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Chairman: Mr. Jorge CASTAÑEDA (Mexico).

AGENDA ITEM 56

Report of the International Law Commission on the
work of its tenth session (A/3859) (continued)CONSIDERATION OF CHAPTER III: DIPLOMATIC
INTERCOURSE AND IMMUNITIES (A/C.6/L.427
AND CORR.1, A/C.6/L.429) (continued)

1. Mr. BELTRANENA VALLADARES (Guatemala) said that the first important point to bear in mind was that only a minority of Member States had thus far presented observations on the International Law Commission's draft articles on diplomatic intercourse and immunities. That did not mean that other countries had no comments to make; they had merely been prevented from submitting them by reasons beyond their control. The Guatemalan Government, for one, wished to stress several important points, some related to general principles of international law and others which revealed the incompatibility of certain of the Commission's proposals with Guatemalan domestic legislation.

2. There seemed to be several reasons why the Committee could not discuss the draft articles (A/3859, para. 53) at the current session, and why the study of the question should be deferred until there was sufficient material available to consider it in conjunction with the question of "ad hoc diplomacy" and the rules applicable to the relations between States and international organizations.

3. The first serious difficulty arose in connexion with article 1. The definition of "diplomatic staff" in sub-paragraph (d) was defective, as it violated the fundamental rule of logic that the thing being defined should not enter into the definition. A more practical course would have been simply to enumerate diplomatic staff, as the notion probably could not be accurately defined in concrete terms. Sub-paragraph (e) was open to an even more serious criticism, as it used the word "agent", which reappeared in many other parts of the draft, in a highly equivocal manner. In its normally accepted sense, the expression "diplomatic agent" would signify only the head of the mission, as he alone was empowered to act on behalf of his Government. That interpretation was largely confirmed by the Vienna Regulation of 1815 and by authorities as respected as Diena, Accioli and Sierra. Other members of the diplomatic staff of the mission were admittedly members of the "diplomatic corps", and as

such "diplomatic staff", but the term "agent" was clearly applicable only to the envoy possessing representative character. The definition in draft article 1 (e) could thus lead to serious confusion, and the very use of the word "agent" might result in an unwarranted restriction of the categories of persons entitled to privileges.

4. The enumeration of the functions of a diplomatic mission in article 3 seemed unnecessary and largely inaccurate, as many of the matters referred to therein were often settled by direct contact between ministers of foreign affairs or even heads of States. Moreover, sub-paragraph (b) seemed to encroach on a subject which was largely a matter of private international law and outside the province of a general agreement concerned solely with diplomatic immunities. In that context, rigid rules might even tend to freeze the progressive development of international law and hinder diplomatic relations.

5. Article 8, dealing with persons declared persona non grata, failed to mention that a State might make such a declaration implicitly, by refusing to accept the notice of a diplomat's appointment. Similarly, the word "normal", in article 10, paragraph 1, seemed somewhat inappropriate. The factors which influenced a Government's decision on the size of a diplomatic mission varied so greatly that a general rule was difficult to state. Moreover, paragraph 2 of article 10 seemed to contradict the second part of article 6, as it entitled the receiving State to refuse to accept officials of a particular category but did not specify what that category might be. Article 18 also failed to reflect general practice, as the right to use flags and emblems was not necessarily restricted to the head of the mission.

6. The very summary statement in article 19, regarding the premises necessary for the mission, might give rise to serious problems of interpretation, especially in disputes concerning diplomatic asylum. An even more serious defect was apparent in article 29, paragraph 1 (c), which could be construed as a tacit authorization of diplomatic officers to engage in liberal professions or commercial activities when they should normally devote their time exclusively to their functions. Article 34, paragraph 2, was also unclear, as the exception seemed to nullify the privilege. If a Government had serious grounds to suspect that a diplomat was guilty of carrying contraband it should request his removal. In any event, the right of inspection should be made subject to permission from the ministry of foreign affairs, in order to preclude arbitrary action.

7. Article 35, concerning the acquisition of nationality, conflicted with article 6 of the Guatemalan Constitution. Under the latter, a child born in Guatemala and having, for example, a foreign diplomat and a Guatemalan mother as parents would inevitably ac-

quire Guatemalan nationality. Again, article 45, which provided for compulsory arbitration and, failing that, submission to the jurisdiction of the International Court of Justice, could not be reconciled with article 149 of the Guatemalan Constitution, under which any government reference to international arbitration or judicial proceedings required the approval of two-thirds of the deputies of the Guatemalan Congress.

8. Despite those criticisms, the Guatemalan delegation thought that, except where it conflicted with constitutional provisions, the Commission's draft could form the basis of a general convention. His delegation would therefore support any draft resolution requesting Governments to present their final opinions on the draft, without prejudice to the action which might be taken at the General Assembly's fourteenth session. The question whether to call a conference or to prepare the final text in the Sixth Committee would then be decided with a full knowledge of Government views on the matter.

9. Mr. TOLENTINO (Philippines) observed that many delegations seemed to believe that it would be impracticable to undertake a detailed consideration of the draft articles at the current session. On the other hand, there seemed to be no clear sentiment whether the draft should at some stage or other be taken up by the Sixth Committee itself or by an international conference. The Philippine delegation could to some extent accept the view that the draft did not require immediate action, although the General Assembly, in resolution 685 (VII), had expressly requested that the topic be given priority treatment. In reality, however, the necessity or desirability of postponing consideration of the draft had not been convincingly demonstrated.

10. The Commission's 1957 draft (A/3623, para. 16) had been transmitted to Governments, and twenty-one States had submitted observations thereon (A/3859, annex) with practically unanimous praise for the Commission's work. During the discussion of the subject in the Sixth Committee at the twelfth session of the General Assembly in 1957, some further modifications and clarifications had been suggested. The Commission had then revised the 1957 draft very carefully and had expressly incorporated several new provisions such as article 3 (e), the need for which had been stressed by his delegation in the Sixth Committee at the twelfth session (509th meeting, para. 43).

11. In those circumstances, it seemed that if the provisional 1957 draft had elicited well-merited commendation the revised draft (A/3859, para. 53) deserved at least equal approval. In fact, the incorporation of subsequent suggestions had necessarily reduced the area of controversy. The Philippine delegation could not be fully convinced, therefore, that the draft could not be considered immediately, article by article. The Sixth Committee knew the views of Governments, and the many renowned jurists present would not need much time to study the Commission's changes. Nor did many members of the Committee need to wait for Government instructions, for the subject was not political but legal, and many representatives might even be the very persons who usually advised their Governments on such legal issues. The only plausible reason for postponing consideration of the draft might be lack of time. But, if the Committee

was determined to work hard and speedily, the task could be accomplished in a relatively short period.

12. If the majority disagreed with that view and the matter had to be postponed, the Committee would still have to take certain immediate concrete decisions. In the first place, it would have to decide whether a convention on diplomatic relations should be concluded. The Government of the United States of America, for one, seemed to oppose the formulation of the relevant rules in the form of a convention, and had advanced weighty arguments in support of that view in its comments (*ibid.*, annex, section 20) on the Commission's first draft. Those arguments, however, had been answered by the Special Rapporteur of the Commission in his report (A/CN.4/116), and the Philippine delegation was inclined to agree with his views. A convention thus seemed highly desirable, and the draft afforded a sufficient basis for such an instrument. His Government admittedly had certain reservations regarding individual provisions such as article 30, which recognized implied or presumed waivers in civil or administrative proceedings; but, precisely because it was a new State, the Philippines was deeply interested in the progressive development of that branch of international law. A convention would leave no room for doubt regarding the rules to be observed by nations big and small, and would thus assist the improvement of relations between States and promote international understanding.

13. If a convention was to be adopted at some future time, the Committee would also have to decide what organization or body should be called upon to prepare it. An international conference was a possibility, but, in view of the scope of the subject matter and the stage already reached, the other course mentioned might be preferable. Furthermore, a conference involved much time and expense and the work could be done just as well in the Sixth Committee. In any event, unless the Committee decided to have a convention and also took a decision on the body which should devise it, the current session might end without the Sixth Committee having accomplished anything substantial.

14. Mr. AGOLLI (Albania) said that the rules relating to diplomatic representatives constituted one of the oldest branches of the law of nations. The first principles had indeed begun to emerge at the very dawn of history, and the contemporary system was the fruit of a protracted process, affirmed by a number of international instruments. Despite the ancient nature of the institution, however, disputes on the subject still arose by reason of the fact that none of the relevant international documents had ever been universally accepted. The codification of the law on the matter would thus greatly facilitate international understanding.

15. The International Law Commission's current draft contained many excellent features, based on the observations submitted by Governments on the preliminary draft. A particularly welcome provision was article 3 (e), which stressed that the functions of diplomatic missions included the promotion of friendly relations between the sending State and the receiving State. Another provision which recognized recent practical developments was article 13; the difference between ambassadors—who had formerly been exchanged only by the bigger States—and ministers had of late largely disappeared.

16. The draft reflected the now accepted principle that privileges enjoyed by diplomatic officers were no longer merely a corollary to the prerogatives of the head of a mission, but a practical recognition of the fact that the mission as a whole was an organ of the sending State. Other welcome features were the emphasis on the freedom of communication and the personal inviolability of diplomatic agents, as well as the statement that it was the duty of all persons enjoying diplomatic privileges to respect the laws and regulations of the receiving State and not to interfere in its internal affairs.

17. In trying to formulate the articles on immunity from jurisdiction, the Commission had experienced some difficulty. That did not apply to immunity from criminal jurisdiction, which was obviously complete. But in the matter of civil jurisdiction, the Commission had been confronted by the uncertainty prevailing in doctrine and practice. In view of those difficulties, the Commission's conclusion that the diplomatic agent enjoyed immunity also from civil and administrative jurisdiction, subject only to certain clearly defined exceptions, was on the whole commendable.

18. Despite its general quality, however, the draft was not perfect. For example, article 36, which enumerated the persons entitled to privileges and immunities, failed to mention the principle of reciprocity to which many Governments attached cardinal importance. Similarly, for reasons which had already been stated on many occasions, the provision for compulsory arbitration and jurisdiction contained in article 45 would be unacceptable to many States.

19. Subject to those criticisms, the draft as a whole provided a suitable basis for a general convention. Such an instrument would preclude the violation of generally accepted principles, and would greatly assist States in maintaining friendly relations.

20. He wished to stress that the question of diplomatic intercourse and immunities was a separate branch of international law, and could be discussed independently of the question of consular relations. If the General Assembly were to defer action on diplomatic intercourse and immunities until the Commission had submitted its draft on consular intercourse and immunities, much valuable time would be lost. The most constructive action would be to call a conference of plenipotentiaries to prepare a convention at an early date. The success of the United Nations Conference on the Law of the Sea and of the United Nations Conference on International Commercial Arbitration amply demonstrated the merit of such a procedure.

21. Mr. EL-ERIAN (United Arab Republic) said that the International Law Commission in its draft on diplomatic intercourse and immunities had taken due account of the observations made in the Sixth Committee during the twelfth session of the General Assembly and of the comments by Governments on the provisional draft. Many changes had been made as a result, such as the inclusion of article 1 on definitions, following a suggestion by the Government of the Netherlands (A/3859, annex, section 14), and article 5 on dual or multiple accreditation, following a suggestion by the Government of the United States of America (*ibid.*, section 20).

22. The adoption of an international convention on the basis of the Commission's draft could bring about a

uniformity of interpretation and practice which would contribute to the improvement of international relations by removing possible causes of friction.

23. His delegation accepted the draft of the International Law Commission as a whole, although it had reservations regarding some of its provisions. His delegation was glad to note that the Commission favoured the modern trend in favour of the doctrine of "functional necessity". That doctrine justified privileges and immunities as necessary to enable a diplomatic mission to perform its functions.

24. In principle, his delegation opposed the practice of appointing nationals of the receiving State as foreign diplomatic representatives; that practice was incompatible with the very purpose of diplomatic representation. It might be necessary, for practical considerations, to appoint nationals of the receiving State as members of the administrative or service staff of a mission, or as interpreters or translators, but there could be no justification for their appointment as members of the diplomatic staff. Many States were unwilling to allow their nationals to act as diplomatic agents in view of the difficulties which could result. Countries which had known the system of capitulations were only too aware of the abuses to which such practices could lead.

25. The Commission had done something to meet those objections by requiring, in article 7, the consent of the receiving State to such appointments, and by granting, in article 37, immunity from jurisdiction only in respect of official acts. Nevertheless, it was not advisable to include provisions which specifically sanctioned a practice which had now become obsolete.

26. His delegation also shared the misgivings of a number of delegations with regard to article 45 which provided for the compulsory jurisdiction of the International Court of Justice. The United Nations Conference on the Law of the Sea had shown that it was inadvisable to lay down a rigid formula for disputes arising out of the application or the interpretation of international conventions; such disputes should be decided in accordance with the specific nature of each convention.

27. When the text of article 45 of the draft was being considered by the International Law Commission, Mr. François had pointed out that it was not advisable to insert a compulsory jurisdiction clause in every draft which the Commission prepared. The task of the Commission was the codification of the law, not its application. He had stated that there was a danger that such a clause would come to be regarded as a clause de style, and reservations to it would be so automatic that the clause would lose its value. In his opinion, the whole matter of the settlement of disputes should be governed by the general provisions relating to the subject.^{1/}

28. The delegation of the United Arab Republic agreed that the draft should be recommended to Member States with a view to the conclusion of a convention. It had, however, doubts regarding the practicability of an article-by-article discussion in the Sixth Committee. In the single instance in which the Sixth

^{1/} Yearbook of the International Law Commission, 1958, vol. I (United Nations publication, Sales No.: 58.V.1, Vol.I), 465th meeting, para. 68.

Committee had undertaken such a task, it had taken two months to prepare the comparatively short Convention on the Prevention and Punishment of the Crime of Genocide.

29. His delegation considered that an international conference should be convened to conclude the convention. For that purpose, it was not necessary to await the preparation of the drafts on ad hoc diplomacy and consular intercourse and immunities which would take many years. Those two topics could, on the other hand, await the adoption of rules on diplomatic intercourse and immunities, which were the basic rules.

30. There was also a practical consideration in favour of that course. The United Nations Conference on the Law of the Sea had shown the difficulty of convening an international conference on several topics. That Conference had been a tax on the facilities of the Secretariat, and had presented great difficulties to the small delegations.

31. In conclusion, his delegation believed that the Commission's draft could serve as a basis of discussion for an international conference, and that such a conference should be held in the near future so as to give all Governments ample opportunity to study the draft.

32. Mr. ULLOA (Peru) said that it was incongruous that, at a time when the world was faced with such grave matters as nuclear weapons, the Sixth Committee should be devoting so much time to the discussion of a draft which dealt with somewhat secondary matters. The Commission's draft was almost exclusively about questions of form which had not given rise to any serious difficulties in international relations. One of the unfortunate consequences of such an approach was that it could create the impression that the principle of the equality of States was observed merely by keeping certain rules concerning the rank and privileges of diplomatic personnel. In reality, the principle of the equality of States involved much more important issues; it meant that what was illegal for one State was illegal for another. That principle had also its economic implications. The rules governing diplomatic privileges and immunities had existed almost unchanged for over a century, but they had done nothing for the real equality of States.

33. The Commission's draft dealt at length with the rights of diplomatic personnel, but contained only one article (article 40) on their duties. The draft was also incomplete, since it left out the question of consular intercourse and immunities, as well as that of ad hoc diplomacy and that of relations between States and international organizations. All those important matters had to be included in any attempt at a progressive development of international law. The Commission, however, had been content to codify the well-established rules concerning permanent diplomatic missions.

34. Many countries dealt with diplomatic and consular representation in a single body of legislation, and therefore regarded the questions of diplomatic and consular intercourse as complementary. They could not deal with the one without considering the other.

35. Temporary missions, both political and technical—particularly the latter—had become increasingly important, and it was necessary to examine the effect of those missions on diplomatic representation.

36. International organizations had fortunately grown in number and in importance, and it was necessary to determine the privileges and immunities to be enjoyed by those organizations and their representatives. There existed already some sixty international organizations, and their relations with the host countries should not be left to bilateral agreements. Some uniformity had to be introduced into the existing chaotic situation, but that did not mean that an International Law Commission draft on the subject would affect existing host agreements. Indeed, under international law, the signing of a general convention on the subject would not affect existing special conventions. The Commission's draft would, however, serve as a useful model for future agreements.

37. The Commission had not included in its draft any provision on diplomatic passports, the regulation of which was essential. The diplomatic agent's passport was the document which established his identity and his right to diplomatic privileges and immunities.

38. His delegation was opposed to the idea of convening an international conference, because such a course would imply that the United Nations organs were not in a position to deal with the question. The question of diplomatic intercourse and immunities should be postponed until a later session of the General Assembly, and should continue to be dealt with by the Sixth Committee, which was the appropriate body. That would give an opportunity to Governments to submit their views on the Commission's final draft. The fact that only twenty-one States had sent written comments did not mean that the other States had no objection to the draft. Many of those States had been unable to send written comments because of such technical difficulties as the translation of the draft and the lack of sufficient personnel.

39. Many references had been made to the example of the United Nations Conference on the Law of the Sea. The time had not yet come to say whether that Conference had been a total or partial success. The holding of the Conference had, however, been justified because of the great importance of the questions referred to it, questions which had already led to a number of serious international disputes. In addition, the Conference had had before it a draft on the law of the sea as a whole. The position with regard to diplomatic intercourse and immunities was completely different. The draft on the subject was incomplete and dealt only with some secondary matters; in addition, the subject was not vitally urgent.

40. Diplomatic privileges and immunities constituted a concession on the part of the receiving State and not a right of the sending State. They were an exception to the normal jurisdiction of the receiving State in its own territory; the rules governing them had therefore to be interpreted restrictively so as to respect the sovereignty of States.

41. It was particularly important to keep within bounds the privileges and immunities enjoyed by diplomatic personnel, because of the great increase in their number in recent years. The number of independent States in the world had increased, and States tended to maintain diplomatic missions in a greater number of countries. The staff of diplomatic missions had increased with the need of maintaining a specialized personnel on a variety of subjects, and international conferences had become very frequent. It was

therefore essential that the increasingly large number of persons who travelled or resided abroad with their families in connexion with the representation of their countries should be given only those privileges and immunities which were really necessary for the purpose of that representation.

42. A similar situation occurred in regard to international organizations. Many thousands of persons worked for those organizations, and it was important to draw a distinction between their representative and their purely administrative functions. Only the former needed the protection of privileges and immunities.

43. Privileges and immunities, particularly in fiscal matters, were extremely unpopular. There was a justifiable tendency to limit their scope; it was thus that a number of States had limited customs exemptions to a "diplomatic quota". There was also a strong feeling that diplomatic immunity should not apply to essential administrative regulations, such as those governing traffic and public health.

44. Lastly, a question which deserved attention was that of the suspension of diplomatic immunities on grounds of security. Certain countries had suspended those immunities during the Second World War, and it was important to determine whether such suspension was in conformity with international law.

45. The Peruvian delegation favoured the postponement of the question of diplomatic intercourse and immunities, so that all those serious aspects of the question which had not been examined by the Commission could be gone into. Accordingly, his delegation supported the French draft resolution (A/C.6/L.427 and Corr.1) which called for the study of the subject of relations between States and international organizations, and the joint draft resolution (A/C.6/L.429) which called for the postponement of the topic to the fourteenth session of the General Assembly.

46. Mr. DOUC RASY (Cambodia) said that the Committee could choose between two courses, either to refer the draft articles on diplomatic privileges and immunities to an international conference of plenipotentiaries or to postpone the item to the General Assembly's fourteenth session. His delegation was not opposed to the convening of a conference; that, however, would not only involve considerable expense but would also make it appear as if the Committee were evading its responsibilities. If the second alternative were adopted, on the other hand, there was a danger that the item might be postponed indefinitely from one session to another until the General Assembly decided either to remove it from its agenda altogether or to assign it to another Committee.

47. It was clear that the Sixth Committee itself could accomplish nothing in the matter, either now or at some future session, unless it was prepared to consider the draft article by article. Two objections had been raised against a detailed discussion of the draft at the current session; namely the Committee did not have sufficient time at its disposal, and delegations had not received adequate instructions from their Governments. The first was unfounded, because the Committee was not required to complete its consideration of the item in a single session. If it succeeded in throwing light on only some of the provisions of the draft, its time would not be wasted. The second objection was

perhaps more serious, but if the function of delegations was merely to transmit the opinions of their Governments, there was little chance of ever reaching any general agreement. In his opinion, delegations were called upon to play a much more active role, that of reconciling the principles of international law developed in the debates of the General Assembly with those developed in their respective countries. Without committing their Governments on all occasions, they should express opinions, clarify points of view, and try to reach a common ground of agreement. The Committee should, therefore, at least make an effort to consider the draft articles in detail at the current session. In any case, it ought not to adopt a draft resolution which, without solving anything, merely postponed the question ad infinitum; if it did so, it would be failing in its duty to the General Assembly. Even if the current discussion of the draft did not proceed beyond a preparatory stage, that work would provide a useful basis either for a conference of plenipotentiaries or for future discussion by the Committee itself.

48. Mr. POWER (Ireland) shared the view expressed by the representative of Pakistan (568th meeting, para. 24) that discussion of the topic of diplomatic intercourse and immunities should be deferred until the fourteenth session of the General Assembly. It was not unreasonable that Governments which had not had adequate time to study the matter should be given a further opportunity of doing so. He regretted that the sponsors of the joint draft resolution had not seen fit to take into account the position of those Governments which would prefer not to commit themselves, in advance of further consideration, to the early conclusion of a convention. He believed that it would not be possible in any event to hold a conference before the fourteenth session.

49. Mr. ABDESSELAM (Tunisia) said that his delegation welcomed the International Law Commission's draft articles on diplomatic intercourse and immunities, and would be glad to see similar drafts on consular intercourse and immunities, ad hoc diplomatic missions, and the relations between States and international organizations. After criticizing certain articles of the draft in detail, he expressed reservations with respect to articles 7, 12, 30, 36 and 45. In particular, his Government was unable to accept the provisions of article 36, which were contrary to its practice, and the provision of article 45 whereby any dispute between States concerning the interpretation and application of the Convention would, at the request of either of the parties, be submitted to the International Court of Justice.

50. With respect to the action which the Committee might take on the Commission's draft, it could either recommend the convening of an international conference of plenipotentiaries, or defer the item to the fourteenth session for more detailed study. Both solutions had their advantages and would give Governments ample time in which to study the draft. States should not, however, be compelled to bear the costs of an international conference; it might be desirable to ask the Secretariat to prepare an estimate of the expense involved by such a conference. He found it difficult to take any definite position with regard to either solution. He also reserved his right to speak on a later occasion concerning the French draft resolution and the joint draft resolution.

51. Mr. THORSTEINSSON (Iceland) said that the International Law Commission's draft articles on diplomatic intercourse and immunities were a valuable contribution to international law, and constituted a good basis for a multilateral convention on the subject. His delegation supported the preparation of a draft convention by the Sixth Committee and the inclusion of the topic in the agenda of the fourteenth session of the General Assembly. To facilitate the Committee's task, however, further preparatory work was desirable. Governments should be invited to submit observations on the draft articles in time for their circulation before the fourteenth session; it might also be advisable to have a draft preamble and final clauses of a

possible convention drawn up and circulated before that session. Likewise, it would be helpful if the first draft on consular intercourse and immunities could be ready some time before the detailed discussion of the draft on diplomatic intercourse and immunities. Lastly, if the Committee decided to convene an international conference of plenipotentiaries, his delegation considered—both for financial and other reasons—that such a conference should not be convened until the draft on consular intercourse and immunities, and possibly also the rules concerning ad hoc diplomatic missions, could be considered at the same time.

The meeting rose at 6 p.m.