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CONTENTS

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 AND ADD.1) (continued)

1. Mr. SALDIVAR (Paraguay) said that the International Law Commission was to be congratulated on the work it had accomplished with regard to diplomatic intercourse. Its draft articles (A/3859, para. 53) provided an excellent basis for discussion and agreement. He reserved the right to comment on the substance of the articles when the Sixth Committee examined the draft in detail. In any case, the conclusion of a convention as recommended by the International Law Commission in its report (ibid., para. 50) seemed desirable.

2. Concerning the procedure to be adopted, he was of the opinion that a detailed consideration of the draft should be postponed until the fourteenth session of the General Assembly to enable Member States to submit their comments. The discussion should take place in the Sixth Committee, to avoid the additional expense of another international conference.

3. Mr. ZULETA ANGEL (Colombia) considered the International Law Commission's draft a work of outstanding importance, and associated his delegation with the congratulations that had been extended to the Commission.

4. He would recall, however, that the Convention regarding Diplomatic Officers which was adopted at Havana in 1928 already represented, as far as the American continent was concerned, a valuable contribution to the codification of international law. The Convention, drafted by eminent jurists, provided some useful points of comparison with the draft before the Sixth Committee; and although it was neither expedient nor possible to discuss that draft in detail at the present stage, he would like to touch on some of the main aspects.

5. The first point concerned the "right of legation", which was explicitly laid down in article 1 of the Havana Convention. The International Law Commission had seen fit to disregard that concept, and in his report (A/CN.4/91, para. 32), its Special Rapporteur had put forward the view that that "right" was a mere privilege which presupposed the consent of the receiving State. That view conflicted with current theory on the subject. A State would be abusing its rights if it refused, without reasonable grounds, to allow another State to institute diplomatic relations with it. Such relations were necessary to international life, and the Havana Convention had rightly recognized that States had the right of legation.

6. The second point concerned the functions of a diplomatic mission, dealt with in article 3 of the draft. The definitions given in that article were didactic in nature and hence were out of place in the text of a convention. Furthermore, the wording of sub-paragraph (b) of the article called for comment. It stated that one of the functions of the mission consisted in "protecting in the receiving State the interests of the sending State and of its nationals". That provision might lead to differences of interpretation and to abuse, in authorizing or encouraging interference by diplomatic missions in disputes between nationals of the receiving State and nationals of the sending State. Protection, in a general sense, of foreign nationals should be exclusively a matter for the receiving State. Any alien who considered that he had been wronged could normally have recourse to the ordinary judicial and administrative tribunals. It was true that the Commission in paragraph 4 of the commentary to the article referred to article 40, which prohibited interference in the internal affairs of the receiving State, but that was not an adequate reservation.

7. With regard to the third point, concerning classes of heads of mission, in paragraph 2 of the commentary on articles 13 to 16 the Commission recalled a previous commentary according to which those articles were "intended to incorporate in the draft the gist of the Vienna Regulation concerning the rank of diplomats". However, that classification was outdated and no longer suited to the needs of contemporary diplomacy. The distinction made by the Vienna Regulation between the different categories of diplomatic representatives was based on the importance of the sending State. Such distinctions were contrary to the principle of the equality of sovereign States as set forth in the United Nations Charter. Nowadays, any State might appoint an ambassador to represent not the head of State personally but the State itself; that principle was, moreover, explicitly recognized in the preamble to the Havana Convention. Since the last war, distinctions between different categories of diplomatic missions had tended to disappear.

8. The fourth point had to do with privileges and immunities proper. As the representative of Peru had pointed out at the previous meeting, the International Law Commission had not specifically stated the criteria it had used in determining what privileges and immunities should be accorded to diplomats. In his

report (A/CN.4/91, para. 14 et seq.), the Special Rapporteur had criticized the various theories advanced in that connexion, while noting (ibid., para. 22) that Governments tended to favour, in preference to the theory of "exterritoriality", the "functional necessity" or "demands of the office" theory, which the International Law Commission, in its general comments on section II of the draft (A/3859, pp. 16-17), admitted it had taken as guidance. According to that theory, only the privileges and immunities necessary to ensure the diplomatic agent sufficient independence should be granted. The principle would thus justify granting immunity from jurisdiction but not, for example, tax exemptions, and would result in a limitation of diplomatic privileges and immunities the desirability of which had been explicitly recognized in the preamble to the Havana Convention. Article 36 of the Commission's draft, however, extended those privileges rather than limited them. With regard to the tax exemptions referred to in article 32, on the other hand, it would be better to allow States themselves the necessary latitude to determine and limit them, as well as to apply the rule of reciprocity.

9. The fifth point, relating to the duties of diplomatic agents, had been dealt with quite satisfactorily in article 40 of the draft. That article was comprehensive and stated that the fundamental obligations and duties of diplomatic agents were: not to interfere in the internal affairs of the receiving State; to respect the laws and regulations of that State; and to conduct all official business with the receiving State through the ministry of foreign affairs of that State. In a draft convention, those obligations could not be entered into in greater detail.

10. Finally, concerning article 45, which provided for compulsory arbitration and the jurisdiction of the International Court of Justice in the event of a dispute, he understood the difficulties which the adoption of that article might present for States which had not accepted the clause providing for the compulsory jurisdiction of the Court. Colombia had accepted such jurisdiction as long ago as 1936. It had continually had recourse to the arbitration and services of the Court and could claim to have always supported, both in theory and in practice, legal means of settling international disputes. The Colombian delegation would therefore have no hesitation in adopting article 45.

11. He agreed that a detailed discussion of the draft articles could not be undertaken at the current session, but felt that the Sixth Committee itself should examine the substance of the draft directly at a later session. The convening of a conference of plenipotentiaries would only be justified if the draft also contained provisions concerning ad hoc diplomacy, international organizations, and consular intercourse and immunities. The United Nations Conference on the Law of the Sea had had four interrelated questions to discuss, whereas the present draft articles were comparatively simple since they dealt with one particular field, in which there was a well-established tradition and the codification of which did not present major difficulties. The Sixth Committee should not confine its work to purely procedural matters since it was empowered to undertake a study of the substance.

12. The Colombian delegation would therefore support any draft resolution requesting the Sixth Committee to undertake at a later session a detailed study of the draft with a view to arriving at definite conclusions.

13. Mr. PHLEGER (United States of America) felt that it was dangerous to assume that the best way of dealing with the International Law Commission's draft was to use it as a basis for an international convention. The United States Government had already stated its views on the question (A/3859, annex, section 20). In a matter which rarely gave rise to serious international disputes, a convention, instead of offering advantages, might result in a reduction of the privileges and immunities at present accorded to members of diplomatic missions, since in some cases its ratification would require changes in existing national laws, and legislative bodies were not always inclined to view such changes favourably.

14. Although the substance of the draft articles had not been examined in detail, several of their provisions had already been subjected to criticism; it therefore seemed likely that the ratification of a convention concluded on the basis of the draft articles would be accompanied by reservations which would weaken it considerably. If, in order to meet the wishes of certain Governments, some of the provisions were deleted, the final text would probably constitute considerably less of an advance than that provided by the International Law Commission's draft.

15. For all those reasons, the United States delegation continued to believe that it would be preferable to submit the draft articles to Member States as a codification of international law in the field of diplomatic intercourse and immunities, rather than to use it as the basis for a convention. However, the question need not be decided immediately. Governments had not yet had time to study the Commission's text adequately and, for the time being, it was only a question of choosing the procedure to adopt.

16. A number of delegations had proposed postponing discussion of the draft articles until the fourteenth session of the General Assembly so as to give Governments an opportunity to submit their comments. That proposal had great advantages, since it would enable Member States, if the comments were conveyed to them before the fourteenth session, to have an idea of the extent and importance of the points of agreement or disagreement, and, consequently, to see if it would be desirable and fruitful to attempt to conclude a convention based on the draft articles. The work of delegations would be easier if no attempt was made to prejudge at the current session whether or not it was desirable to conclude such a convention.

17. Mr. DAVIN (New Zealand) congratulated the International Law Commission and its Special Rapporteur on their excellent draft. Although his Government had not had time to study the draft thoroughly, he had some observations to make at that stage of the discussion.

18. New Zealand entirely approved of the International Law Commission's decision to be guided by the "functional necessity" theory in solving problems on which practice gave no clear pointers. New Zealand had itself acted on a similar basis.

19. However, the Commission had made no distinction between immunities and privileges. The term "immunities" was generally used to mean immunity from the jurisdiction of the courts in both civil and criminal

matters, and it sometimes covered inviolability of official premises and official archives, whereas the term "privileges" described customs and tax exemptions, which rested rather on international comity than on international law. In article 36, paragraph 1, the Commission proposed that the administrative and technical staff of a mission should, if they were not nationals of the receiving State, enjoy the privileges and immunities accorded to diplomatic agents. The New Zealand Government could accept that proposal in so far as it related to immunity from the jurisdiction of the Courts, but it did not think that the reasons advanced by the Commission justified the extension of customs and tax exemptions to such staff. That would be throwing too large a burden on the receiving State. The draft should be amended to cover that point.

20. New Zealand, which was a country of immigration, also felt that the status of persons entering the territory of the receiving State as immigrants and subsequently obtaining employment with the diplomatic mission of their own or a third country should be assimilated to that of nationals of the receiving State. The New Zealand Government, while agreeing that some special provision should be made concerning the position of nationals of the receiving State, reserved its position on article 37 of the draft in its present form.

21. Under article 21 of the draft, some doubt remained concerning the liability to tax of the private residences of diplomatic agents and of members of the administrative, technical and service staffs.

22. Lastly, further study should be given to the question of the application of the principle of reciprocity within the rigid framework established by the Commission's rules, and the provisions of article 44 should be redrafted in order to make its meaning more apparent.

23. The speaker then dealt with the International Law Commission's recommendation in paragraph 50 of its report. His delegation saw some advantage in having such a convention, provided that it attracted wide support. Inasmuch as a considerable number of delegations had endorsed the idea of concluding a convention, it was likely that such a convention would have many signatories. It was true that a convention would necessarily introduce an element of rigidity, but that would be largely outweighed by the advantage of knowing with certainty what the law was. In New Zealand, for example, where most of the rules came from common law based on decisions of the competent courts, the effort which must be made to establish the principles which should govern particular matters would be diminished if the parties in any given case had adhered to a convention establishing their respective rights and obligations.

24. It was more than ever desirable that the extent of diplomatic immunities and privileges should be determined, since the conventions concerning the privileges and immunities of international organizations provided that their staff members should be treated on the same basis as diplomatic agents.

25. His delegation did not believe that consideration of the item should be delayed until the International Law Commission's report on consular intercourse and immunities was available. The fact that the report would not be ready until 1961 would mean an unwarranted delay in disposing of the question of diplomatic intercourse and immunities. On the other hand, it did not appear possible for the Sixth Committee to examine the present draft, article by article, at the current session; moreover, Governments had not had time to study it properly. On the other hand, his delegation would have liked to see a greater proportion of the Sixth Committee's time devoted to the substance of the draft. It noted with satisfaction that the joint draft resolution (A/C.6/L.429 and Add.1) had followed the suggestion of the representative of the Union of South Africa (571st meeting, para. 35) that a date should be fixed for receiving further comments by Governments.

26. The task of establishing the text of the convention should be entrusted to the Sixth Committee. That solution would avoid the considerable expense of a conference and would facilitate the participation of small countries; moreover, two international conferences were already under consideration for 1959, so that it would be difficult to hold a third. Since the International Law Commission would not present any new drafts before 1961, it appeared that the Sixth Committee would have the time, at the fourteenth session, to study the question which, moreover, was not very controversial; by adopting that procedure, the Sixth Committee would avoid being reproached, as it often was, for failing to deal substantively with the items on its agenda. Finally, his delegation did not consider the problem of the representation of States which were not members of the United Nations impossible of solution under the rules of procedure.

27. However, if the majority of the Committee felt that a conference would be the only satisfactory means of concluding a convention, the New Zealand delegation would not wish to stand in the way, although it would prefer that any decision on that point should be postponed until the next session.

28. Mr. DABBAGH (Saudi Arabia) said that, on the whole, the International Law Commission's draft was acceptable to his delegation, which considered that the codification of the principles of international law in the matter of diplomatic intercourse and immunities would do much to improve relations between States. However, it could not agree to such provisions as those of article 36, including paragraph 7 of the accompanying commentary, or of article 45.

29. He would have preferred to see agreement in the Sixth Committee at least on the principle of calling an international conference with a view to the conclusion of a convention, but he would not oppose the solution proposed in the joint draft resolution in the hope that the postponement of the item to the fourteenth session would help the members of the Committee to arrive at a decision without repeating old arguments.

30. He expressed complete approval of the International Law Commission's decisions relating to ad hoc diplomacy and to relations between States and international organizations (A/3859, paras. 51 and 52).

31. Mr. USTOR (Hungary) acknowledged that the compilation of a new universal code of diplomatic intercourse and immunities to replace the rules which had been used for centuries was an enormous task which required great circumspection, and that, as representatives had pointed out, the Sixth Committee was not prepared to discuss the draft in detail at the current session. However, that did not mean coming to a halt; the Hungarian delegation could not support proposals

simply to postpone the item to the fourteenth session; it would be very regrettable if that should be the result of two weeks' discussion in the Sixth Committee. The arguments in favour of convening a conference, especially those advanced by the representatives of Greece (573rd meeting) and the United Arab Republic (574th meeting), seemed substantially to outweigh the arguments to the contrary. All States, whether Members of the United Nations or not, should be invited to such a conference.

32. As pointed out by the representatives of the United Kingdom (570th meeting, para. 21) and New Zealand (para. 25 above), there was nothing to prevent the question of diplomatic intercourse from being dealt with separately from the question of consular intercourse.

33. The Hungarian delegation paid a tribute to the International Law Commission, Mr. Sandström and the Secretariat for the work they had done. The draft met the requirements of international relations as they presented themselves at the present time. The International Law Commission had been right to concentrate on achieving practical results while conforming to the leading principles of present-day international law. One such principle was that of the peaceful coexistence of States which, in the atomic age, was not merely a theoretical postulate but an absolute necessity if mankind wished to survive and save succeeding generations from the scourge of war. For that reason the Hungarian delegation warmly approved article 3, subparagraph (e), of the draft.

34. The corollary of the principles of the coexistence and equality of States was the principle of non-interference, embodied in article 40. That principle, which required diplomatic agents to refrain from any interference in the internal affairs of the receiving State, was one of the cornerstones of diplomatic intercourse. The Hungarian delegation considered the draft as a whole to be satisfactory, but that obviously did not imply approval of all its provisions. In particular, his delegation endorsed the criticism which had been offered with regard to articles 36 and 45.

35. He believed that the Sixth Committee was now in a position to decide on the action to be taken on the draft, the only possible solution in his opinion being the conclusion of a convention. The written comments of Governments (A/3859, annex) and the discussions in the Sixth Committee revealed virtual unanimity in favour of concluding a convention on diplomatic intercourse and immunities. In fact, only one State, the United States of America, had expressed itself as opposed to a convention.

36. The alleged dangers of codification were to be encountered not only in the sphere of diplomatic intercourse: they could be invoked in any other branch of international law, for example, in the law of the sea. The advocates of a codification of international law were fully aware of those dangers. Thus, Mr. Lauterpacht had pointed out that the drawbacks of codification had been taken into account when the Charter had been drafted. But it had been felt at the time that its advantages outweighed its real or imaginary dangers, and codification had been included among the tasks of the General Assembly. The authority of international law required that its abstract principles should be embodied in rules of such certainty, clarity and uniformity as was practicable. That comment applied in particular to diplomatic law, which loomed so large in the intercourse of States. That had been the view expressed by Mr. Lauterpacht in 1954,[1/] and since that time important conventions on the law of the sea had been concluded which only confirmed the soundness of that view.

37. The Committee of Experts of the League of Nations and already stated that the topic was ripe for codification, and if there was any field where there was extensive state practice, precedent and doctrine, it was certainly that of diplomatic intercourse. It could not be claimed that Article 13 of the Charter was being complied with if nothing more was done than to pile up theoretical works without incorporating their substance in treaties. In international law, as in domestic law, custom was gradually being replaced by written law. The past few decades had seen a tremendous increase in the number of international treaties, not only bilateral but also multilateral. The very nature of present-day international relations required that every topic should be the subject of regulation and, as the representative of Mexico had pointed out (570th meeting, para. 2), the Havana Convention of 1928 had contributed greatly towards mutual understanding among the American Republics.

38. In conclusion, the Hungarian delegation believed that the time had come for the Sixth Committee to take action to promote the codification of diplomatic intercourse and immunities by deciding in favour of the conclusion of a convention, as the International Law Commission had recommended (A/3859, para. 50).

39. Mr. COHEN (Chile) shared the view of the Colombian representative on many points. The question was of considerable importance; it went beyond the context of the draft articles and touched upon such fields as ad hoc diplomacy and the relations between international organizations and States. It was highly desirable that while the draft was being studied, it should be compared with instruments already in force, such as the Havana Convention of 1928, to which Chile was a party. He would confine himself to making a few comments.

40. It would be useful to clarify the meaning of the expression "diplomatic agent" since, if it were left vague, there might be diplomatic missions which were not governed by any rule. Under the Chilean Constitution, that expression was confined to the head of the mission (ambassador or minister); Chile no longer had any chargés d'affaires.

41. The Chilean delegation also attached great importance to questions relating to ad hoc diplomacy and to relations between States and international organizations.

42. It agreed entirely with the representative of Colombia concerning diplomatic protection. Interference by a diplomatic agent in the internal affairs of the receiving State was inadmissible. Diplomatic protection could not come into play unless there had been a denial of justice. That did not mean that a diplomatic agent could not assist his fellow citizens, but he could do so only on condition that his act did not constitute interference.

1/ E. Lauterpacht, "The Codification of the Law of Diplomatic Immunity", The Grotius Society: Transactions for the Year 1954 (London, The Grotius Society, 1955), vol. 40, p. 78.

43. Article 7 should make it clear that the members of a diplomatic mission must be nationals of the sending State and may be nationals of the receiving State only by way of exception, since such a state of affairs gave rise to difficulties with which Chile was well acquainted.

44. With respect to article 8, the Commission could usefully have been guided by the Havana Convention by specifying that the receiving State was not required to give its reasons for considering a person persona non grata.

45. Regarding size of staff, dealt with in article 10, the Chilean delegation shared the view of the United States of America.

46. In article 12, it would be preferable for practical reasons to delete the provision whereby the head of the mission could be considered as having taken up his functions when he had presented his letters of credence, since he might have to fulfil his functions immediately after his arrival and without having had time to present his letters of credence to the head of State. It would accordingly be appropriate to restore the traditional rule, which appeared in article 22 of the Havana Convention, whereby the head of the mission and the diplomatic staff enjoyed immunities as soon as they had crossed the frontier.

47. The words "ad interim" in article 17 should be deleted.

48. The inviolability of the diplomatic courier should be extended to the captain of an aircraft to whom the diplomatic bag was entrusted, at least on the American continent, where that practice was current.

49. Paragraph 1 (c) of article 29 should be deleted: it was inconceivable, for a number of reasons, that the diplomatic agent would exercise a professional or commercial activity.

50. In article 30, concerning waiver of immunity, it would be preferable to replace the expression "diplomatic agent" by the broader expression "diplomatic officer".

51. With regard to exemption from taxation, he considered that the article should reproduce the terms of the Havana Convention, which were inspired by the principle of the equality of all persons with respect to taxation.

52. The draft made no provision for the possibility of entering reservations. Reservations with respect to immunities indispensable to the performance of diplomatic functions were, of course, inadmissible. On the other hand, diplomatic privileges were merely a creation of international courtesy: they had no precise content, they could be abolished, and the beneficiary could waive them. It therefore seemed desirable to include in the draft a provision authorizing States to enter reservations with respect to privileges, especially tax and customs privileges.

53. Regarding the action to be taken on the draft articles, the Chilean delegation did not exclude the possibility of convening a conference of plenipotentiaries to draft the convention. It considered the codification of the general legal principles in the matter to be desirable. Rules to govern consular intercourse and immunities and also the relations between States and international organizations should also be formulated.

54. In conclusion, the Chilean delegation wished to express its esteem for the work accomplished by the International Law Commission and its Special Rapporteur, Mr. Sandström.

The meeting rose at 1 p.m.

Litho. in U.N. 77601-February 1959-2,050