

12. Mr. PAL agreed with Sir Gerald Fitzmaurice on the desirability of making it clear that immunity from criminal jurisdiction was absolute.

13. While appreciating Mr. Tunkin's point, he failed to see how his addition would cover the case he had mentioned. Premises held on behalf of a Government by a diplomatic agent would not really be the private property of the holder at all; he would only be a name-lender or a trustee, his State being the beneficial owner. There was the further objection that in many countries the mere ownership of property was regarded as a form of income.

14. Mr. SPIROPOULOS also supported Sir Gerald Fitzmaurice's proposal.

15. He agreed with Mr. Padilla Nervo and Mr. Pal that Mr. Tunkin's amendment did not really solve the particular problem he had raised. In a real action, it was the property that was involved, regardless of whether the owner derived any income from it or not, and he did not see how any real action relating to such property could be prevented. In any case, the word "private" would have to be deleted, since a diplomatic agent could not own a public building.

16. Mr. AGO agreed with Sir Gerald Fitzmaurice that it was advisable to separate the references to immunity from criminal jurisdiction and to immunity from civil jurisdiction.

17. He also appreciated Mr. Tunkin's concern, but did not think that his amendment provided a solution to the problem. The question was one of private property assigned to an official service, and was quite distinct from that of private property which was not a source of income. Moreover, in many cases it would be extremely difficult to discover whether any income was derived from the property or not. A real action could well be brought regarding a villa belonging to a diplomatic agent which had been only a source of expense to him.

18. Mr. TUNKIN also agreed with Sir Gerald Fitzmaurice regarding the redrafting of the first part of the paragraph.

19. He still considered that some qualification on the lines of his amendment was necessary, for, if the text was left as it stood, a diplomatic agent would not enjoy immunity from real actions relating to property of which he was the owner only in name.

20. Mr. SANDSTRÖM, Special Rapporteur, said that it had never been his intention to imply that the actions mentioned in sub-paragraphs 1(a) and (b) might lead to criminal proceedings. The text could be redrafted by the Drafting Committee on the lines suggested by Sir Gerald Fitzmaurice.

21. He also accepted Mr. Verdross's proposal to include a reference to administrative jurisdiction.

22. The CHAIRMAN proposed that the Commission should refer to the Drafting Committee Sir Gerald Fitzmaurice's redraft of the beginning of paragraph 1, in which should be included a reference to administrative jurisdiction.

*It was so decided.*

23. Mr. SANDSTRÖM, Special Rapporteur, doubted whether there was sufficient justification for including Mr. Tunkin's amendment in the paragraph. The rule that the private immovable property of diplomatic agents was subject to local jurisdiction admitted of no exception.

24. Sir Gerald FITZMAURICE said that the problem raised by Mr. Tunkin was a very real one and by no means infrequent. There had been cases where States, owing to the law of the receiving State, had had no alternative but to acquire the premises for their mission in the name of the ambassador. It would be an absurd situation if property really owned by the sending State were subject to the civil jurisdiction of the receiving State merely because, as a matter of form and in accordance with local law, it was held in the name of the head of the mission.

25. Perhaps it would meet Mr. Tunkin's point if the following qualification were inserted after the word "property": "held by the agent in his private capacity and not on behalf of his Government for the purposes of a mission".

26. Mr. TUNKIN said that that was an excellent suggestion which might be referred to the Drafting Committee.

27. Mr. SANDSTRÖM, Special Rapporteur, doubted whether the text just proposed by Sir Gerald Fitzmaurice would settle the question any more than Mr. Tunkin's. In many countries the law regarding rights *in rem* was categorical. The case mentioned by Mr. Tunkin could never have arisen in Sweden, for instance, where there was a law prohibiting the acquisition of land by individuals on behalf of corporate bodies.

28. Mr. MATINE-DAFTARY thought it desirable to include some reference to the fact that personal actions, relating, for instance, to the failure of a diplomatic agent to pay his debts, were settled through diplomatic channels. He naturally did not wish to suggest that diplomatic agents should be subject to civil jurisdiction in such cases, but felt that it would create a wrong impression if the Commission maintained complete silence on the matter.

29. Mr. BARTOS recalled that in a case involving the rights of neighbours in connexion with property owned by a diplomatic agent in Canada, the Canadian court had ruled that the *lex loci rei sitae* applied.

30. He appreciated Mr. Tunkin's point. Yugoslavia had had the same problem when the acquisition of property by foreign States had been forbidden by law. Since then, however, the Yugoslav law had been amended and Yugoslavia was now able to claim reciprocity in other countries.

31. He had been asked by Yugoslav trade unions to raise a special point in connexion with immunity from jurisdiction. There were numerous examples from case law to support the claim that diplomatic agents, in entering into either a tacit or formal contract with domestic servants, thereby accepted the jurisdiction of courts competent to deal with labour questions. However, in cases where diplomats were accused of dismissing servants without just cause or due notice, the protocol department often intervened on the ground that the prestige of a foreign mission was at stake. The only remedy then open to the aggrieved servant was to bring an action in the diplomat's own country, a laborious and expensive matter seldom justified by the value of the claim involved. The problem was further complicated by the fact that many States permitted their diplomatic agents to waive their immunity from jurisdiction only with the prior consent of the ministry of foreign affairs. Thus, even if a diplomatic agent accepted the jurisdiction of labour courts in a contract with a domestic servant, that acceptance might later be shown to be invalid because he had not the prior consent of his minister of foreign affairs.

32. While it would be premature to talk of a definite rule that entry into a labour contract implied acceptance of the jurisdiction of labour courts, there certainly was a marked trend in case law in that direction. The Commission might consider whether to encourage that trend, or simply allow matters to take their course.

33. Mr. SANDSTRÖM, Special Rapporteur, agreed that diplomatic immunity from jurisdiction was often a source of inconvenience. He was not sure, however, that the inconvenience in the case cited by Mr. Bartos was so great as to warrant making an exception to the rule. Sympathetic as he was to the misfortunes of the small man, he did not think it desirable to make too many exceptions.

34. Mr. Matine-Daftary's point could be dealt with in connexion with the proposal for a new paragraph 5 that he understood Mr. François intended to make. It was, of course, the rule for proceedings against diplomatic agents to be conducted in their sending State.

35. Mr. SPIROPOULOS agreed with Mr. Sandström regarding the categorical nature of the provisions of many national laws regarding rights *in rem*. The Commission could not, however, shut its eyes to the problem mentioned by Mr. Tunkin and Sir Gerald Fitzmaurice. Clearly, if the question were regulated by an international convention, no action could be brought, since the international law would override the municipal law. One course would be for local laws to be amended to enable States to buy property in their own name.

36. Mr. YOKOTA expressed agreement with the observations made by Sir Gerald Fitzmaurice and Mr. Pal.

37. The CHAIRMAN put to the vote the amendment to paragraph 1 proposed by Sir Gerald Fitzmaurice.

*The amendment was adopted by 16 votes to none with 3 abstentions.*

38. Mr. SPIROPOULOS observed that the Commission had apparently adopted a text inconsistent with international law. Even Anglo-Saxon law made an exception for real actions relating to private immovable property situated on the territory of the receiving State.
39. Sir Gerald FITZMAURICE said that the essential point was that the immovable property was used for the official purposes of the mission. It was true that if a Government simply held real property in another country, that property would enjoy no immunity, but immunity would always be enjoyed if the property was held for the purposes of the diplomatic mission.
40. Mr. AGO thought that the problem fell rather under the heading of the immunity of States.
41. Mr. LIANG, Secretary to the Commission, observed that the point raised by Mr. Ago, although falling within the Commission's general programme of work, was outside the scope of the item on diplomatic intercourse and immunities.
42. He wondered why the two exceptions to immunity from jurisdiction had not been included in the Harvard Law School draft<sup>1</sup>. The first exception, in particular, was a very well-known one. The reason might be because a real action was an action *in rem*. The authors of the Harvard draft might have omitted the reference because, taking a narrow view, they conceived only personal action as relevant.
43. The CHAIRMAN observed that views differed on the doctrine of the immunity of immovable property used for diplomatic purposes. While some authors considered that such immovable property was entirely immune from the civil jurisdiction of the receiving State, others held that the property was entitled to immunity only to the extent to which that jurisdiction affected its inviolability.
44. Mr. TUNKIN agreed that there might be divergencies of opinion on the general problem of immovable property owned by one State in the territory of another, but there was none regarding the immunity of buildings used for the official functions of a diplomatic mission. There would, therefore, be no point in reverting to a matter on which the Commission had already voted.
45. Mr. FRANÇOIS disagreed with Mr. Tunkin that the principle was accepted without question in international law. Even the situation as regards an embassy had been disputed.
46. The CHAIRMAN suggested that the point raised by Mr. Ago be further discussed when the Commission drafted its commentary on article 20.
- It was so agreed.*
47. Mr. GARCIA AMADOR raised the general question whether the Commission's draft ought to be as detailed as the Harvard draft, which had employed an entirely different technique based on the codification of North American law. The Commission had never used such a technique in its drafts, because it raised innumerable difficulties of detail in addition to the fact that, by avoiding general statements and enumerating cases, it ran the risk of an incomplete enumeration. That point might be pondered, in connexion either with the exceptions in article 20 or with the final draft as a whole.
48. Mr. SANDSTRÖM, Special Rapporteur, replied that it was obviously a matter for individual judgement in each case whether the general rule or also the exceptions should be stated. Very often a statement of the general rule was virtually useless, since the existence of the rule depended on the number of exceptions. The exceptions to article 20 were so important and so generally recognized that their inclusion was warranted.
49. Mr. VERDROSS thought the Commission should make its codification as full as possible; otherwise its work would have been in vain.
50. Mr. GARCIA AMADOR observed that the Havana Convention<sup>2</sup> had been drafted to state the broad general principles. It included a few hypothetical exceptions, but always in general formulation.
51. Mr. SPIROPOULOS remarked that the apparent exceptions in article 20 were, in fact, basic rules of principle, and their inclusion was therefore essential.
52. Mr. SANDSTRÖM, Special Rapporteur, said that he had not intended to depreciate the value of the Havana Convention. It had, however, been designed for an area with homogeneous conditions and laws, whereas the Commission's draft was intended to embrace all the countries of the world, and therefore required to be expressed in greater detail.
53. Mr. MATINE-DAFTARY agreed with Mr. Spiropoulos that immunity from local jurisdiction for diplomatic agents should be regarded as the exception to the general rule governing the jurisdiction of the receiving State. By specifying that exception from immunity the Commission was establishing the general rule.
54. Mr. AGO asked the Special Rapporteur why the exception relating to a succession in sub-paragraph 1(b) had been expressly included, when it did not appear either in the Harvard draft or in the 1929 resolution of the Institute of International Law.<sup>3</sup> He believed that the considerations which the Special Rapporteur had wished to meet were already covered by the exception relating to real assets which, however, should not be limited only to immovable property. Accordingly, the matter might perhaps be better dealt with by inserting a reference to movable as well as immovable property in sub-paragraph 1(a).
55. Mr. SANDSTRÖM, Special Rapporteur, explained that the provision had been inserted because cases dealing with succession required a common court, and if that court were in the receiving State, it would be only natural that it should not be hampered by diplomatic immunity.
56. Mr. SPIROPOULOS said that, in such cases, immunity should not be accorded to diplomatic agents, who should be subject to local jurisdiction if they were involved as heirs or legatees. He agreed with Mr. Ago that a reference to movable property should be included in sub-paragraph 1(a), as it could be the subject of a real action. The Commission should not go against the clear intention of the institute of International Law unless the law itself had developed subsequently to the adoption of its resolution, which, in article 12, paragraph 1, referred to both movable and immovable property.

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

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

<sup>3</sup> Harvard Law School, *op. cit.*, pp. 186 and 187.

57. Mr. AMADO stated that he was against the exceptions mentioned in the text, and emphasized the fact that such exceptions were admitted neither by the Harvard draft nor by the International Law Institute resolution.

58. Sir Gerald FITZMAURICE shared Mr. Ago's doubts, because personal action against a diplomatic agent as an heir would be extremely unusual in many countries, including the United Kingdom. When a person died his estate was normally dealt with by executors, who were not necessarily the heirs or legatees. Any action would, therefore, lie against the executor. The paragraph was unnecessary, as the case it covered would hardly arise.

59. The CHAIRMAN thought the case might well arise where the validity of a will, under which the diplomat was an heir or legatee, was in dispute. The case referred to in article 20, sub-paragraph 1 (b) fell rather under waiving of immunity. If the diplomatic agent claimed the benefit of a will before a foreign court, he would be considered subject to the local jurisdiction.

60. Mr. MATINE-DAFTARY agreed that there were several possibilities of such cases arising. A diplomatic agent might consider himself the creditor of a succession during liquidation; he might be an heir or legatee; his right to inherit might be contested. All those cases would, however, have no connexion with his capacity as diplomatic agent, and he would therefore have to subject himself to the local jurisdiction.

61. Mr. AGO pointed out that, although in many countries the law placed great weight on unity of inheritance, there were others where the principle of distinction between movable and immovable inheritance was preponderant. The clause, which referred to "a succession coming under the jurisdiction of the receiving State", would raise considerable difficulties because of conflicts of jurisdiction and similar issues.

62. Mr. BARTOS said that the question was really what would happen if a third person concerned in a succession brought an action against an heir or legatee enjoying diplomatic immunity, who refused to appear before the courts. The question of jurisdiction in such matters was a very complicated one, and probably not a single community of States applied the same rules.

63. Unity of inheritance was more of a theoretical than a practical concept.

64. The CHAIRMAN said there was no need to bring up the question of competence, because the basic assumption in the text was that the courts of the receiving State were competent.

65. Mr. SANDSTRÖM, Special Rapporteur, agreed that many possible cases relevant to the clause might arise. That was why he had included it, although he was willing to admit that it might not be very clear as it was worded. Obviously, if a succession were contested, a court would not be able to act unless all the parties were subject to its jurisdiction.

66. Mr. EL-ERIAN observed that no objections had been raised to the principle; the discussion turned on the question whether there was a case for retaining sub-paragraph (b) of paragraph 1, or whether it was already covered by sub-paragraph (a). Sub-paragraph (b) might be accepted temporarily, and the Drafting Committee be asked to decide whether it should be retained.

67. Mr. AMADO observed that, if a diplomatic agent refused to waive his immunity, he might make a private agreement. Some members appeared to be able to accept the clause, but others were hesitant; he himself would abstain.

68. The CHAIRMAN said that the Special Rapporteur's point was worth pondering. If a diplomatic agent was a sole heir and refused to waive immunity if his inheritance was attacked in the courts of the receiving State, the case could not be settled.

69. The CHAIRMAN proposed that the vote on sub-paragraph (b) be deferred in order to give members further time for reflection.

*It was so agreed.*

70. Mr. VERDROSS introduced an amendment, to insert in paragraph 1 a new sub-paragraph (c) as follows: "An act relating to a professional activity outside his official duties."

71. He had based his amendment on article 13 of the 1929 resolution of the Institute of International Law, which read as follows:

"Immunity from jurisdiction may not be invoked by a diplomatic agent for acts relating to a professional activity outside his official duties."<sup>4</sup>

It was also akin to article 24, paragraph 2, of the Harvard draft, which read as follows:

"A receiving state may refuse to accord the privileges and immunities provided for in this convention to a member of a mission or to a member of his family who engages in a business or who practices a profession within its territory, other than that of the mission, with respect to acts done in connection with that other business or profession."<sup>5</sup>

72. Admittedly, cases to which the amendment related were comparatively rare, but they might arise. The International Law Commission was the first legal commission composed of representatives of various systems of law, and should, therefore, include in its drafts matters which were taken for granted in homogeneous communities in order that its codification might be as nearly complete as possible.

73. Mr. FRANÇOIS opposed the amendment as unnecessary. Diplomatic agents practically never engaged in any professional activity outside their official duties. If they did, and the receiving State objected, it could easily put an end to such activities by declaring the agent *persona non grata*. The matter might possibly arise if the diplomatic agent was a member of the board of a joint stock company, which function he could easily fulfil at the same time as his diplomatic mission. He would not, however, have to recognize the jurisdiction of the receiving State, but would be subject to that of the sending State, in accordance with the principle *ne impediatur legatio*.

74. The immunity of the diplomatic agent was maintained even in the apparently unrelated matter of divorce, because a divorce action under the local jurisdiction was incompatible with his dignity as a diplomat.

75. Mr. EL-ERIAN supported Mr. Verdross's amendment. If a diplomatic agent engaged in a professional or commercial activity—the word "commercial"

<sup>4</sup> *Ibid.*, p. 187.

<sup>5</sup> *Ibid.*, p. 24.

should undoubtedly be inserted in the amendment—he should enjoy no immunity, but be treated on precisely the same footing as other persons who practised the same profession or engaged in the same commercial activities. The case could not really be assimilated to that of divorce. The dignity itself of a diplomatic agent required that he should not engage in activities outside his official duties.

76. Mr. AMADO thought that Mr. Verdross's amendment did not go far enough; he preferred the fuller statement in article 24, paragraph 2, of the Harvard draft. The clause should either not be included, or be worded as precisely as possible to specify all members of the diplomatic agent's family who might engage in affairs which had nothing to do with the exercise of the agent's official duties.

77. Mr. SANDSTRÖM, Special Rapporteur, agreed by and large with Mr. François. To engage in a professional activity outside his official duties would impair the dignity not merely of the diplomatic agent himself but of the whole mission. If anything at all were to be included, therefore, he would prefer a clause on the lines of the relevant article in the Harvard draft, but he regarded the whole idea of a diplomatic agent engaging in any professional activity outside his official duties as repugnant.

78. Mr. VERDROSS accepted Mr. Amado's suggestion. The text of the Harvard draft was certainly preferable to that of the Institute of International Law; he had followed the latter only because it was briefer. The Drafting Committee would probably wish to make a separate paragraph if the longer Harvard draft text was adopted.

79. Mr. BARTOS preferred Mr. Verdross's version to the texts of either the Harvard draft or the Institute of International Law, since it was more consonant with the general feelings of Governments.

80. Mr. EL-ERIAN said he was prepared to accept Mr. Verdross's wording or any similar formulation.

81. He proposed that the Commission vote immediately that it agreed, in principle, to insert a clause to the effect that a diplomatic agent, or member of his family, should not be immune from civil jurisdiction if he engaged in a professional or commercial activity outside his official duties. The actual drafting could be left to the Drafting Committee.

*The principle thus expressed was adopted by 16 votes to none with 4 abstentions, and the text was referred to the Drafting Committee.*

The meeting rose at 1 p.m.

### 403rd MEETING

*Thursday, 23 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 20 (continued)

1. The CHAIRMAN, after recalling that at the previous meeting a final decision on sub-paragraph (b) of

paragraph 1 had been deferred in order to give members further time for reflection, put the sub-paragraph to the vote.

*Sub-paragraph (b) of paragraph 1 was adopted by 10 votes to 1, with 3 abstentions.*

2. Sir Gerald FITZMAURICE said that he had voted against the provision because it put the matter in a form in which it would probably never arise. With some redrafting, however, the sub-paragraph could be made pertinent. He suggested wording it as follows:

“The mere fact that a person interested in an estate is a diplomatic agent shall not prevent or impede litigation.”

3. Mr. BARTOS said he had abstained from the vote, but supported Sir Gerald Fitzmaurice's proposal.

4. Faris Bey EL-KHOURI said that he had abstained because he considered that diplomatic agents should be immune from criminal jurisdiction only. It was in the interest neither of the receiving State nor of the diplomatic agent for him to be immune from civil jurisdiction

5. Mr. SPIROPOULOS said that he had voted for the principle, but agreed with Sir Gerald Fitzmaurice on the desirability of redrafting the text.

6. The CHAIRMAN said the text had been adopted subject to redrafting.

7. Inviting the Commission to consider paragraph 2, the Chairman drew attention to the following redraft submitted by Mr. Verdross:

“A diplomatic agent who is a national of the receiving State shall enjoy the privilege of immunity only in respect of acts performed in the exercise of his diplomatic functions.”

8. Mr. SANDSTRÖM, Special Rapporteur, observed that the number of amendments submitted to the paragraph bore testimony to the variety of opinions held on the advisability of according immunity from jurisdiction to diplomatic agents who were nationals of the receiving State. His own view was that, once the receiving State consented to the appointment of one of its own nationals as a member of a foreign mission, it must accord him a certain immunity from jurisdiction in order to preserve the dignity of his functions and of the mission. The amendment submitted by Mr. Verdross represented the absolute minimum that could be accorded to such diplomatic agents by way of immunity. He himself would prefer full immunity from criminal jurisdiction.

9. Mr. EL-ERIAN proposed that paragraph 2 become paragraph 4 and be worded as follows:

“A diplomatic agent who is a national of the receiving State shall not enjoy any immunities from the jurisdiction of the receiving State except those specifically granted to him by the receiving State.”

10. Since the Commission, by a majority vote, had adopted the principle that the sending State could appoint a national of the receiving State to its mission with the consent of the latter State, it was necessary to decide what status such diplomatic agents should enjoy. In the rare cases in which such persons had been appointed, there had been some controversy as to their position.

11. Indeed, the law of some countries, as pointed out in the comment on article 8 of the Harvard Law School

draft,<sup>1</sup> provided that the benefits of diplomatic privileges and immunities should not extend to nationals of the receiving State who were members of foreign missions. In other cases, it had been ruled that such diplomatic agents enjoyed immunity only if the receiving State had accepted them without any reservation, as in the judgement of 24 February 1890 in *Macartney v. Garbutt* in the Queen's Bench Division.<sup>2</sup> It followed that the same consent was required for the granting of privileges and immunities as for the appointment of a national of the receiving State as a foreign diplomatic agent.

12. Some might argue that the provision that consent must be obtained to his appointment was sufficient in itself, since the receiving State could always refuse consent if it objected to the conditions attached to it. He thought it inadvisable, however, to present the receiving State with so categorical an alternative, and oblige it to refuse consent to an appointment to which it might not otherwise object, simply because it did not wish to accord full immunity to the person appointed. He was sure that any attempt to represent such a condition as a rule of international law would be opposed by many States, particularly those which had experienced the abuses of the capitulations system.

13. To accord immunity from criminal jurisdiction to such a diplomatic agent would place him in a unique position. Ordinary diplomatic agents, though immune from criminal jurisdiction in the receiving State, were nonetheless subject to the jurisdiction of the sending State. But a diplomatic agent who was a national of the receiving State, and enjoyed immunity therein, could commit murder with impunity, since he would not be subject to the criminal jurisdiction of the sending State either.

14. The Egyptian Penal Code contained a provision, common to most penal codes, that it applied only to crimes committed on Egyptian territory (article 1), except crimes against the security of the State or the stability of the national currency (article 2). But if the national of another State were appointed a member of the Egyptian Embassy in that State and enjoyed immunity from criminal jurisdiction, he could not be tried, either in that State or in Egypt, for any crime he might commit in that State which did not fall within the two categories of crimes covered by article 2 of the Egyptian Penal Code.

15. In view of the legal objections to the principle and to the difficulties it would occasion in practice, he considered it essential for such diplomatic agents to enjoy only those immunities specifically granted them by the receiving State.

16. Mr. FRANÇOIS said that, in substance, his amendment came to much the same as Mr. El-Erian's. He proposed that paragraph 2 be deleted, and that the position of the diplomatic agents in question, with respect both to immunities and exemption from taxation, customs duties and inspection, be dealt with in a new paragraph 3 of article 24 to read as follows:

"3. Members of the staff of the mission who are nationals of the receiving State, together with their wives, children and private staff, shall enjoy privileges and immunities only to the extent admitted by the receiving State."

<sup>1</sup> Harvard Law School, *Research in International Law, I. Diplomatic Privileges and Immunities* (Cambridge, Mass., 1932), p. 70.

<sup>2</sup> *Law Reports*, 24 Q.B.D. 368.

17. For the same reasons as Mr. El-Erian, he was unable to accept the Special Rapporteur's text. The argument that a receiving State which consented to the appointment of one of its nationals to a foreign mission was bound to recognize his extraterritoriality did not hold water. The opposite was true, namely, that in seeking the consent of the receiving State, the sending State automatically renounced all right to immunity for the diplomatic agent concerned.

18. Many countries, including his own, were firmly opposed to according privileges and immunities to their nationals appointed to foreign missions. And it was precisely immunity from criminal jurisdiction that they found least acceptable. The possibility of the agent's committing a criminal offence was not, after all, remote. He could easily be guilty of criminal negligence in a traffic accident, for instance.

19. He found Mr. Verdross's amendment (para. 7 above) equally unacceptable. The phrase "acts performed in the exercise of his diplomatic functions" was so broadly worded that it would, for example, preclude action being taken against a diplomatic agent who was guilty of criminal negligence when taking a communication from his mission to the ministry of foreign affairs by car.

20. The receiving State could, if it wished, grant full immunity to a national appointed with its consent to a foreign mission, but it must be free not to grant any at all.

21. Mr. VERDROSS agreed with the Special Rapporteur that, when a receiving State consented to the appointment of one of its nationals to a foreign mission, it was bound to accord him a certain minimum of rights. Such a view was in harmony with the principles adopted by the Commission in the earlier articles of the draft. He agreed, too, with Mr. El-Erian and Mr. François, that it was impossible for all the acts of such diplomatic agents to be immune from criminal jurisdiction. The acts covered by his amendment, however, were not acts for which the diplomatic agent could himself be held responsible; they were the acts of the sending State, and hence not subject to the jurisdiction of the receiving State. He considered that diplomatic agents of the type in question should enjoy immunity from both criminal and civil jurisdiction in respect of acts performed in the exercise of their diplomatic functions.

22. Mr. TUNKIN agreed with Mr. El-Erian and Mr. François that the granting of immunities to diplomatic agents who were nationals of the receiving State should be as much dependent on the consent of the receiving State as their actual appointment. The practice of appointing nationals of receiving States to such functions was, in most cases, a vestige of the colonial system, and was generally found only in countries which had not yet succeeded in shaking off all trace of their colonial past, so that frequently the consent of the receiving State was only given under pressure. The formula proposed by Mr. El-Erian and Mr. François, therefore, had the advantage of giving the receiving State a second chance of asserting its sovereign rights.

23. He could not agree with Mr. Verdross's view that the receiving State was bound in such cases to accord a certain minimum of rights. It was possible to reverse the argument and claim that any sending State wishing to appoint a national of the receiving State must bear the consequences.

24. He would favour merging the proposals of Mr. François and Mr. El-Erian in the following text, which should preferably appear in article 24:

"Members of the staff of the mission who are nationals of the receiving State, together with their wives, children and private staff, shall not enjoy any immunities from the jurisdiction of the receiving State except those specifically granted to them by the receiving State."

25. Mr. PAL, referring to Mr. Verdross's amendment, said that he did not see how any criminal liability could arise if the acts were to be those performed strictly in the exercise of diplomatic functions. Of course such criminal liability would be possible if the acts contemplated were made comprehensive enough to embrace all acts done in the course of the exercise of diplomatic functions.

26. He supported Mr. François's proposal, though not for the reasons advanced by Mr. Tunkin. Without forgetting that, till recently, imperialism and colonialism had prostituted certain sections of the dominated people to their own purposes, he would not agree that the practice of appointing nationals of the receiving State as diplomatic agents was a vestige of that system. The practice in question had indeed been rare, and, even in those rare instances, it had been resorted to, not in the interests of the receiving State, but in the interests and at the instance of the sending State. If he supported Mr. François's proposal, it was because he felt that it was proper that a State, even while agreeing to such utilization of its nationals by a foreign State for the time-being friendly, should not be rendered helpless in the eventuality of such citizens turning disloyal to their own State, especially when the international world was reverberating with talk of fifth-column activities. Nationals of the receiving State appointed as members of a foreign mission might act, for example, as fifth columnists, and in such cases justice would certainly not be done to the receiving State if these (its own citizens) were not subject to its jurisdiction. In order to close the door to such possibilities, he was rather in favour of deleting the paragraph altogether, as was at first proposed by Mr. François (para. 16 above). In that case, a sending State, wishing to appoint a national of the receiving State, would think twice before doing so.

27. Mr. YOKOTA said that, on purely theoretical grounds, Mr. Verdross's amendment was quite correct. He did not think however that the principle could be said to be an established rule of international law. Article 15 of the 1929 resolution of the Institute of International Law,<sup>3</sup> for example, stated that agents belonging by their nationality to the country to whose Government they were accredited enjoyed no immunity from jurisdiction. It was by no means a matter of course under international law that such agents enjoyed immunity from criminal jurisdiction, and it was even more uncertain that they enjoyed immunity from civil jurisdiction. On the other hand, many authors claimed that if the receiving State consented to such an appointment, it must grant full diplomatic privileges.

28. In view of the uncertainty and the absence of any established rule, he must support the amendments of Mr. El-Erian and Mr. François, but he preferred the amendment of the latter because it was more adequate for the effective exercise of the diplomatic functions.

29. Mr. SANDSTRÖM, Special Rapporteur, observed that the words "acts performed in the exercise of his diplomatic functions" in the English text of Mr. Verdross's amendment were somewhat broader in meaning than the words "*des actes de sa fonction diplomatique*". Diplomatic agents must naturally enjoy immunity in respect of such acts.

30. Paragraph 2 of article 20 should not be considered in isolation, but in relation to provisions in other articles. The provision in article 4, that the appointment of such diplomatic agents was subject to the consent of the receiving State, gave the latter the means of restricting the privileges and immunities granted him. Article 21, on the waiving of immunity, was also relevant, since the sending State would presumably be more ready to waive immunity in the case of a national of the receiving State.

31. As a matter of fact, there was really no great harm in accepting the principle favoured by Mr. François and Mr. El-Erian.

32. Mr. SPIROPOULOS said that the argument that the receiving State, having once consented to the appointment of one of its nationals as a member of a foreign mission, must accord him a certain minimum of privileges, had a great deal in its favour. The receiving State clearly had no right to prosecute such a diplomatic agent for any public acts he performed. Perhaps the substitution of the term "public acts" in Mr. Verdross's amendment might render it less broad in scope. It would certainly exclude the type of case mentioned by Mr. François. That was a matter of drafting, however, and he was not for the moment prepared to take up a final position with regard to the amendment.

33. The receiving State, apart from the certain minimum which Mr. Verdross considered it bound to accord, could, of course, grant fuller immunity if it wished. The system would not work very well in practice, however. States, when submitting the list of the prospective members of their mission, did not normally state their nationality. Greece had, in fact, once accepted a person with a Turkish name in the list of members of the Turkish mission, without realizing that he also possessed Greek nationality. Furthermore, to his knowledge, no State, when accepting members of missions, specified the categories of immunity granted to each individual.

34. Mr. GARCIA AMADOR said that all three amendments before the Commission had a sound foundation, and it might be possible to strike a balance between them. Adoption of Mr. El-Erian's and Mr. François's amendments would have undesirable and serious consequences, however, for they left the question of immunities, which lay at the very basis of the exercise of the diplomatic function, entirely in the hands of the receiving State. He doubted whether it was possible for a diplomatic agent to fulfil his functions without enjoying at least a certain minimum of immunity. Had he no privileges, he would suffer a sort of *capitis diminutio* and, although performing the same functions as the other members of the diplomatic corps, would cut a rather sorry figure among them.

35. Accordingly, though recognizing that Mr. Verdross's amendment would need redrafting, he was in favour of including a provision on those lines. It was possible, however, to combine the apparently conflicting principles formulated by Mr. El-Erian and Mr. François, on the one hand, and Mr. Verdross, on the other.

<sup>3</sup> Harvard Law School, *op. cit.*, p. 187.

The Commission might say that, when a receiving State consented to the appointment of one of its nationals as a member of a foreign diplomatic mission, it was entitled to specify what privileges and immunities he was to enjoy, without prejudice to the minimum of immunity that he must enjoy in order to exercise his functions.

36. Sir Gerald FITZMAURICE wondered whether the whole question had not been presented in a false light, as if the appointment of a national of the receiving State to a foreign diplomatic mission were something imposed by the sending State. The question of such appointments never arose, of course, in colonial territories proper, since they did not enjoy the right of legation, active or passive. It arose solely in recently emancipated countries, and then it was never a question of a national of those countries being appointed to the mission of the former colonial Power. On the contrary, it was the recently emancipated States which, in view of the relatively undeveloped state of their diplomatic services, found it convenient to appoint nationals of the countries to which their missions were accredited. He could recall no case in which the United Kingdom had appointed a non-British representative, but he knew of several cases where countries, whose diplomatic services were not fully organized, had appointed a British subject to represent them in the United Kingdom. The situation was, therefore, the exact opposite of that described by Mr. Tunkin. The sending State was not obliged to appoint a national of the receiving State but, if it did and the appointment was accepted, it was in the interest of the sending State for its representative to enjoy as broad a range of immunities as possible. Thus, the practice of appointing nationals of receiving States to foreign missions, in so far as it served any useful purpose, was in the interest of the less-developed States and not of the former colonial Powers.

37. There were two possible theories with regard to the question. One could say that the receiving State was in no way bound to accept the appointment of one of its nationals to a foreign mission, and that, if it did, it could attach conditions to his appointment. Mr. El-Erian had put forward some very strong arguments in favour of that theory, in particular, the fact that countries prepared to accept one of their own nationals as a member of a foreign mission might refuse altogether if they were not free to regulate the scope of his immunity. The alternative theory was that the receiving State might refuse, but that if it consented, it must accord the customary immunities. Despite the strong practical considerations in favour of the first theory, he felt that the second was technically correct.

38. Referring to Mr. François's amendment, he wondered how its author reconciled it with the principle of *ne impediatur legatio* to which he had shown such attachment at the previous meeting (402nd meeting, para. 73). If subjection to the jurisdiction of the receiving State would prevent the proper performance of the diplomatic function in the one case, why would it not in the other?

39. He agreed with Mr. Verdross, Mr. Spiropoulos and Mr. García Amador that a receiving State, consenting to the appointment of one of its nationals to a foreign mission, must grant him the minimum of immunity essential for the fulfilment of the functions which it had agreed to his performing. If it did not, it would be taking away with the left hand what it had given with the right. He accordingly supported Mr. Verdross's amendment, subject to drafting changes.

40. Mr. MATINE-DAFTARY said that his attitude towards the question under discussion was dominated by memories of the bitter injustice suffered by Iran during the century prior to the abolition of the capitulations system in 1928. All the peoples of the Orient, he was sure, would reject the idea that a receiving State must accord immunity to one of its nationals appointed to a foreign mission. The practice of appointing nationals of the receiving State was a bad one, in any case, and a mere *pis-aller*. If a sending State wished its diplomats to enjoy full privileges, it should appoint its own nationals.

41. Mr. Matine-Daftary therefore supported the amendments proposed by Mr. El-Erian and Mr. François, which would help to discourage the practice.

42. Mr. PADILLA NERVO said that it was always open to a State to refuse to accept one of its own nationals as the diplomatic agent of a foreign State; even if it did accept him, it was not bound to do so unconditionally. In order to avoid controversy, however, it was essential that the receiving State which wished to place conditions on its acceptance should indicate them at the time, in order that the sending State might decide whether it could agree to the conditions, or whether they were such as to interfere with the effective performance of the diplomatic function.

43. Mr. Padilla Nervo therefore proposed that Mr. François's text (para. 16 above) for article 24, paragraph 3, be amended so as to make it clear that the persons in question would enjoy privileges and immunities only to the extent determined by the receiving State at the time it agreed to their serving as diplomatic agents of the sending State.

44. A similar amendment could be made to the text proposed by Mr. El-Erian (para. 9 above). Amended in that way, either text would really be more satisfactory than Mr. Verdross's (para. 7 above) from the point of view of the sending as well as of the receiving State, since the position would be perfectly clear in advance, and if the sending State did not like it, it could make other arrangements. On the other hand, if Mr. Verdross's amendment were adopted, there might very well be disagreement as to what acts were "performed in the exercise of" diplomatic functions.

45. Mr. KHOMAN felt that, though it had given rise to controversy, the question was of very little importance in practice, since nowadays there were very few cases where a national of the receiving State was appointed head of a foreign diplomatic mission. Even when he was, there did not appear to be the slightest ground for disquiet on the part of the receiving State, in whom the sending State was indeed displaying a notable degree of confidence by appointing one of its nationals to so important and delicate a post in preference to one of its own.

46. There were doubtless good logical reasons why the person in question should not enjoy any diplomatic privileges or immunities. It was noteworthy, however, that the Convention on the Privileges and Immunities of the United Nations<sup>4</sup> made no distinction between the privileges and immunities enjoyed by officials who were nationals of the State in which they worked and those who were not, save only in respect of taxation. Although the two cases were not, of course, entirely comparable, that was but one illustration of the current tendency towards

<sup>4</sup> United Nations, *Treaty Series*, Vol. I, 1946-1947, p. 15.

granting all diplomatic agents, whether nationals of the receiving State or not, such diplomatic privileges and immunities as were essential for the performance of their diplomatic functions.

47. He was therefore inclined to favour Mr. Verdross's proposal, though he agreed that the Drafting Committee should try to make it less open to differing interpretations. He did not object in principle to Mr. El-Erian's proposal or Mr. François's, subject to their being amended in the way proposed by Mr. Padilla Nervo; but, if either of them was adopted, the great majority of States, who at present had no laws or regulations governing the status of any of their nationals who were appointed diplomatic agents of another State, would be obliged to enact such laws and regulations, and he was not sure that they would be at all keen to do so.

48. Mr. AMADO remarked that it was strange that, in a Commission which was supposedly engaged on a task of codification, there had been very little said about how many cases were involved and what the existing practice was with regard to them. As far as he knew, very few cases were involved, and he agreed with Mr. Matine-Daftary that, from the point of view of international law, the situation they gave rise to was highly abnormal.

49. He would therefore be in favour of deleting the paragraph altogether, but if the Commission felt its substance should be retained, he could accept either Mr. Verdross's approach, subject to the text being made clearer, or that of Mr. François or Mr. El-Erian, subject to the amendment proposed by Mr. Padilla Nervo (para. 43 above).

50. Mr. HSU said it was true that many States, including his own, had bitter memories of the way in which the system of extra-territoriality or of the capitulations had worked, but agreed with Sir Gerald Fitzmaurice that they were quite irrelevant to the point at issue. No question of colonialism or imperialism was involved. In Imperial days, the Chinese Government also had been in the habit of appointing the nationals of certain receiving States as its diplomatic agents, and he stressed that that had been done on its own initiative, not at the suggestion of the receiving States. It was, of course, true that such cases were becoming increasingly rare, but that was no reason why the Commission should ignore them altogether.

51. In his view, a solution to the present difficulty could be found by combining Mr. Verdross's proposal with Mr. El-Erian's. The Commission should state that, as a general rule, a diplomatic agent who was a national of the receiving State should enjoy immunity in respect of acts performed in the exercise of his diplomatic function, provided, however, that the receiving State could stipulate otherwise at the time it agreed to his serving as a diplomatic agent of the sending State.

52. Mr. VERDROSS pointed out that, if the principle were accepted that a diplomatic agent who was a national of the receiving State enjoyed no immunity, the authorities of the receiving State would, in the event of their detaining him, be able to produce in court any diplomatic papers he was carrying at the time; those papers might well relate to public acts of the sending State, which would thus be made subject to the jurisdiction of the receiving State, and that was clearly quite unacceptable.

53. Although the Austro-Hungarian authorities had apparently had no difficulty in such circumstances in distinguishing between acts that were performed in the

exercise of the diplomatic function and those that were not, he was prepared to accept any wording which safeguarded immunity for public acts, but left it to the discretion of the receiving State whether, and to what extent, to grant immunity for private acts.

54. Mr. EDMONDS felt that one fundamental question was involved, namely, the conduct of the business of government. Under common law at least, the doctrine of sovereign immunity still extended, by and large, to the agent of the State as well as to the State itself. A State which sent a diplomatic mission to a foreign country was, in his view, merely carrying on the function of government in another place. In the United States of America, a United States national who was, quite exceptionally, appointed to a foreign diplomatic mission, in whatever capacity, enjoyed full immunity from criminal and civil jurisdiction, except perhaps in respect of debts incurred prior to the appointment.

55. Provided the receiving State's right to object to the appointment was recognized—as it was in the Commission's draft—he could see no danger in the text prepared by the Special Rapporteur. He had, however, no objection to Mr. Verdross's amendment or, subject to the addition proposed by Mr. Padilla Nervo, those of Mr. François and Mr. El-Erian.

56. Mr. BARTOS said that, at the Chairman's request, he had refrained from putting in a dissenting opinion regarding article 4 at the time that article had been adopted, but he was doing so now, since his objections applied also to the paragraph under discussion.

57. During the discussion of article 4, most members of the Commission had agreed that it was nowadays an exception for diplomatic agents to be chosen from among the nationals of the receiving State, whose consent was in any case necessary before they could be appointed. In his view, that exception, which was really more in the nature of a historical survival, should be dealt with in the same way as the Commission had decided to deal with other exceptional cases; in other words, it should simply be referred to in the commentary. The fact that the consent of the receiving State was required could not be regarded as implying approval of a practice which was contrary to the general principles of international law and out of line with current practice; it was simply an attempt to guard against some of the abuses to which the practice could give rise.

58. National sovereignty was exercised through diplomatic channels by individuals who bore the character of representatives of the nation and were selected from among its nationals. It was contrary to the modern view of public international law and comparative constitutional law for anyone to enjoy a special position in his own country by virtue of representing another country. A person in that position was no longer responsible for what he did in his own country. Working on its territory, but for and on behalf of another country, he was exonerated in advance for any disloyalty to his own country; and disloyal he was bound to be if he was to discharge his responsibilities to the sending State conscientiously. However, cordial the relations between the two States might be, their interests necessarily diverged. Yet, as a citizen, it was surely his duty to defend the interests of his own country, not those of the country whose service he had entered.

59. Moreover, the modern State exercised authority through the elected or appointed representatives of its

people. It was nowadays an almost universal rule that public office in any country was reserved solely for its nationals. It was tactless, to say the least, for the sending State to ask a national of the receiving State to act as its diplomatic agent, since that meant his renouncing the greater part of his civic rights and placing himself in the position of an alien, albeit a favoured one. For favoured he must be, since otherwise he could not perform his functions properly.

60. The examples that had been cited by Mr. Ago during the discussion on article 4, such as the Holy See, the Order of Malta and the Republic of San Marino (387th meeting, para. 14), were quite exceptional cases which did not really affect the rules of international law. Those rules were based on the idea of friendly relations between peoples, and on the duty of foreign diplomats to hold aloof from the domestic affairs of the country to which they were accredited, a duty which was incompatible with the civic duties of someone who was a national of the country.

61. Such was the position in theory, and it was amply confirmed in practice. In 1925, the person who had been appointed Albanian Minister in Belgrade had happened to have Yugoslav as well as Albanian nationality; so, before taking up his appointment, he had been obliged to renounce his Yugoslav nationality. The same was true of one of the present Ambassadors in Belgrade, who had also happened to acquire Yugoslav nationality in childhood.

62. There had also been cases of United States diplomatic agents in Belgrade who had originally come from Yugoslavia and possessed dual nationality at the time of their appointment; by virtue of a special reciprocal agreement between the United States and Yugoslavia, they had not been obliged to renounce Yugoslav nationality, but their United States nationality had been regarded as dominant, provided they did not settle in the country. He understood that in that agreement, when referring to "diplomatic agents", the term meant not only the heads of missions, but all the diplomatic personnel, properly speaking (in other words, excluding only administrative and technical staff and servants), for the question arose just as much for them as for ambassadors, seeing that any of them might at any time be called on to perform the duties of a *chargé d'affaires ad interim*.

63. Mr. YOKOTA felt that solid arguments could be advanced in favour both of Mr. Verdross's approach and of that preferred by Mr. François and Mr. El-Erian. He suggested that a solution could be found by combining the two approaches, retaining the text proposed by Mr. Verdross as a statement of the general rule, and adding to it some such words as "provided however that the receiving State may limit the privileges and immunities which he shall enjoy, at the time it agrees to his serving as a diplomatic agent of the sending State".

64. Mr. FRANÇOIS said the only reason why he had opposed Mr. Verdross's amendment was that he feared it might lead to abuse. He could accept it, provided the text was made more precise, for example, by the insertion of the word "legitimate" before "exercise", or provided its scope was explained in the commentary. It could, of course, be coupled with his own amendment or Mr. El-Erian's.

65. While he had no objection to Mr. Padilla-Nervo's addition (para. 43 above) to his own amendment, he doubted whether it was of any importance in practice.

If an ambassador who was a national of the receiving State behaved in such a way that the receiving State wished to restrict his privileges and immunities, it would ask for him to be replaced, and would doubtless ensure that his successor, if also one of its own nationals, did not enjoy the same freedom of action.

66. Mr. EL-ERIAN agreed with Mr. Tunkin that the provision under consideration should be taken out of article 20 and placed where it would apply to the whole of sub-section B of section II.

67. No provision at all would have been necessary if the Commission had not insisted, in article 4, on recognizing an exceedingly rare and obsolescent practice. Mr. García Amador had said that, since the practice did exist, even though it was exceedingly rare, it should not be left to municipal law to regulate. There were, however, a great many questions which were left to municipal law to regulate; to take only one example, the immunities enjoyed by past Heads of States. Reference had also been made to the Convention on the Privileges and Immunities of the United Nations; but, in his view, it was not possible to assimilate the class of international civil servants, which was growing yearly in numbers and importance, to the negligible and steadily decreasing number of diplomatic agents who were nationals of the receiving State.

68. Since the Commission had, however, referred to the practice in article 4, some provision of the kind now under consideration was necessary. With regard to Mr. Amado's remarks, he had already sought to show that current practice, in the few cases where the receiving State agreed that one of its nationals should serve as a diplomatic agent of the sending State, was that the receiving State stipulated that the person in question should enjoy only certain specified privileges and immunities. Mr. Verdross's amendment would make that impossible, and he could not therefore accept it, at any rate in its present form.

69. His own amendment was in accordance with current practice, but, in order to simplify the discussion, he withdrew it in favour of Mr. François's, which should, however, be amended in the manner proposed by Mr. Padilla Nervo, so as to remove any uncertainty.

70. Mr. SPIROPOULOS thought that Mr. Verdross's text only applied to cases where there was no agreement between the sending and receiving States. The two States could naturally agree that the person in question should enjoy wider immunity, narrower immunity or no immunity at all; it was, after all, an accepted principle that *lex specialis* should prevail. To make the matter clear, however, the following words should perhaps be added at the beginning of Mr. Verdross's amendment:

"Except where otherwise agreed between the sending and the receiving States,"

71. The CHAIRMAN declared the discussion of paragraph 2 of article 20 closed, and suggested that the Special Rapporteur submit a revised text for consideration at the next meeting.

72. The question where the provision should be placed was more than a matter of drafting, but could be decided later.

*The Chairman's suggestion was adopted.*

The meeting rose at 1.5 p.m.

**404th MEETING***Friday, 24 May 1957, at 9.30 a.m.**Chairman:* Mr. Jaroslav ZOUREK.**Arbitral procedure: General Assembly resolution 989 (X)**

[Agenda item 1]

## ESTABLISHMENT OF A COMMITTEE

1. The CHAIRMAN recalled that the draft convention on arbitral procedure adopted by the Commission<sup>1</sup> had been considered by the General Assembly at its tenth session. In resolution 989 (X), the Assembly had invited the Commission "to consider the comments of Governments and the discussions in the Sixth Committee in so far as they may contribute further to the value of the draft on arbitral procedure, and to report to the General Assembly at its thirteenth session" and had decided "to place the question of arbitral procedure on the provisional agenda of the thirteenth session, including the problem of the desirability of convening an international conference of plenipotentiaries to conclude a convention on arbitral procedure".
2. Since then Mr. Scelle, the Special Rapporteur, had submitted a further report on the subject (A/CN.4/109), and the observations submitted by Governments had been distributed in documents A/2899, A/2899/Add. 1 and A/2899/Add. 2.<sup>2</sup>
3. In the light of those circumstances, the officers of the Commission proposed that, in order to expedite discussion in the Commission itself, a committee be set up to consider the situation and report back to the Commission during the current session. Bearing in mind that it was desirable for the committee to reflect in its composition the various views that had been expressed in the Commission and at the General Assembly, and bearing in mind also the fact that some members of the Commission were already fully occupied with their work in the Drafting Committee, the officers further proposed that the committee should consist of Mr. Ago, Mr. Amado, Mr. El-Erian, Mr. Khoman, Mr. Padilla Nervo, Mr. Scelle, Mr. Spiropoulos, Mr. Verdross and the Chairman himself.

*The officers' proposals were adopted.***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 20 (continued)

4. The CHAIRMAN invited the Commission to consider the remaining paragraphs of article 20, pending distribution of the revised text of paragraph 2.
5. Mr. TUNKIN said that the question dealt with in paragraph 3 had two aspects. In the first place, a diplomatic agent could not be compelled to give evidence at all. Secondly, if of his own accord he chose to give evidence, he could not be compelled to do so in court, but could, for example, submit an affidavit.

<sup>1</sup> *Official Records of the General Assembly, Eighth Session, Supplement No. 9, para. 57.*<sup>2</sup> *Ibid., Tenth Session, Annexes, agenda item 52.*

6. The text proposed by the Special Rapporteur might possibly be held to cover both aspects of the question, but, for clarity's sake, Mr. Tunkin proposed that it be amended to read as follows:

"A diplomatic agent cannot be compelled to give evidence in legal proceedings and, in the event of his agreeing to give evidence, cannot be compelled to do so before a court."

7. Mr. SANDSTRÖM, Special Rapporteur, said that, though he was aware that the laws of many countries entered into considerable detail as to the procedure to be followed when it was desired that a diplomatic agent should give evidence in a court case, he had thought it unnecessary for the Commission to do so in its draft. Mr. Tunkin's amendment, though it did enter into rather more detail than his own text, was not unduly detailed, and he could therefore accept it.

8. Mr. BARTOS proposed that it be clearly stated in the commentary that immunity from jurisdiction was not granted out of respect for the person of the diplomatic agent, but out of respect for the State which he represented and for the purpose of enabling the agent to perform his diplomatic functions, and that, if such immunity was abused, it was the duty of the sending State to waive it. The latter idea had found clear and formal expression in the case of international civil servants, but current practice also pointed in the same direction in the case of diplomatic agents. At present the whole matter was often clouded by considerations of prestige, with the result that the sending State refused to waive immunity even when it was well aware that it ought to do so.

9. Mr. MATINE-DAFTARY questioned whether the paragraph was necessary at all, since if a person enjoyed immunity from criminal and civil jurisdiction, he clearly could not be "compelled" to do anything.

10. Mr. EDMONDS said he saw no reason why the text proposed by Mr. Tunkin should not end with the words "in legal proceedings". If a diplomatic agent agreed to give evidence when he was not compelled to do so, it went without saying that he could attach conditions regarding the manner in which his evidence should be given.

11. The CHAIRMAN suggested that the point raised by Mr. Edmonds be considered by the Drafting Committee.

*The text proposed by Mr. Tunkin (para. 6 above) was adopted by 15 votes by none with 4 abstentions, subject to consideration of Mr. Edmonds' point by the Drafting Committee.*

12. Turning to paragraph 4, Mr. SANDSTRÖM, Special Rapporteur, said that the commentary on the Harvard Law School draft<sup>3</sup> appeared to express some doubt as to whether a diplomatic agent's immunity from executory measures should extend to property which was not essential to the diplomatic function. He had felt, however, that since no such distinction had been made in respect of immunity from jurisdiction generally, it would be illogical to introduce it solely in respect of exemption from executory measures.

13. Mr. LIANG, Secretary to the Commission, pointed out that the Special Rapporteur's text implied that execu-

<sup>3</sup> Harvard Law School, *Research in International Law, I. Diplomatic Privileges and Immunities* (Cambridge, Mass., 1932), pp. 97 ff.

tory measures could not be taken even in respect of a diplomatic agent's private immovable property. He very much doubted whether that was in accordance with existing practice.

14. The CHAIRMAN agreed. Moreover, paragraph 1 already stated that a diplomatic agent should not enjoy immunity from jurisdiction in the case of a real action relating to the diplomatic agent's private immovable property; it was clearly essential, therefore, that any judgments or official acts relative to such immovable property should be enforceable.

15. Mr. BARTOS agreed with the Chairman's view, at least as far as indirect enforcement was concerned; in other words, where there was no violation of the diplomatic agent's personal immunity or of his premises.

16. Mr. MATINE-DAFTARY pointed out that the English and French texts of paragraph 4 did not correspond. The English referred only to court judgements and should be brought into line with the French, which was the original and which covered, in addition, documents served by judicial officers and self-executory documents, for example mortgage deeds containing a default clause.

17. The CHAIRMAN agreed that the English text should be brought into line with the French.

18. Mr. EL-ERIAN accordingly suggested that the text be amended to read:

"Nor can he be made subject to executory measures, except in the cases mentioned in paragraph 1(a) above."

19. Sir Gerald FITZMAURICE said that the paragraph required considerable modification. For one thing, it was by no means clear whether movable property was covered. It might be amended to read:

"Neither he nor his property shall be subject to executory measures, except in the cases mentioned in paragraph 1(a) above."

20. However, even in the case of private immovable property, executory measures could not, in Sir Gerald's view, be taken if they involved personal eviction of the diplomatic agent from his residence. If that was agreed, the precise wording could perhaps be left to the Drafting Committee.

21. Mr. SPIROPOULOS thought that in the case of movable property the determining factor was where it was situated. If it was situated in the diplomatic agent's residence, it was exempt from executory measures; otherwise it was not.

22. Mr. AMADO maintained that the present text was satisfactory, since no summons could ever be served on a diplomatic agent.

23. Mr. PAL and Mr. SPIROPOULOS pointed out that paragraph 1(a) already made a specific exception to the principle of immunity from jurisdiction in the case of real actions relating to private immovable property. In such actions, the diplomatic agent was in exactly the same position as anyone else.

24. Mr. VERDROSS pointed out that there might also be cases where a decision of the courts, relating, for example, to an easement on the real property of a diplomat, had to be entered in the land register. That was the execution of a judgment, even though no question arose of serving a summons on the diplomatic agent.

25. Mr. SANDSTRÖM, Special Rapporteur, suggested that, in order to take account of the points made by Sir Gerald Fitzmaurice and others, the text might be amended to read:

"Nor can he be subjected to executory measures, except in cases where he is subject to the jurisdiction of the receiving State by virtue of paragraph 1 above and where the executory measure can be taken without hindering the exercise of his diplomatic functions."

26. Mr. MATINE-DAFTARY observed that the new wording suggested by the Special Rapporteur did not cover all the cases he had mentioned—for example, the default clause in a mortgage agreement.

27. The CHAIRMAN suggested that Mr. Matine-Daftary's point could be met by using a somewhat broader form of words than "by virtue of paragraph 1 above".

28. Mr. SPIROPOULOS felt it was unrealistic for the Commission to try to cover every conceivable case in its draft. If a diplomatic agent was subject to executory measures in the case of a real action relating to private immovable property, he would be all the more so in the case referred to by Mr. Matine-Daftary.

*The amended text suggested by the Special Rapporteur (para. 25 above) was adopted by 17 votes to none, with 2 abstentions, subject to consideration by the Drafting Committee.*

29. Mr. FRANÇOIS proposed that a further paragraph be added to article 20, reading as follows:

"5. A diplomatic agent shall be justiciable in the courts of the sending State. The competent tribunal shall be that of the seat of the Government of the sending State, unless some other is designated under the law of that State."

30. The first sentence simply stated a principle that was universally recognized and was regarded in all manuals of international law as the necessary counterpart to immunity from jurisdiction in the receiving State.

31. With regard to the question which should be the competent tribunal in the sending State, practice was not at present uniform; in some countries the competent tribunal was that of the seat of government, in others it was that of the person in question's last domicile, in others, including his own, the law was silent on the matter. In the resolution which it adopted in 1929,<sup>4</sup> the Institute of International Law had favoured the second solution, but in his view the first was generally preferable, although he did not wish to lay down an inflexible rule and had therefore added an escape clause.

32. Sir Gerald FITZMAURICE said that while it was, he thought, true that all text-books of international law recognized that the mere fact of a diplomatic agent's immunity from the jurisdiction of the receiving State did not give him immunity from the jurisdiction of the sending State, international law did not, to the best of his knowledge, impose any positive obligation on States to allow their diplomatic agents to be sued before their own courts.

33. In addition to that question of international law, Mr. François's amendment raised questions of municipal law. The rules of the sending State on conflicts of jurisdiction might well make it impossible for the local courts

<sup>4</sup> *Ibid.*, pp. 186 and 187.

to hear cases where, for example, a diplomatic agent had contracted debts in the receiving State. Even without Mr. François's amendment, there was nothing to prevent anyone from attempting to sue a diplomatic agent in the sending State's courts, but whether he would be successful in his attempt would depend on the sending State's rules on conflicts of jurisdiction.

34. There was a further difficulty regarding service of process. It was not normally possible to bring proceedings against someone in his home country without serving a writ on him, but in the case of diplomatic agents, personal service could not be effected, though in some cases writs might perhaps be served through the post.

35. He wondered, therefore, whether the Commission should not content itself with saying that immunity in the receiving State did not confer immunity in the sending State, provided the rules in force in the sending State made it possible for the diplomatic agent in question to be brought before its courts.

36. Mr. MATINE-DAFTARY supported Mr. François's amendment in principle, but pointed out that it should be made clear, possibly in the commentary, that it did not apply to the two types of case referred to in paragraph 1, where a diplomatic agent was subject to the jurisdiction of the receiving State.

37. Mr. VERDROSS also supported Mr. François's proposal, since, in his view, it was quite correct to place such an obligation on the sending State.

38. Mr. EDMONDS thought that Mr. François's amendment would give rise to all kinds of difficulty, for the reasons mentioned by Sir Gerald Fitzmaurice. There was nothing in the present text of article 20 to suggest that a diplomatic agent was not subject to the jurisdiction of the sending State.

39. Faris Bey EL-KHOURI agreed with Mr. François's amendment in principle, and felt the points raised by Sir Gerald Fitzmaurice could be met by modifying the wording. In his view it would be sufficient to say:

"A diplomatic agent shall enjoy no immunity in the courts of the sending State."

40. Mr. TUNKIN said he shared the doubts expressed by Sir Gerald Fitzmaurice and Mr. Edmonds. If Mr. François's amendment were adopted, a great many States might find themselves obliged to make far-reaching changes in their municipal law. In his view it was quite obvious that a diplomatic agent did not enjoy immunity from jurisdiction in the sending State, but he would have no objection to saying, for example:

"A diplomatic agent shall be justiciable in the courts of the sending State in accordance with the laws of that State."

41. Mr. SPIROPOULOS said that a question of principle was involved. It was quite true that article 20 related to the jurisdiction of the receiving State; what happened in the sending State was another matter. Moreover, as Sir Gerald Fitzmaurice had pointed out, there was no rule of international law obliging sending States to provide a court competent to deal with actions involving diplomatic agents enjoying immunity in the country to which they were accredited. Nevertheless, if there were any countries which made no such provision—and he thought it highly improbable—he would have no objection to the Commission's referring to the question

in order to have a more complete draft. Diplomatic agents could clearly not be allowed to enjoy complete impunity. The position in Greece was that they were justiciable in the courts of their last domicile, or failing that, in the courts of the capital.

42. Perhaps the Commission, without making any pronouncement on whether an obligation existed, could simply enunciate the principle stated in the first sentence of Mr. François's amendment.

43. Mr. AMADO drew attention to article 9 of the 1929 resolution of the Institute of International Law,<sup>5</sup> according to which the head of a mission and his family preserved their former domicile. The competent tribunal for trying diplomatic agents in their home State was normally that of their domicile, and he failed to see why the Commission should go out of its way to stipulate that the competent tribunal should be in the capital of the sending State.

44. Mr. FRANÇOIS observed that the standpoints of the critics of his amendment were not so far removed from his own as might appear at first sight. Mr. Tunkin had expressed doubt as to whether the amendment was necessary. Even if it were argued that it was not strictly relevant to the question of diplomatic immunity, it was undoubtedly relevant to the question of diplomatic intercourse, which was the subject of the draft. As for Mr. Spiropoulos's suggestion, that it was improbable that there were any countries which made no provision in their laws for the trying of diplomats accused of offences in the receiving State, he pointed out that cases did exist where no such provision was made.

45. He must dispel some misunderstandings as to the purpose of his amendment. His main concern was to establish the obligation on the part of States to have some court before which actions against diplomatic agents enjoying immunity in their receiving States could be brought. He had no intention of suggesting that the laws of States should be amended so as to enable their courts to deal with all the cases that might arise. The court competent to deal with cases involving diplomatic agents would apply the law of the country, and if the law of the country was such that the case was not covered, then nothing could be done. He was sure that it was possible to obtain general agreement in the Commission on the text, provided it was redrafted.

46. Sir Gerald FITZMAURICE thought that the first sentence of the new paragraph might be generally accepted with the addition of the words "in accordance with the laws of that [the sending] State", as proposed by Mr. Tunkin.

47. He found no difficulty in agreeing with the principle that States should provide a court competent to deal with diplomatic agents against whom action could not be brought in the receiving State, but it would be difficult to go any further than that. Many countries based their criminal jurisdiction on the principle of territoriality, their jurisdiction over their nationals for crimes committed abroad being extremely limited. Except in a few cases, such as murder, the United Kingdom, for instance, had no general jurisdiction over crimes committed by its nationals abroad. It would be impossible for the United Kingdom so to amend its legislation as to enable its courts to take cognizance of a theft committed by one of its diplomatic agents abroad. Though the Commis-

<sup>5</sup> *Ibid.*, p. 187.

sion could not impose any absolute obligation on States, it could make it clear that diplomatic agents should be justiciable in the courts of the sending State, according to its law.

48. Mr. SANDSTRÖM, Special Rapporteur, said that, since it might not have occurred to the Secretariat to include all the provisions dealing with the justiciability of diplomatic agents in its collection of national laws relevant to diplomatic intercourse, he was not prepared to say whether all or nearly all countries made provision for a tribunal competent to deal with actions involving diplomatic agents. It was a fact, however, that a very large number of countries did.

49. He had at one time contemplated including the following provision in his draft: "A diplomatic agent can be summoned before the court of the sending State designated by its law as competent"; but had been dissuaded from doing so by the same consideration as that just put forward by Sir Gerald Fitzmaurice, namely, that the matter was complicated by the question of criminal jurisdiction. He had thought of referring to the matter in the commentary, but would have no objection to dealing with it in the draft if the Commission so wished.

50. Mr. YOKOTA agreed with Sir Gerald Fitzmaurice in doubting that there was any obligation on the sending State to provide courts of the type mentioned. Perhaps the paragraph could be redrafted to read:

"The immunity of a diplomatic agent from the jurisdiction of the receiving State does not preclude his being justiciable in the courts of the sending State".

Such a negative formulation of the principle would, he thought, be more in accordance with existing international law.

51. Mr. KHOMAN remarked that the first sentence of Mr. François's amendment appeared to present no difficulty, since all were agreed that diplomatic agents must not enjoy complete impunity.

52. The second sentence was more controversial, however, and would in any case have little practical significance. According to previous speakers, most countries already had such competent courts, and, since Mr. François himself said that he did not advocate anything which was contrary to local law, he did not see how the provision, if adopted, could have any practical implications for countries which did not have such courts.

53. The best course would be to omit the second sentence and to ask the Special Rapporteur to produce a new text incorporating the suggestions of Mr. Tunkin or Mr. Yokota.

54. Mr. SPIROPOULOS observed that the more the Commission discussed the question, the more complicated it appeared to be. Diplomatic agents might be justiciable in the courts of their home State for crimes committed in the receiving State, but it was doubtful whether they would be justiciable for less grave offences. What was to happen when the courts of the sending State had no jurisdiction for a particular offence? The intention appeared to be to establish such jurisdiction at all costs even where it did not exist.

55. Mr. LIANG, Secretary to the Commission, pointed out that, in general, a United States or United Kingdom national could not be tried for a criminal offence committed in another country. He did not believe, however, that Mr. François had contemplated establishing a rule

that diplomatic agents must at all costs be tried for any offence they committed.

56. Mr. BARTOS cited a case of a foreign diplomat accredited to Belgrade who had disabled his landlady for life. In reply to a note from the Yugoslav Government transmitting the conclusions of the judicial enquiry into the case, the sending State had stated that the offending diplomat would be brought before its disciplinary court, as under its law only crimes committed on its territory were punishable by the criminal courts. That case clearly showed that if a State which based its criminal jurisdiction on the principle of territoriality refused to waive immunity, there were no means of bringing an action against an offending diplomat in any court whatever.

57. The Commission should consider whether the complete freedom of diplomatic agents from any liability for common law crimes committed by them when not in the exercise of their functions could be tolerated in international law, and whether courts should not be competent *ratione personae*, regardless of where the crime was committed. The Commission should draw attention to such anomalies in its commentary on the article, and even go so far as to declare that it was the duty of States to do all in their power either to waive immunity or to bring the offender to justice.

58. Mr. AMADO said that the principles formulated by Mr. Bartos were ideal principles with very grave practical implications. He was not enthusiastic for the amendment at all, but would accept it as amended by Mr. Tunkin.

59. Mr. FRANÇOIS said that he accepted Mr. Tunkin's amendment (para. 40 above) to his first sentence.

60. The CHAIRMAN regretted that the debate had turned to a question which, in his opinion, was completely irrelevant to the subject at issue, namely, to the question whether and to what extent penal legislation could have an extra-territorial effect. He thought it would be over-ambitious for the Commission to try to solve that extremely difficult problem within the limits of the subject with which it was dealing, and to enunciate as a principle the duty of the sending State to see that action could be brought against a diplomatic agent for any offence that he might commit in the receiving State. That would be overstepping the bounds of possibility.

61. Mr. SPIROPOULOS thought that Mr. Tunkin's amendment would deprive Mr. François's text of any force it had. If diplomatic agents were already justiciable in the courts of sending States, there was no point in stating the rule. And if they were not, the provision that they should be justiciable only in accordance with the laws of the sending State absolved the countries from any obligation to provide a competent court.

62. Mr. TUNKIN pointed out that he had already expressed the view that the paragraph might be unnecessary, and had suggested amending it only in the event of the Commission's wishing to adopt it.

63. Mr. SANDSTRÖM, Special Rapporteur, proposed that the Commission merely recommend in its commentary on the article that States so frame their laws as to ensure that diplomatic agents should not enjoy impunity simply because there was no court competent to try them.

64. Mr. FRANÇOIS maintained that it would not be sufficient simply to refer to the problem in the com-

mentary on the article. If the articles were to serve as a basis for a draft convention, something more positive was required.

65. Mr. EL-ERIAN considered that Mr. François's proposal served a useful purpose in that it gave the Commission an opportunity of lessening the undoubted inconvenience caused by the system of diplomatic immunity. He agreed with the Secretary of the Commission that the text placed no obligations on States to change their legislation. Indeed, he would go even further and state that it paid due regard to the law of sending States with respect both to substance and procedure.

66. As he had pointed out in a different connexion at the previous meeting (403rd meeting, para. 14), criminal jurisdiction in Egypt, under article 1 of its Penal Code, was governed by the principle of territoriality, but article 2 established certain exceptions to that rule, namely, crimes against the security of the State or the stability of the national currency. Article 3 provided that when an Egyptian national committed a crime abroad he could be tried in the Egyptian courts, provided that the crime was punishable under the law where the crime was committed, and provided he had not already been tried in the courts of that State. The Commission should not try to solve the question of extra-territoriality. It should confine itself to enunciating the principle that the sending State should provide institutions which would ensure that diplomatic agents were amenable to justice.

67. Mr. FRANÇOIS confirmed that, as the Secretary had thought, it was not his intention to propose that States must at all costs set up courts to deal with any action in which their diplomatic agents were involved. If the courts of the sending State were not competent to judge certain actions, there was nothing to be done about it. On the other hand, if his amendment were adopted, some civil actions, in respect of which the competent tribunal had not yet been designated, would be justiciable.

68. Mr. SPIROPOULOS remarked that there was a danger that the amendment would place diplomatic agents in a more unfavourable position than their fellow nationals. An ordinary citizen of one State who committed a crime in a second State might escape judgment if he went to a third State before his offence was discovered. Under the amendment, however, a diplomat who committed an offence in the receiving State, and then left for a third State, could be brought home and tried.

69. The CHAIRMAN remarked that the members of the Commission appeared to be preoccupied with the question of criminal jurisdiction to the exclusion of the important question of civil jurisdiction. The problems attending Mr. François's amendment would be more easily solved if its application were confined to civil jurisdiction.

70. The first sentence of Mr. François's amendment, as modified by Mr. Tunkin, (para. 40 above), seemed generally acceptable to the Commission. The text was, in fact, in accordance with existing international law.

71. The difficulty arose over the question whether the Commission should include a stipulation that it was the duty of States which had no court competent to deal with proceedings instituted against one of their diplomatic agents serving abroad to establish such a court. There could be no doubt that determination of the competence of courts was a purely domestic matter. The

Commission might, however, make a proposal *de lege ferenda* which would draw the attention of States to the problem and prompt them to take whatever steps were necessary, as it would not be in the interests of diplomatic relations between States if a diplomatic agent enjoying immunity from the jurisdiction were also immune from the jurisdiction of the sending State, for the simple reason that the latter had omitted to decide upon the court competent to deal with the cases concerned.

72. Mr. FRANÇOIS said that the need for civil courts to deal with actions involving diplomatic agents was even more apparent than the need for criminal courts.

73. He could not agree with Mr. Spiropoulos that diplomatic agents would be worse off under his amendment than ordinary citizens of the same State resident abroad. They would still enjoy the privilege of immunity in the receiving State.

74. Mr. GARCIA AMADOR pointed out that Mr. François's amendment, especially with the proviso added by Mr. Tunkin, would not really solve the problem before the Commission. The rule it enunciated would have no efficacy. The real question was not which particular court should be competent, but whether there was an obligation on every State to change its laws, if necessary, so as to ensure that it had a court competent to deal with any offence committed by its diplomatic agents in the States to which they were accredited.

75. Mr. MATINE-DAFTARY suggested that, in making his last point, Mr. Spiropoulos had attributed excessive importance to a quite exceptional case. He himself was not a partisan of the principle of "all or nothing", and considered it essential to have a provision such as that proposed by Mr. François, even though it might not cover every possible case. The proposal filled a real need, and he was not in favour either of omitting the point or of dealing with it in the commentary.

76. Mr. FRANÇOIS pointed out that he had accepted Mr. Tunkin's proposal on the understanding that it applied only to the first sentence of his own amendment, and left the second sentence unaffected.

77. Mr. TUNKIN observed that the first sentence of Mr. François's amendment, together with his own addendum, could be regarded as a complete and self-sufficing provision. But, in that case, if the law of the sending State made no provision for a court to try diplomatic agents, there would be no means of bringing them to justice for offences committed in the receiving State. Acceptance of the second sentence, on the other hand, would mean that States in which no competent court existed, were under an obligation to effect some change in their laws. That being so, it would be preferable to vote on the two sentences separately.

78. Sir Gerald FITZMAURICE agreed with Mr. Tunkin's suggestion. There was not much difficulty over the question of providing a court. If, under its laws, a country had jurisdiction over offences committed by its nationals in foreign parts, the provision of a court was no problem.

79. The main difficulty was the question whether countries were to be obliged to provide a competent court regardless of their legislation. The problem was as great with respect to civil as to criminal jurisdiction. It might be, for instance, that the only contracts that could be enforced were those concluded or to be performed in the country concerned. Contracts entered into by diplo-

mats abroad and to be performed abroad might be outside the jurisdiction of the court of the country. Yet, without the addition of the proviso "in accordance with the laws of that [the sending] State", the amendment might place countries under the obligation of assuming in the case of diplomats a competence which they refused in every other case.

80. All things considered, he preferred the negative formulation advocated by Mr. Yokota, and would suggest wording the provision on the following lines:

"The immunity of a diplomatic agent from the jurisdiction of the receiving State shall not exempt him from the jurisdiction of the sending State, to which he shall remain subject in accordance with the law of that State".

The meeting rose at 1.5 p.m.

## 405th MEETING

Monday, 27 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 20 (continued)

1. The CHAIRMAN announced that the Special Rapporteur, Mr. Sandström, and Mr. François unfortunately were indisposed and could not attend the meeting.

2. He invited the Commission to continue consideration of the additional paragraph proposed by Mr. François (404th meeting, para. 29).

3. Mr. EDMONDS said that he appreciated the concern expressed by several members of the Commission that a diplomatic agent should not enjoy complete immunity in the event of his having committed a criminal offence, and should not be entirely exempt from jurisdiction in a civil action brought against him. He pointed out, however, that the Commission was overlooking one or two fundamental points.

4. The section of the draft under discussion related solely to the diplomatic privileges and immunities enjoyed by a diplomatic agent in the receiving State, and had nothing to do with his position in the sending State. If the law of the sending State already made him subject to the jurisdiction of its courts, the text proposed by Mr. François was unnecessary; if it did not, the proposal could only give rise to difficulties. The Commission was tentatively working on the assumption that the draft would form the basis of a draft convention. The numerous States which did not already recognize the competence of their own courts in cases, civil or criminal, arising out of actions committed by their diplomatic agents while serving abroad would be unable, unless they were prepared to alter their laws very radically, to accede to the convention without making a serious reservation. Amongst the States which would have to make reservations would be of necessity all the federal States. If, on the other hand, the Commission's draft finally took the shape of a code, a paragraph along the lines proposed by Mr. François could amount to nothing more than a pious hope.

5. In his view, the Commission should be content in the knowledge that the laws of certain States made it impossible for their diplomats to enjoy complete immunity, in their own country as well as in the receiving State, and that, as far as other countries were concerned, there was nothing it could do about the matter.

6. Mr. HSU thought that, if the Commission was prepared to ask States whose laws did not already make their diplomatic agents subject to the jurisdiction of their domestic courts to change their laws in that sense, there was no reason why it should not do so. States could always make reservations at the time of acceding to the proposed convention, and he did not think such reservations would give rise to any objections, since it was obvious that the change was one which it would take some time to put into effect. On the other hand, if the majority of the members of the Commission were not prepared to ask governments to accept that obligation—and it seemed that they were not—the situation was clearly different, and the best course might be to use the commentary, as the Special Rapporteur had suggested, in order to draw the attention of Governments to the fact that in certain countries diplomatic agents enjoyed complete immunity in respect of acts committed in the receiving State, not only before that State's courts but also before the courts of the sending State.

7. The CHAIRMAN recalled that Mr. François had accepted Mr. Tunkin's suggestion (404th meeting, para. 59) that the words "in accordance with the laws of that State" be added at the end of the first sentence of the additional paragraph which he proposed.

8. Mr. BARTOS said that, although he was not opposed to Mr. François's amendment, he would be obliged to abstain from the vote on it, since it would not have the slightest effect in practice.

9. Mr. AGO agreed that, with the additional words suggested by Mr. Tunkin, the first sentence of Mr. François's amendment, which without them had been open to serious objections, became completely useless.

10. The second sentence was still open to the same kind of objections as had been lodged against the first. The competent tribunal was determined by the laws of the sending State, and the provision was therefore either superfluous or aimed at changing existing law, and that would be questionable.

11. Mr. AMADO felt that Mr. François's proposal was dictated by highly practical considerations. It was a matter of considerable importance to know where a diplomatic agent could be sued, and it seemed quite reasonable that he should retain his domicile in his country of origin, as provided in article 9 of the resolution adopted in 1929 by the Institute of International Law.<sup>1</sup> A provision of that nature, however, appeared to be quite out of place in one of the articles of a draft dealing with diplomatic immunities in the receiving State.

12. Mr. EL-ERIAN agreed that, with the additional words suggested by Mr. Tunkin, the first sentence of Mr. François's amendment was of very little, if any, practical importance. Such importance as the amendment possessed resided in the second sentence.

13. Mr. GARCIA AMADOR suggested that the Commission decide first whether a provision of the kind proposed by Mr. François should be included at all.

<sup>1</sup> Harvard Law School, *Research in International Law, I. Diplomatic Privileges and Immunities* (Cambridge, Mass., 1932), p. 187.

14. The CHAIRMAN agreed, but suggested that the vote on that question be deferred until Mr. François was again able to be present.

15. Mr. SPIROPOULOS said that, before the Commission voted, he wished to remind it of a memorandum which the Government of the Union of South Africa had sent to Greece, and presumably to other States, requesting their comments on a law which the Union Government considered introducing. That law would provide that, in the event of civil actions involving a diplomatic agent, the diplomatic agent should be exempt from jurisdiction, but the receiving State itself should be justiciable. That was not as illogical as might at first appear, since it could be argued that a State which deprived its citizens of the right to sue a certain category of persons should agree to being sued, if necessary, in their stead.

*It was agreed to defer the vote on whether to include in the draft a provision along the lines of the amendment proposed by Mr. François.*

16. The CHAIRMAN recalled that at the close of the 403rd meeting, the Special Rapporteur had been asked to prepare a redraft of paragraph 2. The Special Rapporteur had proposed the following text:

“A diplomatic agent who is a national of the receiving State shall enjoy immunity from jurisdiction in respect of official acts legitimately performed in the exercise of his functions. He shall moreover enjoy the privileges and immunities granted to him by the receiving State.”

17. Mr. TUNKIN recalled that several members of the Commission had stressed that the receiving State should have a deciding voice in the matter of the immunities conferred on diplomatic agents who were its own nationals. That was not reflected in the Special Rapporteur's new text, to the first sentence of which he accordingly proposed that the following words be added: “unless otherwise determined by the receiving State at the time it agrees to his serving as a diplomatic agent of the sending State.”

18. Mr. MATINE-DAFTARY urged that the vote on the Special Rapporteur's new text be deferred until he was able to be present.

19. Mr. EL-ERIAN also thought that the vote should be deferred, particularly since two of the members who had presented amendments to the Special Rapporteur's original text, namely Mr. François and Mr. Padillo Nervo, were also not present.

20. The CHAIRMAN agreed that further discussion of the new text proposed by the Special Rapporteur should be deferred till he was present, since it still appeared to give rise to difficulties.

*It was so agreed.*

#### ARTICLE 21

21. Mr. BARTOS said that article 21 related to a serious matter which gave rise to many difficulties in practice. He was glad that in paragraph 1 the Special Rapporteur had clearly recognized that it was for the sending State to waive immunity. However, his failure to distinguish between civil and criminal cases involved him in some inconsistency. For under paragraph 2, which related to civil cases, the diplomatic agent himself was, in effect, able to waive his immunity, without the consent even of the head of the mission, simply by initiating legal

proceedings; and that corresponded to the real position in many countries, although practice was by no means uniform.

22. The whole subject was much more involved than the Special Rapporteur's text suggested. Not only was there a distinction between civil and criminal cases, but also between civil cases proper and cases arising purely out of administrative matters.

23. Moreover, since the Commission was concerned not only with the codification but also with the progressive development of international law, it could not shirk the fact that more and more attention was nowadays being paid to whether immunity was invoked for personal reasons or for the protection of the diplomatic function. A clear distinction in that respect was made in the case of international officials. It had been suggested that it was not permissible to draw even a rough analogy between the treaty rules of the United Nations Charter and similar instruments, and the general rules of international law; but the United Nations undoubtedly regarded itself as representing the interests of the world as a whole, and its membership was virtually identical with that of the international community.

24. Mr. VERDROSS agreed with Mr. Bartos that the Commission must distinguish between civil and criminal cases. In criminal cases immunity could only be waived by a formal decision of the Government of the sending State; in civil cases it could be waived by the diplomatic agent himself.

25. A distinction must also be made between diplomatic agents and their servants. A servant who was a national of the receiving State did not, of course, enjoy jurisdictional immunity at all; if he was an alien, however, he enjoyed immunity as long as he continued to be employed by the mission, but the question of waiving such immunity did not usually arise in practice, since his employment contract was terminated by the mission as soon as he was known to be involved in a court case. He would propose an amendment to paragraph 1 of article 21 to make the position with regard to servants clear.

26. The CHAIRMAN suggested that Mr. Verdross's proposed amendment could best be discussed under article 24.

*It was so agreed.*

27. Sir Gerald FITZMAURICE agreed that article 21 was not entirely satisfactory as it was. For the purpose of waiving immunity, a distinction was usually made between the head of a mission and its subordinate members. For the head of the mission the consent of the Government of the sending State was necessary; but he, himself, could waive immunity for any member of his staff, without necessarily consulting his Government. In either case it was probably correct, as stated by the Special Rapporteur, that “A statement to that effect by the head of the mission shall serve as evidence of waiver of immunity”.

28. In the absence of any such statement, it might be asked to what extent the court was bound to enquire whether the necessary consent had been given. In many countries the answer was probably, not at all: if the person in question indicated that he accepted the court's jurisdiction, that was enough. It could be argued, however, that, in criminal cases at least, it was the court's duty to ascertain that immunity had been properly waived before proceeding with the case.

29. Mr. SPIROPOULOS agreed that in criminal cases the court should automatically declare itself without jurisdiction unless immunity was specifically waived; in civil cases, on the other hand, there was a presumption that immunity had been waived unless and until it was specifically invoked, either by the head of the mission or by the diplomatic agent himself.

30. Mr. AMADO agreed that paragraph 1 should be made more explicit by stating in a positive way the legal principle it contained. The question did not relate solely to immunity from jurisdiction; article 26 of the Harvard Law School draft contained the following provision: "A sending State may renounce or waive any of the privileges or immunities provided for in this convention."<sup>2</sup> The whole question clearly bristled with difficulties.

31. Mr. PAL said that the deficiencies of the Special Rapporteur's text for article 21 sprang mainly from its failure to recognize the threefold basis of jurisdictional immunity: the requirements of the diplomatic function itself, the dignity of the sending State and the security of the diplomatic agent. That being so, the grant of immunity implied a pact not only between the sending and the receiving States but between them and the diplomatic agent. In order to determine the competence in the matter of waiver of immunity, the Commission could ill afford to ignore whose right it was that was being waived. Of course, the text presented by the Special Rapporteur could be supported if it was taken as only suggesting the agency through which the act of waiver should be exercised, irrespective of the question where the right actually rested. Even for that purpose, however, he would not support the text. He would prefer to see it expressed as in article 19 of the Havana Convention.<sup>3</sup>

32. Mr. TUNKIN said that immunities were granted to a diplomatic agent not as an individual but as a member of a diplomatic mission, because they were necessary for the discharge of his diplomatic function and for maintaining the representative character of the mission. That being so, his immunities were not his to dispose of, and the principle implied in the first sentence of article 21, paragraph 1, was quite correct. Immunity could be waived only by the Government of the sending State.

33. Moreover, since immunity was granted on the same basis in both cases, he doubted the advisability of drawing a distinction between waiving immunity from criminal jurisdiction and waiving immunity from civil jurisdiction, especially as the Commission had already agreed to certain limitations on a diplomatic agent's immunity from civil jurisdiction.

34. As for the question whether the immunity of other members of the mission could be waived by its head, he did not believe that the Commission shared the view prevailing at the time of the Congress of Vienna that an ambassador enjoyed privileges and immunities as a personal representative of his sovereign, the other members of the embassy sharing them merely as a part of his retinue. On the contrary, while not wishing to minimize the difference which existed between an ambassador and the other members of the staff, Mr. Tunkin thought the Commission held, as he did, that the other members of the mission were enjoying immunities, not because they were covered by the immunities granted to

the ambassador, but because they were collaborators of the mission and also civil servants just as the ambassador was. If that was so, the Commission would have to consider whether it was not essential for the decision to waive immunity to come from the Government of the sending State, even in the case of subordinate members of missions.

35. He agreed with previous speakers on the desirability of redrafting paragraph 1. For the first sentence, he suggested the following text, which, in his opinion, expressed an existing rule of international law:

"The sending State may waive any of the privileges or immunities provided for in this draft. Such waiver may be made only by the Government of the sending State."

36. He proposed that the second sentence should be deleted. An ambassador would normally ask for instructions from his Government before waiving immunity; but if he failed to do so and his Government later reversed its ambassador's decision, disputes might arise between the two States concerned. An ambassador must be able to state *expressis verbis* in the name of his Government that he was empowered to waive the immunity of a member of his mission.

37. Mr. AGO maintained that, since diplomatic immunities were an international right of States, the act of waiving them was, in all cases, an act of the State. The question through whom that act of the State was performed was another matter. Clearly, waiver of the immunity of heads of missions could be made normally only by the Government of the sending State, but a declaration waiving the immunity of a subordinate member of a mission could be made, in a normal case, by the head of the mission. The head of the mission was the representative of his State in the receiving State, and when he performed an official act in discharge of his functions he was, so to speak, the State itself.

38. It was extremely unlikely that any dispute would arise over the competence of a head of a mission when an act of waiver was made by him. Such action might give rise to a dispute between the head of a mission and his Government, but that was a purely internal matter. Once the head of a mission had declared, in the name of his sending State, that the immunity of a diplomatic agent had been waived, the receiving State was fully entitled to regard that declaration as final. The sending State might regret the head of the mission's action, but it could not repudiate it.

39. He was accordingly in favour of a text somewhat on the lines of that proposed by Mr. Tunkin, stating that immunity could be waived only by the sending State, and that a declaration of waiver of immunity must be made by the Government of that State in the case of a head of a mission, but could be made by the head of the mission in the case of other members.

40. Mr. YOKOTA thought that, since the question of the privileges and immunities enjoyed by the staff of the mission was not mentioned at all until article 24, in article 21 the Special Rapporteur must have had in mind only the waiver of immunity of the head of the mission. The procedure for waiving the immunity of the head of a mission being different from that for waiving the immunity of subordinate members of missions, it would be more convenient to discuss article 21 with reference only to heads of mission, and to deal with the question of other members of the mission in connexion with arti-

<sup>2</sup> *Ibid.*, p. 24.

<sup>3</sup> Convention regarding Diplomatic Officers, signed at Havana on 20 February 1928. See League of Nations, *Treaty Series*, Vol. CLV, 1934-1935, No. 3581, p. 282.

cle 24. The Commission should, he thought, take a decision on that point before proceeding further.

41. Mr. LIANG, Secretary to the Commission, thought that the Special Rapporteur had correctly stated the law on the subject. In fact, it was in all cases the State which invoked or waived the immunity of its diplomatic agents, even though the head of the mission, in the name of his sending State, might invoke or waive the immunity of the subordinate members of the mission. He could recall no instance in any treaty, or other draft, where a distinction was drawn between the waiving of immunity in the case of the head of a mission and that in the case of other members. From the theoretical standpoint he agreed with Mr. Tunkin and Mr. Ago.

42. He also agreed that the second sentence in paragraph 1 was unnecessary. It seemed to be axiomatic both that the statement by the head of a mission was valid evidence and that the head of a mission could not speak for himself and waive his own immunity. The statement, in his case, must be made by his Government.

43. Mr. SPIROPOULOS agreed that, in principle, it was always the State which waived the immunity of its diplomatic agents. In practice, however, a civil court, seized of an action against a foreign diplomatic agent, did not wait for the production of documentary evidence that his immunity had been waived. The mere fact of his not invoking immunity justified the presumption that immunity had been waived.

44. A declaration of waiver of immunity need not always come from the Government of the sending State. Heads of missions did more than simply wait for instructions from their Governments; they enjoyed the right of general representation, which allowed them a certain discretion. On the other hand, he could not agree with Mr. Ago that a declaration of waiver of immunity once made by a head of mission could not be repudiated by his Government. On the contrary, he thought that it could, provided the repudiation was made immediately. But it was hardly necessary to go into such detail, for ambassadors generally consulted their governments before taking action.

45. The CHAIRMAN, replying to Mr. Yokota, suggested that it would be preferable to discuss the waiver of immunity of the head of a mission and the waiver of immunity of the members of the mission together, since the immunity rested on the same basis in both cases.

*It was so agreed.*

46. Mr. HSU said that, although paragraph 1 needed redrafting, the principle it enunciated was quite simple and acceptable. The actual act of waiving immunity was a State matter, but it was for the head of a mission to give expression to that act. If he overstepped his powers, it was for his Government to deal with him; and it might even go so far as to repudiate his declaration.

47. Mr. KHOMAN agreed that immunities were granted to the sending State to enable its diplomatic representatives to discharge their functions. It was accordingly not only unnecessary but even dangerous to draw any distinction between a waiver of immunity by the head of the mission on his own behalf and a waiver with respect to a member of his mission. If such a distinction were drawn, the authorities of the receiving State might question the validity of a declaration of waiver.

48. Immunity applied both to civil and criminal jurisdiction, and he could not accept the distinction drawn by certain members between the two. In his view, the only occasions on which it was permissible to presume that immunity had automatically been waived, was when the diplomatic agent himself brought an action or voluntarily appeared in a civil court of the receiving State.

49. Mr. SPIROPOULOS, referring to the question of waiving immunity from civil jurisdiction, asserted that, if a diplomatic agent contested an action brought against him in the civil court of the receiving State, he was not entitled to claim immunity later when it was brought before a higher court. The Greek Court of Cassation had on one occasion rendered what was, in his view, an entirely erroneous judgment, allowing immunity to be claimed even when an action had reached the third Court.

50. Mr. MATINE-DAFTARY wondered whether, when a diplomatic agent made no move to claim immunity in a civil suit, it was incumbent on the judge to ask him or his Government whether he proposed to do so.

51. In his opinion, if, as was agreed, immunities were something enjoyed by the State, it was impossible to draw any distinction between criminal and civil jurisdiction. A point which he would like to have cleared up was whether diplomatic immunity resembled parliamentary immunity in that, when a person ceased to be a diplomatic agent, it was possible to bring an action against him retrospectively.

52. The CHAIRMAN said that a distinction should be made between acts carried out in the discharge of diplomatic functions and those which were not. In the first case, immunity from jurisdiction remained even after the cessation of the diplomatic function. He said that the point could be discussed under article 25, which dealt with the duration of privileges and immunities.

53. Sir Gerald FITZMAURICE said that, from the purely logical point of view, Mr. Matine-Daftary was probably quite right in claiming that there was no ground for distinguishing between civil and criminal jurisdiction in the matter of waiver of immunity, since both types of immunity were to some extent based on the same idea, that court proceedings against a diplomatic agent might prevent or impede the proper discharge of his diplomatic functions. In practice, however, States did make a distinction. He had, for instance, never heard it suggested that the court of the receiving State must obtain an express declaration from the Government of the diplomatic agent waiving his immunity in civil cases, even when the agent was a defendant. But in criminal actions, such a declaration might well be required.

54. While agreeing with Mr. Spiropoulos that a diplomatic agent bringing an action in a civil court could be regarded as having waived his immunity in advance, he could not share the view that the court might presume immunity to have been waived if the diplomatic agent failed to invoke it when a defendant. The diplomatic agent might be unaware of the action, or not have sufficient opportunity to invoke immunity. It was a moot point, and his own view might not be correct. He believed, however, that a distinction between criminal and civil jurisdiction in the matter of waiving immunity did exist in practice.

55. Mr. MATINE-DAFTARY pointed out that no distinction was drawn between criminal and civil jurisdiction in article 19 of the Havana Convention.

56. The CHAIRMAN observed that, since the Commission appeared to be unanimous in regarding the waiving of immunity as an act of State, he would put the first sentence of paragraph 1 to the vote, subject to redrafting by the Drafting Committee.

*The first sentence was adopted by 17 votes to none with 1 abstention.*

57. Mr. AGO pointed out that he had voted for the proposal on the understanding that it would be redrafted in a positive sense, as proposed by Mr. Amado, and that the words "the Government of" would be omitted.

58. Mr. PAL said that he had abstained, because he doubted the validity of the principle implied in the text voted upon. He would have preferred a wording on the lines of article 19 of the Havana Convention. The sanction of the sending State was certainly needed, but the question was whether that was enough; he had grave doubts whether the sending State alone could waive immunity. Further, the rights of waiver before and after an incident were on different footings.

59. Faris Bey EL-KHOURI said that he had voted for the proposal, only on the understanding that waiver of immunity applied only to specific legal proceedings. Nothing in the article indicated any limitation on the scope or duration of a waiver of immunity.

60. The CHAIRMAN put to the vote Mr. Tunkin's proposal to delete the second sentence of paragraph 1 (para. 36 above).

*The proposal was adopted by 8 votes to none with 8 abstentions.*

61. Mr. AMADO said that he had voted for the deletion of the sentence because it enunciated something which was self-evident.

62. Mr. BARTOS explained that he had been obliged to abstain because mere deletion of the second sentence did not make it clear that a declaration of waiver of immunity need not necessarily be made by the head of the mission. Had Mr. Tunkin proposed replacing the sentence by a provision stating that a formal declaration from the sending State was necessary, but without specifying through whom it was to be made, he would have voted for the proposal.

63. Mr. KHOMAN said that he had abstained because he considered a formal declaration to be necessary as evidence that immunity had been waived. He noted that many jurists were of that opinion, including Sir Cecil Hurst, who stated that "there must be some act to which the courts can look as embodying the consent of the sovereign of the country which the diplomatist represents".<sup>4</sup>

The meeting rose at 6.10 p.m.

## 406th MEETING

*Tuesday, 28 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]

<sup>4</sup> *International Law—The Collected Papers of Sir Cecil Hurst* (London, Stevens and Sons Ltd., 1950), p. 249.

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

#### ARTICLE 21 (continued)

1. The CHAIRMAN invited the Commission to consider paragraph 2 of article 21 and drew attention to the following alternative text submitted by Mr. François:

"The instigation of legal proceedings by a diplomatic agent shall preclude him from invoking immunity of jurisdiction in respect both of counter-claims directly connected with the principal claim and of appeals lodged against the decision rendered."

2. Mr. BARTOS said that, although the immunity of diplomatic agents from criminal jurisdiction was absolute, case law pointed to the almost general conclusion that diplomatic agents could waive their immunity from civil jurisdiction in various ways. In the United Kingdom, the United States of America and France, for instance, case law was unanimous in the view that acceptance by diplomatic agents of the jurisdiction clause in leases and hire contracts implied that they thereby automatically waived their immunity from civil jurisdiction. He was, therefore, opposed to the paragraph in question, because, in many cases, it was not the instigation of legal proceedings that precluded the diplomatic agent from invoking immunity but the prior act of entering into a contract.

3. Mr. MATINE-DAFTARY, recalling his previous statement (405th meeting, paras. 50 and 51), said that if, as he himself considered, immunity from jurisdiction belonged to the sending State, no distinction could be drawn in that regard between civil and criminal jurisdiction, and a diplomatic agent could waive immunity only with the consent of his Government. There was, however, no indication in the paragraph whether the instigation of legal proceedings could be undertaken only with the consent of the sending State. On a point of drafting, he saw no occasion for the inclusion in the Special Rapporteur's text of the words "germane to the principal claim". Any receivable counter-claim must be germane to the principal claim.

4. Mr. SPIROPOULOS wondered whether the Commission was on the right course. Having adopted in paragraph 1 the principle that a waiver of immunity must ultimately come from the sending State, it must be careful not to adopt any provision which appeared to contradict that principle. Paragraph 2 gave the impression that whenever a diplomatic agent appeared as plaintiff in a court in the receiving State, the judge must conclude that he had waived his immunity from civil jurisdiction. Paragraph 2 could, however, be reconciled with paragraph 1 if it was understood that a diplomatic agent must obtain his Government's consent before entering into litigation in the State to which he was accredited.

5. Mr. Bartos, by raising the matter of contracts, had introduced a further complication—the idea of the waiving of immunity in advance. There again the question arose whether the consent of the sending State was necessary before the agent could accept the jurisdiction clause, and whether the fact of its consent should be mentioned in the clause.

6. Mr. PAL said that the Commission must examine how far paragraph 2 was consistent with the principle adopted in paragraph 1. According to paragraph 1, it was for the sending State to waive immunity. If that

implied that the right of immunity rested with the State only, then it was difficult to see how the instigation of proceedings by a diplomatic agent could amount to a waiver of that immunity. Of course it was possible to read paragraph 1 as simply laying down who could exercise the right of waiver, irrespective of the question where the right of immunity rested. Similarly, paragraph 2 might be read as only enacting the consequences of submission to jurisdiction in the specified manner, irrespective of the logical consequences of considering where the right to immunity lay.

7. The Commission should clarify those matters in its comments on paragraph 1, and it would be better to specify in its comments on paragraph 2 that the right which belonged to the State was exercised by the diplomatic agent. Then, when he instigated proceedings, it was to be presumed that what he did was with the consent of the sending State, and hence with the consequence laid down in the paragraph.

8. There were two ways of submitting to jurisdiction; by initiating proceedings or by entering an appearance in answer to a suit and failing to invoke immunity. In the latter instance, as case law showed, it was possible to invoke immunity even at a later stage. It would be desirable not to pass over that part of the question in silence.

9. He was, however, not satisfied with the form in which paragraph 1 had been adopted, and he experienced the same misgivings with regard to paragraph 2.

10. Mr. VERDROSS said that Mr. Tunkin's description of the nature of diplomatic immunity (405th meeting, para. 32 et seq.) was quite correct. It was a right belonging to the State, the diplomatic agent being merely the person in whose favour the right was exercised. On the other hand, it was a regular practice for diplomatic agents to enter into contracts involving submission to civil jurisdiction. Case law was rich in examples of counter-claims against diplomatic agents, and of cases where costs had been awarded against them. In his opinion, the only way to avoid the apparent conflict between the principle and case law was to regard the State as the rightful owner (*ayant-droit*) of the right to immunity, who could give the holder (*titulaire*) the power to dispose of that right.

11. Mr. AGO remarked that the Commission should not be overawed by the principle that diplomatic immunity was a right belonging to the State of the diplomatic agent. While it was true that only a State had the right to call upon another State to respect the immunity of its diplomatic agents, it was also true that the immunity enjoyed was not an immunity concerning the State, but an immunity concerning the diplomatic agent himself, especially where acts committed by him as a private person were concerned.

12. In that respect, too, one should not forget the true meaning of immunity from jurisdiction. The fact that a diplomatic agent enjoyed that immunity did not mean that the jurisdiction of the receiving State would never be able to operate with respect to that agent, even when he himself had recourse to that jurisdiction. Enjoying immunity from jurisdiction meant simply enjoying the right not to be the object of judicial proceedings, in other words not being bound to appear as defendant in the courts in consequence of proceedings instituted against him. The immunity in question had never meant the inability to appear as plaintiff before the same courts.

Nor did the immunity mean that the courts were never competent to deal with cases in which a diplomatic agent was implicated.

13. Moreover, it was not only established practice that a diplomatic agent who appeared as plaintiff could not plead immunity if he was later the object of counter-claims; it was a perfectly logical deduction, not at all in contradiction with the principle.

14. Sir Gerald FITZMAURICE agreed with Mr. Ago that there was no contradiction between principle and practice. He also shared his doubts as to whether the Commission was on the right tack, at least as far as civil actions were concerned. Criminal proceedings were quite another matter. Never being instigated by individuals, they constituted, in a sense, an act of State, and the immunity of the diplomatic agent might therefore be regarded as appertaining to his State and not to him. In civil proceedings, however, the immunity of the diplomatic agent was, at least in part, of a personal character, though there might be a prior arrangement between him and his sending State regarding the waiver of it.

15. Most of the difficulties sprang from the fact that the Commission had not completed its task in connexion with paragraph 1. That paragraph could not be interpreted as meaning that only the State could invoke or waive immunity. It merely said that immunity could not be invoked if the sending State had waived it.

16. He thought that a new paragraph should be inserted after paragraph 1, specifying when immunity could be waived. Paragraph 2 would then fall into place as an example of how immunity was waived when a diplomatic agent instituted proceedings himself.

17. Mr. AMADO reaffirmed his conviction that the diplomatic agent was enveloped in absolute inviolability. If he waived his immunity, it could only be because his sending State had already agreed to do so. He could not agree with the arguments of Mr. Ago and Sir Gerald Fitzmaurice. He drew attention in that connexion to the statement in the Secretariat memorandum that authors were practically unanimous in considering that even when a waiver was made in due form, a subsequent court order against the diplomat could not be enforced by execution levied on his property or by constraint of his person (A/CN.4/98, para. 290).

18. Mr. YOKOTA, after recalling the Commission's decision on paragraph 1, said that waiver of immunity could be explicit or tacit. Paragraph 2 would be easier to follow if the Commission inserted a new paragraph listing the cases in which immunity could be presumed to have been tacitly waived.

19. He proposed the following text for that purpose:  
"Immunity from jurisdiction is presumed to be waived in the following cases:

(a) When a diplomatic agent enters an appearance to an action against himself and allows the action to proceed without pleading his immunity;

(b) When he himself brings an action under the jurisdiction of the receiving State."

20. Mr. LIANG, Secretary to the Commission, also felt that there was no contradiction between paragraphs 1 and 2, but for different reasons. To use a somewhat old-fashioned terminology, the State could be regarded as the subject of the right of immunity and the diplomatic agent as its object. It was a recognized practice in inter-

national law for the State to authorize its diplomatic agent to initiate legal proceedings and bear the consequences. It was, however, the duty of the head of mission in such cases to warn his Government in advance, and to desist from taking action if so instructed. The apparent contradiction between the two paragraphs was perhaps merely a matter of wording.

21. Mr. MATINE-DAFTARY agreed with Mr. Amado regarding the inviolability of the diplomatic agent. For a diplomat to be free to divest himself of his immunity in civil matters would be to bring him down to the level of the business-man. On the other hand, it was illogical to say that, because of his immunity, a diplomatic agent could not be cited as defendant, but could be a plaintiff.

22. Mr. HSU agreed that there was no contradiction between the two paragraphs. While considering the immunity of a diplomatic agent to be a right belonging to the State, he appreciated that case law supported the view that in certain cases the diplomatic agent might waive his immunity.

23. In paragraph 2 it must be assumed that whenever the diplomatic agent waived his immunity explicitly or tacitly, he did so with the consent of his Government.

24. Mr. TUNKIN recalled his previous statement regarding the basis of diplomatic immunity (405th meeting, para. 32 et seq.). The diplomatic agent enjoyed his immunity as a public official and not as a private person, even though his immunity covered his acts as a private person. That being so, he could not dispose of his right of immunity at his own discretion.

25. It might, however, be possible to find a legal construction of paragraph 2 which would prevent its conflicting with paragraph 1. The remarks of Mr. Verdross and Mr. Yokota deserved careful consideration in that connexion. Perhaps the first part of the paragraph could be amended to read:

“The instigation of legal proceedings in civil courts by a diplomatic agent shall be considered as waiving his immunity and shall preclude . . .”

26. Mr. PAL considered that the right of immunity was shared by the diplomatic agent and did not belong solely to the State. Consequently, he failed to see how the State could unilaterally waive its agent's immunity. It would be more in accordance with the basic principle to state that the Government waived immunity with the concurrence of the diplomatic agent.

27. He agreed, however, that in strict logic there was no contradiction between paragraph 2 and the unqualified principle in paragraph 1, which had been adopted by the majority of the Commission and which gave the diplomatic agent no personal right of immunity at all.

28. Mr. AGO explained that he had not intended to imply that a diplomatic agent had the right to waive his immunity on his own authority. The waiver was always on the authority of the State, as it was an international right of the State which was being waived. However, nothing was more natural than for the waiver to be made, on behalf of the State, by an agency of the State, namely, the diplomatic agent and, especially, the head of a mission.

29. Regarding counter-claims in particular, he would like to point out that certain difficulties probably arose from the fact that paragraph 2 was not in its

proper content. It really belonged to the exceptions to immunity from jurisdiction, cited in article 20, paragraph 1. He drew attention in that connexion to article 12 of the 1929 resolution of the Institute of International Law<sup>1</sup>, where counter-claims were listed with real actions as matters in respect of which immunity could not be invoked.

30. Mr. Ago suggested inserting the Special Rapporteur's text on that point, appropriately redrafted, as subparagraph (c) of article 20, paragraph 1.

31. Mr. EL-ERIAN submitted that immunity belonged neither to the sending State nor to the diplomatic agent but to the diplomatic function. Practice during the last decade supported that view. Examples were furnished by the Convention on the Privileges and Immunities of the United Nations—in section 14, dealing with the privileges and immunities of representatives of Members,<sup>2</sup> and in section 20, dealing with those of officials.<sup>3</sup> Almost identical provisions were to be found in sections 16 and 22 of the Convention on the Privileges and Immunities of the Specialized Agencies<sup>4</sup> and in articles 14 and 23 of the Convention on Privileges and Immunities of the League of Arab States, adopted in 1953 by the Council of the Arab League.

32. The conventions in question also shed light on the practice with regard to the authority empowered to waive immunity. According to the Convention on the Privileges and Immunities of the United Nations, the immunity of representatives of Members could be waived only by States themselves, that of the Secretary-General by the Security Council alone, and that of officials by the Secretary-General. The provision thus ran parallel to the principle that the sending State alone could waive the immunity of the head of the mission, but that the head of a mission acted in the case of subordinate members of the mission.

33. He urged the Commission to adopt a provision on the same lines in order to bring article 21 into line with the existing practice of States.

34. The CHAIRMAN, speaking as a member of the Commission, pointed out that although, under the Charter of the United Nations, the judges of the International Court of Justice enjoyed diplomatic privileges and immunities, officials of the United Nations did not. The latter merely enjoyed those “necessary for the independent exercise of their functions in connection with the Organization”. Those were not, therefore, diplomatic immunities. For that reason it would be wrong for the Commission to base its work of codification on the relevant provisions of the conventions quoted by Mr. El-Erian.

35. Mr. SPIROPOULOS fully agreed with the Chairman. He was somewhat surprised to see that the debate had centred on the question of the basis of diplomatic immunity, a subject on which there was a vast amount of literature and which he thought was largely cut and dried. Immunity was granted in order to ensure that a diplomatic agent should not be prevented from discharging his functions. In the case of criminal jurisdiction, the diplomatic agent could not waive his immunity himself, because the right did not belong to him personally,

<sup>1</sup> Harvard Law School, *Research in International Law, I. Diplomatic Privileges and Immunities* (Cambridge, Mass., 1932), p. 187.

<sup>2</sup> United Nations, *Treaty Series*, Vol. I, 1946-1947, p. 22.

<sup>3</sup> *Ibid.*, p. 26.

<sup>4</sup> United Nations, *Treaty Series*, Vol. 33, 1949, pp. 272 and 276.

but to the State he represented. In the case of civil jurisdiction, the practice was less uniform.

36. Mr. Spiropoulos suggested the inclusion in article 21 of a provision to the effect that, in civil proceedings, immunity could be presumed to have been waived when a diplomatic agent appeared as a defendant, or when a counter-claim was lodged against him. A waiver of immunity from criminal jurisdiction could never be presumed.

37. The only other question to be decided was whether an explicit or tacit waiver of immunity from civil jurisdiction was to be regarded as final, as Sir Gerald Fitzmaurice appeared to think, or whether the sending State could intervene and say that its diplomatic agent had been ill-advised.

38. Mr. KHOMAN suggested that, apart from the exceptions cited in article 20 where immunity from civil jurisdiction could not be invoked, when a diplomatic agent tacitly or explicitly waived immunity in a civil action it was because the condition that immunity was necessary for the discharge of his functions did not apply in that instance. Immunity from civil jurisdiction could be waived by a diplomatic agent, and the State could allow its agent to go to court. But the diplomatic agent was always accountable to his Government, and if the outcome of the action was such as to render him unable properly to discharge his functions in the receiving State, he could be recalled.

39. He agreed with Mr. Yokota and Sir Gerald Fitzmaurice that there was a link missing between paragraph 1 and paragraph 2. Perhaps Mr. Spiropoulos's proposal to include a provision stating when a waiver of immunity could and could not be presumed, would supply it.

40. Sir Gerald FITZMAURICE said he was in complete agreement with Mr. Spiropoulos. The Secretary had doubtless had much the same considerations in mind when he had distinguished between an express waiver and an implied waiver.

41. The present confusion was, he thought, due in part to the Commission's failure to differentiate between a diplomatic agent's position *vis-à-vis* his Government and his position *vis-à-vis* the receiving State's courts. As a service matter, it was probably true that a diplomatic agent could never waive his immunity without his Government's consent. That did not mean, however, at any rate as far as civil cases were concerned, that the receiving State's court was under an obligation to ascertain whether a diplomatic agent had obtained his Government's consent before submitting to the receiving State's jurisdiction. He agreed that in criminal cases the position was somewhat different.

42. With those considerations in mind, he proposed the following new paragraph for insertion after the abridged version of paragraph 1 which had been adopted in principle at the previous meeting:

"2. In criminal proceedings, waiver must be effected expressly by the Government of the sending State through the appropriate channels. In civil proceedings, waiver may be express or implied. An implied waiver is presumed to have occurred if the member of the mission submits voluntarily to the jurisdiction of the Court, either by himself initiating the proceedings, or by appearing in them as defendant without making any objection to the jurisdiction of the Court."

43. Mr. SCELLE said he marvelled at the hesitation which most members of the Commission had displayed in a field that was admittedly full of difficulties but which was assuredly not new, and regarding which he would have expected to find a general measure of agreement.

44. Although he could accept the addition proposed by Sir Gerald Fitzmaurice, he could not agree that the Special Rapporteur's draft was defective. On the contrary, even if the wording could be improved, its general approach was very logical and in accordance not only with the necessities of diplomatic life but with the oldest rules of international law.

45. There was no dispute about the principle laid down in paragraph 1: it was universally agreed that immunity from jurisdiction belonged to the sending State, and not to its diplomatic agent. It was also universally agreed, and indeed obvious, that the scope of jurisdictional immunity differed, depending on whether the proceedings were civil or criminal.

46. The difficulty appeared to relate rather to paragraph 2, but in his view that paragraph was a necessary and logical counterpart to paragraph 1. Indeed he saw no objection to deleting the last five words, "germane to the principal claim", since it was of the very essence of a counter-claim that it was germane to the principal claim, and it seemed clear that no-one could waive immunity for the purpose of making a claim, and at the same time invoke immunity in respect of what was no more than a legitimate defence to it.

47. He could not altogether agree with those who argued that, even though a diplomatic agent had accepted the jurisdiction of the local courts in a civil case, the sending State remained free to over-rule him. In his view, the waiver of immunity was an irrevocable act. Cases where a diplomatic agent blundered in waiving immunity from jurisdiction were no different, as regards the relation of cause to effect, from cases where he blundered with regard to other, possibly weightier, matters; in neither case could the annoyance or embarrassment caused to his Government have the effect of expunging his blunder. To allow it to do so would be contrary to the principle of equality of States. The head of a diplomatic mission was, after all, the embodiment of the sending State, and had a heavy responsibility to bear; if he made too many blunders, he would be recalled, but it would be too easy if his acts remained without effect simply because they were based on an error of judgment, or a wrong appraisal of the situation.

48. Mr. EL-ERIAN said that he felt obliged to clarify his position, in view of the observations of the Chairman and Mr. Spiropoulos. He entirely agreed with the Chairman that the Commission should not draw analogies from the situation of international organization as regards immunities in cases where such analogies were inappropriate. There was, of course, a difference between diplomatic immunities and the immunities of international organizations, but when he had quoted the relevant provisions of the conventions governing the privileges and immunities of the international organizations, he had done so as evidence of the current practice of States. In the, admittedly exceptional, cases where there was a resemblance between the rules governing the immunities of international organizations and the rules governing diplomatic immunities, it was surely neither wrong nor unprecedented to draw an analogy from one to the other. In its Advisory Opinion of 11 April 1949 on the question of reparations for injuries suffered in the serv-

ice of the United Nations, the International Court of Justice, for example, had already drawn a similar analogy, arguing that international organizations to some extent enjoyed an international personality, for the purpose of carrying out the tasks assigned to them.<sup>5</sup>

49. Hé agreed with Mr. Spiropoulos that the Commission's primary task was the codification and progressive development of international law, and that in carrying out that task it was not bound by the text of any convention; but, in its work of codification, it was surely obliged to pay some heed to conventions as reflecting a not unimportant part of the current practice of States. Mr. Spiropoulos himself often quoted, for example, the Havana Convention, the Harvard Law School draft and the 1929 resolution of the Institute of International Law, in support of his arguments.

50. The question at issue was not an academic one. It was a question of principle, underlying many separate provisions in the Commission's draft. If the Commission had been working in the dim and distant past, it would have been quite natural for it to devote most of its efforts to establishing diplomatic privileges and immunities on a firm basis; but diplomatic privileges and immunities had been established and universally recognized for many long years, and, if the Commission was to make any contribution to the subject, it could only do so, in his view, by adopting a new point of departure, one which was consistent with present-day theory and practice in other fields. It was for that reason that he had been so much concerned that the Commission should lend the weight of its authority to the modern, functional or "demands of the office" theory of the basis of diplomatic immunities.

51. Mr. El-Erian did not, however, insist on his proposal. It was perhaps unnecessary to formulate the underlying principle, provided a satisfactory solution was found for the problems that arose in practice. His only doubt regarding Sir Gerald's proposal was whether an implied waiver should be presumed to have occurred if a diplomatic agent, who was appearing as a defendant in a civil case, made no objection to the jurisdiction of the court. In his view there was, in the present instance, only one recognized exception to the principle that a right could not be abandoned unless an explicit statement was made to that effect, and that was the other case referred to by Sir Gerald Fitzmaurice, namely, where a diplomatic agent himself initiated the proceedings.

52. Faris Bey EL-KHOURI felt that the whole question was now very clear. In order to help the Commission decide the only issue of principle on which it appeared to be divided, he would point out that the immunities enjoyed by a Member of Parliament could not be waived by the Member himself but only explicitly by Parliament as a whole, since it was in Parliament as a whole, rather than in its individual Members, that immunity was vested. Since the analogy between parliamentary and diplomatic immunities was perfectly valid, he concluded that a diplomatic agent's jurisdictional immunity could only be waived by the sending State, and then only explicitly, never tacitly.

53. Mr. AGO felt that the Commission was nearing the stage where it could refer the article to the Drafting Committee. His only objection to the text proposed by Sir Gerald Fitzmaurice (para. 42 above), the third sen-

tence of which was identical in substance with Mr. Yokota's amendment (para. 19 above), was that immunity from civil jurisdiction had always been understood to mean only that the person concerned could not be sued by a third party, never that he could not himself initiate proceedings before the court. The question of an implied waiver of immunity did not therefore arise when the diplomatic agent himself initiated proceedings by making himself a plaintiff before a court of the receiving State. There could be no question of waiving immunity where it had never existed.

54. For the reason that he had already given, paragraph 2 of the Special Rapporteur's text could be deleted in the context of article 21. Counter-claims should be referred to under article 20, paragraph 1, as another case with regard to which diplomatic agents did not enjoy jurisdictional immunity.

55. Mr. BARTOS said that, although in principle he had no objection to the text proposed by Mr. Yokota, he noted that, like the Special Rapporteur's text, it failed to distinguish between civil and criminal proceedings; but he assumed that Mr. Yokota had only civil proceedings in mind. Moreover, Mr. Yokota's text—as, for that matter, Sir Gerald's, which in general he preferred—did not make clear when immunity should be waived or invoked. In his own view, it was essential that the matter should be finally settled before the proceedings began; if immunity had been waived by the diplomatic agent himself, it could not subsequently be invoked by his Government once proceedings had begun. On the other hand, a waiver could take a specific form, relating to particular proceedings, or a general form, as when it took place in advance, before any question of proceedings arose.

56. There was one other matter which was not referred to in either text, but which was of considerable importance in practice, namely, the question whether the court could presume that the head or member of a mission who waived immunity had been authorized to do so by his Government or by the head of his mission respectively, or whether the court was bound to make enquiries before proceeding with the case. If the Commission was not in agreement on that question, it could only pass over it in silence, though that would be regrettable, in view of the disagreement and confusion on the point.

57. The CHAIRMAN, speaking as a member of the Commission, said that, in his view, the sending State must be able to nullify a waiver of immunity by one of its diplomatic agents, not only because that was current practice but also because it was in accordance with the fundamental principle that immunity was conferred in the interest of the State and not in the interest of the diplomatic agent himself, and because there was always the possibility that the diplomatic agent might waive immunity in a case which really bore not only on his private acts but on the official acts of the sending State.

58. With regard to paragraph 2 of the Special Rapporteur's text, Mr. Zourek preferred the amended version proposed by Mr. François. He agreed with Mr. Ago, however, that the question of counter-claims should be referred to in the article on immunity from jurisdiction (article 20), as in the resolution adopted in 1929 by the Institute of International Law.<sup>6</sup> In his view, it was essential to retain the words "germane to the principal claim", since in some countries counter-claims could relate to entirely separate matters.

<sup>5</sup> *I.C.J. Reports 1949*, p. 174.

<sup>6</sup> Harvard Law School, *op. cit.*, pp. 186 and 187.

59. Mr. EDMONDS was of the opinion that the Commission had strayed somewhat from the basic principle. Almost all members agreed that the basis of diplomatic immunities was the necessity for the mission to carry on the diplomatic business of the sending State. He understood that the Commission had adopted paragraph 1 on the understanding that it would be cast in a positive rather than a negative form, so as to state that immunity from jurisdiction could only be waived with the consent of the sending State. That being so, the only question the Commission had still to deal with was the manner in which such consent on the part of the sending State was to be established to the satisfaction of the court of the receiving State.

60. Mr. AMADO said that a State, or a diplomatic agent as the emanation and embodiment of a State, had never previously been regarded as forfeiting immunity merely as a result of instigating legal proceedings. And indeed, if a State wished to defend its interests in the courts of another State, there was no reason why it should forfeit its immunity. The Commission should bear in mind the fact that adoption of Sir Gerald Fitzmaurice's text would entail an innovation in international law.

61. Sir Gerald FITZMAURICE said that he agreed that, strictly speaking, when a State or a diplomatic mission instigated legal proceedings, no question of a waiver of immunity was involved. He was prepared to modify his text accordingly.

62. Mr. SPIROPOULOS said that, in his view, the present wording of Sir Gerald Fitzmaurice's proposal was more correct. A diplomatic agent who initiated civil proceedings made himself *ipso facto* subject to the jurisdiction of the receiving State, but his own State might have serious objections to his doing so. It alone could waive his immunity, and a waiver of immunity was definitely implied.

63. The CHAIRMAN suggested that the Commission vote on the additional paragraph proposed by Sir Gerald Fitzmaurice (para. 42 above), leaving it to the Drafting Committee to modify the text as necessary.

64. It was perhaps unnecessary to vote on Mr. Yokota's amendment (para. 19 above), the substance of which, as had already been pointed out, was identical with that of the third sentence in Sir Gerald's text.

65. Mr. YOKOTA indicated his assent.

66. Faris Bey EL-KHOURI requested a separate vote on the second and third sentences of Sir Gerald Fitzmaurice's text.

*The first sentence of the text submitted by Sir Gerald Fitzmaurice was adopted by 18 votes to none with 1 abstention.*

67. Mr. BARTOS, explaining his vote in favour of the text, said that he had no objection to the first sentence but only to the remainder.

*The second and third sentences were adopted by 17 votes to none with 2 abstentions.*

68. Mr. MATINE-DAFTARY, referring to paragraph 2 of the Special Rapporteur's text and Mr. François's amendment to it (para. 1 above), said there was no justification for mentioning only one of the many procedural incidents that might arise during hearing of the case—counter-claims, and only one of the other tribunals it might be referred to before being finally settled—the Court of Appeal.

69. Mr. BARTOS thought that Mr. Matine-Daftary's remarks served to show that it would be prudent to pass over all such questions as that of counter-claims, which in any case had no bearing on the question of waivers, as Mr. Ago had already demonstrated.

70. Mr. AGO said that, in his view, either the text proposed by the Special Rapporteur, or that of article 12, paragraph 2, of the 1929 resolution of the Institute of International Law, was preferable to the text proposed by Mr. François, which brought two different matters under a single head.

71. The CHAIRMAN proposed that the Commission decide in principle to include a provision relating to counter-claims, it being understood that the Drafting Committee would consider where to place such a provision, and what other matters, if any, should be included in it.

*The Chairman's proposal was adopted unanimously.*

The meeting rose at 1.10 p.m.

### 407th MEETING

*Wednesday, 29 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 21 (continued)

1. The CHAIRMAN invited the Commission to continue the consideration of article 21, relating to the waiving of immunity. The only paragraph that had not yet been considered was paragraph 3, which laid down a principle that was, he thought, universally recognised.

*Paragraph 3 was adopted in principle, subject to consideration by the Drafting Committee.*

ARTICLE 22

2. The CHAIRMAN suggested that, even if all the members of the Commission could not entirely agree with what the Special Rapporteur had said in his commentary regarding the basis of exemption from taxation, namely, that it was an immunity accorded by courtesy, they might be able to agree that paragraph 1 constituted a reasonable minimum of exemption. It was, of course, to be understood that exemption was always granted subject to reciprocity.

3. In his view, the purpose of the draft was of particular importance in connexion with articles 22 and 23, since, if it was drawing up a convention, the Commission naturally enjoyed greater freedom of action than if it was merely stating the existing law.

4. Mr. François, who unfortunately was still indisposed, had submitted a proposal to the effect that the words "of foreign nationality" be deleted from paragraph 1 and that paragraph 2 be deleted altogether.

5. Mr. TUNKIN recalled that, in connexion with article 20, paragraph 2, the Commission had envisaged at its 403rd meeting the possibility of devoting a separate article to the whole question of the privileges and

immunities enjoyed by diplomatic agents who were nationals of the receiving State. If that were done, paragraph 2 of article 22, and the words in paragraph 1 whose deletion Mr. François proposed, were clearly unnecessary. He thought therefore that Mr. François's proposal could be referred to the Drafting Committee.

6. The CHAIRMAN and Mr. AGO expressed agreement with Mr. Tunkin's view.

7. Sir Gerald FITZMAURICE pointed out, however, that in paragraph 2 the emphasis was on the emoluments which the diplomatic agent received by reason of his office, in other words, on the salary he received from the sending State. Depending on the use which the receiving State made of the discretionary power that the majority of the Commission apparently desired to vest in it under the proposed article relating to diplomatic agents who were its nationals, the effect of the deletion of paragraph 2 of article 22, might be to infringe the principle that no Government could tax another Government's funds; it was probably in order to safeguard that principle that the Special Rapporteur had inserted the paragraph. In Sir Gerald's view, the paragraph should be retained, whatever the decision on the current provision in paragraph 2 of article 20.

8. Mr. EL-ERIAN said that, in his view, diplomatic agents who were nationals of the receiving State should not enjoy exemption from taxation on their salaries. Such exemption could not be regarded as one of the minimum immunities which certain members of the Commission had urged that all diplomatic agents must enjoy, irrespective of their nationality, in order to be able to perform their diplomatic functions. Moreover, if their salaries were not taxed, nationals of the receiving State who were working for a foreign diplomatic mission would be in a rather privileged position compared with their compatriots working, for example, in their own Foreign Office. For those overriding reasons, he felt that the case under discussion should be regarded as an exception to the principle referred to by Sir Gerald Fitzmaurice: that seemed perfectly reasonable, seeing that it was the exception for diplomatic agents to be nationals of the receiving State.

9. He was therefore in favour of deleting paragraph 2, or at any rate deferring further consideration of it until the Commission had decided the general question of principle regarding the immunities to be enjoyed by diplomatic agents who were nationals of the receiving State.

10. Mr. AGO said that he would have no objection to deleting paragraph 2 and the words "of foreign nationality" from paragraph 1, on the clear understanding that that did not imply that the Commission was opposed to the rule laid down in paragraph 2; the substance of that rule could, if the Commission so decided, be re-introduced elsewhere, in connexion with the provision which the Special Rapporteur had proposed in place of the current paragraph 2 of article 20 (405th meeting, para. 16).

*On that understanding Mr. François's proposal (para. 4 above) was adopted.*

11. The CHAIRMAN invited comments on the four exceptions to the general principle of exemption from taxation listed in sub-paragraphs (a) to (d) of paragraph 1.

12. Referring to sub-paragraph (a), Mr. BARTOS pointed out that in many countries customs duties were

regarded as indirect taxes. He suggested, therefore, that in order to avoid what would, for such countries, appear to be an obvious inconsistency in the text, the words "other than the customs duties referred to in article 23" be inserted after the words "indirect taxes".

13. Mr. KHOMAN pointed out that there were certain other indirect taxes from which diplomatic agents were commonly exempted. In the United States of America, for example, they were exempt from the government tax on petrol.

14. Mr. TUNKIN recalled that, after considering his proposal for insertion of the words "and representing a source of income" after the words "receiving State" in paragraph 1(a) of article 20 (402nd meeting, para. 4), the Commission had adopted an alternative amendment suggested by Sir Gerald Fitzmaurice (*Ibid.*, para. 25). A similar amendment should be made in sub-paragraph (b) of paragraph 1 of article 22.

15. With reference to sub-paragraphs (b) and (c), Mr. AGO pointed out that diplomatic agents were commonly subject to inheritance taxes in countries where such taxes were levied. Those taxes were not taxes on income, and applied to movable as well as immovable property. Some addition might, therefore, have to be made to sub-paragraphs (b) and (c) in order to cover them.

16. He also wondered whether there were, in fact, any cases of "dues" being levied on immovable property.

17. The CHAIRMAN thought that stamp duty was normally regarded as a "due", at least in Central European countries.

18. Mr. AGO said that in certain countries stamp duty was regarded as a tax.

19. The CHAIRMAN suggested that that point could be considered by the Drafting Committee.

20. With regard to sub-paragraph (d), Mr. AGO expressed the view that the wording employed could be dangerous. According to certain theories, any tax or due could be said to represent, either directly or indirectly, remuneration for services actually rendered. If the Commission could not find a more restrictive wording, it should at least explain clearly in the commentary what it meant.

21. The CHAIRMAN recalled that the Commission had decided to delete the words "of foreign nationality" in paragraph 1, and the whole of paragraph 2 of the text submitted by the Special Rapporteur for article 22.

22. He put to the vote the text as thus amended, on the understanding that the Drafting Committee would consider the various points raised.

*The text was adopted by 15 votes to none, with 3 abstentions.*

23. The CHAIRMAN announced that Mr. François had also proposed the addition of the following two paragraphs to article 22.

"3. A diplomatic agent shall not be subject, in respect either of himself or of his staff, to the legal provisions governing social insurance.

4. A diplomatic agent shall not be exempt from succession duties levied by the receiving State on inheritances in its territory."

24. With regard to the first additional paragraph proposed by Mr. François, Mr. AMADO said he agreed in principle, as far as nationals of the sending State were concerned, but that the question of diplomatic agents who were nationals of the receiving State again arose in that connexion. Diplomatic members of the Brazilian Embassy in London, for example, paid the National Health Insurance contributions for all United Kingdom nationals whom it employed, since otherwise they might not be eligible for the benefits.

25. The CHAIRMAN agreed that the proposed provision could not apply to nationals of the receiving State.

26. Mr. BARTOS said that practice was threefold. In the first place, social insurance contributions were not paid at all, but that was highly undesirable, for the reason mentioned by Mr. Amado. Secondly, the sending State formally assumed responsibility for the contributions, but even in such cases there were difficulties—the main one being immunity from execution—and the receiving State often paid after all. Finally, the British system, which had also been adopted by the Yugoslav Government as the only one that worked satisfactorily, made the payment of contributions the personal responsibility of all locally-recruited embassy staff members who, as nationals of the territorial State, were directly responsible for their social insurance—the diplomatic mission or the sending State not assuming any legal obligations concerning social insurance. However, difficulties arose with that system also. Some States considered that their locally-recruited personnel enjoyed immunity from payment of contributions, such contributions being duties on income. Mr. Bartos was of the opinion that that contention had no legal basis. The receiving State undertook the responsibility and the expenses arising from effective payments by all its nationals, including the expenses for those of its nationals temporarily engaged in the service of foreign missions. Such a State ordered its nationals to pay social insurance contributions, and entered into a direct legal relationship with them. Foreign missions were not asked to do anything, and therefore they did not have the right to interfere with the implementation of the social insurance system, because such interference would represent not only a violation of the principle of non-intervention in the internal affairs of other States, but also an obstacle to the carrying out of a humanitarian activity.

27. Mr. AGO proposed that no provision be inserted along the lines of the first additional paragraph proposed by Mr. François, inasmuch as the matter was not really one of immunities. It was the duty of the head of a mission, to see that proper provisions to meet old age, sickness or disability were made for his staff, and particularly his junior staff. Mr. François's text might be taken to suggest that that was not his concern.

28. Mr. TUNKIN felt that Mr. Amado had raised a perfectly valid point. According to the laws of the Soviet Union, social insurance was compulsory, but the entire contribution was paid by the employer. When a foreign diplomatic mission engaged a Soviet national, therefore, a special provision was inserted in his employment contract that the mission undertook to pay his social insurance contribution.

29. Mr. Tunkin accordingly agreed that, if the Commission wished to insert a provision of the kind proposed by Mr. François, it should make clear that it applied only to foreign nationals. Like Mr. Ago, how-

ever, he would prefer that the provision should be omitted altogether.

30. Mr. SPIROPOULOS said he shared the views expressed by Mr. Tunkin.

31. The CHAIRMAN put to the vote Mr. Ago's proposal not to include any provision along the lines of the first additional paragraph proposed by Mr. François.

*The proposal was adopted by 13 votes to 2 with 3 abstentions.*

32. With regard to the second additional paragraph proposed by Mr. François (para. 23 above), Mr. MATINE-DAFTARY said that, in Iran, an inheritance was regarded as income, and so would be covered by paragraph 1(c). If that was not so in other countries, however, he agreed that the proposed addition was necessary.

33. Mr. VERDROSS said that the second additional paragraph prepared by Mr. François undoubtedly filled a gap.

34. Mr. AMADO agreed, but suggested that, in the French text at least, the wording could be made clearer.

35. Sir Gerald FITZMAURICE suggested that the provision could very well be made an additional subparagraph of paragraph 1, since in most countries succession duties were regarded as a form of tax.

36. The CHAIRMAN suggested that the Commission decide in principle to insert a provision to the same effect as the second additional paragraph proposed by Mr. François, it being left to the Drafting Committee to prepare a suitable text.

*It was so agreed.*

#### ARTICLE 23

37. The CHAIRMAN pointed out, that, in the opinion of the Special Rapporteur—as stated in the commentary to the draft—national legislations differed greatly on the question of exemption from customs duties and inspection, but the rule which he proposed constituted a reasonable minimum.

38. Mr. AMADO observed that paragraph 1 left the position undefined with regard to a great many articles, such as wines, spirits and tobacco. He agreed, however, that exemption in respect of such articles could only be a matter of international courtesy.

39. Mr. BARTOS agreed that the Commission could certainly go no further than the Special Rapporteur had proposed. With regard to the articles mentioned by Mr. Amado, for example, some countries imposed no restriction, others allowed a duty-free monthly quota, others made the head of the mission sign a statement that the articles were intended for personal consumption only. Even as regards personal effects, some countries distinguished between what the diplomatic agent brought in when he arrived and what he had sent to him afterwards. In the interests of the progressive development of international law, however, he thought the Commission could take the modest step forward proposed by the Special Rapporteur.

40. Mr. EDMONDS wondered what distinction there was between articles for the use of the mission and effects intended for the diplomatic agent's establishment. In its broadest sense, the mission's function might

well include "the establishment" or the home of the diplomatic agent. He also pointed out, with regard to paragraph 2, that a distinction was often made between accompanied and unaccompanied baggage; the Commission should therefore specify, either in the article itself or in the commentary, whether paragraph 2 referred to accompanied and unaccompanied baggage, or to unaccompanied baggage only.

41. Mr. VERDROSS said that, although the whole question of exemption from customs duties and inspection had long been settled by courtesy, there had for some time been a tendency in that field to transform practices established as a matter of courtesy into rules of international law. The Commission must take that tendency into account, and he was therefore in favour of the Special Rapporteur's text.

42. Mr. SPIROPOULOS agreed, as far as paragraph 1 was concerned, although he shared Mr. Edmonds' view that sub-paragraph (d) largely duplicated sub-paragraph (a). On the other hand, the question of exemption from inspection was still dealt with as a matter of courtesy. If, however, that question was going to be regulated in the Commission's draft, he did not think any distinction should be made between accompanied and unaccompanied baggage.

43. The CHAIRMAN thought that by "effects intended for his establishment" were meant the furniture and fittings intended for the diplomatic agent's private residence.

44. Mr. TUNKIN said that the whole subject was regulated partly by international law and partly by international courtesy. He agreed with Mr. Verdross, however, that even for those exemptions which were still regarded as a matter of international courtesy, there was nowadays a tendency towards formulating rules of law. He was in favour of the Commission's taking a further step in that direction, as proposed by the Special Rapporteur.

45. Sir Gerald FITZMAURICE thought that, except as regards sub-paragraph (a), paragraph 1 of the text proposed by the Special Rapporteur went beyond existing international law, though the exemptions it listed were all generally granted in practice.

46. In an article printed in the *British Year Book of International Law*, the author, after referring to the wide divergence between the laws of the various States with regard to exemption of diplomatic agents from customs duties and inspection, continued:

"Despite the variations mentioned, however, and although the exemptions are by no means essential for the successful functioning of a mission, the practice of granting them is now so widespread and so firmly established that one might be tempted to ask whether the custom of granting concessions has not hardened into a rule of law. On the other hand, it is difficult to see how it can justly be asserted that liability to pay customs dues is a hindrance to a diplomatic representative and, that being the case, the exemptions must be regarded as being still what they originally were—concessions based on international comity or courtesy."<sup>1</sup>

47. In his view, that conclusion was borne out by all that had been written on the subject. As he had already

indicated, the only exception was as regards articles for the use of the mission (sub-paragraph (a) of paragraph 1), where exemption was essential to the proper functioning of the mission.

48. For those reasons, Sir Gerald was somewhat reluctant to agree to paragraph 1 as it stood, but if the majority of the members of the Commission were in favour of retaining it, it should at least be made clear in the commentary that the Commission was deliberately proposing an innovation on the ground that the practice was very widely observed.

49. Mr. KHOMAN said that, in general, he agreed with Sir Gerald Fitzmaurice. The difficulty in which the Commission found itself was, he thought, due to its trying to include a list of exemptions rather than a general formula similar to that in article 18, paragraph 3, of the Havana Convention.<sup>2</sup>

50. Moreover, the text proposed by the Special Rapporteur appeared to overlook the fact that exemption was almost always granted subject to reciprocity and to the proviso that articles and effects admitted duty free should not be sold, at any rate within a specified period of time.

51. Finally, the text of paragraph 2 appeared to run counter to paragraph 1, in which many of the articles referred to were indeed "goods liable to import duty".

52. Mr. YOKOTA said that, though he agreed that certain of the exemptions from customs duties and inspection could nowadays be regarded as rules of international law, in many respects current practice was still based on international courtesy. The Commission should therefore be chary about extending the scope of the article unduly.

53. In particular, he was extremely doubtful whether it could be regarded as a rule of international law that the personal effects of the servants of diplomatic agents should be exempt from customs duties. He therefore proposed the deletion of the words "and servants" in paragraph 1 (c).

54. The CHAIRMAN, speaking as a member of the Commission, said that, although the practice of exempting from customs duties the articles and effects referred to in paragraph 1 could not yet be said to constitute a rule of international law, it was so wide-spread that if the Commission was preparing a convention, there was no reason why it should not propose that the practice be made a rule of international law, provided the commentary made clear that it was an innovation which was proposed.

55. He also agreed with Mr. Khoman that it should be clearly indicated in the commentary that the exemptions were granted subject to reciprocity.

56. Mr. SPIROPOULOS agreed that the Commission was at liberty either to leave the question to be dealt with largely as a matter of international courtesy, as in the past, or to formulate rules of international law with regard to it.

57. There could, he thought, be no doubt that it was already a rule of international law that articles for the use of the mission should be exempt from customs

<sup>1</sup> A. B. Lyons, "Personal Immunities of Diplomatic Agents", *The British Year Book of International Law, 1954* (London, Oxford University Press, 1956), p. 326.

<sup>2</sup> Convention regarding Diplomatic Officers, signed at Havana on 20 February 1928. See League of Nations, *Treaty Series*, Vol. CLV, 1934-1935, No. 3581, p. 269.

duties. Even if it was not a rule, it was at least universal practice that the diplomatic agent's personal effects should also be exempt. And if the Commission was going to adopt the text which the Special Rapporteur proposed for article 24, paragraph 3, it could not logically refuse exemption for the personal effects of the diplomatic agent's family and such private servants as he brought with him from the sending country; that, too, would accord with current international practice. The position as regards locally recruited servants was, as Mr. Yokota had said, somewhat different. Finally, as regards the furniture and fittings intended for the diplomatic agent's personal residence, it could be reasonably argued that he could not exercise his diplomatic functions without them, and that he could not afford to pay duty on them, as he might be required to do, in all the countries to which he might be sent in the course of his career; the exemption could therefore be regarded as necessary for the exercise of the diplomatic function. In all those respects, therefore, current practice could validly be made the basis of international rules of law.

58. The position was quite different with regard to wines and spirits, tobacco, and, for example, private motor cars—though in that respect, too, a case could perhaps be made out on the ground that the motor car was as necessary to the diplomatic agent as many articles of his furniture—and the matter should be left to international courtesy, as in the past.

59. Mr. LIANG, Secretary to the Commission, suggested that bilateral treaties often contained very detailed provisions regarding the baggage and effects of diplomatic agents. In particular, a very sensible distinction was drawn between what was brought with the mission or member of mission on arrival, and what was brought in later. As far as effects intended for the establishment of a diplomatic agent were concerned, there was not much doubt that they were normally imported free of duty. Indeed, the officials of the United Nations and specialized agencies enjoyed such facilities on first installation. In practice, however, many other articles were admitted duty-free, provided the mission certified that they were for the agent's personal use only.

60. Mr. AGO agreed with Mr. Spiropoulos and the Secretary. The provisions relating to diplomatic agents were perhaps rather too limited in scope, and he would like to see the category "articles for his personal use" added to the two other categories "personal effects" and "effects intended for his establishment".

61. Referring to Mr. Yokota's proposal to delete the words "and servants", he suggested that the question be left in abeyance until the Commission had settled the question of entitlement to privileges and immunities dealt with in article 24.

62. Mr. PADILLA NERVO expressed a preference for a general formula on the lines of article 20 of the Harvard draft,<sup>3</sup> or of article 18, paragraph 3, of the Havana Convention,<sup>4</sup> instead of the list given by the Special Rapporteur. Such a general formula would provide better coverage for existing practice.

63. Moreover, in view of the quite wide-spread abuse of exemption from customs duty, he proposed that the Commission specify in the commentary on the article

that, once the mission or member of the mission was installed, the receiving State might require the amount of articles brought in for personal use to be kept within reasonable limits.

64. Mr. SPIROPOULOS proposed that the Commission adopt both of Mr. Padilla Nervo's proposals together with that of Sir Gerald Fitzmaurice (para. 48 above).

65. Mr. TUNKIN agreed with Mr. Yokota on the desirability of deleting the words "and servants". In practice, personal servants were often granted certain privileges, but merely as a matter of courtesy. The Commission should not therefore treat the exemption of servants from customs duties as if it were an established rule, but leave it to *comitas gentium*.

66. In connexion with Mr. Padilla Nervo's proposal to adopt a general formula—which he thought might with advantage be referred to the Drafting Committee—he pointed out that article 20 of the Harvard draft referred to articles for the "official" use of a mission. It might be advisable to include that term in the Commission's text. He also noted that sub-paragraph (*d*), "effects intended for his establishment", of the Special Rapporteur's text was not covered in either of the other texts referred to by Mr. Padilla Nervo.

67. The CHAIRMAN proposed that the entitlement of servants to exemption be dealt with in conjunction with article 24, as suggested by Mr. Ago.

*It was so agreed.*

68. He also proposed that Mr. Padilla Nervo's proposals be referred to the Drafting Committee, and that a text be included in the commentary explaining the scope and the basis of exemption from customs duty and drawing attention to the existence of more liberal provisions in some bilateral treaties. Attention could also be drawn in the commentary to the fact that there was a case for placing both a time-limit on the import of effects for the diplomatic agent's establishment and quantitative restrictions on the consumer goods he imported, once duly installed.

*Paragraph 1 was unanimously adopted on that understanding.*

69. The CHAIRMAN invited the Commission to turn to paragraph 2. He remarked that the wording of the paragraph might be improved.

70. Mr. PADILLA NERVO thought it illogical to refer to goods "liable to import duty", since practically all the articles and effects mentioned in the first paragraph were liable to duty. Some provision on the lines of article 21 of the Harvard draft,<sup>5</sup> regarding articles whose importation, or exportation, was prohibited, should be included in the draft.

71. Faris Bey EL-KHOURI also commented on the absence of any reference to articles whose import was prohibited; in his own country, for instance, the import of certain alcoholic liquors was prohibited.

72. The CHAIRMAN thought that some reference should also be made, somewhere in the draft, to the obligation of the diplomatic agent to respect the laws of the receiving State on the prohibition of the export of certain articles, particularly works of art regarded as part of the national patrimony.

<sup>3</sup> Harvard Law School, *Research in International Law, I. Diplomatic Privileges and Immunities* (Cambridge, Mass., 1932), p. 23.

<sup>4</sup> League of Nations, *op. cit.*

<sup>5</sup> Harvard Law School, *op. cit.*

73. Mr. BARTOS agreed that the wording of the paragraph required clarification. He, too, was in favour of an explicit mention of the prohibition of the export of works of art regarded as part of the national cultural patrimony and of articles of archaeological interest. Diplomatic agents frequently infringed national laws in that respect.

74. The CHAIRMAN, speaking as a member of the Commission, wondered whether it was necessary to refer in the draft to exemption from inspection. The other drafts did not mention it.

75. Mr. AGO argued that it was both logical and necessary to refer to exemption from inspection after having dealt with exemption from customs duty. He agreed with Mr. Padilla Nervo, however, that the words "liable to import duty" should be modified, as they seemed to contradict the principle of exemption from customs duty. The question of the prohibition of the export of objects of artistic value or archaeological interest was a very important one, but, being quite a different matter, should be dealt with separately, as it was in the Harvard draft. The provision should, in particular, draw attention to the obligation on diplomatic agents to respect the laws and regulations prohibiting the export of such objects.

76. Mr. AMADO remarked that, although not opposed to a reference to the question in the draft, he wondered whether it was not already adequately covered in municipal law.

77. Sir Gerald FITZMAURICE pointed out that, apart from the question of the export of works of art, there was also the question of the prohibition of the import of such articles as dangerous drugs, gold, firearms and plants (the latter in order to prevent the spread of plant diseases). He had been struck by the absence of any provision on the subject in the Special Rapporteur's draft, especially as the Harvard draft dealt with the question. It might convey the wrong impression if the Commission's draft referred to the possibility of inspection solely on the ground that the baggage might contain goods liable to duty.

78. Mr. SPIROPOULOS agreed that a provision dealing with the prohibition of certain imports and exports was absolutely essential.

79. Mr. VERDROSS, referring to Mr. Ago's proposal (para. 75 above), pointed out that the duty of diplomatic agents to comply with the laws and regulations of the receiving State was enunciated in article 27.

80. Mr. AGO conceded Mr. Verdross's point, and accordingly proposed the substitution of the words "goods not covered by the exemptions mentioned in paragraph 1 above or articles the import or export of which is prohibited by the law of the receiving State" for the words "goods liable to import duty".

81. Mr. SPIROPOULOS pointed out that a provision on such lines was hardly covered by the French title of the article, "*Exemption douanière*".

82. The CHAIRMAN put paragraph 2, as amended by Mr. Ago, to the vote, on the understanding that the question of its exact position in the draft be left to the Drafting Committee.

*Paragraph 2, as thus amended, was unanimously adopted.*

83. After some discussion, the Chairman put paragraph 3 to the vote, on the understanding that it would be merged with paragraph 2.

*Paragraph 3 was unanimously adopted.*

#### ARTICLE 24

84. The CHAIRMAN invited the Commission to consider article 24 paragraph by paragraph.

85. He said that the question of the type of privileges and immunities to which the various elements composing the staff of a mission were entitled was a complicated one. He thought, nevertheless, that the Commission might rapidly reach agreement if it first defined the various categories clearly. A distinction should be made between the official staff—comprising the diplomatic staff, the administrative and service staff and auxiliary staff—and the non-official staff. In the case of the first category of the official staff, comprising the head of the mission as well as subordinate diplomatic agents and attachés (military, trade and press attachés, etc.), the Chairman thought the members of the Commission would be unanimous in considering it entitled to full privileges and immunities. With regard to the other categories (administrative and service staff and also auxiliary staff), which embraced secretaries, stenographers, archivists, mission chauffeurs, etc., practice varied considerably from country to country, as it did in the case of non-official staff (private secretaries, servants, etc.). Some States granted liberal privileges and immunities to administrative and auxiliary staff, others only certain rights. Others again granted privileges and immunities on a reciprocal basis, while a fourth group of States granted none at all.

86. The Chairman drew attention to Mr. François's proposal to substitute the following text for the Special Rapporteur's draft article:

"1. The members of the staff of the mission, including administrative and service staff, shall, if they are not nationals of the receiving State, enjoy the diplomatic privileges and immunities set forth in the preceding articles.

"2. The privileges and immunities of persons entitled in their own right shall also apply to:

"(a) Their wives;

"(b) Their children under 18 years of age; and

"(c) Their private servants who are not nationals of the receiving State and live under the same roof.

"3. Members of the staff of the mission who are nationals of the receiving State, together with their wives, children and private staff, shall enjoy privileges and immunities only to the extent admitted by the receiving State."

87. Mr. VERDROSS remarked that, with regard to administrative staff, practice was far from uniform. A number of countries, including his own, accorded privileges and immunities to administrative staff, and he was in favour of that custom. It was often most difficult to draw a clear-cut distinction between the diplomatic and non-diplomatic staff of missions. The missions of the smaller countries, particularly those accredited to other small countries, were often staffed merely by a head of mission and some administrative personnel, which often performed functions of a diplomatic nature.

88. Mr. BARTOS observed that, in the matter of entitlement to diplomatic privileges and immunities, a number of countries, among them Yugoslavia, adopted the French system, which drew a distinction between those

members of the staff of missions who were entered on the diplomatic list and those who were not. Persons on the list, i.e., heads of missions, subordinate diplomatic agents and specialist attachés, enjoyed the customary diplomatic privileges and immunities, with certain slight variations according to rank. Those not on the list, classed as "*employés d'ambassade*", enjoyed immunity *de facto*, but *de jure* were entitled only to functional immunity, i.e. immunity in respect of official acts. In the case law of several countries, including Yugoslavia, "official acts" had been interpreted as covering only acts performed on the premises of the mission or when accompanying diplomatic mail. Functional immunity was enjoyed by the administrative and technical staff of missions and those members of the auxiliary services not recruited on the spot.

89. He considered such functional immunity to be quite adequate for the staff concerned. Administrative, technical and auxiliary staff was far easier to replace than the diplomatic agents proper, who were often in charge of specialized sections. Thus the principle of *ne impediatur legatio*, which was the basis of immunity, hardly applied in the case of non-diplomatic staff. Furthermore, experience showed that certain offences, which diplomats, possibly owing to their better education, stricter discipline and greater *esprit de corps*, rarely committed, were quite common amongst the subordinate staff.

90. The staffs of diplomatic missions had grown to such an extent that it had become necessary to subject some of their members to the national jurisdiction. Whereas in the past the diplomatic corps in an average capital had numbered only 200, there might now be 4,000 on the diplomatic list and four or five times as many subordinate mission staff. In view of that expansion, there was a tendency for some States to limit both the total size of missions and the number on the diplomatic list. Even countries accustomed to accord full privileges and immunities to all those on the diplomatic list were changing their attitude in face of the trend. The United States of America had recently addressed a circular letter to all States practising such restrictions, and the United Kingdom had begun to apply the principle of reciprocity. Thus, there was no uniform practice in the matter, and the Commission, if it wished to codify the question, could not ignore the new trend which existed side by side with the older established custom.

91. Mr. MATINE-DAFTARY said he was concerned at the abuses of privileges and immunities committed by the administrative and service staffs of missions, and hence doubted the advisability of extending full immunity to them. He thought it best to leave it to the head of the mission to decide, in the light of the needs of the mission, which members of his staff should be accorded immunity. He would submit an amendment on those lines.

The meeting rose at 1.5 p.m.

#### 408th MEETING

Friday, 31 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 20 (continued)<sup>1</sup>

1. The CHAIRMAN invited the Commission to resume consideration of the Special Rapporteur's redraft of paragraph 2, relating to the position of diplomatic agents who were nationals of the receiving State. (405th meeting, para. 16). The proposed text read as follows:

"A diplomatic agent who is a national of the receiving State shall enjoy immunity from jurisdiction in respect of official acts legitimately performed in the exercise of his functions. He shall moreover enjoy the privileges and immunities granted to him by the receiving State."

2. He recalled that Mr. Tunkin had proposed (405th meeting, para. 17) that the following words be added to the first sentence of that text: "unless otherwise determined by the receiving State at the time it agrees to his serving as a diplomatic agent of the sending State".

3. Mr. PAL said, with regard to Mr. Tunkin's amendment, that, according to the wording adopted by the Drafting Committee for article 4, the express agreement of the receiving State was now required only for such of its nationals as were appointed as diplomatic staff, and not for those appointed as administrative and service staff.

4. Mr. TUNKIN pointed out that if the Commission decided, in connexion with article 24, that the privileges and immunities referred to in the draft should be limited to diplomatic staff, there would be no inconsistency between his amendment and the text adopted by the Drafting Committee for article 4. If it decided that the privileges and immunities should be enjoyed by all members of the mission, including administrative and service staff, he agreed that there would be an inconsistency, but it was, he thought, one which could be left to the Drafting Committee to remove.

5. Mr. YOKOTA said that he had no objection to Mr. Tunkin's amendment, except that it left the entire responsibility for the decision in the hands of the receiving State. He personally would prefer the amendment which Mr. Spiropoulos had suggested at the time the Commission had first considered article 20, paragraph 2, namely, the insertion of the words "except where otherwise agreed between the sending and the receiving States" (403rd meeting, para. 70).

6. Sir Gerald FITZMAURICE said he could not agree to Mr. Tunkin's amendment, since he considered that a State which accepted one of its own nationals as another State's diplomatic agent must at least accord him immunity from jurisdiction in respect of official acts performed in the exercise of his functions.

7. He wondered whether the word "legitimately" in the redraft proposed by the Special Rapporteur did not rather beg the question, since it was precisely in respect of official acts performed in the exercise of the diplomatic function, but the legitimacy of which was disputed, that immunity was required. He suggested that the word "legitimately" be deleted, and that the Drafting Committee consider instead inserting the word "normal" before "exercise".

8. Mr. AGO agreed that the word "legitimately" should be deleted.

9. With regard to the amendment proposed by Mr. Tunkin, he pointed out that the official acts performed by a diplomatic agent in the exercise of his functions

<sup>1</sup> Resumed from 405th meeting.

were acts of the State, and that was the case regardless of the agent's nationality. Therefore, if the receiving State agreed to one of its nationals serving as a diplomatic agent of the sending State, but at the same time declined to recognize his immunity from jurisdiction in respect of the official acts performed in the exercise of his functions, the effect was as though it had withheld its consent and had not permitted the exercise of those same functions, for it was inconceivable that the receiving State should subject to its own jurisdiction the sovereign acts of the sending State.

10. Mr. SPIROPOULOS felt that the Commission was over-rating the importance of the question, since the determining factor, in practice, would be the degree of goodwill shown by the two States concerned. It was, as had already been pointed out, extremely rare for the head of a mission to be a national of the receiving State. In practice, the problem arose almost exclusively in connexion with clerks, messengers, and so on, the nature of whose duties was hardly likely to involve them in acts in respect of which they required immunity from the jurisdiction of the receiving State. Although he preferred his own amendment, which seemed more elegant from the legal point of view, he saw no objection to Mr. Tunkin's, under which the sending State, if it did not agree to one of its mission staff being made subject to the jurisdiction of the receiving State, could always appoint someone else.

11. Mr. TUNKIN said he was prepared to withdraw his own amendment in favour of that suggested by Mr. Spiropoulos.

12. Mr. VERDROSS supported the redraft of paragraph 2 proposed by the Special Rapporteur, since in his view it was essential that all diplomatic agents should enjoy a certain minimum of immunities, for the reasons given by Mr. Ago. Otherwise, a diplomatic agent who was a national of the receiving State might be arrested while he had in his possession confidential diplomatic papers belonging to the sending State, and such papers might be made the basis of legal proceedings, which was clearly quite inadmissible.

13. Mr. SPIROPOULOS felt that the point referred to by Mr. Verdross was of no practical importance, since diplomatic agents did not normally walk about the streets with secret documents in their possession, and, as he had already observed, the vast majority of persons affected would in any case have very limited access to secret documents.

14. Although he too could have accepted the redraft proposed by the Special Rapporteur, it was sometimes necessary to seek a compromise solution such as he himself had suggested. Mr. Tunkin had accepted that suggestion, and he hoped that members of the Commission whose views on the matter were opposed to Mr. Tunkin's would show a like spirit of compromise. He would, of course, have no objection if the Drafting Committee wished to add the words "at the time it agrees to his serving as a diplomatic agent of the sending State" in the text proposed by the Special Rapporteur and amended by him.

15. Mr. EL-ERIAN regretted that he could not agree to the redraft proposed by the Special Rapporteur, since it did not take into account all the points of view expressed during the discussion at the 403rd meeting, but only one, namely, that the diplomatic agent must in all cases enjoy certain minimum immunities. In particular,

the redraft entirely failed to reflect the view expressed by himself and Mr. François, namely, that the principle that a State enjoyed jurisdiction over its nationals must be respected.

16. Nor could he agree to the amendment proposed by Mr. Spiropoulos, under which a diplomatic agent who was a national of the receiving State would enjoy immunity from jurisdiction in respect of official acts, unless the sending State agreed that he should not enjoy such immunity. On the other hand, Mr. Tunkin's amendment correctly made the immunities enjoyed by such a person a matter for the receiving State to decide; if the sending State felt that the conditions imposed by the receiving State were unacceptable, it could always appoint someone else.

17. If Mr. Tunkin's amendment were withdrawn, Mr. El-Erian would be obliged to maintain his own original amendment (403rd meeting, para. 9), although, in the light of the discussions that had taken place since he had first presented it, in particular the general agreement that there should be a separate article regulating the whole question of the immunities and privileges enjoyed by diplomatic agents who were nationals of the receiving State, he would amend it to read as follows:

"A diplomatic agent who is a national of the receiving State shall not enjoy any diplomatic immunities or privileges in the territory of the receiving State except those specifically granted to him by the receiving State at the time of its consent to his appointment."

18. Mr. AGO pointed out that the only type of immunity with regard to which the question of official acts could arise was immunity from jurisdiction; all other types of immunity related to the diplomatic agent's personal acts. He agreed with Mr. Spiropoulos that very few cases would arise in which it would be necessary for a member of a diplomatic mission who was a national of the receiving State to invoke immunity from jurisdiction in respect of official acts. The Commission, however, was laying down principles, and it was a highly dangerous and quite unacceptable principle to say that acts which were undoubtedly acts of the sending State could be subject to the jurisdiction of the receiving State. He could not, therefore, accept Mr. Spiropoulos's amendment, which expressly envisaged the possibility that immunity from jurisdiction might not be enjoyed in respect of official acts performed on behalf of the sending State.

19. While unable to support Mr. El-Erian's amendment either, he thought that, in practice, the amendment, though more extreme, might actually be less dangerous, for on a reasonable construction it could only be interpreted as having the effect of excluding the official acts of diplomatic agents.

20. Faris Bey EL-KHOURI felt that the Commission must be under no misapprehension as to the numbers involved. Even if each mission recruited only one or two clerks, drivers, interpreters or messengers locally, hundreds would be involved in each receiving State. If the receiving State were left entirely free to accord to each of them whatever immunities it wished, anarchy, discrimination and wide-spread confusion and friction would result; the same would happen if each case were left to the receiving State to settle in agreement with the sending State. He could not, therefore, vote for the redraft of paragraph 2 submitted by the Special Rapporteur. The Commission should, in his view endeavour to reach agreement upon a rule which could be applied uniformly

in every case ; if it was unable to do so, it might be obliged to leave the matter to the discretion of the receiving State, but then it should at least ensure that each receiving State granted the same privileges and immunities to all its nationals who were employed by foreign diplomatic missions.

21. Mr. PAL felt that, in substance, there was no difference between Mr. Spiropoulos's proposal and Mr. Tunkin's, since the decision rested ultimately with the receiving State, whose consent was required before any one of its nationals could be appointed as a foreign diplomatic agent. On consideration, however, he preferred the redraft submitted by the Special Rapporteur, with the amendments proposed by Sir Gerald Fitzmaurice.

22. Mr. SANDSTRÖM, Special Rapporteur, said the main purpose of his redraft was to recognize a certain minimum of immunity which all diplomatic agents must enjoy, regardless of whether they were nationals of the receiving State or not. The amendments suggested by Mr. Tunkin and Mr. Spiropoulos and the text proposed by Mr. El-Erian would all deny that minimum. He accordingly still preferred the text which he himself had proposed. By "legitimately" he had had in mind that there were certain activities such as espionage which could not be regarded as private acts, but in respect of which immunity from jurisdiction could hardly be claimed.

23. Mr. TUNKIN felt it made little difference in practice what text the Commission adopted. If the redraft proposed by the Special Rapporteur were adopted, however, the receiving State would be obliged to take into account the automatic consequences of its agreeing to one of its own nationals being appointed a foreign diplomatic agent ; it would then probably refuse to give its agreement in a considerable number of cases where it might well have given it, subject to certain conditions which would have been equally acceptable to the sending State.

24. He could not agree with Mr. El-Erian that there was any danger in Mr. Spiropoulos's amendment. If it were adopted, and if the sending State insisted that a national of the receiving State whom it wished to appoint to its diplomatic mission should enjoy immunity from jurisdiction in respect of official acts, but the receiving State was unwilling to grant such immunity, the receiving State would be at liberty to refuse to agree to the appointment at all. However, the text proposed by Mr. El-Erian was undoubtedly clearer and recognized the receiving State's special interest in the matter.

25. Faris Bey El-Khoury's point might be met to some extent by omitting the words "at the time of its consent to his appointment" from the text proposed by Mr. El-Erian, since that would make it possible for States to enact laws which regulated in a uniform manner the immunities and privileges that should be enjoyed by such of their nationals as were employed by foreign diplomatic missions. Many States already had such laws, at least as far as servants were concerned.

26. Mr. EL-ERIAN said, with regard to Faris Bey El-Khoury's remarks, that by "diplomatic agent" he meant only the head of the mission or a diplomatic official proper. In his view, servants should be excluded from all privileges and immunities by virtue of article 24.

27. The CHAIRMAN said that he would first put to the vote Mr. El-Erian's amendment (para. 17 above) as being the furthest removed from the original.

*The amendment was rejected by 8 votes to 5, with 8 abstentions.*

28. Mr. BARTOS, explaining his vote, emphasized that he was, in principle, against the accreditation of a national in his country by foreign States, but, as the Commission held the opposite view and took into consideration that possibility, in his opinion such a diplomat must be given those privileges and immunities which were necessary for the unhindered carrying out of his functions. Further, there were countries which had subsequently claimed foreign diplomats as their nationals on the basis of so-called historical reasons. The nationality laws of certain countries, such as Turkey, Hungary and Bulgaria, for instance, would have given rise to serious anomalies if the text proposed by Mr. El-Erian had been adopted, because such countries considered as their nationals persons of dual nationality who were born, or whose parents had been born, on territory formerly under their rule. Mr. Bartos had, therefore, been obliged to vote against Mr. El-Erian's text.

29. The CHAIRMAN then put to the vote the amendment proposed by Mr. Spiropoulos, namely, the addition of the words "except where otherwise agreed between the sending and the receiving States". Those words would be added at the beginning of the redraft proposed by the Special Rapporteur.

*The amendment was not adopted, 7 votes being cast in favour, with 7 against and 7 abstentions.*

30. Replying to a question by the Chairman, Sir Gerald FITZMAURICE said he was quite willing that his amendment (para. 7 above) to the redraft proposed by the Special Rapporteur should be considered further by the Drafting Committee in the light of the Special Rapporteur's explanation.

31. Mr. MATINE-DAFTARY said that, before the Chairman put to the vote the redraft proposed by the Special Rapporteur, he wished to know whether it was intended that it should form the separate article that some members of the Commission had envisaged to cover the whole question of the immunities and privileges accorded to locally-recruited mission staff.

32. The CHAIRMAN said that that was not its purpose. The text was intended to deal solely with the question of the immunity from jurisdiction enjoyed by the head of a mission or a diplomatic official who was at the same time a national of the receiving State.

33. On that understanding, he put to the vote the redraft proposed by the Special Rapporteur for paragraph 2 of article 20 (para. 1 above).

*The text was adopted by 12 votes to 2 with 7 abstentions, subject to further consideration by the Drafting Committee of the amendment suggested by Sir Gerald Fitzmaurice.*

34. Mr. SPIROPOULOS, explaining his vote in favour of the text that had been adopted, said that it would make no difference in practice that his amendment had been rejected. That amendment had been designed only as a compromise. He himself preferred the text as it stood.

35. Mr. EL-ERIAN said he had voted against the text that had just been adopted for the reasons that he had already made clear in his previous statements on the subject (403rd meeting, paras. 9-15, and paras. 15-17 and 26 above).

36. Mr. BARTOS said that he had voted in favour of the text despite the fact that it was undesirable, in his view, that diplomatic agents should ever be chosen from among the nationals of the receiving State. If they were, however, and if the receiving State accepted them, he agreed that they should enjoy immunity from jurisdiction in respect of official acts.

37. The CHAIRMAN then invited the Commission to resume consideration of the additional paragraph for article 20, proposed by Mr. François (404th meeting, para. 29).

38. He recalled that Mr. François had accepted Mr. Tunkin's suggestion that the words "in accordance with the laws of that State" be added at the end of the first sentence (*ibid.*, para. 59).

39. Mr. GARCIA AMADOR asked whether the words "shall be justiciable" implied an obligation on the part of the sending State to bring its diplomatic agents before the proper courts if occasion arose.

40. The CHAIRMAN replied that, in his understanding, Mr. François's text merely expressed the universally recognized principle that a diplomatic agent remained subject to the jurisdiction of the sending State, and hence could be the object of proceedings instituted in the courts of that State, provided of course that under the laws of that State a court was specified that had jurisdiction. Moreover, the text tended to vest jurisdiction in the courts of the sending State, if the legislation of the latter failed to specify a court.

41. Mr. SPIROPOULOS felt that the insertion of Mr. Tunkin's amendment robbed the first sentence of Mr. François's text of all practical significance. The only point in Mr. François's text now lay in the second sentence, but the relation between it and the first sentence was obscure, to say the least.

42. Mr. FRANÇOIS agreed that the essence of his proposal lay in the second sentence. The first, however, still had some importance, since a State might take the view that, whatever a diplomatic agent did in the receiving State, he could not be brought before its courts; it was that attitude which it was essential to combat.

43. Mr. SPIROPOULOS pointed out that, if the laws of the sending State did not already provide that a diplomatic agent could be brought before its courts, adoption of Mr. François's text with the amendment proposed by Mr. Tunkin would make no change in the position.

44. Mr. PAL recalled that, on the basis of a suggestion by Mr. Yokota, Sir Gerald Fitzmaurice had suggested (404th meeting, para. 80) that the paragraph proposed by Mr. François be amended to read as follows:

"The immunity of a diplomatic agent from the jurisdiction of the receiving State shall not exempt him from the jurisdiction of the sending State, to which he shall remain subject in accordance with the law of that State."

45. Mr. FRANÇOIS said he could accept that text in replacement of the first sentence of his own text.

46. Mr. SANDSTRÖM, Special Rapporteur, pointed out that the text proposed by Sir Gerald Fitzmaurice did not in fact meet Mr. François's main point any more than Mr. Tunkin's amendment, since it did not impose an obligation on the sending State to designate a tribunal if none was already designated by the existing law.

47. After further discussion, Mr. TUNKIN recalled that he had asked (404th meeting, para. 77) for separate votes on the two sentences of the text proposed by Mr. François.

48. The CHAIRMAN put to the vote the text proposed by Sir Gerald Fitzmaurice (para. 44 above), which had been accepted by Mr. François in place of the first sentence of the additional paragraph which he had proposed.

*The text was adopted for the first sentence by 17 votes to none with 3 abstentions.*

*The second sentence of Mr. François's text was adopted by 10 votes to 1 with 10 abstentions.*

49. Mr. BARTOS said that he had voted in favour of the second sentence, since he thought it would be of some practical benefit, even though it did not fully settle the question of the law applicable.

50. Mr. AMADO said that he had abstained on both sentences, because it was an accepted rule that diplomatic agents retained their former domicile. If the Commission had wished to reiterate that rule, it should have done so in terms clearer than those used in the first sentence. Mr. Amado had been in favour of the second sentence, but had been unable to vote for it since it depended on the first.

51. Mr. MATINE-DAFTARY said he had voted in favour of both sentences, even though they were not entirely satisfactory, since it would always be possible to amend them in the Drafting Committee, or in the light of the comments received from Governments.

52. The CHAIRMAN, speaking as a member of the Commission, said that he had voted for the two sentences of Mr. François's proposal as amended by Sir Gerald Fitzmaurice, although he was convinced that, in the example given in the second sentence, it was solely a matter for the State concerned to decide which court to designate as the competent court. As the Commission was preparing a draft convention, however, it seemed desirable to make some such provision for those States whose legislation did not designate any competent court for diplomatic agents serving abroad.

#### ARTICLE 24 (*continued*)<sup>2</sup>

53. The CHAIRMAN invited the Commission to resume consideration of article 24, paragraph by paragraph, and recalled Mr. François's proposal to replace the article by a new text (407th meeting, para. 86).

54. The Chairman said that Mr. Matine-Daftary had submitted an amendment to delete from Mr. François's text the phrase "if they are not nationals of the receiving State", on the ground that the question was covered by the Commission's decision concerning article 20, and to substitute the following: "within the limits and to the extent deemed appropriate and applied for by the head of the mission on his own responsibility."

55. He asked what the Special Rapporteur meant by the term "service staff" in his text, and whether he accepted Mr. François's amendment.

56. Mr. SANDSTRÖM, Special Rapporteur, said that the term covered official staff, such as messengers and chauffeurs, engaged in ancillary duties—in other words, what were known as *employés d'ambassade*.

<sup>2</sup> Resumed from 407th meeting.

57. He accepted Mr. François's amendment.

58. Mr. FRANÇOIS said that he had included the phrase "if they are not nationals of the receiving State" in order to cover any staff members who might have dual nationality, that of the sending and of the receiving State. The question whether to retain the phrase could be left to the Drafting Committee.

59. Mr. MATINE-DAFTARY remarked that the Commission's decision on article 20 related only to nationals of the receiving State.

60. The CHAIRMAN, speaking as a member of the Commission, thought that paragraph 1, by according full diplomatic privileges and immunities to every category of staff, went much further than the law of most countries, in particular so far as tax and customs exemptions were concerned.

61. Mr. TUNKIN thought that the members of the Commission would all agree that nowadays, according to general international law, only strictly diplomatic staff enjoyed all the immunities listed in the draft. Administrative, technical and service staff certainly enjoyed some privileges and immunities, but probably only on a courtesy basis, or as the result of an agreement between two States. Both the Special Rapporteur's text and Mr. François's amendment, therefore, went beyond existing rules and constituted proposals *de lege ferenda*. While he did not object in principle to extending entitlement to privileges and immunities to other categories than diplomatic officers, he wondered whether the Commission would not be going too far in putting all staff of foreign missions on the same level. A new rule of that kind would entail considerable amendment of the laws of certain countries.

62. The position, as he understood it, was that there was probably an obligation on States under international law to accord full diplomatic privileges and immunities to diplomatic staff proper, and that they might accord such privileges to administrative and service staff on a reciprocal basis. In the Soviet Union, for instance, under an act of 27 March 1956, the Government had been empowered to grant diplomatic immunity to all employees of foreign diplomatic missions on a basis of strict reciprocity in each case.

63. In view of such considerations, he was in favour of drawing a distinction in the paragraph between diplomatic staff and other staff with respect both to the obligation to accord privileges and immunities and their scope. A reference to the principle of reciprocity might be made in connexion with administrative, technical and service staff.

64. It would perhaps be better to leave the words "if they are not nationals of the receiving State" in the paragraph for the time being. The Drafting Committee could decide later whether the question was already covered by another text adopted by the Commission.

65. Sir Gerald FITZMAURICE said that, while appreciating the fact that the expansion of mission staffs had led some countries, quite understandably, to consider limiting the number of persons enjoying privileges and immunities, he was opposed to drawing a distinction between the diplomatic and administrative staff of missions, because of the difficulty of fixing any hard and fast dividing line between them. A century ago, when third secretaries and unpaid attachés had copied out the dispatches by hand, it had been quite sufficient to grant privileges

and immunities to diplomatic officers only. At the present time, however, the ambassador's stenographer might know more State secrets than some individual member of the diplomatic staff, and the same was true of archivists. Members of the administrative staff who often handled highly confidential matter were as much in need of protection from possible pressure from the receiving State as the diplomatic staff itself, and he failed to see how the Commission could avoid including them among those entitled, if not to all diplomatic privileges, at least and undoubtedly to full immunity.

66. Mr. Verdross's remarks regarding the staffing of the missions of smaller countries (407th meeting, para. 87) were an additional argument in favour of establishing no distinction.

67. Mr. SANDSTRÖM, Special Rapporteur, regretted that he had not been able to outline the considerations underlying his draft at the beginning of the discussion on the article. In the whole subject of diplomatic intercourse no question was so differently handled by States. It was impossible to talk of any fixed law. Many countries accorded diplomatic privileges and immunities only to diplomatic staff, while others accorded them to the whole staff of the mission. The difference in treatment was largely a question of approach, i.e., whether each category was considered singly or whether the mission was viewed as an integral whole, a sort of team. He preferred the latter approach, which appeared to be that adopted by Sir Gerald Fitzmaurice. The Commission could stipulate a certain minimum of privileges and immunities, and leave the rest for agreement between Governments. It would be preferable, however, to accord more immunities if possible.

68. Mr. YOKOTA was in favour of distinguishing between the diplomatic and the other staff of missions, the privileges and immunities of the latter not being so well-established. They were, it was true, generally accorded in practice, but partly as a matter of courtesy and sometimes on the basis of reciprocity. He noted that the Harvard Law School draft, in article 23, put the matter on a strictly functional basis, saying that the receiving State "may exercise jurisdiction over any member of the administrative or service personnel of a mission, only to an extent and in such a manner as to avoid undue interference with the conduct of the business of the mission".<sup>3</sup>

69. Mr. Yokota proposed that the Commission should recognize the entitlement of diplomatic members of the staff of missions to full privileges and immunities by drafting paragraph 1 as follows:

"The diplomatic members of the staff of the mission shall, if they are not nationals of the receiving State, enjoy the diplomatic privileges and immunities set forth in the preceding articles."

and should add, after paragraph 1 as thus amended, the following new paragraph:

"The administrative and service members of the staff of the mission enjoy, in the absence of special agreement, the same privileges and immunities as those of the diplomatic members of the staff."

70. Mr. SPIROPOULOS said that he was in favour of extending diplomatic privileges and immunities to

<sup>3</sup> Harvard Law School, *Research in International Law, I. Diplomatic Privileges and Immunities* (Cambridge, Mass., 1932), p. 23.

lower grades of staff on much the same grounds as Sir Gerald Fitzmaurice and the Special Rapporteur, namely, that the mission must be regarded as an entity in which each member of the staff, including chauffeurs and cooks, contributed to the successful functioning of the whole. He appreciated the difficulties caused by the large number of subordinate staff members in some missions, and the fact that offences were much more common amongst such staff than amongst diplomatists; nevertheless, he considered such a course preferable. That was, however, merely his own view; he did not claim that it reflected the existing state of international law.

71. Mr. AMADO found it difficult to understand why cooks should enjoy the same privileges and immunities as first secretaries. In his opinion, it was impossible to discuss paragraph 1 without taking into account paragraph 5, which stated that the names of all persons entitled to diplomatic privileges and immunities must be entered on the diplomatic list.

72. Mr. KHOMAN said that, although he would like to see diplomatic privileges and immunities extended to administrative and service staff, he recognized that such did not appear to be the practice of all States. It might, therefore, be preferable to draw a distinction, on the lines proposed by Mr. Yokota, and state unequivocally that diplomatic staff were entitled to full privileges and immunities, and that administrative and service staff also enjoyed the same privileges and immunities, unless otherwise agreed. Such a solution would, he thought, meet all the different viewpoints expressed.

73. Mr. MATINE-DAFTARY agreed with Sir Gerald Fitzmaurice on the undesirability of drawing any distinction. In most missions there were persons doing work of a diplomatic nature who, often owing to the nature of the regulations, could not be classed as members of the diplomatic service. The Harvard draft, he thought, approached the matter from a rather academic standpoint, ignoring the difficulty of drawing clear-cut distinctions in practice.

74. Nevertheless, in view of the excessively large staffs of missions and the relatively unimportant tasks performed by certain members, he felt it necessary to provide for some curb. That was why he had proposed in his amendment (para. 54 above) that the choice of persons claiming benefit of privileges and immunities be left to the discretion of the head of the mission.

75. Mr. PAL did not think that any curb was necessary. The Commission, having already taken a decision on the desirability of limiting the size of missions, could proceed on the assumption that their size would not be excessive.

76. The CHAIRMAN suggested that the Commission endeavour to find a formula acceptable to the vast majority of States.

77. He drew attention to the following amendment submitted by Mr. TUNKIN as an alternative to paragraph 1:

“The diplomatic members of the staff of the mission shall, if they are not nationals of the receiving State, enjoy the diplomatic privileges and immunities set forth in the preceding articles.”

“The members of the administrative and service staff shall, if they are not nationals of the receiving State, also enjoy these privileges and immunities on the basis of reciprocity.”

78. Mr. BARTOS observed that practice on the matter was so varied that it was impossible to formulate a uniform rule of positive law. The Commission could not do more than analyse the various practices and indicate which seemed most appropriate.

79. He doubted whether the “unity of function” or “entity” approach advocated by the Special Rapporteur and Mr. Spiropoulos was absolutely valid. Undoubtedly the jobs performed by certain members of the administrative and technical staff, archivists or wireless operators, for instance, were so closely bound up with the diplomatic work of the mission as to justify according them immunity. The problem was where the process should stop. It was rather ridiculous for diplomatic immunity to be invoked by office cleaners involved in brawls with costermongers—and such incidents were by no means uncommon. Indeed, staffs of missions were now so large that the according of diplomatic immunity to all categories was definitely prejudicial to public order. For instance, the position of “diplomatic” chauffeurs who exceeded the speed limit on higher orders was far from clear, and many States had found it necessary to subject them to their civil jurisdiction. Again, dealings on the “black market,” though comparatively uncommon among diplomatists, were frequent amongst ancillary staff. Yet, in many cases, the receiving State had no other remedy than the extreme measure of declaring the offender *persona non grata*.

80. Although there was much to be said for Mr. Matine-Daftary’s attempt to solve the problem, it was open to the objection that heads of missions would be tempted to apply for diplomatic privileges and immunities for all their staff, because it was so much more convenient.

81. Personally, he found his desire to ensure that missions were protected from interference by the receiving State in conflict with the hard facts of the existing situation. He would suggest that all categories of staff whose tasks were bound up with the fulfilment of the function of the mission should enjoy diplomatic privileges and immunities. The other staff should be entitled only to “functional immunity”, any other privileges and immunities being granted by bilateral agreement. In that connexion, he did not think that Mr. Tunkin’s amendment was quite satisfactory. If one State accorded full privileges and immunities to all staff, the other State was not bound to do the same on the principle of reciprocity.

82. Though not in a position to suggest any alternative at that stage, he must say that he found both texts before the Commission unacceptable in their existing form.

83. Mr. TUNKIN agreed with the Chairman. The Commission should bear in mind how far States could be expected to go in the matter. His own amendment went beyond the existing rule of international law, but laid down the principle of reciprocity as a counter-weight. A recent agreement between the United Kingdom and the United States of America, on the one hand, and the Soviet Union, on the other, concerning the granting of privileges and immunities to the administrative and service personnel of missions, showed that the principle of reciprocity worked well.

84. The CHAIRMAN observed that the matter appeared ripe for decision and could perhaps be settled at the next meeting.

The meeting rose at 1.15 p.m.

**409th MEETING***Monday, 3 June 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 24 (continued)**

1. The CHAIRMAN invited the Commission to continue its consideration of the amended version of article 24, paragraph 1, submitted by Mr. François (407th meeting, para. 86) and accepted by the Special Rapporteur.

2. He pointed out that amendments to that text had already been submitted by Mr. Yokota (408th meeting, para. 69) and Mr. Tunkin (*ibid.*, para. 77). Mr. Bartos would introduce a further amendment shortly.

3. There appeared to be general agreement on the principle enunciated in the first paragraph of Mr. Yokota's and Mr. Tunkin's amendments.

4. Mr. BARTOS said that he could accept the first paragraph on the understanding that it covered all diplomatic collaborators of the head of the mission, whether engaged in general or in special duties.

5. Mr. PAL observed that, since an article dealing with the nationals of the receiving State had already been adopted, it would perhaps be more appropriate to say "subject to the provisions of article 20" than to repeat in both paragraphs "if they are not nationals of the receiving State".

6. Mr. TUNKIN agreed with Mr. Pal. The point could be referred to the Drafting Committee.

*Paragraph 1 Mr. Yokota's and Mr. Tunkin's amendments was unanimously adopted.*

7. Mr. YOKOTA said that the second paragraph of Mr. Tunkin's amendment might appear to be very little different from his own. The reference to the principle of reciprocity, however, was ambiguous. It might mean that if one State accorded certain privileges and immunities, the other State would do likewise. In other words, if one State did not accord certain privileges and immunities, the other State would not accord them either. That being so, a State could settle the questions of privileges and immunities unilaterally, other States being bound to accept its decision and having no remedy but to accord no more than they were accorded. Such a principle was not only undesirable but positively dangerous, for it opened the door to severe restrictions on privileges and immunities, and to the possibility of disputes. He accordingly thought it preferable to provide, as in his own amendment, that the administrative and service members of the staff of the mission should normally enjoy the same privileges and immunities as the diplomatic members, and that if States wished to limit them they should do so by negotiation and eventual agreement.

8. Sir Gerald FITZMAURICE said that, although there should, on the face of it, be no difference between the two amendments, Mr. Tunkin's text, as interpreted by him at the previous meeting (408th meeting, para. 83),

was the exact opposite of Mr. Yokota's. As Sir Gerald understood the principle of reciprocity in the present content, it should mean that any State prepared to accord privileges and immunities to the diplomatic agents of another State was entitled to claim from that State the same privileges and immunities for its own agents. Mr. Tunkin, however, understood it as meaning that a State was always free to refuse certain privileges and immunities, even to a State prepared to grant them, reciprocity coming into play only in so far as the second State was then free to refuse them also.

9. Mr. BARTOS introduced his amendment, whereby the following paragraph would be inserted after paragraph 1:

"The administrative or technical staff and service staff of a diplomatic mission shall enjoy privileges and immunities with respect to acts performed in the exercise of their functions in the mission. They shall enjoy the privileges and immunities accorded to diplomatic staff only if and in so far as this has been agreed between the countries concerned."

10. He said that being convinced, from both teaching and practice, that functional immunity, or "*petite immunité*" as it was called, was not a matter for negotiation, he had provided in his amendment for the administrative, technical and service members of the staffs of missions to be accorded immunity automatically for acts performed in the exercise of their functions. For other acts, however, the staff in question, in the absence of any special arrangement between the two States concerned, came under the territorial jurisdiction of the receiving State.

11. Mr. PAL said that, of the three amendments proposed, Mr. Bartos's amendment appeared to be the most suitable, and after that, Mr. Yokota's, but even Mr. Bartos's amendment would require drafting changes.

12. The CHAIRMAN reaffirmed the desirability of finding a formula acceptable to practically all States, whatever system those States might apply.

13. Speaking as a member of the Commission, he said that he doubted whether Mr. Yokota's amendment fulfilled that condition. As worded, it would mean that whenever two States were unable to agree on the privileges and immunities to be accorded to administrative and service staff, such staff would automatically enjoy the same privileges and immunities as the diplomatic members.

14. Mr. EL-ERIAN proposed that the Commission first decide the question of principle. There were three possible approaches. The Commission could decide that administrative, technical and service staff should enjoy the same privileges and immunities as diplomatic staff, or that they should enjoy only the same immunities, or that they should enjoy only restricted immunities. Should the Commission decide against the grant of full immunities, it could then decide on what basis a restricted system of immunities should be applied. Mr. Bartos's amendment would be relevant in that connexion.

15. Mr. MATINE-DAFTARY remarked that the principle of reciprocity and the idea that States could settle matters by agreement were already part and parcel of general international law. It was hardly necessary for the Commission to draw attention to such possibilities.

16. As far as immunities were concerned, he placed great store by the theory of functional necessity, and

agreed with Mr. Bartos in considering it vital for administrative, technical and service staff to enjoy immunity in respect of acts performed in the exercise of their functions. Privileges, such as exemption from customs duty, on the other hand, were not essential to the exercise of their functions. The principle of reciprocity could be applied in the case of privileges, but immunities, which were essential to the performance of diplomatic functions, should be governed by the provisions of general international law.

17. He regarded his own amendment (498th meeting, para. 54) as complementary to those of Mr. Yokota and Mr. Bartos, since it provided a means of preventing the abuse of privileges and immunities.

18. Mr. TUNKIN said that he would be willing to accept some modification to his amendment, which was purely a tentative one. Mr. Yokota's amendment, however, went further than existing practice, and, in fact, left the question of privileges and immunities at the mercy of a unilateral decision by the sending State. For that State had only to refuse to come to an agreement with the receiving State and the rule that the administrative and service members of the staff enjoy the same privileges and immunities as the diplomatic members would automatically come into force.

19. In a word, the adoption of Mr. Yokota's amendment would be almost the same as accepting the principle of full equality of treatment contained in the first paragraph of the Special Rapporteur's and Mr. François's text. While Mr. Tunkin would not object to the adoption of that principle, he doubted whether it would stand much chance of general acceptance by States. The Commission must bear in mind that most States did not grant full immunities to administrative and service staff.

20. At first glance, Mr. Bartos's amendment (para. 9 above) appeared a reasonable enough proposal, but he had misgivings over the concept of "acts performed in the exercise of their functions", a concept which was not defined in the text and which it would not be at all easy to define.

21. Mr. SPIROPOULOS pointed out that, although its primary task was to codify, the Commission was also free to encourage the progressive development of international law. The question, however, was in what direction progress lay in the case in point: in the direction of according more, or of according less, rights to administrative and service staff?

22. He agreed with those speakers who considered that there was a profound difference between Mr. Yokota's and Mr. Tunkin's proposals. The objection to Mr. Tunkin's amendment was that, if States could not agree, administrative and service staff might be left without any immunities at all.

23. Mr. Yokota's amendment, on the other hand, might be going rather too far, since, according to the views quoted in the memorandum prepared by the Secretariat (A/CN.4/98, paras. 246-254), the practice with regard to administrative and service staff was far from uniform. If forced to choose, however, Mr. Spiropoulos would prefer Mr. Yokota's amendment, because it did guarantee some immunities to such staff.

24. Mr. Bartos's proposal was a very reasonable one, but he doubted whether the immunity provided for was sufficiently comprehensive.

25. Mr. Spiropoulos himself would propose that a distinction be drawn between administrative and technical staff on the one hand and service staff on the other. Since, as Mr. Verdross and Sir Gerald Fitzmaurice had pointed out, the administrative staff of missions was often of capital importance, the Commission should first decide whether such staff ought not to be accorded full immunity. It could then decide whether service staff ought to enjoy only the functional immunity advocated by Mr. Bartos.

26. Mr. SANDSTRÖM, Special Rapporteur, said that, if the question could be viewed from a purely rational standpoint, his preference would go to Mr. François's text, Mr. Yokota's amendment, Mr. Spiropoulos's proposal and Mr. Bartos's amendment, in that order. Since, however, the Commission must adopt a provision likely to gain wide acceptance among States, it had no alternative but to provide for a minimum of immunity and make any additions dependent on agreement. That being so, he felt obliged to support Mr. Bartos's amendment, on the understanding, of course, that the ideals it formulated were acted upon.

27. Sir Gerald FITZMAURICE said that, although prepared in the last resort to accept a compromise drawing distinctions between the various categories comprising a mission with respect to their entitlement to diplomatic privileges and immunities, he did not regard the distinction established in Mr. Bartos's amendment as a valid one. The limitation of immunity to "acts performed in the exercise of their functions in the mission" had admittedly been adopted by the Commission in the case of nationals of the receiving State appointed to foreign diplomatic missions, but such cases were rare, and would undoubtedly be settled by agreement between the States concerned. The case of administrative and technical staff, on the other hand, was far from rare, and had a bearing on some of the most important aspects of the conduct of diplomatic missions.

28. Although the distinction proposed by Mr. Bartos might at first sight seem feasible, experience showed it to be a dangerous one. If it were adopted, the receiving State could always detain a member of the administrative staff of a mission on grounds ostensibly unconnected with his acts in an official capacity. While he did not wish to dwell on the possible consequences of such detention, however temporary, he felt that the Commission would grasp his point that to agree to a provision under which immunity from criminal jurisdiction was not absolute was to take a big step towards undermining the whole system of immunity.

29. The distinctions established by Mr. El-Erian, Mr. Matine-Daftary and Mr. Spiropoulos, on the contrary, might be feasible. It would do no harm to state that administrative and service staff enjoyed full immunities, but that the question of their privileges was a matter for arrangement between governments. Similarly, while the immunities of administrative and technical staff were obviously of importance, there was no cogent reason why service staff, such as chauffeurs, doormen or cooks, should necessarily enjoy all the same immunities.

30. Mr. BARTOS said that he could agree to a distinction being drawn between administrative and technical staff, on the one hand, and auxiliary or service staff on the other. Such a distinction was to some extent implied in the qualification "with respect to acts performed in the exercise of their functions". If the principle were adopted, he would redraft his amendment accordingly.

31. Mr. KHOMAN considered that the Commission should conform as far as possible to established practice, without, however, losing sight of the need to encourage the progressive development of international law. It should also bear in mind the possibility of its draft's becoming the basis of a convention. In that case, any provision which accorded full privileges and immunities to administrative and service staff in face of the reluctance of many States would be of academic interest only. Under the circumstances, the receiving State must be allowed a certain discretion as to the extent of the privileges it accorded to such categories of staff.

32. He therefore suggested the following rewording of the second paragraph of Mr. Yokota's amendment:

"The administrative and service members of the staff of the mission shall enjoy the immunities set forth in the preceding articles. They may also enjoy any other privileges which may be granted by the receiving State or, as the case may be, those specified in an agreement with the sending State."

33. Mr. AMADO agreed that a mission could not function if its administrative staff did not enjoy immunity. He was rather worried about the inclusion of "service staff", however, since that category included unofficial staff, and as the replies to the League of Nations Committee of Experts showed, many States were reluctant to extend privileges to unofficial staff (A/CN.4/98, para. 249). The principle of reciprocity could be applied in the case of service staff.

34. The CHAIRMAN recalled that the Special Rapporteur had indicated that his text applied to official staff only (408th meeting, para. 56). That should be made quite clear, however, since the definition of "service personnel" in the Harvard draft<sup>1</sup> covered both the service personnel of the diplomatic mission and persons in the private domestic service of members of missions.

35. He put to the vote the question whether a distinction should be made between administrative and technical staff, on the one hand, and service staff, on the other, in the matter of privileges and immunities.

*The Commission decided by 11 votes to 5 with 4 abstentions to make that distinction.*

36. Mr. AGO explained that, though preferring to make no distinction at all, he had cast a favourable vote, because the Commission as a whole did not seem prepared to accord full privileges and immunities to all the staff of missions, and he felt that full immunity should at least be recognized for administrative and technical staff, which often had to carry out essential functions for the mission.

37. The CHAIRMAN put to the vote the principle that the administrative and technical staff of missions should be accorded full immunity unconditionally.

*The principle was adopted by 18 votes to 2 with 1 abstention.*

38. Mr. BARTOS, explaining his vote, said he had been obliged to vote against the principle, since he did not consider that administrative staff should enjoy full immunity but only immunity in respect of acts performed in the exercise of their functions.

39. Mr. SCALLE said the distinction that Mr. Bartos drew between the acts that administrative and service staff performed in the exercise of their functions and their other acts was perfectly valid and logical. It was, however, quite probable that the sending and the receiving State would disagree as to whether a particular act had been performed in the course of duty or not. He was, therefore, once again bound to stress the necessity of including in the draft a special provision to the effect that any disputes between the sending and the receiving State over interpretation of the terms used in the draft, or any other matters arising out of it, must be referred for settlement to an impartial tribunal. In the absence of such a provision, he considered that the only realistic course was to give all three categories, diplomatic staff proper, administrative and technical staff and service staff, the same privileges and immunities.

40. Mr. YOKOTA pointed out that, on the basis of the two decisions it had just taken, the Commission had still to decide three questions, namely, what privileges should be enjoyed by administrative staff, what privileges should be enjoyed by service staff and what immunities should be enjoyed by service staff. It could perhaps agree that administrative staff should, in the absence of special agreement, enjoy the same privileges as diplomatic staff proper, and that, in the absence of special agreement and, in their case, subject to reciprocity, service staff should also enjoy the same privileges and the same immunities as diplomatic staff proper.

41. The CHAIRMAN pointed out that neither the Harvard draft<sup>2</sup> nor the resolution adopted by the Institute of International Law in 1929<sup>3</sup> recognized administrative or service staff as enjoying any privileges, but referred only to immunities.

42. Mr. AGO said that if it was proposed to grant immunities, but not privileges, to administrative staff, the distinction between the two categories should first be elucidated, and he doubted that it was a very clear distinction.

43. Mr. VERDROSS shared Mr. Ago's doubts. In his opinion, the only valid distinction was between cases where the receiving State was under an obligation to take certain action (such as affording protection) and those where it was under an obligation to refrain from certain action. But that distinction was not the same as that between privileges and immunities, if such a distinction were possible, for in reality immunities were also privileges granted to diplomats.

44. The CHAIRMAN said that article 6 of the resolution adopted in 1929 by the Institute of International Law<sup>4</sup> listed four different types of immunity (inviolability of person, *franchise de l'hôtel*, immunity from jurisdiction, and exemption from taxes) to which the Commission had added a fifth, exemption from customs duties and inspection. Diplomatic privileges, in his view, denoted prerogatives based on international law and consisting of rights not enjoyed by other inhabitants of the receiving State, as, for example, the right to send diplomatic mail, the right to use cipher, the right to fly the national flag from the mission premises and so on.

45. Mr. BARTOS felt that Mr. Ago had raised a very important point. If the Commission agreed with the Chairman's view, no difficulty arose; but Mr. Bartos was

<sup>1</sup> Harvard Law School, *Research in International Law, I. Diplomatic Privileges and Immunities* (Cambridge, Mass., 1932), p. 19.

<sup>2</sup> *Ibid.*, pp. 19-25.

<sup>3</sup> *Ibid.*, pp. 186 and 187.

<sup>4</sup> *Ibid.*, p. 186.

by no means sure that that view was altogether correct. It was, for example, no easy matter to say to what extent exemption from taxation was a privilege and to what extent it was an immunity, to what extent it was founded on courtesy and to what extent it was based on a rule of law.

46. Mr. SANDSTRÖM, Special Rapporteur, said it had always been his view that the two terms overlapped but were not co-extensive. All immunities were privileges, but not all privileges were immunities.

47. Mr. HSU said that, in his view, it would be safer for the Commission to speak of both terms together, for immunity was only the dynamic form of privilege and privilege only the static form of immunity.

48. Mr. TUNKIN thought the Commission would be creating unnecessary difficulties for itself if it attempted to define what was meant by privileges and immunities respectively. In his opinion, the distinction was misleading, since all depended on the point of view from which the matter was considered. Provided the Commission agreed that, by the decision it had just taken, it intended administrative and technical staff to enjoy the immunities, privileges, or whatever they might be called, that were referred to in articles 17 to 23 of its draft, that was all that was required, and it could be left to the Drafting Committee to propose wording which would make the Commission's intention clear.

*It was so agreed.*

49. The CHAIRMAN said that, as far as service staff were concerned, the Commission should vote first on the principle reflected in Mr. Bartos's proposal (para. 9 above), since that was the farthest removed from the Special Rapporteur's text, namely, that they should only enjoy immunity in respect of acts performed in the exercise of their functions in the mission and such other immunities as were agreed between the sending and the receiving State.

50. Mr. VERDROSS expressed himself in agreement with the principle formulated by Mr. Bartos, as most in accordance with current practice.

51. Mr. EDMONDS said he knew from experience how difficult it was to determine whether a particular act was performed in the course of duty or not; if the Commission introduced any such distinction it was bound to be a fruitful source of disagreement in practice. It was doubtless largely in order to avoid such disagreements that the United States of America granted full diplomatic immunity to everyone attached to a foreign diplomatic mission.

52. Mr. AMADO agreed that that practice of the United States, which was also followed by the United Kingdom, constituted the only satisfactory basis for the Commission's draft. It was noteworthy that, although there were very many bilateral agreements regulating diplomatic intercourse, very few of them went into any detail as regards the immunities enjoyed by service staff.

53. Mr. AGO agreed that the distinction proposed by Mr. BARTOS gave rise to difficulties in practice, but felt they should not be exaggerated. In his view, the distinction had some validity. He would, however, prefer, so far as service staff were concerned, to speak of acts performed "in the course of their duties" rather than "in the exercise of their functions in the mission"; the words "in the mission" in particular seemed too re-

stricted. Similarly, the reference to "service staff of a diplomatic mission" might possibly be interpreted as excluding, for example, the ambassador's personal staff. Finally, in the second sentence of the text proposed by Mr. Bartos, it would be preferable to refer to current practice in the receiving State rather than to a specific agreement between the countries concerned, as in several countries a liberal practice was observed, and a special agreement was not always necessary.

54. Mr. TUNKIN asked whether, under Mr. Bartos's text, a mission chauffeur who, while on duty, knocked down and killed a pedestrian would be exempt from criminal jurisdiction or not.

55. Mr. BARTOS said that he would, provided his duties required him to make the journey in question.

56. The distinction he proposed had been criticized as not sufficiently objective, but there was room for differing opinions on almost any text that the Commission might adopt. There were always borderline cases, but smuggling, for example, black market operations or illicit currency transactions could never be regarded as acts performed in the course of duty.

57. Mr. Bartos could accept Mr. Ago's amendments if it was thought they would help to make the meaning clear. He had, however, submitted his proposal in that form only because he had thought the Commission wished to give administrative and service staff the same privileges and immunities, and because it was, in his view, essential that administrative staff should enjoy immunity in respect of acts performed in the exercise of their functions. Now that the Commission had decided to distinguish between administrative and service staff, the position was different. In his view, service staff should only enjoy the privileges and immunities granted them by the receiving State, the only restriction on the receiving State's freedom in that respect being that it should treat the service staff of all missions equally, without any discrimination between them.

58. Mr. SANDSTRÖM, Special Rapporteur, still thought that a distinction such as had been proposed by Mr. Bartos would raise many serious difficulties in practice. What, for example, would the position be if a member of the mission's staff engaged in an illicit currency transaction, not on his own behalf, but on behalf of the head of the mission?

59. Mr. BARTOS said that such a transaction could not conceivably be regarded as an act performed in the exercise of the functions of the person concerned or, in Mr. Ago's phrase, in the course of his duties.

60. Mr. SPIROPOULOS said that, despite what Mr. Bartos had said, he still felt there was some basis for the fears expressed by Mr. Edmonds and others that, in endeavouring to differentiate and particularize, the Commission was only sowing the seed of future difficulties in practice. If, despite those doubts, he had voted in favour of the decision to distinguish between administrative and service staff, it was because the distinction was in itself a valid one, and the Commission would, in any case, be able to reverse its decision at the next session, if it so desired, in the light of further reflection on its practical consequences and in the light also of the comments from Governments.

61. Mr. HSU associated himself fully with the views expressed by Mr. Edmonds. It was no more dangerous to give full immunity to service staff than to give it to

administrative staff or diplomatic staff proper; in fact it was less so, for not only could their immunity from jurisdiction be temporarily waived, but, in serious cases, they could be summarily dismissed and thus forfeit it altogether.

62. In his view, therefore, the Commission should revert to a simple, general rule of the kind proposed by the Special Rapporteur or Mr. François.

63. The CHAIRMAN pointed out that the Commission must necessarily be guided by the current practice of States, and, as far as he knew, no State gave service staff the same immunities as those enjoyed by other categories of mission staff. Exemption from taxation or from customs duty, for example, was never granted indiscriminately, but always to certain specified categories, such as diplomatic staff proper or diplomatic, administrative and technical staff.

64. In order to expedite matters, the Chairman proposed that the Commission take a decision on the principle reflected in the first sentence of the text proposed by Mr. Bartos (para. 9 above), as amended by Mr. Ago (namely, that all service staff should enjoy immunity in respect of acts performed in the course of their duties), and leave it to the Drafting Committee to propose an appropriate wording.

*The principle was adopted by 12 votes to 4, with 4 abstentions.*

65. Mr. AGO said he had voted in favour of the principle reflected in the first sentence of the text proposed by Mr. Bartos, on the understanding that it represented the minimum immunity which all service staff must enjoy. That should be made clear by adding a further sentence to the effect that service staff enjoyed also such other immunities as were accorded, in practice, by the receiving State.

66. Mr. VERDROSS and Mr. SPIROPOULOS felt that was unnecessary, since it went without saying that the receiving State could, if it wished, grant wider immunities.

67. Mr. AGO maintained that, if the Commission confined itself to saying simply that service staff should enjoy immunity in respect of acts performed in the course of their duties, it might wrongly be regarded as having advised against the much more generous practice followed by many States.

68. Mr. MATINE-DAFTARY suggested that Mr. Ago's point could be met by stating in the commentary that nothing in the text was to be regarded as preventing the receiving State from granting more extensive immunities than were there specified, if it so desired.

*The suggestion was adopted.*

The meeting rose at 6 p.m.

## 410th MEETING

Tuesday, 4 June 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 24 (continued)

1. The CHAIRMAN invited the Commission to consider paragraph 3 of the Special Rapporteur's article 24 (A/CN.4/91) and paragraph 2 of Mr. François's amended version of the article (407th meeting, para. 86). The position of members of the families of diplomatic agents and of their private servants would be best dealt with separately.

2. Mr. FRANÇOIS, explaining his amendment, said that there was wide variation in both doctrine and practice respecting the entitlement of members of the families of diplomatic agents and of their private servants to diplomatic privileges and immunities. As far as wives were concerned, practice was generally based on the traditional rule that they were entitled to the same privileges and immunities as their husbands, so long as they lived under the same roof. However, the criterion "living under the same roof" not being a very satisfactory one, as Mr. Amado had already pointed out in another connexion (386th meeting), he had omitted it in the case of both wives and children. In the case of children, however, he had included an age-limit, to be found in the municipal law of a number of countries, including the Netherlands. In his opinion, after the age of eighteen, when children frequently left home to attend some institution of higher education, they were no longer entitled to privileges and immunities.

3. In the case of private servants, since there was no family bond between them and the head, or the member, of the mission, he had, despite its imperfections, kept the qualification "living under the same roof", there being no point in extending privileges and immunities to private servants who lived out.

4. The CHAIRMAN proposed that the Commission first decide whether it wished to list the various members of the family entitled to privileges and immunities, or simply to adopt a general formula. Municipal law on the subject varied considerably, sometimes limiting the concept of the family to wives and children, but in other cases including parents, or even parents-in-law, living with the diplomatic agent. Some States would accordingly have difficulty in accepting anything more than a general formula.

5. The adoption of an age-limit of eighteen for children might also make the article difficult to accept. Children over eighteen might very well be still dependent on the diplomatic agent and living with him. As for the phrase "living under the same roof", many countries preferred a criterion such as "belonging to his household", or one based on the concept of economic dependence.

6. Mr. BARTOS, while agreeing as regards the great diversity of practice in the matter, noted a tendency to confine immunity as far as possible to the dependents of the diplomatic agent, largely in order to prevent abuse. There were three points to be borne in mind in that connexion. The first was that members of the family gainfully employed, or attending a university in the receiving State, were not generally regarded as entitled to privileges and immunities. The second was that the criterion of dependency should be taken in a social rather than a strictly financial sense, children or wives being still regarded as part of the household although they might enjoy a private income. The third was that the logical conclusions should be drawn from the principle of the equality of the sexes. That meant that unmarried

daughters who had attained their majority were no longer entitled to diplomatic privileges and immunities, and that husbands of women diplomats, if not gainfully employed in the receiving State, should be entitled to the same treatment as the wives of male diplomats.

7. Although he had originally been in favour of limiting the concept of the family strictly to wives and children, experience had shown him that a more elastic and human approach must be adopted. Since, however, the whole system was based on courtesy, it could be left to the protocol department in each State to settle the question of other members of the family in its own way.

8. Mr. MATINE-DAFTARY considered Mr. François's proposal too restrictive, and objected, in particular, to the age-limit in the case of children. He would much prefer a definition based on the concept of dependence. The Iranian Civil Code, like many others, regarded all persons who depended on the head of the household for their subsistence as members of his family.

9. Sir Gerald FITZMAURICE agreed that Mr. François's proposal was too restrictive, since heads or members of missions might well be either unmarried or widowers, and have a sister, grown-up daughter, or even a sister-in-law as mistress of their household. He accordingly thought it preferable to have a more general formula, such as "members of their family living with them."

10. Mr. AMADO said he too was opposed to the age-limit for children; it was quite common for heads of families to have dependent daughters at home over the age of eighteen.

11. He urged that a vote be taken on the desirability of adopting a general formula.

12. Mr. TUNKIN agreed that municipal law varied widely in its definition of the family for the purpose of entitlement to privileges and immunities. In some countries the definition covered only the wife, or husband, and children under a certain age. In others, there was no strict definition. He would therefore prefer a general formula, such as that suggested by Sir Gerald Fitzmaurice.

13. Mr. YOKOTA preferred the Special Rapporteur's general formula to Mr. François's restrictive list. The qualification "living under the same roof", criticized by Mr. Amado, might be replaced by the formula used in article 1 of the Harvard Law School draft<sup>1</sup>, namely "members of his household."

14. He was also in favour of including a stipulation analogous to that made in the case of diplomatic agents themselves, that "diplomatic privileges and immunities shall not cover acts performed in the exercise of a professional activity by a member of the family of a head or member of a mission".

15. Mr. SPIROPOULOS doubted whether adopting a general formula, without an indication of the minimum definition of a family, and leaving the rest to municipal law would be a satisfactory solution. While States could not be expected, for instance, to regard sisters-in-law as members of a widower's family, he thought that there was no law in the world which did not regard the family as consisting of, at least, the husband, wife and children.

<sup>1</sup>Harvard Law School, *Research in International Law, I. Diplomatic Privileges and Immunities* (Cambridge, Mass., 1932), p. 19.

The Commission might, therefore, adopt the general formula "members of his family," while specifying the above-mentioned minimum, and leave the rest to municipal law. Such a solution would make it unnecessary to mention other relatives, or even servants, and at the same time leave free scope for the extension of privileges and immunities to those categories.

16. The qualification "living under the same roof" was a well-established one; it should be kept, but interpreted liberally.

17. Mr. SANDSTRÖM, Special Rapporteur, said that the diversity of regulations in the various States made it so difficult to establish a list of those members of families entitled to privileges and immunities that he had found it preferable to adopt an elastic formula, namely, the term "members of their families" with the qualification "living under the same roof." He had no objection to replacing the latter phrase by "and to members of their households", but he was not sure that anything would be gained by it. As Mr. Spiropoulos had pointed out, the first phrase was well-established.

18. Mr. VERDROSS agreed with Mr. Spiropoulos. The principle that the wives and children of diplomatic agents living under the same roof with them were entitled to privileges and immunities was a rule of international law. The rest was a matter of courtesy.

19. He agreed too with Mr. Yokota that it would be illogical to give immunity from jurisdiction to members of families of diplomatic agents for acts performed in the exercise of professional activity, when the diplomatic agents themselves did not enjoy such immunity.

20. Mr. SANDSTRÖM, Special Rapporteur, remarked that the Commission had already agreed (402nd meeting, para. 81) to adopt an article on the lines of article 24, paragraph 2, of the Harvard draft, dealing with the professional activities of members of missions and their families outside the functions of the mission.

21. The CHAIRMAN observed that the Commission appeared to be generally agreed on the desirability of defining the family in general terms, while specifying a certain minimum, and of leaving it to municipal law and practice to decide what other relatives should also be entitled to privileges and immunities.

22. Mr. KHOMAN pointed out that, even if the Commission adopted a general formula, and he was in favour of that course, its application would be automatically restricted by paragraph 5 of article 24, which stipulated that only persons whose names were entered on the diplomatic list were entitled to diplomatic privileges and immunities. There was, therefore, no reason to fear an excessive extension of such privileges.

23. Mr. LIANG (Secretary to the Commission) observed that it would be difficult to adopt the age of majority as a criterion in the case of children, because it varied from country to country, and it would not be clear whether the valid age was that prevailing in the sending or in the receiving State. The extent of the diplomatic agent's "hold" over his dependents was, however, a useful criterion to adopt. The traditional formula used was that of "living under the same roof" or "forming part of the same household"; either was more satisfactory than the criterion of age or economic dependence.

24. Mr. MATINE-DAFTARY pointed out that, if dependence were adopted as a criterion, gainfully em-

ployed children would be automatically excluded. On the other hand, children could be "living under the same roof" as their father and not be dependent on him.

25. Mr. EDMONDS said that any rule the Commission adopted ought to be based on practice and offer the least difficulty in interpretation and application. Since, as Sir Gerald Fitzmaurice had pointed out, it was not uncommon for a person other than the wife of a diplomatic agent to be the hostess of his household, it would be better to adopt a general formula. Such a solution could not lead to much abuse. He would have no objection to including the criterion of close association by relationship or other close tie with the diplomatic agent. The best solution would be to adopt a general formula and leave the details to the Drafting Committee.

26. Mr. PAL said that the geography of international law had changed. The Commission should take account of the fact that in many countries of the world the pattern of family life and the constitution of the household were different from what they were in European countries.

27. Mr. FRANÇOIS agreed that, though it was essential not to go too far, his proposal was perhaps a little too restrictive. He would be willing to accept a general formula with a specification of a minimum acceptable to all. Then, if a State wished to accord privileges and immunities to other relatives of diplomatic agents, it would be at liberty to do so.

28. He would prefer the qualification "belonging to their household" to one based on the concept of dependence. A person could still be a dependent even though of age and living in a separate establishment.

29. Sir Gerald FITZMAURICE agreed that the qualification "member of their household" was preferable to one based on the concept of economic dependence. For instance, the sister of a head of mission running his household for him might be financially independent. The theoretical basis for the grant of diplomatic privileges and immunities in such cases was, he thought, the idea that certain persons could be regarded as extensions of the diplomatic agent's personality; the question should be approached in that light.

30. Sir Gerald would prefer a general formula. Mr. Pal had just supplied a further argument for that solution.

31. Mr. VERDROSS remarked that, if the Commission accepted the proposal made by the Chairman, it should explain in the commentary what it understood by the general formula, pointing out that it covered at least wives and children not of age.

32. Mr. SPIROPOULOS thought that the Commission should be careful what it said in the commentary, since such remarks would be taken as an interpretation of the article. It would be better simply to state that in municipal law the term "family" was always considered to cover at least the wife and the children.

33. Faris Bey EL-KHOURI, after recalling that privileges and immunities were accorded to facilitate the discharge of the diplomatic function, remarked that the members of a diplomatic agent's family had nothing whatsoever to do with the discharge of his functions. The grant of privileges and immunities to them was purely a matter of courtesy, often based on the principle of reciprocity. He was accordingly in favour of confin-

ing such rights strictly to the wives and children of diplomatic agents. Persons gainfully employed should certainly not enjoy any immunity. The Commission must bear in mind that many hundreds of people were involved in every capital.

34. The CHAIRMAN put to the vote the principle that diplomatic privileges and immunities should be enjoyed by the members of the families of diplomatic agents who were also members of their household, on the understanding that it be stipulated in the commentary that the term "family" covered at least the wife and the children not yet of age.

*The principle was adopted by 20 votes to none, with 1 abstention.*

35. The CHAIRMAN proposed that the Commission decide whether members of a diplomatic agent's family should enjoy the same immunities as the head of the family, or only inviolability and immunity from jurisdiction. He recalled that the Commission had already agreed that neither diplomatic agents nor members of their families should enjoy immunity in respect of outside professional activities.

*It was decided to proceed in the manner proposed by the President.*

36. The CHAIRMAN, speaking as a member of the Commission, said that he doubted whether full privileges and immunities should be accorded to members of diplomats' families. In practice, a distinction was generally drawn between members of missions and their families.

37. Mr. MATINE-DAFTARY considered that only wives and children should be accorded full diplomatic privileges and immunities. Any other members of the family should merely enjoy inviolability and immunity from jurisdiction.

38. Mr. VERDROSS observed that, in the matter of taxation, the practice was to exempt wives and children in the same way as the diplomatic agents themselves, partly in view of the difficulty of distinguishing their individual incomes. Income derived from professional activities was not, of course, exempt from taxation. The question of exemption from customs duty was rather a different matter.

39. Mr. SPIROPOULOS considered that there was no point in introducing a new concept of privileges and immunities to apply to the wives and children of diplomatic agents. They should enjoy the same rights as the head of the family. As far as customs duties were concerned, there would be no problem. It would mainly be a matter of personal effects, which were not liable to duty in any case.

40. Mr. EL-ERIAN said that the Commission could either agree that full diplomatic privileges and immunities should be accorded to the wives and children of diplomatic agents, or establish a distinction similar to that made in the case of the service staff of missions and accord them only immunities. He did not think that exemption from taxation would raise any difficulties. Minors living with their parents would either have no independent income or, if engaged in professional or commercial activities in the receiving State, would not qualify for immunity anyway. Since the Commission had decided on a general formula, he saw no reason to draw any distinction between the various categories of members of families in the matter of privileges and immunities.

41. The CHAIRMAN remarked that the principle that the members of a diplomatic agent's family should enjoy the same immunities as the agent himself appeared to enjoy general acceptance. As the Commission had already agreed, in adopting sub-paragraph 1(c) of article 22 (407th meeting), that income which had its source in the receiving State was not exempt from taxation, it was perhaps not necessary for it to take any decision regarding the exemption from taxation of members of diplomats' families. He thought, however, that mention should be made in the commentary that article 24 did not apply to the special, but not uncommon, case of members of diplomats' families who possessed the nationality of the receiving State.

*It was so agreed.*

42. The CHAIRMAN drew attention to an amendment by Mr. Yokota to paragraphs 3 and 4 of the Special Rapporteur's article 24. This amendment deleted the words "and their private servants of foreign nationality" from paragraph 3 and redrafted paragraph 4 to read as follows:

"Private servants of the head or members of the mission shall enjoy privileges and immunities only to the extent admitted by the receiving State.

"They shall not however be put under restraint without the consent of the head or members of the mission. When they have been caught in the act, the head or members of the mission shall immediately be informed.

"The head or members of the mission shall waive immunity of their servants in any case where, in their opinion, the immunity can be waived without prejudice to the exercise of the diplomatic functions.

"Private servants who are nationals of the sending State shall be exempt from dues and taxes on the emoluments they receive by reason of their employment."

43. There was, he continued, no general rule or practice on the matter. In Switzerland, for instances, only the private servants of heads of missions enjoyed privileges and immunities. Perhaps the Commission would find a satisfactory solution of the problem in the first sub-paragraph of Mr. Yokota's text.

44. Mr. SANDSTRÖM, Special Rapporteur, remarked that, in view of the diversity of national legislation on the question, the provision in his own article 24, paragraph 4, erred perhaps on the generous side.

45. Mr. FRANÇOIS said it could be considered to be the practice of most countries to accord a certain degree of immunity to the private servants of diplomatic agents, at least when they were housed under the same roof. He found it difficult to accept Mr. Yokota's amendment. It went too far in the other direction, since it accorded them no immunity at all except what the receiving State was prepared to grant.

46. Mr. YOKOTA, explaining his amendment, quoted Oppenheim's statement that there was no uniformity in the practice of States on the question. Some States granted full immunity to servants without qualification; some withheld immunity from servants who were nationals of the receiving State; some did not recognize the immunity of servants of any nationality.<sup>2</sup> In such a

situation, he felt it advisable merely to state as the general rule that private servants should enjoy only those privileges and immunities admitted by the receiving State, and to specify in the second sub-paragraph the minimum to which they should be entitled, namely, not to be put under restraint without the consent of the head or a member of the mission. That was, he thought, the general practice. Under Japanese law, even Japanese nationals who were servants of diplomatic agents enjoyed such minimum immunity.

47. In order to prevent abuse of such privileges, he had included the stipulation in sub-paragraph 3 that immunity of servants should be waived whenever that was possible without prejudice to the exercise of diplomatic functions.

48. His sub-paragraph 4 was based on paragraph 4 of the Special Rapporteur's text, with the difference that it referred to the "sending" and not to the "receiving" State.

49. Mr. MATINE-DAFTARY pointed out that the Commission could not very well accord more privileges and immunities to the private servants of diplomatic agents than it had already agreed to accord to the official servants of the mission.

50. Mr. SANDSTRÖM, Special Rapporteur, agreed.

51. Mr. VERDROSS agreed with the Special Rapporteur that the question of the privileges and immunities of private servants had already been largely determined by the Commission's decision regarding the service staff of missions. He had, however, no objection to the second paragraph of the text proposed by Mr. Yokota, since the arrest of a private servant could cause serious inconvenience to the member of the mission for whom he worked, even to the extent of interfering with the performance of his diplomatic duties.

52. Mr. MATINE-DAFTARY also agreed with the Special Rapporteur. Unlike Mr. Verdross, however, he had considerable doubts about the second paragraph, since private servants either enjoyed immunity or they did not.

53. Mr. SANDSTRÖM, Special Rapporteur, observed that his previous remarks were not to be taken as meaning that he necessarily disagreed with the first paragraph, but only that it must be viewed in the light of the Commission's decision regarding service staff. In that light it was perhaps acceptable. He also had no objection to the second paragraph, although the wording might perhaps be improved.

54. The third paragraph, however, raised a much wider question; was it not the duty of the head of the mission to waive immunity in any case where that could be done without prejudice to the exercise of the diplomatic function and not merely in cases involving his private servants? It might perhaps be desirable to include in the draft some such provision as was contained in section 20 of the Convention on the Privileges and Immunities of the United Nations.<sup>3</sup>

55. Mr. SPIROPOULOS said that, if the Commission had not already distinguished provisionally between administrative and service staff, he personally would have been in favour of giving private servants the same immunities as any other member of a mission, of which they formed an integral part, at least if they had come

<sup>2</sup> L. Oppenheim, *International Law—A Treatise*, Vol. I, *Peace*, 8th ed., ed. H. Lauterpacht (London, Longmans, Green and Co., 1955), pp. 811 and 812.

<sup>3</sup> United Nations, *Treaty Series*, Vol. I, 1946-1947, p. 26.

with it from the sending State. Since the Commission had made such a distinction, however, he agreed that it could not now give private servants a greater degree of immunity than service staff; but that was what the second paragraph of Mr. Yokota's text appeared to do.

56. There seemed, moreover, to be some contradiction between the first paragraph and the third. Any immunities which private servants enjoyed, they enjoyed by virtue of the first paragraph, not as of right but as a matter of courtesy. Immunities which were extended as a matter of courtesy, at the discretion of the receiving State, could at any time be withdrawn at the discretion of the receiving State; the third paragraph, however, appeared to leave the matter of waiver entirely to the discretion of the servant's employer.

57. The second and third paragraphs of the text proposed by Mr. Yokota should therefore be deleted and only the first retained, possibly with the fourth, which related to a somewhat different matter.

58. Mr. TUNKIN said he shared the view that the Commission must be careful not to give private servants a greater degree of immunity than it had already given to the service staff of the mission.

59. Moreover, the great diversity of national laws in that respect clearly showed that there was no established rule of international law according to which States were under an obligation to grant any kind of immunity to private servants of diplomatic agents. The laws of some States which expressly stated that such servants should enjoy no immunities had never been criticized as contrary to international law on that account.

60. There was, of course, no inherent reason why the Commission should not act *de lege ferenda* in that respect, but, in his view, it would be inadvisable, quite apart from the decision the Commission had already taken with regard to service staff. The best course would be not to refer to private servants at all in the Commission's draft. The question of their immunities and privileges would then be left exactly where it stood today, as a matter to be settled by the receiving State purely on the basis of courtesy. He could, however, agree to the course proposed by Mr. Spiropoulos.

61. Mr. KHOMAN said he agreed with Mr. Tunkin that practice was not uniform. Since, however, the Commission had decided to recognize certain immunities in the case of the service staff of missions, it would be only logical to do the same for private servants, since it was often extremely difficult to draw a clear dividing line between the two categories. Moreover, as had already been pointed out, the arrest of private servants might seriously interfere with the working of the mission.

62. He agreed, however, with Mr. Spiropoulos that the second and third paragraphs of the text proposed by Mr. Yokota were incompatible with the first, and, in fact, went beyond what had been recognized in the case of service staff. In his view, the Commission should adopt for private servants precisely the same wording as it had adopted for service staff.

63. Mr. YOKOTA, in reply to a question by Mr. El-Erian, explained that he had used the term "put under restraint" in preference to "arrested" for the reason that, in some countries at least, "arrest" was a technical term relating to a clearly defined police procedure, and he had wished to cover all procedures by which a person could be deprived of his liberty. By "caught in

the act" he meant "caught in *flagrante delicto*"; in such cases it was clearly impossible to obtain the consent of the head of the mission before putting the person concerned under restraint, but it was none the less desirable that he should be informed immediately.

64. Replying to the remarks made by Mr. Tunkin, he agreed that there was no established rule of international law with regard to the private servants of diplomatic agents, but even so he considered that the Commission should lay down a certain minimum of immunity, as it had done in the case of members of the mission who were nationals of the receiving State, where also there was no established rule of international law.

65. The CHAIRMAN pointed out that the commentary of the Harvard Law School draft contained the following sentence:

"The present tendency in State practice with reference to the treatment of the members of the non-official personnel is undoubtedly in the direction of a curtailment of their privileges and immunities, and *de lege ferenda* the Governments of the world seem to be practically unanimous in the desire that all privileged standing be denied to this class."<sup>4</sup>

66. Mr. AMADO said that, if such was the case, he would be interested to know why the Special Rapporteur had proposed that private servants of foreign nationality should enjoy the same privileges and immunities as the diplomatic agents for whom they worked.

67. Mr. SANDSTRÖM, Special Rapporteur, replied that he did not regard the whole question of diplomatic privileges and immunities so much from the point of view of the individual beneficiaries as from the point of view of the mission as a whole and its ability to perform the functions for which it was intended.

68. Sir Gerald FITZMAURICE said he was by no means convinced that the Commission would be innovating if it recognized private servants as entitled to certain privileges and immunities. Referring to the Diplomatic Privileges Act of 1708 (7 Anne, c.12) which, as far as the United Kingdom was concerned, was the very cornerstone of all diplomatic privileges and immunities, and to the case of Gallatin's coachman,<sup>5</sup> one of the most celebrated cases that had arisen in that connexion, he pointed out that most States undoubtedly did grant private servants considerable immunities, whether they regarded themselves as obliged to do so or not.

69. He himself had voted against making any distinction between the privileges given to administrative and to service staff. In the event, the Commission had finally agreed that service staff should enjoy immunity in respect of acts performed in the course of their duties. He wondered whether there was any real basis for refusing such immunity to personal servants. He had been much struck by the following remarks regarding private servants in the Special Rapporteur's commentary:

"... their services facilitate the task of the members of the mission. They have often been brought out with the mission and, by virtue of that fact, their employer and the head of the mission have incurred responsibility for them. Legal action against them can also have repercussions on their employer or the mission. Practice rather supports the idea that they should

<sup>4</sup> Harvard Law School, *op. cit.*, p. 120.

<sup>5</sup> John Bassett Moore, *A Digest of International Law* (Washington, D. C., Government Printing Office, 1906), Vol. IV, pp. 656 and 657.

enjoy the privileges of their employers and the Rapporteur has come to a similar conclusion." (A/CN.4/91, para. 62.)

Even if the Commission could not go so far, it should, he thought, at least agree that all private servants should enjoy immunity in respect of acts performed in the course of their duties.

70. Mr. AMADO pointed out that the Commission appeared to be faced with a complete disagreement on a point of fact. Either current practice was in favour of giving private servants diplomatic privileges and immunities, as the Special Rapporteur stated, or it was opposed to doing so, as the Harvard Law School had stated. The Commission must know which way the truth lay before it could vote.

71. The CHAIRMAN pointed out that, despite what was said in the commentary to the Harvard draft, the text of article 23 of that draft<sup>6</sup> made no distinction between administrative and service personnel. Since the expression "service personnel", used in the text of that article, was defined in article 1 as consisting of "the persons in the domestic service of a mission or of a member of a mission".

72. Mr. SPIROPOULOS further pointed out that article 2 of the resolution adopted in 1929 by the Institute of International Law<sup>7</sup> gave private servants who were not nationals of the receiving State full diplomatic privileges and immunities in the same way as had been proposed by the Special Rapporteur.

73. Mr. AGO felt that the formula used in the Harvard draft, namely "A receiving State may exercise jurisdiction over any member of the administrative or service personnel of a mission, only to an extent and in such a manner as to avoid undue interference with the conduct of the business of the mission" amounted to practically the same as the formula which the Commission had already adopted with regard to service staff, namely, that all service staff should enjoy immunity in respect of acts performed in the course of their duties. He agreed with Mr. Khoman that possibly that latter formula could also be adopted in the case of private servants.

74. Mr. YOKOTA recalled that, as he had already pointed out, some States gave no immunity to private servants who were nationals of the receiving State, while others gave no immunities to any private servants. The Commission must therefore appreciate that if it gave private servants immunity in respect of acts performed in the course of their duties, it would be acting *de lege ferenda*.

75. He could not agree that there was no distinction between service staff and private servants, since the former were appointed by the sending State while the latter were simply employed by a member of the mission in his private capacity.

76. Mr. MATINE-DAFTARY said the first paragraph of the text proposed by Mr. Yokota (para. 42 above) corresponded to current practice; he requested the Chairman to put it to the vote.

*The first paragraph of the text proposed by Mr. Yokota was adopted by 10 votes to 4 with 6 abstentions.*

77. Replying to Mr. MATINE-DAFTARY, Mr. YOKOTA said he could not agree to withdraw the sec-

ond and third paragraphs of his text. He did not accept the argument that they were incompatible with the first paragraph. The first paragraph laid down a general principle; the second was in the nature of an exception to the principle, and the third was in the nature of a qualification placed on the exception.

78. Mr. TUNKIN thought that, although the second paragraph could conceivably be regarded as in the nature of an exception to the first, it was an exception of such scope as to nullify completely the principle which the first paragraph was supposed to lay down. In practice, the second paragraph would mean that private servants enjoyed immunity from jurisdiction.

79. Mr. Ago and Mr. Khoman had argued that private servants should be dealt with in the same way as service staff at the mission, but in that respect he entirely agreed with what had been stated by Mr. Yokota.

80. Mr. HSU said that, in his view, the second and third paragraphs of the text proposed by Mr. Yokota were unnecessary and impracticable.

81. Mr. VERDROSS said that the only reason why he had been able to vote for the first paragraph was because he intended to vote for an exception to that paragraph along the lines proposed by Mr. Yokota in his second and third paragraphs, or along those proposed by Mr. Khoman and Mr. Ago. In his view, there was no more inconsistency involved in recognizing such an exception than there had been in recognizing an exception to the principle that nationals of the receiving State should enjoy privileges and immunities only to the extent admitted by it.

82. Mr. MATINE-DAFTARY declared that the first sentence of the second paragraph of the text proposed by Mr. Yokota was entirely unacceptable, smacking as it did of a new form of capitulation.

83. Mr. AGO said there was no doubt that the second paragraph of the text proposed by Mr. Yokota, as at present worded, would give personal servants greater immunity than the Commission had recognized in the case of service staff. To remedy that state of affairs, he suggested that the words "for acts performed in the course of their duties" be inserted after the words "put under restraint".

84. Mr. YOKOTA emphasized that the crux of the matter lay not in the personal immunity or inviolability of the person concerned, but in the inconvenience caused to his employer.

85. Mr. SPIROPOULOS felt it was quite inappropriate, in the case of cooks, nursemaids, valets and so on, to speak of immunity in respect of "acts performed in the course of their duties". Those duties were of a purely menial nature and could have no possible bearing on the work of the mission as such.

86. Mr. KHOMAN pointed out that the arrest of the cook before an important dinner party might have considerable diplomatic consequences.

87. In his view, the only way out of the impasse was to take a vote on the principle whether private servants should enjoy the same privileges and immunities as the service staff of missions, and leave it to the Drafting Committee to propose appropriate wording.

88. After some further discussion, Mr. AGO, in order to expedite matters, withdrew the amendment he had suggested to the second paragraph of Mr. Yokota's text.

<sup>6</sup> Harvard Law School, *op. cit.*, p. 23.

<sup>7</sup> *Ibid.*, p. 186.

89. Mr. PADILLO NERVO thought that the first paragraph of Mr. Yokota's text, which had already been adopted by the Commission, was undoubtedly in accordance with current practice, but that there was, no less certainly, a legitimate restriction on the principle proclaimed therein. That restriction was, he thought, clearly expressed in article 23 of the Harvard draft, and he suggested that the Commission might instruct the Drafting Committee to supplement the paragraph that had already been adopted by a provision along similar lines.

90. Mr. YOKOTA said he withdrew the second and third paragraphs of his text in favour of Mr. Padilla Nervo's suggestion.

*Mr. Padilla Nervo's suggestion was adopted by 16 votes to none with 5 abstentions.*

The meeting rose at 1.5 p.m.

### 411th MEETING

Wednesday, 5 June 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 24 (continued)

1. The CHAIRMAN invited the Commission to consider the fourth paragraph of the text proposed by Mr. Yokota (410th meeting, para. 42).

2. It was, he thought, quite in accordance with current practice that private servants who were nationals of the sending, as opposed to the receiving, State should be exempt from dues and taxes on the emoluments they received by reason of their employment, a point that did not appear to be covered in article 22.

*The fourth paragraph of the text proposed by Mr. Yokota was adopted in principle, subject to consideration by the Drafting Committee of how best to insert it in article 24.*

3. The CHAIRMAN invited the Commission to consider an amended text for paragraph 5 of article 24 that had been proposed by the Special Rapporteur and that read as follows:

"Diplomatic privileges and immunities may be refused to a person whose name is not on the list communicated to the ministry of foreign affairs, unless such person has been accepted or the omission is an obvious mistake."

4. Mr. SANDSTRÖM, Special Rapporteur, explained that the reason why he had amended the original text (A/CN.4/91) was in order to make the rule less rigid in its application.

5. He further recalled that the Commission had agreed at the 386th meeting to postpone further discussion of article 3, paragraph 2, pending consideration of article 24. The whole question of lists might now usefully be discussed.

6. Mr. PAL asked whether there was not some inconsistency between article 24, paragraph 5, either in its

original or in its amended form, and article 25, paragraph 1, which stated that diplomatic privileges and immunities should be enjoyed from the moment a diplomatic agent presented himself at the frontier of the receiving State; the list referred to in article 24, paragraph 5, might not be communicated to the ministry of foreign affairs until some time afterwards.

7. He also wondered whether that paragraph should not form the subject of a separate article, which would deal also with the evidentiary value of the list. He referred, in that connection, to the case of *Engelke v. Musmann*, in which the House of Lords had reversed the decision of the Court of Appeal on the question of such evidentiary value.<sup>1</sup>

8. Mr. VERDROSS thought it was not normal practice for the names of service staff to be entered on the diplomatic list.

9. The CHAIRMAN pointed out that the list referred to in article 24, paragraph 5, was not the diplomatic list which was drawn up, published, and kept up to date by the ministry of foreign affairs, but a list communicated by the diplomatic missions to the ministry of foreign affairs for information.

10. Mr. TUNKIN felt that the whole question was extremely complicated. In the case, for instance, of a person requesting and receiving an entry visa, the person concerned would enjoy immunities, but his name might not be added to the list until some weeks later.

11. Therefore, for a person to be entitled to diplomatic privileges and immunities, it surely was not sufficient that his name should be placed on a list and the list communicated to the ministry of foreign affairs; the list must first be accepted by the ministry of foreign affairs. The Drafting Committee, acting in accordance with the decisions taken by the Commission, had already agreed on the following text for article 4 (a), paragraph 1:

"The receiving State may at any time notify the sending State that the head of the mission, or any other member of the staff of the mission, is *persona non grata* or not acceptable. In such case, this person shall be recalled."

That text should be kept in mind.

12. Mr. LIANG (Secretary to the Commission) said that his experience in the United States of America and other countries had shown him that there were many kinds of list. The only list, however, which was valid for the granting of diplomatic privileges and immunities was that communicated by the head of the mission to the ministry of foreign affairs, and then only when it had been accepted by the ministry of foreign affairs. In addition, there was the published Diplomatic List. In the United States, that list was used, for example, by shops which wished to know whether to grant someone a rebate of a tax to which diplomatic agents were not subject, but he doubted whether it had any official significance as far as diplomatic privileges and immunities were concerned. The so-called "blue list" of the State Department of the United States gave the names of the members of foreign diplomatic missions. (At the time when he was serving in the Chinese Legation in Washington, there was a functionary in his legation called "the Chancellor". He was, in fact, no more than a clerk, but his name appeared on the "blue list".

<sup>1</sup> *Law Reports* [1928] A.C.433.

It was understood, however, that he was not entitled to the privileges and immunities granted to diplomatic personnel proper.) Finally, there was often another list containing the names of domestic or service staff.

13. Mr. SPIROPOULOS thought there was general agreement that none of the lists referred to by the Secretary, not even that communicated to the ministry of foreign affairs, constituted conclusive evidence that all the persons named on it, and only they, were entitled to diplomatic privileges and immunities. It could be no more than a presumption that if a person's name was on the list he was entitled to diplomatic privileges and immunities; and so the matter was regarded in practice. He wondered, therefore, whether the Commission should not abandon altogether the idea of inclusion of a person's name in the list as a criterion of whether he was entitled to diplomatic privileges and immunities.

14. The CHAIRMAN suggested that the matter could at any rate be relegated to the commentary.

15. Mr. SANDSTRÖM, Special Rapporteur, pointed out that two questions were involved: first, whether the Commission should state that a list must be submitted; and secondly, what were the consequences and implications of non-inclusion of a name in such a list. As regards the first, he had felt that it was in the interest of the receiving State to know the names of all persons for whom diplomatic privileges and immunities might be claimed if occasion arose. As regards the second, he agreed that the list could not be regarded as conclusive evidence of entitlement to diplomatic privileges and immunities, but he hoped he had made that plain in his amended text.

16. Mr. EL-ERIAN said he shared the doubts expressed by Mr. Tunkin. It was, in his view, undesirable to make a substantive question of law depend on a purely procedural matter, one with regard to which, moreover, State practice was far from uniform. He felt that article 24, paragraph 5, could be omitted altogether.

17. Mr. SANDSTRÖM, Special Rapporteur, said he would withdraw article 24, paragraph 5, since the majority of the Commission appeared to be in favour of that course.

18. Mr. PADILLA NERVO said that he had no objection to the withdrawal of article 24, paragraph 5, but felt that there should be somewhere in the draft, possibly in article 25, a provision corresponding to article 11 of the Harvard Law School draft, which read:

“A sending State shall communicate to the receiving State, upon request of the latter, a list of the members of its mission, of their families, and of the administrative and service personnel.”<sup>2</sup>

19. Although such lists could not provide conclusive evidence of entitlement to diplomatic privileges and immunities, they were of great practical use to the receiving State, since they showed it, for example, whether a particular locally-recruited member of the mission staff was no longer employed by it and was therefore no longer entitled to any diplomatic privileges and immunities he might have been receiving, or whether a member of the mission had recently been joined by one of his family, about whose arrival it would otherwise remain in ignorance, at least in the case where no entry visa was required.

<sup>2</sup> Harvard Law School, *Research in International Law, I. Diplomatic Privileges and Immunities* (Cambridge, Mass., 1932), p. 21.

20. Mr. SANDSTRÖM, Special Rapporteur, pointed out that article 3, paragraph 2, of his draft was designed to correspond to article 11 of the Harvard draft. It seemed, however, that most members of the Commission were in favour of relegating all mention of official lists to the commentary.

21. Mr. TUNKIN said that he personally would be in favour of that course, since the question was one of protocol rather than of international law.

22. Mr. MATINE-DAFTARY said he agreed with Mr. Padilla Nervo that a provision along the lines of article 11 of the Harvard draft should be included somewhere among the articles themselves.

23. The CHAIRMAN suggested that it be left to the Drafting Committee to submit proposals as to whether the substance of article 3, paragraph 2, which corresponded to article 11 of the Harvard draft, should be inserted in the articles or in the commentary, and what form the insertion should take.

*It was so agreed.*

24. The CHAIRMAN then drew attention to a proposal by Mr. El-Erian for the insertion in article 24 of a new paragraph reading as follows:

“A receiving State may at any time declare that a person who is a member of the administrative or service staff is objectionable, without obligation to state its reasons. In such case, the sending State shall terminate such person's connexion with its mission.”

25. He wondered, however, whether the point was not already covered by the text which the Drafting Committee had adopted for article 4(a), paragraph 1.

26. Mr. EL-ERIAN agreed that the text adopted for article 4(a), paragraph 1, could be interpreted as applying to administrative and service staff, but since section I of the draft related almost entirely to the heads of missions and diplomatic staff proper, and since administrative and service staff were not referred to at all until article 24, he feared that it might not be interpreted in that way. It would accordingly be safer to make the point absolutely clear in article 24. He did not, however, insist on his amendment, and would be willing to leave the matter to the discretion of the Drafting Committee.

27. Mr. SPIROPOULOS said that he shared Mr. El-Erian's fears, at least as far as service staff were concerned, but felt the point could be met more conveniently by specifying in the comment on article 4(a) that it applied to administrative and service staff as well as diplomatic staff proper.

28. The Drafting Committee might also consider whether it should not incorporate the words “without obligation to state its reasons” in the text it had approved for article 4(a), since it was in accordance with international law that an alien could be asked to leave the country without any explanation.

29. Mr. TUNKIN said he agreed with Mr. El-Erian that article 4(a), in the form adopted by the Drafting Committee, would not necessarily be regarded as applying to administrative and service staff. He suggested, however, that it would be preferable to amend the text of article 4(a) by replacing the words “or any other member of the staff of the mission” by, for example, “or any other member of the diplomatic, administrative, technical or service staff of the mission”.

30. The last sentence of the text proposed by Mr. El-Erian raised another point which was possibly not covered by the text of article 4(a). The Drafting Committee had felt that the phrase "In such case, this person shall be recalled" could be held to cover all eventualities, including, by extension, the case where the person concerned was not a national of the sending State; it might, however, be preferable to add some such words as "or his connexion with the mission terminated".

31. He suggested, therefore, that the Drafting Committee should be requested to reconsider article 4(a) in the light of the various points that had been raised in connexion with Mr. El-Erian's amendment.

*It was so agreed.*

#### ARTICLE 25

32. Replying to a question by the CHAIRMAN, Mr. SANDSTRÖM, Special Rapporteur, said that in article 25 he had deliberately dealt only with the question of the ending of a diplomatic agent's functions in the receiving State, not with the ending of a mission as such. The two questions were difficult to disentangle, but it was still his hope to be able to draft some provision covering the latter question, in accordance with a suggestion made during the course of the discussions.

33. Mr. BARTOS wondered, with regard to paragraph 1, whether the words "from the moment when he presents himself at the frontier of the receiving State" should not be replaced by "from the moment he enters the territory where the receiving State exercises its jurisdiction".

34. Under the first sentence of paragraph 2 it appeared that all members of diplomatic missions, including diplomatic staff proper, would lose all immunity in respect of acts that had not been performed in the exercise of their functions as soon as such functions came to an end. He wondered whether that was really the Special Rapporteur's intention. A point of special importance that arose in that connexion related to the position of the diplomatic agents of a State in which a change of government took place, when diplomatic agents to replace them were sent out by the new Government before it was recognized by the receiving State.

35. Mr. MATINE-DAFTARY asked, with regard to the second point raised by Mr. Bartos, whether the Special Rapporteur could agree to replace the words "in the exercise of his functions" by "during the exercise of his functions". The question was, in fact, whether diplomatic immunity could be entirely assimilated to parliamentary immunity in that respect.

36. Mr. VERDROSS pointed out that article 25 in its present form could only relate to official members of mission staff. The privileges and immunities enjoyed by private servants were clearly enjoyed from the date on which they entered service until the date on which their contract of employment ended.

37. Mr. SPIROPOULOS felt that the case of private servants should be left entirely aside. Since the receiving State had been given discretion to decide what privileges and immunities to grant to private servants, it was only logical that it should also be left free to decide when they should begin and end.

38. Mr. SANDSTRÖM, Special Rapporteur, in reply to Mr. Bartos and Mr. Matine-Daftary, said that, in his view, immunity should subsist only in respect of acts

performed in the exercise of diplomatic functions. The point that Mr. Bartos had raised regarding the possible effects of a change of government could, he thought, be left aside, since in practice the determining factor would be whether or not the receiving State recognized the sending State's new Government and its acts.

39. Replying to Mr. Verdross, he felt it was unnecessary to mention private servants in article 25, since they could only be regarded as such while so employed.

40. The CHAIRMAN, speaking as a member of the Commission, drew the Drafting Committee's attention to the desirability of replacing the words "even in case of war" by "even in case of armed conflict".

41. Sir Gerald FITZMAURICE wondered whether it would not be desirable to insert in article 25 a provision along the lines of article 30 of the Harvard draft, which read:

"Upon the death of a national of a sending State who is a member of a mission, a member of his family, or a member of the administrative or service personnel, the receiving State shall permit the withdrawal of the tangible movable property owned by such person, imposing upon such withdrawal no conditions or restrictions other than those which prevailed for the withdrawal of such property by the person at the time of his death; and it shall impose no tax upon the withdrawal or devolution of property so withdrawn."<sup>3</sup>

42. Mr. SANDSTRÖM, Special Rapporteur, said it had been his intention to ask the Commission whether it thought such a provision necessary. In his view, the point was covered implicitly by paragraphs 2 and 3 of article 25, but he would have no objection to making it explicitly.

43. Mr. PAL agreed with Sir Gerald Fitzmaurice that a provision along the lines suggested was desirable. In his view, paragraphs 2 and 3 of article 25 did not fully cover the point. It was to be noted that article 24 of the Havana Convention<sup>4</sup> also covered the case of the death of a diplomatic agent, though perhaps in a rather sketchy manner.

44. Sir Gerald FITZMAURICE suggested that, as the Special Rapporteur had no objection to including a provision along the lines he had suggested, the Drafting Committee should be asked to propose appropriate wording.

45. The CHAIRMAN suggested that article 25 as a whole should be referred to the Drafting Committee for consideration in the light of the various comments that had been made.

*It was so agreed.*

#### ARTICLE 26

46. Mr. GARCIA AMADOR said he had some doubts as to whether article 26 was appropriate in a draft on diplomatic intercourse and immunities. However, if it was to be retained, it should be worded in a positive rather than a negative form, somewhat as follows:

"The child of a person enjoying diplomatic privileges shall have the nationality of the sending State even if it is born on the territory of the receiving State."

<sup>3</sup> *Ibid.*, p. 25.

<sup>4</sup> Convention regarding Diplomatic Officers, signed at Havana on 20 February 1928. See League of Nations, *Treaty Series*, Vol. CLV, 1934-1935, No. 3581, p. 271.

47. Mr. LIANG, Secretary to the Commission, agreed that the text was open to certain objections. In particular, the reference to the receiving State's "imposing" its nationality seemed to disregard the fact that nationality at birth was not acquired by some arbitrary act on the part of the State concerned, but in consequence of the operation of its laws.

48. Mr. BARTOS felt that the text did not cover all the cases which arose in practice. It was not enough to say that the receiving State should not impose its nationality solely by reason of the child's birth upon its territory; some *jus soli* countries stipulated that children born to aliens on their territory must have their habitual residence there for a given length of time, usually throughout their minority, in order for them to retain the nationality they had acquired by the accident of their birth. A child born to a foreign diplomatic agent might well find himself in that situation: the receiving State would not be imposing its nationality "solely" by reason of the child's birth upon its territory, but the result would be the same.

49. Mr. TUNKIN said that he entirely agreed with Mr. Bartos, and the Drafting Committee should take the point into account.

50. Another point which should be taken into account was that the article, as at present worded, applied equally to nationals of the receiving State, since the Commission had decided to give them certain privileges and immunities. Obviously, however, they should be excluded from its scope, and the article made to apply only to nationals of the sending State.

51. Mr. SPIROPOULOS agreed with Mr. Bartos. He also agreed in substance with Mr. Tunkin, although it would be preferable to speak of "nationals of States other than the receiving State" rather than "nationals of the sending State", since the person in question might come from a third State. Finally, the Drafting Committee should be careful not to exclude the possibility of acquiring the receiving State's nationality by option.

52. Mr. EL-ERIAN felt, with regard to the last point referred to by Mr. Spiropoulos, that article 26 related solely to nationality conferred *jure soli* at the time of birth, not to nationality acquired subsequently. All the article meant was that, in the case of diplomatic agents, the principle of *jus soli* should not apply automatically; in some *jus soli* countries, such as the United States of America, the principle did not apply automatically in every case, since the requirement of being subject to the jurisdiction of the country was taken into account. In countries where the place of birth was the sole criterion, the article was indispensable.

53. The CHAIRMAN suggested that article 26 be referred to the Drafting Committee for consideration in the light of the various comments that had been made.

*It was so agreed.*

#### ARTICLE 27

54. The CHAIRMAN invited Mr. Padilla Nervo to introduce the joint amendment submitted by him and Mr. García Amador to article 27 of the Special Rapporteur's draft.

55. Mr. PADILLA NERVO introduced the following text to replace the existing text of article 27:

"1. It is the duty of diplomatic agents to conduct themselves in a manner consistent with the internal

order of the receiving State, to comply with those of its laws and regulations from whose application they are not exempted by the present provisions, and, in particular, not to interfere in the domestic or foreign politics of that State.

"2. All official business entrusted to a diplomatic mission by its Government shall be conducted with or through the ministry of foreign affairs.

"3. The premises of the mission shall be used solely for the performance of the functions recognized as normal and legitimate under the provisions herein laid down or other rules of general international law and any special agreements in force between the sending and the receiving States."

56. Paragraph 1 of the joint amendment was based on the Special Rapporteur's text. The words "notwithstanding those privileges and immunities" had, however, been omitted, as their precise implication was not clear, and the phrase might even be harmful. The privileges and immunities of diplomatic agents, on the one hand, and their duties, on the other, formed two distinct legal categories. The duties of the diplomatic agent, which lay essentially in conforming with the law of the receiving State, existed independently in their own right, and not merely as a counterpart to the privileges and immunities the law accorded. Inclusion of the phrase might give the impression that one of the categories had priority over the other, and that, in doubtful or marginal cases, privileges and immunities should override duties, which was, of course, not the case.

57. The clause "provided that they do not impede the exercise of his functions" had also been omitted from the end of the paragraph, as it appeared to be unsound and opened the door to abuse. He considered the legal position to be that diplomatic agents were obliged, in principle, to conform to all the laws of the receiving State, with the sole exception of any provisions which conflicted with the enjoyment of any privilege or immunity recognized by international law. In other words, the only exceptions were legal ones. The last phrase of the Special Rapporteur's draft, however lent itself to the interpretation that there were also cases in which the diplomatic agent could decide at his discretion not to conform to the laws of the receiving State if he considered that they might impede the discharge of his functions. That was an anti-legal principle.

58. On the other hand, there was one addition to the paragraph, namely a clause on the lines of article 12 of the Havana Convention,<sup>5</sup> enunciating the obligation not to intervene in the domestic or foreign politics of the receiving State. Such non-intervention was indisputably one of the elementary duties of States. And since such undue intervention on the part of States normally took place through the medium of their diplomatic representatives, it would be strange if a codification of the duties of diplomatic agents made no reference to that fundamental, though perhaps self-evident, duty. The words "to intervene", which he preferred to the words "to interfere" used in the English translation, should be understood as referring to illegitimate intervention, in the perfectly familiar connotation which the term had in international law. They naturally did not apply to legitimate representations which were a normal part of the diplomatic function.

59. The subject dealt with in paragraph 2 had already been discussed at some length by the Commission (393rd

<sup>5</sup> *Ibid.*, p. 267.

meeting, para. 73-84), and he need only affirm that the provision, generally speaking, reflected normal custom. Admittedly, there were numerous exceptions in practice, but he thought it none the less advisable to lay down the general principle. The exceptions in any case should not give rise to any difficulties, in view of the obligation on the receiving State not only to place no obstacles in the way of the mission but actually to assist it in establishing the necessary contacts with the authorities with which it had to deal in cases which seemed justified.

60. The true rule, as Mr. Tunkin had pointed out (393rd meeting, para. 76), was that the receiving State had, under international law, the right to designate the organs of diplomatic intercourse within its governmental system. He preferred his own formulation, however, as a simpler exposition of ordinary practice. Though it might well be argued that the proper place for the rule in question was in a treatise on diplomatic law rather than in a codification of diplomatic intercourse and immunities, he did not think that a sufficient reason to exclude a rule which was of some value and might help to avoid practical difficulties and abuses. It was to be noted that the rule was also included in the Havana Convention (article 13).<sup>6</sup>

61. The principle enunciated in paragraph 3 was an indirect condemnation of the improper use of the premises of missions. As he had previously pointed out (395th meeting, para. 22), the question was closely bound up with the principle of the inviolability of those premises enunciated in article 12. It would be recalled that, in that connexion, the Commission had decided by a majority, which included his own vote, not to state any exception to the principle of inviolability, thereby implying that even the improper use of mission premises, however grave it might be, was no legal justification of entry by the authorities of the receiving State. Unfortunately, the deletion of all reference to exceptions to the principle meant that there was no longer any mention, even indirect, of the fact that premises must not be used in an arbitrary and unrestricted fashion. The purpose of the third paragraph of his amendment was to repair that omission.

62. A clearer and more specific provision than the phrase "shall be used solely for the performance of the functions recognized as normal and legitimate" had proved difficult to find owing to the impossibility of enumerating all the uses included in, or excluded by, the term "normal and legitimate functions"; the remainder of the sentence was, however, designed to clarify the sense of the phrase. By "normal and legitimate" functions were understood those following from the provisions of the Commission's draft and from any other rules of general international law. Concerning the former, he had particularly in mind the draft article which the Special Rapporteur had been requested to prepare on the definition of the diplomatic function, which should provide certain criteria from which to judge the normal uses of mission premises. Further light on those uses might perhaps be shed by other rules of ordinary international law. He might add that he was using the term "general international law" in the sense used by Mr. Verdross in his treatise,<sup>7</sup> i.e. as the opposite of special international law derived from special agreements.

<sup>6</sup> *Ibid.*

<sup>7</sup> Alfred Verdross, *Völkerrecht*, 3rd ed. (Vienna, Springer-Verlag, 1955).

63. Finally, a word in explanation of the last clause in paragraph 3. The Commission had rightly decided not to deal with the question of asylum in the draft, and that decision must be respected. However, in enunciating the rule that the premises of missions should be used solely for normal and legitimate functions, it was impossible not to allude to certain special agreements in which diplomatic asylum was recognized as among the legitimate uses of mission premises. It might, of course, be argued that it was not necessary to mention special agreements at all, since their omission could not affect their validity for the contracting parties. It was, however, necessary, without prejudice to any decision on the question of asylum, to mention the existence of another legitimate use of mission premises, recognized by countries which had subscribed to conventions on diplomatic asylum. Failure to make such mention would be misunderstood in such countries, among which were a large number of Latin American States.

64. Mr. SANDSTRÖM, Special Rapporteur, read out the following draft article on the diplomatic function which he had intended to refer to the Drafting Committee before submitting it to the Commission:

"The functions of the diplomatic mission consist *inter alia* in:

"1. Ascertaining by all lawful means the conditions and development of the receiving country and reporting thereon to its Government;

"2. Protecting the interests of its country and of its nationals in the receiving country; and

"3. Negotiating, under instructions from its Government, with the Government of the receiving State or its agents on questions concerning relations between the two countries which require agreement."

The article was couched in very general terms because of the difficulty of entering into detail.

65. Referring to the differences between his own text for article 27 and the joint amendment by Mr. Padilla Nervo and Mr. García Amador (para. 55 above), he pointed out that he had no intention of implying by the phrase "notwithstanding those privileges and immunities" that the duties of a diplomatic agent were the mere counterpart to his privileges and immunities. He had merely included it as a useful reminder that the enjoyment of privileges and immunities did not place the diplomatic agent above the law, but on the contrary carried an added duty to respect it.

66. The purpose of including the clause "provided that they do not impede the exercise of his function" was to emphasize that the diplomatic agent might fulfil his duty towards his sending State as far as was possible without breaking the law of the State to which he was accredited.

67. He had decided against including a provision on the delicate question of non-intervention in the domestic and foreign politics of the receiving State, despite the presence of such a provision in the Havana Convention, partly on the ground that it lent itself to misinterpretation, but partly also because diplomatic agents almost invariably intervened only on the instructions of their Governments.

68. The point dealt with in paragraph 2 of the joint amendment had already been the subject of some discussion, during which it had been pointed out that on many questions it was preferable for diplomatic agents to deal

with the bodies which had a special knowledge of them (393rd meeting, para. 81). He presumed that the authors of the joint amendment had such exceptions in mind when limiting the scope of the provision to "official business". The term was, however, rather vague; all business of missions might be regarded as official. It was really on eminently political questions that the diplomatic agent should deal solely with the ministry of foreign affairs. If a more appropriate expression could be found he would have no objection to the paragraph.

69. He had less difficulty in accepting paragraph 3 which, though very general, was in accordance with international law.

70. Mr. KHOMAN said that he found the joint amendment fully acceptable, subject to a few drafting changes and some clarification. The term "diplomatic agents" used in paragraph 1 was, he thought, too restrictive. Since the Commission had recognized the right of all categories of the staff of missions to certain privileges and immunities, it would be better to refer to "all members of the mission" or "all the staff of the mission".

71. While fully agreeing with the principle of non-interference in the domestic or foreign policies of the receiving State, he thought it essential to specify what was meant by the concept. Representations made to the receiving State when it contemplated passing laws affecting the interest of the sending State or its nationals might be interpreted as interference, yet it was the positive duty of an ambassador to make them. By the duty of non-interference he understood the obligation not to take part in the formulation or execution of the domestic or foreign policies of the receiving State.

72. Again, while agreeing in principle with paragraph 2, Mr. Khoman thought that it should be construed as indicating that while the ministry of foreign affairs was the normal channel for diplomatic intercourse, it could advise members of missions to get into touch with other departments direct. The Commission had already discussed the question at the 393rd meeting and was, he thought, agreed on the interpretation of such a provision.

73. As for paragraph 3, he feared that the phrase "functions recognized as normal and legitimate" might be subject to various interpretations, and he would prefer to see it reinforced.

74. Sir Gerald FITZMAURICE said that he agreed with practically all that Mr. Khoman had said regarding the joint amendment, in particular on the desirability of substituting some other expression for "diplomatic agents".

75. In paragraph 1, he doubted the advisability of using the phrase "those of its laws and regulations from whose application they are not exempted". Enjoyment of privileges and immunities did not, in principle, give exemption from any of the laws and regulations of the receiving State.

76. He was also doubtful about the inclusion of the words "foreign politics" in that paragraph. While it was a firmly established principle that envoys must not interfere in the domestic politics of the receiving State, it might be argued that their role was precisely, if not to interfere, at least to concern themselves with its foreign policy. The difficulty was perhaps merely a question of drafting, but he thought that the words "or foreign" could conveniently be omitted.

77. Paragraph 2 appeared to imply that even the Government of the receiving State could not allow the diplomatic agents of other States to deal with other departments than its ministry of foreign affairs. Yet, as he had previously pointed out, it was the regular practice of Governments to invite the specialized attachés of missions, and in particular the service attachés, to deal directly with the competent departments (393rd meeting, para. 81). Naturally, in countries which made their ministry of foreign affairs the sole organ of diplomatic intercourse, members of missions must needs comply with that rule. Perhaps the authors of the amendment would agree to redrafting the provision in a less rigid form.

78. He had no comments to make for the moment on paragraph 3; he would prefer first to study the Special Rapporteur's new draft article with which it was so closely connected.

79. Mr. BARTOS welcomed the amendment which, if adopted and applied, would do much to improve international relations and obviate day-to-day conflicts between States. In paragraph 1, which enunciated the extremely important principle that diplomatic agents were still subject to the laws of the receiving State, a small correction appeared, however, to be necessary. Authors were generally agreed that it was the duty of diplomatic agents, without accepting the jurisdiction of the receiving State, to submit voluntarily to its laws and regulations, except when they were contrary to the rules of international law in general, and not only to the rules relating to privileges and immunities.

80. Non-intervention was the rule with reference not only to domestic but also to foreign policy, especially since the adoption of the Charter of the United Nations, under which all Members were pledged to respect the "political independence" (both internal and external) of any State (Article 2, para. 4). But non-intervention in domestic or foreign policy, though obviously precluding anything constituting a "diplomatic" ultimatum to the receiving State to change its policy, or public statements by diplomatic envoys against the policies of the receiving State, did not affect the right of such envoys to intervene in a proper diplomatic manner in order to defend the interests of their sending States even in matters of domestic policy.

81. Paragraph 2 contained a sound principle, which it was necessary to state explicitly. It should not, however, preclude the conduct of business with other organs than the ministry of foreign affairs, such as the ministry of foreign trade or the service ministries, when the receiving State saw no objection. As he understood it, the principle was that official business should not be conducted with other departments than the ministry of foreign affairs, except with the consent of the receiving State.

82. Paragraph 3 contained a rule which the tendency of missions to abrogate to themselves functions not belonging to the sphere of diplomacy made it essential to re-affirm. The qualification implying that exceptionally, and by special agreement, missions might be used for certain not strictly diplomatic purposes was a sound one, and he fully approved of the paragraph in that form.

83. Mr. PADILLA NERVO, clarifying the meaning of the concept of "intervention" in the context, said that it carried the connotations given to it by Professor

Lauterpacht,<sup>8</sup> namely, dictatorial interference in the sense of action amounting to a denial of the independence of the State and implying a peremptory demand for positive conduct or abstention—a demand which, if not complied with, involved threat to or recourse to compulsion, though not necessarily physical compulsion, in some form. Similar definitions, quoted by Lauterpacht, had also been formulated previously by Professors Brierly, Oppenheim and Verdross. The term did not therefore preclude normal diplomatic representations.

84. He accepted Mr. Khoman's suggestion for the replacement of the term "diplomatic agents".

85. As for the question of conducting official business with other departments than the ministry of foreign affairs, he agreed that it was a frequent practice for commercial or service attachés to deal directly with the competent department. He had thought, however, that the idea that they could do so with the knowledge and consent of the ministry of foreign affairs was more or less implied by the last two words of the phrase "with or through" the ministry of foreign affairs. The paragraph could, however, be redrafted as suggested by Sir Gerald Fitzmaurice.

The meeting rose at 1 p.m.

#### 412th MEETING

Thursday, 6 June 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 27 (continued)

1. The CHAIRMAN invited the Commission to continue its consideration of article 27 and the amendment to that article submitted by Mr. Padilla Nervo and Mr. García Amador (411th meeting, para. 55).

2. Mr. AGO said that, as far as the last clause in paragraph 1 of the amendment was concerned, he differed from Mr. Padilla Nervo in preferring the word "interfere", originally proposed in the English text, to the word "intervene". "Intervention", in the sense in which Mr. Padilla Nervo had defined it at the previous meeting, was something quite different from what one should state here; it was an act of State involving normally the use of force or compulsion, and had nothing to do with simple meddling in the politics of the receiving State by the person of a diplomatic agent. Moreover, he agreed with Sir Gerald Fitzmaurice on the desirability of confining the reference to interference in domestic politics; any reference to non-interference by a diplomatic agent in the foreign politics of the receiving State might be misunderstood. Apart from that question and drafting points, the idea enunciated in the clause seemed to him quite clear.

3. Paragraph 2, he thought, might well be dispensed with. Cases where States insisted that foreign missions conduct all official business through the ministry of foreign affairs would be covered by the obligation enun-

ciated in the previous paragraph that diplomatic agents must comply with the laws and regulations of the receiving State. Since, as several speakers had pointed out, it was a regular practice for specialist attachés to deal directly with the competent departments, it would be better not to give the impression that the Commission wished to discourage that practice, all the more so as relations between States were steadily broadening in scope.

4. Mr. TUNKIN said that he accepted the amendment in principle as a potential improvement on the draft, but on the understanding that the grant of privileges and immunities was not made conditional on the due fulfilment of their duty by diplomatic agents. That point might, however, be dealt with in the discussion on article 28.

5. He was doubtful about the phrase "to conduct themselves in a manner consistent with the internal order of the receiving State". The concept of "internal order" was a very broad one, and if taken literally might put the diplomatic agent in the awkward situation of having to observe all local customs and practise the established religion. He would prefer the words "internal legal order".

6. Although on the principle he differed very little from the authors of the amendment, he nevertheless considered that the phrase "from whose application they are not exempted" might be better worded. As it stood, it could be interpreted as meaning that a diplomatic agent should comply only with the laws and regulations from whose application he was not exempted. It had been rightly pointed out, in connexion with article 20, that it was incorrect to interpret immunity from criminal jurisdiction as placing the diplomatic agent above the law. On the other hand, an assertion of the contrary, i.e. that the diplomatic agent must obey all the laws of the State, would also be incorrect. He did not consider it incumbent on the diplomatic agent as a matter of duty to comply with every law of the receiving State. The matter might, however, be referred to the Drafting Committee.

7. On the matter of intervention, he was in favour of referring simply to the principle of non-intervention in the domestic affairs of the receiving State. As Sir Gerald Fitzmaurice had pointed out, it was to some extent the ambassador's duty at least to endeavour to influence the foreign policy of the receiving State.

8. Incidentally, "internal order" must not be taken as a territorial notion, but should be understood in the sense of the phrase "matters . . . within the domestic jurisdiction" used in Article 2, paragraph 7, of the Charter of the United Nations. The clause might also be referred to the Drafting Committee with a view to finding a wording more on the lines of that used in the Charter.

9. While he agreed in substance with Mr. Ago, he would not object to retaining paragraph 2. All States clearly had the right to decide which of their organs might enter into direct communication with the organs of other States. If the paragraph were retained, however, it would be desirable to add a phrase such as "unless the laws and regulations of the receiving State provide for a different procedure".

10. Mr. YOKOTA also agreed with the amendment in principle. As far as the last clause in paragraph 1 was concerned, Mr. Padilla Nervo having defined "intervention" as meaning "dictatorial interference", it fol-

<sup>8</sup>H. Lauterpacht, *International Law and Human Rights* (London, Stevens and Sons Limited, 1950), pp. 167 and 168.

lowed that intervention pure and simple was permitted to diplomatic agents. He doubted, however, whether any State would accept such a proposition. For an ambassador to encourage or subsidize a political party in the receiving State was an unwarranted interference, although it was not a dictatorial intervention. He accordingly preferred the word "interfere".

11. He agreed with Sir Gerald Fitzmaurice on the desirability of omitting the reference to "foreign politics", and would prefer "domestic affairs" or "domestic matters" to the rather vague term "domestic politics". It was to be noted that the concept "domestic matters" was used both in the Covenant of the League of Nations and the Charter of the United Nations. It was also used in many bilateral treaties, especially treaties of arbitration, and judicial settlements.

12. Mr. LIANG, Secretary to the Commission, wondered whether the original article or the amendment to it should be included in the draft at all. If, as many members advocated, the draft was to be regarded as the basis for a draft convention, he doubted whether it would be either logical or practical to include articles on the duties of diplomatic agents, since the convention would define the rights and duties of States. In any case, it was essential to distinguish between the acts of diplomatic agents in their official capacity and their private acts. A provision such as that at the end of paragraph 1 of the amendment would be justified if it referred only to the private acts of diplomatic agents. In cases where diplomatic agents took steps which could be regarded as intervention in the politics of the receiving State, it was on behalf of their Governments, and he could not conceive of any intervention—in the sense in which Mr. Padilla Nervo, quoting Lauterpacht and Brierly, had defined it—occurring except on the explicit instructions of the sending State. It was in fact an act of State, the conduct of the diplomatic agent being involved only in so far as he made himself objectionable when carrying out his instructions. In that respect, the diplomatic agent was in the same position as a military or naval officer who had to carry out the orders of his superiors and could not use his discretion. The real duty of diplomatic agents in the context was one of "abstention". Any suggestion of a positive duty, such as that implied in the term "respect", should, he thought, be avoided.

13. The term "internal order", as Mr. Tunkin had pointed out, was a very broad one, and he was not sure that the concept existed in Anglo-Saxon law at all. It did exist perhaps in continental countries, but there it was associated with the idea of domestic jurisdiction. The term might even be interpreted as meaning "political order"—and it was clearly not the duty of foreign diplomats to act positively in conformity with the political order of the receiving State. The phrase might perhaps be deleted or the idea expressed in some other way.

14. As for the reference to "domestic or foreign politics", logically speaking the formulation and directing of the foreign policy of a State came within the meaning of "matters within its domestic jurisdiction".

15. On the question of the choice between the words "interfere" and "intervene", he observed that the United States Government, when handing Lord Sackville, the British Minister, his passport in 1888, had complained that he had ventured to "interfere" in the political affairs of the United States.

16. Mr. HSU said that the amendment contained some very important principles. Had it been discussed earlier,

there might have been rather less enthusiasm for the restriction of privileges and immunities. Although Mr. Padilla Nervo, by accepting certain drafting changes, had disposed of many of Mr. Hsu's reservations, he still felt some misgivings regarding the last phrase in paragraph 1.

17. The concept of "intervention", as Mr. Padilla Nervo had defined it, seemed to have no place in the article, such dictatorial interference being an act of State for which the diplomat obliged to perform it could not be blamed. What the authors of the amendment appeared to have in mind was meddling in the affairs of the receiving State by over-zealous diplomatic agents, as in the classic instance quoted by the Secretary. The provision was, nonetheless, a useful one, and should be retained in a form which did not involve the concept of "intervention".

18. Mr. VERDROSS considered paragraph 1 of the amendment to be most important, since it rejected the old theory of exterritoriality. Indeed the whole article was of such importance that the Drafting Committee might well consider putting it in a more prominent place.

19. The position of diplomatic agents with regard to the laws and regulations of the receiving State was somewhat complex. Some laws, such as those on taxation, did not apply to them at all; others were valid, but could not be applied in the normal manner. Though he agreed with the provision in principle, he thought that the reference to the special position of diplomatic agents due to their enjoyment of privileges and immunities should be otherwise expressed.

20. He quite understood the feelings of those who were dissatisfied with the last clause of paragraph 1; the concept of "intervention" was quite different from that of "interference" (*ingérence*). Incidentally, Article 2, paragraph 4, of the United Nations Charter referred not only to the use of force but also to the threat of force, and quite clearly forbade such intervention, not only in the domestic affairs of States but in international relations as well.

21. With regard to paragraph 2, he agreed with Mr. Ago that direct contacts between special attachés and other departments than the ministry of foreign affairs were quite common. However, they were admissible only with the consent of the ministry of foreign affairs. Perhaps it would be better to insert the words "unless otherwise agreed" after the word "shall".

22. Sir Gerald FITZMAURICE agreed with Mr. Ago, Mr. Yokota, the Secretary, and other speakers on the undesirability of introducing the concept of intervention. It was quite clear from Mr. Padilla Nervo's explanation that the type of intervention envisaged was an act of State in which the ambassador was merely the mouthpiece of his Government. Whether such acts were right or wrong did not for the moment concern the Commission; the fact was that an ambassador would always perform them when so instructed by his Government, and in doing so would be discharging his function. On the other hand the provision was to cover personal acts of meddling by diplomatic agents (as it should), the concept of forcible intervention was inadequate. The case of Lord Sackville, quoted by the Secretary, was a case of mere interference, with no suggestion of dictatorial intervention. He would prefer the word "interference" or some more general term, but still considered

that any reference to foreign politics would be misleading.

23. Mr. EL-ERIAN considered it most important to include in the draft an article stating the duties of diplomatic agents. He was gratified to note that the Commission, having already reaffirmed the principle of the sovereign equality of States, now considered it desirable to reaffirm the principle of their political independence and the principle of the duty of non-intervention, principles which were of particular significance to countries that had long been subject to intervention in different forms and on different pretexts.

24. In view of its importance, Article 27 should really be placed at the very beginning of the draft, as he had suggested in the general discussion at the beginning of the session (383rd meeting, para. 32). The Drafting Committee might consider commencing the draft with an introductory chapter in which the first article would state that mutual consent was the basis of diplomatic intercourse, and the second would define the diplomatic function. A statement of the duties of diplomatic agents should also be included, either as part of the second article or immediately following it. Such an arrangement would dispel any impression that duties were in some way dependent on privileges and immunities, whereas in the draft before them the position of the text—after articles dealing with privileges and immunities—might give the contrary impression. The article should emphasize the duty of diplomatic agents to respect the law of the receiving State, even though they were exempted from its jurisdiction in certain cases, and should stress their duty to respect the political independence of the receiving State, both in an official and in a personal capacity.

25. Mr. MATINE-DAFTARY said that he fully agreed with the spirit and the principle of the amendment, but, as far as the letter of it was concerned, shared the views expressed by previous speakers. He would like the phrase to comply with those of its laws and regulations from whose application they are not exempted by the present provisions" in the first paragraph replaced by some such phrase as "to comply with its laws and regulations, without prejudice to their privileges and immunities". The law applied to all, and it was impossible to "exempt" persons from it.

26. He agreed with previous speakers on the undesirability of introducing the classical concept of "intervention", which was an act of State, but at the same time felt it necessary to specify in the article that diplomats must not meddle in affairs, whether governmental or non-governmental, in the receiving State. That being so, a provision on the lines of Article 2, paragraph 7, of the United Nations Charter would be insufficient, since the Charter merely referred to matters within the domestic jurisdiction of the State, i.e. State acts of administration or sovereignty, and did not cover other internal affairs such as the activities of political parties.

27. On paragraph 2, he agreed with Mr. Ago and other speakers. Contacts with departments other than the ministry of foreign affairs were quite admissible when the nature of the question required it, the essential condition was that they must be made with the foreknowledge of the ministry. As things were, the ministry was too often by-passed and had no knowledge of what was happening.

28. Mr. PAL agreed with the Secretary to the Commission that the article as presented was somewhat out

of place in the draft. From the discussion, it seemed there had been a certain amount of confusion between three distinct matters, namely: the functions for which diplomatic relations were established; the duties of diplomatic agents in executing such functions; and the rules of conduct of the diplomatic agents while in foreign territory. These three matters should be kept distinct, and the third had no place in the draft. It would be preferable, first to define the diplomatic function, and then to lay down the duties involved in the discharge of that function. He could not agree with Sir Gerald that it was part of the function of a diplomatic agent to carry out any order he received from his Government. If such orders involved intervention in the affairs of the receiving State, the agent would be exceeding his function, even though obliged to obey his Government's orders, and he would also violate the rules of conduct, though at the instance of his Government.

29. Mr. GARCIA AMADOR thought that the Commission had rather drifted away from the point of the amendment through concentrating on the concept of intervention. The problem presented by the last clause in paragraph 1 could be settled independently of that concept. Most members of the Commission accepted the principle that diplomatic agents must not interfere in the affairs of the receiving State, though some of them had qualified their acceptance to an extent tantamount to a negation of the principle. There could be no doubt, however, that foreign ambassadors had frequently interfered in the domestic affairs of States, and that such diplomatic interference was an act contrary to international law. The question whether it was an act of State was not of primary importance; the main point was that when such diplomatic interference took place, it invariably did so through the medium of the diplomatic agent. The Commission's draft would be incomplete if it did not categorically affirm the elementary principle involved. The question of how it should be expressed was another matter.

30. On the question of the extent to which the enjoyment of privileges and immunities was dependent on the fulfilment by diplomatic agents of their duty to respect the laws of the receiving State, he agreed that in the final analysis the absolute principle of inviolability must have overriding force. That did not, however, alter the fact that a diplomatic agent must conduct himself in a manner consistent with the legal order of the receiving State. Indeed, no State would accept any envoys if that were not so. The duty of the diplomatic agent was one of abstention, and he wondered whether that fact could be brought out in a provision based on paragraph 4 or paragraph 7 of Article 2 of the Charter. The Drafting Committee should be able to frame a flexible formula which would bring out the obligation of abstention and non-intervention incumbent on the diplomatic agent, while stating nothing that might tend to impede his discharge of the diplomatic function.

31. The CHAIRMAN, speaking as a member of the Commission, agreed with Mr. Garcia Amador on the fundamental nature of the principle of non-intervention in the affairs of the receiving State.

32. He would like the article under consideration to bring out more clearly the fact on which the Special Rapporteur failed to express a very categorical opinion in his commentary on the article (A/CN.4/91, para. 64), i.e. that the diplomatic agent was in principle subject to the laws of the receiving State. The only exception to that

rule was the case in which the law required the agent to perform personal acts which were not in keeping with his functions. By way of example, he cited an act imposing on all the *inhabitants* of a certain territory the obligation to participate in rescue work in the event of public disasters.

33. Paragraph 2 of the amendment was an accurate statement of the relevant international law. Exceptions were admitted in the case of specialized attachés (commercial, military, cultural, press attachés, etc.) or in that of highly technical negotiations, but in both cases the practice was based on an authorization of the minister of foreign affairs—a general authorization in the former case and a special authorization in the latter. He suggested the addition of a phrase, on the lines of that proposed by Mr. Tunkin, such as “unless the regulations of the receiving State provide otherwise”.

34. Mr. SANDSTRÖM, Special Rapporteur, said that the discussion had increased his reluctance to accept the concept of “non-intervention”, the exact implications of which were not clear in the context. An ambassador must obviously not take part in an electoral campaign in the receiving State, but it might sometimes be his duty to make representations in connexion with the State’s internal affairs. When, for example, the Federal Republic of Germany had introduced a capital levy on property, from which nationals of all States formerly at war with the Third Reich were exempted, Sweden had intervened to complain of discrimination, and its intervention had been taken in good part.

35. Mr. AGO thought it inadvisable to leave it to the Drafting Committee to settle points on which there was no real unanimity. Paragraph 2 might well be referred to it, because only questions of drafting were involved, but paragraph 1 was a different matter.

36. Although as fiercely opposed to the illicit intervention of a State in the affairs of other States as any other member of the Commission, he considered it absurd to mention the duty of non-intervention, which was incumbent on States, in a draft dealing only with the duties of diplomatic agents as persons. The principle was, in any case, quite unequivocally enunciated in Article 2, paragraph 4, of the Charter, and one might argue that it would even detract from its force to include it in the article under discussion. The proper place to consider such a principle would be in connexion with the Commission’s draft on the fundamental rights and duties of States. The point which concerned the Commission for the moment was simply such improper action on the part of a head of mission as giving moral or financial support to a political party in the receiving State. That was certainly an important point, but hardly so vital as to justify placing the article at the head of the draft.

37. As he had already mentioned, he preferred the original wording of the English text: “not to interfere in”, which did not introduce the concept of State intervention.

38. Mr. TUNKIN observed that the first part of paragraph 1 must clearly refer to the private conduct of the diplomatic agent, since his official acts could not be subject to the law of the receiving State. The reference to non-interference, however, seemed to confuse the two categories. Though in some cases of intervention the personal behaviour of the ambassador might play a part, such acts were always regarded as official

acts and primarily the responsibility of the sending State. Difficult as the task involved might be, he could see no alternative to referring the text to the Drafting Committee.

39. Mr. SCALLE fully agreed with Mr. Ago on the question of non-intervention and on the undesirability of referring paragraph 1 to the Drafting Committee. Whenever a diplomatic agent was instructed by his Government to perform an act, generally on a matter of foreign affairs, he had no alternative but to obey.

40. Mr. SANDSTRÖM, Special Rapporteur, suggested that the phrase “may not participate in the domestic or foreign politics . . .”, used in article 12 of the Havana Convention,<sup>1</sup> was preferable to that used in the amendment.

41. Mr. PADILLA NERVO welcomed the fact that there had been general agreement regarding the principles expressed in the joint amendment.

42. The only point on which there might appear to be some real disagreement was the principle of non-interference in the domestic or foreign politics of the receiving State. In some countries that question simply did not arise; but in others it did, and he did not think he need cite instances. It was, moreover, immaterial whether in such instances the diplomatic agent acted on his own initiative or on the instructions of his Government. It was, of course, true that an important part of a diplomatic agent’s duties consisted in trying to influence the receiving State’s foreign policy insofar as it affected the sending State; and it was not always easy to distinguish matters of foreign policy from matters of purely domestic concern. *Démarches* of that kind, however, were properly made through the ministry of foreign affairs. He did not suggest that the channel through which it was made was the sole criterion of whether an attempt to influence the receiving State’s foreign or domestic policy was proper or improper: all that he and Mr. García Amador were desirous of stating was that the diplomatic agent should not attempt to influence the receiving State’s domestic or foreign policies through improper channels, on matters that lay outside the scope of his legitimate official interests, and in a manner inconsistent with the nature of the diplomatic function. If it was generally agreed that such a statement should be included, he did not think it was beyond the bounds of the Drafting Committee’s ingenuity to find an appropriate wording.

43. As to what constituted the proper channels, it was undoubtedly normal practice for all official business entrusted to a diplomatic mission by its Government to be conducted with or through the ministry of foreign affairs. If the mission entered into direct contact with the officials of the competent government department, the latter might well indicate that in their view there was no technical objection to the course which the mission urged; if the Government subsequently decided against that course, it would be clear that its motives were political; whereas if the negotiations were kept in the hands of the ministry of foreign affairs, the fact that there were political objections to the course in question need never openly arise. Paragraph 2 of the joint amendment could be modified so as to take into account the various points that had been raised with regard to it.

<sup>1</sup> Convention regarding Diplomatic Officers, signed at Havana on 20 February 1928. See League of Nations, *Treaty Series*, Vol. CLV, 1934-1935, No. 3581, p. 267.

44. There had, he thought, been no objections to paragraph 3.

45. Mr. SCALLE agreed that in all cases where a diplomatic mission wished to approach a government department it was perhaps preferable for it to apply first to the ministry of foreign affairs. There were, however, very many cases where it might wish to discuss a matter with a leading recognized authority, perhaps ecclesiastic, perhaps scientific, or perhaps even political; surely it did not first have to receive the permission of the ministry of foreign affairs?

46. Mr. PADILLA NERVO said that that was naturally not his intention. Paragraph 2 referred only to official business, in other words to negotiations with government departments designed to lead up to an agreement or arrangement between the two States concerned.

47. Mr. SCALLE observed that if contacts of the kind he had referred to were not to be regarded as official business, a diplomatic agent who sought them might easily be accused of trying to influence the receiving State's policies improperly.

48. The CHAIRMAN suggested that, as the Commission appeared to be in agreement regarding the principles expressed in the joint amendment, it might refer it to the Drafting Committee.

49. Mr. EDMONDS agreed that there was no objection to the principle expressed in the second part of paragraph 1, provided a clear distinction was drawn between the diplomatic agent's official and private acts; the difficulty lay in the fact that such a clear distinction was very hard to make.

50. The CHAIRMAN pointed out that the Commission would, in any case, have a chance to reconsider the matter when the articles adopted by the Drafting Committee were submitted to it for approval.

51. Mr. SCALLE said he had no objection to the amendment being referred to the Drafting Committee, although he feared that, with all its willingness and ingenuity, that body would be unable to surmount the difficulty raised by the last few words of paragraph 1. In his view, there was only one valid criterion for distinguishing between a diplomatic agent's official and private acts: if the act in question offended the receiving State, it could always ask the sending State whether it approved it; if it did, then the act was an official act; if it did not, it was a private act, and, if the matter was serious enough, the receiving State could request the diplomatic agent's recall.

52. Mr. AMADO said that he was quite content that the amendment should be referred to the Drafting Committee. He would only ask the Drafting Committee to bear in mind the wording used in article 12 of the Havana Convention, namely, "Foreign diplomatic officers may not participate in the domestic or foreign politics of the State in which they exercise their functions",<sup>2</sup> since that appeared to meet the point precisely.

*The joint amendment to article 27 (411th meeting, para. 55) was referred to the Drafting Committee for consideration in the light of the various comments made with regard to it.*

#### ARTICLE 28

53. Mr. SANDSTRÖM, Special Rapporteur, withdrew the second part of the article, beginning with the

words "or, if essential", since it had been the Commission's general policy to refrain from dealing with exceptional cases in its draft.

54. Thus abridged, it might be thought that the article was hardly worth retaining; on the other hand there was perhaps some advantage in keeping it as a kind of reminder to diplomatic agents that they could not misbehave with impunity.

55. Mr. VERDROSS pointed out that the possibility of recall was already referred to in the text adopted by the Drafting Committee for article 4(a), paragraph 1.

56. Despite the Special Rapporteur's withdrawal of the second part of the article, he wondered whether the Commission should not at least make it clear, as he had suggested during the discussion of article 17 (401st meeting, para. 20), that if a diplomatic agent was caught *in flagrante delicto*, it was the receiving State's right and duty to restrain him, by force if necessary.

57. Mr. FRANÇOIS agreed that the first part of article 28 was already covered by the text of article 4(a). He, for his part, had no objection to the deletion of the second part also, since in his view it went without saying, for the reasons he had given in connexion with a similar reference to the security of the State and similar matters in article 12 (395th meeting, paras. 8-10).

58. The CHAIRMAN wondered whether article 28, even in its abridged form, did not serve at least one useful purpose, namely, that it made it virtually impossible to interpret article 27 as meaning that if a diplomatic agent failed in his duty, as there defined, the receiving State was no longer under an obligation to respect his immunity.

59. Mr. MATINE-DAFTARY thought the text could not conceivably be interpreted in that way, even without article 28, since it went without saying that the non-fulfilment of obligations did not result in the loss of rights and, in any case, it was clearly stated in article 25 that a diplomatic agent enjoyed immunity as long as he was in the territory of the receiving State.

60. He, personally, was strongly in favour of deleting article 28, because it was misleading as well as unnecessary; it suggested that, before requesting the recall of a diplomatic agent, the receiving State must be able to point to some dereliction of duty on his part, whereas by virtue of article 4(a) it could request his recall at any time, regardless of whether he had failed in his duty or not.

61. Mr. AMADO agreed that the article as a whole should be deleted.

62. Mr. AGO said he was of the same opinion. On the other hand, he entirely agreed with the Chairman that it must be made crystal clear that a dereliction of his duty under article 27 on the part of the diplomatic agent did not absolve the receiving State from its duty to respect his immunity. That could, however, be done in the commentary.

63. Mr. SCALLE agreed that the point raised by the Chairman was one of great importance, particularly since the sending State might not agree with the receiving State that the person in question had failed in his duty under article 27, and since there was no reason why the receiving State's view should prevail.

<sup>2</sup> *Ibid.*

64. Mr. TUNKIN, recalling that he had raised the same point in connexion with article 27, said that the Drafting Committee should be asked to consider, in the light of the draft as a whole, whether it was not desirable to refer to it explicitly, either in article 27 or in a separate article.

65. Mr. SANDSTRÖM, Special Rapporteur, said that the point referred to by the Chairman had been implicitly covered in the last part of article 28. As that part of the article had been withdrawn, the point should perhaps be made explicit, though whether in the articles themselves or in the commentary he was not sure.

66. He willingly withdrew the first part of the article also, since most members appeared to think it was unnecessary.

67. The CHAIRMAN suggested that the Commission decide in principle that the failure of a diplomatic agent to discharge his duty under article 27 did not absolve the receiving State from its duty to respect his immunity, and that it be left to the Drafting Committee—which would also have to consider the point raised by Mr. Verdross—to decide whether some addition to the articles was necessary in order to give expression to that principle, or whether it was sufficient to refer to it in the commentary.

*The Chairman's suggestion was adopted by 18 votes to 1, with 1 abstention.*

68. Mr. MATINE-DAFTARY, explaining his vote against the suggestion, said that, in his view, it was quite unnecessary to state any such principle, since there was no possible relation between a diplomatic agent's duties and his rights.

69. Mr. BARTOS said he had abstained, not because he was opposed to the principle, but because his attitude would depend on the text which the Drafting Committee proposed, as the Drafting Committee was being authorized to solve a question which should have been decided by the Commission.

70. Mr. VERDROSS said he had voted in favour, with the proviso that it was the receiving State's right and duty to prevent a diplomatic agent from committing a crime if it caught him in the act.

#### ADDITIONAL ARTICLES SUBMITTED BY THE SPECIAL RAPPORTEUR

71. Mr. SANDSTRÖM, Special Rapporteur, replying to a question by the CHAIRMAN, said he would be quite willing for the five additional articles he had drafted in order to meet points raised in the course of the discussion to be submitted to the Drafting Committee direct, without prior consideration by the Commission.

72. The CHAIRMAN said that the text of the articles would be distributed to all members of the Commission, who would thus be able to submit any comments to the Drafting Committee and thus expedite final consideration of the articles in the Commission.

The meeting rose at 1 p.m.

### 413th MEETING

Friday, 7 June 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)

##### ADDITIONAL ARTICLE PROPOSED BY MR. SCELLE

1. Mr. SCELLE said that, as experts in international law, all members of the Commission knew that any system of law necessarily comprised three elements: the law or rules; the act of jurisdiction, which added nothing to the rule of law but without which its interpretation and application would remain a matter of insoluble controversy between the parties concerned, in the present case between States; and, finally, were such required, some sanction or form of social pressure.

2. Now that the United Nations Charter had forbidden recourse to force or to the threat of force as a means of imposing the will of the stronger of the two parties, the sanction had been transformed, though it had not disappeared. The settlement of a dispute that was not dealt with by one of the peaceful means referred to in Article 33 might be delayed, and the process might take some time; but whatever means were adopted for settling it, they must be peaceful—and that was the main progress recorded by the Charter—and must still comprise some sanction, emanating either from the Security Council or from the General Assembly itself. Moreover, decisions of the Security Council were binding (Article 25); under Articles 36 and 37 the Council could, at any stage of the dispute, recommend appropriate procedures, including recourse to the International Court of Justice, or even such terms of settlement as it considered appropriate.

3. Thus, in choosing a means of settlement, the parties to a dispute could opt for a governmental, in other words a political, settlement. In most cases, however, if not in all, a legal settlement was preferable. That was particularly so in the event of disagreements or disputes relating to diplomatic incidents. It was increasingly rare for diplomatic incidents to involve really serious political issues; but, as the Commission had seen, even where the sending and the receiving States were both acting in perfect good faith, insoluble difficulties could arise between them with regard to a great many questions of minor importance, such as abuse of customs privileges, exemption from taxation, submission to local jurisdiction, conduct of private servants, refusal to grant privileges to subordinate staff, and so on. Surely it was not really necessary that the Security Council should be seized of disputes relating to such questions. While, therefore, he agreed that some disputes could be referred to arbitration or submitted to the International Court of Justice more readily than others, and that it was difficult, if not impossible, to press for a general treaty of compulsory arbitration or for application of Article 36, paragraph 2, of the Statute of the International Court of Justice in all cases whatsoever, he felt that, as a general rule, arbitration was the best means of settling diplomatic disputes, and, where it was not, that they should, again as a general rule, be submitted to the compulsory jurisdiction of the International Court of Justice.

4. He accordingly proposed the insertion of an additional article, reading as follows:

"Any dispute that may arise between States concerning the exercise of diplomatic functions shall be referred to arbitration or submitted to the International Court of Justice."

5. Nevertheless, in order not to prevent the parties to the dispute from choosing some other means of peaceful settlement if they so desired, he would have no objection to adding some such words as "unless the parties agree to seek a solution by another method of peaceful settlement", as the Commission had already done in its draft articles on the law of the sea, both in article 57 relating to the conservation of the living resources of the high seas<sup>1</sup> and in article 73 relating to the continental shelf;<sup>2</sup> a somewhat similar choice had been left to the parties in article 11 of the draft conventions on statelessness.<sup>3</sup> The Commission should, however, be clear about the fact that that would entail bringing in the whole apparatus of article 33 of the Charter, including the possibility of a legally binding decision by the Security Council or a recommendation by the General Assembly, in disputes that were of much less importance than such as were likely to arise in the three fields he had referred to.

6. The CHAIRMAN pointed out that Mr. Scelle's proposal again raised the question of the final form the Commission's draft was to take, since, if it was to be a convention, the place for the proposed article would clearly be among the final clauses.

7. As the matter would only be decided definitely at the next session of the Commission, the Chairman wondered whether Mr. Scelle's proposal should be discussed at the current session, or whether consideration should be postponed until the next session.

8. Mr. SANDSTRÖM, Special Rapporteur, supported Mr. Scelle's proposal on the assumption that the Commission's draft would eventually take the form of a convention, and pointed out that a similar provision was to be found in section 39 of the draft convention that had been transmitted as a basis for discussion for the negotiations with the competent authorities of the United States of America concerning the arrangements required as a result of the establishment of the seat of the United Nations in that country.<sup>4</sup> His only doubt was whether the Commission should insert the proposed article in its present draft or defer consideration of it until it took up the other final clauses.

9. Mr. YOKOTA supported Mr. Scelle's proposal, but suggested that the words "concerning the exercise of diplomatic functions" should be replaced by the words "concerning the interpretation and application of this Convention".

10. Sir Gerald FITZMAURICE also supported Mr. Scelle's proposal on the assumption that the draft would eventually take the form of a convention. Diplomatic intercourse and immunities was, in his view, a subject with regard to which it was singularly appropriate to provide for compulsory recourse to arbitration, since it was one where it was very common for points to arise that had to be juridically determined, and since it was largely non-political in nature.

11. His only doubts related to Mr. Scelle's references to the Security Council. That organ's fundamental task was the maintenance or restoration of peace and security, and he did not see how it would ever be the most appropriate body to deal with disputes arising out of the matters referred to in the draft under consideration.

12. Mr. BARTOS agreed entirely that if the Commission's draft was to take the form of a convention under the auspices of the United Nations, it was essential that it should include a provision relating to the peaceful settlement of any disputes that arose out of it. If the Commission did not, so to speak, provide its articles with teeth, it would not really be laying down rules of law at all, but norms of conduct. Its task was to strengthen international law, and it should do all in its power to ensure that, unless the parties agreed to try and settle them by other peaceful means, disputes between them would be submitted to a judicial tribunal, by agreement between the parties, or, failing such agreement, automatically.

13. Without the additional words referring to other methods of peaceful settlement, however, the text proposed by Mr. Scelle unduly restricted the parties' freedom to choose the most appropriate procedure in each case. Diplomatic disputes could arise of a nature to endanger international peace and security, in which case it was clearly desirable that they should be submitted to the Security Council. In other cases the parties might agree that the disputes should be referred to a conciliation commission; but that if no settlement was reached before a certain date, the conciliation commission would be automatically transformed into an arbitral tribunal. To give them a simple choice between referring the dispute to arbitration and submitting it to the International Court of Justice was, therefore, much too rigid. It would be preferable to say, always on the assumption that the draft was to be a United Nations convention, that, unless the parties agreed to seek a solution by some other peaceful means, all disputes arising out of the convention should be submitted to the International Court of Justice.

14. Mr. EL-ERIAN wondered whether the Commission should not postpone consideration of the additional article proposed by Mr. Scelle, bearing in mind the fact that it would figure among the final clauses of a convention, and that the Commission's decision that its draft should take the form of a convention was still tentative.

15. Mr. FRANÇOIS regretted that he could not altogether agree with Mr. Scelle. Arbitration was a question entirely apart, and the Commission had always proceeded on the basis that it should be dealt with accordingly. It was true that it had inserted a compulsory arbitration clause in certain of its drafts, but only when it had been laying down new rules of law which it feared might otherwise lend themselves to abuse. Such was emphatically not the case with the draft articles on diplomatic intercourse and immunities, almost all of which stated rules that were already generally recognized. He did not need to assure the Commission that he was in favour of arbitration, but, in his view, it would be bad tactics to insert a compulsory arbitration clause in all its drafts indiscriminately.

16. Moreover, the disputes that were likely to arise out of the draft did not relate purely to juridical questions. The field of diplomatic intercourse and immunities was one in which good faith and the maintenance of good relations between States were of paramount importance, and he was by no means sure that good relations would be best served by automatically referring all disputes, however trifling, to an arbitral tribunal or the International Court of Justice.

<sup>1</sup> *Official Records of the General Assembly, Eleventh Session, Supplement No. 9*, p. 10.

<sup>2</sup> *Ibid.*, pp. 11 and 12.

<sup>3</sup> *Ibid.*, *Ninth Session, Supplement No. 9*, pp. 5 and 6.

<sup>4</sup> *Ibid.*, *First part of first session, Resolutions*, p. 30.

17. Mr. AGO thought that Mr. Scelle's proposal was clearly based on the assumption that the Commission's draft would eventually take the form of a convention. Yet if the draft had consisted merely of a restatement in written form of rules long established and recognized in practice, as Mr. François had suggested, there would be no place for a clause of the kind proposed by Mr. Scelle. If, on the contrary, as the majority of the members of the Commission seemed to wish, the draft were cast in the form of a convention, a clause along the lines proposed by Mr. Scelle would undoubtedly be valuable. It should, however, be made clear in the text itself that the clause would be included only if the draft in fact took the form of a convention.

18. He supported Mr. Yokota's proposal (para. 9 above) that the words "concerning the exercise of diplomatic functions" should be replaced by the words "concerning the interpretation and application of this Convention". Furthermore, it should be stipulated that the possibilities of settlement by diplomatic negotiations must be explored first. The whole text might then be amended to read as follows:

"Any dispute between States concerning the interpretation or application of this Convention that cannot be settled through diplomatic channels shall be referred to conciliation or arbitration or, failing that, submitted to the International Court of Justice."

19. Mr. KHOMAN warmly supported the principle of Mr. Scelle's proposal. He entirely agreed with Sir Gerald Fitzmaurice that the Security Council was not the proper forum to try and settle disputes regarding diplomatic intercourse and immunities, but that was an additional argument in favour of a clause along the lines proposed.

20. In his view, however, the great majority of such disputes would be settled before any question of referring them to arbitration or submitting them to the International Court of Justice arose. He therefore felt it was essential to include some mention of other means of peaceful settlement, as suggested by Mr. Ago and by Mr. Scelle himself.

21. Mr. SCELLE said that Mr. Ago was perfectly correct in thinking that he (Mr. Scelle) had proceeded on the assumption that the Commission's draft would eventually take the form of a convention. The whole field of diplomatic intercourse and immunities was, indeed, singularly well-suited to conventional treatment, precisely because it was so ripe; and in international law the riper the field, the readier it was for arbitration, since the fewer would be the political questions that arose. In the field of diplomatic intercourse and immunities it would be exceedingly rare for political questions to arise of such importance as to make it desirable to have recourse to the Security Council. And it was one of the main purposes of his proposal to exclude such recourse when, as would usually happen, the circumstances of the case did not warrant it.

22. He fully agreed that, before referring a diplomatic dispute to arbitration or submitting it to the International Court of Justice, the parties should try to settle it by conciliation or another of the peaceful means of settlement referred to in Article 33 of the Charter; and, as he had said, he was willing to supplement his proposal accordingly. But the parties must realize that, whatever peaceful means of settlement they chose, the Security Council could, at any stage, intervene in the

proceedings with a recommendation or legally binding decision: that had been the sole purpose of his reference to that organ.

23. Mr. EL-ERIAN said he still felt that the Commission was possibly wasting time discussing an article which might never be required; it should defer further consideration of Mr. Scelle's proposal until a final decision was taken on the form of the Commission's draft. If the final decision was in favour of a convention, the Commission could revert to the article proposed by Mr. Scelle in conjunction with the other final clauses.

24. Mr. TUNKIN entirely agreed with Mr. El-Erian. In his view, the Special Rapporteur should draft final clauses—including one on the subject referred to in Mr. Scelle's proposal, if he thought it opportune—for consideration at the next session, should the Commission confirm its tentative decision in favour of a convention.

25. Mr. BARTOS said he disagreed with Mr. El-Erian, since every rule of law was necessarily coupled with some means of enforcing it.

26. The CHAIRMAN said that the question raised by Mr. El-Erian was clearly one which had to be decided before the Commission could discuss the substance of the matter further.

27. He accordingly asked the Commission to decide whether it wished to continue the discussion of the new article proposed by Mr. Scelle at the current session, and to include, in the draft which would be submitted to Governments for consideration at the close of the session, an article on the settlement of disputes concerning the interpretation or application of the articles relating to diplomatic relations and immunities.

*The question was decided in the affirmative by 15 votes to 4, with 2 abstentions.*

28. Mr. TUNKIN said that since the Commission had decided, in his view mistakenly, to continue discussing the proposal submitted by Mr. Scelle, he too felt obliged to indicate his general views on it.

29. Reference had been made to the very important question of a supposed trend in international law relating to a matter which undoubtedly had a direct bearing on the topic the Commission was considering. It would, however, take him far too long to comment fully on what had been said in that connexion, and he would merely point out that it was quite incorrect to seek to apply the principles of municipal law in the field of international law or to try to bring the latter into line with the former: international law was a form of law *sui generis*, regulating relations between sovereign States.

30. Regarding Mr. Scelle's actual proposal, he fully shared Mr. François's views. It related to a problem which should, in his opinion, be dealt with separately from the task of codification on which the Commission was engaged. Even if the Commission's draft was to take the form of a convention, he would still be obliged to oppose the proposal as inadvisable.

31. Mr. HSU said that the international community had developed to the stage where it could be regarded as a legal community, and he was therefore in favour of Mr. Scelle's proposal, whether the Commission's draft took the form of a convention or not. For a legal community of nations clearly had to provide some means

for the peaceful settlement of disputes between its members. If disputes could not be settled by diplomatic means, they must be settled by law; the only alternative was recourse to war, which all Members of the United Nations had abjured.

32. Faris Bey EL-KHOURI suggested that arbitration could only be a suitable procedure for settling disputes relating to diplomatic privileges and immunities if they were regarded as rights of the individual; if, on the other hand, they were regarded as public rights, the rights of the sending State itself, a judicial procedure was necessary.

33. Mr. MATINE-DAFTARY said he could see no objection to the text proposed by Mr. Scelle, subject to insertion of the additional words suggested by Mr. Scelle himself. It was true that it would be out of place except in a convention; but if the Commission's draft did not eventually take the form of a convention, its labours of the past few weeks would, in his view, have been in vain. The Commission was surely drafting a convention for the twentieth century, just as the Congress of Vienna had drafted one for the nineteenth.

34. The CHAIRMAN suggested that the additional article proposed by Mr. Scelle (para. 4 above) be referred to the Drafting Committee for consideration in the light of the various comments made with regard to it.

*It was so decided.*

35. The CHAIRMAN proposed that further consideration of agenda item 3 be deferred pending receipt of the draft and commentary being prepared by the Drafting Committee.

*It was so decided.*

### State responsibility (A/CN.4/106)

[Agenda item 5]

#### GENERAL DEBATE

36. Mr. GARCIA AMADOR, Special Rapporteur, introducing his second report which dealt with the responsibility of the State for injuries caused in its territory to the person or property of aliens (A/CN.4/106), stressed that he had endeavoured to comply scrupulously with the views that the Commission had expressed during the discussion of his first report (A/CN.4/96) at the previous session.<sup>5</sup> In particular, he had excluded from the draft articles contained in his report all mention of criminal liability; as a result the draft was concerned solely with civil liability or the "duty to make reparation". Moreover, the draft dealt only with "acts and omissions" which gave rise to civil liability and did not touch on the procedural aspects of the matter, such as the rules concerning the exhaustion of local remedies, the nationality of the claim and so on; those would therefore have to be dealt with separately at some later stage.

37. Generally speaking, he had sought to follow the same approach as the few earlier instruments on the subject, eschewing undue detail, avoiding all mention of exceptional cases, and formulating the rules in terms of general principles, but as precisely as possible. The only articles in which he had been compelled to make

a completely fresh departure were articles 4, 5 and 6, relating to the denial of justice and violation of fundamental human rights, where the adoption of the Universal Declaration of Human Rights had made it necessary to try to bridge in an entirely novel way the gap between the concept of the international standard of justice and the Latin American concept of the equal treatment of aliens and nationals. In that respect he had been faced with the drafting difficulties which arose with any progressive rule of international law.

38. In the short time at the Commission's disposal, he suggested that it should begin with a brief general discussion, and then consider the draft articles one by one, concentrating, however, on the following four crucial points: first, whether it agreed with his approach to the problem of the nature and scope of responsibility and, in particular, with his decision to leave academic questions of "causality", "fault" and so forth aside and restrict responsibility to cases where there had been an actual breach or non-observance of a specific international obligation; secondly, the text of articles 4, 5 and 6 as a means of formulating an approach which it had appeared to favour at the previous session; thirdly, the question whether, and in what circumstances, responsibility was incurred by the non-fulfilment of a contractual obligation vis-à-vis an alien or expropriation of his property; and, finally, the degree of negligence required on the part of a State for it to be held responsible for injuries caused to aliens by the acts of ordinary private individuals or in the course of internal disturbance.

39. Mr. VERDROSS, after congratulating the Special Rapporteur on a well-conceived study, which elicited and expounded a number of valuable principles from the rich case law on the subject, said he would deal with the various principles as their turn came for discussion. For the moment he merely wished to draw attention to one problem of great importance which did not appear to have been touched, namely, whether there was in international law such a thing as objective responsibility, responsibility irrespective of any question of fault. The matter had been debated at length at the Lausanne session of the Institute of International Law (August-September 1927), which, despite the opposition of many members, including Professor Anzilotti, had recognized that fault was a necessary requisite for responsibility.

40. Mr. AMADO also congratulated the Special Rapporteur on a very competent report, from which the tendency to undue broadening of the concept of responsibility was gratifyingly absent. It was essential to bear in mind that the whole question of international responsibility was one of disputes involving claims for compensation. International responsibility was a legal concept, according to which a State to which an illicit act was imputable under international law owed reparation to the State against which the act had been committed. Thus, the essential feature of international responsibility was that it was a relation between States. The wrong done to an individual could in itself never constitute a violation of international law. Such a violation existed only when one State failed to honour an obligation to the State of which the individual was a national. "The State which lodges a claim is exercising a *right of its own*, and the consequences for the aggrieved individual are only an incidental outcome thereof".<sup>6</sup>

<sup>5</sup> *Yearbook of the International Law Commission, 1956, Vol. I* (United Nations publication, Sales No.:1956.V.3, Vol. I), 370th to 373rd meetings.

<sup>6</sup> Charles Rousseau, *Droit international public* (Paris, Librairie du Recueil Sirey, 1953), p. 357.

41. Another point to be borne in mind was that international responsibility was a matter of customary international law. Previous attempts at codification having failed, the Commission must perforce base itself on international case law, which was extremely rich on the questions of international responsibility. Indeed, when he considered the immense contribution made by the numerous arbitral awards in disputes involving State responsibility, he found it difficult to share the pessimism of some other members of the Commission with regard to the efficacy of the institution of arbitration.

42. The view that was gaining acceptance in both teaching and practice was that the sole ground for international responsibility was the failure to observe a rule of international law. The Institute of International Law at its Lausanne session had confined itself to enunciating in article I of its draft the principle that: "The State is responsible for injuries caused to foreigners by any action or omission contrary to its international obligations, whatever be the authority of the State whence it proceeds" (A/CN.4/96, annex 8).

43. He was accordingly somewhat surprised at the Special Rapporteur's view that violations of any of the fundamental human rights listed in his draft article 6, with respect to aliens on the territory of a particular State, could involve the international responsibility of that State. He failed to see how the denial to an alien of freedom of thought, conscience and religion, however wrong it might be, could possibly give rise to international responsibility, or, in other words, be the ground for an international claim for compensation. He noted in that connexion that in article 1 the Special Rapporteur defined "international obligations", failure to fulfil which was a source of international responsibility, as "obligations resulting from any of the sources of international law". He could not, however, agree to regard general principles as a valid source of international law on a par with treaties and custom. To his knowledge, the first time that any such thing had been suggested was in Max Huber's arbitral award of 1 May 1925 on United Kingdom claims in the Spanish Zone of Morocco, when he had referred to a State's making "a diplomatic intervention on behalf of its national, quoting either conventional rights [...] or principles *juris gentium* applying apart from treaties on the rights of aliens."

44. The principles enunciated in such texts as the Universal Declaration of Human Rights could not have binding force, as the Special Rapporteur appeared to believe. International obligations could be based only on the rules of international law as established by treaty or custom.

45. Mr. PADILLA NERVO said that, as far as Latin America was concerned, the history of the institution of State responsibility was the history of the obstacles placed in the way of the new Latin American countries—obstacles to the defence of their (at that time) recent independence, to the ownership and development of their resources, and to their social integration.

46. The vast majority of new States had taken no part in the creation of the many institutions of international law which were consolidated and systematized in the nineteenth century. In the case of the law of the sea, for instance, though the future needs and interests

of newly-established small countries were not taken into account, at least the body of principles thus created was not directly inimical to them. With State responsibility, however, international rules were established, not merely without reference to small States but against them, and were based almost entirely on the unequal relations between great Powers and small States. Probably ninety-five per cent of the international disputes involving State responsibility over the last century had been between a great industrial Power and a small, newly-established State. Such inequality of strength was reflected in an inequality of rights, the vital principle of international law, *par in parem non habet imperium* being completely disregarded.

47. As a corollary to that state of affairs—with the noble influence of the Spanish theologians of the sixteenth century and their standards of morals and justice long forgotten—in international law an unbridled positivism had reigned supreme, whose sole criterion was the practice of States, and in the nineteenth century that meant the practice of the Great Powers. Once international lawyers had abandoned the criterion of justice in assessing the conduct of States and reduced the systematization of law to a catalogue of the practice of States, it was hardly surprising that the doctrine of State responsibility became a legal cloak for the imperialist interests of the international oligarchy during the nineteenth century and the beginning of the twentieth.

48. Mr. Scelle, in his report on arbitral procedure, had observed that recently established States were not so inclined as States with a long democratic tradition to submit their disputes to arbitration (A/CN.4/109, para. 8). As Mr. Padilla Nervo had already pointed out, such was not the case with Mexico. Since, however, consent to arbitration in a dispute generally signified willingness to submit to the application of the international rules applying at the moment to the subject under dispute, it was perfectly natural for new States to be reluctant to submit voluntarily in the matter of State responsibility to a body of rules which, far from taking account of their just aspirations, was created to serve the purposes of their probable opponents.

49. The solution to that state of affairs lay perhaps in allowing the new countries to participate fully in the formulation of international law. As new international rules were evolved which were not merely rules of law, in the sense that they reflected practice, but were also just rules, those countries would be more willing to submit to them.

50. All that he had just said implied, of course, no reproach to Mr. Scelle, who with his idealism and spirit of innovation had contributed, as few other jurists, to the improvement of international law.

51. In dealing with State responsibility, the Commission accordingly had an arduous task: to adjust principles to the new structure and conditions of post-war international society, and to replace the cold and naked positivism that had presided over the formulation of existing rules by an imaginative innovation based on the new values and needs of the contemporary world. Those values and needs were embodied in the purposes and principles of the United Nations as enunciated in its Charter, and were to foster the peaceful co-existence of all States, to raise the standard of living of mankind chiefly by the more rapid economic and social develop-

<sup>7</sup> United Nations, *Reports of International Arbitral Awards*, Vol. II (United Nations publication, Sales No. :1949.V.1), p. 633.

ment of the under-developed countries, and to respect the sovereign equality of States. It was in the light of that trilogy of purposes and principles that the rules of State responsibility must be judged.

52. Mr. García Amador was to be congratulated on his report, which appeared to have been inspired by the same sentiments and considerations as those he himself had just expressed, to judge, at least, from the way in which the Special Rapporteur dealt with responsibility for the acts and omissions of the legislature and of officials, and from certain aspects of his treatment of non-performance of contractual obligations, of questions relating to public debts and acts of expropriation, of the problems raised by acts of private individuals and of the question of responsibility in connexion with internal disturbances. The Special Rapporteur's reference to the "Calvo clause" as a waiver of an international claim in contractual obligations appeared, in particular, to be inspired by such considerations.

53. He had certain reservations which he would express at the appropriate time; for instance, with respect to the definition of international obligations in article 1, paragraph 2.

54. As for the Special Rapporteur's theory of the violation of the fundamental human rights of foreigners as a source of international responsibility, despite certain reservations regarding the precision of such a criterion and some of its implications, he regarded it as a laudable and imaginative effort to replace the old and unacceptable criterion of the "international standard of justice". In that connexion, the rule of the fundamental equality of rights between nationals and foreigners must, he thought, be accepted purely and simply and without exception as the sole rule truly compatible with the principle of the sovereign equality of States.

55. There was one important point that he wished to raise in connexion with the nature and scope of State responsibility. According to the traditional rule, the international responsibility of a State was involved only when the damage caused resulted from acts or omissions contrary to the international obligations of that State. In other words—as was the case until recently in municipal law—there could be no liability without fault or negligence. However, the damage already caused, or which might be caused, to persons or property on the territory of other States by the manufacture or experimental explosion of nuclear weapons sheds doubts on the advisability of maintaining the traditional rule. According to the traditional concepts of fault and negligence, it was not strictly possible to talk of violation of international obligations when the weapons were exploded on the territory of the State concerned or on the high seas, especially as every conceivable precaution was undoubtedly taken to prevent damage. On the other hand, it was difficult to accept the view that, when such explosions caused damage to the persons or on the territory of other States, no international responsibility, with the corresponding duty of compensation, arose. The payment made by the United States Government to the Japanese fishermen affected by an experimental explosion at Bikini, though only an *ex gratia* payment, had brought that much debated legal question ever more to the fore.

56. It had been suggested that the so-called theory of risk should be adopted in international law, or, in other words, that objective responsibility should be recognized, regardless of whether any fault or negligence

existed, by analogy with the objective liability, under the factory legislation of many countries. The question was one which should be approached with caution. In the first place, it was no trivial matter to accept as a general principle of international law that responsibility could exist without a direct violation of a clearly defined international obligation; the implications of such a thesis were incalculable. Secondly, the principle of objective responsibility in municipal law had not been accepted in a day, but had been gradually adopted in face of the alarming increase in the industrial accident rate. Possibly the cases that might arise in the international sphere were not sufficiently frequent to justify so radical a departure from the accepted rule.

57. Perhaps the solution of the problem was to be sought in another direction. Perhaps the current conceptions of fault and negligence were no longer adequate to the conditions of the atomic age. Man had now learnt how to unleash forces that were beyond his control. He had in mind not so much the atomic explosions themselves as the resultant atomic radiation, the consequences of which for all living creatures were unforeseeable. That new factor might serve as a basis for a new category *sui generis* of fault or negligence, which might be formulated as follows: "Whoever knowingly unleashes forces that he cannot control and whose effects he cannot foresee commits a fault and is responsible for any damage caused." Countries which found themselves obliged, even for legitimate and lofty motives, to conduct such experiments wittingly ran the risk of causing incalculable damage to other peoples, in a word, international damage. And the fact of wittingly and voluntarily running that risk might perhaps be regarded as a source of international responsibility.

58. He was not sure whether, in stating the problem, he had not come too near to supporting the concept of objective responsibility, i.e., the acceptance of the theory of risk in international law, which was something he was anxious to avoid. But the nature of the phenomenon involved made it difficult to find one's way with the aid of traditional legal concepts. The best legal solution might be for the Great Powers to agree to regulate or prohibit atomic test explosions, for then the nature and scope of the international obligation involved would clearly emerge, and with it the responsibility of those breaking the agreement.

59. He was convinced that it was the duty of the Commission to face that vital problem squarely. It would indeed be paradoxical for it to codify minor cases of international responsibility, and ignore what might turn out to be the most dramatic and far-reaching of all.

60. Mr. HSU said that the Special Rapporteur had produced an excellent report on a subject that lent itself to codification. He particularly appreciated his attempt to turn to account the new attitude towards human rights, for the two existing principles, to replace which the new principle was formulated, often came into conflict with each other in application, though both were meant for one and the same purpose. While, as was clear from Mr. Amador's statement, it would be no easy task to formulate the rules governing international responsibility in the matter of human rights, he thought that the Special Rapporteur was on the right track.

61. Mr. AGO said that he was all the more grateful to Mr. García Amador for his report because the prob-

lems it dealt with had interested him for years. The Special Rapporteur had concentrated, in accordance with the Commission's recommendation, on the question of the responsibility of the State for damage caused in its territory to the person or property of aliens, a very important aspect of the problem, and one which had been given long consideration by doctrine. Its codification would be a most useful task. Though it was an aspect that lent itself to separate treatment, it was, as the Special Rapporteur had himself discovered, impossible to study it without raising all the fundamental problems and defining all the concepts connected with the general notion of State responsibility.

62. International responsibility might be defined as the situation which arose as a consequence of an unlawful fact imputable to a State as a subject of international law. An unlawful fact existed when there had been non-performance by a State of an international obligation owed by that State or, which amounted to the same thing, violation by the State of the subjective right of another State. For the purpose of determining whether non-performance or violation had occurred, several elements had to be considered. The first was the objective element, that of conduct contrary to the State's international obligations. The obvious conclusion to be drawn from that concept, which some authors at times tended to overlook, was that there could be no violation unless there was an international obligation capable of being violated, in other words, unless there was a rule of international law laying down the obligation in question. The second, subjective, element was that the fact must be imputable to a subject of international law. That involved first and foremost the necessity of the presence of a capable subject, and at the same time the question of whom the commission of a wrong against an alien was imputable in the case of a non-self-governing country or a State under military occupation: was it imputable to the country or State itself or to the administering or occupying Power? That raised the problem of indirect international responsibility. At all events the principle was that, in order to bear responsibility, a country must legally possess the capacity to commit unlawful facts. Furthermore, for a fact to be imputable there must have been some action or omission by an organ of the State. Lastly, there must be the psychological element of fault, a notion to which both Mr. Verdross and Mr. Padilla Nervo had referred, and which was considered by the Special Rapporteur in connection with the rule of "due diligence". In that connexion the various gradations of fault must be borne in mind, from *culpa levis* to *culpa lata*, and the extreme case where it was no longer a question of *culpa* but of *dolus*. Finally, once the prerequisites of responsibility had been laid down, there was yet another element to be considered, that of the circumstances, the unlawfulness of the fact and hence the responsibility, for example, the consent of the injured party, self-defence, etc.

63. A further question, with which the Special Rapporteur had dealt more fully in his first report, was that of the aspects of international responsibility: whether an unlawful international fact produced no other consequences than a duty on the part of the guilty State to make reparation, or whether, at least in certain cases, it conferred on the injured State the right to inflict a penalty on the guilty State. Thus there arose the problem of the punishable or penal consequences of an unlawful international fact, and such institutions as reprisals had to be taken into consideration.

64. In his report the Special Rapporteur dealt separately with unlawful facts committed by legislative, executive and judicial organs. In that connexion, Mr. Ago said that only in rare instances did international law require the performance of a specific act by a specific organ, so that failure by that organ to perform the specific act immediately constituted a breach of an international obligation. As Professor Anzilotti had pointed out, in the case of many obligations it was not specified exactly how they should be fulfilled, and international law left the State some discretion to decide whether such fulfilment should be ensured by the legislature, by the courts or through administrative practice.

65. In that connexion, another question was whether the rule that no claim could be lodged until local remedies had been exhausted was merely a rule of procedure, or a prerequisite for responsibility.

66. Finally, in connexion with the more advanced theory which regarded the violation of fundamental human rights as a source of international responsibility, as well as the subject covered by chapter IV of Mr. García Amador's report, Mr. Ago would merely point out that there could be no international responsibility where there was no genuine legal international obligation binding on States.

The meeting rose at 1 p.m.

#### 414th MEETING

Tuesday, 11 June 1957, at 3 p.m.

Chairman: Mr. Jaroslav ZOUREK.

#### State responsibility (A/CN.4/106) (continued)

[Agenda item 5]

#### GENERAL DEBATE (continued)

1. The CHAIRMAN invited the Commission to continue its general discussion of Mr. García Amador's second report (A/CN.4/106) on the responsibility of the State for injuries caused in its territory to the person or property of aliens.
2. Mr. PAL associated himself wholeheartedly with what had been said by previous speakers in appreciation of the Special Rapporteur's erudite and illuminating report. Of course, that did not mean he was in complete agreement with the Special Rapporteur's views. Frankly speaking, he found himself in disagreement with some of his fundamental principles: it would be very difficult for him to accept, for instance, articles 6 and 9 and his principles of vicarious responsibility, nor could he accept his view of the binding character of the so-called traditional rules in the field of State responsibility.
3. The Special Rapporteur's entire argument was based on the principle that every State had the right to protect its nationals abroad, and that all the other States had a corresponding duty. That right, however, was not unlimited; it certainly did not extend to the exertion of pressure on weaker States in order to secure a privileged position for its own nationals. Much depended on the circumstances in which the nationals went abroad. For example, if it was in the pursuit of commercial enterprise, then freedom in that pursuit could be held to imply as a necessary corollary that the alien newcomer chose to cast in his lot with the citizens of the State in which he had decided to trade, and to expose himself to whatever political vicissitudes occurred there.

Nor did the rule that a State was bound to respect the property of aliens necessarily lead to the consequences portrayed in the Special Rapporteur's draft article 9, since that rule, even in its traditional form, was subject to the proviso that extensive interference in private property was sometimes necessary, either for purposes of taxation, police measures, public health or public utility, or in order to carry out fundamental changes in the political or economic structure of the State or far-reaching social reforms, and that in all such cases the State concerned might have the sole right to fix its own compensation terms for the damage done and to employ its own agencies for that purpose. International law would certainly do better not to restrict the already very limited freedom the State enjoyed in that respect.

4. Those, however, were questions of detail to which he would refer during detailed consideration of the report. In the meantime he would confine himself to some general comments. In that respect he associated himself with every word that Mr. Padilla Nervo had spoken. "The international responsibility of States" was indeed almost co-extensive with international law itself. In the vast field covered by the subject, many threatening and urgent problems had arisen since the Second World War, but none graver than that posed by the nuclear bomb tests to which the most powerful nations had resorted in their quest for the mirage of security. By their stubborn indifference to the terrible hazards of such tests, not only for present generations but for generations yet unborn, the States that had conducted those tests, in disregard of the protests of the weak and helpless peoples at whose doors they were held, had shown scant respect for international responsibility, and the only heartening sign was the reaction their insensate attitude had provoked among common people everywhere. The question that now arose was how best to bring home to the States concerned their international responsibility in that respect. If they seriously contended that such tests were essential to their security, and in any case involved relatively insignificant hazards, surely it was only fitting that they should ask their own people to face such hazards by holding the tests on their own doorsteps, not on those of other nations. And if the Commission was prepared to show such concern about an isolated individual's possible future plight on foreign soil, ought it not to concern itself a little with the appalling dangers that already threatened millions of people in their own homes?

5. Turning to that part of the field that had been surveyed by the Special Rapporteur, Mr. Pal recalled that, in his first report (A/CN.4/96), Mr. García Amador had given an account of the past efforts at codification of the subject, and had referred to certain traditional doctrines prevailing in the international field. His own comments were not directed against the account which the Special Rapporteur had given in that respect, but were aimed at reshaping the Commission's thinking while discussing the subject. Earlier efforts at codification dated from the days of the League of Nations and had almost coincided with two vital events, both of which had materially affected the so-called traditional view.

6. In the first place, in Asia, the end of the First World War had touched off the latent impulses of a gigantic force: huge masses of poverty-ridden colonial slaves had entered the political arena in search of independence. As a result, the geography of international law, in Westlake's phrase, had undergone considerable

alteration; international law was no longer the almost exclusive preserve of the peoples of European blood, "by whose differences it is applied or at least invoked."<sup>1</sup> Now that international law must be regarded as embracing other peoples, it clearly required their consent no less; and that fact must be steadily borne in mind in attempting to determine to what extent alien property or alien interests in the newly freed countries merited the protection that international law could afford.

7. Secondly, in Europe, the end of the First World War had been marked by great political upheavals, one result of which had been the birth of a Great Power with a completely different ideology of social justice, involving completely different social and economic systems which endangered, among other things, the existing conception of private property. Now, if the system of international law was to be a neutral system within whose compass must be accommodated all existing social structures, clearly the Commission could not regard community life as bound up essentially with one particular set of principles governing the nature of society, but must recapture a frame of mind in which opposing views could be entertained without rancour, and unfamiliar ideas and ideologies judged less in relation to some abstract standard of truth than as a means of expressing widely-felt human needs.

8. The character and extent of the difficulty with which the Commission was faced would be apparent from a single example. The Special Rapporteur had accepted as a recognized principle of international law the right of aliens to possess and dispose of property, and the inviolability of such property except for public purposes, and then only on payment of full compensation by the State. Underlying that so-called traditional principle, however, was the assumption that it was not a legitimate "public purpose" for a State to abolish certain kinds of private property in general, and that the adequacy of compensation ought to be judged, not by the standard which the State in question deemed right in dealing with its own nationals, but by the standards accepted by other States which might have a fundamentally different outlook on social issues and might not realise its special difficulties. That assumption really involved another, namely, that the standard of right and duty which the European States had hitherto prescribed for themselves in their domestic affairs was the universally just standard, and that certain principles governing the nature of society provided the only sound basis for economic relations between States.

9. The Commission's task, however, was surely to seek a clear way of reconciling the just interests of all nations, remembering that all its efforts were directed towards providing a transitional solution, and that it could not therefore with impunity underrate the importance of caution.

10. Mr. BARTOS said it was his pleasant duty to congratulate the Special Rapporteur on his excellent report, and, in particular, to thank him for giving those members of the Commission who had not specialized in the subject a great deal of valuable information about certain source-material which was, he feared, relatively unknown to them.

11. As had been rightly stressed, the subject was a vast one. The League of Nations had worked on it without

<sup>1</sup> John Westlake, "The Native States of India", *The Law Quarterly Review*, Vol. XXVI, No. CIV (October 1910), p. 313.

avail for seven years, and even though there had been considerable progress as regards traditional views on the general question of the legal status of aliens, the question of State responsibility had certainly not become any easier or less complex in the intervening years. In the three weeks that remained to it, there could therefore be no question of the Commission's reaching final decisions, either on the general principles laid down in articles 1 to 3 of the Special Rapporteur's draft, or even on any of the special cases dealt with in the remaining articles.

12. Part of the difficulty lay in the great diversity of source-material. Where different sources reflected different conceptions or laid down different rules, it was necessary to have some criterion by which to judge whether a particular source had general validity or was valid only under certain conditions, in certain areas, or as between certain States. He would therefore like to know which of the different types of source referred to in Article 38 of the Statute of the International Court of Justice should be regarded as the main source for the work of codification on which the Commission was engaged. Clearly, the Special Rapporteur had very definite ideas of his own on that subject, and he was to be commended for having the courage of his convictions; but his ideas might not be shared by other members. The question was of great importance, since, once it was decided one way or another, much light would be thrown, not only on the basic questions of the scope and origin of the existing obligations and the nature of the acts that gave rise to responsibility, but also on such detailed questions as the admissibility of a plea of *force majeure*, the imputability of the acts of ordinary private individuals, reparation for moral as well as physical injury and so on.

13. In Mr. Bartos's view, international conventions, which bound only the signatory States, could only be relevant to the extent that they reflected general international practice. He stressed the word "general", since he, personally, would have certain reservations about proceeding on the basis of "general" Latin American practice unless it coincided with practice in other parts of the world. The same remarks applied to the "general principles of law recognized by civilized nations"; those could only be determined by careful study of the whole field of case-law, and not just selected cases from one particular region. Judged by those criteria, there was at least one rule about which there could be no doubt, namely, that a State was responsible for injuries caused by acts which contravened its international obligations; for Article 36, paragraph 2d of the Statute of the International Court of Justice, which was based on that rule, had been accepted by all Members of the United Nations without reservation. Referring to the Court's judgment in the *Corfu Channel case*, he said he had considerable doubts whether a like responsibility existed in the event of negligence on the part of the State concerned.

14. The first question to decide, therefore, was what constituted the main source, and although that question could be decided on the basis of the Special Rapporteur's report, he doubted very much whether it could be finally decided at the current session.

15. Mr. MATINE-DAFTARY congratulated the special Rapporteur on his interesting and well-documented report; with due respect to Mr. Garcia Amador, however, the articles which he proposed as a result of his studies failed, in large measure, to reflect the existing practice and present-day circumstances.

16. The Special Rapporteur had had a thankless task, because what the Commission was in effect trying to do was to transplant rules of municipal law into the field of international law, and the rules of municipal law relating to civil responsibility differed greatly from one country to another. Moreover, it was a singularly unpropitious moment for such a task, since distrust and suspicion reigned everywhere, and almost all countries, both great and small, in their efforts to ward off the supposed threat of subversion, had recourse to emergency laws and regulations whose effect amounted in practice to a denial of common law. In his view, it was no exaggeration to say that, no sooner had individual rights and freedoms been guaranteed by the constitutions of almost all countries, than the advent of the atomic era had rendered them almost illusory.

17. It was difficult to see how the Commission could give aliens a degree of protection in international law which even nationals no longer enjoyed under municipal law. The Special Rapporteur's text was therefore largely utopian: the work of a learned and idealistic scholar which, like many similar works before it, was likely to receive a cool welcome from responsible statesmen.

18. In trying to bridge the gulf between the theory of "due diligence"—to which he related the theory of an international standard of justice—and the Latin American theory of the equality of nationals and aliens, the Special Rapporteur had sought to take into account current preoccupation with national security and national economic interest. As in the case of most compromises, that had inevitably led him into inconsistency and ambiguity. For example, article 1, paragraph 2, stated that the international obligations of a State resulted from *any* of the sources of international law, whereas article 5, paragraph 1, referred only to fundamental human rights recognized and defined "in contemporary international instruments". Again, article 7 permitted the repudiation or breach of a contract or concession where such action was justified on grounds of public interest or of economic necessity, or where it did not involve discrimination between nationals and aliens, while article 8 permitted the repudiation or cancellation of public debts in similar cases. Again, it was an accepted principle in civilized countries that a State's responsibility to private persons for acts or omissions by its officials was limited to cases where such officials had acted within the limits of their competence; that principle was recognized in article 3, paragraph 1, but violated in paragraph 2. Again, article 4 stated that a denial of justice should be deemed to have occurred if an alien was prevented from exercising any of the rights specified in article 6, paragraph 1; under article 6, paragraph 2, however, the exercise of such rights could be subjected to such limitations or restrictions as the law expressly prescribed for reasons of internal security, economic well-being and so on, and the reservation constituted by that paragraph, expressed as it was in somewhat elastic terms, appeared also to be inconsistent with article 2, which prohibited a State from enacting legislative provisions which were incompatible with its international obligations. Finally, the rights listed in article 6, paragraph 1, included the right to a public hearing and the right to be tried without delay, or to be released, but the sub-paragraphs in which those rights were referred to did not come within the scope of paragraph 2: in other words they were absolute and subject to no limitation or restriction whatsoever; yet it was common knowledge that in practice these rights

were often illusory, even for nationals, owing to the slow working of justice in all civilized countries and the requirements of public order which sometimes made public hearings inadvisable.

19. Careful study showed that, as the Special Rapporteur himself had said, articles 5 and 6 were the keystone of the whole draft. That put the Commission in a somewhat difficult and embarrassing situation. The Universal Declaration of Human Rights was not a binding instrument, and unfortunately all knew that it had not resulted in any increased respect for human rights in practice. The draft international covenants on human rights would be binding instruments, but the Commission on Human Rights had not yet secured their adoption by Governments. He felt it would be unwise for the International Law Commission to poach on the Commission on Human Rights' preserves until the two draft covenants had been adopted, in other words, until the present atmosphere of international mistrust had given way to one of international confidence.

20. In his view, the Special Rapporteur would have done better to hold fast to the perfectly defensible Latin American theory of the equality of nationals and aliens. That would have been more in accordance with the spirit of the United Nations Charter and its condemnation of any discrimination on grounds of race, sex, language or religion. How and by what tribunal did the Special Rapporteur propose that a State be condemned for "manifest negligence" a somewhat elastic term—in taking the measures normally taken to prevent, or punish, acts of ordinary private individuals? As far as punishment was concerned, the courts were rightly jealous of their independence of the Government, and adhered firmly to the basic rule of imputability, which would be extremely difficult to apply in the cases of negligence referred to in the draft.

21. Iran, like many other Eastern countries, needed foreign, technical and financial assistance for its great programme of national development and reconstruction. With that end in view, it had recently enacted a law which gave foreign capital full legal protection on exactly the same basis as domestic capital. Iranian hospitality was a national tradition, and in practice foreigners received better treatment than nationals. His country did not, however, wish by international treaty to place them above the law, since that would bring back too vividly the bitter memories of the capitulations system.

22. Mr. YOKOTA expressed deep appreciation of the Special Rapporteur's treatment of one of the most important and most difficult subjects in international law and general approval of his choice of topic and method of approach.

23. On the question of the basis of international responsibility, he said that he could not agree with the Special Rapporteur's conclusion that, because the traditional theories of "causality", "fault", "risk" and so forth were so academic, an inquiry into them would not produce any practical results or solutions conducive to the codification of the subject (A/CN.4/106 chap. I). He did not regard the theories as entirely academic; indeed, they were of significance for the solution of actual cases.

24. Complicated as the question was, he did not think that the problems attending it would prove insuperable if the proper approach were adopted. It was pointless

to try and discover a single universal principle underlying the responsibility of States, for none existed. In most cases, however, international responsibility arose out of a fault. And, conversely, it was a well-established principle of international law that whenever a fault was imputable to a State its international responsibility was engaged. As stated in article 1, paragraph 4, of the resolution adopted by the Institute of International Law at its Lausanne session in August-September 1927 (A/CN.4/96, annex 8), no responsibility of the State existed "if the lack of observance of the obligation is not a consequence of a fault of its organs, unless in the particular case a conventional or customary rule, special to the matter, admits of responsibility without fault". He hoped that the Commission would attempt to solve the problem on those lines.

25. With regard to violations of fundamental human rights constituting a source of international responsibility, Mr. YOKOTA approved, in principle, both of the approaches adopted by the Special Rapporteur and of his conclusions. At the same time, he fully understood the anxiety aroused in other members of the Commission by the Special Rapporteur's somewhat ambitious proposals. The only reasonable solution was to reconcile as far as possible the "international standard of justice" with the principle of the equality of nationals and aliens before the law. Since both principles had sound foundations and were to a large extent accepted by States, it would be unwise to adopt one and sacrifice the other. Opinions, it was true, might be divided as to what constituted fundamental human rights, but it should not be impossible to agree on a minimum. In that case article 5, paragraph 2, of the Special Rapporteur's draft would be acceptable.

26. Mr. EDMONDS said that no one familiar with legal writing could fail to be impressed with the magnitude of the task undertaken by the Special Rapporteur and the sincerity of purpose with which he had ventured into what, to some extent at least, was an uncharted field. In proposing specific articles for consideration, the second report of the Special Rapporteur provided the Commission with the opportunity to discuss certain special questions.

27. Mr. Edmonds said that he would reserve the presentation of his position on the questions raised by those articles until they came before the Commission individually. In the meantime he would only comment on general principles.

28. It was difficult for him to accept the view that certain fundamental rights had been recognized and had become familiar in international law. Though they had undoubtedly been much discussed, and to some extent formulated in specific terms, he knew of no instance, apart from the Convention for the Protection of Human Rights and Fundamental Freedoms, adopted in 1950 by the Member States of the Council of Europe, where they had ever been accepted internationally, for, as the Commission was aware, the United Nations covenants on human rights had not progressed beyond the drafting stage. The adoption of articles 5 and 6 of the Special Rapporteur's draft would not be warranted by existing principles of international law. It was not the task of the Commission to speculate on what international law should be; the Commission's terms of reference were to codify existing rules.

29. Again, though the idea of liability without fault

might be accepted in special cases, he would not go so far as to say that it was acceptable in all cases, or generally recognized, and with regard to this matter also, he thought that the Commission should confine itself to codifying existing principles.

30. Mr. KHOMAN also congratulated the Special Rapporteur on the excellent spadework he had done for the Commission's task of codification. The ground on which he had had to venture was uncertain and strewn with controversial principles and difficulties of interpretation. Thanks to his report, however, the Commission now had a clear, if complex, picture of the legal situation with regard to international responsibility.

31. He could not fail to note the progressive tendency of the report, and the Special Rapporteur's fidelity to the ideals of his nation and continent. But while he admired and supported the developments he advocated in the matter of responsibility and the juridical status of aliens he feared that they would meet with some opposition if submitted in that form to Governments. For example, though it was the tradition in south-east Asia, and in Thailand in particular, to recognize the rights of aliens and accord them facilities for engaging in trade, he thought it would be unwise to attempt to extend those rights and facilities, thereby widening the field of potential State responsibility.

32. It was largely a matter of striking the right balance between opposite trends. The very notion of the protection of foreigners and the broader problem of State responsibility was born in Europe, and might be said to have sprung from necessity, and especially from the conditions which existed then in Europe, where at one time so many restrictions had been placed on aliens. The reaction against that unsatisfactory state of affairs had led to the other extreme—the system of capitulations. Thailand had gone through that stage too, with the difference that the right of aliens to be governed by their own laws had been freely accorded by and not extorted from, its Government.

33. While in favour of ensuring everything essential to the personal safety and dignity of aliens, he considered that a balance must be struck between their interests and those of the State in which they resided, and that special account should be taken of the potential threat to a State's security offered by the presence of an unduly large proportion of aliens within its territory.

34. Mr. EL-ERIAN paid a tribute to the Special Rapporteur for his systematic and scholarly report, which provided an excellent basis for the Commission's discussions. He fully approved the Special Rapporteur's view that special priority should be given to the subject of international responsibility. The Special Rapporteur, with the approval of the Commission, had rightly adopted a gradual approach to so complex a problem.

35. However, while not underestimating the importance of the special topic he had selected, i.e. the responsibility of the State for injuries caused in its territory to the person or property of aliens, Mr. El-Erian could think of other aspects of international responsibility that merited prior study. Since a new international order had been established in 1945 by the signature of the Charter of the United Nations, there had been flagrant violations of its principles, and in particular of the cardinal principle of the prohibition of the use of

force against the territorial integrity or political independence of any State, on the pretext of so-called police action. The principles of Chapter XI, on responsibility towards Non-Governing Territories, had also been ignored, on the plea that, the chapter being merely a declaration, the obligations it enunciated were moral and not legal ones. Problems such as those should be given priority, with a view to defining clearly the responsibility of States in that connexion.

36. The responsibility of States towards aliens was closely bound up with the question of the status of aliens, and was, as Jessup had pointed out,<sup>2</sup> one of the most highly developed branches of international law. In the development from the position in antiquity when the foreigner was outside the domain and protection of the law, and in Ancient Greece, when non-Greeks or barbarians had been regarded as born enemies and potential slaves, to a more enlightened attitude which led to the recognition and regulation of the juridical status of aliens in international law, Moslem law, by the tolerant treatment and legal protection it accorded to non-Moslems, had, as Nussbaum had remarked,<sup>3</sup> made a significant contribution. The nineteenth century, however, had seen the emergence of two regrettable trends. The first had found expression in the system of capitulations, under which certain States were compelled to accord to aliens privileges that put them beyond the realm of law and outside the jurisdiction of the territorial State, and, by a complete reversal of the previous position, it became the ambition of the State's own nationals to enjoy equality of rights with aliens. The second trend had been towards making the question of the rights of aliens a pretext for intervention in the domestic affairs of States, a trend particularly marked in the Near East and Latin America. Finally, however, the legal rules established at The Hague Convention of 1907<sup>4</sup> and in previous international instruments, and later incorporated in the United Nations Charter, had prohibited such practices.

37. Codification of the subject of international responsibility was no easy task, despite the clearly defined principles emerging from the vast body of case law produced by the numerous claims commissions and arbitral tribunals. Care must be taken to eliminate unjustified and harmful political considerations, and to counteract the tendency prevalent in "power politics" to place the smaller countries on a subordinate footing. There were three points to be borne in mind in codifying the subject. First, it should not be based solely on traditional international law, but should reflect the essential principles of the United Nations Charter. It should also be grounded on recognition of the inherent right of peoples to own and develop their own natural resources, as formally enunciated in General Assembly resolution 626, (VII). Finally the codification should provide legal rules that were consistent with the new international order established by the Charter, and not merely ensure the protection of vested interests or the maintenance of the *status quo*, which might prove to be harmful

<sup>2</sup> Philip C. Jessup, "Responsibility of States for Injuries to Individuals", *Columbia Law Review*, Vol. XLVI, No. 6 (November, 1946), p. 904.

<sup>3</sup> Arthur Nussbaum, *A Concise History of the Law of Nations* (New York, The Macmillan Company, 1947), p. 27.

<sup>4</sup> Convention for the Pacific Settlement of International Disputes. See *The Hague Conventions and Declarations of 1899 and 1907*, 2nd ed., ed. James Brown Scott, Carnegie Endowment for International Peace (New York, Oxford University Press, 1915), pp. 41–81.

to friendly relations among peoples and would not serve the cause of international peace and co-operation.

38. As far as the individual articles were concerned, article 4, in his opinion, covered cases to which the term "denial of justice", in the traditional sense, did not apply. The concept of "denial of justice" was normally used only with reference to juridical procedure and the law of international claims—a question which the Special Rapporteur had decided not to deal with in the draft.

39. While agreeing in principle with the idea of the equality of the rights of nationals and aliens, he feared that any attempt to work out rules of international law on that basis would encounter many difficulties. Such equality, as he understood it, related to the question of protection and fundamental guarantees on such matters as the possession of legal personality and capacity, and the enjoyment of fundamental rights and freedoms. The very broad connotation given to the concept in articles 5 and 6 was not, he thought, in accordance with international law. It was a customary rule of international law that there were limits to the rights that the State must accord to aliens in the field of civil and commercial law, especially property rights. In view of the economic importance of land, for example, the right to own it was, in the municipal law of many States, reserved for their nationals, and such a provision had never been regarded as contrary to international law. Similarly, certain professions or trades were closed to aliens as a matter of labour policy or national interest, and some countries allowed only their nationals to own shipping. Thus, there were many exceptions to the general principle of equality of nationals and aliens. Indeed, it might be argued that it was inherent in the very concept of nationality that nationals should have special duties towards the State and corresponding special rights.

40. In article 9, to which he would revert later, he had been gratified to find an enunciation of the right of States to expropriate property for reasons of national interest.

The meeting rose at 6 p.m.

### 415th MEETING

Wednesday, 12 June 1957, at 9.30 a.m.

Chairman: Mr. Jaroslav ZOUREK.

#### State responsibility (A/CN.4/106) (continued)

[Agenda item 5]

##### GENERAL DEBATE (continued)

1. The CHAIRMAN said that, before inviting the Commission to continue its general discussion of Mr. García Amador's report (A/CN.4/106), he wished to direct its attention to the scope of the task which the Commission had been invited to undertake. The Special Rapporteur's views on that question were already clearly indicated in article 1, paragraph 2, of his draft, which read:

"The expression 'international obligations of the State' shall be construed to mean, as specified in the

relevant provisions of this draft, the obligations resulting from any of the sources of international law." Moreover, in his comment on article 1, the Special Rapporteur expressed the opinion that the Commission's draft:

"should be self-sufficient and should not constitute a merely subsidiary instrument which leaves the final solution of the problems to the very principles and rules of international law which it is supposed to assemble and formulate in an ordered and systematic form."

2. He appreciated the reasons which had led the Special Rapporteur to attempt to cover the entire subject of the legal status of aliens in all its substantive aspects, instead of contenting himself with the technical rules that were usually regarded as exhausting the subject of State responsibility. He wondered, however, whether the Commission could really undertake that task, every part of which fairly bristled with difficulties. In his opinion, the Commission should study only the circumstances in which the State could be held responsible for an act which gave rise to damages and a claim from a foreign State, without engaging in a study of the rules governing the juridical condition of foreigners on the territory of the State. He recalled, moreover, that the treatment of aliens figured separately on the list of topics which the Commission had, at its first session in 1949, provisionally selected for codification.<sup>1</sup>

3. Mr. FRANÇOIS said that he fully associated himself with what the Chairman had said. He personally was strongly in favour of limiting the scope of the task with which the Commission was faced.

4. He paid a tribute to the Special Rapporteur for his remarkable report, which in general he was glad to endorse. In commenting on the report, some members of the Commission had, in his view, strayed far beyond the confines of the subject. The question of tests of nuclear weapons, for example, seemed to have very little bearing on the subject of State responsibility, at least if one accepted the comparatively restrictive interpretation of that term that had been adopted in 1930 by the Conference for the Codification of International Law and, now, by the Special Rapporteur. He entirely agreed with the Special Rapporteur that a State's responsibility could be said to be involved only when some specific international obligation had been violated. The substance of such obligations, however, was, in his view, a matter that lay outside the scope of the draft, which was concerned rather with the question: given certain obligations, in what cases was the State responsible in the event of their breach or non-observance?

5. Though many of the criticisms that had been directed against his draft were unjustified, the Special Rapporteur had to some extent provoked them by including matter that was not germane to the subject as thus defined. It was a measure of his courage that he had grappled with questions that had been mainly responsible for the failure of the 1930 Codification Conference, and had sought to bridge the gap between the two theories or principles which had then clashed. In Mr. François's view, draft article 5 was perfectly acceptable, and the whole difficulty lay in article 6, which

<sup>1</sup> Official Records of the General Assembly, Fourth Session, No. 10, para. 16.

attempted to lay down substantive rules as to what constituted fundamental human rights. It was hardly necessary to say that that was a very controversial question; as had already been pointed out, the Universal Declaration of Human Rights had no binding force, and general agreement had not yet been secured regarding the draft covenants. If the International Law Commission now attempted to list what were, in its opinion, fundamental human rights, it would be duplicating the work that was still continuing on the covenants. In his view, therefore, it would be preferable to delete article 6 and simply retain the reference to "internationally recognized fundamental human rights" in article 5.

6. He also shared the doubts that had been expressed regarding article 9, relating to acts of expropriation. Even if that question was at first sight less controversial than the definition of fundamental human rights, one aspect of it, namely, the question of nationalization, still gave rise to such conflicting views that the Institute of International Law had thought fit to make an entirely separate study of it. He was therefore inclined to think that article 9 should be deleted too.

7. Thus abridged, the draft would not be revolutionary, but would still be of considerable practical value as a statement of certain guiding principles governing the future development of international law in that field.

8. Sir Gerald FITZMAURICE thought the Commission would not be surprised to hear that he could not agree with much of what had been said at the previous two meetings. He was not referring to what had been said regarding the interpretation of the Charter and the use of force; with much of that he personally could agree, though he doubted its relevance to the subject of State responsibility unless that subject was equated with the whole of international law. In theory, of course, that could be done, but as he would attempt to show later, such a course would, in his view, be unfruitful.

9. He was referring rather to the political statements that had been made. While he had no intention of answering them in detail, that was not because there was no answer—quite the contrary. By no means all the complaints were on one side, as could be seen by anyone who studied the cases relating to the treatment of foreigners that had come before international claims commissions and arbitral tribunals. He defied anyone to read, for example, the *Cotesworth and Powell* case<sup>2</sup>—to quote an instance that did not concern any of the countries from which members of the Commission were drawn—without being shocked at the kind of treatment sometimes meted out to foreigners. In virtually all such cases the injured State had refrained from forcible intervention, and had had recourse to diplomatic intervention only; and he thought that anyone who studied the cases would be bound to agree that the decisions reached by the claims commissions and arbitral tribunals were fully justified.

10. The question of State responsibility had been depicted by some members as one in which the relevant rules of law had been invented in comparatively recent times for the sole purpose of enabling certain Powers to dominate others. No one who was familiar with the history of the subject could seriously uphold that view.

<sup>2</sup> John Bassett Moore, *History and Digest of the International Arbitrations to which the United States has been a Party* (Washington, D.C., U.S. Government Printing Office, 1898), Vol. II, pp. 2050 ff.

The rules relating, for example, to the denial of justice were centuries old; thus they could be found, stated in very modern terms, in *De Bello, de Repraesaliis et de Duello*, a treatise written by the Italian jurist Giovanni da Legnano, three hundred years before Grotius. Obviously, at that time there had been no question of Great Powers, in the sense in which that term was now understood, or of one State seeking to impose its rules of law on another. The reason why the rules had been evolved was that the treatment of foreigners in most European countries had, in those days, been such as to give rise to numerous altercations and disputes. It was, he submitted, perfectly natural that centuries later, when they had come in contact with other countries where foreigners were treated in that way, the European countries should have applied the same rules that, in an earlier age, had enabled them to settle such problems satisfactorily among themselves.

11. There was at least one remark of Mr. Matine-Daftary's with which he entirely agreed, namely, that there could hardly be a subject which it would be less propitious to try to codify at the present time. As had been only too evident, the subject was one which immediately touched off strong emotional charges, and the tendency to approach it from a political and ideological standpoint, entirely inappropriate in a commission of jurists, appeared to be irresistible. At the eighth session Sir Gerald agreed<sup>3</sup> that the subject should be codified if possible, but that was before he had heard speeches of the type and tone delivered at the previous two meetings. If those speeches reflected the spirit in which the Commission intended to deal with the subject, it would be preferable to abandon it altogether until such time as it could revert to it under more favourable circumstances.

12. Turning to the Special Rapporteur's clear and interesting report on a complex subject which raised some of the most difficult theoretical questions to be found in international law, he recalled that its author had specially requested the Commission's comments on four main questions, namely, the basis of State responsibility, the denial of justice and his treatment of that matter in connexion with fundamental human rights, breaches of contract and the State's responsibility for the acts of ordinary private individuals (413th meeting, para. 38).

13. Regarding the first question, he felt it would be a mistake to try to equate the subject of State responsibility with the whole of international law, since the sole result of doing so would be the truism that a State which violated international law incurred responsibility for doing so. In cases where individuals suffered injury on foreign territory, two questions arose: the first, whether the acts amounted to a breach of international law; and the second whether the circumstances were such that responsibility could be imputed to the State on whose territory the injury was caused. It was, in his view, the second question which was of the real essence of the subject of "State responsibility". Indeed, he sometimes felt it would be desirable to abandon that term and speak only of "the problem of imputability".

14. That problem in itself had many aspects: for ex-

<sup>3</sup> *Yearbook of the International Law Commission, 1956*, Vol. I. (United Nations publication, Sales No.:1956.V.3, Vol. I), 370th meeting, paras. 51 and 52.

ample, what were the circumstances, if any, in which responsibility could be imputed to one Government for the acts of another, for acts or events in territory which had not been under its control at the relevant time, for acts of persons, such as revolutionaries, who were not, or not entirely, under its control, for acts of particular judicial or administrative organs of the State, and so on? Those questions of imputability could arise even where no question of aliens or alien property was involved, but the fact that they arose mainly in connexion with the treatment of aliens had led to a tendency to identify the two subjects, although they were in essence separate.

15. He sympathized with the Special Rapporteur's efforts to avoid the question of *culpa* or "fault", which was not only a difficult one but was frequently of little importance in practice, either because the "fault" was not contested, or because, even if the necessity for it was contested, there was no serious dispute in the given case that responsibility existed. He did not, however, think that the Commission could altogether avoid the question, which arose precisely with regard to the type of case it was now considering, namely, where the acts of officials or private individuals caused injury to aliens or alien property. In the last analysis, it could not, he thought, be maintained that a State could be held responsible where no "fault" was involved. To take an example from the field which the Commission had recently been considering, supposing an ambassador went out incognito, committed a misdemeanour and was arrested without revealing his identity, the receiving State could not possibly be held responsible for an undoubted breach of diplomatic immunity, since no "fault" could be said to exist.

16. The Special Rapporteur had raised a slightly different question, whether responsibility could arise as a result of objective risk, in other words, if no breach or non-observance of international law was involved. His answer to that question was an emphatic negative. The theory of risk prevailed under certain systems of municipal law, but could not be held to extend to international law. The International Court of Justice had dealt with that very question in the *Corfu Channel case*, and had concluded that there must be a clear breach or non-observance of international law and some element of fault; and Mr. Krylov, one of the dissenting judges, had specifically agreed with that conclusion<sup>4</sup>. The Special Rapporteur appeared to suggest that the tribunal had come to a contrary conclusion in the *Traill Smelter Arbitration* (1938-1941) between the United States and Canada,<sup>5</sup> but the tribunal's decision had in fact been based on the assumption that a breach of international law had occurred, on the basis of the principle *sic utere tuo ut alienum non laedas*; and that if there had been no breach there would have been no responsibility.

17. Summing up his views on the first point on which the Special Rapporteur sought the Commission's advice, therefore, he said that, in his view, responsibility arose when the facts were such as to lead to a finding that there had been a breach or non-observance of international law, and when the circumstances were such that the responsibility for such facts could be imputed to the State.

18. Turning to the second point, he observed that it at once raised the controversial question whether it was a complete and sufficient answer to a charge of maltreating foreigners to say that they were treated in exactly the same way as nationals. The suggestion which the Special Rapporteur had made with a view to reconciling the two opposing schools of thought in that respect merited careful attention. In his own view, which was endorsed by most of the writers and the great majority of decisions in cases which had come before a claims commission or an arbitral tribunal, the law was very clear. There was, he thought, no doubt that, *prima facie*, it was sufficient to treat foreigners in the same way as nationals; but that rule was founded on the assumption that the treatment of nationals would conform to certain minimum standards of law and justice. Thus, supposing that the laws of a particular country provided redress against physical injury only in the event of death or disability, could it be seriously maintained that, in the event that an alien received a serious injury which did not cause death or disability, the State concerned could legitimately claim that he was not entitled to any redress, since its own nationals were in the same position? The difficulty was to define what was meant by a minimum standard of law and justice.

19. The Special Rapporteur's draft articles 5 and 6 had been criticized on the ground that there was no universally received definition of human rights, but, in his view, the Special Rapporteur was not suggesting that there was, but only that by recourse to the concept of human rights it might be possible to provide such a definition. Thus far he was therefore in considerable sympathy with the Special Rapporteur's attempt, although he did not entirely agree with the wording he proposed. It was possible to conceive of cases where there had been no breach of fundamental human rights, but in which it was nevertheless an insufficient answer to say that aliens received the same treatment as nationals. It might therefore be necessary to go a little further than the Special Rapporteur had done. In particular, it seemed that the wording of article 4, paragraph 3, was too restrictive: if a judicial decision or court order had been manifestly unjust, it should not also be necessary to show that the decision or order would have been different if it had not been for the foreign nationality of the person concerned; the word "and" after "manifestly unjust" should therefore be replaced by "or". There was a great mass of authority for the view that, where palpable injustice had occurred, the responsibility of the State was involved, even if there had been no special discrimination.

20. As regards the clauses relating to breach of contract, he said that, in the light of an intensive study which he himself had had occasion to make into that very difficult question, he had found that imputability was usually recognized in such cases only where there was some element of a delictual character over and above the simple breach of contract, for example, if the breach had been purely arbitrary. In the great majority of cases, the matter was rather one of diverging views as to interpretation and application of the contract; and as the contract was concluded under private law, a claim alleging breach or repudiation of it must first be dealt with in the local courts. Only if that resulted in a denial of justice, as that term was understood in international law, could State responsibility arise, and then in consequence of the denial of justice, not of the original breach of the contract. He therefore fully endorsed the basic

<sup>4</sup> *Judgment of 9 April 1949: I.C.J. Reports 1949, p. 4.*

<sup>5</sup> United Nations, *Reports of International Arbitral Awards, Vol. III* (United Nations publication, Sales No.: 1949.V.2), pp. 1911 ff.

principle underlying article 7, even if its drafting could be improved.

21. Nor did he dissent from the Special Rapporteur's approach to the question of public debts in article 8.

22. The general principle laid down in article 9 regarding acts of expropriation was also unexceptionable, but the article did not touch, for example, on the possibility of discrimination against foreign interests. Nor did it define what was meant by "justified on grounds of public interest". He did not wish to refer to any particular cases, but he felt that anyone who studied the cases of expropriation that had arisen since the Second World War would be struck by the fact that they had frequently been aimed specifically against foreign interests, even against the interests of a particular foreign country; moreover, it was often questionable whether the grounds of public interest which had been advanced were not a cloak for political considerations. Another point which was not referred to in the Special Rapporteur's text was that such cases had often entailed the repudiation of a contract or concession, contrary to its clear terms. Unless the article could be considerably expanded and elaborated in order to cover all those points, he was inclined to agree with Mr. François that it should be deleted.

23. Finally, regarding acts of ordinary private individuals and internal disturbances, he was in very general agreement with the Special Rapporteur. In principle, the State did not incur direct or even indirect responsibility for the acts of ordinary private individuals. It did, however, incur responsibility for certain acts or omissions of its own in connexion with the act of an individual. For example, if a burglar entered a foreigner's house and injured him or his property, the State was not responsible, provided it maintained a normally efficient system of public order and justice; it was only responsible if its system of public order did not provide the normal measure of protection which anyone living in a country was entitled to expect the authorities to provide, or if its authorities failed to try and arrest the offender and mitigate, as far as possible, the results of his act. The former hypothesis was covered by the Special Rapporteur's draft article 10, but the latter, he thought, was not.

24. Similarly article 11, relating to internal disturbances, dealt with one aspect of the matter but not with another. It dealt with the case where, internal disturbances having broken out, the authorities failed to take the normal steps to prevent or punish acts which caused injury to the person or property of aliens. It did not, however, deal with the question of responsibility for the actual occurrence of the internal disturbance. It was, of course, a general rule that a State was not responsible for the mere occurrence of civil disturbances, which could happen even in the best regulated States; but if it could be shown that the authorities knew, or had reason to suspect, that disturbances would occur, and then failed to take police or other measures to prevent them or to mitigate their effects, they might be liable for all the consequences.

25. Mr. TUNKIN said that, as far as the Soviet Union was concerned, the part of the problem of State responsibility under consideration was practically a matter of past history. Before speaking, therefore, he had wished to hear the views of his colleagues from those parts of the world where the problem was one not only of eco-

nomie but also of political significance, affecting sometimes the very independence of States. Mr. Padilla Nervo, Mr. Pal, Mr. El-Erian and others had raised certain fundamental points regarding the responsibility of a State for damage suffered by foreign nationals; he thought the views they had expressed deserved careful consideration. For his part, he would confine himself at that stage of the discussion to a few general comments regarding the Special Rapporteur's interesting and learned report.

26. The problem of State responsibility reached down to the very foundations of contemporary international law. It was therefore essential to bear in mind the recent developments in international relations and international law, which were due to the progress of human society. Two events were of particular importance in that connexion: first, the emergence and growth of a new socialist economic system, with the result that the co-existence of two different economic systems, both on a world-wide scale, had now to be reckoned with; and second, the attainment of independence by a great many former colonial and dependent territories, a process which was still continuing.

27. It was not only the geography of international law that had changed, as Mr. Pal had pointed out, but its economic foundation. Present-day international law could not be a system of legal rules imposed by States belonging to one economic system on States belonging to another; world-wide international law could not contain rules which were incompatible with the principles of one of the two main economic systems. As Mr. Padilla Nervo had rightly pointed out, the countries on whom international law had formerly been imposed in order to facilitate their exploitation were now called upon to partake in its formulation. The further development of international law should be on a basis of peaceful competition and collaboration between all States, irrespective of their political, economic or social systems. International law was one means to ensure their peaceful co-existence.

28. Those considerations dictated a certain approach to the problem in question. Aliens must not be regarded as a privileged group enjoying special privileges. The fundamental principle was that they must be subject to the law of the country of their residence. Individuals, whether nationals or aliens, were not, in fact, subjects of international law at all; as Mr. Verdross had said in his excellent treatise on international law, individuals as a general rule were "*nicht völkerrechtsunmittelbar*" (not directly under international law)<sup>6</sup>. The Special Rapporteur appeared to hold a different view, since he said in his commentary that human beings as such enjoyed the direct protection of international law. That view, which was reflected in many of the draft articles, was, in his opinion, unacceptable.

29. There were, of course, differing views regarding the scope of relations which could be regulated by international law. Kelsen's view was that it was not juridically impossible for all matters which were the domestic concern of the State to be regulated by international law. But if it was said that something was juridically possible, it did not necessarily mean that it was really possible. There were fundamental factors at work which made it impossible for contemporary general international law to regulate some matters which were, and

<sup>6</sup> Alfred Verdross, *Völkerrecht*, 3rd ed. (Vienna, Springer-Verlag, 1955), p. 77.

should remain, within the domestic jurisdiction of a State. Those matters certainly included internal relations pertaining to different economic systems. But changes in the economic system of a State might affect aliens. Present-day international law could not develop unless it was clearly recognised that it was not its role to try and regulate the internal economic relations of States belonging to two fundamentally different economic systems.

30. Turning to the question of when a State incurred international responsibility, he found himself largely in agreement with Mr. Ago and the Special Rapporteur, as well as with some remarks of Mr. Edmonds. He agreed that responsibility could only arise from some act or omission which violated the international obligations of the State; the principle of "fault" should be accepted as a general principle underlying the Commission's whole treatment of the subject. In article 1, however, the Special Rapporteur referred to "some act or omission on the part of its organs or officials"; not all organs of the State and not all its officials could represent the State as a subject of international law, and the question of local remedies accordingly appeared to arise in that connexion.

31. He also agreed with the Special Rapporteur that the expression "international obligations of the State" should be construed to mean obligations resulting from any of the sources of international law. There was, however, some confusion in the report as to what were the real sources of international law. He agreed with Mr. Matine-Daftary that, in practice, there were only two such sources, namely, conventions and the customary rules of international law. He fully agreed with Mr. Amado that before any question of responsibility could arise it must be possible to point to some rule of international law which had been violated. That would mean, for instance, leaving out of account any problem of human rights.

32. He agreed with the Chairman that the first question to decide was the scope of the study. Since the violation of any rule of international law raised the question of State responsibility, the subject might be said to cut across the whole field of international law. It was obviously impossible, however, for the Commission to review the whole of international law, and indeed the subject had not been referred to the Commission in that form. He accordingly supported the view of previous speakers that the Commission should leave out all substantive rules and deal only with State responsibility in the strict sense of the term.

33. The CHAIRMAN, speaking as a member of the Commission, congratulated the Special Rapporteur on a valuable report which set out clearly the problems that the Commission had to face.

34. With regard to the sources of the international obligations, the violation of which involved the responsibility of the State, he agreed that it would be preferable, as in previous drafts concerning the same field, to refer to the rules of general international law without attempting to codify the fundamental rules, the violation of which would involve the responsibility of the State. He was glad to note that the Special Rapporteur intended to deal, in his next report, with the question how international responsibility arose, a question bound up with the question of the exhaustion of local remedies. If the Commission could agree on the principle that a State could not be made responsible for an unlawful act

until all local remedies had been exhausted, it would have taken a step forward. Generally speaking, he thought it hardly possible for a State to be held responsible when a case had only passed through the lower courts, although there were exceptions to that rule, for example if it was clear from precedents that the aggrieved party had no chance of obtaining redress by taking the case further, or if the injury had been caused by persons who enjoyed diplomatic immunity.

35. On the difficult problem of denial of justice, he agreed with Sir Gerald Fitzmaurice that the Special Rapporteur had perhaps interpreted the concept too narrowly. He could recall a number of cases in which courts had deliberately refused to apply the correct law to an alien. In one case, for instance, a court had refused to apply Czech law (at a time when the Austrian Code of 1811 had still been in force in Czechoslovakia) on the ground that it could not know what laws were in force behind the "iron curtain".

36. He viewed with great sympathy the course chosen by the Special Rapporteur in seeking a legal basis for international responsibility in the rules concerning the international protection of human rights, and thought that a solution might one day be found on those lines, but doubted whether at the moment there was a sufficient legal basis for such a solution. The Universal Declaration of Human Rights was not a legal instrument, the proposed covenants on human rights were still under discussion, and the only international instrument stipulating specific legal obligations that had as yet been adopted was the Convention for the Protection of Human Rights and Fundamental Freedoms, signed at Rome in 1950, which applied only to a small number of countries. He accordingly agreed with Mr. François that the question should be held over for the time being. In the absence of applicable rules of international law, the only basis on which the status of aliens could rest was the principle that they should be accorded the same treatment as nationals in that particular respect.

37. As far as the question of expropriation was concerned, he did not consider that the term could cover "nationalization", which was entirely different from expropriation not only in scope but also by reason of its economic basis. Nationalization, in fact, was the term used to describe the transfer of whole branches of the economy from private to collective ownership. If that definition of the term "expropriation" were admitted, the Commission should easily be able to reach agreement on the principle.

38. Mr. AGO noted the emergence of two trends in the course of the illuminating discussion on the Special Rapporteur's report. Some speakers had been more concerned with the essentially technical and legal side of international responsibility, and had put forward suggestions which would be of great value if the subject was to be dealt with in greater detail; others had emphasized the political aspects of certain questions which had been dealt with by the Special Rapporteur, and which concerned only indirectly the question of responsibility.

39. As far as he could see, the Commission had the choice of three courses. Firstly, it could adopt the radical course of stating that, for various reasons, the subject was not ripe for codification. Secondly, it could deal with the subject covered by the report in all the aspects touched on by the Special Rapporteur, following the tendency, found in many works on international respon-

sibility for damages suffered by foreigners, to widen the subject to include all the substantive rules regarding the treatment of aliens. There was, of course, nothing to prevent the Commission's adopting that course, but he himself doubted the wisdom of undertaking such a wide task, which would involve considering and defining all the obligations of States towards aliens before studying the consequences of violations thereof, and settling not only the technical and legal problems involved but the political ones as well though the latter might not present such insuperable difficulties as some supposed. Thirdly, the Commission could, as advocated by the Chairman, leave all the matters concerning the definition of the obligations of the State as to the conditions of aliens, and confine itself to the examination of the questions within the framework of responsibility proper, i.e., of the consequences of an international illicit act committed in the field under consideration.

40. Of those three courses, Mr. Ago preferred the third, which would enable the Commission to do a useful job without engaging in a debate on the treatment of aliens, a subject on which it might prove sometimes impossible to reach agreement, and which, in any case, could usefully be allowed to evolve further before attempting to codify it. One thing that was clear, however, was that the Special Rapporteur must have clearer directives than had so far emerged from the discussion.

41. If the third course were adopted, the articles already drafted by the Special Rapporteur would need to be considerably amplified. Among the many points to be considered was, for example, the question at what moment responsibility arose. In the specific case of denial of justice, was the international illicit act imputable to the State from the time of the court judgment, or did it date back to the time when the wrong was initially inflicted? The question was no minor one, for the extent of the reparation due might depend on the answer.

42. Other points to be considered were the possibility of imputing to a State an international illicit act committed by another State, the question of "fault" as a condition of responsibility, and that of the circumstances which excluded the wrong character of an act and, therefore, responsibility, for example, the consent of the aggrieved party, or self-defence. It would also be necessary to study the question of the prior exhaustion of local remedies, and the conditions to which the exercise of diplomatic protection was subject. Finally there was the question whether the duty to make reparation implied the obligation to make full restitution, or if the payment of an equivalent compensation could be admitted, and whether the obligation to grant reparation was the only consequence of an illicit act in the field under consideration.

43. A separate question, on which it was too early to take any decision, was the form that the Commission's contribution should take. That naturally depended on the scope given to the subject. His own impression was that the subject was not one on which an international convention could be conveniently concluded at that stage. A draft code, on the other hand, would be most valuable.

44. Mr. BARTOS observed that on some aspects of international responsibility rules of international law undoubtedly existed, but they were of a very general nature. On other aspects there were precise rules, but

they were accepted by some States and only tolerated by others. A subject so controversial and still in course of evolution did not lend itself to codification in the strict sense of the term, and the Commission should accordingly combine the work of codification with the encouragement of the progressive development of the law in the matter. The Special Rapporteur was accordingly to be congratulated on having emphasized the progressive element in his report, though he had perhaps been ill-advised in presenting relative innovations as constituting existing, recognized law. There were still many points on which international acceptance must be obtained before it would be possible to talk of rules of law.

45. He agreed with Mr. Tunkin and Mr. Ago on the need to give the Special Rapporteur clear instructions for his future work, but thought it preferable to entrust a committee with the task of elaborating them. Any attempt to go into further detail as a Commission would merely mean a prolongation of the debate on the present divergent lines.

46. Mr. LIANG, Secretary to the Commission, agreed on the need to define the scope of the subject before considering it further. There were a number of questions with which it had been confused, but from which it could, and should, be clearly distinguished. When the subject had been discussed in the Sixth Committee of the General Assembly, some delegations had had the impression that it was identical with the question of the rights and duties of States. That impression was, however, easy to dispel. In law schools in the United States of America, the subject was often dealt with under the heading of international claims, although there were obviously many inter-State claims, territorial ones for instance, which raised no question of State responsibility. Borchard had entitled his masterly treatise: "The Diplomatic Protection of Citizens Abroad". The question of diplomatic protection, however, could be conceived of as one of State policy, rather than of international law.

47. Mr. François had been quite right in remarking that the treatment of aliens had been included in the list of topics adopted by the Commission at its first session, but that list had been adopted after only a cursory examination. The topic had been included, presumably, because it had been the subject of previous international action leading to the Convention on the Status of Aliens, signed at the Sixth International Conference of American States (Havana, 1928), and of an abortive International Conference on the Treatment of Foreigners, held at Paris under the auspices of the League of Nations in 1929 just prior to the Conference for the Codification of International Law at The Hague, which dealt *inter alia* with the question of State responsibility. The draft convention prepared as a basis for discussion for the Paris 1929 Conference did not deal directly with the question of international responsibility, but mainly emphasized the economic aspect of the treatment of aliens. In Europe, the subject of the status of aliens was dealt with in treatises on private international law, which was considered as nothing but municipal law. In fact, the status of aliens as discussed in those treatises was deemed one of the matters essentially within the domestic jurisdiction of States.

48. Thus, although the question of international responsibility might include aspects of the treatment of aliens, it was really quite a distinct subject, and was essentially concerned with the obligation to make reparation.

49. Mr. AMADO considered the Secretary's remarks most pertinent to the discussion. It was essential to avoid confusion as to the exact nature of the subject. The subject was not really worthy of the attempts to enlarge it that had been made by some members of the Commission. International responsibility was virtually nothing more than a question of damages, a pecuniary matter.

50. There being no rules on the question and hardly any international instruments, the only basis for a codification was case law. In such a situation it was pointless to discuss whether or not "fault" was a pre-requisite of responsibility. The first thing to do was to compile a digest of the main arbitral awards involving State responsibility, for until the Commission knew what case law had to offer its discussions were bound to be academic.

51. He therefore proposed that the Commission should briefly review the articles drafted by the Special Rapporteur, and request him to prepare, in the light of the discussion, a third report, to which the digest he had just mentioned would be attached.

52. He wished to emphasize the following points: that the important question of denial of justice would only arise when all local remedies had been exhausted; that State responsibility could be envisaged only in connexion with claims made in good faith, i.e., when the aggrieved party had "clean hands"; and that an injury to an individual did not necessarily constitute an injury to the State of his nationality—the latter was free to close its eyes to the incident, if it wished.

The meeting rose at 1.5 p.m.

### 416th MEETING

Thursday, 13 June 1957, at 9.30 a.m.

Chairman: Mr. Jaroslav ZOUREK.

#### State responsibility (A/CN.4/106) (continued)

[Agenda item 5]

GENERAL DEBATE (continued)

1. The CHAIRMAN invited the Commission to conclude the general debate on Mr. García Amador's report (A/CN.4/106).

2. Mr. SPIROPOULOS said that the very profound differences on questions of principle which had become apparent during the discussion were quite understandable. The Special Rapporteur had, naturally enough, introduced certain innovations. Since those innovations, which were to be found mainly in chapters III and IV of his report, raised certain substantive questions relating to the violation of fundamental human rights, non-performance of contractual obligations and acts of expropriation, which did not strictly come under State responsibility, the remarks made by certain speakers on that score were to some extent justified.

3. He agreed with Sir Gerald Fitzmaurice on the advisability of limiting the study to rules of a more or less procedural nature. To consider every possible violation of an obligation involving the responsibility of the State would, as Mr. Tunkin had rightly pointed out (415th meeting, para. 32), entail covering the whole field of international law. It was, however, very difficult to draw a clear dividing line between the procedural and the substantive.

4. Articles 1 to 4 and 10 to 12, dealt with in chapters I, II and V of the report, were, he thought, fully relevant to the question of international responsibility. Articles 5 and 6, on the other hand, though dealing with the very important subject of respect for fundamental human rights, were not. It would accordingly be better to omit them, and take up their study when international instruments had made respect for fundamental human rights the legal duty of all States.

5. Similarly, he was not in favour of pursuing the study of articles 7, 8 and 9 at that stage in the Commission's work. Though relevant to the question of State responsibility, they dealt with special problems, and there were many other special problems equally worthy of study.

6. He therefore proposed that the Commission adopt as its immediate programme of work on the subject of State responsibility, the matters dealt with in articles 1 to 4 and 10 to 12, together with the questions left out of account by the Special Rapporteur but which he proposed to study in his next report (A/CN.4/106, para. 3). The problem of indirect responsibility suggested by Mr. Ago (415th meeting, para. 42) might also be studied. Such a decision could be taken without prejudice to the question of considering at a later stage the substantive matters dealt with in chapters III and IV of the report.

7. Mr. EL-ERIAN, referring to the problem of the scope of the subject, remarked that, as Mr. Ago had pointed out (415th meeting, para. 39), there were three courses open to the Commission. The first was to confine its study to international claims involving State responsibility for injuries sustained by foreigners, and exclude the other cases of State responsibility to which the Secretary had referred (*ibid.*, para. 46-48); the subject would then be more or less synonymous with the law of procedure with respect to international claims. Clearly, if so narrow a view were taken, many questions which speakers had found occasion to raise would be irrelevant.

8. The second course was to codify, in addition to the procedural rules, the substantive rules of international law with respect to the treatment of aliens. Such a course would, however, hardly be in accordance with General Assembly resolution 799 (VIII), which referred solely to the "principles of international law governing State responsibility".

9. Incidentally, since some members of the Commission had been taxed with introducing extraneous elements into the subject, it was interesting to note that much the same questions had been raised during the discussion of the Special Rapporteur's first report at the Commission's eighth session. Sir Gerald Fitzmaurice, for instance, had suggested that attention should be devoted to "the treatment of aliens in the broadest sense of the term—i.e., with regard not only to their persons, but also to their property, commercial interests and the like", justifying his suggestion on the ground that "to a large extent, international intercourse depended for its smooth flow on clearly formulated rules", and adding that "a code on that topic that would reconcile the different points of view and find general acceptance would be of real benefit".<sup>1</sup> There could, therefore, hardly be

<sup>1</sup> *Yearbook of the International Law Commission, 1956, Vol. I* (United Nations publication, Sales No.: 1956. V.3, Vol. I), 370th meeting, para. 52.

any objection to other members drawing attention, on the same grounds as Sir Gerald Fitzmaurice at the previous session, to certain problems on which some principles existed but no clearly defined rules. He agreed with the Chairman that a broader approach to the subject would raise many difficult questions, but he had never intended to suggest that the Commission should consider all international obligations from the standpoint of international responsibility. Nor had he ever confused the subject with the question of the rights and duties of States, a mistaken impression which, as the Secretary had pointed out (415th meeting, para. 46), had been dispelled in the debates in the Sixth Committee at the eighth session of the General Assembly.

10. The third course was to study international responsibility, leaving questions already included in the Commission's list of topics out of account, but dealing with any new principles enunciated in the Charter on which no clear rules of international law existed.

11. Now that all the various aspects and implications of the subject had been pointed out, the Commission could embark on a discussion of the articles drafted by the Special Rapporteur, setting aside those substantive rules relating more or less to the status and treatment of aliens. While considering it essential to take into account the "dynamics" of international law when seeking to codify it, he appreciated that it might be more advisable for the moment to concentrate on the law of international claims, which would mainly involve considering such questions as denial of justice, the exhaustion of local remedies and the nationality of claims.

12. Faris Bey EL-KHOURI remarked that in neither of his reports had the Special Rapporteur explained fully why injuries to aliens should be accorded a special legal treatment not accorded to injuries to a State's own nationals, although the same type of wrong and the same State responsibility were involved. He failed to see the point of converting personal claims into international claims in the case of aliens. Any text which accorded such special privileges to the claims of aliens would make a most unfortunate impression in his own country, and indeed throughout the Near East. The customary rules on the subject were based on the nineteenth century practice, imposed by the imperialist Powers. The state of affairs that had given rise to that practice no longer existed, and, with so many new and small States established under the aegis of the Charter of the United Nations, it would be unwise to codify a system which enabled personal claims to be transferred to the field of international responsibility.

13. Mr. YOKOTA was opposed to undue limitation of the scope of the Special Rapporteur's next report. In particular, he doubted the advisability of deciding to leave the question of the violation of fundamental human rights out of account after so brief a discussion. Even among those members who had raised objections to that question, some had been in favour of retaining certain points at least. Mr. François, for instance, though urging the deletion of article 6, was in favour of retaining article 5. It should be borne in mind, too, that the question of fundamental human rights was brought in not for its own sake but because it was closely connected with the question of the protection of foreigners and thus with international responsibility, even in its procedural aspects. He was in favour of including article 5 among the matters to be elaborated in the Special

Rapporteur's next report. It was by no means impossible that when the Commission came to discuss that report it might decide to retain the article.

14. The CHAIRMAN pointed out that, if Mr. Spiropoulos's proposal were adopted that would by no means mean that the Commission would definitely forego the study of chapter III, concerning the violation of fundamental human rights, and chapter IV, on the non-performance of contractual obligations and acts of expropriation: it would merely defer consideration.

15. Sir Gerald FITZMAURICE said that, whereas chapter IV, which was concerned with the purely substantive question of treatment of foreigners in the matter of contracts, might well be left out of account, he agreed with Mr. Yokota in doubting the advisability of treating even part of chapter III in the same fashion. The section of article 5 which dealt with the important point of national treatment of aliens involved the concept of the international standard of justice, which, in turn, was inseparable from the subject of State responsibility. Though the point was, admittedly, one of substance, it had some bearing on the procedural question of denial of justice.

16. Mr. SPIROPOULOS explained that his remarks had referred to chapters III and IV as a whole. He agreed that the question of the international standard of justice was a very important one, and was relevant to that of international responsibility. The Special Rapporteur, therefore, might well deal with it in his next report, but not under the heading of fundamental human rights; to the best of his knowledge, tribunals had never described the international standard of justice as being based on the concept of fundamental human rights.

17. Mr. MATINE-DAFTARY said that he was not opposed to the provisions of articles 5 and 6 as such. On the contrary, he had described them in his previous statement (414th meeting, para. 19) as the keystone of the whole edifice. If he had advised the Commission against including chapter III in the subjects for further elaboration by the Special Rapporteur, it was because the question of human rights was already being studied by the Commission on Human Rights.

18. Mr. GARCIA AMADOR, Special Rapporteur, expressed his thanks to the members of the Commission for their kind remarks, and even more for their constructive criticism. He found himself, nonetheless, in an unenviable position because of the contradiction between certain criticisms. On the one hand, he had been commended for abandoning the somewhat revolutionary approach of his first report (A/CN.4/96) in favour of a more realistic attitude. On the other, he had been taxed with introducing revolutionary elements belonging to the sphere neither of codification nor of development of international law, but to municipal law. Equally disconcerting was Mr. Ago's observation that he had neglected to consider the penal element in State responsibility. For the Commission would recall that in his previous report he had devoted a whole chapter to criticizing the limitation of the concept of State responsibility to civil liability, and had reluctantly excluded the penal element at the express request of the Commission.

19. Various speakers had dwelt on the political aspects of the problem, and it must be said that there were few subjects in international law where political considerations intervened so persistently. On the other

hand, there was none that was entirely free from them; even the comparatively harmless question of diplomatic privileges and immunities had, somewhat to his surprise, proved to possess political undertones. But the fact that the question of State responsibility was beset by such difficulties was no reason for abandoning the task of seeking out its basic principles.

20. A further source of perplexity was the variety of distinctions drawn in an endeavour to delimit the topic, distinctions between substantive and procedural rules and between State responsibility on the one hand, and the obligations of States and the status and treatment of aliens on the other. He must confess, however, that in all his preparatory studies of the background to the subject he had never come across such clear-cut distinctions. Differences there undoubtedly were, but none such as to justify the distinctions established during the discussion. The treatment of aliens, for instance, was an age-old subject, which had gradually moved from the sphere of private into that of public international law, and was now passing into a new sphere, that of the international respect for human rights. As Mr. Verdross had pointed out in a lecture on the subject at the Academy of International Law, the question of international responsibility arose not at all on some points but constantly in connexion with others.

21. As far as the distinction between international responsibility and the obligations of States was concerned, he considered it impossible not to refer to obligations in connexion with the question of imputability, international responsibility being invariably the consequence of a breach or non-performance of an obligation.

22. He could not avoid the impression that the discussion had complicated the question unnecessarily by introducing notions and distinctions totally absent from the texts on the subject produced by the Institute of International Law and the Harvard Law School, and in connexion with the Conference for the Codification of International Law held at The Hague, in 1930. For his first report, it was he himself who had been guilty of introducing complications. Now the position appeared to be reversed, for, with the exception of chapter III, his report was a faithful reproduction of the principles of previous codifications. He would nonetheless follow the Commission's instructions to the best of his ability.

23. Mr. AGO felt there was some misunderstanding. When the Special Rapporteur referred to the "penal element" of responsibility, he was evidently thinking of the question of the possibility of punishing the person who had committed the act which had given rise to the international responsibility of the State. What he himself had had in mind when speaking of the punishable or penal consequences of an illicit international fact was something quite different. The authors who had dealt with the question of State responsibility had always been doubtful whether, when an unlawful international fact gave rise to such responsibility, the only course open to the injured State was to ask the responsible State to make reparation for the injury, either by restoring the *status quo ante* or, if the *status quo* could not be restored, by equivalent reparation, or whether, on the contrary, it was also open to the injured State, particularly when no reparation could be obtained, to punish the State responsible for the violation of its subjective right; it was that latter possibility that he had had in mind when he had spoken of the punishable or penal consequences of an unlawful international fact (413th

meeting, para. 63), or the "penal" aspect of international responsibility. The matter might perhaps be of less importance in connexion with the subject the Commission was discussing than with the study of the question of international responsibility as a whole. In any event, however, the problem remained to be solved, in particular if no reparation was made by the responsible State. In that connexion he recalled that certain authors, including Kelsen, in his view rightly, considered that the reprisals to which States might resort in such a case would be a form of sanction, and thus in that sense a "penal" consequence of the illicit fact committed by the responsible State.

24. With regard to the question of imputability, all he and, he thought, Sir Gerald Fitzmaurice had wished to say was that those articles in which the question was dealt with should be considerably amplified rather than modified. Mr. Spiropoulos, he thought, had had the same idea in mind in proposing that the Commission should leave aside chapters III and IV and concentrate on elaborating the very general principles that were laid down in chapters I and II.

25. Mr. VERDROSS pointed out that the scope of the draft articles was determined by the title of the report, which referred specifically to the "responsibility of the State for injuries caused in its territory to the person or property of aliens". Those members of the Commission, however, who criticized the trend of the draft articles were considering "State responsibility" in general, regardless of the sphere in which the violation of international law occurred. The Commission must therefore decide whether it wished to alter the entire scope of the subject it was considering, or whether to continue along the same lines.

26. Mr. SPIROPOULOS observed that General Assembly resolution 799 (VIII) referred only to State responsibility, without specifying what was meant by that term. When the Commission had first come to discuss it, it had seen how the term could be interpreted in such a way as to embrace a very large part, if not the whole, of international law. It had accordingly decided to follow the example set by the 1930 Codification Conference and limit the subject to the special problem of the responsibility for injuries sustained by aliens. He did not think the Commission could now consider redefining the subject and thus changing its entire scope. He therefore maintained his proposal that it should decide to leave chapters III and IV aside provisionally—on the understanding that it might have to consider including some provision on the international standard of justice—and confine itself to studying the remaining articles. It might well find that many of them could, in fact, apply to other cases of State responsibility (i.e. other than those arising out of the protection of aliens), but there would be no difficulty about that; in fact it would facilitate the Commission's subsequent task.

27. Mr. EL-ERIAN said he could not agree with Mr. Ago if he meant that the Commission should deal with reprisals and other hostile measures short of war. Even if there had been some ambiguity in the Covenant of the League of Nations as to whether such measures were legal or not, there was no such ambiguity in the United Nations Charter. If a State which had suffered an injury failed to get satisfaction from the State responsible for the injury, the issue between the two States became an international dispute which must then be settled by one of the many means for the peaceful set-

tlement of disputes mentioned in Chapter VI of the Charter.

28. Mr. BARTOS felt that Mr. Ago had been perfectly right to raise the question of reprisals. It was, however, necessary to distinguish between compensation for injury done to a person or to his property, and the reparation due to a State. As regards the latter type of case, where for example a national flag was violated, reparation might take the "penal" form referred to by Mr. Ago; but he doubted whether that would ever happen in the event of injury inflicted on an alien or his property. On the other hand, there was undoubtedly a tendency on the part of arbitral tribunals to award increased compensation in cases where they felt it was desirable to emphasize that the responsible party was not only responsible but guilty—if, for example, he had been acting in bad faith. Similarly, in the treaties concluded with Nazi Germany's allies after the Second World War, the amount of reparations to be paid had been determined to some extent at least by the degree of "fault" that was found to reside in their actions. He was not defending that tendency, but it was, nonetheless, sufficiently widespread for it to be desirable that the Commission should take it into account.

29. Although the Special Rapporteur had therefore been right to leave such matters out of account, if one considered the question solely from the point of view of the decision which the Commission had taken at its previous session, Mr. Ago was also right in contending that the Commission should not ignore the question of penal consequences—even if he (Mr. Bartos) interpreted that term somewhat differently.

30. Mr. AGO said that his purpose in raising the question of the punishable or penal consequences of an unlawful international fact had been to ensure that the Commission did not overlook it. He had been careful to avoid giving any reply to the question whether and in what circumstances such sanctions were legitimate. He had certainly not intended to say, for example, that military reprisals were always a legitimate form of reaction to an unlawful international fact, in the light also of the United Nations Charter.

31. Sir Gerald FITZMAURICE thought that Mr. El-Erian had over-simplified the matter by taking "reprisals" as involving the use of force or something very akin to force. On the contrary, "reprisals" was a very general term covering many different types of counter-action, some of which could be, and were, undoubtedly peaceful and legitimate; although the Charter forbade the use of force, it had nothing to say on recourse to such peaceful types of counter-action at all. Of course the Charter provided machinery for the peaceful settlement of disputes without recourse to reprisals; but the whole difficulty lay in the fact that one party could always refuse to use that machinery, and there was at present no means of compelling it to do so. Even if the other party took the dispute to the United Nations and the United Nations made some recommendation concerning it, there was no means of compelling either party to comply with such recommendation. Until the present international machinery had been made more effective, therefore, recourse to peaceful sanctions remained a legitimate form of counter-action.

32. Mr. SPIROPOULOS said that, in his view, the problem of reprisals had nothing to do with the problem the Commission was discussing. The Commission

was concerned solely with the consequences of a violation of international law, whereas an act of reprisal was not a consequence but the reaction of the injured state.

33. Mr. AGO said he could not agree with Mr. Spiropoulos either that the matter was irrelevant or that any reprisals resorted to by the injured State might not be regarded as a consequence of the violation of international law committed by the guilty State. Mr. Spiropoulos had rightly spoken of a "reaction" by the injured State. Legally, however, such a reaction was not possible except precisely because of the fact that it was the consequence of a wrong suffered. In other words, the consequence of the unlawful act committed by one State was to make lawful on the part of the injured State, a reaction which would otherwise itself have been unlawful.

34. The CHAIRMAN said that the whole question of penal consequences, damages, and the related matters referred to by Mr. Ago and Mr. Bartos, was extremely interesting, but the Special Rapporteur had already indicated that his next report would cover, amongst other things, the entire subject of the form and scope of reparation. The Commission would therefore undoubtedly have the opportunity of reverting to those questions at its next session, and any discussion of those questions would be premature at the current session.

35. Turning to the question of procedure, Mr. MATINE-DAFTARY said that the Special Rapporteur's draft was an indivisible whole, and he was therefore opposed to discussing some parts of it and leaving others aside, as Mr. Spiropoulos had proposed. He was also opposed to simply referring the draft back to the Special Rapporteur without giving him any clear directives on points of principle.

36. He proposed, therefore, that the Commission should discuss and decide certain points of principle, in particular, first, whether it wished to confine the draft solely to the question of the protection of aliens, or whether it wished to extend it to cover responsibility for the violation of all types of international obligation; and secondly, whether it could accept the principle that aliens should be treated in the same way as nationals.

37. The CHAIRMAN felt that the first question of principle referred to by Mr. Matine-Daftary was already settled, since the title of the draft referred only to injury to the person and property of aliens; it went without saying that the study of that question was only the first stage in the study of the whole subject. He also felt that a discussion on questions of principle such as Mr. Matine-Daftary proposed might lead nowhere. In his view, it would be better, when the general debate was concluded, to consider the text of the draft articles themselves and reach some conclusion on them even if it was only a provisional one, subject, of course, to later re-drafting when the whole draft was put together. Disagreements on the treatment of aliens could best be discussed in connection with the text of the articles and the amendments proposed by the members of the Commission.

38. Mr. GARCIA AMADOR, Special Rapporteur, said that, in the two or three days available to it, the Commission could not hope to discuss all the articles exhaustively. Article 1 could well be left aside, since it clearly depended on the eventual form of the remainder. Articles 2 and 3 stated simple, elementary rules of international law, and should not cause much difficulty. Arti-

cle 4 raised a difficult and fundamental question on which it would be useful to have a full discussion. Regarding articles 5 and 6, the Commission must make up its mind whether it was in favour of the approach he proposed or not; if not, it would have to choose between the principle of an international standard of justice and that of the equality of nationals and aliens; but the whole question was one on which members of the Commission might wish to reflect for another year, for it was indeed the crux of the whole draft. Articles 7, 8 and 9 had been described as substantive law, but they had been discussed at length at the 1930 Codification Conference, and had always been regarded as an integral part of State responsibility; he himself had no doubt that they should be retained in the draft, and it would be desirable for them to be discussed at the current session if time allowed. Unfortunately, time would almost certainly not allow discussion of the one fundamental question raised in articles 10, 11 and 12, namely, the question of negligence. Even so, discussion of the remaining points he had referred to should give him invaluable guidance in revising the draft articles for further consideration at the next session.

39. Mr. PADILLA NERVO expressed the view that, in considering the draft articles, the Commission should not vote on them or on any amendments submitted to them but merely discuss, in a general manner, the various points that were raised, especially those to which the Special Rapporteur had just drawn particular attention.

40. Mr. SPIROPOULOS said he was quite willing that the Commission should proceed to discuss the draft articles, beginning with article 2, as suggested by the Chairman and the Special Rapporteur, since he did not think it would reach chapter III anyway.

41. Mr. MATINE-DAFTARY said he did not insist on his proposal, (para. 36 above) since the procedure suggested by the Chairman would in practice amount to the same thing.

*The Commission decided to discuss the draft (A/CN.4/106, annex) article by article, beginning with article 2.*

The meeting rose at 1.5 p.m.

#### 417th MEETING

Friday, 14 June 1957, at 9.30 a.m.

Chairman: Mr. Jaroslav ZOUREK.

#### Co-operation with international bodies

1. The CHAIRMAN invited the Commission to consider the contents of a letter dated 27 May 1957 addressed to the Secretary of the Commission by the Acting Secretary of the Asian Legal Consultative Committee, and drew attention in that connexion to article 26 of the Commission's Statute, relating to consultation with international or national organizations, and to the resolutions on co-operation with inter-American bodies adopted by the Commission at its sixth, seventh and eighth sessions.

2. Mr. LIANG (Secretary to the Commission) stated that he wished first of all to report to the Commission regarding the resolution adopted by the Commission in 1956 on the subject of co-operation with inter-American bodies. Under that resolution the Commis-

sion requested the Secretary-General of the United Nations to authorize the Secretary of the Commission to attend, as an observer, the fourth meeting of the Inter-American Council of Jurists to be held at Santiago, Chile, in 1958.<sup>1</sup> He had, however, been informed that, owing to the need for further preparatory work by the Inter-American Juridical Committee of Rio de Janeiro, the meeting would have to be postponed until 1959. No further action by the Commission was required in that connexion.

3. He then went on to explain that the Asian Legal Consultative Committee, described by its Acting Secretary as an "intergovernmental committee of legal experts", had been established on 15 November 1956 for an initial period of five years by the Governments of Burma, Ceylon, India, Indonesia, Iraq, Japan and Syria. According to article 3 of the Committee's Statute, one of its objects was "to examine the questions under consideration by the International Law Commission and to arrange for its views to be placed before that Commission." At the Committee's first meeting at New Delhi from 18 to 27 April 1957, it had instructed its Acting Secretary to get in touch with the Commission with a view to establishing consultative relations.

4. The CHAIRMAN proposed that the Commission authorize the Secretary to reply to the Asian Legal Consultative Committee on the following lines:

(1) The Commission will ask the Secretary-General of the United Nations to put the Asian Legal Consultative Committee on the list of organizations which receive the Commission's documents (see article 26, paragraph 2, of the Commission's Statute).

(2) The Commission requests the Consultative Committee to send, whenever it sees fit, any observations it may wish to make on questions under study by the Commission.

(3) The Commission has pleasure in acknowledging the Committee's letter, and expresses a keen interest in its work. The Commission would welcome any information on the development of its programme.

*It was so agreed.*

#### Arbitral procedure: General Assembly resolution 989(X) (A/CN.4/109) (continued)<sup>2</sup>

[Agenda item 1]

5. The CHAIRMAN recalled that the Commission, after adopting its draft convention on arbitral procedure at its fifth session, had recommended to the General Assembly, under article 23, paragraph 1, of its Statute, that the Assembly recommend the draft to members with a view to the conclusion of a convention.<sup>3</sup> Under resolution 989 (X) adopted by the Assembly on 14 December 1955, the Commission was invited to consider the comments of Governments and the discussions in the Sixth Committee in so far as they might contribute further to the draft on arbitral procedure, and to report to the General Assembly at its thirteenth session. The Assembly had also decided to place on the provisional agenda for its thirteenth

<sup>1</sup> *Official Records of the General Assembly, Eleventh Session, Supplement No. 9, para. 47.*

<sup>2</sup> Resumed from 404th meeting.

<sup>3</sup> *Official Records of the General Assembly, Eighth Session, Supplement No. 9, paras. 53-55.*

session the question of arbitral procedure, including the question of the desirability of convening an international conference of plenipotentiaries to conclude a convention on the subject.

6. The Special Rapporteur, Mr. Scelle, had prepared a report (A/CN.4/109) on the basis of those comments and discussions. In order to expedite the discussion, the Commission had decided at its 404th meeting to set up a committee to consider the situation and report back to the Commission. The Special Rapporteur being of the opinion that there was no longer any point in submitting the text to the General Assembly in the form of a draft convention and that it should take the form of a "model", certain members of the Committee had urged that that preliminary question be referred to the Commission for decision. In the opinion of some of the members of the Committee, the question was identical with the question whether the Commission should review the articles of the draft in the light of the observations of Governments.

7. Speaking as a member of the Commission, he said that the terms of the General Assembly resolution and the fact that nine new articles had been added to the draft made a review of the text essential. The Commission need not review every article. It could follow the usual practice of merely reconsidering those affected by the comments of Governments or their representatives in the Sixth Committee.

8. Mr. SCELLE, Special Rapporteur, said that he could not entirely agree with the view just expressed by the Chairman. The articles of the draft all hung together to form a coherent whole, and it would be very difficult to review some without the others.

9. The draft, it would be recalled, had been adopted by only a narrow majority at the Commission's fifth session, members being divided between the concepts of "diplomatic arbitration" and "judicial arbitration". Though it was difficult to discern any definite trend in the conflicting comments made by Governments, either in writing or through their representatives in the Sixth Committee or the Assembly itself, it was clear that the general tendency was to reject the draft, and that States, naturally enough, continued to regard arbitration as a diplomatic and not a judicial procedure, and wished to retain the old system under which the *compromis* was the keystone of the whole edifice—the basis on which the entire procedure was regulated.

10. The Commission had, none the less, in the report on its fifth session, made it clear that the draft could be used neither as a means of imposing compulsory arbitration nor, indirectly, to give the International Court of Justice any influence over cases submitted to arbitration.<sup>4</sup> No State would be obliged either to sign the convention or to resort to arbitration, but once a State had given an undertaking to accept the arbitral procedure indicated in the convention and had signed the instrument, it would be bound to apply that procedure. Even so, it could, before signature, enter reservations to the effect that the provisions would not apply to incidents prior to signature.

11. Notwithstanding those assurances, States apparently preferred the traditional system of arbitration, under which the States parties to a dispute remained masters of the procedure followed, and could frustrate or delay a settlement by not appointing arbitrators or

by changing them whenever they appeared not to support the State's case. Such a system, in the Commission's view at least, was unacceptable to jurists. The procedure could not be left in the hands of the parties and must culminate in an award, which, once finally rendered, was binding on the parties. The very essence of arbitration was that it must culminate in a final award which put an end to the dispute, unless some new fact emerged that justified review of the award. Such a view had already been established doctrine, more than fifty years before, in the days of Oppenheim, Lapradelle, Politis and Renault, the latter of whom had been the first to declare that there could be no hope of progress so long as arbitration was not established on a judicial basis, and so long as the States parties to the dispute were masters of the procedure followed.

12. The draft, which was based on the Convention for the Pacific Settlement of International Disputes signed at The Hague in 1907, the General Act adopted in 1928, and the teaching of the writers he had just mentioned, established a strict system of judicial arbitration. Some of its articles might well win the general approval of States, but they were only the formal and technical ones which were valueless by themselves. And if any considerable changes were made in the essential articles in order to produce a draft international convention capable of general adoption, the draft would be emasculated and rendered quite useless for the Commission's purpose.

13. Under General Assembly resolution 989 (X), the Commission was asked "to consider the comments of Governments and the discussions in the Sixth Committee in so far as they may contribute further to the value of the draft". However, a large proportion of the conflicting observations made on the draft were not calculated to improve it, but rather to destroy it. Indeed, the whole resolution was to be regarded as a polite rejection of the Commission's draft convention.

14. The reasons were not far to seek. Very few Governments had the same conceptions or practice in the matter of arbitration. Moreover, as had been pointed out in the Sixth Committee, no two arbitration cases ever presented themselves in the same light. Owing to political circumstances, it was very rare for two *compromis* to be alike, so that as long as the *compromis* regulated the entire procedure, that procedure was bound to be different in each case. Of the whole membership of the United Nations, there were probably less than ten Governments, those with a long practice of arbitration, whose conceptions were close enough to those of the draft to make it likely that they would ratify a convention based on it. The General Act for the Pacific Settlement of International Disputes drawn up by the League of Nations had obtained twenty-four ratifications. The same instrument when taken up by the United Nations had obtained a bare four. The reason was the emergence since the Second World War of a group of States wedded to the concept of national sovereignty. The numerous newly-established States were also firmly attached to the same concept. Consequently, with the steadily increasing membership of the United Nations, there would be less chance of a convention based on the draft securing anything approaching general acceptance.

15. The new draft which he had prepared did not differ a great deal in substance from the previous one, although it included a few new articles. It differed merely in form and purpose, being intended only as a

<sup>4</sup> *Ibid.*, paras 28 and 29.

model draft on arbitral procedure that Governments were free to ignore or to follow as they wished. On the other hand, there was nothing to prevent its serving as a basis for an international convention whenever greater harmony prevailed between States.

16. He was in favour of submitting the draft to the Assembly in that form, and of recommending, under article 23, sub-paragraph 1 (b) of the Commission's Statute, that the Assembly simply "take note of" the draft.

17. Mr. SPIROPOULOS agreed that the Commission must take a decision on its programme of work with regard to arbitral procedure, but did not think there was any point in deciding immediately on the form the draft should take. What was perhaps more urgent was to consider what action the Commission should take afterwards, since it was obviously impossible for the Sub-Committee to do any serious work on the revision of the draft in the short time left to it.

18. He would have difficulty in accepting the procedure, which he understood to be under consideration by the Secretariat, namely, to submit the revised text to Governments in 1957 with a view to establishing a final text at the Commission's next session in the light of their replies. The Commission already had the comments of Governments and the record of the discussions in the Sixth Committee, and it would seem very odd if it were to submit the draft again to Governments for further comments. The only course, in his opinion, was to decide on the form of the draft and review the text at the next session. That would allow the Commission time to give mature consideration to the text of the draft, and would enable it to submit the revised text to the General Assembly for its thirteenth session, as stipulated in General Assembly resolution 989 (X), and should not prevent it from completing its work on diplomatic intercourse and immunities at the same session.

19. Mr. LIANG (Secretary to the Commission) agreed with Mr. Spiropoulos on the inadvisability of referring drafts to Governments time and time again. He had thought that, if the Commission could agree to the proposal of the Special Rapporteur, the draft could be sent to Governments in 1957 as a reminder that the matter was to come before the General Assembly in 1958, and in order to give them time to define their attitude. Revision of the text of the draft would take up a considerable number of meetings, and clearly could not be completed at the current session.

20. The CHAIRMAN, recalling that the establishment of the Committee had been advocated as a means of expediting the work of the Commission, urged that the Committee be allowed to continue its work. Otherwise, the Commission would find itself in exactly the same position at its tenth session, with the difference that it would then be no longer possible to delay the work on arbitral procedure any further.

21. Speaking as a member of the Commission, he said that he did not share Mr. Spiropoulos's pessimistic view. If the Commission settled the preliminary question of the form to be given to the draft and took a decision on some of its fundamental articles, the Committee could then review fairly quickly most of the articles. Actually many dealt with purely technical matters on which there could be little difference of opinion. Those could be adopted forthwith, subject to reference to the

Drafting Committee, and only the controversial articles need be referred to the Commission for discussion.

22. The capital question was whether or not the Commission was to revise the draft in the light of the comments of Governments and the discussions in the Sixth Committee. In his opinion it was bound to do so. A mere change in the form of the draft would not be sufficient to give it any chance of adoption by the General Assembly. Moreover, the Sixth Committee had already discussed the possibility of drawing the attention of the Member States to the draft so that they could use it as a *model* when they drew up provisions to be incorporated in arbitration treaties; but the Committee had rejected the idea on the grounds that even such action would imply approval of the principles of the draft.

23. Mr. AMADO stated that it seemed to him useless to reopen the discussion, as the subject had been exhausted in the previous sessions of the Commission. Besides, Mr. Scelle's draft constituted a whole whose structure would be destroyed if one tried to modify its main articles. Like many other members of the Commission, he had been concerned with the problems of arbitration throughout his career, and had considered and discussed them *ad nauseam*. There was no point in discussing the question further if there was no chance of the draft's serving as a basis for an international convention. He was not interested in international law in the abstract, but only in its diplomatic implications.—in what it meant in practical terms for States and the international community.

24. Mr. FRANÇOIS, after paying a tribute to the work of the Special Rapporteur, said he found himself in entire agreement with Mr. Spiropoulos. In his view, the Commission should continue to pay the same careful attention to the comments of Governments as it had always done in the past, and not treat them lightly. It clearly did not have time to give proper attention to them in what remained of the current session, even if it had further recourse to the Committee—and that, in his view, would be a waste of time. It therefore had no choice but to consider them at its next session. That might well take three or even four weeks, and the Commission would then have no time for anything more than to complete its work on diplomatic intercourse and immunities. The fact that the General Assembly only allowed the Commission ten weeks a year should not be made an excuse for skimping its work. In his opinion, it was far better to submit a few carefully considered drafts than a large number which bore the marks of hasty preparation. Moreover, it must be borne in mind that the Commission had a number of new members, who must be given an opportunity to express their views. The General Assembly wished to have the advice of the Commission as it now was, not as it had been a few years previously.

25. The final argument in favour of Mr. Spiropoulos's proposal was that it would enable all the members of the Commission to study the Special Rapporteur's most recent report at leisure, in the light of the comments made in the Sixth Committee. Mr. François himself, and, he thought, most of the other members, had not yet had a chance of doing so.

26. Mr. KHOMAN said it seemed that the main point at issue in the Committee had been whether to submit the draft in the form of a draft convention or a model draft. But that question was of no particular importance

or urgency because the Commission had not been asked it by the General Assembly in resolution 989 (X). Moreover, as the Special Rapporteur had said, his latest text (A/CN.4/109), which was in the form of a model draft, differed very little from the draft convention which the Commission had prepared at its fifth session. Finally, the Commission had no assurance that the General Assembly would be any more likely to accept that text in the form of a model draft than in the form of a draft convention.

27. In his view, the most important and urgent matter with which the Commission was faced was the comments made at the tenth session of the General Assembly. The Special Rapporteur apparently thought that if those comments were taken into account it would destroy the whole value of his draft, but, with all due respect, that was only his personal opinion, and the question was one for the Commission to decide.

28. While he agreed with Mr. Spiropoulos that very little time remained for that purpose, he shared the Chairman's view that the Committee should use such time as was available to consider as many of the comments of Government as possible. Then, if the results of the Committee's efforts warranted it, the Commission could even consider submitting an interim report. What the General Assembly would not understand would be a failure by the Commission to take any action in the matter at its current session.

29. The CHAIRMAN, speaking as a member of the Commission, said that he personally agreed with Mr. Khoman that the form of the draft was a secondary matter.

30. Mr. AGO said he entirely agreed with those members of the Commission who thought that further work on the subject should be postponed till the next session. He saw no necessity even of taking a final decision at the current session as to whether the draft should be a draft convention or a set of rules to help Governments in drafting arbitration treaties or *compromis*.

31. Sir Gerald FITZMAURICE agreed that the Commission did not have time to dispose of the draft at its current session, if it wished to revise it completely with a view to presenting it in the form of a draft convention. That, however, was the very question it was asked to decide, and if it did not decide it now it would have to decide it at its next session. In his view, it would be better to decide it now, since, if the Commission did not wish to revise the draft completely, it might be able to dispose of it very quickly. To his mind it was obvious that there was a very great difference regarding the nature of the work that had still to be done on the draft, depending on whether it was to take the form of a convention, a model draft or— if the word "model" had certain unacceptable overtones—simply a project. If it was to be a convention, the Commission was bound to concern itself to some extent at least with making it acceptable to Governments. If it was to be a model draft, or simply a project, which Governments would be free to use, or not to use, as they pleased, it could be drafted from a more purely juristic standpoint.

32. He could not agree that the General Assembly would be just as likely to reject a model draft as a draft convention. The General Assembly need not positively approve or disapprove the draft; it could simply

take note of it, as it had done in the case of the draft Declaration on Rights and Duties of States.

33. Finally, he found himself in profound disagreement with certain previous speakers since, in his opinion, it would be extremely valuable to have a model draft or project along the lines proposed by the Special Rapporteur. Speaking from some experience in the matter, he knew how much arbitral procedure depended on the relations between the two States parties to the dispute: if the relations were good, it did not matter if the *compromis* was somewhat loosely drafted; but if they were not particularly good, one party or both would want the *compromis* drawn up in a manner to cover all eventualities. That was where the Special Rapporteur's draft would be of particular value, as a guide to possible pitfalls in arbitral procedure. In fact, it might be even more valuable than a draft convention, for, as the Special Rapporteur had pointed out, there was reason to fear that only comparatively few States would ratify a convention, even if the text were modified radically in order to take account of the objections that had been made to it.

34. For those reasons, he felt that the draft should be regarded simply as a project; and, if that could be agreed, he saw no reason why the Commission should not dispose of it at the current session. Members had already had an opportunity to read the Special Rapporteur's very lucid report and to study the amended draft articles which he proposed. It seemed to Sir Gerald that the Special Rapporteur had done everything possible to take the comments made in the General Assembly into account, to the extent that that could be done without departing from the basic concepts underlying his draft. The Committee could perhaps meet once more, in order to satisfy itself that none of the comments had been overlooked, but, apart from that, he saw no reason why the text should not be submitted to the General Assembly as it stood.

35. Mr. PADILLA NERVO, after recalling the gist of the discussions in the Committee, said that he entirely agreed with all that Sir Gerald Fitzmaurice had said, particularly that a model set of rules enjoying the great moral authority of the International Law Commission and the General Assembly would be of even more value than a draft convention. On the assumption that it was to be a model set of rules, he too was prepared to support the text as it stood, except for one or two not particularly important reservations to articles 3 and 9. He saw no reason why the Commission should not now decide that the draft should take that form. Then, even if other members felt they had not time to discuss the draft articles at the current session, they could at least reflect on them before the next session, without any doubt in their minds as to the form they would eventually take.

36. Mr. HSU said he was in complete agreement with the views expressed by Sir Gerald Fitzmaurice and Mr. Padilla Nervo.

37. Mr. AMADO said that, as far as he knew, there was really no question in anybody's mind of transforming the draft into a convention, since that would mean destroying the whole structure that had been built up by Mr. Scelle. In his view, the draft should not be regarded as a "model", but simply as the Commission's contribution to the development of arbitration, a contribution which he personally was convinced would be

of the utmost value, as Sir Gerald had said, in avoiding possible pitfalls.

38. Mr. TUNKIN said that the question the Commission was at present concerned with was a question of procedure. He would not, therefore, reply to certain points made by the Special Rapporteur in his report and in his statement at the beginning of the meeting, but would merely say he could not agree with him on many points, particularly when he divided States into different groups depending on their attitude to international law and its development.

39. He thought all the members of the Commission agreed that, whenever practicable, it was desirable to submit its drafts in the form of conventions. The Commission was not living in the age of the *consolato del mare*, and international treaties were undoubtedly the main source of present-day international law. He agreed with Mr. Khoman that the Commission must first decide the question referred to it by the Committee, namely, whether it should comply with General Assembly resolution 989 (X) and revise its previous draft in order to make it more acceptable to States, or whether it should adhere to the substance of its former draft at all costs and merely present it in a different form. The view had been expressed that if the Commission revised the draft, it would destroy the whole structure built up by the Special Rapporteur. With all due respect, that was not the decisive factor. The Commission's task was to make a contribution to the development of international law, and, as Mr. Amado himself had pointed out, international law was developed not by professors but by States.

40. Mr. Tunkin was of the opinion that the Commission should carefully reconsider the draft and make the necessary changes in the light of the observations made by various Governments, whether in writing or orally in the Sixth Committee.

41. He could not agree with Mr. Spiropoulos that the Commission should postpone its decision until the next session. For, if the Commission decided to revise the Special Rapporteur's draft in accordance with the General Assembly resolution, the Committee could begin work at once, and all members of the Commission would be able to reflect on the matter further between the sessions, knowing what end was in view.

42. Mr. BARTOS said he fully agreed with Mr. Khoman and Mr. Spiropoulos. With due respect to the Special Rapporteur, every member of the Commission had the duty to examine the drafts on which he was asked to vote. Of course new members of the Commission might take no part in the vote; but if it was desired that the draft should be submitted by the Commission as a whole, even in the form of a model draft, all its members must have a chance to comment on its provisions. There was, therefore, some objection even to referring the draft to the Committee, at least before those who were not represented on the Committee had been able to comment on it.

43. Mr. Bartos could see no objection to referring the draft again to Governments, in the amended form proposed by the Special Rapporteur, and considering it in plenary at the next session with all the relevant facts available.

The meeting rose at 1 p.m.

## 418th MEETING

Monday, 17 June 1957, at 9.30 a.m.

Chairman: Mr. Jaroslav ZOUREK.

### Arbitral procedure: General Assembly resolution 989 (X) (A/CN.4/109) (continued)

[Agenda item 1]

1. Mr. KHOMAN observed that some speakers had expressed the view that there was a fundamental difference between a draft convention and a model draft, and that they favoured a draft convention, but were nevertheless prepared to approve without discussion the Special Rapporteur's model draft (A/CN.4/109). That attitude seemed inconsistent. Personally, he was in favour of a model draft.

2. With regard to procedure, he thought that the Committee might be asked to hold two or three more meetings to consider the question and then to submit its proposals regarding the form to be adopted. In his own view, all that the Commission was required to do was to study the comments by Governments and see in what way the proposals embodied in the draft could be modified.

43. Mr. EL-ERIAN said that the General Assembly had asked the Commission to reconsider the draft in the light of the observations in the General Assembly and of the comments from Governments. Accordingly, the Commission should spare no effort to amend the draft in the light of those observations and comments; he felt that the draft now submitted by the Special Rapporteur did not give due consideration to the different approaches and constructive suggestions contained in the comments of Governments and the observations of delegations. The reasons which had compelled some Governments to reject the draft were quite complex, and it was not appropriate to dismiss objections on such grounds as that those Governments had newly come into existence. Such an attitude would be an over-simplification of the problem. While all admired the keen interest displayed by the Special Rapporteur in the development of arbitral procedure, it would not be right to accept his attitude, which seemed to be that failure to endorse the view of the Commission was due to lack of experience on the part of the newly independent Governments. The comments of Governments should be classified, but to contrast the attitude adopted by Governments with long histories of sovereignty with that adopted by others could not be described as a "universal" approach to membership in the community of nations.

4. As to what should be done with the draft, he felt that the Commission should attempt to adapt it in the light of the comments by Governments and by the representatives of the Sixth Committee. The subject would be included on the agenda for the thirteenth session of the General Assembly, which could then consider the possibility of convening a conference of plenipotentiaries with a view to the conclusion of a convention. The Committee should try to complete its consideration of the draft accordingly, after which the Commission should reconsider it, if necessary at its next session. The issues were well-defined, and the fact that the Commission now included a number of new members need not delay matters, since some of the new members had participated in the Sixth Com-

mittee when the draft convention had been discussed, and the others were no less familiar with a draft which they had more than once consulted in their capacity as legal advisers to their foreign offices.

5. Mr. YOKOTA said that the Commission's task was to formulate a draft acceptable to the largest possible number of States, and in his view, a view expressed by Mr. Tunkin and also once shared by Mr. Amado, since the Commission was not merely an academic body, it should strive to evolve a draft convention. In so doing, it should be careful to keep intact the fundamental principles embodied in the draft prepared by the Special Rapporteur, which constituted a valuable contribution to the development of international law in the field of arbitration. Moreover, the continuity of the Commission's work should be maintained, and the essential characteristics of its procedure should not be changed without good reason; in other words, even new members should pay proper respect to the Commission's past work.

6. It would be advisable to postpone, perhaps until the next session, the final decision on whether the draft should take the form of a draft convention or that of a model draft until the comments of Governments had been studied thoroughly.

7. Mr. AMADO pointed out that, contrary to what Mr. Yokota appeared to think, he had not changed his mind, as a perusal of the records of his earlier statements would show. His attitude had been completely consistent.

8. The CHAIRMAN pointed out that he had asked the Commission to decide on the form of the draft at the current session because certain members of the Committee felt that, without such a decision, it was impossible to agree on the text of the articles.

9. Mr. SPIROPOULOS observed that the General Assembly, in its resolution 989 (X), had invited the Commission to consider the comments of Governments and the discussions in the Sixth Committee in so far as they might contribute further to the value of the draft on arbitral procedure. It had not asked the Commission to discuss the form. The Commission was merely asked to see if it could improve on the proposed articles in the light of the comments made. The General Assembly would itself decide on the form the draft would finally take, though the Commission could, of course, make recommendations to the General Assembly with regard to the form.

10. Many of the objections raised by Governments were purely technical, and could quite well be handled by the Committee, but important questions would have to be handled by the Commission itself. As the Commission was due to meet again on 28 April 1958, the Committee might meet one week earlier, and hold two meetings daily.

11. The CHAIRMAN pointed out that he had asked the Commission for a decision not only on the question of the form of the draft, but also on the question whether it should review the draft on arbitral procedure in the light of the comments from Governments, with a view to increasing the practical value of the draft.

12. Mr. VERDROSS thought all the members would agree that the comments by Governments should be taken into account. It would, however, be difficult to elaborate a draft that would be generally acceptable,

since any draft that took into account only the observations of some Governments and disregarded those of others would be useless.

13. Mr. MATINE-DAFTARY said that the draft was not that of a convention making arbitration compulsory, but of a convention laying down the procedure for arbitration where the obligation to arbitrate already existed. Every State that signed the convention would thereby surrender a part of its sovereignty. He was therefore opposed to discussion of the draft at the present stage. The different, and sometimes contradictory, observations of Governments would have to be studied first. The Commission must try to carry out the task that had been set it by the General Assembly, and to do that it would have to pass the whole question through the hands of the Committee.

14. Mr. TUNKIN felt it was not desirable to devote the remaining meetings of the Commission to the discussion of arbitral procedure; it would be better for the subject to be discussed by the Committee, and if the Committee did not finish its work at the current session, then it could continue it at the next. The comments of Governments could not simply be brushed aside. The Commission could not take an immediate decision, so it should ask the Committee to examine the comments of Governments so far as it could during the remainder of the session and then report back.

15. Mr. SCALLE, Special Rapporteur, observed that the 1953 draft<sup>1</sup> had been adopted by a small majority only; however, having been adopted by a majority, it was a draft by the Commission. The membership of the Commission had since changed, and the majority which would now be achieved might be different; it might be that some articles would be changed or even omitted. That being so, all the articles should be discussed, in turn, by the full Commission; even if some of the work was done by the Committee, its decisions would have to be reviewed by the full Commission.

16. It seemed to him that some Governments had a confused idea of the purpose of the draft, which was not to make arbitration compulsory, but to prescribe the procedure to be followed in cases where there was an obligation or agreement to arbitrate. Some Governments had rejected the draft because they wished to be free to withdraw from arbitration if they so desired; they wished to be, not only parties to arbitral proceedings, but also judges in those proceedings.

17. He agreed that much might be left to the Committee; on the other hand, it was certain that the Committee would not be able to adopt decisions that would all be acceptable to the Commission as a whole, and the matters to which those decisions related would therefore have to be dealt with by the Commission itself.

18. He had been accused of dividing States into classes. But not all States were the same age, and some of them had in the past been kept in a position of inferiority by colonial Powers. There were likewise wide divergences of view between western and eastern States on certain subjects. There were States which were not only older, but also perhaps "tired" than others. All he had done had been to note those facts in his classification; no criticism had been expressed or implied.

19. It had been rightly said that the comments by Governments should be taken into account. That was

<sup>1</sup> *Official Records of the General Assembly, Eighth Session, Supplement No. 9, para. 57.*

precisely what he had done, with the aid of the Secretariat, in his report. The Secretariat had summarized the comments, and he had summarized those summaries. He had considered all the comments which related to the substance of his report.

20. If the term "*projet-modèle*", by which his model draft was described in French, was considered a little clumsy or otherwise inappropriate, there was no reason why the expression "*projet-type*" should not be used instead.

21. He suggested the Commission should now consider the draft articles one by one, taking the comments of Governments into account. It might well be that the difficulties confronting the Commission could be resolved by presenting a draft which would leave it open to Governments either to accept arbitrability or, if they chose, to reject it, but it would be useless to put forward a document in which what was said in the first part was contradicted in the second.

22. The CHAIRMAN was glad to note that the Special Rapporteur shared the view of the majority of the Commission that the draft should be reconsidered in the light of the comments of Governments and the discussions in the Sixth Committee, with a view to effecting some amelioration.

23. Sir Gerald FITZMAURICE said that the view attributed to the majority was not his view. To him, as to Mr. Amado, it was clear that the draft prepared by the Special Rapporteur was founded on a definite concept of the arbitral process, and that the General Assembly's request to the Commission to re-examine the draft was tantamount to saying that the Assembly did not agree with that concept. If the Assembly had agreed with the concept, the draft would not have been sent back.

24. To speak of an amelioration of the draft was begging the question. It would indeed be possible to alter the draft, but it was a moot point whether such alteration would represent any amelioration. He was inclined to think, moreover, that it might be a waste of time to alter the draft, since, whatever changes might be introduced, it would be impossible to produce a draft convention which all States would be prepared to sign.

25. He suggested, therefore, that the draft should be left in its present form, in which it would be of immense value to Governments, because it would indicate to them the type of point they must look out for in drafting arbitral agreements or a *compromis*. It should be presented to the Assembly, not as a draft convention but simply as a general concept of arbitral procedure which the Commission wished to place on record.

26. The CHAIRMAN pointed out that the Commission could not refer the draft back to the Assembly without considering the comments of Governments.

27. Mr. AMADO, while agreeing with that observation, wished to point out that resolution 989 (X) invited the Commission "to consider the comments of Governments . . . in so far as they may contribute further to the value of the draft". He asked what was meant by the word "value". Was it intended to convey that the merit of the draft would necessarily be increased if it were made acceptable to all States by the abandonment of concepts which had already been endorsed by the Commission, even if only by a small majority? In his view it carried no such connotation,

and he felt that the Assembly had not given the Commission any precise instructions concerning the object to be achieved in reconsidering the draft.

28. The value of the draft lay in the fact that it was a remarkable contribution by the Commission to the scientific study of arbitral procedure. The facts were that arbitration and arbitral institutions were already in existence, but that some States, being disinclined to delegate their prerogatives in the field of arbitration and wishing to remain masters of arbitral procedure, preferred to retain the system whereby arbitral procedure derived from the *compromis*. In that light the draft should be regarded as a document defining the present stage of development of international law regarding arbitration.

29. Mr. LIANG, Secretary to the Commission, with reference to an earlier statement by Mr. Spiropoulos that resolution 989 (X) said nothing of the form in which the draft should be presented (para. 9 above), pointed out that the preamble to the resolution lent weight to the Special Rapporteur's proposals to present the draft as a model. While there was no mention of the word "convention", the preamble indicated the Assembly's belief that "a set of rules on arbitral procedure will inspire States in the drawing up of provisions for inclusion in international treaties and special arbitration agreements", a statement which surely left it open to the Commission to present the draft as a model, for guidance or reference. There was nothing in the resolution which suggested that the Commission was called upon to revise the draft only as the text of a convention.

30. Mr. SPIROPOULOS said that he had simply wished to emphasize that the General Assembly had invited the Commission "to consider the comments of Governments and the discussions in the Sixth Committee in so far as they may contribute further to the value of the draft" and had not specifically called upon the Commission to decide on the form of presentation. Notwithstanding, it was within the Commission's competence to decide whether the draft should be presented in the form of a convention or as a model, or in any other appropriate form.

31. Mr. PAL, while agreeing with the Secretary that, in view of the statement contained in the fourth paragraph of the preamble to resolution 989 (X), the possibility of presenting the draft as a model was not excluded, wished to observe at the same time that paragraph 3 of the operative part of the resolution, in which the General Assembly had decided "to place the question of arbitral procedure on the provisional agenda of the thirteenth session, including the problem of the desirability of convening an international conference of plenipotentiaries to conclude a convention on arbitral procedure", did not exclude the possibility of submitting a draft convention.

32. He urged, however, that before deciding on the form in which the draft should be presented, the Commission should first reconsider the draft in the light of the comments of Governments. If, for instance, it was decided to alter the article on the *compromis*, the whole purport of the draft would be radically changed, and that in turn might affect the views of individual members of the Commission on the form in which the draft should be presented to the Assembly.

33. As to whether the draft should be reconsidered in plenary session or by the Committee, he proposed that, if the draft were referred to the Committee in the first

instance, it should be considered once again by the Commission. He personally would prefer the course that had been followed in the case of the report on the régime of the high seas: the Special Rapporteur had summarized the comments of Governments, given his own comments on those comments, and had then placed all that material before the whole Commission, together with his own suggestions. Mr. Pal did not see why that could not be done in the present case. If the Committee were to function at all, it should function only as the Special Rapporteur had done in the case of the high seas.

34. The CHAIRMAN said that the Commission had decided at its 404th meeting to refer the draft to a committee, and that it was inappropriate to discuss the matter again, unless a formal proposal for a reversal of that decision were submitted.

35. There was no doubt in his mind that reconsideration of the 1953 draft implied possible changes in the draft. The third paragraph of the preamble to resolution 989 (X) stated that the General Assembly had noted "that a number of suggestions for improvements on the draft have been put forward". The Special Rapporteur had not only modified a number of articles and inserted some additional ones, but had offered two alternative texts for article 3, so that it seemed the Commission could not evade consideration of the draft.

36. Mr. SCELLE, Special Rapporteur, wished to submit a formal proposal which, he was aware, was in direct contrast to some of the suggestions he had made earlier. As there was no means of telling whether the Committee was genuinely representative of the Commission and whether its decisions would be accepted by the Commission as a whole, he was afraid that much of the work which might be undertaken in the Committee, especially if it were prolonged over two years, would be of no avail. He proposed therefore that the Commission itself should examine each article of the draft at the current session, and in plenary meeting. Since there were seven new members of the Commission at the current session, it was by no means certain that the voting on the draft would be the same as in 1953.

37. Mr. AMADO pointed out, in support of Mr. Scelle's proposal, that, while the older members of the Commission were not interested in the specific details of the problem, the new members were probably better able to consider it in its entirety, and also that it would be difficult to arrive at clear-cut decisions in the Committee.

38. The CHAIRMAN put to the vote the question whether or not the Commission should reconsider the draft in the light of the comments of Governments and the discussions in the Sixth Committee of the General Assembly.

*The question was decided in the affirmative by 13 votes to 2, with 4 abstentions.*

39. Mr. MATINE-DAFTARY explained that he had voted against the decision, not because he contested that the Commission should have the last word on the matter, or because he felt that it should disregard the General Assembly's instruction to consider the comments of Governments and the discussions in the Sixth Committee, but because he had understood that it was intended to submit the draft to the General Assembly

at the same time as the Commission's report, and he felt that the time still available was inadequate for a thorough examination of the draft.

40. In his view, the amended draft prepared by the Special Rapporteur should be referred to the Committee, which in turn should ask Governments to express their views on the Special Rapporteur's proposals. He was convinced that the Governments had misunderstood some of the essential features of the original draft.

41. Mr. EDMONDS said that he had voted against the decision, not because he was opposed to reconsideration of the draft, but because the Commission had not yet reached a decision on the fundamental question whether the draft was to be considered in a jurisdictional form or in some other form. If the form of the draft was to be changed, it would be a very long and arduous task to reconstruct it; while, if it was to be considered in the form presented by the Special Rapporteur, he did not feel that much time would be required. Before discussing whether the draft should be considered by the Committee or in plenary session, the Commission should first agree in what form the draft was to be presented to the General Assembly.

42. Mr. GARCÍA AMADOR explained that he had taken no part in the discussion because he wished to hear the views of the other members of the Commission on the question of arbitral procedure.

43. He himself had played an active role, as the representative of Cuba, in the General Assembly's debates on the question. In 1953 he had been the first to propose that the draft should be accepted by the General Assembly.<sup>2</sup> In 1955, when the matter had been raised in the General Assembly again, he had suggested that the draft be adopted by the Assembly as a model for Governments to follow.<sup>3</sup> He regretted that Governments were not prepared to accept a draft which did not impose an obligation to accept arbitration, but he felt that there was no alternative for the Commission, as a subsidiary organ of the General Assembly, to carry out the Assembly's instructions to reconsider the draft in the light of the comments of Governments.

44. The Commission need not, however, undertake a substantial revision of the draft, but merely discuss certain clauses which gave it a somewhat rigid character. It was impossible to impose on Governments the obligation to accept arbitration whether they were inclined to do so or not, and he felt that a measure of flexibility could be introduced into the draft without abandoning the fundamental principles.

45. Mr. YOKOTA said he had voted in favour of reconsideration of the draft because he felt that the Commission ought to comply with the General Assembly's wishes. He pointed out, however, that reconsideration did not imply that the fundamental character and economy of the draft need be altered. There had been much discussion as to the form in which the draft should be presented to the General Assembly, and it seemed to him that that discussion concealed an essential difference of opinion about the substance of the draft. Those who were in favour of submitting the draft simply as a model felt that there was no need to change its fundamental character, but those who wished the Commission

<sup>2</sup> *Ibid.*, Eighth Session, Sixth Committee, 382nd meeting.

<sup>3</sup> *Ibid.*, Tenth Session, Annexes, agenda item 52, document A/C.6/L.369.

to submit a draft convention to the Assembly tended to the view that its fundamental character must be changed in order to meet the views of certain Governments. He personally was in favour of the first alternative.

46. He would suggest that the Commission, having decided to reconsider the draft in the light of the comments of Governments, should now make up its mind whether to keep the fundamental character of the draft intact, or whether to proceed with substantial alterations.

47. Mr. BARTOS explained that he had voted in favour of reconsideration of the draft for two reasons. First, the Commission, as a subsidiary body of the General Assembly, was obliged to comply with the Assembly's recommendations. Secondly, if the draft were submitted in its present form as a model, without further reconsideration, it might nevertheless come to be regarded as a subsidiary source of law, and he thought that the creation of subsidiary sources of law was in principle to be avoided.

48. The CHAIRMAN invited the Commission to decide whether it would abide by the decision it took at its 404th meeting to refer the draft to the Committee for reconsideration, or whether it would consider the whole draft, article by article, in plenary session, as had been formally proposed by the Special Rapporteur (para. 36 above).

49. When the officers of the Commission had proposed that a committee be established to consider the 1953 draft and Mr. Scelle's amended draft in the light of the comments of Governments and the discussions in the Sixth Committee (404th meeting, para. 3), they had hoped that that procedure would result in a considerable saving of time. It was expected that the committee would reach agreement on many of the more technical articles without a great deal of discussion, and would refer to the Commission only those articles on which they had found it impossible to agree. It had been the intention, of course, that the Committee should deal only with matters of substance, and that drafting should be entrusted to a drafting committee at a later stage. However, the Committee had not yet begun its consideration of individual articles, so that it was impossible to say how quickly the work would proceed.

50. With regard to the Special Rapporteur's alternative proposal that the draft be considered article by article by the full Commission, the Chairman asked if Mr. Scelle would agree to a postponement of the vote on his proposal until some experience had been gained of the rate of work in the Committee.

51. Mr. SCELLE, Special Rapporteur, stated that in submitting his formal proposal he had felt, on the contrary, that consideration of the draft in the Committee would be valueless and time-wasting.

52. It was not easy to foresee on which articles the Committee was likely to agree at once, until some decision had been reached on the major articles which determined the essential character of the draft. It was true that on the articles of a purely formal nature, which merely recapitulated the provisions of existing conventions, a decision might be reached quickly. But on the more difficult articles there was bound to be a difference of opinion, since some members would wish to attach overriding importance to the *compromis* while

others were in favour of reducing its importance. In those cases, nothing could be decided without reference to the Commission in plenary session.

53. The CHAIRMAN felt that another solution might be to ask the Special Rapporteur to state which articles would require discussion by the Commission.

54. Mr. SCELLE, Special Rapporteur, thought that article 1, for a start, would have to be discussed in plenary session.

55. Mr. SPIROPOULOS observed that, when he had spoken earlier in the meeting, he had taken it for granted that the discussion on item 5 of the agenda, State responsibility, would be adjourned to allow more time for consideration of the draft on arbitral procedure.

56. The Commission could not get out of its present impasse until members knew whether the draft was to be presented to the General Assembly as a draft convention or as a model which might possibly be accepted as the text for a convention. Personally, he did not think that more than five or six articles need be debated in plenary session; there would certainly be differences of opinion over articles 2 and 3, and some others might call for revision or even be rejected altogether.

57. He urged that there should be no further discussion until the Commission had decided one way or another on the essential character of the draft.

58. Mr. SCELLE, Special Rapporteur, thought that, if the Commission came to a decision on articles 1, 2 and 4, the crux of the matter would be settled.

59. Mr. GARCIA AMADOR said he had no objection whatsoever to adjournment of the discussion on State responsibility in order to permit the Commission to reach a final decision on arbitral procedure. From the practical aspect, however, he thought that the reconsideration of the draft on arbitral procedure should be undertaken in part by the Committee, so that the Commission would have time to deal with the draft convention on diplomatic intercourse and immunities during the current session.

60. Mr. PADILLA NERVO explained that his vote in favour of a reconsideration of the draft in the light of the comments of Governments had been based on a careful study of all those comments and on the conviction that a reconsideration of the draft would not necessarily imply any substantial modifications.

61. On the question whether some of the crucial articles, such as articles 1, 2 and 3 and, perhaps, 9 should be considered by the Committee or in plenary session, he pointed out that the Committee had already expressed the opinion that it was useless to consider articles 1, 2 and 3 without knowing what form the draft was to take, and had referred the matter back to the Commission. But, in the discussion in the Commission a vicious circle had formed, some members saying that their views on individual articles depended on the form in which the draft was to be presented, other members refusing to discuss the form until consideration of individual articles had been completed. That vicious circle could only be broken by a decision in plenary session.

62. Mr. PADILLA NERVO suggested that the Commission first decide in what form the draft was to be presented.

63. Mr. AMADO urged that the Commission should vote forthwith on the Special Rapporteur's formal proposal and decide whether the draft should be reconsidered by the Committee or in plenary session.

64. Mr. SPIROPOULOS emphasized that the main issue was whether or not arbitration was to be judicial, and that that issue could be decided without studying all the comments of Governments.

65. The CHAIRMAN observed that, if a member of the Commission objected that he was unable for technical reasons to follow the discussion, his objection ought to be taken into consideration. It had been pointed out to him, however, that those who were unable to read Conference Room Paper No. 46—which had been issued in French only—could find the relevant material in the documents for consideration under item 52 of the agenda of the General Assembly's tenth session,<sup>4</sup> and also in the records of the meetings of the Sixth Committee on that item at the same session.<sup>5</sup>

66. The CHAIRMAN called upon the Commission to decide whether or not articles 1, 2, 3, 4 and 9 of the draft on arbitral procedure should be considered by the Commission in plenary session.

*The question was decided in the affirmative by 14 votes to none, with 5 absentions.*

67. Mr. AMADO asked whether that decision implied that discussion of other articles of the draft was excluded.

68. The CHAIRMAN replied that that was so.

#### **State responsibility (continued)<sup>6</sup>**

[Agenda item 5]

69. Mr. TUNKIN asked whether the discussion on agenda item 5, State responsibility, was to be adjourned.

70. The CHAIRMAN replied that he had understood that the majority of the members had agreed on the need for an adjournment, but if there was any doubt on the matter, he would invite members of the Commission to vote on the question whether discussion on State responsibility should be adjourned until the Commission's tenth Session.

*It was decided by 12 votes to 2, with 4 abstentions, that the discussion on agenda item 5 should be adjourned.*

The meeting rose at 1.35 p.m.

### **419th MEETING**

*Monday, 17 June 1957, at 3.30 p.m.*

*Chairman: Mr. Jaroslav ZOUREK.*

#### **Arbitral procedure: General Assembly resolution 989(X) (A/CN.4/109) (continued)**

[Agenda item 1]

1. The CHAIRMAN invited the Commission to decide on the form and purpose of the draft on arbitral procedure (A/CN.4/109) before proceeding to review

<sup>4</sup> *Official Records of the General Assembly, Tenth Session, Annexes, agenda item 52, document A/2899 and Add.1 and 2.*

<sup>5</sup> *Ibid.*, Sixth Committee, 461st to 464th and 466th to 472nd meetings.

<sup>6</sup> Resumed from 416th meeting.

the text of the crucial articles, as decided at the previous meeting. Some members of the Commission did not regard the question as a vital one, but others, including the First Vice-Chairman, attached considerable importance to it and regarded a decision on the point as an essential preliminary to any discussion of the text.

2. Mr. MATINE-DAFTARY pointed out that it was customary to decide on the substance of a draft before settling the form it should take. The articles to be discussed dealt with a question of primary importance, namely, the role to be played by the International Court of Justice in arbitration. He accordingly proposed that the text of the articles be reviewed before taking a decision on the form and purpose of the draft.

3. Mr. TUNKIN said that he would not object to Mr. Matine-Daftary's proposal, but nonetheless regarded the question of the form of the draft of considerable importance. To judge from remarks made in the course of the discussion, there appeared to be a tendency on the part of some members to assume that, if the Commission agreed that the text should serve merely as a model for the guidance of States, it could be left as presented by the Special Rapporteur. He could not agree with that assumption, and if the Commission adopted such a course, it would be evading its responsibilities and failing to comply with General Assembly resolution 989 (X).

4. Mr. GARCÍA AMADOR said that, while generally speaking it would be the normal procedure to consider the question of form after that of substance, the case under consideration was so different as to warrant the reverse procedure. It was essential to know exactly what purpose was to be served by the text before members could decide on the substance of certain articles. If the text was to serve as a basis for an international convention, it would be necessary, for instance, to modify article 2 quite considerably; even then it would probably win little support from States. On the other hand, in a text merely intended as a guide, article 2 might secure far wider acceptance. He saw no alternative to submitting the text as a model. Any draft convention on arbitral procedure likely to win wide acceptance in the existing political situation would be so much on the lines of traditional arbitration that it would be better for the Commission not to have prepared it at all.

5. Mr. PAL supported Mr. Matine-Daftary's proposal. It appeared that fourteen Governments, in comments<sup>1</sup> submitted after the discussion of the matter in the Sixth Committee, still regarded the draft as a possible basis for an international convention. The United Kingdom Government, in particular, had expressed itself quite explicitly on the subject, while none had expressly stated that there was no possibility of a convention being concluded on the subject. Indeed most of them had indicated that, provided certain changes were made in the draft, they would be prepared to consider the possibility of concluding a convention. At any rate, so far no proposal had been placed before the Commission formally calling for a decision not to consider at that stage the possibility of a convention.

6. Mr. SCALLE, Special Rapporteur, remarked that he had taken account of the comments of the fourteen Governments in question in his report. It must be borne in mind, however, that there would be in all eighty-one Governments represented at the General Assembly.

<sup>1</sup> *Official Records of the General Assembly, Tenth Session, Annexes, agenda item 52, document A/2899 and Add.1 and 2.*

7. He agreed with Mr. García Amador. A decision simply to recommend the draft to Governments for their guidance would materially affect the attitude of members of the Commission towards the substance of the articles. A model set of rules would place no obligation on any State. The General Assembly could, if it wished, even agree to the simple publication of the draft by the Secretariat, without indicating its own attitude towards it.

8. Mr. TUNKIN thought that to submit substantially the same text as before, but merely as a model draft and not as a draft convention, would be contrary to the spirit of resolution 989 (X). The General Assembly had found the draft convention unacceptable and had referred it back to the Commission for reconsideration in the light of the comments of Governments. The Commission was bound to revise the draft, and the question was what principles it should submit. The Special Rapporteur proposed to bring arbitral procedure closer to judicial arbitration, as opposed to what was described by him as "diplomatic arbitration", by which was meant the generally accepted procedure. His draft would make the arbitral tribunal a kind of subsidiary court of the International Court of Justice. Such a course, however, was in the interest neither of the development of international law, nor of the improvement of international relations. Arbitration was an alternative means of settlement of disputes quite distinct from reference to the International Court of Justice.

9. He saw little purpose in submitting a model set of rules such as any association of jurists could produce. The Commission as an organ of the United Nations must endeavour to make a practical contribution to the development of international law. And the best way to do that was to submit a draft convention, based on well-known principles of arbitration and taking into consideration the practice in the matter of arbitration over the last fifty years.

10. Mr. LIANG, Secretary to the Commission, said that the comments of Governments, referred to by Mr. Pal, though subsequent to the discussions in the Sixth Committee at the Assembly's eighth session in 1953, were prior to the discussions at its tenth session in 1955, and had been taken into account in resolution 989 (X).

11. There were two ways in which a revised version of the draft might become an international convention. It might be adopted by the General Assembly as such, or it might serve as the basis for discussion at an international conference convened by the Assembly for the purpose of concluding a convention. In either case, action would have to be adopted by a clear majority of the Assembly. To judge from the discussions at the eighth and tenth sessions, that was a very unlikely eventuality. If, however, the Commission submitted its text as a model draft or set of rules, there would be nothing to prevent States agreeing in bilateral agreements to follow its principles.

12. Sir Gerald FITZMAURICE said that, although Mr. Matine-Daftary's proposal undoubtedly reflected the normal procedure, the views of members on the substance of the draft depended so much on the decision as to its form and purpose that he felt it advisable that that decision should be taken without delay. In discussing any draft, the Commission was bound to bear the practical possibilities in mind and to have some view as to its ultimate fate. It was no use preparing a draft con-

vention unless there was reason to suppose that the General Assembly would accept it. It seemed, however, in the highest degree unlikely that it would do so; the most it might do, and that was not very likely, was to convene an international conference which would go again over the ground already covered by the Commission. And even if such a conference did produce a convention, he doubted whether it would obtain many signatures. There seemed, however, therefore, to be no point in making all the adjustments and concessions required to render the draft acceptable as a convention.

13. If, however, the Commission reviewed the articles with the idea in mind that they would best serve as a model set of rules, its work would be of considerable value. He must challenge the claim that such a course would be contrary to the spirit of resolution 989 (X). The only reference in the resolution to the question of a draft convention on arbitral procedure was in paragraph 3 of the operative part, and even there it was couched in the most guarded terms. The Assembly merely decided to put the question of arbitral procedure on the provisional agenda of its thirteenth session, including, it would be noticed, not the problem of convening an international conference to conclude a convention but merely "the problem of desirability" of convening one. On the other hand, it expressly stated in the preamble its belief that "a set of rules on arbitral procedure will inspire States in the drawing up of provisions for inclusion in international treaties and special arbitration agreements". That was as explicit a reference to a model set of rules for the guidance of States as one could wish to have.

14. Regarding the comments of the United Kingdom Government, referred to by Mr. Pal, though naturally unable as a member of the Commission to speak on behalf of his country, he thought it would be unwise to assume that the United Kingdom Government would necessarily still hold the same view it had expressed some years previously before the Assembly's decision.

15. Mr. AGO recalled that he himself had made a proposal in the Committee which would in a way have left both courses open. After listening to the discussion, however, he felt that the Commission must make a choice between the two widely different courses, since its decision would affect the substance of the crucial articles of the draft. He saw no alternative to adopting the course advocated by the Special Rapporteur. Since it was most unlikely that an international conference would consider concluding a convention on the basis of the existing draft, if the Commission still thought of suggesting a draft convention, it would be bound to make radical changes in the draft. Mr. Ago was accordingly of the opinion that it would be better if the Commission did not make too many innovations, and contented itself with submitting the draft as a simple guide for Governments instead of turning it into a rather colourless text which could be accepted by all States as binding.

16. Mr. PADILLA NERVO said that various members had referred to General Assembly resolution 989 (X), but it was to be noted that the only paragraph of that resolution in which the General Assembly might appear to have expressed some preference for a draft convention, namely the last, was also the only one which was not, so to speak, addressed to the Commission but related solely to action to be taken by the General Assembly itself. In all the preceding paragraphs there was

nothing to suggest that the Commission was expected to present its revised draft in the form of a draft convention; on the contrary, the General Assembly referred specifically to "a set of rules on arbitral procedure" which, in its view, would "inspire States in the drawing up of provisions for inclusion in international treaties and special arbitration agreements". It would therefore be entirely in accordance with the General Assembly's resolution if the Commission now submitted a draft set of rules. Moreover, as had already been pointed out, there was very little prospect of States accepting a draft convention, even if the text proposed by the Special Rapporteur were toned down to resemble the Convention for the Pacific Settlement of International Disputes, signed at The Hague in 1907.

17. It was, in any case, essential that the Commission should decide the form without further delay. If it took up the draft articles proposed by the Special Rapporteur without first deciding what form they should eventually take, as proposed by Mr. Matine-Daftary, it would be obliged to reckon with the possibility that they might conceivably take the form of a convention and would therefore be obliged to consider them from that point of view. Such a proposal was equivalent to asking an architect to design a building without specifying the purpose it was to serve.

18. Mr. TUNKIN said he had never suggested that General Assembly resolution 989(X) had instructed the Commission to present its revised draft in the form of a convention. All he had wished to point out was that certain members at least appeared to think that only by presenting the draft in the form of a model set of rules could the Commission conserve the principles of the draft that it had adopted at its fifth session; but it was the very principles of that draft which the General Assembly had refused to accept.

19. Mr. MATINE-DAFTARY felt that the Commission would hardly have decided to reconsider specific articles of the draft in the light of the comments made by Governments if it had not intended to submit it in the form of a convention; if its intention had been to submit it as a model set of rules, there would have been no need to take the comments of Governments into account.

20. Mr. SPIROPOULOS said that since he could vote for all the articles in the draft, whether it was to take the form of a convention or of a model set of rules, it was a matter of indifference to him whether the Commission decided the form before discussing the substance. He realized, however, that there might be certain members who would vote differently on the articles, depending on whether they were to take the form of a convention or a model set of rules. For their sake at least, it would be desirable to decide on the form first.

21. As regards the substance, he felt that if the Commission removed the idea of judicial arbitration, it would be destroying the whole basis of the draft and reverting to all intents and purposes, to the system established by The Hague Convention of 1907.

22. Mr. EL-ERIAN said that the discussion raised two important questions, the constitutional relationship between the Commission and the General Assembly, and the nature of the Commission's functions.

23. Regarding the first question, he had already stated that, in accordance with General Assembly resolution 989 (X), by which the Assembly, in the words of article

23, paragraph 2, of the Commission's Statute, had referred the draft "back to the Commission for reconsideration or redrafting", the Commission was in duty bound to reconsider the draft in the light of the comments of Governments and the discussions in the Sixth Committee. The Commission could not discharge that duty properly if it decided from the outset that it was only going to make a few minor amendments on technical points.

24. That, in turn, raised the second question, the nature of the Commission's functions. The Commission had the dual task of codifying international law and promoting its progressive development. In laying down rules designed to promote the progressive development of international law, however, it must clearly bear the views of Governments in mind; for, as Mr. Amado had pointed out, new rules of law were not evolved by professors but by Governments. Article 38 of the Statute of the International Court of Justice put doctrine and jurisprudence in their proper perspective.

25. The root of the difficulty lay in the fact that the draft which the Commission had adopted at its fifth session<sup>2</sup> departed from the accepted rules of arbitration as a means of settling disputes as distinct from judicial settlement through the International Court of Justice, and tended to identify the two by laying down a complicated procedure which, in fact, made arbitration a subsidiary process in the system of international jurisdiction at whose centre was the International Court of Justice. The General Assembly's entire action and attitude had been determined solely by the terms of that earlier draft. If a draft along different lines were submitted, the General Assembly might take a different view and decide to convene a conference for the purpose of concluding a convention.

26. The question was, as Mr. Amado had neatly summed it up in 1953, and again in 1955, in the Sixth Committee of the General Assembly, whether the Commission intended to submit a draft on arbitral procedure or a draft of arbitrary procedure.

27. The CHAIRMAN, speaking as a member of the Commission, recalled that he had been one of the severest critics of the draft produced at the fifth session. In his view, the form of the draft was not of great importance, as the Commission's responsibility was the same in either case.

28. He agreed with Mr. El-Erian that the Commission must take the comments of Governments into account if the whole process of consulting them was to serve any useful purpose. On the other hand, he could not agree with those who argued that, if it removed certain articles, the Commission would be putting the clock back to 1907; for The Hague Convention of that year did not settle a number of points which could usefully be settled now. Arbitration rested on the will of the parties: where the purpose of the draft was to oblige them to respect their obligations, he fully supported it, but not where it sought to create obligations where there were none, or to apply rules which could only properly apply to other forms of peaceful settlement.

29. Mr. SCALLE, Special Rapporteur, said that he had carefully studied all the comments made by Governments or by their representatives in the Sixth Committee, and had been particularly struck by two objec-

<sup>2</sup> *Official Records of the General Assembly, Eighth Session, Supplement No. 9, para. 57.*

tions to the draft presented in 1953. The first was that that draft, if accepted, would actually be harmful to the cause of arbitration, since it placed arbitration in a straitjacket and would therefore deter Governments from having recourse to that method of settling their disputes. The second was that no two cases of arbitration were alike, and that it was therefore wrong to try to lay down a uniform procedure covering all cases; it had been argued that it might be embarrassing for Governments to accede to an arbitral convention without knowing in advance in what specific disputes they would be obliged to comply with it. There was considerable force in both those objections which, more than anything else, had led him to the view that it might after all be better to abandon the idea of a convention.

30. The statements of Mr. Tunkin, Sir Gerald Fitzmaurice and Mr. El-Erian all showed that in deciding the form of the draft the Commission would be deciding much more than that; it would be deciding whether a draft which was based on a judicial concept of arbitration should be replaced by a draft which simply reflected existing international custom. That would not be putting the clock back to 1907, it would be putting it back to very much earlier, to a period when respect for international law and for international obligations had been at as low an ebb as it was at present.

31. There was no ground for the suggestion that the present draft made arbitration a kind of ancillary procedure of the International Court of Justice. The Court was not the only tribunal to which difficulties or differences of opinion arising out of the arbitral procedure could be referred; the draft provided in many cases for recourse to another arbitral tribunal or to the Permanent Court of Arbitration. It was, however, absolutely essential that differences of opinion regarding the arbitrability of the dispute should be referred to some judicial organ for final settlement; the only reason why the draft gave that responsibility to the International Court of Justice was that the Court seemed the most appropriate organ.

32. The CHAIRMAN put to the vote Mr. Matine-Daftary's proposal that the Commission defer any decision on the final form of the draft until it had discussed the substance of articles 1, 2, 3, 5 and 9.

*The proposal was rejected by 10 votes to 8 with one abstention.*

33. The CHAIRMAN said that the Commission must now decide the form of the draft. The only proposal before it was the Special Rapporteur's proposal that it should take the form of a "model draft".

34. Mr. BARTOS asked under what provision of the Commission's Statute the draft would fall if the Commission decided it should take the form of a model set of rules.

35. The CHAIRMAN replied that the only obligation which its Statute placed on the Commission in that connexion was that referred to in article 20, namely, that the Commission "shall prepare its drafts in the form of articles and shall submit them to the General Assembly together with a commentary". Under article 23, paragraph 1, however, the Commission could recommend to the General Assembly one of four different courses:

"(a) To take no action, the report having already been published;

(b) To take note of or adopt the report by resolution;

(c) To recommend the draft to Members with a view to the conclusion of a convention;

(d) To convoke a conference to conclude a convention".

36. Mr. BARTOS felt that the Commission was under an obligation to recommend one of those courses. The words "may recommend to the General Assembly" referred to the fact that it had a choice between them. In the present instance it should, he believed, simply recommend the General Assembly to take note of its draft.

37. Mr. AMADO agreed that the Commission should recommend the General Assembly to take note of its draft, not as a model but, in the words used in General Assembly resolution 989(X) itself, as a "set of rules" which could provide useful guidance to States "in the drawing up of provisions for inclusion in international treaties and special arbitration agreements."

38. Mr. SCHELLE, Special Rapporteur, agreed that in the present circumstances the most appropriate course would be simply to recommend that the General Assembly take note of the draft.

39. Mr. GARCÍA AMADOR pointed out that that was the formula adopted by the General Assembly when it wished to avoid taking any action on a report or expressing any opinion as to its value. In the present instance, the General Assembly had surely not asked the Commission to revise its draft simply with a view to "taking note of" it. In his view, the General Assembly would undoubtedly expect the Commission to adopt a more positive and constructive course by asking it to recommend that Governments use the revised draft as a guide in drafting arbitral provisions.

40. Mr. PADILLA NERVO felt that there was no need for the Commission to take an immediate decision on the nature of its recommendation to the General Assembly; that question could be considered after the draft articles had been examined. Moreover, other courses were open to the General Assembly than those already mentioned. It might, for example, adopt similar wording to that which it had used in resolution 375(IV), relating to the draft Declaration on Rights and Duties of States; paragraph 2 of the operative part of that draft resolution read as follows:

*"Deems the draft Declaration a notable and substantial contribution towards the progressive development of international law and its codification and as such commends it to the continuing attention of Member States and of jurists of all nations"*.

41. However, the only point that had to be decided before examining the draft articles was whether they were to be submitted as a draft convention or as a set of rules.

42. Mr. VERDROSS protested that the term "draft convention" was itself ambiguous. It could refer either to an instrument which would be binding on all States that had ratified it in all cases where they wished to arbitrate, or to one which would be binding on them only in cases where they had not agreed in some other instrument to adopt some other procedure.

43. The CHAIRMAN said that would be a matter for the General Assembly to decide. The only question the Commission was now called on to decide was

whether it wished to submit the draft as a draft convention.

*The question was decided in the negative, by 10 votes to 4 with 5 abstentions.*

The meeting rose at 6.10 p.m.

## 420th MEETING

Tuesday, 18 June 1957, at 930 a.m.

Chairman: Mr. Jaroslav ZOUREK.

### Arbitral procedure: General Assembly resolution 989(X) (A/CN.4/109) (continued)

[Agenda item 1]

1. The CHAIRMAN said that certain members of the Commission wished first to explain their votes on the question decided at the end of the previous meeting, namely, whether to submit the draft to the General Assembly in the form of a draft convention (419th meeting, para: 43).

2. Sir Gerald FITZMAURICE said that he had voted against the proposal because he considered it more advisable, in the circumstances, to submit it in the form of a technical contribution. It had been argued that such a course was wrong on the ground that the Commission was an international and not a technical body. In point of fact, exactly the opposite was true. The members of the Commission being experts appointed in their personal capacity and not representatives of governments, the Commission could not be described as an international body in that sense. He believed he was right in saying that the Commission was a technical commission of the General Assembly.

3. In connexion with remarks made by some speakers, that it was no longer professors but State practice which made international law, he would point out that theorists had never been directly responsible for making international law. It had always been made by the practice of States, but their debt to the professors was enormous. It had also been said in that connexion that Article 38, paragraph 1(d), of the Statute of the International Court of Justice placed teaching and case law in their proper perspective as subsidiary sources of international law. It was interesting to note, however, that the provision in question had been taken word for word from Article 38 of the Statute of the Permanent Court of International Justice. Even in the dark days of 1920, jurists had realized that it was States and not professors that made international law! However, admitted that States made international law, it must also be recognized that a very large part of their ideas came from professors and publicists.

4. Mr. MATINE-DAFTARY said that his abstention was sufficient answer to the allegation that those in favour of his proposal to discuss the substance of the crucial articles of the draft before deciding on its form were necessarily wedded to the idea of submitting it as a draft convention. Incidentally, article 1 of the draft, which the Commission was about to consider, would fit equally well into a draft convention or a model draft.

5. Mr. VERDROSS explained that, in voting against the proposal, he had had in mind a draft convention applicable only in the cases in which the parties had not

stipulated other provisions, as in article 51 of the Convention for the Pacific Settlement of International Disputes, signed at The Hague in 1907: "unless other rules have been agreed on by the parties".<sup>1</sup>

DRAFT ON ARBITRAL PROCEDURE (A/CN.4/109, ANNEX)

#### ARTICLE 1

6. The CHAIRMAN invited the Special Rapporteur to introduce article 1 of his draft (A/CN.4/109, annex).

7. Mr. SCALLE, Special Rapporteur, quoted *in extenso* paragraphs 16 to 20 of his report (A/CN.4/109) and referred to article 37 of The Hague Convention for the Pacific Settlement of International Disputes of 1907, which described the object of international arbitration as "the settlement of disputes between States by judges of their own choice and on the basis of respect for law".<sup>2</sup> He added, in connexion with paragraph 20 of his report, that, prior to The Hague Convention of 1907, some writers had preferred arbitration to legal proceedings as a means of settlement, and had held that the arbitral award must be accepted as final even when not rendered in accordance with law.

8. Sir Gerald FITZMAURICE agreed with the views expressed by the Special Rapporteur. The suggestions made by various Governments regarding the exclusion of political disputes and matters within the domestic jurisdiction of States were beside the point. There was nothing in the draft to oblige any State to resort to arbitration at all, so that it lay entirely with the parties to decide which type of dispute they wished to submit to arbitration.

9. He agreed with the thesis that the undertaking to arbitrate derived from an arbitration agreement and not from the *compromis*. Though an undertaking to arbitrate was sometimes included in the *compromis*, the two things were quite distinct. The undertaking might exist before any dispute arose, but a *compromis* was only drawn up after a dispute had arisen.

10. He thought that it would be more logical in paragraph 3 to say "the undertaking results from a written instrument" rather than "shall result".

11. Mr. GARCÍA AMADOR observed that some comments of Governments appeared to be due to a misunderstanding of the scope of the article, which did not impose compulsory arbitration; the article was in accordance with the traditional system, recourse to arbitration being entirely at the discretion of the parties. Consequently, such considerations as the exclusion of political disputes, matters within the purview of regional agencies and the justiciability of disputes, were relevant not to article 1 but to the original agreement to have recourse to arbitration.

12. Perhaps the article would be less subject to misinterpretation if the statement in paragraph 17 of the Commission's report on its fifth session that "the obligation to arbitrate results from an undertaking voluntarily accepted by the parties"<sup>3</sup> were incorporated in paragraph 1.

<sup>1</sup> *The Hague Conventions and Declarations of 1899 and 1907*, 2nd ed., ed. James Brown Scott, Carnegie Endowment for International Peace (New York, Oxford University Press, 1915), p. 64.

<sup>2</sup> *Ibid.*, p. 55.

<sup>3</sup> *Official Records of the General Assembly, Eighth Session, Supplement No. 9.*

13. Paragraph 3 merely reflected established practice, while paragraph 4, which stated that the undertaking constituted a legal obligation which must be carried out in good faith, did no more than enunciate an elementary truth.
14. Mr. TUNKIN enquired whether the Special Rapporteur considered that there was any substantial difference between the provisions of his article 1 and those of Article 36 of the Statute of the International Court of Justice where jurisdiction was concerned.
15. Mr. SCELLE, Special Rapporteur, said that he could not see any essential difference as far as article 1 was concerned. There might, however, be a difference between Article 36 of the Statute and article 2 of his draft, which dealt with the question of the *compromis*. Parties might agree in the *compromis* to apply a certain law and to exclude other types of law.
16. Mr. PAL agreed with the Special Rapporteur and Sir Gerald Fitzmaurice on the question relating to political disputes. Since agreement to have recourse to arbitration was in any case optional, there was no reason whatever for ruling out the possibility of States' agreeing to submit any type of dispute, including political disputes, to arbitration.
17. As regards the question of the retroactivity of the articles, those Governments which had raised the question appeared to be under a misapprehension. The fact that it was left open to States parties to an undertaking to decide whether or not the undertaking should apply to disputes or circumstances arising prior to its conclusion, did not make the undertaking retrospective. The question of retroactivity would arise only if it were provided that the article would apply to undertakings already entered into before the acceptance of those articles by the State concerned.
18. Mr. MATINE-DAFTARY thought that the Special Rapporteur did not appear to have grasped Mr. Tunkin's point. Although the International Court of Justice was called a court, for all States which had not made a declaration of acceptance of its jurisdiction under Article 36, paragraph 2, of its Statute, it was merely an arbitral tribunal to which recourse could be had only by agreement between the parties to an international dispute.
19. He noted that paragraph 1 of the same Article 36 used the word "cases" and wondered whether it would not be preferable to substitute that word for the word "disputes" in article 1 of the draft.
20. Mr. SCELLE, Special Rapporteur, said that he had used the word "disputes" merely because many Governments appeared to desire it. He regarded the word "cases" as synonymous with it.
21. Mr. BARTOS said he had been asked by a scientific association of Yugoslav jurists what the position would be in the event of a dispute between two States which had accepted the jurisdiction of the International Court of Justice and had also signed an agreement containing a general arbitration clause. Which undertaking would prevail? It should, he thought, be made clear that in such cases either State would have the right to require the dispute to be brought before the International Court. In many instances, it might be in the State's interest for the matter to be dealt with by a public procedure.
22. Referring to paragraph 2 of the article, he pointed out that States were free not only to decide that an undertaking did not apply to past disputes, but to exclude any category of dispute that they saw fit. The article as a whole was clearer than the previous version, and more likely to secure the acceptance of States.
23. Mr. SPIROPOULOS said that much unnecessary misunderstanding had arisen regarding the implications of article 1. As far as paragraphs 3 and 4 were concerned, misunderstanding was practically impossible, paragraph 3 reflected established practice, while paragraph 4 simply enunciated the truism that legal obligations must be carried out in good faith.
24. It was chiefly in connexion with paragraph 1 that misunderstanding arose. It was clear that if States did not enter into an agreement to arbitrate, no obligation whatever arose out of the draft. The obligation to follow a certain procedure did not arise until States had, in another instrument, entered into an undertaking to arbitrate. There could not therefore be any contradiction between article 1 and Article 36 of the Statute of the International Court of Justice, for the latter dealt with the question of how States could enter into an undertaking to submit disputes to the jurisdiction of the Court. States which had made the declaration referred to in paragraph 2 of Article 36 must have recourse to the Court in any dispute covered by that paragraph, but under article 1 of the draft, States need only resort to arbitration when they specifically agreed to do so.
25. Mr. BARTOS interjected that Mr. Spiropoulos was right on that point, provided no abstract undertaking to arbitrate had been entered into, and if the special agreement had been concluded only concerning arbitration *in concreto*, or if both parties had agreed, in the course of the procedure, to change the abstract clause into a clause *in concreto*. He agreed with Mr. Spiropoulos when Mr. Spiropoulos had in mind the obligation to arbitrate *in concreto*, but that was not the question here because Mr. Scelle was of the view that *in abstracto* the obligation to arbitrate represented a sort of "blanco" arbitration clause which Mr. Bartos could support, in his capacity of university professor, as an ideal for the future, but was obliged not to recommend to States in his capacity of member of the International Law Commission, particularly after the discussion in the Sixth Committee of the General Assembly.
26. Mr. SPIROPOULOS continued that the question of excluding political disputes concerned not the draft but the *compromis*.
27. The question of the retrospective effect of the draft did arise with respect to abstract or specific undertakings to arbitrate entered into by States prior to their acceptance of the draft. He understood Mr. François to be of opinion that the draft would have retrospective effect in that respect. The matter could be simply remedied by adding a stipulation that the draft applied only to matters arising subsequent to its acceptance.
28. Mr. VERDROSS said he was in favour of deleting paragraph 2, since it conveyed the false impression that States could exclude only past disputes from the scope of an undertaking to arbitrate, whereas in fact the undertaking covered only such disputes as they agreed to include.
29. Mr. SCELLE, Special Rapporteur, repeated that he saw no possibility of conflict between article 1 and Article 36 of the Statute of the International Court of

Justice. Parties to a dispute were always free to agree to resort to arbitration as a more flexible means of settlement than court proceedings.

30. The CHAIRMAN, speaking as a member of the Commission, thought it should be specified, either in the article or in the commentary, what exactly was meant by an undertaking to arbitrate. There had been cases where States had entered into an undertaking in principle to arbitrate, but had reserved the right to draw up a *compromis* setting up a tribunal or defining the dispute. It was difficult to regard such an undertaking as final.

31. He agreed with the Special Rapporteur that arbitration between States must, in the words of article 37 of The Hague Convention for the Pacific Settlement of International Disputes of 1907, be "by judges of their own choice".<sup>4</sup>

32. He likewise concurred with Mr. García Amador that it should be made quite clear in paragraph 1 that the obligation to arbitrate resulted from an undertaking voluntarily accepted by the parties. Such a stipulation would obviate much misunderstanding and criticism, and would be all the more necessary if the Commission envisaged making the article retrospective.

33. Mr. SPIROPOULOS, though appreciating the Chairman's first point, wondered how the distinction between the two types of undertaking could be made; it would be very difficult to find a clear wording. It was really a matter of interpreting the will of the parties; of ascertaining whether they had had the clear intention of submitting disputes to arbitration. One way to avoid the difficulty would be not to make the draft retrospective, and to rely on States to be more specific in future agreements.

34. Mr. LIANG (Secretary to the Commission) pointed out that, after the vote at the close of the preceding meeting, there could no longer be any question of the draft articles being presented as a draft convention, and submitted that the only fruitful course was to discuss them in terms of their suitability as a set of rules.

35. From that point of view it could be seen that article 1 was concerned with general questions of principle. He did not think it was possible to compare that article with Article 36 of the Statute of the International Court of Justice, as Mr. Tunkin had suggested, for its character was quite distinct from that of an arbitration treaty or an arbitration clause.

36. The question of the nature of the obligation which the Commission's draft would create, had given rise to much confusion in the General Assembly's discussions. Some delegations had appeared to think the draft was a kind of arbitration treaty; but that was not true any more than it was true of Article 33 of the United Nations Charter which only laid down a principle. Even if States had accepted the draft as binding, it would have had no force except where there was already a treaty or arbitration in existence. On the legal scope of such treaties there were two schools of thought in the Commission; one held that they were in themselves sufficient to establish an obligation to refer particular disputes to

arbitration, while the other considered that they were no more than a joint declaration in principle, and that the obligation to refer particular disputes to arbitration could spring only from the arbitration clause, or the *compromis*, concluded in each case. That, however, was a question of interpreting treaties of arbitration; it did not affect the utility of the set of rules under consideration, from the point of view of the States which wanted to adopt them.

37. There did not therefore seem to be much point in considering paragraph 2 any further. If two States were concluding an arbitration treaty they were naturally free to decide that it should not apply to many different types of dispute other than the two referred to—but that was a matter relating to arbitration treaties, not to arbitral procedure as such.

38. Paragraph 4 could of course also be deleted on the ground that it stated a self-evident truth; the fact remained that the authors of The Hague Convention of 1907 had decided to retain it.

39. Mr. YOKOTA pointed out that some treaties of arbitration and judicial settlement provided that certain types of dispute should be submitted either to arbitration or to judicial settlement. Some others, of more recent date, further laid down that if the two parties did not agree within a given period whether the dispute should be submitted to arbitration or to judicial settlement, it should, at the request of either party, be submitted to the International Court of Justice. In the case of treaties of the former kind, there might be a doubt whether and when the draft set of rules under consideration would be applied. He felt it would be desirable to define precisely "an undertaking to have recourse to arbitration" at the beginning of paragraph 1 in such a way as to take treaties of that kind into account.

40. Mr. TUNKIN said that the only purpose of his question to the Special Rapporteur had been to find out whether compulsory arbitration was contemplated in article 1. From that point of view it was surely legitimate to compare the article with Article 36 of the Statute of the International Court of Justice.

41. He fully agreed with Mr. García Amador that the Commission should make it clear that it did not have any form of compulsory arbitration in mind, and that the obligation to arbitrate could only result from specific agreements, whatever their nature. In accordance with its decision at the close of the previous meeting, however, the Commission should also make it clear that, even where there was an obligation to arbitrate, the rules did not apply unless the parties to the dispute specifically agreed to accept them. States should be left free to choose the procedure they preferred; in certain cases they might prefer that established by the 1907 Convention.

42. Mr. AMADO pointed out that, by virtue of the decision taken at the previous meeting, the Special Rapporteur's draft would now be nothing more nor less than a reference document that might be consulted by Governments or by jurists in their efforts to avoid the difficulties that frequently arose in arbitral proceedings. Considering it from that angle, he thought all members—whose views on the draft would in any case be on record in the Commission's Yearbook—could appreciate the desirability of preserving its organic unity: once they began to tamper with it they would inevitably end by destroying the whole fabric which had been so

<sup>4</sup> *The Hague Conventions and Declarations of 1899 and 1907*, 2nd ed., ed. James Brown Scott, Carnegie Endowment for International Peace (New York, Oxford University Press, 1915), p. 55.

carefully and skillfully woven by the Special Rapporteur. He would even be in favour of retaining article 1, paragraph 4; though it was a truism, it was a venerated one, and, as had been pointed out, the authors of other instruments had deemed it worth repeating.

43. The CHAIRMAN, speaking as a member of the Commission, welcomed the emphasis which Mr. Spiropoulos and the Secretary had placed on the fact that the draft was not itself a treaty of arbitration, but a set of rules which presupposed the existence of such a treaty. If that were agreed, it followed that paragraph 2 must be deleted, since arbitration treaties could contain all kinds of clauses excluding various types of dispute from their scope. In his view, it also followed that there could be no objection to an addition such as was proposed by Mr. Tunkin and Mr. García Amador.

44. Regarding the comments made on his previous statement, he pointed out that it was not always true that a prior undertaking to have recourse to arbitration was the basis of the arbitral proceedings; in cases of *ad hoc* arbitration, the only possible basis for the proceedings was frequently the *compromis*, since there was no prior instrument.

45. Mr. BARTOS said that if Mr. Verdross's proposal for the deletion of paragraph 2 were not accepted, he would propose the insertion after the words "apply to" of the words "certain types of dispute such as".

46. He also felt that if a prior undertaking to arbitrate (an undertaking *in abstracto*) laid down that any dispute should be submitted to arbitration, and the same States had also accepted the obligatory jurisdiction of the International Court of Justice on the basis of Article 36, paragraph 2, of the Court's Statute, it was necessary to clarify the relationship between the two obligations, the former being based on the obligation to arbitrate *in abstracto*, and the latter on the provisions of the United Nations Charter. In his view, the latter obligation should prevail. If that was generally agreed, he would be content if it were so indicated in the summary record.

47. Mr. MATINE-DAFTARY said he shared the view of those members who wished to make it very clear that the Commission had no intention of providing for compulsory arbitration.

48. He hoped the Special Rapporteur could agree that paragraph 4 went without saying. The principle *pacta sunt servanda* was after all the very basis of all international law.

49. The words in parenthesis in paragraph 1: "(arbitration treaty—arbitration clause)" should, in his view, be placed at the end of paragraph 3.

50. The Special Rapporteur had distinguished between two types of arbitration treaty: the abstract, prior type and the specific, *ad hoc* type. As regards the former he felt it was essential to reserve the sovereign rights of States over matters which were essentially within their domestic jurisdiction; the following words should therefore be added at the end of paragraph 1: "except in the cases referred to in Article 2, paragraph 7, of the United Nations Charter".

51. Mr. HSU agreed that it was vital to make a clear distinction between an obligation to arbitrate and an obligation to abide by the rules the Commission was laying down. If the General Assembly had had that

distinction more clearly in mind, he did not think it would have been so hostile to the Commission's draft.

52. He was inclined to support Mr. Tunkin's proposal that the Commission should make it plain that its rules would only apply in cases where the parties specifically so agreed, for there was no reason why it should seek to discard the traditional forms of arbitration. It must, however, guard against the proposed proviso being used by either party as a loophole through which to escape from its obligations.

53. Mr. SPIROPOULOS said that most of the various points that had been made might have been justified if the Commission had been drafting a convention, but fell to the ground once it was borne in mind that the Commission was only drafting a set of rules to be used by States as they thought fit. It was, in his view, incorrect to speak of States "accepting" the set of rules, as Mr. Tunkin had done. For on each separate occasion on which they had to determine the procedure to be followed in carrying out an undertaking to arbitrate, they would be entirely free to make whatever use of the rules they wished. Even if they had followed them on ninety-nine previous occasions, they would be under no obligation to follow them on the hundredth; conversely, the fact that they had ignored them on ninety-nine previous occasions did not mean that they might not find some good reason to follow them on the hundredth.

54. Mr. AGO felt that, although the Commission had abandoned the idea of a draft convention, it was still labouring under the misapprehensions provoked by the use of the word "model" to designate the alternative form on which it had now agreed. The word "model" suggested that the draft was itself, in the opinion of the Commission, a model of an arbitration treaty which could be accepted and put into force as it was, whereas the Commission clearly wished it to be regarded purely as a collection of suggestions aimed at helping States in drafting the clauses of such treaties as they might freely conclude amongst themselves. As Mr. Spiropoulos had said, there was no question of States being asked to accept it; it was simply being made available to them in order that they might refer to it and draw on it, to the extent that they desired, whenever they had occasion to lay down the procedure to be followed in referring disputes to arbitration. That being the case, the question of retrospectivity did not arise; the draft clearly could not affect arbitration treaties that had already been concluded.

55. As regards the last point raised by Mr. Matine-Daftary, it was not in the set of rules that the State's exclusive competence in matters within its domestic jurisdiction should be reserved, but in the *compromis* or the arbitration treaty itself.

56. The CHAIRMAN observed that the Commission had never explicitly excluded the possibility of the draft as a whole being taken by individual States as the basis for an arbitration treaty between them. That possibility therefore remained.

57. Mr. AGO thought that possibility had not been envisaged by the Commission.

58. Mr. TUNKIN, in reply to Mr. Spiropoulos and Mr. Ago, said that, even if States were free to decide in each case whether to accept the draft or not, that was no reason why the Commission should recommend what was unreasonable. It should weigh every provision as carefully as if the draft was going to be a legally

binding convention. Even if it did not commit States, it certainly committed the body which was presenting it to the General Assembly.

59. Mr. SCALLE, Special Rapporteur, said that in the main he associated himself with what Sir Gerald Fitzmaurice, Mr. Spiropoulos and Mr. Ago had said in reply to the various points that had been raised. In particular, he could not share the fears expressed by the Chairman and Mr. Tunkin; for, in the unlikely event of two States agreeing to take the draft as a whole as the basis for an arbitration treaty, they would do so by means of a *compromis* relating to the specific types of dispute which they agreed to refer to arbitration. Some at least of Mr. Tunkin's objections appeared to relate rather to article 3.

60. In his view, the only valid point that had been made was Mr. Verdross's criticism of paragraph 2. He had only inserted that paragraph in order to try to meet the views of certain Governments, who were anxious to remove any doubts as to the draft's retrospective effect; he realised that if it was to be retained it would be necessary to expand it considerably, and so willingly agreed to its deletion.

61. If the Commission so desired, he would also be willing to delete paragraph 4, but would prefer to retain it.

62. The CHAIRMAN asked Mr. Tunkin how he would formulate his proposed addition to article 1.

63. After some discussion between Mr. TUNKIN and Mr. SCALLE, Mr. VERDROSS proposed that it be stated at the beginning of article 1 that "the following rules are only applicable when incorporated in whole or in part, in an arbitration treaty or a *compromis*."

*The proposal was adopted by 18 votes to none, with 1 abstention.*

64. Referring to a point raised earlier by Mr. Bartos (para. 46 above), Sir Gerald FITZMAURICE observed that two States which had accepted the compulsory jurisdiction of the International Court of Justice by virtue of the optional clause in the Court's Statute were always free to conclude a separate agreement, stipulating that particular types of dispute should not be submitted to the Court but must be referred to arbitration. In such a case the special agreement would prevail over the general agreement. The point, therefore, appeared to require further consideration.

The meeting rose at 1.15 p.m.

## 421st MEETING

*Wednesday, 19 June 1957, at 9.30 a.m.*

*Chairman: Mr. Jaroslav ZOUREK.*

### Arbitral procedure: General Assembly resolution 989(X) (A/CN.4/109) (continued)

[Agenda item 1]

DRAFT ON ARBITRAL PROCEDURE (A/CN.4/109, ANNEX)  
(continued)

ARTICLE 1 (continued)

1. Mr. VERDROSS, recalling the decision that had been taken at his suggestion (420th meeting, para. 63) just before the close of the previous meeting, said that

on consideration it seemed necessary to refer not only to "an arbitration treaty or a *compromis*" but also to "another international treaty"; for the rules, or some of them, might well be incorporated in instruments, like the Convention for the Pacific Settlement of International Disputes (The Hague, 1907), which were neither *compromis* nor, strictly speaking, arbitration treaties at all.

2. Mr. Verdross's proposal, therefore, would insert the following clause at the beginning of article 1: "the following rules are only applicable when incorporated, in whole or in part, in an arbitration treaty, a *compromis* or another international treaty."

3. Also, arbitration treaties proper were of two kinds. Most of those concluded since the First World War laid down the manner in which the tribunal was to be constituted and gave the parties the right to have direct recourse to it. Those concluded before the First World War, on the other hand, had, for the most part, confined themselves to saying that if a dispute arose which came within the scope of the obligation to go to arbitration, the parties should conclude a *compromis* laying down the manner in which the tribunal was to be constituted and other related matters. The Commission should not leave the latter type out of account just because it was no longer fashionable.

4. He therefore suggested that the Commission insert the following clause in article 1:

"The arbitration treaty may leave the question of the establishment of the arbitral tribunal and other points in the arbitral procedure open, to be determined in the *compromis*."

5. Mr. GARCIA AMADOR wondered how the Commission could insert in a set of rules whose whole purpose was to limit the parties' freedom of action and establish an automatic procedure which might even continue to operate against their wishes, a provision which appeared to be an open invitation to revert to the old system where everything depended on the will of the parties at every stage of the procedure.

6. The CHAIRMAN thought that, since there were treaties in existence which relegated the establishment of the tribunal and such matters to the *compromis*, Mr. Verdross had been perfectly right to raise the matter, as long as the question of the draft's retrospective effect had not been settled.

7. He could not agree with Mr. García Amador—nor, he thought, could the Special Rapporteur—that the purpose of the draft was to substitute an automatic procedure for one depending on the will of the parties. The consent of both parties was essential before recourse was had to arbitration; the sole purpose of the draft was to ensure that once that step had been taken, arbitration should be continued until a decision was reached.

8. Mr. VERDROSS, agreeing, maintained that his amendment was in complete harmony with the Special Rapporteur's draft, in which everything depended on the initial willingness of the parties to have recourse to arbitration, and the aim was simply to ensure that, granted such willingness, the procedure was continued to its end.

9. Mr. SCALLE, Special Rapporteur, said he gladly accepted Mr. Verdross's first suggestion (para. 2 above), which filled an obvious gap. Thus supplemented, the provision that had been agreed on at the previous meeting

could become paragraph 2, in place of the paragraph 2 he had agreed to delete.

10. As regards Mr. Verdross's second suggestion (420th meeting, para. 60), (para. 4 above), he was of course in complete agreement with him in principle. He wondered, however, whether the point was not already covered by the text of article 2, in which he had sought to give equal recognition to the two principles involved, the absolute freedom of the parties as regards the initial undertaking to have recourse to arbitration, and the necessity of subsequently curtailing their freedom to the extent needed in order to prevent either of them from bringing the procedure to a premature end—and to that extent only, for the parties remained entirely free to include in the *compromis* whatever they wished, with one important exception. They could not include in it any provision which would make it possible for either of them to evade its obligation to follow the procedure through to its appointed end; otherwise, in the words of sub-paragraph 30 of the second paragraph of article 2, the tribunal would "remain free to remove obstacles which may prevent it from rendering its award".

11. The whole purpose of the draft was to ensure that the will of the parties was respected, but by "the will of the parties" he meant the will of both parties, as expressed in the undertaking to have recourse to arbitration, not just the subsequent desire of one party to frustrate that joint expression of will because he felt the case was likely to go against him.

12. Mr. EL-ERIAN said that, in order to remove any possible misunderstanding as to the difference between the Commission's draft and a treaty on arbitration, it seemed desirable to remove from article 1 all those provisions which did not relate directly to the basis of arbitral procedure but bore rather on the substance of arbitration.

13. He therefore proposed that the whole of article 1 be replaced by the following text:

"Recourse to arbitration is based on the mutual consent of parties as expressed in a definite undertaking to have recourse to arbitration (arbitration treaty—arbitration clause)."

14. Mr. SCELLE, Special Rapporteur, said he was strongly opposed to Mr. El-Erian's proposal which, by failing to specify the nature and scope of the undertaking to have recourse to arbitration, destroyed the whole basis of his draft and so left full freedom to the parties at every stage of the procedure.

15. Mr. EL-ERIAN expressed regret that his proposal seemed to have been misunderstood. He had no intention of destroying the basis of the Special Rapporteur's draft; the only purpose of his proposal was to introduce the draft by a statement of fact similar to that which introduced the draft on diplomatic intercourse and immunities, article 1 of which, in the form agreed by the Drafting Committee, began: "The establishment of diplomatic relations between States . . . take place by mutual consent." He could have understood the Special Rapporteur's objection if his proposal had read: "Recourse to arbitration is based on the mutual consent of parties as expressed in the *compromis*", but in the form in which he had proposed it it appeared to him unobjectionable.

16. The CHAIRMAN suggested that, pending distribution of Mr. Verdross's and Mr. El-Erian proposals

in writing, the Commission should consider Mr. Matine-Daftary's proposal to delete paragraph 4 (420th meeting, para. 48).

*It was so agreed.*

17. Mr. SCELLE, Special Rapporteur, agreed that the statement contained in paragraph 4 was valid for all treaties, and amounted to little more than a tautology. Even so, he would prefer to retain it because it gave added force to paragraph 1. Although an undertaking to have recourse to arbitration resulted from the will of the parties, it was a question not simply of their good intentions, but, as was said in paragraph 4, of a legal obligation which must be carried out in good faith. Under the traditional procedure there might be some doubt as to whether the undertaking to have recourse to arbitration was not perhaps subordinate to the way in which the parties interpreted it—the way in which they gave concrete expression to it in the *compromis*.

18. Mr. MATINE-DAFTARY, in the light of the explanation by the Special Rapporteur, said he withdrew his proposal to delete paragraph 4.

19. Nor would he insist on his proposal to add at the end of paragraph 1 a reference to Article 2, paragraph 7, of the United Nations Charter, since the cases he had in mind were exceptional cases such as the Commission had already agreed, in other instances could safely be left aside.

20. On the other hand, he maintained his proposal that the words in parenthesis in paragraph 1: "(arbitration treaty—arbitration clause)" should be transferred to the end of paragraph 3.

21. Mr. SCELLE, Special Rapporteur, accepted that proposal.

22. The CHAIRMAN said that Mr. Ago had drawn his attention to the fact that, as paragraph 1 referred to existing disputes, the words in parenthesis should also include mention of a *compromis*.

23. Mr. SCELLE, Special Rapporteur, said he did not necessarily agree, for the undertaking to have recourse to arbitration might be a *nudum pactum* which had the force of a *compromis*, even if it said no more than that the parties agreed to have recourse to arbitration.

24. The CHAIRMAN pointed out that States often concluded a single instrument, a *compromis*, with no prior arbitration treaty.

25. Mr. AMADO observed that the fact that the *compromis* and the undertaking to have recourse to arbitration could sometimes be combined in a single instrument did not mean that they were the same. The great achievement of the Special Rapporteur's draft was that it clearly distinguished between the undertaking to have recourse to arbitration and the *compromis*, and made the second subordinate to the first. If article 1 were replaced by the text proposed by Mr. El-Erian, that distinction would be lost.

26. Mr. KHOMAN thought that, in the light of the explanation by the Special Rapporteur in connexion with the proposal to delete paragraph 4, it might be advisable to combine that paragraph with the first part of paragraph 1 and make the second part of paragraph 1 a separate paragraph, since it related to a somewhat separate matter.

27. He therefore proposed that paragraph 1 should be amended to read as follows:

“An undertaking to have recourse to arbitration results from the agreement of the parties and must therefore be carried out in good faith.”

and that the following text should be inserted as paragraph 2:

“The undertaking, which may be included in an arbitration treaty, an arbitration clause or a *compromis*, may apply to existing disputes or to disputes arising in the future.”

*Consideration of Mr. Khoman's proposal was deferred pending its distribution in written form.*

28. Mr. BARTOS, reverting to the suggestion he had made at the previous meeting (420th meeting, para. 46), further consideration of which had been deferred, said that paragraph 1 seemed to suggest that a dispute which came within the scope of the undertaking to have recourse to arbitration must necessarily be referred to arbitration, even if the two parties had accepted the compulsory jurisdiction of the International Court of Justice under Article 36, paragraph 2, of the Court's Statute, and one party wished to submit the dispute to the Court. In his view, as long as there was no *compromis* in the sense of article 2, but only an undertaking *in abstracto*, then the optional clause providing for recourse to the Court should prevail.

29. Sir Gerald FITZMAURICE said the question was one of great complexity but, fortunately for the Commission, did not relate to the matter it was considering. In his view, if two States which were bound by their acceptance of the optional clause in the Statute of the International Court of Justice had concluded a special treaty stipulating that disputes on the specific matters dealt with in that treaty should be referred to arbitration, it might well be that the latter jurisdiction would prevail. He could, however, think of special cases where the conflict of obligations could probably only be decided by the competent international tribunals themselves.

30. Mr. SPIROPOULOS said that the question referred to by Mr. Bartos, though of great importance, was not relevant to the draft. Many States which had accepted the optional clause in the Court's Statute had made a reservation to the effect that they would not have recourse to the Court where other possibilities of peaceful settlement, such as arbitration, existed. In such cases, there was clearly no possibility of conflict with arbitration treaties or arbitration clauses in other treaties; but where States had accepted the optional clause without any reservation, there clearly was a possibility of conflict. In his view, no general rule could be laid down for the purpose of resolving such conflicts, since it was necessary in each case to interpret the will of the parties at the time they accepted whichever obligation came last—the obligation to have recourse to arbitration or the obligation to have recourse to the Court. The reason why the question was not relevant to the draft was that the draft did not establish an obligation to have recourse to arbitration.

31. Mr. YOKOTA, after recalling that he had raised a somewhat similar point (420th meeting, para. 39), said that, on consideration, he agreed with Sir Gerald Fitzmaurice that the Commission should not attempt to settle it in the present draft but should leave it to the

science of international law and the decisions of international tribunals.

32. Mr. SCHELLE, Special Rapporteur, said that if the Commission wished to consider the matter raised by Mr. Bartos, it would have to consider it from two angles—the nature of the two conflicting obligations, and their relation to each other in time—on the basis of the principle *lex posterior derogat priori*.

33. Mr. BARTOS said that, in the light of what had been said, he would not insist on his suggestion, but would reserve the right to enter a dissenting opinion.

34. The CHAIRMAN proposed that further consideration of article 1 should be deferred until the amendments of Mr. Verdross, Mr. El-Erian and Mr. Khoman had been distributed in written form.

*It was so decided.*

## ARTICLE 2

35. Mr. SCHELLE, Special Rapporteur, replying to a question by the CHAIRMAN, said that the last word of item 11 in the French text of the second paragraph of article 2 should read “*dépens*”, which did not mean the same as “*dépenses*”. Since, however, the word was peculiar to French legal terminology, he was prepared to omit it and refer only to “*frais*”.

36. Mr. BARTOS said that competent academic jurists in Yugoslavia, during a discussion of the question of international arbitration at a scientific conference, had asked him, in connexion with the Commission's draft on arbitral procedure, to say that they agreed that there should be co-operation between arbitral tribunals and the International Court of Justice only on the understanding that such co-operation was compatible with the Statute and the rules of the Court, in view of the fact that the Statute of the International Court of Justice derived its legal validity from the Charter of the United Nations.

37. They had further asked him to say that, in their view—which coincided in the present instance with his own—there was no obligation on the parties to refer a particular dispute to arbitration until they had agreed on the subject-matter of the dispute and the method of constituting the tribunal (points (a) and (b) in the first paragraph of article 2).

38. Mr. SCHELLE, Special Rapporteur, expressed his emphatic disagreement. The obligation to arbitrate existed irrespective of any arbitration machinery. Mr. Bartos's remarks served to show that paragraph 4 of article 1 was no empty tautology but an essential part of the very core of the draft.

39. The main difference in arrangement between the draft adopted at the fifth session<sup>1</sup> and that now under consideration was that in the former he had, following the example of the General Act for the Pacific Settlement of International Disputes, introduced a judicial element into the procedure from the very outset; now, in an effort to placate those Governments which seemed so critical of any reference to the International Court of Justice, he had sought to keep such references to the minimum and make them as inconspicuous as possible. Thus, with regard to the conclusion of the *compromis*, he had reverted in principle to the system established

<sup>1</sup> *Official Records of the General Assembly, Eighth Session, Supplement No. 9, para. 57.*

by article 52 of The Hague Convention of 1907.<sup>2</sup> The parties were free to include in the *compromis* whatever they liked, with the one exception to which he had already drawn attention. If there were obstacles to its rendering an award, the tribunal, under the traditional system, could bring in a finding of *non liquet*; but by virtue of article 12—which had been adopted at the fifth session by a much greater majority than many of the other articles—the tribunal could not bring in a finding of *non liquet*; it must therefore have power to remove such obstacles, even if they stemmed directly from the *compromis* itself. The proviso in item 3 was therefore an essential element of the whole draft.

40. Mr. AMADO maintained that the draft was an entity and must be viewed as a whole. It established a system which was totally different from the traditional system of arbitration, and before considering it, members of the Commission must clear their minds of pre-conceptions born of long years' experience of traditional arbitration. If Governments did not like the system it established, they would be free to ignore it.

41. But as regards the particular question raised by Mr. Bartos, he drew attention to the provisions of article 9, paragraph 1, and article 10, where it was stated that the tribunal could decide "whether there is already sufficient agreement between the parties on the essential elements of a *compromis* as set forth in article 2 to enable it to proceed with the case" and that the tribunal "shall be fully competent to interpret the *compromis*".

42. Mr. BARTOS said the Special Rapporteur's successive remarks showed ever more clearly that, while his general conception was undoubtedly logical, it did not correspond to the existing system of arbitration; nor could it be regarded as corresponding sufficiently closely to any system that was likely to be established in the comparatively near future for it to be acceptable to the Commission under the heading of the "progressive development of international law".

43. As a practical jurist he had not the slightest doubt that, at the present time, in order for there to be an obligation to refer a particular dispute to arbitration there must be a *compromis*—to use that term in its broadest sense—an agreement expressing willingness to refer the dispute to arbitration, and defining, as an irreducible minimum, its subject-matter and the manner in which the tribunal was to be constituted. He deeply regretted that he was therefore in profound disagreement with Mr. Scelle.

44. The CHAIRMAN, speaking as a member of the Commission, proposed that, to cover cases where, in the absence of a prior agreement, the *compromis* and the undertaking to arbitrate were one and the same, the following words should be inserted at the head of the list in the first paragraph of article 2: "The agreement of the parties to submit the dispute to arbitration".

45. Mr. AGO supported the Chairman's proposal.

46. Mr. SCELLE, Special Rapporteur, accepted that amendment, but pointed out that the undertaking to arbitrate was nonetheless entirely distinct from the *compromis*.

47. Mr. KHOMAN, referring to the second paragraph of the article, noted that the list of thirteen points which it contained was not intended to be exhaustive. However, not all of the points mentioned might be dealt with in the *compromis*. In the case of some of the points, that eventuality was provided for in other articles. Article 11, for instance, indicated the law applicable in the absence of any agreement between the parties on the subject, while article 13 made the tribunal competent to formulate its own rules of procedure in a similar situation. On other points, however, such as the languages to be used in the proceedings, no such provision was made. Perhaps the Special Rapporteur would consider adding a clause to the effect that, in the absence of any specific agreement of the parties on any of the points mentioned in the paragraph, the matter might be settled either by the tribunal or another authority.

48. Mr. SCELLE, Special Rapporteur, agreed to Mr. Khoman's suggestion.

49. He pointed out, at the same time, that it was not obligatory on the parties even to specify points (a), (b) and (c), mentioned in the first paragraph of the article. In the case of (c), if the two parties failed to specify the place where the tribunal should meet, the choice of only one of the parties must be accepted, and the undertaking to arbitrate continued to be valid indefinitely pending such a choice.

50. Mr. AGO said that, in view of the decision that the text was to serve as a guide only, he considered it advisable to include in the second paragraph of article 2 certain additional points which the Special Rapporteur, when preparing the text with a draft convention in mind, had probably intended to deal with in other articles. For example, he thought it advisable for the *compromis* to invest the tribunal, or rather its president, with the power to take provisional measures for the protection of the respective interests of the parties.

51. As far as item 1 was concerned, he was in favour of adopting the suggestion made by the Brazilian Government in its comments,<sup>3</sup> to refer to "the rules and principles" rather than "the law and the principles". A reference to principles coming after the word "law" might give the impression that the principles in question were not principles of law; and that, he presumed, was not the Special Rapporteur's intention.

52. The Special Rapporteur, in his concern to avoid at all costs a finding of *non liquet*, had rightly referred in the same point to the possibility of the tribunal's adjudicating *ex aequo et bono*. He wondered, however, whether the power to adjudicate in equity would cover all eventualities. Perhaps the Special Rapporteur would consider including a provision, on the lines of article 1 of the Swiss Civil Code, to the effect that, where the tribunal was unable to render an award on the basis of the applicable rules and principles of law, it should have the power to decide "according to the rules which it would lay down if it had itself to act as legislator".

53. As regards item 3, he noted that the Special Rapporteur had made provision elsewhere for the tribunal to formulate its rules of procedure in the absence of any agreement between the parties. It would, however, be more in accordance with the general view of the Commission that in arbitration everything flowed from the will of the parties to arbitrate, if the power to formulate its rules of procedure were accorded to the tribunal by

<sup>2</sup> Convention for the Pacific Settlement of International Disputes. See *The Hague Conventions and Declarations of 1899 and 1907*, 2nd ed., ed. James Brown Scott, Carnegie Endowment for International Peace (New York, Oxford University Press, 1915), p. 64.

<sup>3</sup> *Official Records of the General Assembly, Eighth Session, Supplement No. 9*, annex I, sect. 3.

the parties in the *compromis* itself. That was, in fact, the usual practice, as the parties very rarely went into such detail in the *compromis* as to lay down the actual rules of procedure of the tribunal.

54. Mr. AGO therefore proposed adding the words "or the power of the tribunal to establish its rules of procedure" after the words "the procedure to be followed by the tribunal" in item 3.

55. Although he agreed with the substance of the further clause in item 3 that "the tribunal shall remain free to remove obstacles which may prevent it from rendering its award", he thought it advisable to modify the wording somewhat. Under the new approach to which he had referred, the tribunal could not, strictly speaking, remove obstacles in the way of its rendering an award, unless it had been empowered to do so by the parties. The clause might therefore be amended so as merely to draw attention to the desirability of giving the tribunal such power in the *compromis*.

56. The CHAIRMAN pointed out that the proviso to item 3 to which Mr. AGO had just referred did not appear in article 9 of the draft adopted by the Commission in 1953.

57. Mr. SCALLE, Special Rapporteur, said that he accepted Mr. AGO's proposals to refer to "the rules and principles" instead of "the law and the principles" in item 1 and to add the words "or the power of the tribunal to establish its rules of procedure" in item 3.

58. As far as the question of freedom to remove obstacles was concerned, he did not regard Mr. AGO's amendment as necessary. If, for instance, it was stipulated in the *compromis* that the tribunal was not free to conduct investigations on the spot, it must ignore that provision if it found it necessary to conduct such investigations in order to render its award.

59. Similarly, though he had no objection to a reference in the *compromis* to the power of the tribunal to take conservatory measures, he considered it in any case the tribunal's right to take such measures, even when the parties refused to grant it such powers, since failure to take them might prevent its rendering an award.

60. Mr. VERDROSS, also referring to item 3, said that he fully accepted the idea that everything depended on the initial will of the parties, and that their will must be carried out until the final award. That principle appeared, however, to be incompatible with the idea that the tribunal could in no case bring a finding of *non liquet*. If, for instance, the parties in a frontier dispute stipulated in the undertaking to arbitrate that the frontier was to be fixed on the basis of existing treaties, and the tribunal could find nothing to guide it in those treaties, the tribunal could not render an award, unless it substituted its will for that of the parties.

61. Mr. SCALLE, Special Rapporteur, said that he could not accept the idea behind Mr. Verdross's argument. The tribunal was bound to conform to the expressed will of the parties only if it would lead to a settlement of the dispute. If, however, their expressed will would frustrate a settlement, the tribunal must substitute its will for that of the parties. In other words, the undertaking to arbitrate overrode everything, including the will of the parties.

62. Mr. VERDROSS said that he could agree with the Special Rapporteur if the provisions of the *compromis* were in contradiction to the undertaking to arbitrate,

but he wondered what the position would be if the stipulation which he had cited as an example were already included in the initial undertaking to arbitrate.

63. Mr. MATINE-DAFTARY said that a distinction must be drawn between cases where the tribunal would be bound to bring a finding of *non liquet* on procedural grounds, for example, when forbidden to conduct investigations on the spot, and cases, such as that mentioned by Mr. Verdross, where it would be forced to the same conclusion on substantive grounds. In the case mentioned by Mr. Verdross, the tribunal could not substitute its own law for that emanating from the treaties to which it had been referred. Though the provision of the Swiss Civil Code (and incidentally of the Iranian Civil Code too) that the judge might decide according to the rules which he would lay down if he himself were legislating, applied perfectly well in municipal law, there was no corresponding principle in international law.

64. The CHAIRMAN observed that the question of findings of *non liquet* would be discussed in connexion with article 12.

65. Mr. BARTOS, referring to item 13 in the second paragraph of article 2, enquired whether the services of the International Court of Justice would be rendered strictly within the framework of its Statute and rules.

66. The CHAIRMAN pointed out that item 13 did not appear in article 9 of the Commission's 1953 draft.

67. Mr. SCALLE, Special Rapporteur, replied that the International Court of Justice could naturally not be expected to render services not permitted by its Statute or rules. In any case, the reference in the *compromis* to the part to be played by the International Court would be couched in the form of a request.

68. Mr. LIANG (Secretary to the Commission) said that an enquiry made by the Secretariat into the question of requests to the International Court of Justice had indicated the desirability of drawing a distinction between requests to the Court itself and requests to its President. It was not unusual for the President to be asked to render certain services, such as suggesting an arbitrator or a suitable person to head a special committee of the United Nations, and in such cases, he understood, it was not necessary for the President to consult the Court. If, on the other hand, the request was addressed to the Court, the President could not act alone. It would be noted, too, that in some articles of the 1953 draft, where it was a question of the International Court of Justice intervening, the articles referred to the President of the Court. Incidentally, he wondered whether a more appropriate term than "services" could be found to describe the part which the Court might be requested to play.

69. Sir Gerald FITZMAURICE, referring to the question of the freedom of the tribunal to remove obstacles to the rendering of its award, observed that he had already made clear that he was in favour of the basic concepts of the draft. On that point, however, the Special Rapporteur went further than he himself was prepared to go. Failure of the parties to express their will on a particular point, or ambiguity in its expression, must not be allowed to defeat the will of the parties or the power of the tribunal to reach a final settlement; but whenever the parties expressed a definite intention, effect must be given to it, even if the tribunal was thereby

prevented from rendering an award. The principle that in arbitration everything flowed from the initial will of the parties to arbitrate applied to procedural matters too, in so far as the parties might have agreed to arbitrate only on condition that the arbitration was conducted in a certain fashion. When a fact arising out of the expressed will of the parties prevented the tribunal from reaching a decision, the tribunal had no alternative but to accept the situation, and to assume that the parties themselves had been aware of that possibility from the outset and were resigned to it.

70. Mr. SCHELLE, Special Rapporteur, said that on that point he was prepared to go further than either Mr. Ago or Sir Gerald Fitzmaurice. In his view, the provisions of the *compromis* were subsidiary and supplementary to the provisions of the undertaking to arbitrate. It might, and did fairly frequently happen that one party was mistaken or even misled when drawing up the *compromis*. If, for instance, the parties instructed the tribunal in the *compromis* to fix a frontier on the line of the watershed and the tribunal could find no watershed, that provision of the *compromis* would be null and void. Once the arbitral tribunal was constituted it was not merely an organ of the parties, but an international organ with the task of settling a conflict.

71. Mr. AGO remarked that a further point which ought to be mentioned in the *compromis*, and hence in the second paragraph of article 2, was the power of the tribunal to revise its award.

72. Mr. SCHELLE, Special Rapporteur, considered such a reference to be unnecessary. Any tribunal had the power to revise its award, always provided that some significant new fact emerged which justified the conclusion that, in rendering its award, it had not been in possession of the full facts.

73. The CHAIRMAN said that the Commission appeared to be prepared to take a decision of principle on the article, without prejudice to formal changes that might be rendered necessary by the nature of the final structure of the draft and to the possibility of additions to the thirteen items in the second paragraph.

74. He assumed that the Commission agreed that the reference to the role of the International Court of Justice or its President should be clarified on the lines indicated by the Secretary.

75. Mr. GARCIA AMADOR gave notice of his intention to raise the question of adding a further paragraph to the article.

*It was accordingly agreed to defer a decision article 2 until the next meeting.*

The meeting rose at 1.10 p.m.

## 422nd MEETING

Thursday, 20 June 1957, at 9.30 a.m.

Chairman: Mr. Jaroslav ZOUREK.

### Arbitral procedure: General Assembly resolution 989 (X) (A/CN.4/109) (continued)

[Agenda item 1]

DRAFT ON ARBITRAL PROCEDURE (A/CN.4/109, ANNEX)  
(continued)

### ARTICLE 2 (continued)

1. Mr. GARCIA AMADOR remarked that the fundamental question of the role played by article 2 as a whole in the system of arbitral procedure established by the set of rules did not appear to have been raised. The obligations imposed by the article could be described as imperfect, in the sense that States could comply with the letter without the real purpose of the article being fulfilled. A typical example of such an imperfect obligation was that which the Charter of the United Nations placed on Members to co-operate with the Organization for the achievement of some of its purposes. Members might co-operate but there was no guarantee that the purposes would be achieved. A similar situation prevailed with regard to article 2. Under the first paragraph, the obligation of the parties to a dispute began and ended with the duty to initiate negotiations, for there was no rule of international law which stipulated that States must necessarily come to an agreement. The second paragraph, being optional in character, was even weaker and might be said merely to recognize the right of the parties to include certain matters in the *compromis* rather than to put any obligation on them to do so.

2. The inadequacy of the article became more apparent when it was compared with article XLIII of the American Treaty on Pacific Settlement ("Pact of Bogotá"), ratified by eight American States, none of which had entered any reservation with respect to the article in question. The text of the article was as follows:

"The parties shall in each case draw up a special agreement clearly defining the specific matter that is the subject of the controversy, the seat of the Tribunal, the rules of procedure to be observed, the period within which the award is to be handed down, and such other conditions as they may agree upon among themselves.

"If the special agreement cannot be drawn up within three months after the date of the installation of the Tribunal, it shall be drawn up by the International Court of Justice through summary procedure, and shall be binding upon the parties."<sup>1</sup>

As could be seen, the obligation established in the first paragraph was also an imperfect one, but it was completed in the second paragraph by the stipulation that, failing agreement by the parties, a *compromis* binding upon them should be drawn up by the International Court of Justice.

3. The Pact of Bogotá had been drawn up with the same aim as the Special Rapporteur's draft, namely to develop arbitral procedure on lines that would remedy the defects of the traditional system. But the Ninth International Conference of American States, in its concern not to limit the article to a stipulation which might frustrate the purpose of the procedure, had not only imposed the obligation to draw up a special agreement but had also established machinery to ensure that it came into being.

4. Article 9 of the draft admittedly sought to remedy the deficiencies of article 2, in that it provided that the undertaking to arbitrate might replace the *compromis*, on two conditions: that it contained provisions which

<sup>1</sup> American Treaty on Pacific Settlement, signed at Bogotá on 30 April 1948. See United Nations, *Treaty Series*, Vol. 30, 1949, No. 449, p. 100.

seemed sufficient for the purpose, and that the tribunal was already constituted. Those two conditions, however, tended to destroy the efficacy of the provision. The first would hardly ever be fulfilled in practice, since it was extremely rare for agreements to arbitrate to go into sufficient detail to make a *compromis* superfluous. The second was also unlikely to be fulfilled, since the tribunal was generally set up as a result of the *compromis* and not before it had been drafted.

5. Although the most logical course for him would be to propose the addition of a paragraph on the lines of article XLIII of the Pact of Bogotá, he hesitated to advocate a course which would run counter not only to the views of a large number of the members of the Commission but also to the opinion of most Governments, as expressed in their comments on the 1953 draft.<sup>2</sup> He nevertheless remained convinced that it was essential that article 2 should impose, not an imperfect obligation as in the existing text, but one that provided a remedy where there was a lack of agreement between the parties.

6. Mr. SCELLE, Special Rapporteur, said that, if he considered only his personal views, he would be in full agreement with Mr. García Amador. However, it appeared from the comments of Governments that what they chiefly objected to and even feared was the obligation to have recourse to the International Court of Justice. That was why he had drafted article 2 so as to leave States all possible freedom in preparing a *compromis*, which, provided it served the purpose of arbitration, could be drawn up entirely according to their will.

7. Legally speaking, the obligation imposed in article 2 was an imperfect one, in that it made no provision for the intervention of a public authority able to compel the parties to fulfil their duty. Politically speaking, however, it was not wholly imperfect, for Articles 34, 35 and 36 of the United Nations Charter gave the Security Council the power to exercise various degrees of influence on the parties to international disputes, while Article 36 drew attention to the fact that such disputes should as a general rule be referred to the International Court of Justice. Thus, article XLIII of the Pact of Bogotá, though much more drastic, was not totally different in essentials from Articles 33 to 36 of the Charter.

8. In view of the marked reluctance of most Governments to have recourse to the International Court of Justice, and more especially to ask the Court to draw up a *compromis* in case of disputes, he had sought to achieve the same object as article XLIII of the Pact of Bogotá by giving the power of preparing the *compromis* not to the Court but to the arbitral tribunal itself, as in the General Act for the Pacific Settlement of International Disputes. The possibility of the *compromis* not being executable or not being properly implemented was provided for in subsequent articles. They applied, however, only to cases where one, and one only, of the parties proved recalcitrant. When both parties were unwilling to submit their dispute to arbitration, nothing more could be done, since no external authority could force them to do so.

9. Article XLIII of the Pact of Bogotá had been adopted only in one region of the world, and he considered it quite impossible for an article on the same lines, even when merely part of a model set of rules,

<sup>2</sup> Official Records of the General Assembly, Eighth Session, Supplement No. 9, para. 57.

to win the acceptance either of the Commission or of Governments in general.

10. The CHAIRMAN asked whether Mr. García Amador wished to move a formal amendment.

11. Mr. GARCIA AMADOR said that, as he had already mentioned, he did not wish to press his suggestion in face of the obvious preference of Governments for the traditional system of arbitration. It was to be noted that, although article 2 of the draft made the preparation of the *compromis* dependent on the will of the parties and thus virtually returned to the traditional system of arbitration, many Governments, including some which had accepted the Pact of Bogotá, had seen a tendency towards judicial arbitration even in those provisions.

12. It was, however, a curious phenomenon that when it came to signing a convention containing the most complicated clauses, to which Governments had previously raised all sorts of objections, the latter disappeared as if by magic and those same Governments signed an instrument to which they had previously appeared to be irrevocably opposed. In the discussions in the Sixth Committee of the General Assembly, many of the severest criticisms of the Commission's 1953 draft had come from Governments which had already signed the Pact of Bogotá, an instrument which in many respects went much further than the Commission's draft. That did not of course mean that the comments of Governments were negligible, but it did show that they did not necessarily reflect those Governments' final position.

13. He hoped that at its next session the Commission would be able to reconsider the question of the legal, if not the political, deficiency of article 2 and provide machinery to ensure the effective execution of the undertaking to arbitrate.

14. The CHAIRMAN invited the Commission to vote on article 2 as variously amended, subject to the possibility of supplementing the list of points in the second paragraph.

15. The following amendments had been accepted by the Special Rapporteur: to insert at the head of the three points listed in the first paragraph a new point (a) as follows: "the agreement of the parties to submit the dispute to arbitration"; to substitute the phrase "the rules and principles" for the phrase "the law and the principles" in item 1 of the second paragraph; to add to that same item a provision on the lines of article 1 of the Swiss Civil Code; to substitute in item 3 the words "or the power of the tribunal to establish its rules of procedure" for the clause beginning "on condition that"; to clarify in item 13 the part which the International Court of Justice might be asked to play; and to add a clause to the effect that, in the absence of any specific agreement by the parties on any of the points mentioned in the second paragraph, the matter, unless covered by other articles of the draft, should be settled either by the tribunal or by another appropriate authority.

16. Mr. BARTOS asked for a separate vote on each of the two paragraphs.

17. The CHAIRMAN put to the vote the first paragraph of article 2 as amended.

*The first paragraph was adopted by 18 votes to 1.*

18. Mr. BARTOS explained that he had voted against the paragraph because he was not convinced that it did not constitute a departure from the traditional system of arbitration.

19. The CHAIRMAN put to the vote the second paragraph of article 2 as amended.

*The second paragraph was adopted unanimously.*

20. The CHAIRMAN put article 2, as amended, as a whole to the vote.

*Article 2, as amended, was adopted by 19 votes to 1 with one abstention.*

#### ARTICLE 1 (continued)<sup>3</sup>

21. The CHAIRMAN invited the Commission to take a decision on article 1, the vote on which had been deferred at the previous meeting (421st meeting, para. 34) pending the distribution of the text of the amendments submitted by Mr. Verdross, Mr. El-Erian and Mr. Khoman.

22. Mr. VERDROSS, explaining his amendment (421st meeting, para. 4), said that an agreement to submit disputes to arbitration could contain either explicit provisions on the constitution of the tribunal and the regulation of its procedure or simply an abstract undertaking to have recourse to arbitration. The amendment merely drew the logical conclusion from the implied recognition of the possibility of such different types of undertaking in the first paragraph of article 2.

23. Mr. SCELLE, Special Rapporteur, said that Mr. Verdross's amendment was unacceptable as it stood. To leave to the *compromis* fundamental provisions which might or might not be accepted by the parties would completely undermine the whole economy of his draft.

24. Mr. AMADO observed that by the words "The arbitration treaty" in his amendment Mr. Verdross presumably meant the undertaking to arbitrate.

25. In his opinion, Mr. Verdross's point was already covered by the first part of article 2. Although he was opposed to the whole principle of the Special Rapporteur's draft which, as the Special Rapporteur would be the first to admit, was designed to deprive arbitration of its arbitral character, he must agree that, from the logical standpoint, Mr. Verdross's amendment ran counter to the spirit of the draft.

26. The CHAIRMAN, speaking as a member of the Commission, pointed out that the possibility of the method of constituting the tribunal not being dealt with in the undertaking to arbitrate was recognized in the first paragraph of article 2. There were three possible types of undertaking to arbitrate. The first was a detailed undertaking which either designated a tribunal—the Permanent Court of Arbitration for instance—to which disputes should be referred, or provided for the constitution of the tribunal, or laid down the procedure for constituting it. The second was the ordinary arbitration clause found in agreements. The third was an undertaking in principle to arbitrate, the parties leaving open the question of the constitution of the tribunal and the procedure it should follow, but making certain provisions in the event of their not agreeing on the latter points when a dispute arose. Mr. Verdross's amendment merely catered for the last type of undertaking.

<sup>3</sup> Resumed from 421st meeting.

27. Mr. SCELLE, Special Rapporteur, said that the constitution of the tribunal had always been the stumbling block in arbitral procedure. Mr. Verdross's amendment took exactly the opposite approach from article 2 of the draft, which stated that the parties to a dispute were free to include almost anything in the *compromis*. Mr. Verdross, on the other hand, gave the parties the right to leave agreement on certain crucial points to the *compromis*.

28. Mr. LIANG, Secretary to the Committee, remarked that although Mr. Verdross's amendment undoubtedly reflected the existing juridical situation, he appreciated the Special Rapporteur's contention that it conflicted with the whole idea of his draft. The conflict lay, however, not so much in what the amendment said as in the shift of emphasis which it implied. In the system established by the Special Rapporteur, the *compromis* played a subordinate role. Mr. Verdross's amendment, on the other hand, placed less emphasis on the original agreement to arbitrate while raising the *compromis* to a position of greater importance.

29. Mr. MATINE-DAFTARY suggested that Mr. Verdross's amendment could best be considered in connexion with article 4, which dealt with cases where the party or parties failed to constitute the tribunal.

30. Sir Gerald FITZMAURICE said that he had difficulty in grasping the exact point of the controversy. The idea contained in Mr. Verdross's amendment appeared to him so self-evident that it was hardly necessary even to state it. Apart from *ad hoc* arbitral agreements, where everything was settled in a single document, it was the practice in virtually every other case for parties undertaking to arbitrate to leave open such questions as the constitution of the tribunal and its procedure. It was not always possible for them to state in advance how many arbitrators they would need and who they should be. Such decisions depended on the nature of the particular dispute.

31. As he had often pointed out, the Special Rapporteur's draft enjoyed his general support, but he would have no difficulty in accepting Mr. Verdross's amendment, and could not see what objection there was to it, even from the Special Rapporteur's standpoint.

32. Mr. VERDROSS observed that nobody could forbid States, when entering into an agreement to arbitrate, to leave certain matters for settlement in the *compromis*.

33. Mr. SCELLE, Special Rapporteur, said that he could accept Mr. Verdross's amendment only if it were qualified by the words "subject to the provisions of subsequent articles".

34. Mr. VERDROSS replied that he had no objection whatever to such a qualification.

35. Mr. YOKOTA considered Mr. Verdross's point to be already covered by the first paragraph of article 2. He saw no need for its inclusion, either as part of article 1 or in the commentary.

36. Mr. SANDSTRÖM said that he saw no objection to the substance of Mr. Verdross's amendment, though he considered the idea it contained to be already implied in article 2. He was not in favour of it, however, on other grounds.

37. The draft did not deal with arbitration in general, but was concerned with establishing rules of arbitral

procedure. It must accordingly leave out many things on the assumption that they were already known. The whole of article 1 could, in fact, be dispensed with, some of the ideas it contained being merely mentioned in a preamble and the ideas in paragraphs 1 and 2 being worked into the text of article 2. That was a question, however, which could be discussed in a drafting committee at the next session.

38. Mr. AMADO agreed with the Secretary. Mr. Verdross's amendment introduced a completely foreign element into the Special Rapporteur's perfectly coherent, but to him unacceptable, structure.

39. The CHAIRMAN, speaking as a member of the Commission, agreed with Sir Gerald Fitzmaurice. Arbitration agreements in which the details of the execution of the undertaking to arbitrate were not specified were extremely common.

40. Faris Bey EL-KHOURI agreed that Mr. Verdross's amendment contained elements calculated to undermine the whole system of the draft, since it gave either party the possibility of frustrating the intent of the original undertaking to arbitrate by simply not agreeing on the constitution of the tribunal.

41. He would nevertheless support the amendment, since he believed in preserving the freedom of choice of parties to a dispute.

42. Mr. SCELLE, Special Rapporteur, pointed out that, if the clause he had proposed were not inserted in Mr. Verdross's amendment, the provisions of article 4 regarding the appointment of arbitrators by the International Court of Justice would no longer be applicable should the parties fail to agree on a *compromis*.

43. He could accept the amendment, however, if it were clear that it did not override the rest of the provisions of the draft; the additional clause he had proposed would provide such a safeguard.

The meeting rose at 11.25 a.m.

### 423rd MEETING

Friday, 21 June 1957, at 10.30 a.m.

Chairman: Mr. Jaroslav ZOUREK.

#### Planning of future work of the Commission

[Agenda item 7]

1. The CHAIRMAN said there could be little doubt that at its next session the Commission must give priority to the questions of arbitral procedure and diplomatic intercourse and immunities.

2. He invited comments on the order in which the remaining three topics on its current programme should be listed on the next session's agenda.

3. Mr. AGO felt it was most desirable that the Commission should take a binding decision at its current session on the topics that would be discussed at the next session in order that members might know what topics specially to prepare. It would take the Commission a large part of the next session to complete its work on arbitral procedure and diplomatic intercourse and immunities, and that should be taken into consideration when deciding the other topics to be taken up.

4. Regarding diplomatic intercourse and immunities, he wondered whether the Secretariat could prepare an

analysis of the law and practice of the different States. Such an analysis would have been very valuable to the Commission in its discussions at the current session. Fortunately, however, the Commission had been engaged only on a preliminary reading, so the lack of such analysis had, perhaps, been a less serious matter than it would have been had the Commission been preparing its final draft. It would be desirable to have an analysis of that kind whenever the Commission took up a new topic.

5. Mr. LIANG, Secretary to the Commission, said that the Secretariat was preparing a collection of laws and regulations in the field of diplomatic intercourse and immunities, which would be published before the Commission met for its tenth session next year. It was unfortunately impracticable to supply advance copies to all members of the Commission, since the material was exceedingly voluminous, but it had been made available to Mr. Sandström, Special Rapporteur on the topic of diplomatic intercourse and immunities, and also to Mr. Zourek, Special Rapporteur on the topic of consular intercourse and immunities.

6. Mr. Ago had also mentioned the desirability of compiling materials relating to the practice of States as distinct from their laws. He recalled in that connexion that at its first session the Commission had considered ways of making the evidence of customary international law more readily available,<sup>1</sup> and had eventually submitted certain proposals to the General Assembly regarding the possibility of compiling documentation on the practice of States concerning various branches of international law; no further action, however, had been taken on them. He was afraid that for the next session the Secretariat's resources would not permit it to undertake a work of such large size. He would however study the matter.

7. Sir Gerald FITZMAURICE said that, although in principle he agreed with Mr. Ago, in practice it seemed desirable for the Commission to be prepared to discuss the other three topics on its current programme, at least for a few meetings each. For one thing the Special Rapporteurs would find it useful to have the Commission's preliminary comments on certain key points in their reports; as Special Rapporteur on the question of the law of treaties, he, for example, was very eager to hear the Commission's views on the doctrine of *rebus sic stantibus*. Moreover, it always happened that, after the Commission had finished substantive discussion of the main topics on its agenda, there had necessarily to be a pause while the Drafting Committee completed its work, while the Special Rapporteur revised his commentary, and while the final report was processed. In his view, therefore, the Commission should at least place State responsibility, the law of treaties and consular intercourse and immunities on its agenda for the next session, in addition to the two topics mentioned by the Chairman.

8. Mr. SPIROPOULOS thought that after arbitral procedure and diplomatic intercourse and immunities, the Commission should, next year, give priority to the law of treaties which had been on its programme since 1949. It had always been the Commission's practice to include all topics on its current programme in the agenda for the next session. In addition to the reasons for doing so which Sir Gerald Fitzmaurice had men-

<sup>1</sup> Official Records of the General Assembly, Fourth Session, Supplement No. 10, chap. V.

tioned, there was always the possibility that one or other of the Special Rapporteurs might be unable to attend part of the session.

9. Mr. SANDSTRÖM felt there was some conflict between the Special Rapporteurs' interest in hearing the Commission's views on their reports and the other members' interest in not having to prepare more topics than would be discussed. On balance he inclined to the view expressed by Mr. Ago.

10. Mr. TUNKIN said that in general he agreed with Mr. Sandström and Mr. Ago. It was clearly unrealistic to hope that the Commission could discuss all the topics on its current programme at its next session. In order to avoid causing inconvenience to its members, it must at least take a firm decision now regarding the order in which the various topics would be taken up. He agreed that the law of treaties should be taken up after arbitral procedure and diplomatic intercourse and immunities, since he personally doubted whether the present approach to that topic was likely to lead to any practical results. In his view, it was essential to have a week or ten days in which to discuss the topic and give the Special Rapporteur the specific guidance which neither he nor his predecessors had ever had.

11. Mr. YOKOTA felt that, in addition to arbitral procedure and diplomatic intercourse and immunities, the Commission should allow at least one week each for discussion of the law of treaties and State responsibility, for the reasons indicated by Sir Gerald Fitzmaurice. The question of consular intercourse and immunities should be postponed until the 1959 session.

12. Mr. GARCÍA AMADOR thought that experience at the current session showed that it was impossible to fix a rigid timetable even at the beginning of the session, let alone a year in advance, since there was always the possibility of circumstances arising which necessitated some sudden change.

13. Mr. PAL said that at any rate it seemed clear that the Commission must begin with arbitral procedure and diplomatic intercourse and immunities. However, he wondered whether, in discussing the latter topic, it intended to give priority to consideration of the comments of Governments on its current draft or to the additional report for which the Special Rapporteur had been asked on certain related topics such as the right of asylum.

14. He agreed that the third topic on the agenda should be the law of treaties, and he saw no possibility of the Commission taking up any further topics since the law of treaties alone would, in his view, occupy three sessions.

15. Mr. SANDSTRÖM, Special Rapporteur, pointed out that his instructions to prepare an additional report related not to the right of asylum, but only to *ad hoc* diplomacy. He agreed, however, with Mr. Pal that the third topic on the agenda for the next session should be the law of treaties, and that the Commission should not attempt to deal with any other topics.

16. Sir Gerald FITZMAURICE agreed with Mr. García Amador that, whatever decision the Commission took now, everything would depend in practice on what progress was made with arbitral procedure and diplomatic intercourse and immunities. The Commission might hope to dispose of those two topics in five or six

weeks, and for that reason alone it would be desirable that the other three topics should remain on the agenda.

17. Regarding the point raised by Mr. Pal, he felt that the discussion of diplomatic intercourse and immunities should be confined almost entirely to the comments of Governments on the current draft. Consideration of the Special Rapporteur's additional report should be postponed to another year, in fairness to the other topics on the programme.

18. Mr. SCALLE shared the view that, once the Commission had disposed of arbitral procedure and diplomatic intercourse and immunities, it should take up the law of treaties, which had been on its programme for so long and which was perhaps more amenable to judicial treatment than a topic that raised as many delicate and controversial issues as State responsibility.

19. Mr. TUNKIN thought that no immediate answer could be given to Mr. Pal's question. The Special Rapporteur, and later on the Commission itself, might find that the question of *ad hoc* diplomacy could be dealt with by inserting two or three additional articles in the current draft, in which case there was no reason why the Commission should not consider it in 1958. If, on the other hand, he found that it had to be dealt with separately, it would have to be left for later consideration.

20. Mr. SPIROPOULOS, supported by Sir Gerald FITZMAURICE, expressed the hope that, if the Special Rapporteur found it possible to adopt the former course, the Commission would not feel under an obligation to submit the articles in question to Governments for comment, since that would mean delaying submission of the whole draft to the General Assembly for a further year.

21. The CHAIRMAN suggested, in the light of the discussion, that the Commission decide to place the following items on its agenda for the next session, it being understood that they would be taken up in that order:

1. Arbitral procedure.
2. Diplomatic intercourse and immunities: consideration of the comments of Governments on the draft prepared at the ninth session, and of the possibility of inserting in it provisions relating to *ad hoc* diplomacy.
3. Law of treaties.
4. State responsibility.
5. Consular intercourse and immunities.

*It was so agreed.*

#### **Date and place of the tenth session**

[Agenda item 6]

22. The CHAIRMAN announced that the Commission, at a private meeting, had decided to hold its tenth session at Geneva for a period of ten weeks beginning on 28 April 1958.

#### **Consideration of the Commission's draft report covering the work of its ninth session (A/CN.4/L.70 and Add.1)**

23. The CHAIRMAN invited the Commission to consider, paragraph by paragraph, the draft report covering the work of its ninth session.

CHAPTER I: ORGANIZATION OF THE  
SESSION (A/CN.4/L.70)

*No observations.*

CHAPTER II: DIPLOMATIC INTERCOURSE  
AND IMMUNITIES (A/CN.4/L.70/ADD.1)

I. INTRODUCTION

*Paragraphs 1 to 3*

*No observations.*

*Paragraph 4*

24. Sir Gerald FITZMAURICE, Rapporteur of the Commission, proposed that after the last sentence of the paragraph an explanation should be added that the Commission's decision was due to its work on the draft on the law of the sea.

*It was so decided.*

*Paragraph 5*

*No observations.*

*Paragraph 6*

25. Mr. GARCÍA AMADOR said that it should be made clear in the paragraph that the question to be studied was that of *ad hoc* missions to Governments. In article 2 of Havana Convention<sup>2</sup> the term "extraordinary" was used in a different sense and applied to diplomatic officers accredited to international conferences and bodies. He therefore suggested the deletion of the words "extraordinary or" from the second sentence.

*It was so agreed.*

26. Mr. SANDSTRÖM, Special Rapporteur, proposed transferring to paragraph 6 the first sentence of the Introduction to the draft articles concerning diplomatic intercourse and immunities in order to clarify the meaning of the term "*ad hoc* missions".

*It was so agreed.*

27. Mr. GARCÍA AMADOR, referring to the same sentence, said that he was under the impression that the question referred to the Special Rapporteur for study did not include diplomatic conferences.

28. Mr. SANDSTRÖM, Special Rapporteur, replied that missions to international organizations had been excluded but not diplomatic conferences.

29. The CHAIRMAN pointed out that any negotiations between more than two States might be regarded as a diplomatic conference. It was therefore essential to include that category.

30. Mr. SCALLE observed that in French the term *ad hoc* was open to a variety of interpretations and so was one to be avoided.

31. Mr. AMADO wondered whether it was necessary to refer to *ad hoc* diplomacy at all, since the term was defined in the rest of the sentence under discussion.

32. In the last part of the sentence it was not clear whether the reference was to "diplomatic conferences" as such or to "special missions to diplomatic conferences".

33. Sir Gerald FITZMAURICE, Rapporteur, said he would like to retain the term "*ad hoc* missions" in the English text as a useful means of denoting a variety of special and temporary missions.

34. In connexion with Mr. Amado's second point, he proposed recasting the last part of the sentence as follows: "which covers roving envoys, diplomatic conferences and special missions sent to a State for limited purposes".

35. Mr. KHOMAN remarked that the terms "roving envoys" and "special missions" really referred to the same thing.

36. Mr. SANDSTRÖM, Special Rapporteur, said he could not agree. A roving envoy might go to a whole series of States in turn.

37. He agreed to the Rapporteur's proposed recast of the last part of the sentence.

38. The CHAIRMAN proposed that paragraph 6 should be redrafted in the light of the decisions taken and the comments made.

*It was so agreed.*

*Paragraph 7 and introductory sentence of paragraph 8*

*No observations.*

II. DRAFT ARTICLES CONCERNING DIPLOMATIC INTERCOURSE AND IMMUNITIES

39. The CHAIRMAN said that the first paragraph should be redrafted in the light of the decision taken with regard to paragraph 6 of the Introduction.

*It was so decided.*

40. The CHAIRMAN proposed that the word "diplomatic" should be deleted from the phrase "diplomatic relations between States and the international organizations" in the second paragraph.

*It was so decided.*

41. Mr. LIANG (Secretary to the Commission), referring to the second paragraph, suggested that the last sentence be drafted differently. The question of the privileges and immunities of international organizations, though it had to do with the question of relations between States and those organizations, was a subject in itself and not merely "linked" with the latter. He suggested stating: "There is also the question of privileges and immunities . . .".

42. Referring to the third paragraph, he pointed out that the conventions on the privileges and immunities of the United Nations and of the specialized agencies were fundamental instruments and not merely *ad hoc* conventions. The term "special conventions" would be acceptable.

43. Sir Gerald FITZMAURICE, Rapporteur, agreed with the Secretary's suggestion and proposed that the first sentence of the second paragraph be deleted accordingly.

44. Mr. YOKOTA proposed that the two paragraphs be merged.

*It was agreed to redraft the two paragraphs in the light of the discussion.*

<sup>2</sup> Convention regarding Diplomatic Officers, signed at Havana on 20 February 1928. See League of Nations, *Treaty Series*, Vol. CLV, 1934-1935, No. 3581, p. 365.

## SECTION I. DIPLOMATIC INTERCOURSE IN GENERAL

## ARTICLE 1

*The text of article 1 was adopted.*

## COMMENTARY ON ARTICLE 1

45. Mr. AMADO, referring to the commentary on the article, proposed limiting it to the statement: "The Commission here confirms the general practice of States".

*It was so agreed.*

## ARTICLE 2

46. Mr. SANDSTRÖM, Special Rapporteur, pointed out that the article was a new one which had been drafted pursuant to a decision of the Commission (411th meeting, page 64) and then referred direct to the Drafting Committee.

47. Mr. PAL, Chairman of the Drafting Committee, pointed out that the Commission had accepted the principle of the article and had merely entrusted the drafting to the Drafting Committee.

48. Mr. AMADO, referring to sub-paragraph 3 of the article, suggested that the words "subject to authorization by the Government of the sending State" with reference to the conclusion of agreements, were unnecessary.

49. Mr. YOKOTA proposed that sub-paragraphs 2 and 3 be transposed, since the role of negotiation dealt with in sub-paragraph 3 was closely connected with the role of representation dealt with in sub-paragraph 1. Moreover it was a more important function than the protection of the interests of a sending State and its nationals.

50. Mr. PAL, Chairman of the Drafting Committee, saw no need to change the sequence of the sub-paragraphs. The order in which they came was no indication of their importance.

51. Sir Gerald FITZMAURICE, Rapporteur, thought that the order proposed by Mr. Yokota was more logical, though there was something to be said for the existing sequence.

52. Mr. KHOMAN agreed with Mr. Amado. It went without saying that envoys must have the authorization of their Governments before concluding agreements, but that was also true of the agents of the receiving State.

53. He suggested inserting the words "with a view to concluding agreements" after the word "negotiating" in sub-paragraph 3.

54. Mr. SPIROPOULOS said that while he was not really convinced of the need for such an article at all, he would not oppose it. He agreed with Mr. Amado. The idea enunciated in the last part of sub-paragraph 3 really belonged to the law of treaties; it was out of place in the context and might even prove misleading.

55. Mr. SANDSTRÖM, Special Rapporteur, said that the clause to which Mr. Amado objected had been included because such authorization was in fact necessary, even though often given in advance. He had also had in mind the special case of the signature by the diplomatic mission of agreements negotiated by other agents of the sending State.

56. Mr. TUNKIN agreed that the last part of sub-paragraph 3 dealt with a question that came under the

law of treaties. He proposed ending the sub-paragraph with the words "between the two States".

57. Mr. MATINE-DAFTARY, referring to sub-paragraph 4, proposed substituting the word "activities" for the not very satisfactory term "development".

58. Mr. PADILLA NERVO, referring to sub-paragraph 3, pointed out that the words "or its agents" were superfluous, since the only way of negotiating with a Government was through its agents. It would also be better to delete the phrase "with regard to any questions which may arise in the relations between the two States", since it might rule out the possibility of negotiating on situations in third States, or on the general international situation, both possibly of great interest to the two States concerned.

59. Referring to sub-paragraph 4, he proposed substituting the words "developments in" for "development of".

60. Mr. SPIROPOULOS agreed with Mr. Yokota's proposal to rearrange the sub-paragraphs, and agreed with Mr. Padilla Nervo on both points he had raised in connexion with sub-paragraph 3.

61. He saw no need to include sub-paragraph 4, since, quite apart from the fact that it was a common practice to obtain information by other than lawful means, it merely dealt with an obligation of diplomatic agents towards their own Government and had no direct bearing on relations between the sending and the receiving State.

The meeting rose at 1.10 p.m.

**424th MEETING**

*Monday, 24 June 1957 at 3 p.m.*

*Chairman:* Mr. Jaroslav ZOUREK.

**Consideration of the Commission's draft report covering the work of its ninth session**

**(A/CN.4/L.70 and Add.1 to 3) (continued)**

**CHAPTER II: DIPLOMATIC INTERCOURSE AND IMMUNITIES (A/CN.4/L.70/Add.1) (continued)****II. DRAFT ARTICLES CONCERNING DIPLOMATIC INTERCOURSE AND IMMUNITIES (continued)****SECTION I. DIPLOMATIC INTERCOURSE IN GENERAL (continued)****ARTICLE 2 (continued)**

1. Mr. SANDSTRÖM, Special Rapporteur, referring to the suggestions made at the previous meeting, said that he saw no objection to deleting the whole of sub-paragraph 3 after the words "of the receiving State". On the other hand, it seemed desirable to retain sub-paragraph 4, since it supplied a logical basis for article 19, relating to facilities and free movement.

2. Mr. BARTOS said that he was opposed to the deletion of the second part of sub-paragraph 3, since he thought it made for clarity. He would not, however, press his opposition to a vote.

*It was agreed to delete the second part of sub-paragraph 3, following the words "of the receiving State".*

*The text of article 2, as amended, was adopted unanimously.*

## COMMENTARY ON ARTICLE 2

3. Referring to the commentary on article 2, Mr. BARTOS agreed that the Commission could not give an exhaustive list of the functions of a diplomatic mission, but thought it might have been more relevant to state and that there had been a tendency in the Commission to indicate the limits of such functions. He had, however, no specific amendment to suggest.

4. Mr. GARCÍA AMADOR thought it would be desirable to have a somewhat fuller commentary on an article which was at the very basis of the whole draft.

5. Mr. SPIROPOULOS said that while, in general, he agreed with Mr. Garcia Amador, if the Commission decided to expand the commentary, it was a little difficult to see where it would stop. In his view, the Commission need not spend much time discussing the commentary on any of the articles, since the draft was not final. The commentary on article 2 might be retained in its present form, and the Special Rapporteur requested to prepare a somewhat fuller text for consideration at the next session.

6. Sir Gerald FITZMAURICE, Rapporteur of the Commission, suggested that, without bringing in theoretical considerations, the Commission could very simply expand the commentary at its current session, possibly along the following lines:

“Without attempting to be exhaustive, this article is believed to reproduce the actual practice of States as it has existed for a very long time.”

7. The CHAIRMAN suggested that the Special Rapporteur be requested to prepare a text along those lines, for consideration later at the current session.

*It was so agreed.*

## ARTICLE 3

*The text of article 3 was adopted unanimously.*

## ARTICLE 4

*The text of article 4 was adopted unanimously.*

## ARTICLE 5

8. Mr. EL-ERIAN and Mr. BARTOS both said they were opposed to article 5 for the reasons they had given earlier. (386th meeting, paras. 60 and 61; 403rd meeting, paras. 56 to 62).

*The text of article 5 was adopted.*

## ARTICLE 6

9. Mr. SANDSTRÖM, Special Rapporteur, suggested that the French title of the article be brought into line with the English, which reflected the scope of the article more correctly.

*It was so agreed.*

10. Replying to points raised by Mr. MATINE-DAFTARY and Mr. SCALLE, Mr. SANDSTRÖM, Special Rapporteur, said that the words “or not acceptable” in paragraph 1 seemed necessary since the article referred to all members of the mission staff, and it seemed inappropriate to use the term “*persona non grata*” in connexion with administrative and service staff. The final phrase of the paragraph, “or his connexion with the mission shall be terminated”, also seemed necessary in order to cover the case of nationals of the receiving State. If the Commission thought it desirable,

suitable additions could perhaps be made which would make the purpose of the two phrases clear.

11. Sir Gerald FITZMAURICE thought that such a course would be undesirable, in the one case because it was difficult to decide in a uniform manner the categories of staff for which the term “*persona non grata*” was inappropriate and, in the other, because a national of the sending State, particularly if he was not one of the diplomatic staff proper, would not necessarily be recalled, but might prefer to remain in the receiving State provided he was allowed to do so.

12. Mr. TUNKIN agreed with Sir Gerald Fitzmaurice, and felt that all that was necessary was to alter the words “his connexion with the mission shall be terminated”, which did not clearly reflect the idea that the person concerned should no longer be a member of the mission staff.

13. Mr. AMADO suggested that the last phrase of paragraph 1 might be amended to read “or his functions shall be terminated” in accordance with the wording used in paragraph 2.

14. Mr. YOKOTA pointed out that, in view of what Sir Gerald Fitzmaurice had said, the word “mostly” should be inserted after the word “refer” in the last sentence of paragraph 6 of the commentary on articles 3 to 7.

15. Mr. BARTOS said that the drafting difficulty was only a foretaste of the substantive difficulties that would result from the Commission’s decision to treat non-diplomatic staff on the same footing as diplomatic staff. He only mentioned the point because it was not too late to reverse that decision.

16. In the absence of further comments, the CHAIRMAN suggested that the Special Rapporteur be asked to submit a redraft of paragraph 1 of article 6 in the light of the discussion.

*It was so agreed.*

17. Turning to paragraph 2, Mr. BARTOS pointed out that, although reference was made to the sending State’s “obligations under paragraph 1”, that paragraph did not explicitly impose any obligations.

18. Faris Bey EL-KHOURI said that, when the receiving State declared a member of a mission *persona non grata*, all it could do, should the sending State fail to recall or dismiss him, was to withdraw recognition of him as a member of the mission.

19. Mr. PAL, Chairman of the Drafting Committee, in reply to Mr. Bartos’s remarks, said that by “recalled” was clearly meant “recalled by the sending State” and by “his connexion with the mission shall be terminated” was clearly meant “terminated by the sending State”. By the words “may declare the functions of the person concerned to have been terminated”, the Drafting Committee had meant exactly the same as Faris Bey El-Khoury.

20. Mr. SPIROPOULOS said that he appreciated the force of Mr. Bartos’s remarks. It might be preferable to say in paragraph 1: “In such a case the sending State shall be under an obligation to recall this person or to terminate his connexion with the mission”.

21. He also agreed with Faris Bey El-Khoury that paragraph 2 was not exactly in accordance with existing practice. Only the sending State could declare the func-

tions of the person concerned to have been terminated. All the receiving State could do was to withdraw his privileges and immunities.

22. The CHAIRMAN thought that the Commission had in effect agreed that, in the case in point, the receiving State could declare the functions terminated.

23. Sir Gerald FITZMAURICE agreed that it was not only a question of withdrawing privileges and immunities. He had no doubt at all that a diplomatic agent's functions in the receiving State ceased once he was declared *persona non grata*.

24. Mr. LIANG, Secretary to the Commission, said that Sir Gerald Fitzmaurice was no doubt perfectly correct as far as the head of the mission was concerned; but if, for example, a third secretary was declared *persona non grata* but not recalled, he would continue to carry out his normal duties until the day of his departure, and it might seem somewhat grandiloquent to say with regard to such a person that the receiving State could "declare his functions to have been terminated".

25. Mr. TUNKIN said he could not see the force of the Secretary's objection. In the case cited, if the person concerned was declared *persona non grata* but not recalled within a reasonable time, the receiving State could then declare that it no longer recognized him as third secretary. That not only entailed the withdrawal of privileges and immunities, but went somewhat further.

26. Mr. LIANG, Secretary to the Commission, said that he was in complete agreement with the principle in the way that Mr. Tunkin had formulated it, but that that did not quite correspond to the way in which it was formulated in the text.

27. Mr. SANDSTRÖM, Special Rapporteur, suggested that he submit a redraft of paragraph 2 also in the light of the discussion.

*It was so agreed.*

#### ARTICLE 7

28. Mr. BARTOS wondered whether the receiving State could really "effect a limitation" of the size of the mission. Would it not be more accurate to say that it could refuse to accept more than a certain number?

29. Mr. AGO suggested that the relevant words in paragraph 1 be amended to read: "the receiving State may refuse to accept a size exceeding what is reasonable and customary."

30. Mr. SPIROPOULOS supported Mr. Ago's suggestion.

31. He also wondered whether the introductory proviso could not be omitted, since it was obvious that a specific agreement prevailed over the general rule laid down in the article.

32. The CHAIRMAN recalled that the idea of inserting the introductory proviso had been to stress that the two States should first seek agreement on the size of the mission.

*Mr. Ago's suggestion was adopted.*

33. The CHAIRMAN suggested that, in the French text of paragraph 2, the words "*personnes telles que les*" should be deleted, since the practice referred to applied not to persons such as military, naval and air attachés, but to military, naval and air attachés only.

*The suggestion was adopted.*

*The text of article 7 was adopted as amended.*

#### COMMENTARY ON ARTICLES 3 TO 7

34. Turning to the commentary on articles 3 to 7, Mr. SANDSTRÖM, Special Rapporteur, said that since his interpretation of the word "staff" had been slightly different from the Drafting Committee's, it would be necessary to make certain changes in the draft text of his commentary. Thus paragraph 1 should be amended to read:

"Articles 3, 4, 5, 6 and 7 deal with the appointment of the persons who compose the mission, a matter which is obviously the responsibility of the sending State, and with the influence which the receiving State can exercise in this respect."

35. Mr. GARCÍA AMADOR felt it was desirable to use some other word than "influence" which might convey a wrong impression.

36. Mr. TUNKIN suggested that the words "the influence which the receiving State can exercise" be replaced by "the receiving State's rights".

37. Mr. KHOMAN felt that the word "rights" could not appropriately be used of all the steps which the receiving State could take by virtue of articles 3, 4, 5, 6 and 7. It might be better to find some neutral term and say, for example, "the role which the receiving State can play in order to safeguard its rights and interests".

38. Mr. SANDSTRÖM, Special Rapporteur, said that, while he could see no valid objection to Mr. Tunkin's suggestion, if the word "rights" were felt to be inappropriate the word "prerogatives" might be used. Alternatively the paragraph could be deleted altogether.

39. Mr. GARCÍA AMADOR thought the most appropriate wording might be: "the relations between the receiving State and the sending State."

40. Mr. TUNKIN said he would be perfectly willing to accept Mr. García Amador's suggestion.

41. Mr. AGO felt the best course would be to delete the paragraph altogether, since it added nothing to what was said in paragraph 3. If it was felt desirable to have an introductory paragraph to that section of the commentary, paragraph 3 should precede and be merged with paragraph 1.

42. Mr. EL-ERIAN agreed that the two paragraphs could be merged in one.

*Mr. PAL, First Vice-Chairman, took the Chair.*

43. After further discussion, the Chairman proposed that paragraphs 1 and 3 be redrafted in the light of the discussion.

*It was so decided.*

*Paragraph 2 was adopted.*

44. Mr. TUNKIN, referring to the third sentence of paragraph 4, suggested that the idea it contained was self-evident and not particularly well expressed. He urged the deletion of the sentence.

*It was so agreed.*

*Paragraph 4, as amended, was adopted with one minor drafting change.*

45. Mr. TUNKIN proposed to delete all except the first phrase of the first sentence in paragraph 5, and to merge it with the second sentence.

*It was so decided.*

*Paragraph 5, as amended, was adopted.*

*Paragraph 6 was adopted with one minor drafting change.*

46. Mr. SANDSTRÖM, Special Rapporteur, proposed the deletion of the words "other than its head" from paragraph 7.

*It was so decided.*

*Paragraph 7, as amended, was adopted.*

*Paragraph 8 was adopted.*

47. Mr. FRANÇOIS proposed the insertion of a paragraph at that point to indicate that the Commission had also considered the question of the appointment of persons of dual nationality.

*It was so decided.*

48. Mr. SANDSTRÖM, Special Rapporteur, made the following suggestions: firstly, to merge paragraphs 9 and 10; secondly, to replace the words "the first of these exceptions" in the second sentence of paragraph 9 by the words "the first paragraph"; thirdly, to delete the first sentence of paragraph 10; and fourthly, to amend the second sentence of paragraph 10 to read "Paragraph 2 of article 7 gives the receiving State the right to refuse . . ."

*These suggestions were adopted.*

49. Mr. TUNKIN suggested substituting the word "limitations" for "exceptions" in the first sentence of paragraph 9, and deleting the last sentence of paragraph 9 on the ground that, if article 36 were adopted, any dispute in connexion with the convention might be referred to the International Court of Justice and not merely disputes in connexion with article 7.

*It was so agreed.*

50. Mr. LIANG, Secretary to the Commission, suggested replacing the words "to reduce" in the third sentence of paragraph 10 by the words "to limit the size of".

*It was so agreed.*

*Paragraphs 9 and 10, as amended, were adopted.*

#### ARTICLE 8

51. The CHAIRMAN pointed out that article 8 was a new article drafted by the Special Rapporteur at the Commission's request (393rd meeting, para. 13).

52. Replying to Mr. KHOMAN, he said that the article would be submitted to Governments as it stood, i.e. with both variants.

*The text of article 8 was unanimously adopted.*

53. Mr. BARTOS pointed out that it was not strictly correct to say that the head of the mission could take up his functions after he had presented his credentials to the ministry of foreign affairs. Cases often arose where the receiving State was unable to accept the credentials in the form in which they were submitted, since that might entail either recognition of a claim implicit in the

titles of the head of the sending State or recognition of a newly-established State. It would be better to say that the head of the mission could take up his functions "when the copy of his credentials submitted to the ministry of foreign affairs had been accepted."

54. Mr. SANDSTRÖM, Special Rapporteur, suggested that Mr. Bartos's point was covered by the words in the commentary, "which . . . must be the time when his status is established".

55. Mr. TUNKIN observed that, although cases of the kind mentioned by Mr. Bartos were by no means infrequent, it would be difficult to find a neat formula to meet his point. The idea of acceptance was, he thought, implied in the words "presented a copy of his credentials".

56. The CHAIRMAN pointed out that the text of the article had already been approved.

*Commentary on article 8.*

57. Mr. LIANG, Secretary to the Commission, thought that the reference in the English text to municipal law was somewhat obscure and served little purpose.

58. The CHAIRMAN proposed the deletion of the words "as in municipal law governing the power of attorney".

*It was so decided.*

59. Mr. FRANÇOIS suggested that the word "formality" was inappropriate and that it would be better to end the sentence with the words "to await the presentation of the letters of credence to the Head of State".

*It was so agreed.*

*The commentary, as amended, was adopted.*

#### ARTICLE 9

60. The CHAIRMAN pointed out that article 9 was also a new article, drafted by the Special Rapporteur at the Commission's request (392nd meeting, para. 84).

*The text of article 9 was unanimously adopted.*

#### COMMENTARY ON ARTICLE 9

*The commentary was adopted.*

#### ARTICLE 10

61. Mr. BARTOS reaffirmed his opposition to the principle of dividing heads of mission accredited to Heads of State into two classes.

62. Mr. YOKOTA, referring to sub-paragraph (b), said that he saw no reason for the words "envoys, ministers and other persons". A so-called envoy extraordinary and a minister plenipotentiary were one and the same person, and there were no "other persons" accredited as diplomatic agents to Heads of State.

63. Mr. TUNKIN pointed out that the text reflected the practice of States. In some States the second class of heads of mission were described as "envoys" and in others as "ministers".

64. Mr. SANDSTRÖM, Special Rapporteur, said that the term "other persons" was intended to cover ministers resident.

65. The CHAIRMAN pointed out that the text was based on that of the Regulation concerning the relative

ranks of diplomatic agents adopted by the Congress of Vienna, which the Commission had agreed to follow.

*The text of article 10 was adopted.*

#### ARTICLES 11 AND 12

*The text of articles 11 and 12 was adopted.*

#### ARTICLE 13

66. The CHAIRMAN stated that the French text of the article would be brought into line with the wording of the corresponding provision in the Regulation of the Congress of Vienna.

*The text of article 13 was adopted.*

#### COMMENTARY ON ARTICLES 10 TO 13

67. The CHAIRMAN said that it was proposed to redraft the beginning of paragraph 1 of the commentary as follows:

"Articles 10, 12 and 13 are intended to incorporate in the draft, with slight modifications, the provisions of the Vienna Regulation concerning the rank of diplomats, and article 11 provides . . ."

*The proposal was adopted.*

*Paragraph 1, as amended, was adopted.*

The meeting rose at 6.5 p.m.

### 425th MEETING

*Tuesday, 25 June 1957, at 9.30 a.m.*

*Chairman: Mr. Jaroslav ZOUREK.*

#### Consideration of the Commission's draft report covering the work of its ninth session

**(A/CN.4/L.70 and Add.1 to 3) (continued)**

#### CHAPTER II: DIPLOMATIC INTERCOURSE AND IMMUNITIES (A/CN.4/L.70/ADD.1) (continued)

##### II. DRAFT ARTICLES CONCERNING DIPLOMATIC INTERCOURSE AND IMMUNITIES (continued)

##### SECTION I. DIPLOMATIC INTERCOURSE IN GENERAL (continued)

##### COMMENTARY ON ARTICLES 10 TO 13 (continued)

1. Mr. HSU proposed the deletion from paragraph 2 of the words "such a reform being justified by the principle of equality between States".

2. The use of the word "reform" gave the impression that the distinction in rank between the two classes of envoy had acutely reflected a difference in standing between States. That was not the case, and any assumption that the distinction implied inequality of standing was merely an abuse. As a result of frequent criticism in recent years of such an assumption, the fact had been generally recognized that no inequality between States was implied. The existence of two different classes was of advantage to States and need not be subjected to further disparagement, since it enabled them to economize on missions to States with which their relations were not important enough to justify an exchange of ambassadors.

3. Mr. SANDSTRÖM, Special Rapporteur, said that, though he could not fully agree with Mr. Hsu, he would have no objection to deleting the clause.

4. Mr. BARTOS was not in favour of deleting the clause. He regarded equality of rank among envoys as symbolic of equality among States.

*It was agreed to delete the final clause of paragraph 2.*

*Paragraph 2, as amended, was adopted.*

5. Mr. LIANG, Secretary to the Commission, pointed out that paragraph 3 would need to be amended accordingly. He suggested substituting the words "for the abolition of any difference in title" for the words "for a reform designed to abolish at least any difference in rank".

6. Mr. SANDSTRÖM, Special Rapporteur, suggested using the word "change" instead of the word "reform" and deleting the words "at least".

*It was so agreed.*

*Paragraph 3, as amended, was adopted.*

7. Mr. HSU observed that the Commission's decision with regard to paragraphs 2 and 3 raised the question whether paragraph 4 need be retained. The reference to "the problem" at the end of the paragraph was open to the same objection as the previous reference to "reform". In his opinion, no problem existed.

8. Mr. SANDSTRÖM, Special Rapporteur, was in favour of retaining the paragraph.

9. Sir Gerald FITZMAURICE, Rapporteur of the Commission, said that he failed to see why Mr. Hsu should be so concerned. However, to accommodate him, he proposed that only the first part of paragraph 4, as far as the words "Vienna Regulation", be retained and added to the end of the previous paragraph.

10. Mr. FRANÇOIS, while acknowledging that Mr. Hsu's remarks were partly justified, was in favour of retaining the paragraph. The existing state of affairs was undoubtedly unsatisfactory, and the only way of improving it was to raise all envoys accredited to Heads of States to the rank of ambassador.

11. Mr. HSU pointed out that the existing tendency to give heads of mission the title of ambassador might be reversed, once it was realized that difference in rank implied no difference in the standing of States. He could accept the Rapporteur's suggestion.

12. The CHAIRMAN put to the vote the Rapporteur's proposal that the remainder of the paragraph, after the words "Vienna Regulation", be deleted.

*The proposal was rejected by 9 votes to 3, with 6 abstentions.*

13. Mr. MATINE-DAFTARY urged that reference be made at an appropriate point in the commentary to the fact that there had been some difference of opinion in the Commission regarding the advisability of retaining the classification established by the Regulation adopted by the Congress of Vienna. Although the spirit in which that Regulation had been established no longer prevailed, and the representatives of all States were nominally equal, some States were in favour of retaining the two classes in order to be able to appoint ambassadors only to those States with which they had very close relations.

14. Mr. SPIROPOULOS pointed out that Mr. Matine-Daftary's views would emerge clearly from the summary record of the discussion.

15. The CHAIRMAN invited Mr. Matine-Daftary to draft a text on the point for inclusion in the commentary.

*Paragraph 4 was adopted on that understanding.*

*Paragraphs 5, 6, and 7 were adopted.*

16. With regards to paragraph 8, Mr. BARTOS observed that the Commission had not considered the question of the validity of credentials in the event of a radical change in the régime of the receiving State. In such cases, the new Government of the receiving State often stipulated that the credentials of accredited agents must be renewed within a certain period. If they were renewed within that period, the rank of the head of the mission was unaffected. If they were not, the receiving State regarded the mission as terminated. Case law furnished a number of cases where sending States had refused, on political grounds, to renew their letters of credence and had argued that the old ones were still valid.

17. The CHAIRMAN observed that the question could be considered when the draft was reviewed at the Commission's next session.

18. Mr. LIANG, Secretary to the Commission, and Mr. KHOMAN pointed out that the last clause of the paragraph, "with the obvious exception of promotion to a higher class", related to a matter that had no real connexion with the subject of the paragraph.

*It was agreed to delete the clause in question.*

*Paragraph 8, as amended, was adopted.*

*Paragraph 9 was adopted with minor drafting changes.*

19. Concerning paragraph 10, Mr. AMADO said that, since the Commission was codifying the subject of diplomatic intercourse and immunities in the light of all the rules and doctrine on the question, and not just some of them, he saw no reason for it to explain why it had omitted certain provisions of the Vienna Regulation. The paragraph seemed unnecessary.

20. Sir Gerald FITZMAURICE said he was in favour of retaining the paragraph. The Commission made considerable reference to the Vienna Regulation in its report, and it would be of some interest to Governments to know why it had retained certain provisions of the Regulation and not others.

*After "article VIII" had been corrected to read "article VII", paragraph 10 was adopted.*

#### ARTICLE 14

21. The CHAIRMAN pointed out that article 14 was a new article drafted by the Drafting Committee.

*The text of article 14 was adopted by 15 votes to 1 with one abstention.*

22. Mr. EL-ERIAN, supported by Mr. KHOMAN, urged that the word "protocol" be substituted for the words "precedence and etiquette".

*It was agreed that no action could be taken on that proposal at the current session.*

#### COMMENTARY ON ARTICLE 14

23. Mr. LIANG, Secretary to the Commission, pointed out that the principle of the equality of representatives of States applied to other matters than privileges and

immunities. He accordingly suggested either omitting the relative clause in the second sentence or substituting the words "*inter alia*" for the words "which is what this article states".

24. Mr. YOKOTA suggested inserting the word "functions", before the words "privileges and immunities."

25. Mr. TUNKIN said that he had misgivings regarding the commentary as a whole and, in particular, the last sentence. Since it did not shed much light on the article, it might well be deleted.

26. Mr. SANDSTRÖM, Special Rapporteur, said he had no objection to Mr. Tunkin's proposal.

*After further discussion it was agreed to replace the commentary by the statement "This article calls for no comment".*

#### SECTION II. DIPLOMATIC PRIVILEGES AND IMMUNITIES

##### *Paragraphs 1 to 3*

27. Mr. TUNKIN said that he was in favour of omitting the first three introductory paragraphs. The description of the various theories regarding the basis of privileges and immunities was not necessary, and, being very concise, was open to the criticism that it did not do them full justice.

28. Mr. SANDSTRÖM, Special Rapporteur, explained that, after some hesitation, he had decided to include a theoretical introduction because, the Commission having settled certain problems in the light of the theory of "functional necessity", some reference to that theory, at least, seemed to be called for.

29. Sir Gerald FITZMAURICE observed that the Commission was showing a tendency to omit from the commentary everything which might be of the slightest interest to the reader. He would like to retain the introductory paragraphs, although paragraph 3 might be amended, or even deleted, if that was the part to which some members of the Commission objected.

30. Mr. SPIROPOULOS doubted the wisdom of including too much theory in a document addressed to Governments. Paragraphs 1 and 2 should be deleted, but it might be better to retain paragraph 3 with its reference to the theory of "functional necessity".

31. Mr. YOKOTA was in favour of retaining the whole text, especially as the Commission had discussed the possibility of including an article on the subject. Paragraph 3 was clearly necessary, since it appeared to be the Commission's view that, when disputes regarding privileges and immunities arose, they should be settled in the light of the needs of the functions. However, paragraph 3 would not be clear by itself.

32. Mr. EL-ERIAN recalled that he had proposed the inclusion of an article dealing with the basis of privileges and immunities with special reference to the "demands of the office" theory (383rd meeting, para. 31; 393rd meeting, para. 63), but had not pressed his proposal pending the preparation of an article defining the diplomatic function. It was not necessary to retain the first two paragraphs, but he was strongly in favour of retaining paragraph 3.

33. Mr. BARTOS considered it essential to retain the text as it stood in order to indicate that all three theo-

ries had been discussed, and to explain what the view of the majority of the Commission was.

34. Mr. MATINE-DAFTARY thought that the paragraphs could be retained in the draft to be submitted to Governments. Once the observations of Governments had been received the Commission could then reconsider whether their retention was necessary.

35. Mr. SPIROPOULOS considered that the text dealt too much with matters of remote historical interest, the question of the "dignity of the prince", for example. Moreover, he doubted whether the "representative character" theory had ever been invoked as a basis for the grant of immunities.

36. The CHAIRMAN put to the vote the question whether the first three paragraphs should be retained, subject to possible redrafting.

*The question was decided in the affirmative by 14 votes to none, with 5 abstentions.*

37. Mr. SPIROPOULOS explained that he had abstained because, although in favour of retaining paragraph 3, he wished to see the other two paragraphs deleted.

38. Mr. VERDROSS suggested that all that was needed was a simple statement that various theories had been formulated concerning the basis of privileges and immunities, but that the theory of "functional necessity" now prevailed.

39. The CHAIRMAN said that, if the theory of "extritoriality" were mentioned, it should be made clear that it had been abandoned.

40. Sir Gerald FITZMAURICE said that, though not opposed to asking the Special Rapporteur to redraft the paragraphs, he saw no real objection to the text as it stood. He could not agree that the theory of "extritoriality" had been entirely superseded. Though nobody supported the theory in its extreme form, certain elements of it still survived, particularly in connexion with the concept of *franchise de l'hôtel*. The method adopted by the Special Rapporteur was therefore a good one; he indicated that the theories of "extritoriality" and of "representative character" had been superseded but were not completely obsolete.

41. Mr. TUNKIN said that, since the three paragraphs were to be retained, it was essential to point out that privileges and immunities were based not only on "functional necessity" but also on the "representative character" of the mission.

42. Mr. SANDSTRÖM, Special Rapporteur, agreed with Mr. Tunkin on the latter point, but observed that the only privileges and immunities affected by the concept of the "representative character" of the mission were precisely those on which general practice gave some guidance. Paragraph 3, moreover, made it clear that the other two theories had had some influence on the formation of law on the subject.

43. Mr. AGO remarked that the last sentence in paragraph 1, which only mentioned the fact of a similarity of the situation in this respect among all countries, might give the impression that the privileges and immunities were entirely in the gift of the receiving State. He was in favour of deleting it and of inserting the word "customarily" between the words "have" and "enjoyed" in the preceding sentence.

44. With reference to paragraph 3, he did not think that the Commission had taken the theory of "functional necessity" as its basis only in seeking solutions to those problems on which practice gave no guidance. He was also in favour of deleting the word "uniform".

45. Mr. LIANG, Secretary to the Commission, agreed on the advisability of deleting the last sentence in paragraph 1, especially as the statement did not necessarily reflect the true position.

46. Referring to paragraph 2, he pointed out that it was an important part of the theory of "extritoriality" that the mission must be regarded not only as being outside the territory of the receiving State but also as constituting an extension of the territory of the sending State. Some reference to that fact should, he thought, be included.

47. He agreed with Mr. Spiropoulos that the safeguarding of the "dignity of the prince" had ceased to be a relevant consideration. Perhaps rather less space could be devoted to the "representative character" theory, since it was even less defensible than the theory of "extritoriality". On the other hand, more might be made of the theory of "functional necessity". If the text did not give a convincing exposition of the various theories, it would be better not to include it at all. Incidentally, a better term than "functional necessity" might be found to describe the theory in question.

48. The CHAIRMAN proposed that the Special Rapporteur be requested to redraft the three paragraphs in the light of the discussion, and more particularly of the points made by Mr. Ago and the Secretary.

49. Speaking as a member of the Commission, Mr. Zourek said that he could not agree with Sir Gerald Fitzmaurice regarding the theory of "extritoriality". *Franchise de l'hôtel* was based on the other two theories as well, as could be seen from certain national regulations.

*It was agreed that the three paragraphs be redrafted on the lines indicated.*

#### Paragraph 4

50. Mr. SANDSTRÖM, Special Rapporteur, suggested that the third group of privileges and immunities should be described as "personal privileges and immunities", instead of "those relating to the staff of the mission".

51. Mr. TUNKIN, proposed that the number of groups listed be reduced to two, namely:

"(i) those relating to the premises and archives of the mission and to its work,

"(ii) those relating to the staff of the mission."

52. The CHAIRMAN remarked that such had been the original arrangement of the articles, but the division into three groups had developed in the course of the discussion (383rd and 384th meetings).

53. Sir Gerald FITZMAURICE said he was in favour of retaining the three distinct groups. Although only two groups, i.e. premises and persons, were required for the question of immunity from jurisdiction, there were a number of privileges and immunities, such as freedom of communication, which related specifically to the work of the mission and involved considerations of quite a different order.

54. Mr. YOKOTA supported Sir Gerald Fitzmaurice and pointed out that a reduction to two groups would involve changing the entire presentation of section II.

55. Mr. TUNKIN said that he would not press his proposal.

*Paragraph 4 was adopted.*

*Sub-section A. Mission premises and archives*

#### ARTICLE 15

56. Mr. KHOMAN observed that the precise implication of the words "ensure adequate accommodation" was not clear. It was hardly the duty of the sending State actually to provide accommodation. Perhaps it would be better to say "provide facilities for the mission to obtain adequate accommodation".

57. Mr. FRANÇOIS said that he had some misgivings regarding both the article and the commentary. The only time when it was obligatory for the receiving State to ensure accommodation for the mission was when the receiving State's own laws and regulations prevented the mission from acquiring the necessary premises. But apart from that extreme case, there was the more important question of what was to be done when a housing shortage made it practically impossible for a mission to obtain suitable premises. It would be going rather far to say that it was obligatory for the receiving State to ensure accommodation in such cases; it was merely bound to lend its good offices to see that the mission obtained premises. Perhaps an addition to the commentary on those lines would meet Mr. Khoman's point.

58. The CHAIRMAN pointed out that article 15 was a new article drafted by the Special Rapporteur in the light of the Commission's discussion.

*The text of article 15 was unanimously adopted.*

#### COMMENTARY ON ARTICLE 15

59. Mr. VERDROSS said that it was insufficient to say that the laws and regulations of the receiving State "may place difficulties" in the way of a mission. In the case envisaged they made it actually impossible for a mission to acquire the necessary premises.

*It was agreed that the commentary should be redrafted.*

#### ARTICLE 16

60. Mr. LIANG, Secretary to the Commission, wondered if it was really necessary to refer in paragraph 1 to the "agents and authorities" of the receiving State; he suggested that the words "and authorities" be deleted.

*It was so agreed.*

*The text of article 16, as amended, was adopted.*

#### COMMENTARY ON ARTICLE 16

*Paragraph 1 was adopted.*

*Paragraph 2 was adopted, subject to a number of minor drafting changes.*

61. Regarding a point raised by Mr. SANDSTRÖM, Special Rapporteur, concerning the English text of paragraph 3, Mr. LIANG, Secretary to the Commission, suggested that the paragraph should be amended so as to avoid any implication that the sending State might wish to prevent the receiving State from using,

for the purposes indicated, the land on which the premises of the mission were situated.

62. Mr. SPIROPOULOS suggested that that could be done by replacing the words "gives the sending State the right" by "could have as a result".

63. Mr. PAL, Chairman of the Drafting Committee, thought it should be made perfectly clear that the case referred to did not constitute an exception to the principle of inviolability of mission premises.

64. Mr. LIANG, Secretary to the Commission, suggested that Mr. Pal's point could be met, at least in part, if at the beginning of the second sentence some indication were provided that what followed did not relate to immunity from search, attachment or execution, but only to immunity from requisition.

*It was agreed that the Special Rapporteur should submit a redraft of paragraph 3 in the light of the discussion.*

65. Mr. SANDSTRÖM, Special Rapporteur, proposed that the following paragraph be added to the commentary on article 16:

"4. In connexion with the '*franchise de l'hôtel*' of the head of the mission, it is sometimes stated that 'the head of the mission may have in his residence a chapel of the faith to which he belongs'.\* The inviolability of the premises of the mission undoubtedly includes freedom of private worship, and nowadays it can hardly be disputed that the head of the mission and his family, together with all members of the staff of the mission and their families, may exercise this right, and that the premises may contain a chapel for the purpose. It was not thought necessary to insert a provision to this effect in the draft.

*The proposal was adopted.*

#### ARTICLE 17

*The text of article 17 was adopted.*

#### COMMENTARY ON ARTICLE 17

66. Mr. SANDSTRÖM, Special Rapporteur, proposed that the text of the commentary be replaced by the following: "This article requires no commentary".

*It was so agreed.*

#### ARTICLE 18

*The text of article 18 was adopted.*

#### COMMENTARY ON ARTICLE 18

*The commentary was adopted.*

*Sub-section B. Facilitation of the work of the mission, freedom of movement and communication*

#### ARTICLE 19

67. With reference to an observation by the CHAIRMAN regarding the heading of article 19, Mr. BAR-TOS suggested that the article be divided into two, one relating to the facilities for the performance of the mission's functions, and the other to freedom of movement.

*It was so agreed.*

\* Article 8 of the resolution adopted in 1929 by the *Institut de droit international* [Harvard Law School, *Research in International Law, I. Diplomatic Privileges and Immunities* (Cambridge, Mass., 1932), pp. 186 and 187.]

68. Regarding the provisions relating to freedom of movement, Mr. EL-ERIAN thought that the Commission's intention had been rather to say that the receiving State should ensure to all the members of the mission such freedom of movement and travel in its territory as was compatible not only with national security but also with its laws. He recalled that he had pointed out that national security was not the only consideration involved (400th meeting, para. 57); a State might, for example, wish to prohibit access to certain sacred places.

69. Sir Gerald FITZMAURICE feared that if the provision were amended as suggested by Mr. El-Erian, the receiving State would be able to whittle away all freedom of movement by enacting laws deliberately framed to that effect.

70. Mr. EL-ERIAN said that, though he was not convinced, he would not press the point.

*The text of article 19 was adopted.*

#### COMMENTARY ON ARTICLE 19

71. Mr. TUNKIN proposed that in order to bring them more into line with the text of the article, the last three sentences should be amended to read as follows:

"This freedom of movement is subject to the laws and regulations of the receiving State concerning zones entry into which is prohibited or regulated for reasons of national security."

72. Sir Gerald FITZMAURICE said he had no objection to the substitution of that text for the penultimate and ante-penultimate sentences, provided the last sentence was retained.

73. Mr. TUNKIN said that in his view the last sentence was not necessary, for the reasons he had given previously (400th meeting, paras. 38-41, and 49 and 50).

74. Mr. SCALLE said that he agreed with Sir Gerald Fitzmaurice that the last sentence expressed exactly what the Commission had had in mind.

75. The CHAIRMAN put to the vote the proposal to retain the last sentence in addition to the text proposed by Mr. Tunkin.

*The proposal was adopted by 14 votes to 1, with 2 abstentions.*

*Subject to the substitution of the text proposed by Mr. Tunkin for the penultimate and ante-penultimate sentences, the commentary on article 19 was adopted.*

#### ARTICLE 20

*The text of article 20 was adopted.*

#### COMMENTARY ON ARTICLE 20

76. In the penultimate sentence of paragraph 1, Mr. KHOMAN suggested that the term "wireless broadcasting station" be replaced by "wireless transmitter" or whatever term was used in the International Telecommunication Convention.

*It was so agreed.*

77. With regard to a point raised by Sir Gerald FITZMAURICE concerning the last sentence of the same paragraph, Mr. EDMONDS proposed that the sen-

tence be amended to read: "If the regulations applicable to all users of such communications are observed, such permission should not be refused."

78. Mr. EL-ERIAN proposed that the whole sentence be deleted, since it did not correspond to any decision reached by the Commission.

79. Sir Gerald FITZMAURICE said he must oppose Mr. El-Erian's proposal, since the use of wireless was nowadays an essential part of diplomatic communications. Even if the Commission had not formally agreed to the principle laid down in the last sentence, he did not see how it could deny it, seeing that almost every mission had a wireless transmitter.

80. Mr. SANDSTRÖM, Special Rapporteur, agreeing, said that the only reason why it was necessary for the mission to apply to the receiving State was in order to be allocated a wave-length which did not clash with that used by other transmitters.

81. Mr. EL-ERIAN said he was by no means sure that the great majority of diplomatic missions really used wireless transmitters.

82. He recalled that when the Commission had agreed to insert the words "all appropriate means" in paragraph 1 of article 20, he and various other members of the Commission had made certain reservations (398th meeting, paras. 62-83). There had been no agreement to the effect that permission for the operation of a wireless transmitter should not be refused, subject only to observance of certain technical conditions.

*Mr. El-Erian's proposal for deletion of the last sentence of paragraph 1 was rejected by 6 votes to 5 with 7 abstentions.*

*Paragraph 1 was adopted by 15 votes to none with 4 abstentions, subject to the last sentence being amended as proposed by Mr. Edmonds (para. 77 above).*

83. Mr. TUNKIN proposed that the last sentence of paragraph 2 should also be deleted, because it was unnecessary in view of the preceding sentence and was not in accordance with the general form of the draft, which concerned the obligations of States, not of individuals.

*Mr. Tunkin's proposal was adopted.*

*Paragraph 2, as amended, was adopted.*

84. Mr. LIANG, Secretary to the Commission, suggested that the words "in certain countries" be deleted from the first sentence of paragraph 3.

*It was so agreed.*

85. Mr. TUNKIN felt that the whole paragraph was not in harmony with the general trend of the Commission's discussion, nor with the basic concepts that were manifest in the commentaries on the other articles. The inviolability of the diplomatic bag should not be made conditional on its containing only diplomatic documents or articles intended for official use. If difficulties arose as a result of the bag being used for improper purposes, they should be settled through diplomatic channels and not used as a pretext for opening the bag.

86. Sir Gerald FITZMAURICE suggested that Mr. Tunkin's perfectly valid objection might be met by amending the second sentence to read: "While recognizing that States have been led to take such measures in exceptional cases where there were serious grounds...".

87. Mr. TUNKIN said that that suggestion certainly improved the text, but that he was still sceptical about the intent of the paragraph as a whole.

88. Mr. BARTOS recalled that the whole question had been discussed at length, and that the Commission had finally adopted a proposal that it should be referred to in the commentary (399th meeting, para. 56). It could not now delete paragraph 3 without going back on that decision.

89. Sir Gerald FITZMAURICE agreed that it was desirable to retain some reference to a question on which public opinion in many countries felt very strongly.

90. The CHAIRMAN suggested that the Rapporteur of the Commission and the Special Rapporteur submit a redraft of paragraph 3.

*It was so agreed.*

91. The CHAIRMAN suggested that the words "normally, courier's papers" be inserted after the words "a document testifying to his status" in paragraph 4.

*It was so agreed.*

*Paragraph 4 was adopted.*

*Sub-section C. Personal privileges and immunities*

*1. Diplomatic agents other than those having local nationality*

92. Mr. SANDSTRÖM, Special Rapporteur, proposed that the following sentence be inserted immediately after the heading "Diplomatic agents other than those having local nationality":

"For the purposes of the present draft articles, the term 'diplomatic agent' shall denote the head of the mission and members of the diplomatic staff of the mission (article 21, paragraph 2)".

That was the text of article 21, paragraph 2, which had not yet been approved by the Commission, but, for clarity's sake, he thought it desirable that it should also be inserted in the introductory comments on sub-section C.

*It was so agreed.*

93. Mr. TUNKIN felt that the heading "Diplomatic agents other than those having local nationality" gave the impression that diplomatic agents having local nationality were of at least equal, if not greater, importance, instead of being an insignificant minority. There was no reason for the heading at all, for if it were deleted, articles 21 to 28 would be understood to lay down the rules applicable to diplomatic agents generally, while article 29 would be understood as being in the nature of *lex specialis*, an exception to the general rule.

94. Mr. EL-ERIAN and Mr. AMADO associated themselves with Mr. Tunkin's remarks.

The meeting rose at 1.5 p.m.

## 426th MEETING

*Tuesday, 25 June 1957, at 3.30 p.m.*

*Chairman: Mr. Jaroslav ZOUREK.*

### Consideration of the Commission's draft report covering the work of its ninth session (A/CN.4/L.70 and Add.1 to 3) (continued)

#### CHAPTER II: DIPLOMATIC INTERCOURSE AND IMMUNITIES (A/CN.4/L.70/ADD.1) (continued)

#### II. DRAFT ARTICLES CONCERNING DIPLOMATIC INTERCOURSE AND IMMUNITIES (continued)

#### SECTION II. DIPLOMATIC PRIVILEGES AND IMMUNITIES (continued)

##### Sub-section C. Personal privileges and immunities (continued)

##### 1. Diplomatic agents other than those having local nationality (continued)

1. The CHAIRMAN recalled that at the previous meeting Mr. Tunkin had suggested that the heading "Diplomatic agents other than those having local nationality" could well be deleted.

2. Mr. LIANG, Secretary to the Commission, suggested that it be replaced by the heading "Foreign diplomatic agents".

3. Mr. SANDSTRÖM, Special Rapporteur, observed that, though that wording was not ideal, it was convenient and might well be adopted.

4. Mr. BARTOS said the term "Foreign diplomatic agents", in its French rendering at least, was ambiguous, for it could apply equally to agents of foreign nationality and to agents in the service of a foreign State.

5. Mr. AGO said that, as already pointed out by Mr. Tunkin, there was a special article, article 29, dealing with diplomatic agents who were nationals of the receiving State, and he thought it could therefore be assumed without explanation that the provisions of articles 21 to 28 applied to foreign diplomatic agents.

6. He therefore suggested that both the first heading under sub-section C and the introductory paragraph which followed it should be deleted.

*It was so agreed.*

7. Sir Gerald FITZMAURICE, Rapporteur, suggested that the remaining headings in sub-section C corresponding to that just deleted should be made the headings for the relevant articles.

*It was so agreed.*

#### ARTICLE 21

*Paragraph 1 was adopted.*

*Paragraph 2 was adopted.*

#### COMMENTARY ON ARTICLE 21

8. Mr. VERDROSS, referring to the last sentence, suggested that it was inappropriate to describe inviolability as an "abstract principle". The principle of inviolability was generally accepted and applied in prac-

tice, while "self-defence" and "measures to prevent the diplomatic agent from committing crimes or offences" were simply exceptions to the application of the principle.

9. Mr. SANDSTRÖM, Special Rapporteur, said that the purpose of that sentence was to indicate that a diplomatic agent might not always be able to claim inviolability.

10. Mr. VERDROSS conceded that some such reservation might be necessary, but insisted that the mode of expression was logically unsound.

11. Mr. LIANG, Secretary to the Commission, suggested that the first and last sentences should be reworded as follows:

"This article confirms the principle of the personal inviolability of the diplomatic agent."

and

"This principle does not exclude either self-defence or, in exceptional circumstances, measures to prevent the diplomatic agent from committing crimes or offences."

*It was so agreed.*

*The commentary, as amended, was adopted.*

#### ARTICLE 22

*Paragraph 1 was adopted.*

*Paragraph 2 was adopted.*

#### COMMENTARY ON ARTICLE 22

12. Sir Gerald FITZMAURICE pointed out that article 22 dealt exclusively with the inviolability of residence and property, and proposed the deletion of the last sentence of the commentary.

*It was so decided.*

*The commentary, as amended, was adopted.*

#### ARTICLE 23

13. Mr. EL-ERIAN proposed the deletion of the words "of foreign nationality" at the beginning of paragraph 1.

*It was so decided.*

14. The CHAIRMAN proposed that in the French text of sub-paragraph (b) the word "*testamentaire*" should be added after "*exécuteur*" to reproduce the distinction between "executor" and "administrator" in the English text.

15. Mr. BARTOS objected that the term "*exécuteur testamentaire*" had a restricted sense and was not applicable to the case in point.

16. Mr. LIANG, Secretary to the Commission, pointed out that the difficulty in reconciling the French and English texts arose from differences between the legal systems of various countries. In the United Kingdom, an administrator was appointed by the court in cases where a deceased person had not nominated an executor, but there was no corresponding institution in France. The problem was to find a form of words which could be applied equally to different legal systems.

17. The CHAIRMAN observed that that was a problem of comparative law, and suggested that the Commis-

sion defer further consideration of paragraph 1 until it had an opportunity of consulting Mr. Scelle.

*It was so agreed.*

18. Mr. BARTOS objected to the wording of paragraph 2 and asked if there were good grounds for altering the original wording, namely, "A diplomatic agent is exempted from giving evidence".

19. Mr. TUNKIN, supporting Mr. Bartos's objection, pointed out that, according to the present wording, even though no compulsion could be brought to bear upon him, a diplomatic agent might be under a legal obligation to give evidence.

*It was agreed that the word "compelled" be replaced by the word "obliged".*

*Paragraph 2, as amended, was adopted.*

20. Mr. LIANG, Secretary to the Commission, thought the English text of paragraph 3 was confusing, due to the occurrence of the words "subjected" and "subject" so close together in the same sentence.

21. He also thought it would be desirable to list the circumstances in which the diplomatic agent was subject to the jurisdiction of the receiving State, namely, those described in sub-paragraphs (a), (b) and (c) of paragraph 1. He suggested, therefore, that the words "in accordance with the provisions of sub-paragraphs (a), (b) and (c) of paragraph 1" should be inserted after the words "receiving State".

22. Sir Gerald FITZMAURICE agreed that the meaning of paragraph 3 was perhaps obscured by the use of the words "subjected" and "subject".

23. Both the Secretary's points would be met if the phrase "except in cases where he is subject to the jurisdiction of the receiving State" were replaced by "except in the cases coming under sub-paragraphs (a), (b) and (c) of paragraph 1".

*It was so agreed.*

*Paragraph 3, as amended, was adopted.*

*Paragraph 4 was adopted.*

24. The CHAIRMAN recalled that Mr. Ago had drawn attention to a fourth case in which a diplomatic agent could not claim immunity from the civil jurisdiction of the receiving State, namely, the case of counter-claims directly connected with the diplomatic agent's principal claim (406th meeting, paras. 11 to 13). In the draft under consideration there was a reference to the case of counter-claims both in paragraph 6 of the commentary to article 23 and in paragraph 3 of article 24. A decision must be taken as to whether the provision relating to counter-claims should be placed in article 23 or in article 24.

*It was agreed to place the provision relating to counter-claims in article 24, and to amend the text of paragraph 3 of that article accordingly.*

#### COMMENTARY ON ARTICLE 23

25. Mr. TUNKIN thought the wording of the second and third sentences of paragraph 1 was not especially felicitous. The second sentence in particular was far too wide in scope, for there were some laws to which diplomatic agents were not subject at all.

26. The CHAIRMAN, speaking as a member of the Commission, pointed out, in support of Mr. Tunkin's

view, that diplomatic agents were not subject to the laws of the receiving State which made personal service compulsory, in the case, for instance, of a public disaster. The principle expressed in the second sentence of the commentary was sound, but some revision of the wording was obviously required.

27. Mr. BARTOS recalled that, when the problem had been discussed at an earlier meeting, he had advocated that the words "insofar as international law may require" should be inserted in the second sentence after the words "receiving State". It was quite clear that diplomatic agents were not subject to laws imposing personal service on the inhabitants of a country.

28. He agreed with the Chairman that the principle expressed in paragraph 1 of the commentary was sound; the Rapporteur of the Commission and the Special Rapporteur should be asked to redraft the second sentence in a more precise form.

29. Mr. SANDSTRÖM, Special Rapporteur, observed that article 32 of the draft contained a provision regarding the duty of diplomatic agents to comply with the laws and regulations of the receiving State. He suggested therefore that one remedy might be to insert the words "(article 32)" after the words "receiving State" in the second sentence.

*It was agreed that paragraph 1 should be redrafted in the light of the discussion.*

*Paragraph 2 was adopted.*

30. With regard to paragraph 3, Mr. FRANÇOIS suggested the deletion of the end of the paragraph, after the words "for the purposes of the mission". Inclusion of those final phrases might give the impression that it was only in the case envisaged that a diplomatic agent could claim immunity in respect of his property.

*It was so agreed.*

31. Mr. AGO suggested a small drafting change at the beginning of the paragraph, namely, that the word "private" should be deleted and the words "of the diplomatic agent" should be replaced by the words "belonging to the diplomatic agent personally".

*It was so agreed.*

*Paragraph 3, as amended, was adopted.*

32. Mr. AGO stated that he was still in doubt as to what was meant by the phrase "relating to a succession there" in the first sentence of paragraph 4, and asked if it referred to a succession to property situated in the receiving State, or to a succession to which there was an entitlement in the receiving State. The phrase concerning the requirement of "the presence of the diplomatic agent" was also ambiguous. With reference to the second sentence, he pointed out that the issue was not whether the proceedings could be held in abeyance, but whether they could be held at all. He suggested therefore that the second sentence should be deleted.

33. Mr. FRANÇOIS suggested that the word "there", following "succession", be deleted.

34. Sir Gerald FITZMAURICE found the phrase "which require the presence of the diplomatic agent" difficult to follow. He suggested its replacement by the phrase "in which the diplomatic agent is concerned".

35. Mr. LIANG, Secretary to the Commission, agreed that the word "presence" was confusing, particularly

since it had been stated in an earlier paragraph of the commentary that a diplomatic agent could not be brought before the courts against his will. He believed that the intention was to refer to proceedings in which the diplomatic agent was a party.

36. Mr. SANDSTRÖM, Special Rapporteur, suggested that paragraph 4 be amended to read:

"The second exception arises in the case of proceedings against the diplomatic agent relating to a succession, whether he is involved as executor or administrator of the will or as heir or legatee."

37. Sir Gerald FITZMAURICE wondered whether the exception really was limited to the case of proceedings against the diplomatic agent. For example, if a will was contested, it might be necessary to cite a large number of persons with a potential interest, and the diplomatic agent might be amongst them, but that could not be regarded as proceedings against him.

38. Mr. SANDSTRÖM, Special Rapporteur, suggested that he prepare a further redraft of paragraph 4, taking into account what Sir Gerald Fitzmaurice had said.

*It was so agreed.*

39. With regard to paragraph 5, Mr. TUNKIN pointed out that, although it might be true that the diplomatic agent himself should not engage in professional or commercial activities outside his official functions, the same could not be said of members of his family who were, however, assimilated to him by virtue of article 27. The second sentence of paragraph 5 should, therefore, be amended to read: "If the diplomatic agent engages in such an activity, those with whom . . ."

*It was so agreed.*

*Paragraph 5, as amended, was adopted.*

*Paragraph 6 was adopted.*

40. Sir Gerald FITZMAURICE and Mr. BARTOS proposed that in paragraph 7 the words "evidence in writing" be replaced by "written or oral testimony".

*It was so agreed.*

*Paragraph 7, as amended, was adopted.*

*Paragraph 8 was adopted.*

41. Mr. FRANÇOIS said that the last sentence of paragraph 9 implied that it was for Governments to take action in order that diplomatic agents should retain a domicile in the sending State. In his view, that was rather a matter of international law and the responsibility, therefore, rested primarily with the Commission.

42. Mr. TUNKIN pointed out that in the preceding sentence it seemed inappropriate, to say the least, to speak of "the drawbacks" of the diplomatic agent's immunity from jurisdiction. The last two sentences might well be deleted since the first three said all that was necessary.

43. Mr. SANDSTRÖM, Special Rapporteur, said he feared that without the last two sentences it might be thought that the text proposed by the Commission removed all existing difficulties, whereas, in fact, it did not. It did not cover the case where the diplomatic agent had not retained domicile in the sending State and

he saw no reason why the Commission should not suggest that all States might ensure that their diplomatic agents retained a domicile within their own territory. What he had in mind was some system such as that used in his own country, where all diplomats on service abroad had fictitious domicile in a certain parish of Stockholm so that they were subject to the jurisdiction of the Swedish courts.

44. Mr. BARTOS felt it was at any rate essential to delete the second part of the last sentence since domicile was no longer the important matter it had once been in determining the competence of courts.

*After further discussion it was agreed to delete the end of the last sentence, after the word "further".*

45. Mr. BARTOS also proposed the deletion of the end of the first sentence, which read: "but one condition of his being amenable to the courts of that country is that they should be competent to try a case like the one concerned under the country's laws".

46. Mr. FRANCOIS and Mr. SANDSTRÖM, Special Rapporteur, felt that those words were essential since they showed that the Commission's aim was to provide for the case where no competent court had been designated in the sending State.

47. The CHAIRMAN said that there was no question about the principle that the diplomatic agent remained subject to the jurisdiction of the sending State. If, however, the sending State had neglected to designate a competent court, such jurisdiction remained without effect.

48. Mr. BARTOS said that the first sentence laid down the principle, while the third sentence covered the case where the sending State had omitted to designate a competent court within its territory—the case dealt with in the second sentence of paragraph 4 of the article. He would not, however, insist on his proposal if other members of the Commission did not agree with him.

49. Sir Gerald FITZMAURICE, replying to a remark by Mr. EDMONDS, said there had never been any intention of making a diplomatic agent's immunity in a receiving State conditional on his being amenable to the courts of the sending State.

*It was agreed that the Special Rapporteur should prepare a redraft of the first part of paragraph 9 in the light of Mr. Bartos's remarks.*

#### ARTICLE 24

50. Mr. AGO proposed the insertion of the words "of its diplomatic agents", in paragraph 1, in order to make it quite clear that the paragraph did not refer to the State's own immunity from jurisdiction.

51. In paragraph 2, the statement in the French text that the waiver must "*émaner*" from the sending State did not make it clear whether the waiver must always come directly from the Government of the sending State, or whether it might be made through the diplomatic agent himself.

52. Paragraph 3, unlike paragraph 2, did not say from whom the waiver must come. He presumed that in the case of the head of mission the waiver must be made by his Government, but that the immunity from jurisdiction of other members of the mission could be waived by the head of the mission himself.

53. Sir Gerald FITZMAURICE remarked that, in the English text, Mr. Ago's first two points were obvious from the context.

54. As for paragraph 3, the Drafting Committee had decided to express it in rather vague terms because of the difficulty of framing a satisfactory detailed provision. It was an essential point that immunity from civil proceedings could be waived by the diplomatic agent himself, the assumption being that he did so with the consent either of his Government or of the head of the mission. He knew of no instance, however, of the question whether the diplomatic agent had obtained such consent having been raised in court.

55. The CHAIRMAN suggested that the first three paragraphs of the article might be redrafted so as to state in the first that the waiver must come from the Government of the sending State, in the second that it must be made expressly in the case of criminal proceedings, and in the third that it might be express or implied in the case of civil proceedings.

56. Mr. AGO thought that that would be going too far.

57. Mr. LIANG, Secretary to the Commission, did not see how paragraph 1 could possibly be interpreted as applying to the immunity of the State itself. If Mr. Ago's amendment were adopted, however, it should be added to both the English and the French texts.

*It was agreed to insert the words "of its diplomatic agents" in paragraph 1.*

58. Mr. AGO supported the insertion of the word "always" after the words "waiver must" in the second paragraph, not because the sense required it, but in order to bring out the contrast with the following paragraph where the waiver need not always be express.

*It was so agreed.*

The meeting rose at 6.5 p.m.

### 427th MEETING

*Wednesday, 26 June 1957, at 3 p.m.*

*Chairman: Mr. Jaroslav ZOUREK.*

#### Consideration of the Commission's draft report covering the work of its ninth session (A/CN.4/L.70 and Add.1 to 3 (continued))

##### CHAPTER II: DIPLOMATIC INTERCOURSE AND IMMUNITIES (A/CN.4/L.70/ADD.1) (continued)

##### II. DRAFT ARTICLES CONCERNING DIPLOMATIC INTERCOURSE AND IMMUNITIES (continued)

##### SECTION II. DIPLOMATIC PRIVILEGES AND IMMUNITIES (continued)

##### Sub-section C. Personal privileges and immunities (continued)

#### ARTICLE 24 (continued)

1. The CHAIRMAN said that, in the light of the discussion at the previous meeting on article 23, paragraph 1, the Special Rapporteur suggested that the second

sentence of article 24, paragraph 3, should be amended to read simply: "An implied waiver is presumed to have occurred if a diplomatic agent appears as defendant without claiming any immunity".

*It was so agreed.*

*Subject to the above amendment, to the amendments adopted at the previous meeting, and to one minor drafting change in paragraph 4, the text of article 24 was adopted.*

#### Commentary on article 24

*Paragraphs 1 to 4 of the commentary were adopted subject to a number of minor drafting changes.*

2. Mr. VERDROSS suggested the deletion of paragraph 5. It went without saying that the general rules governing interpretation of declarations by States were applicable.

*It was so agreed.*

#### ARTICLE 25

3. Mr. KHOMAN suggested that the word "governmental" at the beginning of the text be replaced by "national".

*It was so agreed.*

*The text of article 25, as amended, was adopted.*

#### COMMENTARY ON ARTICLE 25

4. Mr. TUNKIN pointed out that it would be more in accordance with the text of the article if the first sentence of paragraph 1 were amended to read somewhat as follows:

"The general practice is to grant a diplomatic agent exemption from dues and taxes with certain exceptions, which are listed in the text of the article."

5. The last sentence should also be deleted since several countries granted diplomatic agents exemption from, for example, indirect taxes without making the exemption subject to reciprocity.

6. The CHAIRMAN thought it might be desirable to say something on the lines of the last sentence, but agreed that the words "subject to reciprocity" should be deleted.

7. He suggested that the Special Rapporteur should submit a redraft of paragraph 1 in the light of Mr. Tunkin's remarks.

*It was so agreed.*

8. Mr. LIANG (Secretary to the Commission) suggested with regard to paragraph 2 that a clearer wording than "the heading under which the charge is levied" might perhaps be found. He also felt that the words "the service must actually have been rendered" were unduly restrictive; in certain instances the charge could be levied in advance of the service being rendered, as in the case of a telephone subscription.

9. Mr. SCALLE suggested that it might be sufficient if paragraph 2 were amended to read simply:

"The Commission's intention in wording subparagraph (e) was to indicate that the charge must be in payment for a specific service, rendered or to be rendered."

*It was so agreed.*

#### ARTICLE 26

10. Mr. KHOMAN felt it was desirable that in subparagraph (b) of paragraph 1 some better French rendering of the English words: "belonging to his household" should be found than "*appartenant à son ménage*".

11. Mr. AMADO agreed that the expression used in the French text was most inelegant. He could not really see the force of the objections to the commonplace expression "*vivant sous le même toit*"; although it did not perhaps cover every case, no difficulties would arise provided it was interpreted in a reasonably liberal way. In any case "*faisant partie de son ménage*" would be less objectionable than "*appartenant à son ménage*".

12. Sir Gerald FITZMAURICE, Rapporteur of the Commission, said that in the English text at least, "belonging to his household" was infinitely better than "living under the same roof".

13. The CHAIRMAN suggested that the English text be retained and that some more elegant way be sought of rendering it in French.

*It was so agreed.*

14. Mr. FRANÇOIS said he regretted that he had been absent during the discussion of article 26, and wondered whether the Commission fully realized the implications of the words: "or articles the import or export of which is prohibited by the law of the receiving State" which appeared in paragraph 2. It followed logically from the text that an ambassador could not, for example, import a drug such as heroin whose import was prohibited by the law of the receiving State, even though he had a prescription for it from his doctor in the sending State. Many other examples came to mind where the text of paragraph 2 appeared to be directly contrary to accepted practice.

15. Sir Gerald FITZMAURICE, Rapporteur, thought that Mr. François had drawn attention to an important point. There were many countries which prohibited the import, for example, of certain plants, of bullion or of explosives. To take the example referred to by Mr. François, it would clearly be intolerable to a country which prohibited the import of heroin if diplomatic baggage were used for wholesale importation of the drug; but, as Mr. François had pointed out, it would be quite contrary to existing practice if the ambassador were prevented from importing for his own personal use proprietary medicines containing that drug. It might be preferable to say "or articles in circumstances in which their import or export is prohibited by the law of the receiving State or is permitted only subject to certain conditions".

16. Mr. AMADO said that the normal practice was for a diplomatic mission to refer the matter to the ministry of foreign affairs of the receiving State in all cases where one of its members or the mission itself wished to import prohibited goods.

17. Mr. BARTOS said that a distinction was usually made between accompanied and unaccompanied baggage. In the former case the normal practice was to take a diplomatic agent's word that his baggage contained no prohibited articles. In the latter case the same procedure was followed as for imported goods; an import licence was issued on the basis of a declaration sent to the ministry of foreign affairs of the receiving State.

ing State, whose customs officials could inspect the baggage to see that the contents corresponded to the declaration.

18. As regards prohibited goods generally, he recalled that in "prohibition" days diplomatic agents in the United States of America had been allowed to import a "reasonable quantity" of liquor. Similarly, the Fascist Government of Italy had at one time prohibited the import of publications printed in Serbo-Croat, but that prohibition had never been held to apply to printed matter addressed to the Yugoslav Ambassador. Again, certain countries prohibited the import of drugs that had not been tested by the national authorities, but ambassadors enjoyed exemption in that respect.

19. He proposed that the Commission should leave paragraph 2 as it stood, but refer in the commentary to the fact that a certain degree of latitude was allowed in that respect.

20. Mr. KHOMAN suggested that the scope of the paragraph could be restricted if the relevant words were amended to read: "or articles the import or export of which without special or prior permission is regarded by the law of the receiving State as a criminal offence".

21. Mr. FRANÇOIS pointed out that Mr. Khoman's suggestion did not meet his objection to the text of paragraph 2, which was much stricter than existing practice. If an ambassador wished to bring back with him, on his return from leave, certain drugs the import of which was prohibited, it was certainly not the existing practice for him to send them separately as goods; he just included them with his personal baggage, which was exempt from inspection.

22. The CHAIRMAN put to the vote Mr. Bartos's proposal that the text of paragraph 2 be left as it was, but that the Special Rapporteur be requested to make a suitable reference to the matter in the commentary.

*The proposal was adopted by 12 votes to 2 with 3 abstentions.*

*The text of article 26 was adopted, subject to the decision regarding the French text of paragraph 1 and to certain minor drafting changes.*

#### COMMENTARY ON ARTICLE 26

*Paragraph 1 was adopted.*

23. Mr. TUNKIN observed that paragraphs 2, 3 and 4 all related to personal effects; it would be clearer, therefore, if all three were merged in a single paragraph.

24. Regarding paragraph 4, moreover, he pointed out that the draft contained many provisions which were in the nature of progressive development, but that only in paragraph 4 was that fact stressed. He proposed that the paragraph be amended to read:

"In view of the wide-spread nature of these practices, the Commission considers that advantage should be taken of the present work of codification to suggest accepting them as rules of international law."

25. Mr. SANDSTRÖM, Special Rapporteur, suggested that he redraft the three paragraphs in the light of Mr. Tunkin's remarks.

*It was so agreed.*

26. Mr. BARTOS proposed that in paragraph 5 the word "reasonable" be inserted before the word "restrictions".

*It was so agreed.*

*Paragraph 5, as amended, was adopted.*

*Paragraph 6 was adopted.*

27. With regard to paragraph 7, Mr. BARTOS proposed that it should be stipulated that only a reasonable quantity of prohibited goods could be imported, and that they must be for the diplomatic agent's personal use.

28. Mr. LIANG, Secretary to the Commission, wondered whether the Special Rapporteur could agree to deleting the last sentence which was unnecessary and might be regarded as controversial.

29. Mr. KHOMAN felt that the entire paragraph was not in harmony with the text of paragraph 2 of the article.

30. Mr. PAL proposed that further consideration of paragraph 7 be deferred until the Special Rapporteur had submitted a revised text in the light of the decision that had been taken on the proposal of Mr. Bartos.

*It was so agreed.*

#### ARTICLE 27

31. Mr. KHOMAN suggested that the French title of the article be changed to "*Personnes bénéficiant de privilèges et immunités*".

*It was so agreed.*

32. Mr. TUNKIN suggested the addition of the words "apart from diplomatic agents" at the beginning of paragraph 1, in order to make it cover all persons entitled to privileges and immunities.

*It was so agreed.*

33. Mr. KHOMAN suggested that the words "*n'implique pas une gêne excessive pour*" in the French text of paragraph 3 be replaced by the words "*n'entrave pas d'une manière excessive*".

*It was so agreed.*

*The text of article 27, as amended, was adopted.*

#### COMMENTARY ON ARTICLE 27

34. Mr. SANDSTRÖM, Special Rapporteur, proposed the addition, at the end of paragraph 1, of the words "apart from that already mentioned".

*It was so agreed.*

*Paragraph 1, as amended, was adopted.*

35. Mr. TUNKIN said the meaning of the words "as a person on his own account" in paragraph 2 was not clear to him. Persons enjoyed privileges and immunities in their capacity as members of a diplomatic mission.

36. Mr. YOKOTA agreed with Mr. Tunkin. The sentence was neither clear nor necessary. He proposed its deletion.

37. Sir Gerald FITZMAURICE, Rapporteur, remarked that, although the idea might perhaps be better expressed, the sentence constituted an important link in the argument. After recalling the earlier discussion on the subject (407th meeting, paras. 85 to 91; 408th meeting, paras. 60 to 84), he proposed the following new wording:

"The answer to the question depends on whether it is regarded from the point of view of the work of the individual member or from that of the work of the mission as a whole."

*It was agreed that paragraph 2 should be redrafted in the light of the discussion.*

*Paragraphs 3, 4 and 5 were adopted.*

38. Mr. BARTOS proposed that the words "persons in the first group" at the beginning of paragraph 6 be replaced by the words "members of the administrative and technical staff" and that the words "by a majority vote" be inserted before the word "recommends" in the last sentence.

*It was so agreed.*

*Paragraph 6, as amended, was adopted.*

*Paragraph 7 was adopted.*

39. The CHAIRMAN suggested that the words "members of the groups" at the beginning of paragraph 8 be replaced by a specific reference to the categories of staff who enjoyed full privileges and immunities.

*It was so decided.*

40. Mr. LIANG, Secretary to the Commission, pointed out that it was not clear from the English text whether "close ties and special circumstances" in the last sentence but one were two separate qualifications or only one. The last sentence also was unsatisfactory; diplomatic protocol could not decide such matters, though the protocol section of the ministry of foreign affairs might frame rules on the subject.

*It was agreed to delete the last sentence and, in the last sentence but one, to substitute "necessary qualifications" for "a necessary qualification".*

*Paragraph 8, as amended, was adopted.*

41. Mr. SANDSTRÖM, Special Rapporteur, suggested the insertion of the words "in the case of those who are not nationals of the receiving State" after the words "dues and taxes" in paragraph 9.

*It was so agreed.*

42. Mr. YOKOTA pointed out that there were some States in which private servants did enjoy considerable privileges and immunities. He suggested that the words "should not enjoy" be replaced by "do not generally enjoy".

43. Mr. EL-ERIAN remarked that no point of theory was involved, but merely one of practice, and he, for one, was not at all clear as to the general practice of States in the matter.

44. He therefore suggested indicating that the Commission reserved its final position pending study of the observations of Governments.

45. Mr. LIANG, Secretary to the Commission, wondered whether the words "a majority of" at the beginning of the paragraph need be retained. On a number of more important points, the Commission had not indicated in its report that the decision had not been unanimous.

46. The CHAIRMAN, replying to Mr. El-Erain, pointed out that all the Commission's proposals on the subject of diplomatic intercourse and immunities were so far merely tentative, and that no final decision could be taken until the observations of Governments had been received. He thought it essential to include in the commentary some observation on paragraphs 3 and 4 of the article.

47. Sir Gerald FITZMAURICE, Rapporteur, suggested that the paragraph be redrafted to read:

"Paragraph 3 of the article is believed to reflect the existing law on the subject, but the matter is one on which the Commission would particularly welcome the comments of Governments."

48. Mr. TUNKIN considered the question not of sufficient importance to warrant a special invitation to Governments to comment on it.

49. Mr. PAL suggested inserting the words "as of right" between "they should not" and "enjoy any privileges or immunities".

50. Sir Gerald FITZMAURICE, Rapporteur, supported that proposal.

51. Mr. EL-ERIAN pointed out that some States attached much importance to the enjoyment of privileges and immunities by the private servants of the head of the mission at least, while others did not. In the absence of any clear principle, he would prefer the Commission to indicate that it reserved its final position.

52. Mr. SANDSTRÖM, Special Rapporteur, pointed out that the Commission had so far only issued a special invitation to Governments to comment where an article contained two alternatives. He agreed with Mr. Tunkin that to do so in the case in point would be attributing too much importance to the question.

53. The CHAIRMAN suggested leaving the text as it stood, except for the addition of the Special Rapporteur's amendment (para. 41 above).

54. After further discussion, Mr. EL-ERIAN withdrew his proposal.

*It was agreed that paragraph 9 should be redrafted in the light of the discussion.*

55. Mr. BARTOS considered that the second sentence in paragraph 10 did not give an entirely accurate reflection of the discussion on the question of diplomatic lists (411th meeting, paras. 6 to 23). Although the enjoyment of diplomatic privileges and immunities could not be made conditional on the formality of submitting a list of entitled persons, the fact remained that, without that formality, it was impossible for the local authorities to know whether a particular person enjoyed diplomatic immunities or not. He recalled in that connexion an incident involving an Ethiopian envoy who had recently arrived in the United States of America. The United States Government, though regretting the incident *in abstracto* claimed *in concreto* that its authorities could not be blamed, as the envoy had not notified his arrival and had no document to prove his diplomatic immunity. The presence of a person's name on a diplomatic list at least warranted the presumption that he was entitled to privileges and immunities.

56. Sir Gerald FITZMAURICE recalled that the question had been very fully discussed by the Commission, and that there was a considerable body of case law on the subject.

57. The English text of the second sentence in the paragraph should be amended so as to state that diplomatic lists could in no circumstances constitute conclusive evidence; they were obviously evidence of some sort, and no one denied that they were very useful. The point raised by Mr. Bartos was really covered by the last sentence of the paragraph.

58. Mr. BARTOS agreed that his point might be covered by the last sentence provided the words "and in that case only persons on the list can claim privileges and immunities" were added to it.

59. Mr. AGO remarked that the paragraph sought to deal with two distinct questions at once. The first and only real question was that of the value of the lists as evidence. The second, less important, question was that of the alleged obligation on missions to submit a list of members to the ministry of foreign affairs.

60. He suggested redrafting the beginning of the paragraph on the following lines:

"In connexion with this article, the Commission considered the value, as proof, of the lists of persons enjoying privileges and immunities normally submitted to the ministry of foreign affairs."

61. Mr. LIANG, Secretary to the Commission, thought it would be wiser to make no reference to the question of the obligation to submit lists. The last sentence in the paragraph need not be retained since the point was already covered by the previous sentence.

62. Mr. SANDSTRÖM, Special Rapporteur, said that although both questions covered in the paragraph had been raised during the discussion, there was no real reason why both should be referred to in the commentary. He therefore had no objection to Mr. Ago's proposal.

63. Mr. TUNKIN said that he could accept Mr. Ago's proposal with the addition of a sentence expressing Mr. Bartos's point that, when a person's name was on a diplomatic list, it might be presumed that he was entitled to privileges and immunities.

64. Mr. BARTOS said that he could accept Mr. Ago's proposal were it not for the fact that it appeared to assume that such lists would be submitted. It did not cover cases where no list had been submitted and the person had not been officially presented. There was, for example, no rule that the names of service staff should be submitted to the ministry of foreign affairs. In the event of incidents involving such staff, the impossibility of the local authorities' being aware that a person was privileged must prevail over the fact that he was legally entitled to privileges.

*It was agreed to redraft paragraph 10 in the light of the discussion.*

The meeting rose at 6.15 p.m.

## 428th MEETING

Thursday, 27 June 1957, at 9.30 a.m.

Chairman: Mr. Jaroslav ZOUREK

### Consideration of the Commission's draft report covering the work of its ninth session (A/CN.4/L.70 and Add.1 to 3) (continued)

#### CHAPTER II: DIPLOMATIC INTERCOURSE AND IMMUNITIES (A/CN.4/L.70/ADD.1) (continued)

##### II. DRAFT ARTICLES CONCERNING DIPLOMATIC INTERCOURSE AND IMMUNITIES (continued)

#### SECTION II. DIPLOMATIC PRIVILEGES AND IMMUNITIES (continued)

##### Sub-section C. Personal privileges and immunities (continued)

#### ARTICLE 28 AND COMMENTARY

1. The CHAIRMAN said that the terms in which the exception to the rule in the article was couched—"other than the child of one of its nationals"—appeared to suggest that diplomatic agents who were nationals of the receiving State were not themselves subject to its laws governing the acquisition of nationality. That was certainly not the Commission's intention.

2. Mr. AGO pointed out that, at any rate in the French text, the words quoted by the Chairman could also be interpreted to mean that a foreign diplomatic agent's child would come within the ambit of the local nationality laws if the other parent was a national of the receiving State. The case was common enough to warrant attention.

3. The article was also unsatisfactory in other respects. The Commission was solely concerned to avoid the possibility of the receiving State's nationality being imposed on a diplomatic agent's child by the operation of *jus soli*; but the case of the diplomatic agent who himself wished his child to have the receiving State's nationality should also be considered. He therefore proposed that the words "shall be subject to the laws of the receiving State" be replaced by "shall ever be obliged to acquire such nationality by virtue of the local laws".

4. Mr. BARTOS and Mr. FRANÇOIS both said they preferred the text in the draft report, since the child of a foreign diplomatic agent should not automatically acquire the receiving State's nationality by virtue of its laws, even if the parents were willing.

5. Mr. HSU thought that the scope of the words "no person enjoying diplomatic privileges and immunities" was not clear. Did they mean "no person enjoying the full diplomatic privileges and immunities enjoyed by diplomatic agents, administrative and service staff and their families", or did they mean "no person enjoying any of the privileges and immunities referred to in the draft"?

6. It seemed to him that the difficulties with which the Commission was faced were due to the attempt to draft the article in negative rather than in positive terms. He thought that it might be better to amend it to read as follows:

"A child born to members of a diplomatic mission other than nationals of the receiving State shall enjoy immunity from the operation of the nationality laws of the receiving State."

7. Mr. EL-ERIAN pointed out that, although the commentary was limited to the case of acquisition of nationality at birth *jure soli*—and that was, he thought, the only case the Commission had had in mind—the text of the article went much further and covered the case of the acquisition of nationality by naturalization or marriage. If the Commission really wished to broaden the scope of the article to that extent, it would clearly have to amend the commentary. In his view, however, it was sufficient to regulate the acquisition of nationality at birth, since the acquisition of nationality by naturalization entailed a voluntary act on the part of the

person concerned and the acquisition of nationality by marriage was almost always nowadays subject to his or her consent.

8. Mr. EL-ERIAN therefore proposed that the article be amended to read:

"In cases where nationality is conferred solely on the basis of *jus soli*, such nationality shall not be imposed on the child of persons enjoying diplomatic privileges and immunities other than . . . [the words chosen to express the exception, having regard to the remarks made by the Chairman and Mr. Ago, should be inserted here]."

9. Mr. AGO did not think it would be advisable to ignore the question of the acquisition of nationality by marriage. As more and more women entered the diplomatic service, more and more difficulties would arise on that account, so long as the nationality laws remained what they were.

10. Sir Gerald FITZMAURICE, Rapporteur of the Commission, said that the Drafting Committee had deliberately rejected the word "imposed" because it felt that would limit the article to cases where the receiving State imposed nationality by a specific act; in the great majority of cases nationality was acquired by the operation of an existing law.

11. He was by no means sure that the Commission had wished to confine itself to the acquisition of nationality at birth; it had certainly discussed the other two cases (411th meeting, paras. 46 to 53). In his view, diplomatic agents should be completely excluded from the operation of the receiving State's nationality laws. If a diplomatic agent wished to acquire the receiving State's nationality, either for himself or for his child, there was nothing to prevent him from applying to or his request being granted by the receiving State, subject to its laws.

12. Mr. AGO's first point could be simply met in the English text of the article by adding the words "not being the mother" after "the child of one of its nationals".

13. Mr. GARCÍA AMADOR said he agreed with those who thought the article should cover the case of marriage, but Mr. El-Erian was, of course, perfectly right in saying that in that event the commentary would have to be amended, possibly by the addition of some such sentence as the following: "It also seeks to prevent the compulsory acquisition of nationality as a result of subsequent marriage."

14. The CHAIRMAN, speaking as a member of the Commission, agreed with Mr. El-Erian that the wisest course would be to limit the article to the case of the acquisition of nationality at birth, as in the original draft article presented by the Special Rapporteur (A/CN.4/91, art. 26).

15. Speaking as Chairman, he suggested that the Rapporteur of the Commission and the Special Rapporteur together submit a redraft of article 28 and the commentary on it, in the light of the discussion.

*It was so agreed.*

#### ARTICLE 29

16. Mr. BARTOS recalled that he was, in principle, opposed to the practice of appointing diplomatic agents who were nationals of the receiving State. However, he

had no objection to the way in which article 29 was drafted.

*The text of article 29 was adopted.*

#### COMMENTARY ON ARTICLE 29

17. Mr. YOKOTA thought that the use of the word "responsibility" at the end of paragraph 1 suggested a legal responsibility. He suggested that the final clause be amended on the following lines: "others that he should enjoy only such privileges and immunities as the receiving State may grant him at the time of the *agrément*".

18. Mr. TUNKIN suggested that the Rapporteur and Special Rapporteur be asked to submit a redraft of paragraph 1, taking Mr. Yokota's observation into account.

*It was so agreed.*

19. Mr. MATINE-DAFTARY said that paragraph 2 referred to the majority view. It was only fair that it should also refer to the minority view that the whole practice of appointing diplomatic agents who were nationals of the receiving State should be eliminated.

*It was agreed that the Special Rapporteur should redraft paragraph 2 accordingly.*

20. Mr. SANDSTRÖM, Special Rapporteur, said he wished to withdraw the last sentence of paragraph 3, since it did not reflect exactly what he had in mind.

*Paragraph 3, as amended, was adopted.*

21. In reply to a point raised by Mr. LIANG, Secretary to the Commissioner, Mr. SANDSTRÖM, Special Rapporteur, suggested that the words "as is stated in article 21, paragraph 2", be inserted after the words "Attention is drawn to the fact that" at the beginning of paragraph 4.

*It was so agreed.*

*Paragraph 4, as amended, was adopted.*

*Paragraph 5 was adopted.*

#### ARTICLE 30

22. Replying to a question by Mr. MATINE-DAFTARY, the CHAIRMAN confirmed that the Commission's intention with regard to the second sentence of paragraph 2 of the article was that immunity should subsist indefinitely, since the acts concerned were not really private acts at all but acts of the sending State.

23. In the French text of the preceding sentence the words "*en cas de guerre*" should be replaced by "*en cas de conflit armé*", as elsewhere in the draft.

*It was so agreed.*

*The text of article 30 was adopted by 16 votes to none with 3 abstentions.*

#### COMMENTARY ON ARTICLE 30

*The commentary was adopted.*

#### ARTICLE 31

24. The CHAIRMAN suggested that the last two words of paragraph 1, "or return", could be deleted as unnecessary.

*It was so agreed.*

*The text of article 31, as amended, was adopted.*

## COMMENTARY ON ARTICLE 31

25. Mr. LIANG, Secretary to the Commission, and Sir Gerald FITZMAURICE, Rapporteur, suggested that the words "for a diplomatic agent or a diplomatic courier" be inserted after "it may be necessary" in paragraph 1.

*It was so agreed.*

*Paragraph 1, as amended, was adopted.*

26. The CHAIRMAN, replying to Mr. LIANG, Secretary to the Commission, said that, in his view, the second, third and fourth sentences of paragraph 2 could be deleted. They related to a matter that was not referred to in the text of the article, which was based on the assumption that the diplomatic agent had been granted free passage through the third State's territory; they were, therefore, unnecessary for the purpose of understanding the article. In addition there was an obvious contradiction between the third and fourth sentences.

27. Sir Gerald FITZMAURICE, Rapporteur, agreed that the problem dealt with in paragraph 2 did not arise directly out of the text of the article. None the less, he thought it desirable to make some mention of it, since it would clearly be a very grave matter for a third State to refuse free passage to a diplomatic agent proceeding to or from his post.

28. Mr. YOKOTA agreed with Sir Gerald Fitzmaurice and recalled that the problem had been discussed at length (401st meeting, paras. 46 to 82). If the text of the fourth sentence was felt to be open to objection, it could be amended to read: "On the other hand, a State is entitled to regulate the access of foreigners to its territory".

29. Mr. SPIROPOULOS also agreed with Sir Gerald Fitzmaurice and supported Mr. Yokota's suggestion.

30. Mr. LIANG, Secretary to the Commission, agreed that if the Commission intended to refer to the problem at all, it could not confine itself to the first and last sentences of paragraph 2. It might, however, prefer to delete all reference to the problem, in which case paragraph 2 would have to be deleted and paragraphs 1 and 3 amended accordingly.

31. Mr. EL-ERIAN agreed with the Chairman's objections to the text before them. It was most undesirable that the commentary should be used to lay down principles which were not reflected in the text of the articles. If it is desired to refer to the problem, all that the Commission could properly do was to link the second, third and fourth sentences together and preface them by some such words as: "This problem was discussed in the Commission. Certain members expressed the view that . . .". The final sentence could then be introduced by the word "However".

32. Mr. TUNKIN supported Mr. El-Erian's suggestion.

33. Mr. LIANG, Secretary to the Commission, said it was not the Commission's normal practice to include in the commentary what amounted to a summary of the discussions, except where such a summary threw light on the actual text of the article, and that did not apply in the present case.

34. Sir Gerald FITZMAURICE, Rapporteur, referring to the Commission's draft articles on the law of

the sea, said that it had been the Commission's normal practice to refer in the commentary to the conflicting views expressed by members on certain controversial questions. He had indeed been rather struck by the fact that the present commentary in general failed to follow the Commission's normal practice in that respect. The present draft was not final, but a paragraph could perhaps be inserted somewhere indicating that a suitable reference to conflicting points of view on certain controversial questions would be included in the commentary on the final articles, where that had not been done already. He therefore saw no objection to Mr. El-Erian's suggestion.

35. Mr. KHOMAN agreed with the Rapporteur that the commentary should indicate the conflicting views expressed on controversial questions.

36. He supported Mr. El-Erian's suggestion and further suggested that the final sentence of paragraph 2 could be shortened to read: "However, the Commission did not think it necessary to evolve a solution for this problem, which arises only in exceptional circumstances". The remainder of the sentence was not essential to an understanding of what the Commission had in mind.

37. The CHAIRMAN suggested that the Rapporteur and Special Rapporteur submit a redraft of paragraph 2 along the lines suggested by Mr. El-Erian and Mr. Khoman.

*It was so agreed.*

38. Mr. YOKOTA suggested that the words "take up or" should be inserted before the words "return to his post" in the first sentence of paragraph 3 of the English text.

*It was so agreed.*

39. Mr. SANDSTRÖM, Special Rapporteur, suggested that the final sentence of paragraph 3 be made a separate paragraph, paragraph 4.

*It was so agreed.*

*Paragraph 3, as amended, was adopted.*

*The new paragraph 4 was adopted.*

## SECTION III. CONDUCT OF THE MISSION TOWARDS THE RECEIVING STATE

40. In reply to a point raised by Mr. AGO, Sir Gerald FITZMAURICE, Rapporteur, suggested that the words "and of its members" be inserted after the words "Conduct of the mission", in the heading.

*It was so agreed.*

## ARTICLE 32

41. Mr. TUNKIN said that, although paragraph 1 had been discussed at length in the Drafting Committee, he was still not satisfied with the text; it was open to too broad an interpretation. He did not believe that it was the duty of persons enjoying diplomatic privileges and immunities to comply with every single law or regulation of the receiving State.

42. Mr. HSU agreed with Mr. Tunkin. There were some laws and regulations with which it was impossible for persons enjoying diplomatic status to comply. It would be better to say that it was their duty "to keep in mind" those laws and regulations.

43. The CHAIRMAN, speaking as a member of the Commission, said he also agreed with Mr. Tunkin. Persons enjoying diplomatic immunities could not comply with certain laws which placed on the receiving State's nationals an obligation to render personal services. Perhaps the Commission could find a more subtle expression at its next session.

44. Mr. TUNKIN suggested replacing the words "to comply with" by "to respect".

45. Mr. VERDROSS said that he appreciated Mr. Tunkin's point. It might be met by stating that "all persons enjoying diplomatic privileges and immunities are bound to comply with the laws and regulations of the receiving State, in so far as they are not exempted from such compliance."

46. Mr. KHOMAN objected that the word "respect" implied a moral obligation only. He suggested replacing the words "to comply with" by the words "not to act contrary to" the law of the receiving State, which exactly reflected the nature of the obligation on the diplomatic agent.

47. Mr. EL-ERIAN pointed out that the position of the diplomatic agent vis-à-vis the law of the receiving State had already been dealt with in the articles on inviolability and immunity. The point under discussion was his conduct and, in that context the verb "to respect" was perfectly appropriate. It had, in fact, already been used in international agreements.

48. The CHAIRMAN, replying to Mr. Khoman, pointed out that the verb "to respect" had been used in connexion with the most solemn obligations; the Charter, for instance, spoke of the duty to respect the territorial integrity of States. In any case, whatever term was used, it would convey a legal obligation under the convention.

49. Mr. SANDSTRÖM, Special Rapporteur, thought that there was no need to be concerned about the obligation to perform personal services; those enjoying diplomatic status were already exempted from that by the proviso with which the paragraph began.

50. Mr. Verdross's amendment, he was afraid, would give the impression that there were other exceptions to the rule, apart from those consequent upon the enjoyment of diplomatic privileges and immunities.

51. He was quite willing to accept the term "respect".

52. Mr. LIANG, Secretary to the Commission, said he did not think that it had been the intention of the Commission to state that persons enjoying diplomatic status must comply with all the laws and regulations of the receiving State. Mr. Verdross's amendment was open to the interpretation that a specific act of exemption would be needed before a person enjoying diplomatic privileges and immunities was free not to perform those obligations inconsistent with enjoyment of those privileges and immunities. Generally speaking, however, persons enjoying diplomatic immunities were implicitly exempt from compliance with certain laws and regulations by the very nature of those immunities. The term "to respect" was quite satisfactory and would, he thought, have a legal meaning in the context. If it were adopted, however, it would be more logical to omit the phrase "without prejudice to their diplomatic privileges and immunities".

53. Mr. KHOMAN remarked that in municipal law, where the obligation on citizens went further than merely to respect the law, the words "to comply with" were those normally used. In the Charter of the United Nations, however, owing to the absence of sanctions in the event of non-observance, the verb "to respect" was used. He was none the less willing to withdraw his suggestion (para. 46 above) and accept the verb "to respect".

*It was agreed that the words "to respect" should be substituted for the words "to comply with".*

54. Mr. BARTOS suggested that in paragraph 2 the words "shall be conducted with or through the ministry of foreign affairs" did not properly reflect the views of the Commission. It would be more correct to say "with the ministry of foreign affairs or with other authorities with the former's consent".

55. Mr. SPIROPOULOS considered the words "*sauf décision contraire*", with which the French text opened, to be appropriate. In most cases no decision or regulation was involved, but merely an arrangement between the missions and the ministry.

56. Mr. SCELLE objected to the whole of the opening phrase, not only on the grounds just stated by Mr. Spiropoulos, but also because it left the matter entirely in the hands of the receiving State. If the paragraph opened with the phrase "*sauf accord contraire*", both difficulties would be avoided.

57. Mr. SANDSTRÖM, Special Rapporteur, suggested as an alternative ending "*sauf règlement ou pratique contraire*".

58. Mr. GARCÍA AMADOR said that in proposing the new article (411th meeting, para. 55), Mr. Padilla Nervo and he had merely wished to emphasize that all negotiations were normally conducted through the ministry of foreign affairs. He agreed that the phrase under discussion was not entirely satisfactory. All that it was necessary to convey was that, if the receiving State did not allow direct contact with other authorities than the ministry of foreign affairs, missions must refrain from such direct contacts. He was willing to accept Mr. Scelle's proposal.

59. Mr. BARTOS said he also was willing to accept Mr. Scelle's proposal, since it implied that the sending State had a right to ask the receiving State to permit such direct contacts.

60. Mr. SPIROPOULOS said that he would accept it on the understanding that the agreement could be tacit as well as formal.

61. Mr. HSU thought that both the original text and Mr. Scelle's amendment prescribed a far too rigid and formal procedure. Even Mr. Scelle's amendment would mean that States would have to conclude a treaty on the question.

62. The CHAIRMAN remarked that the use of the word "agreement" did not necessarily imply that a treaty was required; informal agreement would do.

*It was agreed to substitute the words "Unless otherwise agreed" for the words "Unless otherwise provided for by the receiving State".*

63. Mr. SCELLE said that paragraph 3 struck him as quite useless. It might serve the purpose of an indi-

cation to an international court of the principles on which it should base its decision in a dispute, but it seemed to be out of place in the context.

64. Mr. KHOMAN observed that the question dealt with in paragraph 3 had been discussed at length by the Commission (411th meeting, paras. 56 to 85). Many members of the Commission attached much weight to the provision as enunciating a duty of States corresponding to the privileges of inviolability of their missions.

65. Mr. GARCÍA AMADOR said that he also was anxious to retain the provision. The fact that the premises of missions had in the past been used for purposes incompatible with their proper role made it necessary to enunciate such an obligation.

66. Mr. SCELLE said he would accept the paragraph because "*ce qui va sans dire va mieux encore en le disant*".

67. The CHAIRMAN put to the vote the text of article 32, as amended, and as a whole.

*The text of article 32, as amended, was adopted by 18 votes to none with one abstention.*

68. Mr. HSU said that he had abstained, not because he was opposed to the principles of the article but because he objected to parts of its drafting.

#### COMMENTARY ON ARTICLE 32

69. Mr. SANDSTRÖM, Special Rapporteur, suggested that the third sentence in the French text of paragraph 1 be redrafted on the lines of the English text.

*It was so agreed.*

70. Mr. VERDROSS considered that the paragraph did not reflect accurately the real state of affairs. Some laws of the receiving State were applicable to persons enjoying diplomatic immunities, though they could not be applied to them in the normal manner. Others did not apply to them at all.

71. Mr. LIANG, Secretary to the Commission, wondered whether it was necessary to retain the last two sentences. Being a qualification of the principle of the personal inviolability of the diplomatic agent, they would be more in place in the commentary on article 21.

72. Mr. TUNKIN agreed with the Secretary. It was essential to avoid giving the impression that the grant of privileges and immunities was conditional on the diplomatic agent's fulfilling his duties towards the receiving State.

*It was agreed that the last two sentences of paragraph 1 should be deleted.*

73. Mr. PAL pointed out that, paragraph 1 of the article having been amended, corresponding changes would have to be made in paragraph 1 of the commentary.

*It was so agreed.*

*Paragraph 1, as amended, was adopted.*

74. With regard to paragraph 2, Mr. GARCÍA AMADOR observed, first, that persons enjoying diplomatic privileges and immunities were under an obligation not to interfere in the internal affairs of the receiving State, not only outside their functions as stated in the para-

graph, but within them as well. There was no need to state that explicitly in the commentary, however, and it would be sufficient if the words "outside their functions" were deleted.

75. Secondly, the phrase "matters which are essentially the private concern of the receiving State" was also unsatisfactory. The word "essentially", presumably introduced as a reminiscence of the phrase "essentially within the domestic jurisdiction of any State" in Article 2, paragraph 7, of the United Nations Charter, would be better deleted, so as to avoid any uncertainty as to what matters were "essentially" and what were "not essentially" the private concern of the receiving State.

76. Thirdly, instead of the latter phrase he would prefer "in matters which come within the jurisdiction of the receiving State". It would be recalled that the concept of "internal affairs" in the article had already been interpreted by the Secretary as covering both domestic and foreign politics (412th meeting, para. 14).

77. Mr. TUNKIN agreed with all Mr. García Amador's points. It was quite clear that the rule of non-interference applied also to the official functions of diplomatic agents.

78. During the discussion of the joint amendment on which the article was based (411th meeting, para. 55), Mr. Tunkin had pointed out that "internal order" must not be taken as a territorial notion, but in the sense of the phrase used in Article 2, paragraph 7, of the Charter (412th meeting, para. 8). It would, however, be difficult to make that point clear in the commentary without going into excessive detail. The simplest course would be to reproduce the words of the article itself, namely, "in the internal affairs of the receiving State".

79. Mr. SCELLE agreed with Mr. García Amador's second and third points. The wording of the French text was an unfortunate amalgam of the vague concept of *domaine réservé* and of the reference in the Charter to matters essentially within the domestic jurisdiction of any State.

80. The CHAIRMAN proposed the deletion of the words "outside their functions" and the substitution of the words "in the internal affairs of the receiving State" for the words "in matters which are essentially the private concern of the receiving State".

*It was so decided.*

*Paragraph 2, as amended, was adopted.*

*It was agreed to modify paragraph 3 so as to bring it into line with the amended version of paragraph 2 of the article.*

*Paragraph 3, as amended, was adopted.*

81. Mr. GARCÍA AMADOR proposed the deletion in paragraph 4 of the word "bilateral", since the treaties governing the right to grant asylum in mission premises were mainly multilateral.

*It was so agreed.*

82. Mr. FRANÇOIS proposed the deletion of the whole of the second sentence in paragraph 4, as it might give the impression that the right to grant asylum existed solely on the basis of treaties, which was of course untrue. The Commission had, in any case, agreed to leave aside the question of asylum.

83. Sir Gerald FITZMAURICE agreed that the right to grant asylum was not necessarily dependent upon agreements between States. He did not think, however, that there was any danger of the sentence in question being interpreted in that sense; it merely mentioned certain treaties as examples of the special agreements referred to in the article.

84. Mr. SCELLE said he appreciated the point of Mr. François's objection. It should be made clear that the treaties governing the right to asylum were mentioned merely as examples.

85. Mr. AMADO saw no reason to quote the particular example of treaties on asylum, thereby drawing attention to a matter which the Commission had agreed to avoid. He supported Mr. François's proposal.

86. Mr. LIANG, Secretary to the Commission, agreed with Mr. Amado on the undesirability of making explicit reference to the subject of asylum. Other special agreements existed on such subjects as, for instance, refraining from subversive propaganda.

87. Mr. GARCÍA AMADOR agreed with Mr. François that the right to grant asylum existed independently of any convention. He was inclined to agree with those who favoured deleting the sentence.

88. The CHAIRMAN pointed out that the whole purpose of the last few words in paragraph 3 of the article was to enable a reference to be made to the example of treaties governing the right to grant asylum. There should be no danger of misunderstanding if it were made clear that the agreements were cited merely as examples.

89. Mr. SANDSTRÖM, Special Rapporteur, agreed that the reference to "special agreements" in the article would look rather mysterious if no examples were quoted in the commentary.

90. Mr. SCELLE was in favour of retaining the reference to the practice of granting asylum, which was an essential, traditional, and, in his opinion, praiseworthy, function of missions.

91. Mr. LIANG, Secretary to the Commission, remarked that the right of asylum, in the sense in which Mr. Scelle understood it, was really already covered by the words in paragraph 3 of the article, "by other rules of general international law".

92. Mr. HSU thought it unnecessary to give any examples. But if the Commission wished to do so, it should quote examples of agreements permitting practices which would otherwise not be legitimate. An agreement permitting propaganda, if such existed, would be a good example. If no good example could be found, it would be better to delete the last part of paragraph 3 of the article.

93. He agreed with Mr. François that the right to grant asylum was not dependent on the existence of a treaty.

*It was agreed to redraft the second sentence of paragraph 4 on the lines indicated by Mr. Scelle. Paragraph 4 was adopted on that understanding.*

#### SECTION IV. END OF THE MISSION

##### ARTICLE 33

94. The CHAIRMAN suggested the substitution of the word "function" for the somewhat misleading term "mission" at the beginning of the article.

95. Mr. LIANG, Secretary to the Commission, thought it advisable to combine sub-paragraphs 3 and 4, since otherwise the mistaken impression might prevail that each circumstance by itself could mark the end of the mission. Sub-paragraph 3 conveyed the false idea that the mission would be terminated even if the receiving State did not act on the diplomatic agent's request, although he could not recall any instance of a receiving State having refused to deliver his passport to a diplomatic agent in such circumstances. Sub-paragraph 4 by itself would not make much sense; before the receiving State could return the passport to a diplomatic agent, the sending State must have indicated that his mission had come to an end.

96. Sir Gerald FITZMAURICE, Rapporteur, said that he could not entirely agree with the Secretary. Sub-paragraph 3 might be deleted but sub-paragraph 4 could stand on its own, and it would be inadvisable to combine them. There were two distinct cases to be dealt with: termination of a mission at the request of the sending State and its termination at the request of a receiving State. Paragraph 4 would cover both.

97. Mr. LIANG, Secretary to the Commission, said that he was satisfied by Sir Gerald's explanation.

98. Mr. SPIROPOULOS said he was puzzled by the reference to "delivery of his passports" in sub-paragraphs 3 and 4. He wondered whether it was the current practice for the receiving State to hold the passports of diplomatic agents accredited to it. So far as he was aware, it was customary for a diplomatic agent wishing to leave to ask for the return of his letters of credence.

99. The CHAIRMAN observed that "to ask for his passports" was the phrase usually employed in that connexion. He had, however, failed to find a single instance where the former practice of holding a diplomatic agent's passports was still followed.

100. Mr. BARTOS said that even until the First World War it had been the practice for diplomatic agents to hand in their passports to the ministry of foreign affairs and ask for them only when they left the country. The practice had, however, ceased, and there was no point in reviving it.

101. Mr. LIANG, Secretary to the Commission, doubted whether it was the diplomatic agent's passport that was meant. He thought the term referred to a pass, or safe conduct, issued by the receiving State to the diplomatic agent to ensure that he was not molested on his journey home.

The meeting rose at 1.10 p.m.

### 429th MEETING

Thursday, 27 June 1957, at 4 p.m.

Chairman: Mr. Jaroslav ZOUREK.

#### Consideration of the Commission's draft report covering the work of its ninth session

(A/CN.4/L.70 and Add.1 to 3) (continued)

#### CHAPTER II: DIPLOMATIC INTERCOURSE AND IMMUNITIES (A/CN.4/L.70/ADD.1) (continued)

#### II. DRAFT ARTICLES CONCERNING DIPLOMATIC INTERCOURSE AND IMMUNITIES (continued)

#### SECTION IV. END OF THE MISSION (continued)

##### ARTICLE 33 (continued)

1. Mr. SANDSTRÖM, Special Rapporteur, pointed out that sub-paragraphs 3 and 4 were based on similar

clauses in the Havana Convention<sup>1</sup> and used almost the identical wording. He had taken the view that it was impossible to depart from current practice, but if it were true, as Mr. Bartos assured them (428th meeting, para 100), that there had been a change in practice, then the wording of the article must also be changed, and he was prepared to submit an alternative text.

2. Mr. LIANG, Secretary to the Commission, stated that, after reflection, he had come to the conclusion that there were a number of other anomalies in the article, to which attention had not yet been drawn.

3. In the first place it was clear that the phrase "diplomatic agent" at the beginning signified the head of the mission alone. On the other hand, article 21, paragraph 2, stated that the phrase "diplomatic agent" included not only the head of the mission but also members of the diplomatic staff. It was essential, therefore, to make clear that in the present case that definition of "diplomatic agent" did not apply.

4. Secondly, in his view, there was some duplication or even inconsistency between the text of article 33 and that of article 6. Paragraph 2 of article 6 stated that "the receiving State may declare the functions of the person concerned to have been terminated" if the sending State had refused or failed within a reasonable time to recall a diplomatic agent whom the receiving State considered as *persona non grata*. That was surely another circumstance in which the mission of a diplomatic agent might come to an end, and he urged that mention of it be made in article 33, or at least that the article be in some way related to article 6.

5. Sir Gerald FITZMAURICE feared that, if the two articles were related to one another, there was a danger of two separate ideas being confused. While article 6 dealt with a case in which a mission might be terminated, article 33 described the "mechanics" of the termination, and the moment in time at which it came to an end. There was not, in his view, any inconsistency between the two articles, and he was not therefore in favour of relating them to one another.

6. Mr. VERDROSS suggested that the words "of a diplomatic agent" be deleted from the opening phrase of the article, which should thus read simply, "The mission comes to an end".

7. The CHAIRMAN, recalling the suggestion at the previous meeting to replace the word "mission" at the beginning of the article by the word "functions", said it was desirable to distinguish between the end of diplomatic relations on the one hand and the end of the functions of a given agent on the other.

8. Mr. LIANG, Secretary to the Commission, reverting to the phrase "delivery of his passports", said that that denoted an extraordinarily drastic step, to which recourse was had only in the event of war. It was more common simply for the Government of a receiving State to declare that it considered the mission of a diplomatic agent terminated.

9. Sir Gerald FITZMAURICE said that the term "delivery of his passports" was acceptable, even if the occasions on which the receiving State handed a diplomatic agent his passports were extremely rare. In any

case, whenever a receiving State wished a diplomatic agent to leave its country, it invariably handed him a *congé*, *laissez-passer*, or other similar document.

10. Mr. BARTOS, referring to the suggestion made at the 428th meeting to replace the word "mission" by the word "functions" at the beginning of the article, said that, although there was undoubtedly no time at the current session, it might be desirable at the next session to draft two articles, one dealing with the termination of the mission and the other with the termination of the functions of a diplomatic agent.

11. Mr. SPIROPOULOS agreed that it was too late to draft a new article, and suggested that the word "mission" should be retained for the current session.

12. With reference to the use of the phrase "delivery of his passports" in sub-paragraphs 3 and 4, he agreed with Mr. Bartos and the Secretary that it would be more satisfactory in that case to speak of "notification by the Government of the receiving State that it considers the mission of the diplomatic agent to be terminated".

13. He further suggested that the words "*inter alia*" should be added at the end of the introductory phrase of the article.

14. The CHAIRMAN supported Mr. Spiropoulos's last suggestion on the grounds that otherwise it might be assumed that the list of circumstances in which the mission came to an end was exhaustive.

*It was agreed to add the words "inter alia" at the end of the introductory phrase.*

15. Mr. TUNKIN recalled that there had been some discussion in the Drafting Committee on the possibility of speaking of a "termination of functions" rather than a "termination of the mission" and, for his part, he would support the replacement of the word "mission" by the word "functions" in the introductory phrase.

16. The CHAIRMAN pointed out that that amendment would have the further advantage that it would extend the provisions of the article to the whole of the diplomatic staff, and not just to the head of the mission.

*It was agreed that the word "mission" in the introductory phrase be replaced by the word "functions".*

17. After further discussion, the CHAIRMAN proposed that:

(i) Sub-paragraph 3 be deleted;

(ii) Sub-paragraph 4 be reworded as follows: "On notification to the diplomatic agent by the receiving State that it considers his functions to be terminated";

*The proposal was adopted.*

*The text of article 33, as amended, was adopted by 14 votes to none, with 1 abstention.*

#### COMMENTARY ON ARTICLE 33

*It was agreed that the Special Rapporteur be asked to revise the commentary to bring it into line with the amended text of the article.*

#### ARTICLE 34

18. Mr. KHOMAN thought the wording of the beginning of the article was not sufficiently clear, and proposed the following redraft:

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

“The receiving State must grant facilities, even in case of armed conflict, to make it possible for persons enjoying privileges and immunities to leave at the earliest possible moment, and particularly must place at their disposal etc.”

*The proposal was adopted.*

19. Sir Gerald FITZMAURICE and Mr. FRANÇOIS suggested that the word “communication” be replaced by the word “transport”.

*It was so agreed.*

*The text of article 34, as amended, was approved.*

#### COMMENTARY ON ARTICLE 34

20. Mr. LIANG, Secretary to the Commission, suggested that the commentary might well be deleted, since it simply reproduced the sense of the article itself.

*It was so agreed.*

21. The CHAIRMAN proposed that the commentary be replaced by the note “This article does not require any commentary”.

*It was so decided.*

#### ARTICLE 35

22. Mr. VERDROSS proposed that in sub-paragraph (iii) the words “acceptable to” be replaced by the words “accepted by”.

23. Mr. SANDSTRÖM, Special Rapporteur, said that, when the article had been discussed in the Drafting Committee, Mr. Padilla Nervo had proposed the use of the word “acceptable” instead of the word “accepted” in sub-paragraph (ii), and that his proposal had been adopted both for sub-paragraph (ii) and for sub-paragraph (iii).

24. Mr. VERDROSS asked who would decide whether the third State entrusted with the protection of the interests of the sending State was acceptable to the receiving State or not.

25. Sir Gerald FITZMAURICE, Mr. FRANÇOIS and Mr. LIANG, Secretary to the Commission, pointed out that the choice of a third State to assume the protection of the interests of the sending State was fundamentally the concern of the sending State, and that it was not the practice for the sending State to consult the receiving State in advance.

26. Mr. VERDROSS said he did not dispute that that was the customary procedure, but, since the receiving State could nevertheless interpose its veto, he still felt that the word “accepted” was more suitable than the word “acceptable”.

27. Mr. KHOMAN suggested that the phrase “acceptable to the receiving State” be replaced by the phrase “to which the receiving State has no objection”.

28. The CHAIRMAN put to the vote Mr. Verdross’s proposal that the words “acceptable to” in sub-paragraph (iii) be replaced by the word “accepted by”.

*The proposal was rejected by 4 votes to 3, with 8 abstentions.*

*The text of article 35 was adopted.*

#### COMMENTARY ON ARTICLE 35

29. Mr. AMADO proposed that the commentary be deleted. In his view, it was inappropriate to refer to

protection of the interests of the sending State after protection of the premises and the archives, since it was obviously the interests that were of primary importance.

*It was so agreed.*

30. The CHAIRMAN proposed that the commentary be replaced by the note “This article requires no commentary”.

*It was so decided.*

#### SECTION V. SETTLEMENT OF DISPUTES

##### ARTICLE 36

31. Mr. TUNKIN said that it was inadvisable to include the article in the draft at all, since it might make the draft as a whole less acceptable to States.

32. Mr. GARCÍA AMADOR agreed with Mr. Tunkin that some States might object to the article as it was then drafted, with its rigid provision that any dispute between States should be referred to either conciliation or arbitration or, failing that, to the International Court of Justice. It would be preferable to replace it by the clause customarily inserted in treaties, which called upon States to settle any dispute arising between them by good offices, mediation, or other pacific means, and did not require them to resort at once to conciliation, arbitration or the International Court of Justice.

33. Mr. VERDROSS observed that, if it were proposed to amend the article in order to make the draft as a whole more acceptable to States, that was a tactical and not a juridical question.

34. Mr. YOKOTA said he doubted whether the article could be amended, since it had already been adopted by the Commission.

35. The CHAIRMAN pointed out that, while the Commission had indeed decided in principle that the draft should contain an article on the settlement of disputes, it had not yet approved the text of that article.

36. He invited the Commission to vote on the text of article 36.

*The text of article 36 was adopted by 11 votes to 2, with 3 abstentions.*

#### COMMENTARY ON ARTICLE 36

37. The CHAIRMAN proposed that the commentary be replaced by the note “This article requires no commentary”.

*It was so decided.*

#### CHAPTER III: PROGRESS OF WORK ON OTHER SUBJECTS UNDER STUDY BY THE COMMISSION (A/CN.4/L.70/Add.2)

##### Paragraph 1

*Paragraph 1 was adopted.*

##### Paragraph 2

*Paragraph 2 was adopted.*

##### Paragraph 3

38. Mr. AMADO suggested the deletion from the first phrase of the words “held two meetings and”, and the replacement of the words “before any” by the words “in order that”.

*It was so agreed.*

39. The CHAIRMAN suggested that the words "account of", in the penultimate sentence be replaced by "into consideration", a less positive expression.

*It was so agreed.*

40. Mr. TUNKIN thought that the wording of the first sentence gave the impression that the General Assembly had decided in advance on the form the set of rules should take. He suggested that the first sentence should end with the words "or simply a set of rules", the remainder being deleted.

41. Sir Gerald FITZMAURICE agreed that the words "in the language of the Assembly resolution above-mentioned" could well be deleted, but felt it was necessary to explain the purpose of the proposed set of rules.

*It was agreed that the phrase quoted by Sir Gerald Fitzmaurice, together with the quotation marks before "inspire" and after "agreements", should be deleted.*

*Paragraph 3, as amended, was adopted.*

#### *Paragraph 4*

42. The CHAIRMAN suggested that the word "tenth" in the penultimate sentence should be deleted.

*It was so agreed.*

*Paragraph 4, as amended, was adopted.*

### CHAPTER IV: OTHER DECISIONS OF THE COMMISSION (A/CN.4/L.70/Add.3)

#### *Paragraph 1*

*Paragraph 1 was adopted.*

#### *Paragraph 2*

43. Mr. LIANG, Secretary to the Commission, suggested that the phrase "commenting on this request" (at the beginning of the paragraph) should be deleted.

*It was so agreed.*

*Paragraph 2, as amended, was adopted.*

#### *Paragraphs 3 and 4*

*Paragraphs 3 and 4 were adopted.*

#### *Paragraph 5*

44. Mr. FRANÇOIS suggested that the words "en tenant compte" in the French text of sub-paragraph (ii) should be replaced by a less positive expression.

45. Sir Gerald FITZMAURICE observed that the expression "after reviewing it in the light of" in the English version, which was the original text, appeared to him to be sufficiently neutral.

46. The CHAIRMAN suggested that the words "étudiée à nouveau en tenant compte" be replaced by "réexaminée à la lumière".

*It was so agreed.*

*Paragraph 5, as amended in the French text, was adopted.*

#### *Paragraph 6*

47. Mr. FRANÇOIS felt that the word "quotidiennes" in the third sentence of the French text was inappropriate; it had not the same connotation as "day-to-day" in the English text.

48. Sir Gerald FITZMAURICE agreed that, while the English expression was unobjectionable, it was not quite correctly rendered in French by "quotidiennes".

49. Mr. AGO suggested that all adjectives qualifying the word "instructions" should be omitted.

*After further discussion, paragraph 6 was adopted subject to amendment in the light of members' observations.*

#### *Paragraph 7*

50. Mr. AGO felt that the expression "les rapporteurs n'interrompent jamais leur tâche", in the second sentence of paragraph 7, should be brought more closely into line with the English original, which read "the rapporteurs were continually at work."

*It was so agreed.*

*On that understanding, paragraph 7 was adopted.*

#### *Paragraph 8*

51. Mr. KHOMAN suggested that it might be as well to delete the final part of the paragraph beginning "and the Commission" since it appeared to insist too much on the Commission's own views.

52. Sir Gerald FITZMAURICE said that there seemed to be a growing tendency on the part of the General Assembly to consider only the quantity rather than the quality of work done. It was for that reason that he had felt it desirable to lay stress on the view expressed in the second part of the paragraph.

53. Mr. AGO and Mr. SANDSTRÖM supported Sir Gerald Fitzmaurice.

*Paragraph 8 was adopted.*

The meeting rose at 6.5 p.m.

## 430th MEETING

*Friday, 28 June 1957, at 9 a.m.*

*Chairman: Mr. Jaroslav ZOUREK.*

### Consideration of the Commission's draft report covering the work of its ninth session (A/CN.4/L.70 and Add.1 to 3) (continued)

#### CHAPTER IV: OTHER DECISIONS OF THE COMMISSION (A/CN.4/L.70/Add.3) (continued)

#### *Paragraph 9*

*Paragraph 9 was adopted.*

#### *Paragraphs 10 and 11*

*Paragraphs 10 and 11 were adopted.*

#### *Paragraph 12*

1. Mr. TUNKIN suggested that it would be better to omit the words "and bearing in mind also that a number of members of the Commission would not have been able to accept or continue in office except on the basis of the present allowance".

*It was so agreed.*

*Paragraph 12, as amended, was adopted.*

#### *Paragraphs 13 and 14*

*Paragraphs 13 and 14 were adopted with one minor drafting change.*

*Paragraph 15 was adopted.*

CHAPTER II: DIPLOMATIC INTERCOURSE  
AND IMMUNITIES (*continued*)<sup>1</sup>

2. The CHAIRMAN invited the Commission to consider the various redrafts prepared in the light of its discussion of chapter II of its draft report (A/CN.4/L.70/Add.1).

I. INTRODUCTION (*continued*)<sup>2</sup>

Paragraph 6 (*continued*)<sup>3</sup>

3. Mr. SANDSTRÖM, Special Rapporteur, proposed the following text to replace paragraph 6 of the Introduction:

“The draft deals only with diplomatic missions. Diplomatic relations between States also assume other forms that might go under the heading of ‘*ad hoc* diplomacy’, which covers roving envoys, diplomatic conferences and special missions sent to a State for limited purposes. The Commission considered that these forms of diplomacy should also be studied, in order to bring out the rules of law governing them, and requested the Special Rapporteur to make a study of the question and to submit his report to it at its next session. The Commission will thus be able to discuss that part of the subject simultaneously with the present draft and any comments on it submitted by Governments.

“Apart from the diplomatic relations between States, there are also the relations between States and international organizations. There is likewise the question of the privileges and immunities of the organizations themselves. These matters are governed by special conventions. The question whether and, if so, to what extent they will be studied by the Commission will be decided later.”

4. He recalled the Commission’s decision at the 423rd meeting to merge the preface to the draft articles with the original paragraph 6 of the Introduction.

5. The CHAIRMAN urged the deletion of the last sentence of the paragraph. Though the Commission might well take a decision on the subject, there was no point in binding it to do so.

*It was agreed to delete the last sentence.*

6. Mr. BARTOS suggested adding the words “in most cases” in the sentence “These matters are governed by special conventions”. There were some international organizations whose relations with States, more particularly in the matter of privileges and immunities, were not governed by conventions, but who merely applied the provisions of conventions concluded by similar organizations where appropriate.

*It was so agreed.*

*Paragraph 6, as amended, was adopted.*

II. DRAFT ARTICLES CONCERNING DIPLOMATIC INTERCOURSE AND IMMUNITIES (*continued*)<sup>4</sup>

7. The CHAIRMAN said that the deletion of the preface to the draft articles had been proposed.

*The proposal was adopted.*

8. Sir Gerald FITZMAURICE, Rapporteur of the Commission, proposed that the following paragraph should be inserted before the text of the draft articles:

“The commentary to the draft should be regarded as provisional. It has been drafted so as to afford the minimum of necessary explanation of the articles. In the final draft which the Commission will prepare at its next session in the light of the comments of Governments, a fuller commentary will be provided.”

*The proposal was adopted.*

SECTION I. DIPLOMATIC INTERCOURSE IN GENERAL  
(*continued*)<sup>5</sup>

COMMENTARY ON ARTICLE 2 (*continued*)<sup>6</sup>

9. Mr. SANDSTRÖM, Special Rapporteur, proposed the substitution of the following text for the existing commentary:

“Without attempting to be exhaustive, this article is believed to reproduce the actual practice of States as it has existed for a very long time.”

*The proposal was adopted.*

ARTICLE 6 (*continued*)<sup>7</sup>

10. Mr. SANDSTRÖM, Special Rapporteur, proposed the following text to replace the existing text of article 6:

“(1) The receiving State may at any time notify the sending State that the head of the mission, or any member of the staff of the mission, is *persona non grata* or not acceptable. In such case, the sending State shall recall this person or terminate his functions with the mission.

“(2) If a sending State refuses or fails within a reasonable time to comply with its obligations under paragraph 1, the receiving State may refuse to recognize the person concerned as a member of the mission.”

11. In reply to an enquiry by Mr. MATINE-DAFTARY, Mr. Sandström explained that the words “or terminate his functions with the mission” had been included in paragraph 1 to cover members of missions who were nationals of the receiving State.

12. The CHAIRMAN said that the addition of the words “according to circumstances” after the word “shall” in the second sentence of paragraph 1 had been proposed.

*The proposal was adopted.*

*The text of article 6, as amended, was adopted.*

COMMENTARY ON ARTICLES 3 TO 7 (*continued*)<sup>8</sup>

Paragraphs 1 to 3

13. Mr. SANDSTRÖM, Special Rapporteur, proposed the following paragraph to replace paragraphs 1 to 3 of the commentary on articles 3 to 7:

“(1) Articles 3 to 6 deal with the appointment of the persons who compose the mission. The mission comprises a head, and assistants subordinate to him, who are normally divided into several categories: diplomatic staff, who are engaged in diplomatic activities proper; administrative and technical staff;

<sup>1</sup> Resumed from 429th meeting.

<sup>2</sup> Resumed from 423rd meeting.

<sup>3</sup> *Idem.*

<sup>4</sup> Resumed from 429th meeting.

<sup>5</sup> Resumed from 424th meeting.

<sup>6</sup> *Idem.*

<sup>7</sup> *Idem.*

<sup>8</sup> *Idem.*

and service staff. While it is the sending State which makes the appointments, the choice of the persons and, in particular, of the head of the mission, may considerably affect relations between countries, and it is naturally in the interest of both States concerned that the mission should not contain members whom the receiving State finds unacceptable. In practice the receiving State can exercise certain prerogatives to this effect."

14. Sir Gerald FITZMAURICE, Rapporteur, suggested changing the words "prerogatives to this effect" at the end of the paragraph to "powers to that end".

*It was so agreed.*

*The new paragraph 1, as amended, was adopted.*

#### Paragraph 8

15. Mr. SANDSTRÖM, Special Rapporteur, proposed the following paragraph 6 to replace the former paragraph 8 of the commentary:

"(6) Another exception is that arising out of article 5 of the draft, concerning cases where the sending State wishes to choose as a member of the diplomatic staff a national of the receiving State or a person who is a national of both the receiving State and the sending State. The Commission takes the view that this should only be done with the express consent of the receiving State. While the practice of appointing nationals of the receiving State as members of the diplomatic staff has now become fairly rare, the majority of the members of the Commission think that the case should be mentioned."

*The new paragraph 6 was adopted.*

#### Paragraphs 9 and 10

16. Mr. SANDSTRÖM, Special Rapporteur, proposed the following text as a commentary on article 7 alone, to replace paragraphs 9 and 10:

"(1) There are also questions other than the choice of the persons comprising the mission, which, though connected with the latter's composition, may cause difficulties, and which, in the Commission's view, require regulation. Article 7 deals with such questions.

"(2) Paragraph 1 of the article refers to cases where the staff of the mission is inordinately increased; experience in recent years having shown that such cases may present a problem. Such an increase may cause the receiving State real difficulties. Should the receiving State consider the staff of a mission unduly large, it should first endeavor to reach an agreement with the sending State. Failing such agreement, the receiving State should, in the view of the majority of the Commission, be given the right but not an absolute right, to limit the size of the staff. Here there are two sets of conflicting interests, and the solution must be a compromise between them. Account must be taken both of the mission's needs, and of prevailing conditions in the receiving State. Any reduction in the staff must remain within the bounds of what is reasonable and customary.

"(3) Paragraph 2 gives the receiving State the right to refuse to accept officials of a particular category. But its right to do so is circumscribed in the same manner as its right to limit the size of the staff, and must, furthermore, be exercised without discrimi-

nation between one State and another. In the case of military, naval and air attachés, the receiving State may, in accordance with what is already a fairly common practice, require their names to be submitted beforehand for its approval."

17. Sir Gerald FITZMAURICE, Rapporteur, suggested replacing the words "reduction in the staff", in the last sentence of paragraph 2, by the words "limitation of the staff".

*It was so agreed.*

18. Mr. MATINE-DAFTARY proposed the substitution of the word "consentement" for the word "agrément" at the end of the French text.

*It was so agreed.*

*The new text, as amended, was adopted.*

#### SECTION II. DIPLOMATIC PRIVILEGES AND IMMUNITIES (continued)<sup>9</sup>

19. Mr. SANDSTRÖM, Special Rapporteur, proposed that the introductory commentary be amended to read as follows:

"(1) Among the theories that have exercised an influence on the development of diplomatic privileges and immunities, the Commission wishes to mention the 'extritoriality' theory, according to which the premises of the mission represent a sort of extension of the territory of the sending State; and the 'representative character' theory, which bases such privileges and immunities on the idea that the diplomatic mission personifies the sending State.

"(2) There is nevertheless a third theory which appears to be gaining ground in modern times, namely, the 'functional necessity' theory, which justifies privileges and immunities as necessary to enable the mission to perform its functions.

"(3) The Commission was guided mainly by this third theory in solving problems on which practice gave no clear pointers."

20. Mr. SCALLE proposed that in paragraph 1 the words "wishes to mention" be replaced by "will mention"; that in paragraph 2 the word "nevertheless" be replaced by "now"; and that in paragraph 3 the word "mainly" be deleted.

*It was so agreed.*

21. In reply to a point raised by Mr. TUNKIN, Sir Gerald FITZMAURICE, Rapporteur, suggested that the following clause be inserted in paragraph 3: "Although it also bore in mind the representative character of the head of the mission and the mission itself,"

*It was so agreed.*

*The new text, as amended, was adopted.*

#### COMMENTARY ON ARTICLE 15 (continued)<sup>10</sup>

22. Mr. SANDSTRÖM, Special Rapporteur, proposed the following text to replace the existing commentary:

"The laws and regulations of a given country may make it impossible for a mission to acquire the necessary premises. For that reason the Commission has

<sup>9</sup> Resumed from 425th meeting.

<sup>10</sup> *Idem.*

inserted in the draft an article which makes it obligatory for the receiving State to provide accommodation for the mission if the latter is not permitted to acquire it. If the difficulties are due to a shortage of premises, the receiving State must facilitate the accommodation of the mission as far as possible."

23. Mr. MATINE-DAFTARY proposed the substitution of the word "*acquérir*" for the word "*obtenir*" in the first sentence of the French text.

*It was so agreed.*

24. Sir Gerald FITZMAURICE, Rapporteur, proposed the substitution of the words "ensure the provision of" for the word "provide" in the second sentence of the English text.

*It was so agreed.*

*The commentary on article 15, as amended, was adopted.*

#### COMMENTARY ON ARTICLE 16 (continued)<sup>11</sup>

##### Paragraph 3

25. Mr. SANDSTRÖM, Special Rapporteur, proposed the following two paragraphs in place of paragraph 3:

"(3) The inviolability confers on the premises and their furnishings immunity from any search, requisition, attachment or execution.

"(4) If it is thought that the inviolability of the premises gives the sending State the right to prevent the receiving State from using the land on which the premises of the mission are situated for carrying out public works of importance to the State (widening of a road, for example), then it should be recalled on the other hand that real property is subject to the laws of the country in which it is situated. In these circumstances, therefore, the sending State is under a duty to co-operate in every way in the implementation of the plan which the receiving State has in mind; and the receiving State, for its part, is obliged to provide adequate compensation or, if necessary, to place other appropriate premises at the disposal of the sending State."

26. Mr. BARTOS suggested adding the words "and fixtures" after the word "furnishings" in paragraph 3.

*It was so agreed.*

27. Sir Gerald FITZMAURICE, Rapporteur, suggested replacing the words "gives the sending State the right" by "may enable the sending State" in paragraph 4 of the English text.

*It was so agreed.*

28. Mr. EL-ERIAN recalled that certain amendments had been dropped in favour of a reference to their subject in the commentary. Since, however, the commentary was only provisional, he would not press for the inclusion of such references in the text at that stage.

29. Mr. SCELLE suggested the deletion of the words "of importance to the State" in paragraph 4.

*It was so agreed.*

*The new paragraphs 3 and 4, as amended, were adopted.*

<sup>11</sup> *Idem.*

#### COMMENTARY ON ARTICLE 20 (continued)<sup>12</sup>

##### Paragraph 3

30. Mr. SANDSTRÖM, Special Rapporteur, proposed that paragraph 3 be amended to read as follows:

"(3) The Commission has noted that the diplomatic bag has on occasion been opened with the consent of the Ministry of Foreign Affairs of the receiving State, and in the presence of a representative of the mission concerned. While recognizing that States have been led to take such measures in exceptional cases where there are serious grounds for suspecting that the diplomatic bag is being used in a manner contrary to paragraph 3 of the article and with detriment to the interests of the receiving State, the Commission wishes nevertheless to emphasize the overriding importance which it attaches to the observance of the principle of the inviolability of the diplomatic bag."

31. Mr. KHOMAN proposed that the word "consent" in the first sentence be replaced by the word "permission".

*It was so agreed.*

32. Mr. EL-ERIAN proposed that the words "are serious grounds" and "is being used" be replaced by "were serious grounds" and "was being used" respectively.

*It was so agreed.*

*Paragraph 3, as amended, was adopted.*

#### COMMENTARY ON ARTICLE 23 (continued)<sup>13</sup>

##### Paragraph 1

33. Mr. SANDSTRÖM, Special Rapporteur, proposed the following text to replace paragraph 1:

"A diplomatic agent is exempt from the receiving State's criminal jurisdiction and, with the exceptions mentioned in paragraph 1 of the article, also from its civil and administrative jurisdiction. On the other hand, it should be recalled that he has the duty to respect the laws and regulations of the receiving State as laid down in article 32 of the present draft".

*The new paragraph 1 was adopted.*

##### Paragraph 4

34. Mr. SANDSTRÖM, Special Rapporteur, proposed that paragraph 4 of the commentary be amended to read as follows:

"The second exception is based on the consideration that diplomatic immunity should not be allowed to prevent the settlement of a dispute in the receiving State regarding a succession."

35. The Commission would note that he had decided to adopt a different approach, referring to the purpose of the exception rather than attempting to define its scope.

36. The CHAIRMAN suggested that the word "dispute" was unduly restrictive.

37. Mr. SANDSTRÖM, Special Rapporteur, thought the Chairman's point would be met if the end of the paragraph were amended to read: "the settlement of a succession in the receiving State".

<sup>12</sup> *Idem.*

<sup>13</sup> Resumed from 426th meeting.

38. Mr. AGO said that the text of the commentary proposed by the Special Rapporteur was drafted in a form which gave the impression that the Commission had in mind cases other than that in which it was a question of calling a diplomatic agent as defendant in an action relating to a succession. But it was clear from sub-paragraph (b) of paragraph 1 of the article that that was the only case really considered.

39. Sir Gerald FITZMAURICE said he saw no objection to the text proposed by the Special Rapporteur, subject to the amendment that he had just suggested: it was broad enough to cover all the different types of cases that might arise.

40. Mr. AGO proposed that the paragraph be amended to read:

“The second exception is based on the consideration that diplomatic immunity cannot be invoked by a diplomatic agent in order to refuse to appear in an action relating to a succession”.

41. Sir Gerald FITZMAURICE, Rapporteur, said he could agree to the wording proposed by Mr. Ago, subject to insertion of the following words before “diplomatic immunity”: “in view of the general importance of not hindering the succession procedure”.

42. Mr. AGO accepted Sir Gerald Fitzmaurice’s suggestion.

*Mr. Ago’s proposal, as amended by Sir Gerald Fitzmaurice, was adopted.*

#### Paragraph 9

43. Mr. SANDSTRÖM, Special Rapporteur, proposed the following paragraph to replace paragraph 9:

“The first sentence of paragraph 4 states that the immunity from jurisdiction enjoyed by the diplomatic agent in the receiving State does not exempt him from the jurisdiction of his own country, on condition, however, that a court in that country is competent *ratione materiae* under its laws. To bring this jurisdiction into operation, it is not however sufficient that the case should come within the general competence of the country’s courts under its laws; these laws must also designate a local court before which the action can be brought. Where no such court exists, the second sentence provides that the competent court shall be that of the seat of the Government of the sending State. This provision would of course remove only a few of the drawbacks of the diplomatic agent’s immunity from jurisdiction. Governments should address themselves to this problem and take appropriate steps to reduce these drawbacks still further.”

44. Mr. AGO suggested deletion of the words “*ratione materiae*” from the first sentence.

*It was so agreed.*

45. Mr. TUNKIN expressed doubts as to the appropriateness of the last sentence.

46. Mr. YOKOTA proposed the deletion of the last two sentences.

47. Mr. EL-ERIAN proposed the following text for the last sentence:

“The Commission hopes to be able, in the light of the observations of Governments, to adopt other pro-

visions which will reduce these drawbacks still further.”

48. Mr. TUNKIN said that, on second thoughts, he preferred Mr. Yokota’s proposal, although he could accept Mr. El-Erian’s text. The emphasis on the drawbacks of the immunities of diplomatic agents gave the impression that the Commission regarded such immunities as something of a nuisance.

49. Mr. FRANÇOIS, referring to Mr. El-Erian’s proposal, said that it was inadvisable for the Commission to say anything in its report which might imply that it was putting on Governments the onus of taking the initiative in solving problems.

50. Mr. EL-ERIAN agreed with Mr. François that the Commission should take the initiative. There were, however, certain points on which it was necessary to have the observations of Governments in order to know what was the practice of States.

51. He had no objection to the deletion of both sentences.

*Mr. Yokota’s proposal was adopted.*

*Paragraph 9, as amended, was adopted.*

#### COMMENTARY ON ARTICLE 25 (continued)<sup>14</sup>

##### Paragraph 1

52. Mr. SANDSTRÖM, Special Rapporteur, proposed the following new text for paragraph 1:

“In all countries diplomatic agents enjoy exemption from certain dues and taxes; and although the degree of exemption varies from country to country, it may be regarded as a rule of international law that such exemption exists, subject to the exceptions listed in the article.”

53. Mr. AGO remarked that the Commission had provided for a large number of exceptions to the principle of the exemption of diplomatic agents from dues and taxes, so much so that there was hardly any difference between the treatment of foreign diplomats and that of ordinary aliens in the matter of taxation. His objection to the text as it stood was that it would be hard to say that all such exceptions were today part of an existing rule of international law.

*It was agreed to amend the final clause to read “subject to certain exceptions”.*

*Paragraph 1, as amended, was adopted.*

#### COMMENTARY ON ARTICLE 26 (continued)<sup>15</sup>

##### Paragraphs 2, 3 and 4

54. Mr. SANDSTRÖM, Special Rapporteur, proposed that paragraphs 2, 3 and 4 be replaced by the following single paragraph 2:

“As a rule, no customs duties are levied on articles for the personal use of the diplomatic agent or members of his family belonging to his household, including articles intended for his installation. This exemption has been regarded rather as based on international comity. In view of the widespread nature of this practice, the Commission considers that it should be accepted as a rule of international law.”

<sup>14</sup> Resumed from 427th meeting.

<sup>15</sup> *Idem.*

55. Mr. KHOMAN suggested that, in the French text of the first sentence, the word “*effets*” be replaced by “*objets*”.

*It was so agreed.*

56. Sir Gerald FITZMAURICE suggested that in the English text of the same paragraph the word “*installation*” be replaced by “*establishment*”.

*It was so agreed.*

*The new text, as amended, was adopted.*

#### Paragraph 7

57. Mr. SANDSTRÖM, Special Rapporteur, proposed the following new paragraph 5 to replace paragraph 7:

“In framing the exceptions, the Commission referred not only to articles exempted from customs duties but also to articles the import or export of which is prohibited by the laws of the receiving State, without wishing to interfere with the tolerance shown towards articles intended for the diplomatic agent’s personal use.”

58. Mr. FRANÇOIS thought that the words “*exempted from customs duties*” should read “*subject to customs duties*”.

59. Mr. AGO suggested replacing the words “*exempted from customs duties*” by the words “*in the case of which exemption from customs duties exceptionally does not apply*”.

*It was so agreed.*

60. Sir Gerald FITZMAURICE suggested the substitution of the words “*without wishing to suggest any interference with*” for “*without wishing to interfere with*”. The Commission could not itself interfere in such a matter.

*It was so agreed.*

61. The CHAIRMAN questioned the appropriateness of the term “*tolerance*”.

62. Mr. LIANG, Secretary of the Commission, suggested introducing the concept of international courtesy in place of the reference to tolerance.

63. Mr. FRANÇOIS doubted whether such exemption was a matter either of courtesy or of tolerance on the part of the receiving State: it was a rule of international law.

64. Mr. SCALLE agreed with Mr. François. Such exemption was an established custom and thus a rule of international law.

65. Mr. TUNKIN remarked that any considerable change in the commentary might make it necessary to amend paragraph 2 of the article.

*It was agreed to substitute the words “customary treatment accorded with respect to articles” for the words “the tolerance shown towards articles”.*

*The new paragraph 5, as amended, was adopted.*

#### COMMENTARY ON ARTICLE 27 (continued)<sup>16</sup>

66. Mr. SANDSTRÖM, Special Rapporteur, proposed the replacement of paragraphs 2, 3 and 9 by the following new texts:

<sup>16</sup> *Idem.*

“(2) The solutions adopted for this problem will differ according to whether the privileges and immunities required for the exercise of the functions are considered in relation to the individual official or to the mission as an organic whole.

“(3) In view of the differences in State practice, the Commission has had to choose between two courses: either to work on the principle of a bare minimum, and stipulate that any additional prerogatives to be accorded should be decided by bilateral agreement, or to try to establish a general and uniform rule based on what would appear to be reasonable.

“(9) With regard to private servants of the head or members of the mission, a majority of the Commission took the view that they should not enjoy privileges and immunities as of right except, in the case of those who are not nationals of the receiving State, exemption from dues and taxes on the emoluments they receive by reason of their employment. In the majority view, the mission’s interest would be adequately safeguarded if the receiving State were under a duty to exercise its jurisdiction over their persons in such a manner as will avoid undue interference with the conduct of the mission’s business.”

#### Paragraph 2

67. Mr. TUNKIN, recalling his remarks on the original text of paragraph 2 (427th meeting, para. 35), said that he found the new text equally unintelligible.

68. The CHAIRMAN suggested the deletion of the paragraph.

69. Sir Gerald FITZMAURICE, Rapporteur, said that the paragraph dealt with a subject which had been discussed at some length by the Commission and appeared to be quite clear.

70. It could be made even clearer by modifying the last part of the sentence to read “*in relation to the position of the individual official or, alternatively, to the work of the mission as an organic whole.*”

71. Mr. LIANG, Secretary to the Commission, thought that “*in relation to the work*” would be clearer than the words “*in relation to the position*”.

72. Sir Gerald FITZMAURICE, Rapporteur, agreed.

73. The CHAIRMAN put the amended text to the vote.

*Paragraph 2, as amended, was adopted by 9 votes to 3, with 4 abstentions.*

#### Paragraph 3

74. Mr. AGO wondered whether it was necessary to refer to decision by “*bilateral agreement*”. Such matters could also be settled simply by the local authorities.

75. The CHAIRMAN pointed out that even in such cases an agreement was implied.

*Paragraph 3 was adopted.*

#### Paragraph 9

*Paragraph 9 was adopted with minor drafting changes.*

#### Paragraph 10

76. Mr. SANDSTRÖM, Special Rapporteur, proposed that paragraph 10 be amended to read as follows:

"In connexion with this article, the Commission considered what value as evidence could be attached to the lists of persons enjoying privileges and immunities which are normally submitted to the ministry of foreign affairs. It took the view that such a list might constitute presumptive evidence that a person mentioned therein was entitled to privileges and immunities, but did not constitute final proof".

*The new text was adopted.*

ARTICLE 28 AND COMMENTARY (*continued*)<sup>17</sup>

77. Mr. SANDSTRÖM, Special Rapporteur, proposed that the commentary on article 28 be replaced by the following text:

"This article is based on the idea that a person enjoying diplomatic privileges and immunities shall not, by virtue of the laws of the receiving State, acquire the nationality of that State against his will. An exception is made, however, in the case of a child of a national of the receiving State."

78. Mr. TUNKIN proposed that the beginning of the second sentence be amended to read: "This rule does not apply to the case of . . ."

*It was so agreed.*

79. Mr. FRANÇOIS pointed out that, under the terms of the article, an ambassador's daughter who married a national of the receiving State would be able to refuse to accept her husband's nationality, even in countries where the wife's nationality automatically followed the husband's. However, the whole article raised so many complicated questions which could not be considered adequately at the current session that the Commission should consider it further at its next session.

80. Mr. SANDSTRÖM, Special Rapporteur, said the Commission had already agreed in connexion with other articles that it could not hope to take all exceptional cases into account. In addition to the case instanced by Mr. François, the text of the article did not cover the case of women diplomats.

81. Mr. AGO and Sir Gerald FITZMAURICE, Rapporteur, said that in their view the exception made in the article only arose when the diplomatic agent was the father.

82. Mr. BARTOS pointed out that the nationality laws of many countries now made no distinction between men and women.

83. Mr. TUNKIN thought the Commission could not properly take the view that the exception would apply only where the diplomatic agent was the father, since in that case the Commission would be setting its seal to laws which discriminated on grounds of sex.

84. Mr. AGO and Sir Gerald FITZMAURICE, disclaiming any approval of discrimination on grounds of sex, said that they only wanted to indicate which would be the cases to which, in practice, the exception would apply.

*It was agreed that the text of article 28 should be considered further at the next session.*

*On that understanding, the text of article 28 was adopted.*

*On the same understanding the new text for the commentary was adopted, as amended.*

<sup>17</sup> Resumed from 428th meeting.

COMMENTARY ON ARTICLE 29 (*continued*)<sup>18</sup>

85. Mr. SANDSTRÖM, Special Rapporteur, proposed that paragraphs 1 and 2 of the commentary be replaced by the following text:

"(1) This article deals with the privileges and immunities of a diplomatic agent who is a national of the receiving State. On this subject practice is not uniform, while the opinions of writers are also divided. Some hold the view that a diplomatic agent who is a national of the receiving State should enjoy full privileges and immunities, subject to any reservations which the receiving State may have made at the time of the *agrément*, while others are of opinion that he should enjoy only such privileges and immunities as have been expressly granted him by the receiving State.

"(2) This was a minority opinion—the majority of the Commission suggested an intermediate solution. It considered it essential for a diplomatic agent who is a national of the receiving State to enjoy at least a minimum of immunity to enable him to perform his duties satisfactorily. That minimum, it was felt, is immunity from both criminal and civil jurisdiction in respect of official acts performed in the exercise of his functions, namely, acts performed in the name of the government of the sending State."

86. Mr. MATINE-DAFTARY, Mr. EL-ERIAN and Mr. BARTOS recalled that the Special Rapporteur had been asked (428th meeting, para. 19) to include a reference to the fact that a minority of the members of the Commission held the view not only that diplomatic agents who were nationals of the receiving State should enjoy only such privileges and immunities as were expressly granted them by the receiving State, but that they should not enjoy any privileges or immunities at all, and indeed that the whole practice of appointing diplomatic agents who were nationals of the receiving State should be eliminated.

87. Mr. SANDSTRÖM, Special Rapporteur, said he saw no objection to such a reference, but it should be included under article 5 rather than under article 29.

*It was so agreed.*

88. MR. EL-ERIAN thought the words "both criminal and civil" should be deleted from paragraph 2, since their inclusion must give rise to controversy.

*It was so agreed.*

89. The CHAIRMAN suggested that as the last phrase of paragraph 2—beginning with the word "namely"—was repetitious, it should be deleted.

*It was so agreed.*

*The new text, as amended, was adopted.*

COMMENTARY ON ARTICLE 31 (*continued*)<sup>19</sup>

90. Mr. SANDSTRÖM, Special Rapporteur, proposed that paragraphs 1 and 2 of the commentary be replaced by the following text:

"In the course of diplomatic relations it may be necessary for a diplomatic agent or a diplomatic courier to pass through the territory of a third State. Several questions were raised on this subject during discussion in the Commission.

<sup>18</sup> *Idem.*

<sup>19</sup> *Idem.*

“The first problem is whether the third State is under a duty to grant free passage. The view was expressed that it is in the interest of all States belonging to the community of nations that diplomatic relations between the various States should proceed in a normal manner and that in general, therefore, the third State should grant free passage to the member of a mission or the courier carrying the diplomatic bag. It was pointed out, on the other hand, that a State is entitled to regulate access of foreigners to its territory. The Commission did not think it necessary to resolve this problem, which only arises in exceptional circumstances.”

91. Mr. LIANG, Secretary to the Commission, with reference to a point raised by Mr. SPIROPOULOS, suggested that in paragraph 2 the words “the courier carrying the diplomatic bag” be replaced by “the diplomatic courier” as in paragraph 1, and that the words, “which only arises in exceptional circumstances” be replaced by “which arises only rarely”.

*It was so agreed.*

*The new text, as amended, was adopted.*

COMMENTARY ON ARTICLE 32 (*continued*)<sup>20</sup>

92. Mr. SANDSTRÖM, Special Rapporteur, proposed the following new text for paragraph 3:

“Paragraph 2 lays down that the ministry of foreign affairs of the receiving State is the normal channel through which the diplomatic mission shall conduct all official business entrusted to it by its Government; in the event, however, of agreement (whether express or tacit) between the two States, the mission may deal directly with other authorities of the receiving State.”

*The new text was adopted.*

COMMENTARY ON ARTICLE 33 (*continued*)<sup>21</sup>

93. Mr. SANDSTRÖM, Special Rapporteur, proposed the following new text for the commentary:

“This article lists the various ways in which a diplomatic agent’s functions may come to an end. The causes which may lead to termination under points 2 and 3 are extremely varied. Termination is often due to difficulties which have arisen in relations between the two countries concerned or to the breaking-off of diplomatic relations.”

94. Mr. LIANG, Secretary to the Commission, suggested that the last sentence could be deleted as unnecessary and because point 3 also referred to the case where the receiving State declared a diplomatic agent *persona non grata*.

*It was so agreed.*

95. Mr. SPIROPOULOS suggested that in the first sentence the words “the various ways” be replaced by the words “various examples of the ways”.

*It was so agreed.*

*The new text, as amended, was adopted.*

96. The CHAIRMAN, after indicating that the Rapporteur would go through the English text with a view to making any necessary stylistic changes, put the draft

articles concerning diplomatic privileges and immunities and the commentary thereon (part II of chapter II of the draft report), as amended, to the vote as a whole.

*The draft articles and commentary, as amended, were adopted unanimously.*

97. Mr. LIANG, Secretary to the Commission, said that before he had been obliged to leave, Mr. Verdross had indicated to him that he was prepared to vote in favour of the draft articles and commentary as amended.

98. Mr. BARTOS said that he had voted for the draft articles and commentary subject to reservations he had expressed concerning certain articles and certain paragraphs.

99. Mr. TUNKIN said that, though he had voted for the draft articles and the commentary as a whole, he maintained his objections on certain points, in particular on the advisability of including article 36 on the settlement of disputes.

CHAPTER III: PROGRESS OF WORK ON OTHER SUBJECTS UNDER STUDY BY THE COMMISSION; CHAPTER IV: OTHER DECISIONS OF THE COMMISSION (*continued*)

100. The CHAIRMAN put to the vote chapters III and IV of the draft report (A/CN.4/L.70/Add. 2 and 3), as a whole, as amended.

*Chapters III and IV, as amended, were adopted unanimously.*

101. The CHAIRMAN then called for a vote on the draft report (A/CN.4/L.70 and Add. 1 to 3), as a whole, as amended.

*The draft report, as amended, was adopted unanimously.*

**Closure of the session**

102. Mr. GARCÍA AMADOR, on behalf of all its members, paid a tribute to the Chairman for his devoted service to the Commission and his wise and patient conduct of its debates which had been largely responsible for the very cordial atmosphere that had prevailed throughout the session.

103. Mr. EDMONDS associated himself with the tributes paid to the Chairman, and also expressed the Commission’s gratitude to the Drafting Committee, which had had an exceptionally heavy task.

104. Mr. SPIROPOULOS, Mr. FRANÇOIS, Mr. AMADO, Mr. HSU and Mr. PAL also paid a tribute to the Chairman, as well as to the Rapporteur, the Special Rapporteurs and the Secretariat, and congratulated the new members of the Commission on their valuable contributions to its debates.

105. Mr. MATINE-DAFTARY, Mr. KHOMAN, Mr. EL-ERIAN and Mr. AGO associated themselves with the tributes that had been paid, and expressed their gratitude to the old members of the Commission, whose friendly welcome had set them at ease from the outset.

106. Mr. LIANG, Secretary to the Commission, thanked those members of the Commission who had expressed appreciation of the Secretariat’s efforts.

107. Although it was not normal for the Secretariat

<sup>20</sup> *Idem.*

<sup>21</sup> Resumed from 429th meeting.

to congratulate United Nations organs on their work, he was sure that on the present occasion the Secretary-General would wish him to point out that it was a monumental achievement for the Commission to have completed in a single session its first draft of an entirely new subject, particularly when its increased membership was borne in mind.

108. The CHAIRMAN, after thanking members for their kind remarks, and expressing appreciation of the help he had received from the other officers, from the Special Rapporteurs and from all members of the Secretariat, said he particularly welcomed the atmosphere of cordial co-operation which had marked the current session and had contributed notably to its success. He

also welcomed the unanimous adoption of the draft rules on a question of perennial importance.

109. Last but not least, he welcomed the valuable contributions of the new members, who represented legal systems that had not previously been represented or had been under-represented in the Commission. Those contributions were welcome, not only for their own sake, but also because they increased the likelihood of approval by the General Assembly of the draft on diplomatic intercourse and immunities.

110. The Chairman declared the ninth session of the International Law Commission closed.

The meeting rose at 1.20 p.m.



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