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A/CN.4/SR.412

Summary record of the 412th meeting

Topic:
Diplomatic intercourse and immunities

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Lauterpacht,[8] 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 enunciated 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-

[8] 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. García 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. SCELLE 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,[1] 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.

[1] 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. SCELLE 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. SCELLE 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. SCELLE 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",[2] 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. SCELLE 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.

[2] *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."